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Nunca Más (Never Again)

Towards a jurisprudential cross-fertilization for the prosecution of the enforced disappearances at the ICC

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Contents

Abstract

This thesis examines the possible transjudicial interaction that may arise between the ICC and the IACtHR with regard to the interpretation of the crime of enforced disappearance of persons. This potential scenario of jurisprudential cross-fertilisation is considered on the fact that both, the IACtHR and the ICC exercise jurisdiction *ratione materiae* over the crime of enforced disappearance, therefore the same context or situation could be the object of adjudication by both courts either simultaneously or at different times. However, given the undeveloped state of the ICC's jurisprudence on this crime, reliance on IACtHR jurisprudence provides, therefore, a useful tool for the interpretation of enforced disappearance in the ICC context.

In this sense, the present work focuses on the interpretative legal standards of the elements of the crime developed by the IACtHR case law and their utilisation as a potential interpretative tool in the future case law of the ICC. This bearing in mind that Article 21(3) of the Rome Statute provides a legal basis for the recourse to human rights law. Therefore, resort to cross-fertilisation in the case of study may contribute to determining common legal standards at an issue of common concern, thus, ensuring the coherence of international law.

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Ana Maria Mendoza E
27 August, 2018
Lund, Sweden

Abbreviations

AC	Appeals Chamber
ACHR	American Convention on Human Rights
CAH	Crime(s) Against Humanity
ECCC	Extraordinary Chambers of the Courts of Cambodia
IACHR	Inter-American Convention on Human Rights
IACtHR	Inter-American Court of Human Rights
IACFD	Inter-American Convetion on Forced Disappearance of Persons
ICC	International Criminal Court
ICC Statute	International Criminal Court Statute
ICED	International Convention on Enforced Disappearance of Persons
ICT/ICTs	International Criminal Tribunal(s)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IMT	International Military Tribunal
NMT	Nuremberg Military Tribunal
TC	Trial Chamber
UN	United Nations
UN Declaration	United Nations Declaration on the Protection of All Persons from Enforced Disappearance
UNGA	United Nations General Assembly
SCSL	Special Court for Sierra Leone
VCLT	1969 Vienna Convention on the Law of Treaties
WGEID	United Nations Working Group on Enforced or Involuntary Disappearances

1 Introduction

1.1 Background

Enforced disappearance of persons constitutes one of the most serious human rights violations, as well as one of the most complex crimes. Its complexity is due to its composite character as it constitutes a violation of a wide range of human rights embodied in different international human rights instruments.[1] Accordingly, several international instruments have been enacted prohibiting and criminalising this practice: the UN Declaration for the Protection of all Persons from Enforced Disappearance[2], the Inter-American Convention on Forced Disappearance of Persons[3], and the International Convention for the Protection of All Persons from Enforced Disappearance[4]. Additionally, the Rome Statute of the International Criminal Court codified for the first time Enforced disappearance as a crime against humanity.[5]

Despite its categorisation as a crime against humanity, the jurisprudence of ICTs on enforced disappearance has been considerably underdeveloped. Conversely, international human rights courts and treaty monitoring bodies have contributed significantly to the development of substantive and procedural standards for addressing this crime. Notably, the IACtHR has dedicated a significant part of its jurisprudence to enforced disappearance, making it a pioneer in the subject.[6] Throughout its case law, the IACtHR has established different interpretative principles to be considered when dealing with cases of enforced disappearance, such as the reversal of the burden of proof, the continuing nature of the offense, the prohibition of amnesty laws, the standing of victims, and the characteristics of the crime.[7] In this respect, the jurisprudence of international human rights bodies has played a significant role in ensuring accountability for enforced disappearance. Nonetheless, the international responsibility for enforced disappearance has been dealt exclusively within the scope of state responsibility, leaving the question of individual criminal liability entirely to the domestic jurisdictions.

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[1]Lisa Ott, *Enforced Disappearance in International Law* (Intersentia 2011), 7

[2] Declaration on the Protection of All Persons from Enforced Disappearances (adopted 18 December 1992) UNGA Res. 47/133, UN Doc. A/47/49 (1992) (hereinafter 1992 UN Declaration)

[3]Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) 68 OAS Treaty Series 33 ILM 1429 (hereinafter, IACFD)

[4]International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, UNGA Res. 61/177 (20 December 2006) (hereinafter, ICED)

[5] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (hereinafter ICC Statute), Art. 7(1)(i) and (2)(i).

[6] Tullio Scovazzi and Gabriela Citroni, *The Struggle Against Enforced Disappearance and The 2007 United Nations Convention* (Martinus Nijhoff Publishers 2007)101,133.

[7] Ibid, 101, Nikolas Kyriakou 'An Affront to the Conscience of Humanity: Enforced Disappearances in the Case Law of the Inter-American Court of Human Rights' [2014] 7 Inter-Am. & Eur. Hum. Rts. J. 17, 20

In light of the emerging state of enforced disappearance in international criminal law, and the ICC's mandate to investigate and prosecute the most serious crimes of concern for the international community; it is timely to consider and reflect upon potential obstacles for future investigation and prosecution by the ICC, in order to hold criminally accountable individuals responsible for the crime of enforced disappearance. This opens up the possibility for a cross-referencing scenario between international courts, namely the IACtHR and the ICC, at an issue of common concern such as enforced disappearance.

It has become a common practice among international tribunals to reference and 'borrow of' each other's case law and rationales in the process of creating their own jurisprudence. Accordingly, legal scholars have given special attention to the judicial interaction between ICTs and international human rights courts and monitoring bodies, when interpreting applicable human rights norms. Mainly, because despite belogning to different jurisdictions, ICL on the one hand, and, IHRL on the other, they do not operate on disjointed planes. As pointed out by Maculan, the practice of 'cross-fertilisation between ICTs and human rights [judicial] bodies steams of from the strong interconnection between their respective areas of law'.[8] Consequently, their work is complementary in their joint mission of protecting human rights and the realisation of justice.

This notion is based on the idea that cross-fertilisation between international tribunals is cemented by their shared sense of belongning to an 'international judicial system' part of a 'global community of courts'.[9] In that way, the interaction between international tribunals contributes to their shared undestranting matters of common concern; and therefore aims to 'enhance the coherence, unity, and authority of international law' thus preventing its fragmentation.[10]

In this respect, this dissertation examines the transjudicial interaction that may arise between the ICC's use of the IACtHR jurisprudence in regards to the interpretation of the crime of enforced disappearance under the ICC Statute. This potential scenario must be considered on the fact that both, the IACtHR and the ICC, exercise jurisdiction *ratione materiae* over the crime of enforced disappearance pursuant to the IACFD and the ICC Statute, respectively. Hence, the same context or situation could be the object of adjudication by both courts either

[8] Elena Maculan, 'Judicial Definition of Torture as a paradigm of Cross-fertilisation: Combining Harmonisation and Expansion' [2015] 84 Nordic J. Int'l L. 456, 457.

[9] Sergey Vasiliev, 'International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-Fertilisation' [2015] 84 Nordic J. Int'l L. 371, 372, referring to Anne-Marie Slaughter, 'A Global Community of Courts' [2003] 44 Harv. Int'l L.J. 191.

[10] Ibid, 379. The fragmentation of international law is interrelated to the proliferation of international courts and tribunals. As observed by Chester Brown, the creation of regional and specialised tribunals and monitoring bodies, which operate in parallel with other international institutions of a universal or general character can lead to divergences in the way that those institutions approach legal issues; which may result in conflicting norms. In that respect, despite the subject of 'fragmentation of international law' being a transversal issue to cross-fertilisation, an analysis of this topic goes beyond the scope of this thesis. For a thorough analysis on this subject, please *see*. Chester Brown 'The emergence of a Common Law of International Adjudication against a background of Proliferation' in Chester Brown, *A Common Law of International Adjudication* (OUP, 2007) 16 ff.

simultaneously or at different times. Moreover, considering that with the codification of enforced disappearance within the ICC Statute, this crime elevated from a human rights violation prohibited under human rights treaties to the rank of an international crime. This idea raises the question as to whether the crime of enforced disappearance as a crime against humanity brings with itself the case law of the international human rights adjudicating bodies which have interpreted it, particularly the IACtHR.

Consequently, bearing in mind that Art. 21(3) of the ICC Statute, as will be discussed, sets forth that the provisions within the ICC Statute must be applied and interpreted in consistency with 'internationally recognized human rights'[11]. It will be argued that under this provision, the human rights standards developed by the IACtHR jurisprudence, could constitute a criterion for the interpretation and application of the ICC's own legal standards on the crime of enforced disappearance; thus, ensuring consistency with internationally recognised human rights. This will contribute to the reasoning that the judicial interaction between these two courts, and the influence that the IACtHR jurisprudence could have on the future case law of the ICC on enforced disappearance, constitutes a prominent factor for the development of international criminal justice.

1.2 Research Question

In light of the above, this contribution aims to answer the following question: How could the human rights standards and principles developed by the IACtHR jurisprudence on enforced disappearance inform the ICC's future jurisprudence on the interpretation of the definition of the crime of enforced disappearance under Article 7(1)(i) and (2)(i) of the ICC Statute, and what impact would it have.

To answer this inquiry, the following sub-questions will be addressed in the forthcoming chapters: what have been the developments of the crime of enforced disappearance in ICL? Is there a difference between the elements of enforced disappearance as a crime against humanity under the ICC Statute, and as a human rights violation? Does the IACtHR jurisprudence widen the context in which enforced disappearance as a crime is interpreted? Is the ICC obliged to adopt the interpretation of the crime of enforced disappearance given to it by the IACtHR?

1.3 Objective

The purpose of this work is to contribute the existing literature of cross-fertilisation between ICTs and human rights adjudicating bodies, in regards to the interpretation and understanding of core crimes and human rights violations. In this respect, the objective of this thesis is twofold. In first place, it aims to provide a deeper understanding of the elements of the crime of enforced disappearance as a crime against humanity in light of the jurisprudence of human

[11]ICC Statute, Article 21(3)

rights judicial bodies, specifically the IACtHR due to its leading expertise on the subject. And in second place, to partially address an existing gap within the ICC's jurisprudence.

1.4 Methodology

This thesis adopts a dogmatic legal approach. This research examines the crime of enforced disappearance within two international courts belonging to separate legal regimes, ICL and international human rights law. The focus, however, is on the interpretative legal standards of the elements of the crime developed by the IACtHR case law, and their utilisation as a source of interpretation for the future case law of the ICC.

In this regard, the primary sources of this research are the international conventions on enforced disappearance, the statutes of the courts under consideration, and relevant applicable law. Commentaries and essential case law illustrating those primary sources are used within the terms of Art. 38 of the Statute of the International Court of Justice (ICJ Statute). The present work also uses and refers to secondary sources, such as academic literature and the works of legal scholars. Particular attention is given to the literature on the practice of enforced disappearances, both as a crime and as a human rights violation. Additionally, in order to establish an argument towards judicial cross-referencing between courts, literature regarding cross-fertilisation between ICTs and regional courts has been taken as reference. Finally, literature regarding the analysis of the IACtHR jurisprudence on the crime of enforced disappearance is also used as an additional guide to establish a comparative analysis between the definition of the crime in both, the ICC and the IACtHR.

1.5 Limitations

First and foremost, this dissertation is not meant to be a comprehensive study on the crime of enforced disappearance in international law, nor in regard to its developed case law by international human rights bodies. Instead, it focuses solely on the established jurisprudence of the IACtHR on enforced disappearance as a source for the interpretation of enforced disappearance by the ICC. It is important to establish that this research does not intend to provide an in-depth analysis on the mutual interaction between these two courts, nor to provide a comparative analysis between the interpretation of enforced disappearance by ICTs and the IACtHR. Instead, it centres on the interaction that may arise from the use of the IACtHR case law by the ICC when interpreting the definition of the crime of enforced disappearance in the ICC's context. The latter, considering that the ICC has yet to provide its first case on enforced disappearance

Accordingly, due to the existing dichotomy of these two regimes and the dynamics of cross-fertilisation, attentiveness will be given to the issue of fragmentation of international law, and to the competing standards that may arise between international human rights law and international criminal law when addressing interrelated issues. However, the focus of this work will pertain only to the definition and elements of enforced disappearance under the ICC Statute.

Consequently, under the premise that crimes are different from human rights violations, an analysis of the relationship between state and individual responsibility for international crimes is required. This discussion is relevant as it raises issues concerning the interpretation of the elements of the crime, and its distinct application depending on the legal regime. This poses the question as to whether the context in which the ICC operates requires a 're-interpretation' and deviation from the human rights standards developed by IACtHR.[12] It should be noted that the aim of this work is not to propose a methodology for *how* the interaction between the IACtHR and the ICC on enforced disappearance should be done. Instead, it highlights a scenario where the resort to the human rights standards, through cross-fertilisation, are necessary for addressing the crime of enforced disappearance.

In this sense, and for reasons of limitations the case law of the African Commission on Human and Peoples' Rights, the European Court of Human Rights, the Human Rights Committee, and the Human Rights Chamber for Bosnia and Herzegovina on enforced disappearance, will not be examined as a proper analysis of their case law scapes the scope of this work. Neither will States' obligations to criminalise this conduct within their domestic legislation, nor the implementation of the human rights standards within the national proceedings be addressed in this thesis.

Furthermore, an extensive debate has been established among legal scholars, as well as by international human rights courts and monitoring bodies, regarding the scope of enforced disappearance as a human rights violation. However, an analysis of the different human rights violations that arise from the conduct of enforced disappearance will not be carried. On the same note, crimes in connection to the circumstances surrounding cases of enforced disappearance, such as incommunicado detention, arbitrary deprivation of liberty, murder, torture, extrajudicial executions, among others, will not be subject of analysis.[13]

Finally, bearing in mind that jurisprudential cross-fertilisation can cover issues of substantive, as well as procedural law, the focus of this thesis will rely on the substantive aspect of ICL, given that the interpretation of human rights standards could lead to the expansion of the definition of the crime.

1.6 Outline

Chapter 2 examines the prohibition of enforced disappearance in international law and its development in ICL. It provides a general overview on the criminalisation of enforced disappearances under international law giving special attention to the definitions of enforced disappearance contained in the international instruments. It further establishes an an analysis of how ICTs have addressed enforced disappearance. Chapter 3 analyses the notion of enforced

[12] Julia Geneuss 'Obstacles to Cross-Fertilisation: The International Criminal Tribunals' Unique Context and the Flexibility of the European Court of Human Rights' Case Law' [2015] 84 Nordic J. Int'l L. 404, 407

[13] For an analysis of this conducts and their connection with enforced disappearance, *see.* Lisa Ott (n1) 32

disappearance as a crime against humanity under Article 7 of the ICC Statute. It examines the constitutive elements of the crime, and its characteristics, in light of the IACtHR jurisprudence. Chapter 4 discusses the possibility of establishing a judicial cross-fertilisation between the IACtHR and the ICC for the analysis of enforced disappearance under the ICC Statute. It illustrates potential points of divergence and convergence between these legal regimes. Finally, Chapter 5 provides the concluding remarks of this work.

