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Time for Enforced Disappearance to Disappear

A Study of the International Legal Instruments
Addressing Enforced Disappearance

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Abstract

The purpose of this study is to examine the international legal instruments specifically addressing the practice of enforced disappearance and analyse if they are sufficient in relation to the gravity and seriousness of the crime. The instruments examined are: the International Convention for the Protection of All Persons from Enforced Disappearance, the Inter-American Convention on Forced Disappearance of Persons and the Statute of the International Criminal Court. The analysis is done by examining some of the most crucial elements of the instruments: definition, disappearance as a crime against humanity, domestic legal responsibilities, the victim and the monitoring mechanisms. The jurisprudence of cases concerning the Inter-American Convention on Forced Disappearance of Persons in the Inter-American Court is also examined.

The conclusion of the study is that the UN Convention contains some very innovative and progressive parts and will seal many of the current gaps in the protection against enforced disappearance, but it is dependent on the number of states ratifying the Convention. Also, the preventive effect of the ICC might not be as significant as it could be because of the rigid requirements in the definition.

Keywords: Enforced Disappearance, Crime against Humanity, International Criminal Court, Inter-American Convention on Forced Disappearance of Persons, International Convention for the Protection of All Persons from Enforced Disappearance

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Abbreviations

CAT	Convention Against Torture and Other Inhumane and Degrading Treatment
FEDEFAM	Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos
ICC	International Criminal Court
NGO	Non-Governmental Organisation
OAS	Organisation of American States
UN	United Nations
WGEID	United Nations Working Group on Enforced or Involuntary Disappearance

1 Introduction

A van stops outside a house, a group of armed men – some dressed in civilian cloths other in army uniforms - get out and move towards a house. They break in; putting a hood over the head of a person and force the person into the van. The person is taken away, without an arrest warrant, to a detention facility where the person is harshly interrogated before being killed and buried in an unmarked grave. A person has been disappeared.¹

“It’s worse than a war. During the war, we weren’t so scared... We knew, of course, that we might be hit by a bullet – no one was safe from that. But now, how can one sleep through the night? They wake people, take them away, shoot them... I’m terrified to talk, the prosecutor’s office is terrified – we’re all scared! At any moment [the security forces] might come after anyone of us. Ask anyone here – we are all weeping from fear”. --A father of a young man who was summarily executed in June, 2004, Chechnya, February 4, 2005.²

Practiced in Sri Lanka and China in Asia, the Democratic Republic of Congo and Gambia in Africa, Colombia and Honduras in Latin-America, enforced disappearance is no longer a problem limited to Latin-America. The problem is global. In 2007 the United Nations Working Group on Enforced or Involuntary Disappearance (WGEID) transmitted 629 new cases of enforced disappearance to 28 governments. The total number of cases transmitted from the working group to governments since its inception is now 51,763 concerning 78 states. Enforced disappearance is unfortunately a widely practiced phenomenon in the world today.³

1.1 Research Question

The aim of this study is to investigate the international legal instruments that are currently available to combat enforced disappearance, hence the research question is as following: Do the current international legal instruments specifically designed to protect against enforced disappearance constitute sufficient protection in relation to the gravity and seriousness of the crime?

To answer this question the three instruments specifically addressing enforced disappearance will be examined: the Inter-American Convention on Forced Disappearance of Persons (hereinafter referred to as the 1994 Inter-American Convention), the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter referred to as the UN Convention) and the Rome Statute of the International Criminal Court (hereinafter referred to as the ICC Statute). The reason this essay examines 1994 Inter-American Convention, UN

¹ Office of the High Commissioner of Human Rights, Fact Sheet N. 6 (Rev.2), Enforced or Involuntary Disappearances.

² Human Rights Watch, *Worse Than a War: “Disappearances” in Chechnya—a Crime Against Humanity*, March 2005, pp. 2

³ UN Doc. A/HRC/7/2, 10 January 2008, para. 9

Convention and the ICC Statute is that these are the only international legal instruments addressing enforced disappearance as a unique human right. The UN Human Rights Committee have handled cases of enforced disappearance, just as the European Court of Human Rights, but always as violation of rights present in those treaties, of which the right not to be subjected to enforced disappearance is not.

1.2 Method

The essay is divided into three parts. The first part provides background information for a general understanding of the practice of enforced disappearance, why it occurs, the history of it and the importance of legal instruments to combat it. The second part analyse some important elements of the treaties. The third part examines the application of the 1994 Inter-American Convention in order to understand the effectiveness of the instrument. The third part also examines the possibility of the UN convention to become a strong and effective instrument. The effect the possibility to prosecute perpetrators in the ICC might have is also investigated.

The most crucial parts of the treaties are examined in a deeper level: definition, the question of crime against humanity, the victim and the monitoring mechanisms. The elements are analysed by comparing them with each other to find strengths, weaknesses and discrepancies. The drafting process has also been examined in order to understand the development of the treaties and if they have lost or gained strength in the process. The core elements of these instruments have been analysed in order to get a coherent understanding of the international legal protection against enforced disappearance. The instruments have thus been deconstructed in smaller fractions and analysed in order to show similarities and differences between them.

The sources used in the essay mostly come from academic literature and from documents produced by international organisations such as the UN, the OAS or the European Council. Reports from different NGO:s have also served as material.

1.3 Theory

There is an element of tension between the natural law and the positivistic understanding of law. Enforced disappearance is rejected as a practice in natural law, some say that the widespread and systematic use constitutes a crime against humanity and thus the prohibition of it reaches the status of *jus cogens*, which can in itself be seen as an expression of natural law. Hence, from a natural law perspective the case is clear, enforced disappearance is not acceptable. There is a discrepancy here, from the view of natural law enforced disappearance is never acceptable, but that does not make it with any legal power until it is written on a paper, stipulated as a law.

This theoretical framework serves as a backdrop for the essay, which takes its starting-point from the natural law perspective: that enforced disappearance is inherently wrong and must be combated by the application of the positivistic view, which calls for the codification of norms in treaties. This basically becomes a codification of the natural law. The position of the natural law towards enforced disappearance is becoming more manifest in the positivistic view of the law, which stresses on the codification of norms in treaties.

1.4 Delimitations

As the research question implies, this essay will not examine domestic legal instruments and not human rights instruments that are not specifically created to protect against enforced disappearance. Treaties such as the European Convention on Human Rights or the International Covenant on Civil and Political Rights, since the rights stipulated in these instruments only deal with some aspects of enforced disappearance (such as the right of liberty and right not to be tortured) and not enforced disappearance as an autonomous right.

Also, the essay is not exhausting in its examination of the elements of the treaties. There are more elements that can be considered when analysing the possible effectiveness of the legal instruments but due to lack of space and time not all are considered. This essay will therefore not examine the continuous nature of enforced disappearance, respect for human remains, forms of reparation or the right to truth.

2 Background

Enforced disappearance a brutal practices and violates a number of internationally recognized human rights. The gravity of the crime can not be underestimated. Human Rights that are violated are, *inter alia*, the right to recognition as a person before the law, the right of liberty and security of a person, the right not to be subjected to torture or other inhuman or degrading treatment or punishment and the right to life.⁴ Disappearance also violates a number of rights stipulated in the International Covenant on Economic, Social and Cultural Rights, such as the right to family life, right to adequate standard of living and right to education. Often the women who are subjected to disappearance are also sexually abused, and when a child loses its parent it is also a violation of the rights of the child.⁵ The Human Rights Committee has found that long time incommunicado is an act of inhumane treatment. The Human Rights Chamber of Bosnia and Herzegovina has found that enforced disappearance violates article 3 (prohibition of torture) of the European Convention on Human Rights.⁶

The practice of enforced disappearance is usually said to have started with the *Nacht und Nebel Erlass* (Night and Fog Decree) created by Adolf Hitler in 1941. Persons from the occupied territories were seized and taken to Germany where they were executed. Meanwhile the whereabouts of the missing was unknown for their families and the public.⁷ The intentions of the decree was made clear in a letter where Wilhelm Keitel, the Chief of the German Armed Forces High Command, stated that for crimes against the Reich “the Führer thinks that in the case of such offences life imprisonment, even life imprisonment with hard labour, is regarded as a weakness. An effective and lasting deterrent can be achieved only by the death penalty or by taking measures which leave the family and the population uncertain of the fate of the offender. The deportation to Germany serves this purpose...” (emphasis added). That the main aim of the decree and the practice of seizing persons and having them disappeared was to be deterrent, and create an “uncertainty over the fate of the prisoner among their relatives and acquaintances” was also elaborated on in a letter by the Chief of the German Security Police in 1942.⁸ It had a deterrent effect and there was no risk of creating a martyr. Hitler clearly understood the effect

⁴ Articles 3, 5, 6 in the Universal Declaration of Human Rights

⁵ Office of the High Commissioner of Human Rights, Fact Sheet N. 6 (Rev.2), Enforced or Involuntary Disappearances.