2 Historical context and evolution of the crime of Enforced Disappearance in International Law

2.1 Introduction

The crime of enforced disappearance of persons had its first precedent in the implementation of the *Nacht und Nebel Erlass* ('Night and Fog Decree') in Nazi-occupied Europe during World War II. Its purpose was to subject persons 'endangering German security' to 'protective arrests' and to secretly brought them to Germany for trial at special courts, where they were subsequently vanished without a trace.[14] In addition, the Night and Fog Decree forbade the prisoners to have any contact with their family members or to provide any information on their whereabouts.[15]

Subsequently, in the 1960s and early 1970s, the practice of enforced disappearances emerged in Latin America as a 'systematic policy of State repression' used by the military regimes in Guatemala and Brazil.[16] Due to the armed conflicts and dictatorships experienced within the Latin American region, the practice of enforced disappearance expanded to other countries including, Argentina, Bolivia, Chile, Colombia, El Salvador, Honduras, Haiti, México, Perú, Paraguay, and Uruguay.[17] Nonetheless, enforced disappearances have not been limited to the Latin American region. In the Former Yugoslavia, as a result of the armed conflict and 'ethnic cleansing' policy, by the end of the war in 1995, approximately twenty-seven thousand people were missing.[18] Throughout the 2000s, disappearances continued to occur in Chechnya,

[14] *Trial of the Major War Criminals before the International Military Tribunal Nuremberg* (IMT Judgment) 14 November 1945-1 October 1946 (Official English Text) Compiled by the Secretariat of the Tribunal under the authority of the Allied Control Authority for Germany. Nuremberg: International Military Tribunal., 1947-1949. (Distributed by the United States Department of State.) Vol 1, at 43 ff; United States Holocaust Memorial Museum 'Night and Fog Decree' (*Holocaust Encyclopedia*, 2018) <https://encyclopedia.ushmm.org/content/en/article/night-and-fog-decree> accessed 5 May 2018.

[15]UNCHR, '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 disappearances, pursuant to paragraph 11 of Commission resolution 2001/46' (7 January 2002) UN Doc. E/CN.4/2002/71 para.7 ; United States Holocaust Memorial Museum 'Night and Fog Decree' (*Holocaust Encyclopedia*, 2018) <https://encyclopedia.ushmm.org/content/en/article/night-and-fog-decree> accessed 5 May 2018.

[16] Lisa Ott, (n.1) 3; Report by Mr Manfred Nowak (n.15) para. 8

[17] Scovazzi/Citroni 'the Struggle…' (n.6) 2; Gabriella Citroni and Tullio Scovazzi, 'Recent Developments In International Law To Combat Enforced Disappearances' [2009] 3 Revista Internacional de Direito e Cidadania 89, 90; Jeremy Sarkin, 'Putting in place Processes and Mechanisms to Prevent and Eradicate Enforced Disappearances around the World' [2013] 38 S. Afr. Y.B Int'l L. 20, 26.

[18]ECOSOC Commission on Human Rights, 'Question of Enforced or Involuntary Disappearances, Special process on missing persons in the territory of former Yugoslavia. Report submitted by Mr Manfred Nowak, expert member of the Working Group on Enforced or Involuntary Disappearances, responsible for the special process, pursuant to paragraph 4 of Commission resolution 1995/35' (4 March 1996) UN Doc. E/CN.4/1996/36 para. 1, cited in Brian Finucane, 'Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War' [2010] 35 Yale J. Int'l L. 171, 188

Belarus, Ukraine, and Azerbaijan[19]. Within the Asian region, in Sri Lanka, Nepal, Pakistan, India and Bangladesh enforced disappearances have been used as a mechanism against nationalist or separatist groups, or as a countermeasure against terrorism or insurgency.[20] Africa and the Middle East, have not been exempted from this practice. In countries like Algeria, Burundi, Syria and Egypt, the occurrence of enforced disappearances continues to be present.[21] In recent years enforced disappearances have increased in various regions around the world. In particular, the Working Group on Enforced or Involuntary Disappearances ('WGEID') stated that up until 2017, 45,120 cases of alleged enforced disappearances in 91 States are currently under active consideration.[22]

In that respect, since the boom of enforced disappearance in the 1960s and its subsequent increasing practice, the international community has issued several instruments at the regional and international level addressing this practice. Moreover, international human rights monitoring bodies have developed significant case law on enforced disappearances; namely, the African Commission on Human and Peoples' Rights, the European Court of Human Rights, the Human Rights Committee, the Human Rights Chamber for Bosnia and Herzegovina, and the Interamerican Commission and Court Human Rights, have established significant guiding principles on the subject.[23]

On the other hand, in the area of criminal law, the recognition of enforced disappearances as a crime in international law, and more specifically its characterisation as a crime against humanity has been debated extensively. Mainly, because under the ICC Statute enforced disappearance can only amount to a crime against humanity when committed in the framework of a widespread and systematic attack[24]. This characterisation of the crime has raised issues concerning whether or not isolated acts of enforced disappearances can be considered an international crime. Additionally, the issue of individual liability for enforced disappearance has been mostly addressed by domestic courts. At the international level, even though the ICTs have referred to the crime of enforced disappearances within their judgments, no specific case law on this crime has been issued yet.

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[19] Council of Europe, Parliamentary Assembly 'Enforced Disappearances Report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Pourgourides' (19 September 2005) Doc. 10679, paras. 15-19

[20]International Commission of Jurists, *No more "Missing Persons": The Criminalization of Enforced Disappearance in South Asia* (August 2017) 5

[21] UNGA 'Report of the Working Group on Enforced or Involuntary Disappearances' (31 July 2017) UN Doc. A/HRC/36/39; UNGA 'Communications, cases examined, observations and other activities conducted by the Working Group on Enforced or Involuntary Disappearances' (24 November 2017) UN Doc. A/HRC/WGEID/113/1

[22] UNGA, 'Report of the Working Group on Enforced or Involuntary Disappearances' (n.21) para. 5

[23] For the purposes of this thesis, the jurisprudence on enforced disappearance developed by African Commission on Human and Peoples' Rights, the European Court of Human Rights, the Human Rights Committee, and the Human Rights Chamber for Bosnia and Herzegovina, will not be subject of analysis. For a deeper view on the case law of this monitoring bodies please see. Lisa Ott (n.1) 35 ff.

[24] See. Chapter 3

In that regard, this chapter will first establish the evolution of the crime of enforced disappearance in international human rights law and its subsequent condification within the Rome State. Furthermore, it will examine the elements of the crime as established in the international instruments on the subject. This will further enable to understand the elements of the crime as defined in the human rights instruments and the ICC Statute, distinguishing the nature of the crime under each body of law and their contextual differences. Finally, it will provide an analysis of the existing case law on enforced disappearance in ICL, in order to provide an overview of the ICTs interpretation of the enforced disappearance as a crime against humanity.

2.2 The criminalisation of Enforced Disappearances in International Law

The prohibition of enforced disappearances in international law has been developed within the areas of international human rights law, international criminal law and international humanitarian law. Most scholars agree that the criminal prohibition of enforced disappearance emerged from international human rights law in response to the disappearances perpetrated in Latin America since the 1960s.[25] Others, such as Finucane, consider that the origin of the prohibition of enforced disappearances can be found in the laws of war, and not in human rights law, following the findings of the IMT and NMT.[26] Subsequently, the prohibition of such practice was reaffirmed with the adoption of specific instruments on enforced disappearance.

In this respect, the following sections will address the illegality and criminalisation of enforced disappearances under international law. In section 2.2.1, special attention will be given to the international human instruments in order to determine the evolution of enforced disappearance from a human rights violation to its recognition as an international crime. Later in section 2.2.3 it will examine the codification of enforced disappearance of persons as a crime against humanity during the Rome conference.

2.2.1 The evolution of Enforced disappearance from human rights violation to a crime in International Criminal Law

The first international body to address the practice of enforced disappearance was the Inter-American Commission on Human Rights in 1974 in its Report on the status of human rights in

[25] Brian Finucane, 'Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War' [2010] 35 Yale J. Int'l L. 171; William A. Schabas, *International Criminal Court- A Commentary on the Rome Statute* (2nd edn OUP 2016), 202; Irena Giorgou 'State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute' [2013] 11 JICJ 1001, 1002.

[26] B. Finucane (n.25)171

Chile.[27] Afterwards, in 1978 the UNGA adopted Resolution no. 33/173 on *Disappeared persons*, concerned for the increased number of 'enforced or involuntary disappearances of persons as a result of excesses on the part of law enforcement or security authorities or similar organizations',[28] and for the 'difficulties in obtaining information' as to the circumstances of such persons. The UNGA called upon States to take appropriate measures to ensure legal accountability for those authorities or organisations whose 'unjustifiable excesses' may have lead to enforced or involuntary disappearances.[29]

In 1980 the UN Commission on Human Rights established the WGEID to address questions relevant to missing and disappeared persons.[30] The WGEID was set up as an *ad hoc* mechanism with the humanitarian mandate to assist and serve as a communication channel between the families of those who are reportedly disappeared, human rights organizations and the Government of the States, in order to determine or acquire information regarding the fate or whereabouts of their missing or disappeared family members.[31] It is not within the mandate of the WGEID to determine State or individual criminal responsibility.

Later in 1984, the Parliamentary Assembly of the Council of Europe adopted Resolution 828/1984 recognising the practice of enforced disappearance as a human rights violation; and called for its recognition as a crime against humanity.[32]

The efforts of the international community to establish a universal document on enforced disappearances led the UNGA in 1992 to adopt the UN Declaration on the Protection of All Persons from Enforced Disappearance ('UN Declaration').[33] The UN Declaration established for the first time an internationally agreed definition of enforced disappearances.[34]

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[27] Inter-American Commission on Human Rights (IACHR) 'Report on the status of human rights in Chile' (25 October 1974) OEA/Ser.L/V/II.34 Doc. 21 corr. 1.

[28]UNGA Res.33/173 (20 December 1978)

[29] *Ibid.*

[30] UN Commission on Human Rights 'Question of missing and disappeared persons' Res. 20 (XXXVI) (29 February 1980).

[31]Scovazzi/Citroni 'The Struggle against' (n.6) 95; OHCHR 'Working Group on Enforced or Involuntary Disappearances' (*OHCHR*, 2018) <https://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx> accessed 05 August 2018.

[32] Council of Europe, Parliamentary Assembly Resolution 828/1984 of 26 September1984 on Enforced Disappearances [1984].

[33] UN Declaration (n.2)

[34] Scovazzi/Citroni 'The Struggle against' (n.6) 245." The UN Declaration in its preambular paragraph 3 states: "enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law"

Furthermore, the UN Declaration recognises that the 'systematic practice' of enforced disappearance is of the nature of a crime against humanity.[35]It also acknowledges the autonomous nature of the crime of enforced disappearance and calls upon States to criminalise enforced disappearance as a crime under their national legal framework.[36] However, while the UN Declaration is not binding in itself, it has been considered by scholars to provide significant interpretative value and to express *opinion juris*.[37]

In 1994, The UN Declaration was followed by the adoption at the regional level of the Inter-American Convention on Forced Disappearance of Persons ('IACFD'), which entered into force on 28 March 1996.[38] The IACFD was the first international legally binding instrument to prohibit enforced disappearances. Similarly, to the UN Declaration, the IACFD reiterates that the 'systematic practice of forced disappearance of persons constitutes a crime against humanity'.[39] In addition, it imposes the obligation to States parties to codify enforced disappearances under their domestic legislation as a continuous and autonomous offence.[40]

Until this point, only human rights instruments and human rights bodies addressed the practice of enforced disappearance. With the adoption of the Rome Statute of the International Criminal Court, enforced disappearance was listed as one of the underlying acts of crimes against humanity within the wording of Article 7.[41] This categorisation not only represented a step forward in ICL regarding the criminal liability of individuals for acts of enforced disappearance, but also the reaffirmation of a established prohibiton under CIL.[42]

Lastly, in 2006 the UN Human Rights Council adopted the International Convention for the Protection of All Persons from Enforced Disappearance ('ICED').[43] Contrary to the UN Declaration and the IACFD, the ICED constitutes the first universally and legally binding instrument on enforced disappearance. However, and more importantly, the International Convention establishes the right not to be subjected to enforced disappearance.[44] The recognition of this right represents a significant step in the fight against enforced disappearances by the international community as it establishes an 'independent and non-derogable human right'.[45] This follows the case law of the IACtHR, which found in *Goiburú*

[35] UN Declaration, Preambular para. 4

[36] *Ibid*, Art, 4

[37]María F. Perez Solla, *Enforced Disappearances in International Human Rights* (Mc Farland & Company, Inc. Publishers 2006) 10; Scovazzi/Citroni 'The Struggle against' (n.6) 249; Lisa Ott (n.1) 8

[38] IACFD (n.3)

[39] Ibid., Preambular para. 6

[40] Ibid. Article 3

[41] ICC Statute, Art. 7. *See*, Chapter 2, section. 2.2.2

[42] Antonio Cassese, *International Criminal Law* (3rd ed. OUP 2013), 98

[43] ICED (n. 4)

[44] Ibid, Art. 1

[45] Scovazzi/Citroni 'The Struggle against' (n.6) 265; Report by Mr Manfred Nowak (n.15) para. 76

et al. v Paraguay that 'the prohibition to carry out enforced disappearance and the corresponding obligation to investigate and punish those found to be responsible have acquired the character of *jus cogens*.'[46]

However, it has been argued that the criminalisation of enforced disappearances took place long time before its formal prohibition in the international legal instruments. In that sense, the Nuremberg Tribunals convictions of Field Marshall Keitel and other high-ranking German officers for the implementation of the Night and Fog decree are considered to establish a customary rule regarding the individual criminal liability for acts of enforced disappearance. [47] Moreover, State practice has also contributed to developing a customary rule prohibiting enforced disappearances. Several states around the world have recognised enforced disappearances as a crime within their domestic legislation in their effort to prosecute those responsible for this crime.[48]

In this respect, international human rights law has contributed extensively, through treaty law and the case law of the human rights bodies, to the development and establishment of a customary rule prohibiting enforced disappearances.[49] Moreover, it has acknowledge that enforced disappearance entails the violation, *inter alia*, of the right to life, the right to liberty and personal security, the right of access to justice, the right to an effective remedy, the right to recognition as a person before the law, the right not to be subjected to inhuman or degrading treatment, as well as the right to the protection of family life, and the right to truth.[50] The cumulative character of enforced disappearance has been constantly addressed in the jurispridence of human rights judicial bodies. For instance, in the case of *Velásquez-Rodríguez v. Honduras*, the IACtHR affirmed that 'the phenomenon of enforced disappearance is a complex form of human rights violation that must be understood in an integral fashion'.[51] The 'multiple' rights violated by enforced disappearances denotes its complex nature and criminal character. This bearing in mind that most of the rights violated or threatened by enforced disappearances are considered customary rules under international law.[52]

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[46] *See*. UN Declaration, Art. 7; IACFD, Art. I and X; ICED, Art. 1(2); *Goiburú et al. v Paraguay* (Merits, Reparations and costs) IACtHR Series C No. 153 (22 September 2006) para 84 referenced by Scovazzi/Citroni 'The Struggle against' (n.6) 266. *See* also, Jeremy Sarkin, 'Why the prohibition of Enforced Disappearance has Attained Jus Cogens Status in International Law' [2012] 81 Nordic J. Int'l L. 537, 564-65

[47] B. Finucane (n.25) 175-176

[48] For examples of legislation prohibiting this practice see, International Committee of the Red Cross (ICRC) 'Practice relating to Rule 98, Enforced Disappearance' in *IHL Database- Customary IHL*, available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule98 > accessed 7 May 2018. (ICRC Customary IHL)

[49] A. Cassese (n. 42) 98; ICRC Customary IHL (n. 48)

[50]Report by Mr Manfred Nowak (n.15) para. 70. As a matter of limitations, this contribution will not address the case law on the human rights violated by the crime of enforced disappearance. For further information regarding some of the case law spelled out in international jurisprudence, s*ee* Report by Mr Manfred Nowak.