⁶ Council of Europe, Parliamentary Assembly, Enforced Disappearance, Report to the Committee on Legal Affairs and Human Rights, Rapporteur Christos Pourgourides, Doc 10679, 19 September 2005, para. 48. Hereinafter referred to as Report by Mr Pourgourides.

⁷ United Nations War Crimes Commission, Law Reports of Trials of War Criminals, Selected and prepared by the United Nations War Crimes Commission, Volume XII The German High Command Trial, 1949, p. 19. United Nations, Commission on Human Rights, Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance pursuant to paragraph 11 of Commission resolution 2001/46, E/CN.4/2002/71, 8 January 2002, para. 7. Hereinafter referred to as Report by Mr Nowak.

⁸Gabriella Citroni & Tullio Scovazzi, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Martinus Nijhoff Publishers, Leiden, 2007. pp. 4-7

enforced disappearance would have on the relatives and the community of the disappeared and that was why he used it.

It was not until the 1960s and 1970s that enforced disappearance became more widely practiced this time by the Latin American military regimes such as Guatemala and Brazil. And it was also the Latin American NGO:s that first started to refer to the practice with the term “enforced disappearance”. The Inter-American Commission on Human Rights and the UN Commission of Human Rights first brought up the practice to attention in the 1970s.⁹ The enemy of Latin American military regimes can best be described by the Argentinean President Videla who said that “a terrorist is not only one who carries a bomb or a pistol, but also one who spreads ideas contrary to Western Christian civilization”. The enemy was thus defined very broadly, and anyone who fit this description could be subject to disappearance. The Director of the Naval Mechanics School in Buenos Aires Ruben Chamorro, also stated it quite well when he said that “an infinite minority cannot be allowed to continue upsetting the minds of our youths, teaching them foreign ideas and converting them into social critics, with an interpretation cunningly distorted of what Christian doctrine is. All this is subversion.”¹⁰ By making some persons disappear, the regimes managed to create an atmosphere of fear that helped to control the society and to undermine the political opposition.¹¹ During the Pinochet era thousands were disappeared. Some were killed and buried in unmarked graves, some were thrown in the ocean or the rivers and others were dumped on the streets at night.¹² It might have started with the Nacht Und Nebel Erlass but it was the military regimes in Latin America that popularised the practice.

Because of the history of enforced disappearance in Latin America it was here that the criminalisation of it first emerged. It was the Organisation of American States that prompted the criminalisation of it. With regional organisations such as the OAS, a region can create new laws that are particularly of interest for that region. The laws that were created in Latin America by the OAS in response to the great atrocities were later spread globally.¹³

Multiple different sources show that the criminalisation of enforced disappearance has been considered one of the most important efforts to deter states or individuals from practicing enforced disappearance. The United Nations Human Rights Commission resolution 2001/46 states that “impunity is simultaneously one of the underlying causes of enforced disappearances”.¹⁴ Manfred Nowak strongly agrees on this point, and underlines in his report on the subject to the United Nations Human Rights Commission that a strong legal protection is fundamental in combating enforced disappearance. Nowak also concludes in his report that “universal jurisdiction in clearly defined individual cases of enforced disappearance, with appropriate punishment, will constitute the most effective measure to deter the practice of

⁹ Report by Mr Nowak, para. 8.

¹⁰ Patrick J Flood, *Effectiveness of U.N. Human Rights Institutions*, Westport, CT, USA: Greenwood Publishing Group, Incorporated, 1998. p 58.

¹¹ An Vranckx, *A long road towards universal protection against enforced disappearance*, International Peace Information Service, 2006, p. 4

¹² Vranckx, 2006, p. 4

¹³ Steven R. Ratner & Jason S. Abrams, *Accountability For Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford: Oxford university Press , 2001, pp. 123-124

¹⁴ United Nations Human Rights Commission, E/CN.4/Res/2001/46, 23 of April 2001 , para. 5(d)

enforced disappearance in the future.”¹⁵ Louis Joinet, Special Rapporteur in Haiti and one of the driving forces for the creation of UN Convention, has pointed out that “the problem of forced disappearance [...] is all the more serious since its perpetrators are virtually certain of not being punished”.¹⁶ The WGEID agrees, stating that “impunity is perhaps the single most important factor contributing to the phenomenon of disappearance. Perpetrators of human rights violations, whether civilian or military, become all the more irresponsible if they are not held to account before a court of law.”¹⁷ Legal instruments are thus fundamental in order to create measures to prevent enforced disappearance from occurring again, but also to end the impunity and instead make perpetrators accountable for their actions.

¹⁵ Report by Mr Nowak para. 96. Anderson, Kirsten, How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?, *Melbourne Journal of International Law*; Volume 7, Issue 2; Oct 2006; 245-277.

¹⁶ Louis Joinet, "Rapport général", in *Le Refus de l'oubli - La politique de disparition forcée de personnes - Colloque de Paris, Janvier-Février 1981*, Ed. Berger-Levrault, Paris, 1982, p. 295 cited and translated in Federico Andreu-Guzmán "The Draft International Convention on the Protection of All Persons from Forced Disappearance", in *The International Commission of Jurists Review: Impunity, Crimes against Humanity and Forced Disappearance*, September 2001, No 62-63, p. 11.

¹⁷ UN Doc. E/CW.4/1991/20, 17 January 1991, para. 406. Brody, Reed and Felipe Gonzalez, *Nunca Mas: An analysis of International Instruments on "Disappearance"*, in *Human Rights Quarterly* 19(2) (1997), p. 383.

3 Elements of the Instruments

To create an international treaty is a long and difficult process. In the process the draft document will most likely been subjected to modification of some extent by the time the document is adopted. In some cases the document gets watered out and other times it is strengthened. This will be analysed in the following chapter. The chapter will examine certain important elements of the three international legal instruments dealing specifically with enforced disappearance to try to understand the strength of the treaties. The treaties are the 1994 Inter-American Convention, UN Convention and the ICC Statute.

3.1 Definitions of Enforced Disappearance

The rights the practice of enforced disappearance violate have been fairly well dealt with in international law, but it is not enough to just recognize that enforced disappearance violate a number of rights; it needs to be considered an autonomous human rights violation.¹⁸

The first legally binding treaty that defines enforced disappearance was the 1994 Inter-American Convention. In article II it is defined as:

“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.”¹⁹

In the UN Convention article 2 defines enforced disappearance as:

“the arrest, detention, abduction or 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.”²⁰

There is not a complete consensus regarding the definition of enforced disappearance, but there are however some constitutive elements that are present in most definitions, including the 1994 Inter-American Convention and the UN Convention. Those elements can be divided into four parts: (a) the deprivation of liberty against the will of a person, (b) involvement of government officials or with acquiescence of the government, (c) absence of information and refusal to acknowledge the whereabouts and the fate of the disappeared, (d) the person must be placed

¹⁸ Citroni & Scovazzi, 2007, p. 269.

¹⁹ Inter-American Convention on Forced Disappearance of Persons, Organization of American States, 9 June 1994, article II.

²⁰ UN Doc.A/61/488, International Convention for the Protection of All Persons from Enforced Disappearance, article 2.

outside the protection of the law.²¹ These four distinct elements can be found in the Declaration on the Protection of All Persons from Enforced Disappearance. The declaration was adopted unanimously in the UN General Assembly and can therefore be seen as an expression of opinion juris.²² The same elements also accord with the WGEID recommendations on what elements should be included in a definition.²³ All of the four parts must be met in order for it to be defined as enforced disappearance.²⁴ There are however some smaller differences between the two treaties' definitions.

- In the first element the 1994 Inter-American Convention does not specify what type of deprivation of liberty, as the UN convention does (detention, arrest, abduction), it only refers to it as any act of deprivation of liberty.²⁵
- The second element is the nexus with the state. It is made clear in both the UN Convention and the 1994 Inter-American Convention that there has to be a connection between the perpetrators and the state, either directly by state agents or by person with authorization, support or acquiescence for the state to be responsible of the act.²⁶
- The third element contains in addition, in the 1994 Inter-American Convention, three parts; (1) absence of information, (2) refusal to acknowledge the deprivation of liberty and (3) refusal to give information on the whereabouts of the disappeared. What information needs to be provided is never specified, and neither is what information needs to be absent to consider it an enforced disappearance. Also, in regard to part 2, what if the state acknowledges the deprivation of liberty but does not give any information on the whereabouts of the disappeared: has the state then not breached the article? According to Maria Perez Solla the first two parts are irrelevant and can lead to confusion, the third part is most important.²⁷
- The forth element is the question of access to legal remedies. The definition in the 1994 Inter-American Convention states that there will as a consequence of a disappearance be a lack of legal remedies. Then what if a family member or other persons have access to legal remedies? If so, is it not an enforced disappearance? The UN convention instead uses the term "outside the protection of the law", something that is clearly present if a person is disappeared. The 1994 Inter-American Convention can hence be seen as to have too restrictive requirements for an act to constitute enforced disappearance.²⁸ In this sense the UN convention is superior in its definition. Some say that this forth element is a consequence of the act and not a requirement or a characterization of the act.²⁹

²¹ María Fernanda Pérez Solla, *Enforced Disappearance in International Human Rights*, McFarland & Co Inc , 2005 p. 8.

²² Pérez Solla, 2005, p. 10.

²³ Citroni & Scovazzi, p. 271. UNWGEID, *Annual Report for 1995*, E/CN.4/1996/38, 15 January 1996, para. 55.

²⁴ Susan McCrory, "The International Convention for the Protection of all Persons from Enforced Disappearance", 7:3 *Human Rights Law Review*, 2007, pp. 549-550.

²⁵ Pérez Solla, 2005, 12.

²⁶ Pérez Solla, 2005, 12.

²⁷ Pérez Solla, 2005, 13.

²⁸ Pérez Solla, 2005, 14.

²⁹ Pérez Solla, 2005,p. 19.

These two conventions are basically on the same page when it comes to the definition with only minor differences. The third legal instrument dealing specifically with disappearance, the ICC Statute, does however contain a definition that is somewhat different, the definition is found in article 7(2)(i):

“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.³⁰

In the UN-convention the practice of enforced disappearance *per se* is constituted as a violation while in the ICC Statute the court is only able to handle cases where the practice of enforced disappearance is widespread and systematic. The national courts are to deal with specific cases of enforced disappearance and the ICC when it constitutes a crime against humanity as a widespread attack.³¹ There is however a weakness in international law in not having a consensus about the definition.

As mentioned, the ICC definition differentiates from other definitions: requirements of intention, removed from the protection of the law for a prolonged period of time are added and the element of perpetrator is different. This definition can be seen as a step backwards in the process for strengthened protection. Why these elements were added is not clear, it might have been a compromise. In an April 1998 report by the Preparatory Committee the definition was, except for the addition of political organisation, very much like the UN Convention definition, but the definition that was later used was the watered down version with the extra requirements.³²

3.1.1 The Question of Prolonged Period of Time

According to the ICC definition, the perpetrator must have the intention of removing the person from the protection of the law for a “prolonged period of time”. Neither the UN Convention nor the 1994 Inter-American Convention contains the element of a prolonged period of time, but it was however discussed in the making of UN Convention. Some delegations suggested the term to be used, but others objected and argued that the disappearance starts from the moment the victim is abducted and that it would not benefit the definition to add such a vague term as prolonged period of time. Several other delegations argued that considering the convention's new monitoring mechanisms (see chapter 3.5) with early warning and prevention it is important to make the committee able to investigate right away instead of waiting for the undefined “prolonged period” to be over.³³ The concept does not concur with prevailing jurisprudence, in

³⁰ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 7(2)(i).

³¹ McCrory, 2007, pp. 551-552.

³² Citroni & Scovazzi, 2007, p. 273.

³³ UN Commission on Human Rights, 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, UN. Doc E/CN.4/2004/59, 23 February 2004, para 22-23.

the case of *Mahmud Kaya v. Turkey* in the European Court of Human Rights it was regarded as enforced disappearance despite that the victims was only gone for five days before they were found dead.³⁴ It becomes a hard task for the prosecutor to prove that the alleged had the intention to remove a person for a prolonged period of time. If the alleged only had the intention to remove the person for a limited period of time the alleged might not be convicted.³⁵

3.1.2 The Subjective Element

The second difference in the definition is the need for “intention to remove [the person detained or abducted] from the protection of the law for a prolonged period of time” (emphasis added). It is not enough to just disappear a person, one must also have the intention to remove the person for a prolonged period of time.³⁶

The question of intention was discussed in the drafting process of UN Convention. Some states requested that intention should be added in the definition. Other delegations supported the definition without the intention, they argued that it would be difficult to prove and referred to paragraph 74 of the Report by Manfred Nowak where he suggests that intention should not be a part of the definition.

Nowak argues that intention can be really hard to prove, not only because of the nature of the crime but also because the way it is carried out. Different persons may partake in different parts of the crime and therefore does not have the intention to make a person disappear since that person is only part of a small fraction of the complete offence. One perpetrator might abduct the person while another is keeping the person in a detention facility, and therefore one perpetrator might not intent to commit disappearance. Hence, Nowak proposes that the definition in the UN Convention should be wider than the one in the ICC.³⁷ When the UN convention was adopted by the Third Committee of the General Assembly (Social, humanitarian and cultural) India pointed out that it was a failure to not include intent in the definition since *mens rea* is a fundamental part of domestic law. The US also noted the importance of intent.³⁸

Christos Pourgourides is not positive to the use of subjective element. He, just like Nowak and others, point out that a disappearance is often carried out by a number of persons, and is thus not solely responsible for the disappearance, and lack the intention of it. He also makes clear that any future international legal instruments should not include the subjective element.³⁹ In resolution 1463 the Parliamentary Assembly of the Council of Europe stated that a legal binding definition “should not include a subjective element, which would be too difficult to prove in

³⁴ Pérez Solla, 2005, p. 14, endnote 21. European Court of Human Rights, Case of *Mahmud Kaya v. Turkey*, application nr 22535/93, 28 Mars 2000.

³⁵ Citroni & Scovazzi, 2007, p. 276.

³⁶ McCrory, 2007, p. 552.

³⁷ Report by Mr Nowak, para. 74.

³⁸ Citroni & Scovazzi, 2007, p. 283-284.

³⁹ Report by Mr Pourgourides, 2005, para. 47.

practice”.⁴⁰ The subjective element will make it more difficult for the ICC to make convicting sentences, in this sense the ICC definition is much weaker than the definition found in the 1994 Inter-American Convention and the one in the UN Convention.

3.1.3 Non-State Actor

A third major difference in the definition between the 1994 Inter-American, the UN-convention and the ICC is when it comes to who can commit the crime, the perpetrator. The ICC Statute stipulates that the offence can not only be carried out by the state or with acquiescence but also by any political organization.⁴¹ In this sense the ICC definition is much wider and it is applicable to groups that are not a party to the other treaties. Traditionally, under the international law instruments dealing with enforced disappearance, only state actors can commit the offence.⁴² Manfred Nowak explains in his report that since the very nature of enforced disappearance is the secrecy around the act it is often hard to know whether the perpetrators had the “the authorization, support or acquiescence of the State” or not. Nowak therefore calls for including non-state actors in the definition in order to create a “full protection” against enforced disappearance.⁴³

The term political organization raises a lot of interesting questions. Political organization is usually referred to as national liberation movements, guerrilla groups, political parties and it can even include terrorists. By using the term “political” some groups are excluded, such as mafia or narcotic cartels, or other forms of organized crime with a focus on economics rather than politics. But what happens when organized crime as economic rather than political organisation begins to have political interests. If for example a mafia commits enforced disappearance against individuals of political parties with the purpose of gaining power that means a non-political group acts to gain political power.⁴⁴ This is a question that will be very interesting to see how the ICC handle.

The question of non-state actors was also discussed in the draft process of the UN Convention. One delegation noted that states are no longer the only subject to international law and non-state actors should therefore be included in the convention. Other delegations responded by pointing out that the state can not be held responsible for what non-state actors do. Other delegations argued that by including non-state actors the definition would be too broad and would include other forms of abductions, and it was also noted that the monitoring mechanisms was only relevant to state actors.⁴⁵ Non-state actors is mentioned in the UN convention article 3, and it says that the state party should investigate any enforced

⁴⁰ Citroni & Scovazzi, p. 277, Council of Europe, Parliamentary Assembly Resolution 1463 (2005), 3 October 2005, para. 10.1.12.

⁴¹ Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 7(2)(i).

⁴² A/RES/47/133, Declaration on the Protection of All Persons from Enforced Disappearance, 18 December 1992. Inter-American Convention on Forced Disappearance of Persons, Organization of American States, 9 June 1994.

⁴³ Report by Mr Nowak, para. 73.

⁴⁴ Pérez Solla, 2005, p. 18

⁴⁵ UN Commission on Human Rights, 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, UN. Doc E/CN.4/2005/66, 10 March 2005, para. 29-33.

disappearance, as defined in the convention, which is made by non-state actors.⁴⁶ In the end non-state actors were excluded from the UN Convention, but it is not an uncontroversial question. The ICC can be said to have gone the middle way by including some non-state actors (political organisations) while excluding others (mafia). It still, however, represents a wider definition of the perpetrator compared to the 1994 Inter-American Convention and the UN Convention.