[51] *Velásquez Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No. 4 (29 July 1988) para. 150

[52] Irena Giorgou, 'State Responsibility and Individual Criminal Liability, A Comparison Between Torture and Enforced Disappearance' (Master Thesis, Geneva Academy of International Humanitarian Law and Human

Consequently, the criminalisation and subsequent recognition as a customary rule, has widened the scope of protection for cases of enforced disappearance that do not amount to crimes against humanity. Meaning, that recognition of enforced disappearance as a crime in international law is established regardless of its characterisation as a crime against humanity.[53] More importantly, the recognition of the prohibition of enforced disappearances, both as a customary rule and as a crime against humanity, implies that the crime cannot be subjected to any statute of limitations.[54] Therefore, there is an international obligation to prevent and punish all cases concerning enforced disappearance.

2.2.2 The Rome Conference 1998

At the Rome Conference, enforced disappearance was for the first time codified as a specific category of crime within crimes against humanity.[55] Prior to the adoption of the Rome Statute, the nature of enforced disappearances as a crime against humanity was recognised in international human rights instruments but addressed solely in terms of State responsibility rather than individual liability.[56] An example of this was the systematic practice of enforced disappearance as a crime against humanity, which had already been codified in the IACFD in 1994.[57]

Furthermore, in the area of international criminal law, none of the statutes of the *ad hoc* tribunals, nor the Nuremberg Charter included enforced disappearances as crimes against humanity. Nonetheless, in several cases, the ICTs have recognised acts of enforced disappearance as an example of conducts falling under the category of crimes against humanity of 'other inhumane acts'.[58] Moreover, within the *Draft code of crimes against the peace and security of mankind* (1996), enforced disappearance was included as a prohibited act of crimes against humanity in Art. 18 due to its 'extreme cruelty and gravity'.[59]

Rights 2011) 48-9; Nikolas Kyriakou, 'An affront to the conscience of humanity: enforced disappearance in international human rights law' (JD Thesis, European University Institute 2012) 64; Antonio Cassese (n. 42) 98

[53] B. Finucane (n.25) 172; J. Sarkin 'Putting in place…' (n.17) 27-28; J. Sarkin 'Why the prohibition…' (n. 46) 561, 582; I. Giorgou 'State Responsibility and…' (n. 52) 49-500

[54] ICC Statute Art. 29; Gabriela Citroni 'The Specialist Chambers of Kosovo, the applicable Law and the Special Challenges Related to the Crime of Enforced Disappearances' [2016] 14 JICJ 123,128

[55] Scovazzi/Citroni 'The Struggle against' (n.6) 255; I. Giorgou 'State Involvement in…' (n 25) 1009

[56] I. Giorgou 'State Involvement in…' (n 25) 1001-02. For example, the IACtHR condemned for the first time the crime of enforced disappearances in the case *Velasquez Rodriguez v Honduras*, where the Court found a systematic practice of forced disappearance was carried out or tolerated by the Honduran officials in the early 1980s, were the Government failed to protect and guarantee to human rights affected by such practice. Consequently, the Court found that the State had violated the right to life (Art. 4 IACHR), right to humane treatment (Art. 5 IACHR) and the right to personal liberty (Art. 7 IACHR)

[57] IACFD, preambular para. 6 and Art. II.

[58] *See*, Chapter 2, section 2.4

[59] *Yearbook of the International Law Commission*. 1996, 2(2) A/CN.4/SER.A/1996/Add.l (Part 2). See. Commentary on Art. 18(i), para. 15

During the Rome Conference, several delegations were hesitant to include enforced disappearances of persons as one of the underlying acts of crimes against humanity. This was because some of the delegates were concerned about the 'unclear' wording of the provision as "it could be used in reference to liberation movements fighting for the freedom and to regain their territory", and thus required a more precise definition.[60] Others argued in favour of not including the provision at all.[61] Besides, the lack of awareness of any prior precedent for the prosecution of enforced disappearances among the delegations increased concerns of amounting enforced disappearance to a crime against humanity, on par with murder, rape and torture.[62] Nonetheless, Latin American States insisted that given their unfortunate experience, the crime of enforced disappearance should fall within the jurisdiction of the Court.[63]

In this respect, enforced disappearance was codified under Article 7(1)(i) as a crime against humanity, and defined within Article 7(2)(i) of the ICC Statute.[64] Consequently, as will be elaborated in detail in Chapter 3, for enforced disappearance to amount to a crime against humanity the *chapeau* requirements of Article 7 of the ICC Statute must be fulfilled.[65] Following the adotption of the ICC Statute[66], the Preparatory Commission further developed the elements on the definion of enforced disappearance in the text of the Elements of Crimes, establishing the conditions under which the crime of enforced disappearance may fall under the jurisdiction of the ICC.[67]

In practice, the ICC has yet to adjudicate a case in which the crime of enforced disappearances has been invoked. However, in the situations of Côte d'Ivoire and Burundi, the Pre-Trial Chamber has authorized the opening of an investigation with the Chamber concluding that there existed a reasonable basis to believe that the crime of enforced disappearance pursuant to

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[60] 'Summary records of the plenary meeting and of the meetings of the Committee of the Whole' *UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (Rome 15 June–17 July 1998) (2002) UN Doc A/CONF.183/13 (Vol. II) See. *Inter alia*, commentaries delegates Mr Shukri (Syrian Arab Republic), Mr Güney (Turkey), Mr Nagamine (Japan); William A. Schabas, (n. 25) 204

[61]UN Diplomatic Conference (n 60) Commentary delegate Mr S. R. Rao (India)

[62] B. Finucane (n.25)172, referring Herman von Hebel and Darryl Robinson, 'Crimes within the jurisdiction of the Court' in Roy S. Lee (ed.), *The International Criminal Court: The making of the Rome Statute. Issues, Negotiation*, Results (Kluwer Law International 1999).

[63] UN Diplomatic Conference (n 60) *See* ommentaries delegates, Mr Suarez Gil (Observer for the Latin American Institute of Alternative Legal Services), Mr Díaz Paniagua (Costa Rica), Ms Nagel Berger (Costa Rica), Mr Salina (Chile).

[64] The definition of Article 7(2)(i) is supplemented by Article 7(1)(i) of the Elements of Crime, which states the conditions for an individual to be liable for the crime of enforced disappearance.

[65] ICC Statute Article 7: 'For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (…)'

[66]*See.* 'Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) UN Doc A/CONF.183/10.

[67] *See.* 'Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crime' (2 November 2000) PCNICC/2000/1/Add.2. *See also*, International Criminal Court, Elements of Crimes ISBN No 92-9227-232-3 (2011), Art. 7(1)(i). ('Elements of Crimes')

article 7(1)(i) and 2(i) of the ICC Statute had been committed.[68] Nonetheless, no indictment for this crime has been issued yet by the Prosecutor.

At the same time, several situations of enforced disappearances have been considered within the OTP investigations. Notably, in the 2017 Report on preliminary examinations, the OTP indicated that in the situations of Colombia, Gabon, Ukraine and Guinea, allegations of enforced disappearances are being examined.[69]

2.3 The definition of Enforced Disappearance in the International Instruments

The has been generally agreed, that in accordance to the definition of enforced disappearance in all the international instruments, the *actus reus* of enforced disappearance consists of three main constitutive elements: 1) some form of deprivation of liberty, 2) the involvement of State agents, either directly or indirectly, and 3) the refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person.[70]

Article 2 of the ICED, states:

> For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

In accordance to the elements the ICED provides three forms in which the deprivation of liberty may occur, however, the wording 'or any other form' broadens the scope of protection to cover all possible forms in which the deprivation of liberty may take place. Therefore, any consideration regarding the unlawfulness of the deprivation of liberty is irrelevant to qualify an act as enforced disappearance.[71] Secondly, it determines that the deprivation of liberty must have been committed by 'agents of the State or by persons or groups of persons acting with the

[68] *Situation in the Republic of Burundi* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi) ICC-01/17-X-9-US-Exp (25 October 2017) paras.117-136; *Situation in the Republic of Côte d'Ivoire* (Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire") ICC-02/11 (15 November 2011) para. 77-82

[69] ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2017* (4 December 2017)

[70] *Radilla Pacheco v México* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 209 (23 November 2009) para. 140; *Gomes Lund et. al ("Guerrilha do Araguaia") v Brazil* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No 219 (24 November 2010) para. 104; Scovazzi/Citroni 'The Struggle against…' (n.6); Report by Mr Manfred Nowak (n.15) para. 70; Lisa Ott (n.1) 21

[71] Lisa Ott (n.1) 20-21; Scovazzi/Citroni 'The Struggle against…' (n.6) 272 and 282

authorization, support or acquiescence of the State'. This element denotes the particular gravity of this crime as it constitutes an essential element of the crime, as both parts of the *actus reus* require the involvement of the State. Historically, enforced disappearances were mostly committed by State organs as a mechanism to eliminate political opponents and to infringe terror within society.[72] However, the increasing participation of non-state actors in the commission of enforced disappearance opened a big debate regarding their inclusion as one of the perpetrators of this crime. The ICED referred to this issue in Art. 3 by imposing the obligation on the State to investigate and prosecute acts of enforced disappearance committed 'by persons or group of persons acting without the authorization, support or acquiescence of the State'.[73] The ICC Statute, took a similar approach by including within Art. 7(2)(i) the concept of *political organisation*.

The deprivation of liberty needs to be followed by the 'refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts' of the person, which constitutes the third element of the crime. This has been the main element of the enforced disappearances when distinguishing it from other crimes. This is largely due to enforced disappearances having a composite character, meaning that the crime does not arise at the moment of the deprivation of liberty but at the moment where the refusal to acknowledge the deprivation of liberty or concealment of information on the whereabouts of the person takes place.[74]

The last part of the definition refers to the placement of the person outside the protection of the law, or in the case of the ICC Statute, the removal from the protection of the law. However, the Inter-American Convention provides a different wording.

Article II of the IACFD describes enforced disappearance as:

> For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, 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*. (emphasis added) [75]

This definition has been extensively debated due to its reference to the applicable legal remedies and procedural guarantees. It has been considered that such requirement confuses the elements of the crime with one the consequence inherent to the criminal action. Therefore, it

[72] I. Giorgou 'State Involvement in…' (n 25) 1004

[73] ICED, Article 3.

[74] Gabriella Citroni 'when is it enough? Enforced Disappearance and the "Temporal Element"' [2013] 9 Droits Fondamentaux 1, 3

[75] IACFD Article II

restricts the scope of protection to only those disappearances where, neither the victim or his or her next of kin have no access to judicial remedies.[76]

Finally, the ICC Statute constitutes a landmark in the definition of enforced disappearance as a crime against humanity. Article 7(2)(i) states,

> '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.[77]

Although the ICC Statute follows the definitions of the UN Declaration and the Inter-American Convention, the wording of Art. 7(2)(i) departs from the elements established in the human rights instruments by introducing additional elements to the definition of the crime. In first place, it introduced the concept of 'political organisation' as one of the possible perpetrators of the crime. This notion has been the object of considerable debate as it appears to open the door for non-state actors to be held criminally liable, something that was not previously established in the human rights instruments.

Moreover, it incorporates a special intent *(dolus specialis)* by requiring that the acts must be committed 'with the intention of removing them [the victim] from the protection of the law'. This element has been criticised as it appears to put 'an extremely heavy burden of proof' for the prosecution of the individual perpetrator.[78] Finally, something that has been object of debate among scholars is whether or not the wording 'for a prolonged period of time' constitutes a temporal element.[79] In this respect, the definition of the ICC Statute has a narrower approach. By being an instrument of international criminal law, it aims at determining the criminal liability of individuals, not of states as pertain to the international human rights framework. An additional potential limitation is that neither the ICC Statute, nor the Elements of Crimes, clarify what constitutes a prolonged period of time, hence, leaving the term extremely vague.

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[76] Ophelia Claude 'A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence' [2010] 5 Intercultural Hum. Rts. L. Rev. 407, 429 referring María F. Perez S. (n 37) 13; Lisa Ott (n.1) 28. The IACtHR, has stated that "the definition of forced disappearance contained in Article II of the 1994 Inter-American Convention on this field, recognizes that one of its elements is the consequence of "impeding his or her recourse to the applicable legal remedies and procedural guarantees." *Anzualdo-Castro v Perú* (Preliminary Objection, Merits, Reparations and costs) Inter-American Court of Human Rights Series C No. 202 (22 September 2009) para. 94

[77] ICC Statute, Article 7(2)(i).

[78] Report by Mr Manfred Nowak (n.12) para. 69

[79] Scovazzi/Citroni 'The Struggle against…' (n.6) at 273-278; G. Citroni 'Temporal element…' (n. 74) 1-28

2.4 The Jurisprudence of Enforced Disappearances in International Criminal Law

Before the codification of enforced disappearances of persons as a crime against humanity in the ICC Statute, its practice was almost exclusively dealt within the human rights framework, where the issue of individual criminal liability was not addressed. In international criminal law, the establishment of the international and internationalised courts dealing with this crime has been of great importance in the pursuit of justice and convicting individuals for the gravest crimes. However, few cases within these courts have addressed this matter.

This section aims to provide a general overview on how enforced disappearances have been addressed in international criminal law by some of the international and internationalised courts. In this respect, the case law of the Nuremberg Military Tribunals (Section 2.4.1), the *ad hoc* Tribunals (Section 2.4.2), and Internationalized or 'hybrid' Courts (Section 2.4.3) will be examined. Morover, it is worth mentioning that although the jurisprudence of domestic jurisdictions have addressed individual liability for enforced disappearance, for reasons of limitations their case law will not be examined.

2.4.1 The Nuremberg Military Tribunals

The first recognised practice of enforced disappearance in international law, and more specifically in international criminal law, took place during Nazi Germany in World War II with the implementation of the Night and Fog Decree in December 1941.[80]

The Night and Fog Decree provided that:

> [P]ersons who committed offences against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial or punishment in Germany.[81]

During the Nuremberg Trials, Wilhelm Keitel was tried along with other of the top leaders of the Nazi regime before the International Military Tribunal at Nuremberg (IMT). Keitel, Chief of High Command of the German Armed Forces and Field Marshal, was in charge of implementing Hitler's Night and Fog Decree. He was held guilty on all four Counts. Particularly, he was convicted for war crimes and crimes against humanity involving the ill-treatment of prisoners of war and the civilian population in occupied territories under Art.6(b)

[80] Scovazzi/Citroni 'The Struggle against' (n.6) 4. See also, Lisa Ott (n.1) 3.

[81] IMT Judgment (n. 14) at 232

of the IMT Charter, for his role in the implementation of the Night and Fog program.[82] He was sentenced to death and executed in 1946.[83]

Under the Night and Fog policy program a large number of people were systematically subjected to 'protective arrests' whereby they were placed outside the protection of the law, detained under inhumane conditions, and in most of the cases killed.[84] As recalled by the IMT, the purpose of this order was to achieve 'efficient and enduring intimidation' against members of resistance movements by implementing severe measures through which the relatives of the person accused and the population in general, would be denied any information with regard to their fate.[85]

The IMT found that the Night and Fog Decree and its implementation as a state policy constituted a war crime and a violation of the 'family rights' articulated in Article 46 of the 1907 Hague Regulations and protected under CIL in times of armed conflict.[86] It considered that the effects of the Night and Fog Decree constituted a form of mistreatment infringed upon the victims and their families. This, because it explicitly restricted information in regards to the fate and whereabouts of the victims, subjecting the family members of the disappeared in a stage of continued uncertainty.[87] The IMT further found that the conducts carried under the Night and Fog Decree were contrary to international conventions, the laws and customs of war and to the 'general principles of criminal law as derived from the criminal law of all civilized nations.'[88]

Keitel's conviction represents the first case before an international criminal tribunal where acts related to enforced disappearance were deemed criminal. Accordingly, some scholars have argued that the criminalisation of the Night and Fog Decree by the IMT implicitly recognised the practice of enforced disappearance as an international crime and a violation of international law and CIL.[89]

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[82] Ibid. 77

[83] Ibid. 366

[84] Ibid. 44

[85] Ibid, 233. Here the IMT referred to a covering letter written by defendant Keitel which stated: "Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.

[86] Particularly, the IMT held that the Night and Fog Decree was 'a systematic rule of violence, brutality, and terror' *Ibid.* 232. *See, also*. B. Finucane (n.25) 177-78

[87] IMT Judgment (n.14) 232-333; B. Finucane (n.25)178

[88] IMT Judgment (n. 14) 44

[89] *See,* Scovazzi/Citroni 'The Struggle against…' (n.6) 5; B. Finucane (n.25) 175-177; Jeremy Sarkin 'Putting in place…' (n.17) 25

Following the IMT's judgment, the Nuremberg Military Tribunal ('NMT') in the *Justice Case*[90] prosecuted members of the Reich Ministry of Justice, as well as, jurists and prosecutors for their participation in the execution and carrying out of the Night and Fog Decree. The NMT highlighted that under the Night and Fog program thousands of persons of occupied territories were imprisoned, tortured, ill-treated, murdered and subjected to secret trials in the course of which the 'victims' whereabouts, trial, and subsequent disposition were kept completely secret' without any right to a fair trial.[91]

The NMT built upon the IMT's judgement, holding that the proceedings carried under the Night and Fog Decree not only constituted war crimes but also and crimes against humanity contrary to Art. II(1)(b) and (c) of Control Council Law No. 10, and violation of CIL and the laws of war as articulated in Article 5, 23(h), 43 and 46 of the 1907 Hague Regulations.[92] Moreover, it determined that the enforcement of the Night and Fog Decree was a violation of 'international common law relating to recognized human rights'.[93]

In reaching its decision, the NMT emphasised, in the same way as the IMT, the effects of the Night and Fog Decree on the families of the missing and the civilian population. It noted that the practice of the program was not only confined to implement severe measures against the members of the resistance but also extended to their families, friends and the civilian population, as it created an atmosphere of constant fear and anxiety.[94] The Tribunal went even further and ruled that the secrecy nature of the proceedings, the deportation of the civilian population and the manner in which the victims were held incommunicado constituted a form of cruel and inhuman treatment contrary to the human rights standards recognised by the laws of war and CIL.[95]

The Nuremberg Tribunals interpretation of the laws of war represented a progressive development towards a nascent body of law on enforced disappearance. However, the tribunals did not condemn the crime of enforced disappearance as such, mainly because the notion of enforced disappearance had not been codified yet, and therefore was not included as a crime under the jurisdiction of the tribunals.[96] In that sense, the tribunals' reliance on the protection of family rights showed, that the acts committed during the Night and Fog constituted both war crimes and crimes against humanity, subject to individual criminal responsibility. This was the starting point for the recognition of enforced disappearance as a crime at the international level.

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[90] '*The Justice case'* Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law no.10 (NMT) October 1946-April1949 (Distributed by United States Government Printing Office) Vol 3. (NMT Judgment)

[91] Ibid. 21

[92] *Ibid.* 1057-1061.

[93] Ibid. 1057-1058; B. Finucane (n.25)180

[94] Ibid. 1057-1059

[95] Ibid. 1058-1061

[96] Gabriela Citroni (n. 54) 138

2.4.2 The *ad hoc* Tribunals

Within the statutes of the ICTR and ICTY, the concept of 'crimes against humanity' was included as one of the crimes matter of jurisdiction of the *ad hoc* tribunals.[97] However, despite the fact that enforced disappearances were being committed on a large scale in Rwanda and the former Yugoslavia[98], neither of the statutes of the *ad hoc* tribunals explicitly included enforced disappearance as one of the underlying acts of crimes against humanity. Through the case law of the ICTY enforced disappearance was adjudicated within the category of 'other inhumane acts' as crimes against humanity.[99]

In *Prosecutor v. Kupreškić,*[100] the ICTY draw upon international human rights standards to identify prohibited inhumane acts under the scope of Art. 5(i) of the ICTY Statute. In that regard, the ICTY relied on the prohibition of enforced disappearance under the UN Declaration and the IACFD to characterised enforced disappearance as a crime against humanity falling within the category of 'other inhumane acts' provided for in Article 5(i). To reach this conclusion, the ICTY determined that the infringement of several human rights contained in different international human rights provisions can lead to possible identify conducts that, depending on the circumstances, may amount to a crime against humanity.[101] Moreover, the ICTY stated that enforced disappearance, as well as other similar acts, constitute crimes against humanity as long as they are 'carried out in a systematic manner and on a large scale'.[102] The same argument was subsequently referred to by the ICTY in *Prosecutor v Kvočka.*[103] Here, the ICTY stated that Article 5(i) 'applies to acts that do not fall within any other sub-clause of Article 5 and which present the same degree of gravity as the other enumerated crimes'.[104] In that sense, the ICTY reaffirmed the categorisation of enforced disappearance as a prohibited inhumane act.[105]
Although the ICTY in both cases did not provide an in-depth analysis on the crime, the classification of enforced disappearances by the ICTY as 'other inhumane acts', reflects the

[97]Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) UN Security Council, UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc. S/RES/827 (1993), Articles 5 ; Statute of the International Criminal Tribunal for Rwanda (ICTR) UNSC Res. 955 (adopted 8 November 1994) Article 3.

[98] Report by Mr Manfred Nowak (n.15) para. 66

[99] Irena Giorgou (n. 25) 1010; G. Citroni (n. 44) 138

[100] *Prosecutor v. Kupreškić* (Judgment) ICTY IT-95-16-T (14 January 2000)

[101]Ibid. para. 566.

[102] Ibid.

[103] *Prosecutor v Kvočka* (Judgment) ICTY IT-98-30/1-T (2 November 2001)

[104] Ibid. para. 206.

[105] Ibid. paras.207-208.

evolution of the Nuremberg Tribunals findings regarding the protection of family rights from any inhumane treatment.[106]

Later on, the ICTY provided a more detailed understanding of enforced disappearances in the case of *Prosecutor v Gotovina et. al.*[107] Here, the Court reffered to the international instruments on enforced disappearance and the case law of the regional human rights courts.[108] In light of this instruments, the ICTY further determined the elements crime of enforced disappearance as:

> (a) an individual is deprived of his or her liberty; and
> (b) the deprivation of liberty is followed by the refusal to disclose information regarding the fate or whereabouts of the person concerned, or to acknowledge the deprivation of liberty, and thereby denying the individual recourse to the applicable legal remedies and procedural guarantees.[109]

However, contrary to its previous case law, in *Gotovina et al.* enforced disappearance were analysed under the count of 'persecution through disappearances'; and not as a crime falling under the category of 'other inhumane acts'.

2.4.3 The Internationalised Criminal Courts

2.4.3.1 The Special Panels for Serious Crimes in East Timor (SPSC)

In 2000, the United Nations Transitional Administration in East Timor (UNTAET) through Regulation 2000/15, established the Special Panels for Serious Crimes in East Timor. The Special Panels were invested with jurisdiction over serious crimes, *inter alia,* genocide, crimes against humanity, war crimes, sexual offences, murder and torture, committed between 1 January and 25 October 1999.[110] The UNTAET Regulation, incorporated the definition of crimes against humanity as established in Article 7 of the ICC Statute , including acts of enforced disappearance.[111]
In accordance to the 2011 Report of the Working Group on Enforced or Involuntary Disappearances, paramilitary groups and Indonesian Military committed several acts of

[106] B. Finucane (n.25) 188.

[107] *Prosecutor v Gotovina et al* (Judgment vol. II) ICTY IT-06-90-T (15 April 2011)

[108] Ibid. paras 1831-1836. Mainly, the ICTY referred to the UN Declaration, the IACFD, the ICED and the ICC Statute. It additionally cited the cases of *Velásquez Rodríguez v. Honduras* (1988) and *Kurt v Turkey* (1998), of the IACtHR and the ECtHR respectively, where issues of enforced disappearance were dealt for the first time by the Court.

[109] Ibid. para. 1837

[110]Gerhard Werle and Florian Jessberger, *Principles of International Criminal Law* (3rd edn. OUP 2014) para. 338; UNTAET, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (6 June 2000) UNATET/REG/2000/15, s. 1.3, s. 5.1(i) and s. 5.2(h).

[111]UNTAET (n.110) s. 5

brutality where approximately 1,500 Timorese were killed, and many others disappeared.[112] Although no conviction on the crime was ever made, the SPSC became the first judicial body to prosecute individuals on charges of enforced disappearance.

In the case of *Prosecutor v Rusdin Maubere*[113], Mr Maubere was indicted for the crimes of torture and enforced disappearance as crimes against humanity. In considering the charges of enforced disappearance, the Court established that in accordance to the constitutive elements of the crime and the factual circumstances of the case, the elements of enforced disappearance had not been fulfilled. The Court based its decision, first, on the fact that the victim was beaten to death by the same militias members who arrest him and, secondly, that the body of the victim was subsequently buried in a shallow grave.[114] In this respect, the Court considered that the victim, despite being arrested was not hidden or disappeared while alive, and therefore was not prevented from contacting the authorities or seeking assistance to protect his rights. Instead, it held that what had disappeared was the corpse of the victim which was never found.[115]

Furthermore, in accordance with the element of intent, the Court argued that the militia members arrested the victim with the purpose of inflicting severe torture, ill-treatment and serious injuries, and not with the aim of removing the victim outside the protection of the law.[116] Consequently, the Court decided in Maubere's case that the crime of enforced disappearance did not take place and thus acquitted him of such charges. However, the analysis of the Court is problematic as it limits the crime enforced disappearance to situations where the victims are still alive, thus failing to recognise the complex character and continued character of the crime.[117]

2.4.3.2 The Extraordinary Chambers in the Courts of Cambodia (ECCC)

Upon an agreement between the UN and the Cambodian government in 2003, the ECCC was established with the purpose of bringing to justice the senior leaders of the Khmer Rouge for the crimes and serious violations "of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."[118] The ECCC has jurisdiction over crimes

[112]UNGA, 'Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Mission to Timor-Leste' UN Doc. A/HRC/19/58/Add.1 (26 December 2011) para. 8

[113] *Prosecutor v Rusdin Maubere* (Judgment) SPSC Case. No. 23/2003 (5 July 2004)

[114] Ibid at. 15

[115] Ibid.

[116] Ibid

[117] *See*. Chapter 3

[118] Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea no. 41723 (entered into force 29 April 2005) 2329 UNTS 117, Art. 1; G. Werle /F. Jessberger (n. 110) para. 339

of genocide[119], crimes against humanity[120], grave breaches of the Geneva Conventions[121], violations of the 1954 Hague Convention for the Protection of Cultural Property[122], and the 1961 Vienna Convention on Diplomatic Relations of 1961[123], as well as over certain offences under Cambodian Law[124].

On the 7 August 2014, the Trial Chamber of the ECCC in *Case 002/01*[125] dealt with the criminal responsibility of senior leaders of Democratic Kampuchea, Noun Chea and Khieu Samphan, over crimes against humanity.