3.2 Enforced Disappearance as a Crime Against Humanity

Enforced Disappearance has been regarded as a crime against humanity in various treaties and legal documents in different contexts. Today there is no question that the widespread and systematic use of enforced disappearance constitutes a crime against humanity. It is defined as a crime against humanity in all three treaties that are dealt with in this essay, however, not the practice of enforced disappearance *per se* is described as such, but only when it is done in a widespread and systematic way. It can be found in the preamble of the UN Convention and also in article 5. The ICC Statute, article 7, includes enforced disappearance in the definition of crime against humanity, the practice has to be widespread, systematic and be directed against the civilian population. And according to Ian Brownlie the ICC Statute "constitutes good evidence of the offences forming part of general international law".⁴⁷ In the 1994 Inter-American Convention it is not found in any of the operative parts, but only in the preamble. Apart from these treaties the notion is expressed in the preamble of the Declaration on the Protection of all Persons against Enforced Disappearance⁴⁸ and a number of Inter-American resolutions.⁴⁹ If enforced disappearance constitute a crime against humanity is of great importance, since if it does it reaches the status of *jus cogens*, which is the strongest possible rule in international law.⁵⁰

In the ICC Statute all crimes that are considered crimes against humanity must be carried out in a widespread and systematic way and aimed at a civilian population, as it is read in article 7 of the statute. This concept that it has to be widespread and systematic can of course be questioned, and has been.⁵¹ FEDEFAM, one of the most important NGO:s working for a international legal instrument against enforced disappearance, stated in the project for the creation of a convention that "[t]he forced disappearance of persons constitutes a crime under international law and a crime against humanity", consequently excluding the principle of widespread and systematic. This quite progressive view that lacks the widespread and systematic condition has been uttered in different contexts by different actors as well. Resolution AG/RES.666 (XIII-0/83) of the OAS General Assembly states that "disappearances of persons is an affront to the conscience of the hemisphere and constitutes a crime against humanity", without adding conditions.⁵² The same

⁴⁶ UN Doc.A/61/488, International Convention for the Protection of All Persons from Enforced Disappearance, article 3.

⁴⁷ Brownlie, Ian, *Principles of Public International Law*, 2008, p. 589.

⁴⁸ A/RES/47/133, Declaration on the Protection of All Persons from Enforced Disappearance, 18 December 1992, preamble.

⁴⁹ General Assembly of the Organisation of American States, Doc. AG/RES.666 (XIII-0/83).

⁵⁰ Brownlie, 2008, p. 511.

⁵¹ Citroni & Scovazzi, 2007, p. 286.

⁵² General Assembly of the Organisation of American States, Doc. AG/RES.666 (XIII-0/83), para. 4.

goes for Resolution 828/1984 of the Parliamentary Assembly of the Council of Europe which states that enforced disappearance constitutes a crime against humanity without adding the requirement of widespread and systematic.⁵³ The most important actor to define enforced disappearance as a crime against humanity without condition is probably the Inter-American Court of Human Rights that stated it in the case of the 19 *Tradesmen v. Colombia* in 2004.⁵⁴ The formulation of crime against humanity with requirement of "widespread and systematic" has however now become standard and it is not likely to change.

In the drafting process of the UN Convention there was never really any discussion whether a single enforced disappearance could constitute a crime against humanity. It was difficult enough to add it to the convention with the condition of widespread and systematic. While some delegations stated that the question of crimes against humanity should be dealt with in the ICC and not the convention and hence opposed including article 5 in the convention, others argued that it could be seen as a step backward from the Declaration against Enforced Disappearance that included it in its preamble.⁵⁵ In the Declaration against Enforced Disappearance and in the 1994 Inter-American Convention the condition is included, but not defined more specifically what widespread and systematic comprises of, a clarification which is much needed and hopefully will be dealt with by the ICC.⁵⁶

The International Court Tribunal of former Yugoslavia (ICTY) found something interesting in the *Tadic* Case. They found that one act of enforced disappearance constitutes a crime against humanity if that act is within a greater widespread and systematic practice. "The perpetrator needs not to commit numerous offences to be held liable... Even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or prosecution". Basically this means that an individual who only commits one enforced disappearance can be charged with the crime against humanity, granted that "there is a link with the widespread or systematic attack against a civilian population".⁵⁷

It was not possible to reach an agreement on whether enforced disappearance should be considered a crime against humanity when the Declaration against Enforced Disappearance was written. So instead of putting it in the operative parts of the declaration it was put in the preamble, which became a form of compromise. In the 1994 Inter-American Convention the same problem arose, and the conflict was resolved in the same way, so now the crime against humanity is found in the preamble of the 1994 Inter-American Convention instead of the operative part. The US was one of the states that objected to calling it crime against humanity, in the 1994 Inter-American convention.⁵⁸ The US also objected against the use of the term crime against humanity in the UN Convention by calling it "vague, aspirational in nature, and

⁵³ Parliamentary Assembly of the Council of Europe, Resolution 828/1984, para. 13(a)(i).

⁵⁴ Inter-American Court of Human Rights, Case of the 19 *Tradesmen v. Colombia*. Merits, Reparations and Costs. Judgment of July 5, 2004. Series C No. 109, para 142. Citroni & Scovazzi, 2007, p. 286-287.

⁵⁵ UN Commission on Human Rights, 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, UN. Doc E/CN.4/2004/59, 23 February 2004, para 42-48.

⁵⁶ Citroni & Scovazzi, 2007, pp. 288-289.

⁵⁷ Citroni & Scovazzi, 2007, p. 289.

⁵⁸ Brody & Gonzalez, 1997, p. 382.

inappropriate as an operative treaty provision”.⁵⁹ How such a straightforward article can be vague is hard to understand.

3.2.1 Consequences of Defining the Phenomenon as a Crime Against Humanity

Despite the fact that the definition today in most major legal instruments includes the widespread and systematic condition it is still a positive thing to have in these treaties. Because to classify enforced disappearance as a crime against humanity is not only of great importance for its normative power but also because by doing so it enables a couple of more mechanisms to set in.⁶⁰ It becomes connected with, inter alia, the still a little bit controversial concept of universal jurisdiction, obligation to extradite perpetrators, it is no longer able to apply statute of limitation and amnesties and there can be no political asylum for perpetrators.

Universal Jurisdiction

Universal jurisdiction is the idea that when a crime of such severity is committed, the whole international community is able to bring the individual to justice no matter where the crime was committed. The concept came out of courts declaring acts of piracy *hostis humani generis* (an enemy of all mankind) and enabled universal jurisdiction against it, and since then the number of crimes that are subject to universal jurisdiction have been increasing.⁶¹ Crime against humanity is usually seen as one of the crimes that nowadays are subject to universal jurisdiction.⁶² Mr Christos Pourgourides suggested in his report that enforced disappearance *per se* should be subjected to universal jurisdiction⁶³, much like the Inter-American convention is built.⁶⁴

Statute of Limitation

Another factor that is important to mention that occur when a crime is defined as a crime against humanity is the inapplicability of statute of limitations,⁶⁵ and this is significant in the case of enforced disappearance since the disappeared might be disappeared for a substantial amount of time. The non-application of statute of limitation in cases of crimes against humanity has a long history. On 26 November 1968 the UN General Assembly adopted and opened the Convention on Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity for signatures. Article I(b) states that “[n]o statute of limitation shall apply to the following crimes

⁵⁹ U.S. Statement on the Draft Convention on Enforced Disappearances, Geneva, June 27 2006, <http://geneva.usmission.gov/Press2006/0627U.S.StatementonForcedDisappearances.html>, (2009-01-04). Citroni & Scovazzi, 2007, p. 293

⁶⁰ Brody & Gonzalez, 1997, pp. 377-381

⁶¹ Brody & Gonzalez, 1997, p. 391

⁶² Anderson, Kirsten, How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?, Melbourne Journal of International Law; Volume 7, Issue 2; Oct 2006; 245-277. UN General Assembly, Principles of International Co-operation in the Detection, Arrest, extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, UN Doc. A/RES/3074(XXVIII), 3 December 1973.

⁶³ Report by Mr Pourgourides, 2005, para. 56-57

⁶⁴ Report by Mr Pourgourides, 2005, para. 40-41

⁶⁵ Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 29.

irrespective of the date of their commission: ... (b) Crimes against humanity”.⁶⁶ There cannot be a statute of limitation in the domestic legal process either. But this is of course only applicable when the enforced disappearance is widespread and systematic.⁶⁷ Also the ICC Statute follow in the tradition of making statutes of limitation non-applicable to crime against humanity, genocide and war crimes. It makes in very clear in article 29 “ [t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.” ⁶⁸ If the crime is not widespread and systematic enforced disappearance should, according to article 8(1)(a) of the UN Convention be of long duration and proportionate to the seriousness of the crime.

Now, this question of statute of limitation is complicated by the recognition of enforced disappearance as a continuous crime. If enforced disappearance has the nature of a continuous crime and it is not widespread and systematic then when should the statute of limitation start?⁶⁹

No Amnesties

The non-application of amnesties to crimes against humanity have been established in the Statute of the Special Court for Sierra Leone, Security Council resolution 1315 of August 2000, and according to some there is an obligation under customary law to prosecute and punish alleged for crimes against humanity.⁷⁰ It is however not mentioned in the ICC statute, which might indicate that there is not a complete consensus as regarding the application of amnesty laws. This rule safeguards the impunity caused by amnesty laws in cases of crime against humanity.

Ban on Political Asylum

A perpetrator who has committed a crime against humanity lacks the right to seek political asylum. This has been shown in a number of international documents, the Universal Declaration of Human Rights article 14,⁷¹ the Declaration of Territorial Asylum article 1,⁷² Resolution on Principles of International Cooperation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and the Convention Relating to the State of Refugees article 1(F).⁷³ This ban on political asylum is however only for those who committed enforced disappearance as a crime against humanity and not enforced disappearance per se. A ban on

⁶⁶ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity , 26 November 1968, 754 U.N.T.S 74.

⁶⁷ Citroni & Scovazzi, 2007, p. 306

⁶⁸ Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 29. Citroni & Scovazzi, 2007, p. 306

⁶⁹ For further reading see Dijkstra, Petra, Helen Klann, Rosa Ruimschotel and Myrthe Wijnkoop, Enforced Disappearance as Continuing Violations, Amsterdam International Law Clinic, 7 May 2002.

⁷⁰ UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002, article 10. The Court was established in pursuant of Security Council resolution 1315 (2000). Lafontaine, Fannie, ‘No Amnesty or Statute of Limitation for Enforced Disappearances: The Sandoval Case before the Supreme Court of Chile’, 3 *Journal of International Criminal Justice* (2005) pp. 469-484

⁷¹ A/810 (III), Universal Declaration of Human Rights, Res. 217A, 10 December 1948, article 14.

⁷² A/RES/2312 (XXII), Declaration on Territorial Asylum, 14 December 1967, article 1.

⁷³ A/RES/3074 (XXVIII), Principles of International Cooperation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, 3 December 1973, article 1(F).

political asylum was first included in the OAS draft convention on enforced disappearance but was later dropped for the final convention.⁷⁴

If an act of enforced disappearance constitutes a crime against humanity, that individual may be held accountable under the ICC. But, the ICC is not the primary instance to go to, the crime should first be tried in a domestic court, and it is only if the court is “unwilling or unable genuinely to carry out the investigation or prosecution” that it becomes a matter for the ICC.⁷⁵ Also, in order for the ICC to be able to handle the case the crime must have been either committed within the territory of a state that is part to the ICC Statute or by an individual national of a state party to the statute.⁷⁶

On the one hand it is of course positive that the enforced disappearance is considered a crime against humanity. The problem is that it has to be a part of a systematic and widespread practice. If an enforced disappearance does not constitute a crime against humanity it will not be subject to measures such as universal jurisdiction, non applicatory of statutes of limitations and so on.

3.3 Individual Criminal Responsibility in Domestic Law

Since enforced disappearance *per se* does not constitute a crime against humanity, and since only a few cases can be considered a crime against humanity, and especially with the rigorous demands by the ICC definition, with it to be widespread and systematic against civilians, with intention, prolonged period of time, this does not constitute full legal protection against enforced disappearance. The primary judicial instrument to deal with enforced disappearance should be the domestic courts.⁷⁷

Enforced disappearance is criminalised in the UN Convention in article 4 which states that: “[e]ach State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.”⁷⁸ The State party is also obligated according to article 9 to exercise jurisdiction over the crime of enforced disappearance when the crime is committed on the territory or onboard a ship or an aircraft under the flag of the state party. Or when the offender is a national, or if the disappeared is a national of the state party and the state party considers it appropriate. The state party is also obligated to either try an offender before a

⁷⁴ Brody & Gonzalez, 1997, pp. 394-395

⁷⁵ Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 7(2)(i). Anderson, Kirsten, How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?, Melbourne Journal of International Law; Volume 7, Issue 2; Oct 2006; 245-277.

⁷⁶ Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 12(2)(a) and article 12(2)(b). Anderson, Kirsten, How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?, Melbourne Journal of International Law; Volume 7, Issue 2; Oct 2006; 245-277.

⁷⁷ Report by Mr Nowak, para 96. E/CN.4/2003/71, 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, 12 February 2003, article 30.

⁷⁸ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 4

court no matter the nationality of the offender or extradite him or her to an international criminal tribunal whose jurisdiction the state has recognized.⁷⁹ There are several benefits of putting a perpetrator to trial in a domestic court: it facilitates the acquirement of evidence and witnesses, and it is more likely to create a sense of ownership over the process which hopefully can have a reconciling effect.⁸⁰

By defining enforced disappearance a crime against humanity, there will be a possibility of universal jurisdiction as mentioned above. But that is only if the act is widespread and systematic. To prosecute an individual under universal jurisdiction is permitted but it is not mandatory. Article 9(2) in the UN Convention creates a mandatory universal jurisdiction. This means that enforced disappearance *per se* is criminalised under international law, and thus creates a very strong protection. Mandatory universal jurisdiction is only present in one other convention and that is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) article 7.⁸¹ This article shares a lot of similarities with article 9(2), and provides that a state party either prosecute an alleged criminal or extradite the person. Article 9 in the UN Convention effectively encourages state party's to handle cases of enforced disappearance under domestic jurisdiction, either by putting the perpetrator before a trial or extradite the perpetrator to a state which is willing to prosecute. As Kirsten Anderson puts it: "[t]his framework significantly expands the scope of international criminal law in its application to enforced disappearances."⁸² It is also recalled in the Human Rights Commission resolution 2001/46 that: "all acts of enforced or involuntary disappearance are crimes punishable by appropriate penalties which should take due account of their extreme seriousness under penal law".⁸³

Article 7 in the UN Convention provides that the state party should make enforced disappearance criminal under the national law and that the extreme seriousness will be taken into account when deciding on the punishment. However, the state may have mitigating circumstances, if for example a perpetrator helps to effectively contribute to bringing the disappeared back, or if the perpetrator makes it possible to clarify the case.⁸⁴ Just as the state is able to decide if it will apply mitigating circumstances in the national law it can also, according to

⁷⁹ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 9

⁸⁰ Anderson, Kirsten, How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?, *Melbourne Journal of International Law*; Volume 7, Issue 2; Oct 2006; 245-277. Ratner & Abrams, 2001, p. 343.

⁸¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S 113, article 11.

⁸² Anderson, Kirsten, How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?, *Melbourne Journal of International Law*; Volume 7, Issue 2; Oct 2006; 245-277.

⁸³ E/CN.4/Res/2001/46, Question of Enforced Disappearance, 23 of April 2001. United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006.

⁸⁴ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 7(2)(a). McCrory, 2007, pp. 553-554

7(2)(a) implement aggravating circumstances if the disappeared is a pregnant women, a minor, or if it is a person with disabilities or other particularly vulnerable person.⁸⁵

Article IV of the 1994 Inter-American Convention calls for a criminalisation of enforced disappearance in the domestic law and create jurisdiction when the crime is committed on the territory of the state party, the perpetrator is a national, or when the victim is a national.⁸⁶

The ICC statute recalls in the preamble that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”⁸⁷

3.4 The Victim

What is especially interesting in the UN convention is the aspect of the victim. Who is the victim of enforced disappearance? The concept of who is the victim is elaborated in the convention. Article 24 of the convention defines the victim as “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”⁸⁸ It is thus not only the actual disappeared who is defined as the victim, but also others who have suffered harm as a result of the disappearance. These others can be family or friends of the disappeared. This is a very broad definition of a victim of the violation. As a victim of the violation the victim has a right to know according to article 24(2) the truth regarding the enforced disappearance, the progress and results of the investigation and the fate of the disappeared. This measure is not common in international human rights treaties, another example of it can only be found in the Geneva convention optional protocol 1 article 32 which states that there is a “the right of families to know the fate of their relatives”. The Convention does however give the right to know to a broader group than the protocol since it is not only the family that can be considered a victim.⁸⁹ The broadly defined victim also has the right to “reparation and prompt, fair and adequate compensation” according to article 24(4).⁹⁰

The Inter-American Court of Human Rights has recognized that relatives of the victims of forced disappearance are also to be considered as victims. The court refers to the Declaration against Enforced Disappearance article 1(2) that states that enforced disappearance causes grave suffering to the family of the disappeared and that therefore the family is considered a victim and has the right to a effectively investigation of the death and disappearance of the disappeared.⁹¹ The 1994 Inter-American Convention however does not discuss the nature of the victim.

⁸⁵ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 7(2)(a) and 7(2)(b). McCrory, 2007, pp. 553-554.

⁸⁶ Inter-American Convention on Forced Disappearance of Persons, Organization of American States, 9 June 1994, article IV.

⁸⁷ Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, preamble.