In accordance with the *Closing Order*[126] charges, the defendants were indicted pursuant to Article 5 of the ECCC Law with crimes against humanity of, murder, extermination, political persecution, and other inhumane acts. The charges included within the category of 'other inhumane acts', the crime of enforced disappearances as one of the associated crimes that formed part of a widespread attack against the civilian population carried out throughout the Democratic Kampuchea era and in all regions of Cambodia[127]. The Trial Chamber recalled that enforced disappearances had been previously recognised as criminal conduct in the Nuremberg trials.[128] It also referred to the jurisprudence of international human rights bodies and the *ad hoc* tribunals, as well as to international instruments; and concluded that acts of enforced disappearance 'may be of a similar gravity to the other crimes against humanity enumerated in Article 5 of the ECCC Law and thus may fall within the ambit of "other inhumane acts"'.[129]

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[119]Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (with inclusion of amendments) Legislative Act of Cambodia NS/RKM/1004/006 (promulgated 27 October 2004) Article.4

[120] Ibid. Article. 5. The definition of crimes against humanity within Art. 5 of the ECCC Law included within the *chapeau* of crimes against humanity the requirement that the attack against civilian population must be on 'national, political, ethical, racial or religious grounds', hence departing from the definition established in Art. 7 of the ICC Statute. In addition, enforced disappearances as a crime against humanity were not included within the ECCC Law.

[121] Ibid. Article 6

[122] Ibid. Article 7

[123]Ibid. Article 8

[124] Ibid. Article 3

[125] *Case 002/01* (Judgment) ECCC No. 002/19-09-2007/ECCC/TC (07 August 2014)

[126] *Case 002* (Closing Order) ECCC No. 002/19-09-2007-ECCC/SC (15 September 2010)

[127]Ibid. paras. 1470-1478; *Case 002/01* (n. 125) paras. 175-198

[128] *Case 002/01* (n. 125) paras. 444-445. The Trial Chamber referred to the IMT Judgment and the conviction of Keitel for the implementation of the Night and Fog Program, where enforced disappearances were used as a way of spreading terror. In that respect, the Trial Chamber established that "While it is unclear from the Nuremberg Judgment whether his conduct concerning enforced disappearances was also considered to amount to a crime against humanity, it was clearly considered to be of extreme gravity." *Ibid.* para. 444

[129] Ibid. para. 446-448. Later on the Supreme Court Chamber of the ECCC in the Appeal Judgement, drawing upon international human rights norms, held that "an inhumane act reaching the gravity of other crimes against humanity usually will also violate the broad tenets of human rights articulated at the onset of crimes against humanity (…) the subsequent emergence of new, more specific human rights norms, including those of international criminal law – such as, for example, norms against forcible transfer or enforced disappearances – may serve to provide additional confirmation of the international unlawfulness of the prior specific conduct

Subsequently, the Trial Chamber identified the elements of enforced disappearance,[130]and found that in the course of the population movement between September 1975 and 1977, Khmer Rouge officials and soldiers deliberately deprived individuals of their liberty and intentionally refused to disclose any information regarding their fate or whereabouts, thus causing great suffering to those who disappeared and their relatives.[131] It, therefore, concluded that 'Khmer Rouge soldiers and officials committed the crime against humanity of other inhumane acts through enforced disappearances'.[132] Both of the defendants were found guilty and sentenced to life imprisonment for the crimes against humanity of 'other inhumane acts' through enforced disappearance, among other charges.[133] This decision was subsequently confirmed by the Supreme Court Chamber in the *Case 002/01 Appeal Judgment.*[134]

In the Appeal Judgment, the defendants alleged that the 'Trial Chamber's findings concerning the crime against humanity of other inhumane acts in the form of enforced disappearances' contradicted the requirements of 'accessibility and foreseeability stemming from the principle of legality'. [135] This considering that by 1975 acts of enforced disappearance did not exist under CIL, and therefore could not be considered within the category of other inhumane acts.[136] In this respect, the Supreme Court established that 'under customary international law as it stood in 1975, "other inhumane acts" was accepted as a residual category of crimes against humanity'.[137] It further stated, following the case law of international criminal tribunals, that 'an inhumane act reaching the gravity of other crimes against humanity usually will also violate the broad tenets of human rights articulated at the onset of crimes against humanity'; [138] and thus considered that the 'unlawfulness' of a conduct, such as enforced disappearance, can be

charged as "other inhumane acts" and be used as a tool to assess whether the conduct in question reaches the requisite level of gravity (…)" *Case 002/01* (Appeal Judgement) Supreme Court Chamber ECCC No. No 002/19-09-2007-ECCC/SC (23 November 2016) para. 585; *See also*. Sarah Williams, 'The Conviction of Cambodian Khmer Rouge Leaders– Justice At Last?' (Ejiltalk.org, 2014) <https://www.ejiltalk.org/the-conviction-of-cambodian-khmer-rouge-leaders-eccc-case-00201-justice-at-last/> accessed 6 May 2018.

[130] The Trial chamber identified that enforced disappearance occur when, "(i) an individual is deprived of his or her liberty; (ii) the deprivation of liberty is followed by the refusal to disclose information regarding the fate or whereabouts of the person concerned, or to acknowledge the deprivation of liberty, and thereby deny the individual recourse to the applicable legal remedies and procedural guarantees, and (iii) the first and second elements were carried out by state agents, or with authorization, support or acquiescence of a State or political organization" *Case 002/01* (n. 125) para. 448

[131] *Case 002/01* (n. 125) paras. 640-641

[132] Ibid. para. 643

[133] Ibid. para.1056 ff.

[134] *Case 002/1* (Appeal Judgement) Supreme Court Chamber ECCC No. No 002/19-09-2007-ECCC/SC (23 November 2016)

[135] Ibid. para.574

[136] Ibid.

[137] Ibid. para.576

[138] Ibid. para. 585

determined by identifying the rights and prohibitions contained in international human rights instruments.[139]

However, the Supreme Court highlighted that the Trial's Chamber analysis and interpretation on the elements of enforced disappearance, determining whether such conduct qualified as 'other inhumane acts', was legally incorrect. The Supreme Court found that the Trial Chamber erred by stipulating the specific elements of enforced disappearance as though they constituted a separate category of crimes, instead of considering if the acts of enforced disappearance, in light of the specific circumstances of the case, fulfilled the elements of the crime against humanity of other inhumane acts.[140] Although the Supreme Court did not expand much on this consideration, it concluded that there was sufficient evidence to support the finding of specific elements of enforced disappearances, but not to whether the elements of the crime against humanity of other inhumane acts were fulfilled as such.[141] Despite this, the Supreme Court Chamber upheld the convictions of both defendants for the crimes against humanity of other inhumane acts.

2.4.3.3 The Special Court for Sierra Leone (SCSL)

The SCSL was established by an agreement between the UN and the Government of Sierra Leone in 2002 in order to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[142]

The SCSL was invested with jurisdiction over crimes against humanity, war crimes (violations of common Art. 3 and other serious violation of IHL), and grave crimes under Sierra Leonean law.[143] Within the SCSL the crime of enforced disappearance was not explicitly included. However, in the case of *Brima et. al.*, the Appeals Chamber, in line with the previous jurisprudence of the international tribunals, reaffirmed the fact that a wide range of criminal acts, including enforced disappearance, have been recognised as 'other inhumane acts.'[144]

2.4.3.4 The War Crimes Chamber of the Court of Bosnia and Herzegovina ('WCC')

[139]Ibid. para.84

[140] Ibid, paras. 589-590, and 651

[141] Ibid.para. 653

[142] Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (with Statute) (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 137

[143] Statute of the Special Court for Sierra Leone (adopted 16 January 2002, entered into force 12 April 2002) 2178 UNTS 145, Article 2-5

[144] *Prosecutor v Brima et al* (Appeals Chamber, Judgment) SCSL-2004-16-A (22 February 2008) paras.183-184

In 2005, the WCC was established with the purpose to prosecute those persons allegedly involved in serious violations of international law during the 1992-1995-armed conflict.[145] The Court has jurisdiction over crimes defined within Bosnia and Herzegovina's (BiH) Criminal Code, including war crimes, crimes against humanity and genocide.[146] In particular, Article 172 of the BiH Criminal Code reproduces, *verbatim*, Article 7 of the ICC Statute .[147] Accordingly, on several occasions the WCC has addressed the issue of enforced disappearances as a crime against humanity under Article 172; however, no decision has dealt exclusively with the crime.[148]

For instance, in the case of *Mitar Rašević and Savo Todović*,[149] the defendants were charged and convicted for persecution as a crime against humanity under Article 172(1) of the BiH Criminal Code, in conjunction with murder, forcible transfer of population, torture, imprisonment, inhumane acts, and enforced disappearance, of the same article.[150] Throughout the trial, the Court noted that between 1992 and 1994, approximately 200 persons were detained and disappeared with no information about their fate ever provided.[151]

The Court's decision regarding enforced disappearance as a crime against humanity can be summarised as follows. On the one hand, the Court observed that despite enforced disappearances being addressed in multiple international instruments, it was relatively a 'new crime' both in itself and as a crime against humanity.[152] Significantly, the Court pointed out the IMT judgment, the ICC Statute , international human rights instruments and the case law of human rights courts, to support the fact that by the time of the conflict CIL recognised enforced disappearance as a crime against humanity.[153] Additionally, the Court referred to the IACtHR's judgment in *Velasquez-Rodríguez v. Honduras* which affirmed that 'international practice and doctrine have often categorized enforced disappearances as a crime against humanity.'[154] Also, it noted that by 1992, the UN General Assembly had adopted the UN Declaration stating that "enforced disappearance undermines the deepest values of any society

[145] Bogdan Ivanišević, '*The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* International Center for Transitional Justice (International Center for Transitional Justice, 2008) 1

[146] Bosnia and Herzegovina: Criminal Code (BiH) Official Gazette of Bosnia and Herzegovina nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10 (entered into force 1 March 2003, last amended 2 February 2010) Article. 171 et seq.

[147] See, *Ibid.* Article 172

[148] *Prosecutor v Rašević and Todović*, (First Instance Verdict) WCC Case No. X-KR/06/275 (28 February 2008); *Prosecutor v. Damjanović*, (First Instance Verdict) WCC Case No. X-KR-05/51 (15 December 2006); *Prosecutor v. Simsić*, (First Instance Verdict) WCC Case No. X-KR-05/04, (11 July 2006) cited in, B. Finucane (n.25) 191 fn 120

[149] *Prosecutor v Rašević and Todović*, (First Instance Verdict) WCC Case No. X-KR/06/275 (28 February 2008)

[150] Ibid. at. 12

[151] Ibid. at 98

[152] Ibid. at 88. See also, B. Finucane (n.25)191

[153]*Prosecutor v Rašević and Todović* (n. 149) at 88-89; B. Finucane (n. 25) 191-192

[154] *Prosecutor v Rašević and Todović* (n. 149) at. 89 citing *Velásquez Rodríguez v Honduras* (Merits) Inter-American Court of Human Rights Series C No. 7 (21 July 1988) para. 153

committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity."[155]

On the other hand, the Court provided an analysis of the elements of enforced disappearance as established in Article 172 of the Criminal Code of BiH.[156] In the first place, the Court found that the detention and subsequent disappearance of the detainees were carried with the authorisation of the Foča Tactical Group (organ of the Republika Srpska) and the participation of the military and military police. Secondly, that those acts were conducted repeatedly and systematically with the aim of removing the detainees from the protection of the law[157]; and thirdly, that there had not only been a failure from the authorities and organs of the Republika Srpska to provide information regarding the fate and whereabouts of the detainees; but also, that there had been a clear attempt to hide and disguise that information.[158] With these considerations in mind, the Court concluded that the elements of enforced disappearance have been satisfied beyond doubt.[159] However, the Court did not provide an in-depth explanation of its rationale. Nonetheless, the Court's analysis on the elements of the offence, in particular the third element regarding the 'refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons' evidences, as B. Finucane describes it, the hallmark feature of enforced disappearances since Nuremberg to the present day.[160]

[155] *Prosecutor v Rašević and Todović* (n. 149) at. 89 citing the UN Declaration.

[156] See. Bosnia and Herzegovina: Criminal Code (n 146) Article 172(2)(h)

[157] *Prosecutor v Rašević and Todović* (n. 149) at. 98-99

[158] Ibid.

[159] *Ibid.* at. 98

[160] B. Finucane (n. 25) 190

3 The Crime of Enforced Disappearances under the ICC Statute : A comparative analysis with the Inter-American Court Jurisprudence

3.1 Introduction

Enforced disappearance of persons is codified as one of the underlying acts of crimes against humanity under Article 7(1)(i) and (2)(i) of the ICC Statute. Pursuant to the *chapeau* of Article 7(1), for an act of enforced disappearance to amount to a crime against humanity, it must have been committed in the context of a widespread or systematic attack against a civilian population, pursuant to or in furtherance of a State or organisational policy and with knowledge of the attack.[161] These elements, distinguish enforced disappearances, in the form of crimes against humanity, from enforced disappearance as a crime *per se*. This is in order to differentiate isolated or random acts that, despite constituting grave infringements of human rights, do not meet the threshold of crimes against humanity, and hence do not fall under the ICC's jurisdiction.

As discussed aboved in section 2.3, the the various definitions of the crime provided in international instruments share three main constitutive elements; first, that a person is deprived of liberty; second, that in the course of that deprivation of liberty, there has been a refusal to acknowledge that deprivation of liberty or to provide information concerning the fate or whereabouts of the person; and third, that as a consequence of this conduct, the person is removed from the protection of the law. However, the definition enshrined in the ICC Statute differs from those contained in the human rights instruments, namely as it introduces additional elements, such as the notion of *political organisations*, the element of intent and the clause '*for a prolonged period of time'.*

In practice, the crime of enforced disappearance as a discrete crime against humanity has yet to be addressed within international criminal law. Although the *ad hoc* tribunals and the internationalized courts have made efforts to tackle this crime, there are still no jurisprudential criteria set out on this matter. Conversely, the notion and characteristics of the crime of enforced disappearance have been developed by the jurisprudence of international human rights bodies, which has contributed on the establishment of normative principles for this crime.[162] Notably, the case law of the IACtHR has established specific legal standards

[161] ICC Statute, Article 7(1) and 2(a); Elements of Crimes, Article 7

[162] Scovazzi/Citroni (n.6) 101: "For instance, it is at the judicial level that principles such as the reversal of the burden of proof, the continuing nature of the offence and the lack of competence by military tribunals and special courts to judge on cases of enforced disappearance have been elaborated. e same can be said as regards the prohibition to apply amnesty laws and similar measures to persons responsible for disappearance, as well as the concept of the right to truth and the need for articulated forms of reparation to the victims."

regarding both the nature and elements of enforced disappearance.[163] Accordingly, these standards could, potentially, provide guidance for the interpretation on the criminal provisions of enforced disappearance under the ICC Statute.

In that respect, the present chapter will conduct a comparative analysis between the elements of the crime as defined within the ICC Statute, and the elements of enforced disappearances as identified and developed by the IACtHR jurisprudence. The analysis will take the ICC Statute as a starting point and will identify the possible discrepancies that may arise between the wording of the ICC Statute and the IACtHR interpretation with respect to the elements of the crime.
This chapter will provide an analysis of the constituve elements of the crime of enforced disappearance. Particularly, it will highlight the different elements to be considered when addressing this crime under the jurisdiction of the ICC. Mainly, it will focus on the contextual elements of crimes against humanity, and the additional elements introduced by the ICC Statute within the definiton of the crime. Lastly, it will address the continous nature of the crime.

3.2 The Constitutive Elements of the crime Enforced Disappearance of Persons as a crime against humanity

3.2.1 The *chapeau* requirements

3.2.1.1 An attack directed against any civilian population

According to the definition of crimes against humanity under Article 7 of the ICC Statute, it is required for the acts to be committed 'as part of a widespread and systematic attack directed against civilian population'. The notion of 'attack' is further explained in Article 7(2)(a) as 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.'[164]

The ICC has stated in several judgements that the concept of 'attack' needs to be understood as the 'course of conduct', which refers to a campaign, operation or series of actions carried out against the civilian population involving the multiple commission of acts.[165] Therefore, the 'course of conduct' describes the overall context, that is, the widespread or systematic nature of the attack, rather than isolated or random acts.

[163] Juan Luis Modolell Gonzalez, 'The crime of Forced Disappearance of Persons According to the Decisions of the Inter-American Court of Human Rights', 10 Int'l Cim. L. Rev. 475 (2010) 480

[164] ICC Statute, Article 7(2)(a)

[165] *Prosecutor v Bemba* (PTC) ICC-01/05-01/08-424 (15 June 2009) para.75; *Prosecutor v. Katanga* (TC) ICC-01/04-01/07 (7 March 2014) para. 1101; *Prosecutor V. Laurent Gbagbo* (Decision on the confirmation of charges against Laurent Gbagbo) ICC-02/11-01/11 (12 June 2014) para. 209-10.

However, it is not necessary for the individual act to be widespread or systematic, what is relevant is the existing nexus between the offence and the overall context.[166] Thus, a single act by a perpetrator can amount to a crime against humanity, and hence entail individual criminal responsibility, providing that it was committed as part of a widespread or systematic attack.[167] The link between the underlying offence and the overall attack is deemed necessary in order to separate isolated or radom acts committed outside the overall context of violence, that do not meet the necessary criteria to qualify as a crimes against humanity.

Furthermore, the Elements of Crimes clarify that the attack in the context of crimes against humanity does not need to be a military attack. It is well established that crimes against humanity do not need to be committed in the context of an armed conflict.[168] Thus, it is not required for the attack to occur in within the context of an armed conflict or within the conduct of hostilities.[169]

The wording of Article 7 of the ICC Statute clearly states that the attack must be directed against the civilian population. This means that in the context of crimes against humanity, the civilian population constitutes the primary object of the attack.[170]

The notion of 'population' emphasizes the collective nature of the attack, thereby excluding attacks against individual victims and randomly selected groups of individuals.[171] As expressed by the Pre-Trial Chamber in *Prosecutor v Jean-Pierre Bemba*[172], the fact that the attack is directed against the civilian population does not mean that the entire population of the area where the attack occur was being target. Rather, it just has to be proved 'that the attack was such that it cannot be characterised as having been directed against only a limited and randomly selected group of individuals'.[173] In cases of enforced disappearance of persons, this point is

[166] *Prosecutor v Kunarac* (Judgment) ICTY, IT-96-23 T & IT-96-23/1-T (22 February 2001) para. 418; *Prosecutor v Jean-Paul Akayesu* (TC Judgment) ICTR-96-4-T (2 September 1998) para 579. *See also*, Rodney Dixon, 'Art. 7. B. Analysis and Interpretation of Elements- Chapeau' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' notes* (2a edn. C.H. Beck, Munich 2008) 168, 176

[167] *Prosecutor v Tadic* (Opinion and Judgment) ICTY IT-94-1-T (7 May 1997) para 649. The IACtHR following the ICTY case-law, also acknowledge that "A single illegal act as those mentioned above, committed within the described background, would suffice for a crime against humanity to arise" *Almonacid Arellano v Chile* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 154 (26 September 2006) para 96; Werle /F. Jessberger (n. 107) para 89.

[168] *Prosecutor v Tadic* (Decision on the defense motion for interlocutory appeal on jurisdiction) ICTY IT-94-1 (2 October 1995) para 141; Rodney Dixon (n. 166) 181.

[169] Elements of Crimes Article 7(1)(3); Rodney Dixon (n. 166) 175; W. Schabas (n. 25) 155.

[170] *Prosecutor v. Jean Pierre-Bemba* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (15 June 2009) para 76; *Prosecutor v Kunarac* (n. 166) para. 421

[171] *Prosecutor v Tadic* (n. 167) para 644, *Prosecutor v. Jean Pierre-Bemba* (n.170) para 77; Werle /F. Jessberger (n. 107) para 882

[172] *Prosecutor v. Jean Pierre-Bemba* (n. 170)

[173] Ibid. para 77; *Prosecutor v Kunarac* (n. 166) para. 421; Werle /F. Jessberger (n. 107) para. 882.

essential considering that enforced disappearances are often committed against particular individuals chosen due to their political affiliations. However, as seen above, single acts of enforced disappearance against particular individuals can also constitute crimes against humanity, provided they are committed as part of the general attack.

The notion of 'civilian population' refers to persons who are not members of armed forces and do not participate directly in hostilities.[174] Accordingly, paragraph 2 of Article 50 of Additional Protocol I states that 'civilian population comprises all persons who are civilians'.[175] This notion aims to protect a broader range of potential victims than war crimes. Hence, no link between the victims and a particular side in the attack against civilian population needs to be demonstrated, even if the attack occurs during armed conflict.[176]

3.2.2 The widespread or systematic character

As seen above, any of the acts under Article 7 of the ICC Statute needs to have been committed within the context of a *widespread* or *systematic* attack. These are two alternative requirements.

On the one hand, the 'widespread' character is quantitative in nature. It refers to the to the large-scale nature of the attack and the number of victims.[177] It has also been understood as the 'the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'.[178] The ILC in the Draft Code, determined that this requirement is intended to exclude isolated acts committed in a private manner and directed against a single victim.[179]

On the other hand, the 'systematic' character refers to the degree of organization of the attack, thus, excluding the probability of its random occurrence.[180] In *Prosecutor v Akayesu,* the ICTR stated that the systemic character 'maybe defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private

[174] International Committee of the Red Cross (ICRC) 'Rule 5 Definition of Civilians' in *IHL Database- Customary IHL*, available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule5> accessed 27 August 2018 ; International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 50; *Prosecutor v. Jean Pierre-Bemba* (n. 170)para. 78

[175] Additional Protocol I, Article 50(2)

[176] Rodney Dixon, (n. 166) 181

[177] *Situation in the Republic of Côte d'Ivoire* (n. 68) para. 53

[178]Ibid. *Prosecutor v. Blaskic* (TC Judgment) ICTY IT-95-14-T (3 March 2000) para. 206

[179] Ibid.

[180] *Situation in the Republic of Côte d'Ivoire* (n. 68) para. 54

resources'.[181] It also added, that there must be some kind of preconceived plan or policy, but it is not required that such policy has been formally adopted as a state policy.[182]

3.2.3 The policy element

According to Article 7(2)(a) of the ICC Statute, the attack against the civilian population must be committed 'pursuant to or in furtherance of a State or organizational policy to commit such attack'. Moreover, the Elements of Crimes provides that a '"policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against civilian population.'[183]

In *Katanga*, the Pre-Trial Chamber found, that the *policy* for the purpose of crimes agaisnt humanity does not need to be explicitly defined. Rather, if the attack has been planned, directed or organized, as opposed to spontaneous or isolated acts of violence, the policy element is fulfilled.[184] This was also affirmed by the ICTY in *Tadić* where it stated that:

> [S]uch a policy need not be formalized and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those acts, whether formalized or not.'[185]

In that respect, the notion of 'organisation' within the meaning of Article 7(2)(a) of the ICC Statute, has been understood as to encompass groups of persons governing a specifc territory, or organizations with established structures capable of committing widespread or systematic attacks against a civilian population.[186] However, the Pre-Trial Chamber in the Decision to

[181] *Prosecutor v. Jean Paul Akayesu* (n. 166) para 580

[182] Ibid. para 580. *See also, Prosecutor v. Blaskic* (178) paras. 203-4

[183] Elements of Crimes, Article 7 introductory paragraph (3). The Elements of Crimes further clarify that "A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action." *Ibid.* fn.6

[184] *Prosecutor v. Katanga and Mathieu Ngudjolo Chui* (Decision on the confirmation of charges) ICC-01/04-01/07 (30 September 2008) para 396. In the *Situation of the Republic of Côte d'Ivoire* , the Pre-Trial Chamber established that regarding the 'policy' requirement certain criteria has been identified, namely: "a) it must be thoroughly organized and follow a regular pattern; b) it must be conducted in furtherance of a common policy involving public or private resources; c) it can be implemented either by groups who govern a specific territory or by an organization that has the capability to commit a widespread or systematic attack against a civilian population; and d) it need not be explicitly defined or formalized" *Situation in the Republic of Côte d'Ivoire* (n. 68) para. 43

[185] *Prosecutor v Tadic* (n. 167) para. 653. The ICC in *Bemba* stated that 'the existence of a State or organizational policy is an element from which the systematic nature of an attack may be inferred' *Prosecutor v. Jean-Pierre Bemba* (Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo) ICC-01/05-01/08 (10 June 2008) para 33; *Prosecutor v Germain Katanga* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) para 1109.

[186] *Prosecutor v. Katanga and Mathieu Ngudjolo Chui* (n. 184) para 396; *Prosecutor v. Jean Pierre-Bemba* (n. 170) para.81

authorize an investivation on the Situation in the Republic of Kenya[187], took a different approach by determining that the 'formal nature of a group and the level of its organization should not be the defining criterion'[188]. Instead, the key element is whether the group 'has the capability to perform acts which infringe on basic human values'.[189]

The ICC's decision on the Situation in the Republic of Kenya, has been emblematic for the interpretation of the notion of *organisational policy* as one of the requirements establsihed within the contextual element of crimes against humanity. Accordingly, in the Kenya decision, the Pre-Trial Chamber determined that organizations not linked to a State are capable of carrying out policies to commit attacks against a civilian population. Therefore, it concluded that non-State actors, for the purposes of the ICC Statute, fall within the meaning of 'organisation'established in Article 7(2)(a) of the ICC Statute.[190] To reach this conclusion, the Court relied on the Report of the ILC on the Draft Code of Crimes against the Peace and Security of Mankind, where it was stated that 'private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights'.[191] Consequently, as Dixon points out, 'non-state actors, or private individuals who exercise *de facto* power can constitute the entity behind the policy.'[192]

This notion has also been recognised by the jurisprudence of the *ad hoc* tribunals. In *Tadic* 1997 the ICTY established that 'the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory.'[193] More importantly, the ICTY recognised that, 'although a policy must exist to commit these acts, it need not be the policy of a State.'[194]

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[187] *Situation in the Republic of Kenya* ('Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya') ICC-01-09 (31 March 2010)

[188] Ibid. para. 90

[189] Ibid.; Werle /F. Jessberger (n. 110) para. 904.

[190] *Situation in the Republic of Kenya* (n. 187) para. 92. Additionally, the PTC in the *Kenya* decision held that when determining if a group qualifies as an organization under the ICC Statute, it must be considered, *inter alia:* whether the group is under a responsible command, or has an established hierarchy; if the group possesses the means to carry out widespread or systematic attacks against a civilian population; if the group exercises any type of control over a part of the territory of a State; whether it has criminal activities against the civilian population as its primary purpose; if it articulates, explicitly or implicitly, an intention to attack a civilian population; and if the group is part of a larger group, which fulfills some or all of the abovementioned criteria. The PTC further specify, that these criteria do not constitute a rigid legal definition, nor have to be exhaustively fulfilled. *Ibid.* para 93. See also *Prosecutor v Germain Katanga* (n. 185) paras. 1118-19; Werle /F. Jessberger (n. 110) para. 904

[191] *Situation in the Republic of Kenya* (n. 187) para. 91.

[192] Rodney Dixon 'II. Paragraph 2: Definitions of crimes or their elements- (a) Attack' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' notes* (2a edn. C.H. Beck, Munich 2008) 234, 236-237.

[193] *Prosecutor v Tadic* (n.167) para 654.

[194] Ibid. para. 655

In this context, as will be mentioned in Section (3.3.1), one of the main concerns debated among academic scholarship has been in regards to the interpretation of the contextual element requirement of *organisational policy* with respect to the definition of the crime of enforced disappearance contained in Article 7(2)(i).