⁸⁸ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 24

⁸⁹ McCrory, 2007, pp. 557-558

⁹⁰ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 24(4).

⁹¹ Inter-American Court of Human Rights, Case of Blake v. Guatemala, 24 January 1998. Series C No. 36, para. 97.

3.5 Monitoring Mechanisms

One of the most important parts of a human rights treaty is the part concerning the monitoring mechanism. Without effective monitoring mechanisms the convention loses its force.

In the Inter-American convention there are no monitoring mechanisms like there are in the UN-convention, instead the convention is connected with the Inter-American Court of Human Rights. How this court has worked is further analysed in part 4.1.

The ICC doesn't have any monitoring mechanism since it's a court. It takes cases that are being presented to their prosecutor from state party, Security Council, on initiative of the prosecutor.⁹²

The FEDEFAM did not include any monitoring bodies, in their draft of the future convention, since they believed it would not be needed as it would be directly connected with an international criminal court. Now when a court is established we know that since the condition of widespread and systematic is included the court will not be able to bring justice to crimes of enforced disappearance if they are sporadic and non-systematic.⁹³

There is, just as in most other international human rights conventions, a committee that is in charge of the monitoring mechanisms. The committee's mandate is found in the articles 26 and 28 of the Convention. Some changes were made between the draft convention and the later adopted convention. For example, in the draft convention article 25 provides that a member of the committee created with the convention cannot possess "any post or function subject to the hierarchical structure of the executive authority of a State Party.", which would exclude for example members of the judiciary, ombudsmen and state university professors. And thus safeguard the independency of the committee, this clause is not in the finished convention.⁹⁴ This type of treaty-based committee does not have any judicial power, but it has gained a somewhat quasi-judicial status, and especially the Human Rights Committee. Although it is not a judicial actor, the Human Rights Committee has played a major role establishing which rights are affected by enforced disappearance.

The UN Conventions contains a number of interesting monitoring mechanisms.

3.5.1 Report

In the UN-convention the state parties are obligated to report to the Committee within two years on the measures taken to give effect to the obligations from the convention.⁹⁵ The committee will handle the report as they always do, by giving comments, observations or recommendations to the State Party.⁹⁶ The Secretary General then makes this report available to all State Parties.

⁹² Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 13.

⁹³ Citroni & Scovazzi, 2007, p. 387.

⁹⁴ Draft International Convention on the Protection of all Persons from Forced Disappearance, E/CN.4/Sub.2/1998/19, Annex, article 25, para 1. Andreu-Guzmán, 2001, p. 20.

⁹⁵ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 29.

⁹⁶ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 29(3).

Some participants in the drafting-process did not favour periodic reports as it is in the CAT,⁹⁷ they claimed that the procedure is too unwieldy.⁹⁸ The committee can request the State party to provide additional information on the implementation of the convention.⁹⁹

3.5.2 Individual Communication

Article 31 provides with the possibility of individual communication. However, this is an optional monitoring mechanism and will only be utilized if the state party “declare that it recognize the competence of the Committee to decide and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation this State Part of provision on this Convention”.¹⁰⁰ The committee forwards the communication to the state party of concern together with a request to provide observations and comments. The meeting that takes place between the committee and the state party are closed, but when the committee adopts its final recommendations it is public.

The convention contains the usual elements of this mechanism that the communication is considered inadmissible if the communication is anonymous, constitutes an abuse or is incompatible with the provisions of the Convention, if the case is being considered in another procedure of international investigation, or if the domestic remedies have not been fully exhausted.¹⁰¹

In most treaties a state must declare the committee competent to handle individual communications for the committee to admit communications concerning the State Party.¹⁰² This was not a part of the draft convention, which would have made the individual communication mechanism mandatory and thus made the convention a lot stronger. This was later excluded in the convention. This type of mandatory communication mechanism is found in the American Convention on Human Rights.¹⁰³

3.5.3 State Communication

The other type of communication that is present in the convention is the state communication (article 32). But considering how extremely few times this mechanism have actually been used it is fair to say it is not of great importance.¹⁰⁴

⁹⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S 113, article 19.

⁹⁸ E/CN.4/2005/WG.22/CRP.6, III. Discussion on the Chairpersons’s Working Paper. 9 February 2005.

⁹⁹ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 29(4).

¹⁰⁰ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 31(a).

¹⁰¹ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 31(2).

¹⁰² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S 113, article 22(1). Convention on the Elimination of All Forms of Racial Discrimination, 7 Mars 1966, 660 U.N.T.S 212, article 14. Optional Protocol to the International Covenant on Civil and Political Rights, 16/12/1966, 999 U.N.T.S 302.

¹⁰³ Andreu-Guzmán, 2001, p. 17.

¹⁰⁴ Nowak, Manfred, *Introduction to the International Human Rights Regime*, Leiden; Martinus Nijhoff, 2003, p. 100.

3.5.4 Emergency Procedure - Urgent Action Request

The convention has its quite innovating parts, for example article 30. It is a mechanism that shares a lot with the individual communications, except that a State Party does not have to recognize it for it to function. Any person with a legitimate interest can submit a request to the committee that a disappeared shall be sought and found. The committee then forwards the information about the disappeared to respectively state and urge them to provide information of the whereabouts of the person sought for. The committee will then, based on the information by the State Party, make recommendations on what the state should do and also request the state party to take all necessary measures to locate and protect the supposedly disappeared within a given timeframe (article 30(3)). The committee will then work together with the State Party as long as the person concerned is missing (article 30(4)). This type of work has before been done to some extent by the UN working group on enforced or involuntary disappearance.

The procedure had a strong support in the drafting-process and was seen as essential for the convention. Not only would it have a preventive effect, but it would try to put on end to a disappearance that has already occurred. It was also noted in the drafting process that the Working Group on Enforced and Involuntary Disappearance also have an emergency procedure.¹⁰⁵

3.5.5 Fact-Finding Mission - Committee Visit

In pursuant of article 33 the Committee may request from the state party for one of the committees members to make an on site visit. There is no need for a declaration for this mechanism to function. If the committee have “reliable information” that “serious violations” of the convention is being committed, the committee can send one of its members to the State Party and do research and then report back to the committee. The committee will communicate to the State Party that they intend to make a visit so the state party has the possibility to respond, if the State Party disagree with the committee and does not accept a visit, the committee can still do it, but, needless to say, it might be quite difficult. This type of non-cooperation may be considered a violation of article 26(9) which state that a State Party shall cooperate with the committee in its work to fulfil its mandate.¹⁰⁶ Some delegations wondered how appropriate this mechanism was, considering that the main aim of the convention was prevention.¹⁰⁷

3.5.6 Bring the Matter to the General Assembly

Another innovative mechanism is found in article 34 that make it possible for the committee to bring the question of enforced disappearance to the general assembly via the Secretary General. Provided that there are well founded indications that enforced disappearance is being used on a widespread and systematic way within the jurisdiction of the State Party. One of the delegations in the drafting process noted that such procedure is not unprecedented and has already been

¹⁰⁵ E/CN.4/2005/WG.22/CRP.6, III. Discussion on the Chairpersons's Working Paper. 9 February 2005, para. 5-10.

¹⁰⁶ United Nations General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance, A/61/488, 20 December 2006, article 33. McCrory, 2007, p. 564.

¹⁰⁷ E/CN.4/2005/WG.22/CRP.6, III. Discussion on the Chairpersons's Working Paper. 9 February 2005, para. 11.

incorporated in the Genocide convention (article VIII) and in the Apartheid convention (article VIII). Some delegations argued that the Secretary-General should be able to transmit the information to the Security Council that could pass it on to the International Criminal court.¹⁰⁸ Unfortunately this ended up not being the case. The Secretary-General can only bring the matter up in the General Assembly, and it is thus up to the General Assembly to decide how to move forward with the situation. The General Assembly can then decide if they want to try to take the case to the ICC, through the established channels set forth in the ICC statute article 13.¹⁰⁹

3.5.7 The Working Group on Enforced and Involuntary Disappearance

Some of the new monitoring mechanisms of the treaty committee are similar to the mandate of the Working Group on Enforced and Involuntary Disappearance. The Working groups mandate as of resolution 20 (XXXVI) concludes that the working group “shall seek and receive information from Governments, Intergovernmental organisation, humanitarian organisations and other reliable sources”.¹¹⁰ The 1980 resolution established the working group on a one year basis, but as of 1986 it was on a two years basis and since 1992 on a three year basis. It has thus been around for 28 years and is a well established monitoring mechanism.

The working group receives reports of disappearances from family members, relatives or non-governmental organisations and then transfers the information to the government in concern and requests them to investigate situation and notify the working group of its results. The working group carries out this mandate regardless of what treaties a state have ratified, and regardless of if the state have given their consent to be subjected to individual communications in treaties. Since the start the Working group they have transmitted 51,763 cases to governments and in 78 states. Of these cases 10,506 cases have been clarified.¹¹¹

As seen in this chapter the convention includes some very innovative monitoring mechanisms. The possibility of urgent action and on site visit make this convention possibly the strongest UN convention ever made. And as it will hopefully be working side by side with the Working Group it will make enforced disappearance one of the most protected areas within the UN system. The only problem is that it might be too strong and effective and hence frighten some states from ratifying it and thus make it weaker than other conventions that are less progressive in their nature. It might make fewer states willing to enter the convention and thus make it into a strong convention that is weak in practice since not many states are part of it.

¹⁰⁸ E/CN.4/2005/WG.22/CRP.6, III. Discussion on the Chairpersons's Working Paper. 9 February 2005. para. 18-19

¹⁰⁹ Citroni & Scovazzi, 2007, p. 395.

¹¹⁰ E/CN.4/RES/1980/20 (XXXVI), Question of missing and disappeared persons, 29 February 1980, para 3.

¹¹¹ A/HRC/7/2, Report of the Working Group on Enforced or Involuntary Disappearances, 10 January 2008.

4 Appliance

The Inter-American Convention has been in force since 1996 and the ICC Statute entered into force in 1 of July 2002 although it has not yet been in practice in cases concerning enforced disappearance. The UN convention, though, has not entered into force. In this last part of the essay, the jurisprudence of the Inter-American Court of Human Rights will be examined to understand the effectiveness of the 1994 Inter-American Convention. The possible effectiveness of the UN Convention will also be examined, and what preventive effect the ICC might have on enforced disappearance will also be discussed.

4.1 The Jurisprudence of the Inter-American Court of Human Rights in Regard to the Inter-American Convention on Enforced Disappearance

The 1994 Inter-American Convention does not create a new committee charged with the monitoring responsibilities as the UN convention does. Instead it is the Inter-American Commission of Human Rights that has the monitoring responsibility. And the petitions and communications are subject to the procedures that are established in the American convention on Human Rights, and the Statute and Regulations of the Inter-American Commission on Human rights and, importantly, to the statute and Rules of Procedure of the Inter-American Court of Human rights.¹¹²

Cases of enforced disappearance have been dealt with by the Court before the 1994 Inter-American Convention entered into force. The first case, and probably the most famous case concerning enforced disappearance was *Velasquez Rodriguez v. Honduras*. Since then there have been quite a few other cases. However, most of these cases never consider the crime to be enforced disappearance since that crime is never mentioned in the American Convention on Human Rights, but instead a number of other rights violated in the Convention, such as article 4 (right to life), 5 (right to humane treatment), 7 (right to personal liberty) as was the case in the *Hermanas Serrano Cruz v. El Salvador*.¹¹³ The few cases that are connected with the 1994 Inter-American convention however make it legally binding to give reparation for example and conduct other types of measures.

4.1.1 *Velasquez Rodriguez v. Honduras*

This case was the first dealing with an enforced disappearance. What is especially important in this case was that the court found that enforced disappearance “of human beings is a multiple and continuous violation of many rights under the Convention that State Parties are obligated to

¹¹² Inter-American Convention on Forced Disappearance of Persons, Organization of American States, 9 June 1994, article XIII.

¹¹³ Citroni & Scovazzi, 2007, pp. 166-167

respect and guarantee”.¹¹⁴ Those multiple violations was in Velasquez Rodriguez case a violation of article 7, the right to personal liberty, the right to integrity of the person (article 5) and a violation of the right to life (article 4).¹¹⁵

4.1.2 Blanco Romero and Others v. Venezuela

In December 1999 a flood hit parts of Venezuela, the parliament issued a state of emergency and special power was given to the army. During the state of emergency a number of people were abducted by security forces without any arrest warrant. They were disappeared. The Inter-American Court of Human Rights found that the Venezuelan state had violated numerous rights of Blanco Romero, *inter alia*, 4.1 (right to life), 5.1, 5.2, right to humane treatment. etc. in the American convention. And articles I.a (not to practice enforced disappearance), I.b (to punish those who have committed enforced disappearance), X (exceptional circumstances may not be invoked to justify disappearance) and XI (person deprived of liberty shall be held in officially recognized place of detention) of the ED Convention.¹¹⁶ Venezuela was, *inter alia*, ordered to pay compensation to the children and spouse of the victims, to carry out investigation and judicial proceedings on the disappearances, adopt measures to establish the whereabouts of the disappeared. Venezuela is also ordered to harmonize the domestic law with the international laws regarding enforced disappearance, which is in this case the 1994 Inter-American Convention¹¹⁷ This case is important because Venezuela is actually judged on basis of violation of the Inter-American Convention on Enforced Disappearance.

4.1.3 Gómez Palomino v. Peru

At dawn on July 9th 1992 a group of armed men and women, wearing military boots and uniforms, abducted Gómez Palomino in his house without providing any judicial warrant or administrative order.¹¹⁸ In the case of Gomez Palomino v. Peru the 1994 Inter-American Convention was never mentioned in relation to a violation of it since the disappearance was carried out in 1992, when Peru was not a party to the convention. The court, however, decided on the case in November 2005, and was therefore able to use the 1994 Inter-American Convention and the Draft International Convention as a help to define enforced disappearance while investigating if the Peruvian state had really criminalised enforced disappearance or not. If the Peruvian definition was compatible with the international recognized definition. The court ruled, *inter alia*, that just as in the Blanco Romero case, the state should adapt the domestic law with the international standard regarding enforced disappearance.¹¹⁹ The case is important

¹¹⁴ Dijkstra, Petra, Helen Klann, Rosa Ruimschotel and Myrthe Wijnkoop, 2002, p. 32. Inter-American Court of Human Rights, Case of Velásquez Rodríguez v. Honduras, 29 July 1988, Series. C No.4 (1988), para. 155.

¹¹⁵ Dijkstra, Petra, Helen Klann, Rosa Ruimschotel and Myrthe Wijnkoop, 2002, p. 33

¹¹⁶ Citroni & Scovazzi, 2007, pp. 177-178

¹¹⁷ Inter-American Court of Human Rights, Case of Blanco-Romero et al v. Venezuela. 28 November 2005, series C No. 138, XI, para. 6, 7, 10, 14.

¹¹⁸ Inter-American Court of Human Rights, Case of Gómez-Palomino v. Peru, 22 November 2005, series C No. 136, VII, para. 54.9.

¹¹⁹ Citroni & Scovazzi, 2007, pp. 174-176.

because it proves the normative effect of conventions concerning enforced disappearance. And how the definitions set out in both the 1994 Inter-American and the UN Convention can influence courts decisions. It also point out the importance of having one internationally recognized definition.

4.1.4 Bámaca Velásquez v. Guatemala

Bámaca Velásquez disappeared in March 1992 during a gunfight between the Organización Revolucionaria del Pueblo en Armas and the army of Guatemala. He was subjected to torture and was artificially kept alive to provide information and cause greater suffering until he was later killed. This was a very important case in the process of creating jurisprudence for crimes of enforced disappearance. The commission claimed that Guatemala violated a number of articles set forth in the American convention such as 4, 5, 7, 8, 25 but also article I, II and VI of the 1994 Inter-American Convention. The court concluded, among other things, that Guatemala had to harmonize its domestic legislation with the international standard definition of enforced disappearance.¹²⁰

4.1.5 Caso Heliodoro Portugal vs. Panamá

In this case the commission requested the court to try the state of Honduras, for, *inter alia*, failing to criminalise enforced disappearance under domestic law, article III of the 1994 Inter-American Convention. The court found that Panamá had failed to define enforced disappearance in accordance with article II and III of the 1994 Inter-American Convention.

Considering that there are new cases of enforced disappearance in the Americas every year, it can be seen as rather weak to have so few cases that are connected to the Inter-American Convention. But on the other hand, that might mean that the domestic remedies are working, so that the court is not needed.

4.2 The Future Strength of the UN Convention against Enforced Disappearance

For the convention to actually have any real effect, it first needs to enter into force, which it does when 20 states have ratified the convention. It was opened for signatures on the 6th of February 2007. As of this moment only seven states have ratified the convention, but the convention has 80 signatories. It is very important that it becomes a universally accepted treaty, especially for regions like Asia as it does not have a regional human rights organisation such as the European Council or the Organisation of American States. The success of the convention is also dependent on the acceptance of the individual communication mechanism.¹²¹

The CAT has become a universally accepted treaty with 146 states parties and the UN convention shares a lot of similarities with it. In the drafting process of the UN Convention the

¹²⁰ Citroni & Scovazzi, 2007, p. 159

¹²¹ Citroni & Scovazzi, 2007, p. 397

CAT many times served as the model, which now can be seen very clearly in the many similarities, not only in the way that they are treaties dealing specifically with one right, but also the actual articles shares a lot of similarities.¹²²

In article 16 of the UN Convention the non-refoulement principle can be found, it states that no party shall extradite, surrender or expel a person if there is a risk the person will be disappeared. This is similar to the non-refoulement principle found in article 3 in the CAT. Article 11 of the CAT provides with a universal jurisdiction of the crime, just as article 9(2) of the UN Convention does. The CAT and the UN Convention shares the same basic aim which is to create effective domestic criminalisation and universal jurisdiction.