Mainly, because it is contended that the nature of enforced disappearance requires to a certain degree the element of State involvement, as a ncessary condition for the crime to be established.[195] Accordingly, as Giorgou argues, the Kenya decision's interpretation of the element of 'organizational policy' conflicts with the elements of enforced disappearance, namely with the element of *political organisation.*[196] This because, if the element of *political organisation* refers only to 'state-like' organisations, a broad interpretation of the element of 'organisational policy', as proposed in the Kenya decision, would dilute the nature of enforced disappearance as a crime intrinsically connected to the State. [197]

In that respect, in the dissenting opinion of Judge Hans-Peter, he determined that:

> [T]he juxtaposition of the notions "State" and 'organization' in article 7(2)(a) of the Statute are an indication that even though the constitutive elements of statehood need not be established those 'organizations' should partake of some characteristics of a State.[198]

Under this premise, it is contended that a restrictive interpretation of the requirements *organisational policy* and *political organisation*, limiting them to political or state-like' organisations, is warranted to circumvent discrepancies between the definition of the crime of enforced disappearance with the *chapeau*.[199] Academic scholarship suggests that this approach is necessary in light of the object and purpose of crimes against humanity provided in the ICC Statute.[200]Additionally, the historical context and practical experience regarding crimes against humanity, demonstrates that crimes of this nature and magnitude have, for the most part, been committed by virtue of an existing State plan or policy, and thus required a level of State

[195] Irena Giorgou 'State Involvement' (n. 25) 1004-1008

[196] Irena Giorgou 'State Involvement' (n. 25) 1003

[197] Ibid. 1015–1019

[198]*Situation in the Republic of Kenya* (n.187) Dissenting Opinion Judge Hans-Peter Kaul para 51. "These characteristics could involve the following: (a) a collectivity of persons; (b) which was established and acts for a common purpose; (c) over a prolonged period of time; (d) which is under responsible command or adopted a certain degree of hierarchical structure, including, as a minimum, some kind of policy level; (e) with the capacity to impose the policy on its members and to sanction them; and (f) which has the capacity and means available to attack any civilian population on a large scale." *Ibid.*

[199] Irena Giorgou 'State Involvement' (n. 25) 1004

[200] I. Giorgou, 'State Involvement….' (n. 25). 1020. *See also, Situation in the Republic of Kenya* (198) para.55 ff;

involvement. [201] Therefore, under this premise, a strict interpretation of the concept 'organization', by requiring such organizations to be 'State-like', is thus necessary.[202]

Moreover, in accordance to the principles comprised in Article 31 of the Vienna Convention on the Law of Treaties, a strict interpretation of the notions 'organizational policy' and 'political organization' would contravene the object and purpose of the ICC Statute; that is punishing the 'most serious crimes of concern to the international community as a whole' and putting an 'end to impunity for the perpetrators of these crimes'.[203]

Alternatively, according to the analysis on the *organisational policy* requirement established in the Kenya decision, a broad intepretation of this notion would be in line with the purpose and object of the ICC Statute. This because it is well- established that non-state actors are also capable of committing mass atrocities in a widespread or systematic manner against the civilian population.[204] Accordingly, it can be argued that the inclusion of 'political organisations' in the definition of the crime of enforced disappearance reflects the intention of the drafters to cover emerging patterns where non-state actors often commit crimes of enforced disappearance, albeit detached from the State.[205] Consequently, from this point of view, a narrow interpretation of both requirements would exclude crimes that, due to their gravity and extent, would concern the international community as a whole.[206]

A similar approach was adopted by the IACtHR in the case of *Velásquez-Rodriguez,* where systematic acts of enforced disappearances were being carried out by persons acting under cover of public authority.[207] The IACtHR affirmed that, the lack of due diligence of the State to prevent or respond to human rights violations, derived from illegal acts commited by private individuals, lead to the international responsibility of the State.[208] Since then, the IACtHR has focused on the States' positive obligations when addressing cases of enforced disapperance

[201] Ibid. para. 59 ff

[202] Ibid paras. 64-66

[203] ICC Statute, Preambular paras 4-5

[204]Werle /F. Jessberger (n. 110) para 907. For a further discussion on these issue *see,* Tilman Rodenhäuser, 'Beyond State Crimes: Non-State Entities and Crimes against Humanity' (2014) 27 Leiden J Int'l L 4, 913.

[205] Irena Giorgou, 'Enforced disappearance: time to open up the exclusive club?' OUP Blog, 2013. Available at: <https://blog.oup.com/2013/12/enforced-disappearance-pil/> accessed, 18 May 2018.

[206] For a deeper discussion on the policy element, see: William A. Schabas, 'State Policy as an element of International Crimes' [2008] 98 J. of Crim. L and Criminology 3 (2007-2008) 953; *see also* Tilman Rodenhäuser (n. 204)

[207] *Velásquez Rodríguez v Honduras* (n.51) (29 July 1988)

[208] "An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention" *Velásquez Rodríguez v Honduras* (n.51) para. 172 and 152

committed by non-state actors or where the State involvement is difficult to prove or not apparent.[209]

3.2.4 The *mens rea*

Article 30 of the ICC Statute codifies the general requirement regarding the mental element for all the crimes under the jurisdiction of the ICC. It establishes the requirements under which a person can be held criminally responsible for a crime under the jurisdiction of the ICC.[210] In this regard, it determines that the material elements of the respective crime, must have been committed with *intent*[211] and *knowledge*[212], unless a different standard is required (*dolus specialis)*.[213]

In the context of crimes against humanity, Article 7 of the ICC Statute requires as a general rule that the perpetrator commits the act with 'knowledge of the attack'.[214] Nonetheless, the Elements of Crimes also specifies that such knowledge should 'not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization.'[215] Additionaly, the jurisprudence of the ICTY has emphasised that the perpetrator does not need to share the purpose or goal behind the attack. Hence, it is only relevant that the perpetrator knew the overall context in which his attack took place.[216]

On the other hand, with regards to the crime of enforced disappearance, the mental element under Article 30 of the ICC Statute must be consider, in the first, in respect to the components of the *actus reus;* in second place in relation to the factual circumstances surrounding the commission of the crime, and third to the consequence of the crime.

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[209] Franz Christian Ebert and Romina I. Sijniensky 'Preventing Violations of the Right to life in the European and the Inter-American Human Rights Systems: From the *Osman* Test to a Coherent Doctrine on Risk Prevention? (2015) 15 Human Rights Review 2, 351-352

[210] ICC Statute, Article 30

[211] ICC Statute, Article 30(2): "For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events"

[212] ICC Statute, Article 30(3): "For the purposes of this article, 'knowledge' means awareness that a circumstance exists, or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.".

[213]ICC Statute, Article 30(1)

[214]Ibid, Article 7(1). This requirement is further clarified in Article 7 of the Elements of Crimes, where each of the punishable conducts it is established that 'the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population'.

[215]Elements of Crimes, Article 7, introductory paragraph 2.

[216]*See. Prosecutor v Kunarac* (Judgment) ICTY IT-96-23 (12 June 2002) para. 103; *Prosecutor v Kordić et al* (Judgment) ICTY IT-95-14/2-T (26 February 2001) para.185

In this respect, with regards to *conduct*, the Trial Chamber in *Prosecutor v Katanga*[217] determined that in accordance to Article 30(2) of the ICC Statute 'it must be ascertained whether the suspect deliberately acted or failed to act, without regard to the expected result of the action taken.'[218] Under this view, in accordance to the *actus reus* of enforced disappearance, the perpetrator must have intended to either: deprive a person(s) of his or her freedom; or refuse to acknowledge that deprivation of freedom or to share information regarding that person(s) fate or whereabouts.[219] As established by the Pre-Trial Chamber in *Bemba*[220]this form of criminal intent presuposes that:

> [T]he suspect knows that his or her acts or omissions will bring about the material elements of the crime and carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime. According to the dolus directus in the first degree, the volitional element is prevalent as the suspect purposefully wills or desires to attain the prohibited result.[221]

Conversely, pursuant to Article 30(2)(b) of the ICC Statute, regardless of the volitional element, it is required that the perpetrator is aware that, with his or her acts or omissions, the consequence of the crime, 'will occur in the ordinary course of events'.[222] In the case of enforced disappearance, this would mean that, on the one hand, the perpetrator who carries out the deprivation of liberty is aware that, in the ordinary course of events, that deprivation of liberty was followed by a refusal to acknowledge or provide information on the fate or whereabouts of the person with the intention of removing that person out of the protection of the law.[223] On the other hand, that the perpetrator who refuses to acknowledge the deprivation of liberty or withholds the information on the fate or whereabouts of the persons has to be aware that, in the ordinary course of events, 'such refusal was preceded or accompanied by that deprivation of freedom'[224]with the intention of removing that person out of the protection of the law.

As for the *circumstances*, Article 30(3) requires that the perpetrator is aware of the existing circumstances surrounding the crime, or is aware that the consequence of the crime will occur in the ordinary course of events.[225] Consequently, this would mean that the prepetrator was aware, in the first place, that the conduct was part of a widespread or systematic attack; second, that conducts were carried out by, or with the authorization, support or acquiescence of a State

[217] *Prosecutor v Germain Katanga* (n. 185)

[218] Ibid. para 774

[219]Elements of Crimes, Article 7(1)(i)(1)

[220] *Prosecutor v. Jean Pierre-Bemba* (n. 170)

[221] Ibid. para 358

[222] Ibid. paras 356 and 359.

[223] Elements of Crimes, Article 7(1)(3)(a).

[224] Ibid, Article 7(1)(3)(b)

[225] ICC Statute, Article 30(3)

or political organisation; and third, that in the ordinary course of events the proscribed consequence of the crime – *the removal out of the protection of the law*- would occur.

Lastely, it has been debated on whether or not the wording '*with the intention* of' in the defintion of the crime of enforced disaperances establishes a special intent (*dolus specilis*). However, as will be analysed in section (3.3.3), there is a general agreement among academic scholarship that the wording of the ICC Statute's definiton evidences the natural consequence of the crime.

3.3 The specific elements of enforced disappearance under the ICC Statute

3.3.1 The actus reus

The crime of enforced disappearance consists of two interrelated components: 1) the deprivation of liberty, and 2) the refusal to acknowledge that deprivation or to give information on the fate and wherebouts of the person.[226]

The definiton of the crime in Article 7(2)(i) of the ICC Statute estblishes that enforced disappearances means 'the arrest, detention or abduction of persons'. The ICC in the decision on the *Situation in the Republic of Burundi* established that the terms 'arrest, detention or abduction' are to be understood as to cover any form of deprivation of liberty.[227] Accordingly the Elements of Crimes provides, that the deprivation of liberty does not necessarily need to be unlawful.[228] On this point, the IACtHR has held that the deprivation of liberty cannot be conditioned to its unlawful character, as this would exclude legitimate forms of deprivation under which enforced disappearances can also take place.[229]

The second element of the crime refers to 'the refusal to acknowledge that deprivation or to give information on the fate and wherebouts of those persons'.[230]This element has been considered the main characteristic of this crime since Nuremberg. In this respect, the IACtHR

[226] *Situation in the Republic of Burundi* (n. 168) para.118.

[227] *Ibid.* The interpretation provide by the ICC is in accordance with the interpretation given by legal scholarship. On this point *see.* Christopher K. Hall 'Art. 7 para 2. (i) Enforced Disappearance of Persons' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' notes* (2a edn. C.H. Beck, Munich 2008) 266, 267.

[228] Elements of Crimes, Art. 7(1)(i) fn. 26

[229] *Heliodoro Portugal v Panamá* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No.186 (12 August 2008) para.192. See also, *Blanco Romero et al. v. Venezuela* (Merits, Reparations and Costs) IACtHR Series C No. 138 (28 November 2005) para. 105; *Osorio Rivera and Family members v Perú* (Preliminary Objections, Merits, Reparations and Costs) IACtHR Series C No. 274 (26 November 2013) para.125

[230] ICC Statute Art. 7(2)(i)

has determined that the refusal to acknowledge or denial of information is a constitutive element of the crime, which distinguishes it from other crimes of similar nature, such as kidnnapping, abduction and murder.[231] Additionally, this element is intrinsecally related to the consequence of the offence, that is the removal of the person from the protection of the law.[232] This because only when the refusal or denial of information takes place, in connection with the deprivation of liberty, the crime of enforced disappearance arises. Otherwise, the elements of the crime are not fulfilled.

Accordingly, the IACtHR has determined that when analysing enforced disappearance, the deprivation of liberty shall be understood as the starting point of the configuration of the offense, which is prolonged in time until the situation and whereabouts of the person is clarified.[233] In that respect, the IACtHR has stressed that, due to its complex nature, an analysis of the crime has to be done taking into account all the elements and the factual circumstances on the case.[234]

Some scholars suggest that the refusal of information is only given if there has been a previous inquiry on the fate or whereabouts of the person by the victim's family members or counsels.[235]Conversely, the ICC in decision on *Burundi* determined that refusal of information is not dependant on whether or not the victim's family lodges a formal complaint.[236] Furthermore, the ICC held that the refusal or denial of inforamation encompasses 'outright deniel or the giving of false information about the fate or whereabouts of the victim'.[237]

The Elements of Crimes specifies that both elements need to be carried out by, or with, the authorization support or acquisence of the State. However, it is not required that both actions are executed by the same person. The Elements of Crimes recognises that due to complex nature of the crime, its execution will normally involve more that one person.[238]

3.3.2 The act of the State or *political organization*

[231] *Gómez-Palomino v Perú* (Merits, Reparations and Costs) IACtHR, Series C No. 136 (22 November 2005) 103

[232] *Ibsen Cárdenas and Ibsen Peña v Bolivia* (Merits, Reparations and Costs) IACtHR Series C No. 217 (1 September 2010) para 99. See also, *Chitay Nech et al. v Guatemala* (Merits, Reparations and Costs) IACtHR Series C No. 212 (25 May 2010) para 99; *Anzualdo Castro v Perú* (n. 76) para. 96; Christopher K. Hall (n. 226), 269

[233] *Chitay Nech et al. v Guatemala* (n. 232) para 89; *Gónzalez Medina and Family v Dominican Republic* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR Series C No. 240 (27 February 2012) para. 175

[234] Ibid.

[235] Werle /F. Jessberger (n. 110) para. 1008; Kai Ambos, *Treatise on International Criminal Law - Volume II: The Crimes and Sentencing* (OUP, Oxford 2014) 112

[236] *Situation in the Republic of Burundi* (n 68) 118

[237] Ibid.

[238] Elements of Crimes, Art. 7(1)(i) fn. 23

Since its origins, the crime of enforced disappearance has, for the most part, been committed by the State, as a mechanism to eliminate political oponents and subdue resistance. In all the international instruments providing a definition of enforced disappearance, the element of State involvement has remained unaltered.[239] Consequently, the involvement of the State or state agents, either directly or by means of consent, is what has traditionally characterised this crime as a 'state crime'. [240]

The relevance of the involvement of the State in the perpetration of the crime of enforced disappearance, has been addressed in a wide range jurisprundence by international judicial and quasi-judicial bodies.[241] Namely, the IACtHR has established a connection between the perpetrators of the crime and the State. It has held that, in accordance with the provisions of the IACFD, criminal punishment must be imposed on all persons who commit acts of enforced disappearance, as well as their accomplices and accessories, whether there are agents of the State or persons acting with the authorization, support or acquiesense of the State.[242] Furthermore, in the case of *Blanco-Romero et. al. v Venezuela*, the IACtHR added that the punishment should 'not be limited to "public authorities" or "persons in the service of the state"'.[243]

The ICC Statute expanded the definition of the crime of enforced disappearance by conceiving 'political organisations' as one of the possible perpetrators of this crime.[244] This notion opened the posibility of prosecuting enforced disappearances committed by non-state actors or organized groups not linked to the State. However, both the ICC Statute and the Elements of Crimes do not clarify what should be undertood by 'political organisation'.[245] Likewise, neither

[239] UN Declaration on the Protection of All Persons from Enforced Disappearance, Preambular para. 3 (by officials of different branches or levels of the Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government); Inter-American Convention on Forced Disappearance of Persons, Article II (perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state); International Convention for the Protection of all Persons form Enforced Disappearance, Article 2 (perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state); ICC Statute, Article 7(2)(i) 'by, or with the authorization, support or acquiescence of the State'

[240] Christopher K. Hall (n. 226) 268; I. Giorgou, 'State involvement…' (n. 25) 1007 with further references.