Considering the gravity of enforced disappearance with its many resolutions in the General Assembly,¹²³ and that it can constitute a crime against humanity, it is likely that the UN Convention will have a great impact with strong support. And considering the major similarities between the CAT and the UN Convention in its monitoring mechanisms, call for mandatory universal jurisdiction and other parts it is possible for the UN Convention to become just as universally accepted as the CAT has been.

There is of course a risk that some states won't become parties to the convention since its monitoring mechanisms might be seen as a little bit too radical. Not only does it have the well established mechanisms such as periodic reports (29), individual and interstate communication (art 31-32), but the convention also provides for an emergency procedure (30), on site visits (art 33) and the possibility to bring a matter to the General Assembly via the Secretary-General, these procedures that not even the CAT have might discourage some states from ratifying it. A strong convention can impede the acceptance of the treaty and thus make it strong in theory but weak in practice.

Christos Pourgourides, rapporteur on enforced disappearance for the Committee for Legal Affairs and Human Rights under the Council of Europe, line up what are according to him the most important elements of a legal instrument against enforced disappearance. And these are, *inter alia*, a clear and sufficiently wide definition on enforced disappearance, strong monitoring mechanisms such as emergency procedure, and a clarification of the obligations of prevention and criminalisation of enforced disappearance, and also a proper recognition of the rights of victims and their families.¹²⁴ Many of these elements that he considers important have been included in the convention. Therefore, based on the elements provided by Pourgourides, the UN Convention can be considered strong.

¹²² Report by Mr Nowak, para 100.

¹²³ General Assembly resolution 1994/193, A/RES/49/193, 9 March 1995, Question of enforced or involuntary disappearances. General Assembly resolution A/RES/51/94, 28 February 1997, Question of enforced or involuntary disappearances. Commission on Human Rights E/CN.4/RES/1996/30, Question of enforced disappearances.

¹²⁴ Report by Mr Pourgourides, para 74.

4.3 The Effect of the ICC in Regard to Enforced Disappearance

Including enforced disappearance as a crime against humanity in the ICC charter was a historic step towards accountability for the crime of enforced disappearance. Enforced disappearance has not been within the jurisdiction of either the charter of the Tribunal of Nuremberg, the statute of the Tokyo Tribunal, or the statutes for the Tribunal of the former Yugoslavia and Rwanda.¹²⁵

Steven Ratner and Jason Abrams deem that the ICC is a promising creation for holding criminals of great atrocities accountable. But the success is depending on the number of states willing to become a party to the court, if few states ratify the statute the court will become weak. They also note that it is important that state parties are willing to cooperate with the court in matters of gaining “custody over defendants, providing evidence, and giving adequate financial support.” Also, the principle of *nullum crimen sine lege* provides that the court can only handle cases that occurred after a state became a party to the court.¹²⁶ To date 108 states are party to the ICC statute.

Since the Court always have to rely on the consent of the state in question in order to exercise jurisdiction over a national (or a case referred to by the Security Council), some have argued that the court is too weak. It is not likely that a state will be willing to extradite nationals to the court if the act was state-sponsored. Since it is in the very definition of enforced disappearance that it is carried out by state agents or acquiescence of the state (or from a political organisation), it is unlikely that a state will extradite nationals accused of enforced disappearance. The widespread and systematic usage of enforced disappearance has historically mostly been carried out by governments. It will thus be difficult for the court to exercise jurisdiction of crimes that are in any way state sponsored, which enforced disappearance usually is. Abrams and Ratner hold that “[a] tribunal unable to enforce its orders and judgements becomes at best an academic exercise and at worse a cynical set-back for the international law and justice.”¹²⁷

This could mean that the individuals practicing enforced disappearance in brutal regimes are still safe from prosecution. If another state intervenes to stop repressive acts of a brutal regime the foreign military personnel will be under the jurisdiction of the court, and the brutal regime probably most willing to extradite the personnel to the court. The court could thus work as a shield from an intervention that might be morally and legally legitimate.¹²⁸

The deterrent effect of the ICC is often mentioned as a core element in the protection against grave human rights violations. Through punishment of perpetrators a preventive effect is hoped to be created.¹²⁹ However, the ICC will most likely handle very few cases of enforced disappearance because of the rigid requirements (widespread and systematic towards a civilian population, subjective element, prolonged period of time), mentioned earlier in this essay, and

¹²⁵ Citroni & Scovazzi, 2007, p. 255

¹²⁶ Ratner & Abrams, 2001, p. 339

¹²⁷ Ratner & Abrams, 2001, pp. 218-222

¹²⁸ Ratner & Abrams, 2001, p. 218

¹²⁹ Mayerfeld, Jamie, “Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights” in *Human Rights Quarterly* 25, 2003, p. 98.

because of repressive regimes unwillingness to cooperate in the prosecution of their own nationals. Because of the rigid requirements there is also a risk that the preventive effect won't be as significant as it could be.

The Court can find a case inadmissible if the case "is not of sufficient gravity",¹³⁰ so it is clear that the court will only be used in grave breaches of international criminal law. Hence, the preventive effect of the court might not be as strong towards enforced disappearance *per se*, since is not within the jurisdiction of the court. A State has nothing to fear from the court if the practice of enforced disappearance is only sporadic.

¹³⁰ Rome Statute of the International Criminal Court, Rome, 17 July 1998, United Nations, Treaty Series, vol. 2187, article 17(1)(d).

5 Conclusion

The biggest problem with these three instruments as of today is probably that the 1994 Inter-American Convention is only effective on a regional level. The UN Convention has only been ratified by 7 states, and therefore needs another 13 ratification to enter into force and the ICC only handles cases where the practice is systematic and widespread against civilians to a point where it constitutes a crime against humanity. The international legal instruments' addressing enforced disappearance does therefore currently not constitute sufficient legal protection. There is however no need for despair, when the UN Convention enters into force a considerable amount of the legal gaps will be sealed.

UN Convention

If the UN Convention is ratified by a large number of states it will strengthen the protection against enforced disappearance. Not only in the states that will have ratified it, but it will become important as a normative force, sending the message that enforced disappearance is never accepted. The definition of the crime is in line with the Declaration against Enforced Disappearance and the 1994 Inter-American Convention, it could have been a definition with wider scope if non-state actors were included. In comparison with the 1994 Inter-American Convention the definition is slightly more progressive in its design.

The effective creation of a universal jurisdiction in article 9 is perhaps the single most important part of the convention.

The monitoring mechanisms handled by the Committee are very innovative and possibility to submit urgent request to the committee will not only have a preventive effect but it might also effectively end occurring disappearances. The possibility to make on-site visits is also important and will hopefully have the effect that the Committee will get closer to the affected persons. The treaty Committee together with the WGEID will, if the Convention enters into force, become an instrument of great strength against enforced disappearance.

The 1994 Inter-American Convention

The 1994 Inter-American Convention is not as strong or innovative in its design as the UN Convention, but the fact that it is connected to the Inter-American Court is a major advantage. The nexus between the Convention and the Court makes the convention a very strong instrument in the process towards greater state accountability.

However, in my examination of the jurisprudence of the court some questions have arisen that needs further examination. What does it mean that so few cases have been brought to the court? Does it mean that the domestic courts handle cases enforced disappearance adequately? Or does it mean that there has been a great decrease in enforced disappearance itself, or maybe the court is not working as it should? This needs further examination to be able to draw any substantive conclusions.

The International Criminal Court

There are a few problems in the ICC Statute definition on enforced disappearance that substantially decreases the possibility to reach greater individual accountability; the subjective element, the need for prolonged period of time, and the fact that the practice has to be widespread and systematic aimed towards a civilian population. Because of these restrictive requirements the preventive effect of the ICC on single and sporadic acts of enforced disappearance can be questioned. There is nothing to fear from the court as long as it is not widespread and systematic.

Regardless of the rigid requirements found in the definition the fact that enforced disappearance is one of the enumerated crimes in the Statute must be seen as a victory.

The definition in the ICC Statute includes non-state actors, this has probably a lot to do with the fact that the ICC is addressing individual accountability so to add non-state actors will not cause more problems for the state, as it would in the case of the Inter-American Court for example where the court handle state responsibility.

Since not every element of the treaties are examined it is not possible to draw any definite conclusions on the sufficiency of the instruments, but it is possible to give a strong indication of the strength of the protection. The conclusion of this essay is that there are great possibilities to soon have a very strong protection against enforced disappearance. Much of it depends on how many states will join the UN Convention and how the subjective element and prolonged time will be interpreted and dealt with by the ICC.

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