[241] Considering the scope of this thesis, here it will only be referred to the jurisprudence of the IACtHR. In particular the IACtHR in several judgments has recognized that one of the constitutive elements of enforced disappearance is 'the direct intervention of State agents or their acquiescence', see, *inter alia*: *Radilla Pacheco v México* (n. 70) para.140; *Rodríguez Vera et al. 'the disappeared from the Palace of Justice' v Colombia* (Preliminary Objections, Merits, Reparations, and Costs) IACtHR, Series C. No. 287 (14 November 2014) 365.

[242] *Gómez-Palomino v Perú* (n. 231) para. 101; *Blanco-Romero et. al. v Venezuela* (n. 229) para. 105; *Blake v Guatemala* (Merits) IACtHR, Series C No. 36 (24 January 1998) 75 et seq.

[243] *Blanco-Romero et. al. v Venezuela* (n. 229) para. 105

[244] ICC Statute, Art. 7(2)(i) "by, or with the authorization, support or acquiescence of, a State or *political organization*". (emphasis added)

[245] ICC Statute, Art. 7(2)(i); Element of Crimes Art. 7(1)(i).

of the other international instruments on enforced disappearance includes the notion of political organisation or non-state actors within their defintions.[246]

However, the inclusion of the notion 'political organisation' within Article 7(2)(i) of the ICC Statute, remains problematic. As discussed further in Section (3.2.3), one of the main concerns regards the interpretation of 'political organisation' in light of the *chapeau* 'policy'element. This because, on the one hand, a restrictive interpretation of the notion 'political organisation', limiting it to only State-like organisations, would contravene the meaning of 'organisational policy' enshrined in the chapeau of Article 7; while, on the other hand, a broader interpretation, including non-state actors and organised groups, would dilute the nature of the crime of enforced disappearance as a state crime.[247]

In light of the above, a broad interpretation of the term 'political organisation' would also raise difficulties regarding the obligation to provide information on the fate and whereabouts of the victim. In this regard, it could be contended that the obligation to provide information on the fate or whereabouts of the person, presupposes that the perpetrator of the crime withholding the information has the legal obligation to provide such information. This would suggest that non-state actors, due to their nature, do not have the same obligation to provide for information as State.[248] Hence, a restrictive interpretation of the of the notion 'political organization' would be warranted. This understanding, however, would lead to question situations where enforced disappearance have been committed with the *acquiescence* of the State. For instance, acts committed by self-defence or paramilitary groups tolerated by the State.[249]

On this point, the IACtHR in several cases has emphasised the States' positive obligation to take effective measures to protect and prevent human rights violations committed by non-state actors.[250] Moreover, the IACtHR has given special consideration to situations where the State has contributed to or even created the risk at hand, as has been the case with paramilitary groups.

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[246]It is worth noting that, although the ICED does not include non-state actors within the definition of enforced disappearance, Art. 3 states "Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice".

[247] *See*.I. Giorgou 'State Involvement….'(n.25)

[248] L. Ott (n.1) 23-25. While there has been great debate regarding the notion of non-state actors and their obligations under international law, a thorough examination on this point falls outside the scope of this thesis. For a thorough reflection on the point, see: Andrew Clapham 'Non-state Actors' in Vincent Chetail (ed.) *Post-Conflict Peacebuilding: A lexicon* (OUP, Oxford 2009) 200-12.

[249] Juan L. Modolell G, (n.163) 486

[250] On this point, the IACtHR has acknowledge that the State cannot be responsible for all the human rights violations committed by individuals. However, the State does have the obligation to adopt preventive and protective measures for individuals in their relationships with each other. This is conditioned by the awareness of the situation and the imminent threat it poses for a specific individual or group of individuals, and on the existence of the reasonable possibility of preventing or avoiding that threat. Therefore, responsibility of the State has to be considered *vis-à-vis* the specific circumstances of the case. See, *Pueblo Bello Massacre v Colombia* (Merits, Reparations and Costs) IACtHR, Series C No. 140 (31 January 2006) para.123; *Valle Jaramillo et al. v Colombia* (Merits, Reparations and Costs) IACtHR, Series C No. 192 (27 November 2008) para. 78.

For instance, in the case of *Pueblo Bello Massacre v Colombia*[251], the IACtHR found that, although there was no evidence showing that 'the State was directly involved in the perpetration of the massacre or that there was a connection between the members of the Army and the paramilitary groups or a delegation of public functions from the Army to such groups', the State was responsible for the acts committed by the paramilitary group.[252] The Court recognised that the State 'objectively created a dangerous situation for its inhabitants' by encouraging the creation paramilitary groups.[253] In this regard, the Court determined that given the circumstances of the case, the State had a special guarantor position, under which it had the duty to take all the necessary measures to avoid the consequences of the danger the State had helped to create.[254]

Following this line of reasoning, it can be argued that acts of enforced disappearance committed by non-state actors, dependant on the circumstances of the case, would cary the indirect involvement of the State. Mainly, because of the State's obligations regarding the protection and guarantee of the rights of individuals. This point also relates to the legal obligations applicable when depriving a person of their liberty and the subsequent access to any judicial remedies.[255] As Modolell points out, these obligations can only arise at the State's organs; therefore, although in principle non-state actors do not have the same obligations as the State towards individuals, the responsibility of the State may still arise from the support or acquiescence of the State to these non-state organisations.[256]
Consequently, the increasing involvement of non-state actors in acts of enforced disappearance, would favour for a wide interpretation of the notion of political organisation.

3.3.3 dolus specialis

The definition of the crime under the ICC Statute provides that the perpetrator must have acted 'with the intention of removing the [victim(s)] from the protection of the law for a prolonged period of time'.[257] Accordingly, some academic scholarship suggests that the wording '*with the intention of*' establishes a *dolus specialis* requiring that the perpetrator 'wants, desires, or wishes the victim's removal from the protection of the law'.[258]

[251] This case concerned a massacre carried out by a paramilitary unit where 43 individuals were detained, and subsequently killed or disappeared.

[252] *Pueblo Bello Massacre v Colombia* (n. 250) para 140.

[253] Ibid, 126-127

[254] Ibid, 140.

[255] L. Ott (n.1) 27

[256] Modolell G. (n. 163) 487

[257] ICC Statute, Article 7(2)(i)

[258] Kai Ambos (n. 235) 112

However, as Prof. Manfred Nowak pointed out in his 2002 Report, the requirement of a special intent within the defintion of the ICC Statute seems to put,

> [A]n extremely heavy burden on the prosecution to prove that the individual perpetrator was aware from the very beginning of committing the crime that the deprivation of liberty would be followed by its denial and that he (she) intended to remove the victim from the protection of the law for a prolonged period of time'.[259]

Conversely, some interpreters have sustained that the removal of the individual must be seen as an additional mental element, and should not be considered to impose an excessively high threshold to establish criminal liability.[260]

On the other hand, Hall has established that, under Article 7(2)(i) the intention to deprive a person from the protection of the law is refers to the natural consequence of the *actus reus*.[261] This interpretation is shared by the jurisprudence of the IACtHR.

The IACtHR in several judgments has reiterated that:

> [T]he result of the refusal to acknowledge the deprivation of liberty or the whereabouts of a disappeared person is, together with other elements of forced disappearance, what takes the person "outside the protection of the law".[262]

Consequently, the element of intent remains under the framework of Article 30 of the ICC Statute. Accordingly, the IACtHR has determined that the 'intention' to remove a person from the protection of the law can be inferred from the *modus operandi* of the crime.[263]

The ICC in the the *Situation in the Republic of Burundi*[264], opted for this interpretation. The ICC cited the international human rights instruments on enforced disappearance, as well as the

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[259] Report by Mr Manfred Nowak (n.15) para. 69. As expressed by the expert, the ICC Statute defines enforced disappearances in a 'very narrow manner which can only be applied in truly exceptional circumstances' making it very difficult to prove in practice. This because 'the perpetrators usually only intend to abduct the victim without leaving any trace in order to bring him (her) to a secret place for the purpose of interrogation, intimidation, torture or instant but secret assassination. Often many perpetrators are involved in the abduction and not everybody knows what the final fate of the victim will be.' *Ibid*, 74. The position of Mr Nowak is criticized by C. Hall who stresses that the ICC Statute 'does not expressly require that each perpetrator in the chain of events (…) have performed the same acts and omissions or had the same mental state at each stated of the "disappearance"'. Christopher K. Hall (n. 226) 269 fn. 587.

[260] L. Ott (n.1) 185

[261] Christopher K. Hall '(n. 226) 269 fn. 587

[262] *Ibsen Cárdenas and Ibsen Peña v Bolivia* (n. 232) para 99. See also, *Chitay Nech et al. v Guatemala* (n.232) para 99; *Anzualdo Castro v Perú* (n.76) para. 96

[263] *Ibsen Cárdenas and Ibsen Peña v Bolivia* (n. 232) para 100; *Chitay Nech et al. v Guatemala* (n. 232) para 99; *Anzualdo Castro v Perú* (n. 76) para 100

[264] *Situation in the Republic of Burundi* (n. 68)

case law of the IACtHR and the international human rights monitoring bodies, namely, the European Court of Human Rights and the Human Rights Committee.[265] Accordignly, the ICC established that,

> As a result of the enforced disappearance, the victim is removed from the protection of the law, i.e. the victim no longer has access to judicial assistance and legal procedures. In this respect, oftentimes the manner in which the person is deprived of his or her liberty allows the Chamber to infer the intention to remove the victim from the protection of the law (…)[266]

Consequently, the ICC found that, although the information on the authorites' refusal to acknowledge the deprivation of freedom or to provide information on the fate and whereabouts of the persons may not be always available, the manner in which the persons were deprived of their liberty (e.g arrests without a judicial warrant, detention in unofficial prisions, etc.), infers the intention to remove the victims from the protection of the law. [267]

3.3.4 The 'temporal element'

The formula '*for a prolonged period of time'* within the definition of enforced disappearance in Article 7(2)(i) ICC Statute, is considered by some scholars as a 'temporal element' intrinsically tied to the special intent.[268] This notion differs from the definition of the crime established under customary international law.[269] As detailed above in Chapter 2, none of the definitons contained within the international human rights instruments on enforced disappearance includes this particula element.

In addition, neither the ICC Statute nor the Elements of Crimes, provide an interpreation on what should be considered as a 'prolonged period of time', therefore, leaving this requirement completly vague.

In this respect, the notion of a temporal element is related to the continuous character of the crime.[270] This as it refers to the time framework between the moment the deprivation of liberty takes place and the moment in which the fate or whereabouts of the person are determined.

In light of the above, the IACtHR has in a number of cases established that:

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[265] Ibid. para 120

[266] Ibid.

[267] Ibid. 129

[268] G. Citroni 'The Specialist Chambers of Kosovo…' (n. 54) 133. See also, G. Citroni 'The temporal element...' (n.74)

[269] L. Ott (n. 1) 186; G. Citroni 'The Specialist Chambers of Kosovo…' (n. 54) 134

[270] *See* within this chapter. Section 3.3

> [W]hen analysing an alleged forced disappearance, it must be taken into account that the individual's deprivation of liberty should be understood as merely the beginning of the constitution of a complex violation that is prolonged over time until the victim's fate and whereabouts are known. The analysis of a possible forced disappearance should not focus in an isolated, divided and fragmented manner only on the detention (…) but rather on all the facts that are present in the case being considered by the Court.[271]

Nonetheless, the temporal element estabished in the definition of ICC Statute, as Ott argues, seems to exclude cases from the jurisdiction of the ICC, where the intention was directed towards releasing the detained after a short period of time.[272] Accordingly, the Pre-Trial Chamber in the *Situation in the Republic of Burundi,* considered that a period of several months or years, would certainly fulfill this requirement.[273] However, this assertion by the Chamber remains ambigous regarding what would constitute '*several*'.

3.4 The Continuous nature of Enforced Disappearance of Persons

The continuous character of the crime enforced disappearance is one of its most important features. The jurisprudence of the IACtHR has constantly recognised the continuous and permanent nature of the crime.[274] The IACtHR has developed the concept that:

> [T]he crime of forced disappearance violates multiple norms, and that it is of a permanent or continuing nature, which means that the forced disappearance subsists until the whereabouts of the disappeared person are discovered or their remains are reliably identified.'[275]

This view has also been adopted by the Pre-Trial Chamber in the *Situation in the Republic of Burundi,* where the Court determined that,

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[271] *González Medina and Family v Dominican Republic* (n. 233) para 175. *See, inter alia, Heliodoro Portugal v Panamá* (n. 229) para. 112; *Chitay Nech et al. v Guatemala* (n.232) para. 89

[272] L. Ott (n. 1) 186-7

[273] *Situation in the Republic of Burundi* (n. 68) para. 120

[274] See *inter alia, Velásquez Rodríguez v Honduras* (n.51) para.155; *Heliodoro Portugal v Panamá* (n.229) para. 34; *Radilla Pacheco v México* (n. 70) para. 87; *Gomes Lund et. al ("Guerrilha do Araguaia") v Brazil* (n. 70) para.17; *Rodríguez Vera et al. 'the disappeared from the Palace of Justice' v Colombia* (n. 241) para. 228.

[275] *Rodríguez Vera et al. 'the disappeared from the Palace of Justice' v Colombia* (n. 241) para.228. See also, *Heliodoro Portugal v Panamá* (n.229) para.112

> The crime of enforced disappearance is considered a continuous crime as long as the perpetrators continue to conceal the fate and whereabouts of the person or persons who have disappeared, and these facts remain unclarified.[276]

In accordance to this notion, the continuos character of this crime is intrinsically related to the temporal jurisdiction of the ICC, and the principle of non-retroactivity established in Article 24 of the ICC Statute.[277] Bearing in mind that the crime of enforced disappearance initiates when the deprivation of liberty takes place, and does not cease until the fate or whereabouts of the victim(s) are revealed, it would be possible for the crime to take place before the entry into force of the ICC Statute, or the entry into force of the ICC Statute for a particular State. Accordingly, as Ambos explains, if the jurisdiction of the ICC is triggered from the moment the deprivation of liberty takes place, then the crime would have a *retroactive effect*, thereby infringing Article 11 and 24 of the ICC Statute.[278]

On this point, the Elements of Crimes clarifies that the crime of enforced disappearance falls under the jurisdiction of the Court 'only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute'.[279] This meaning that, only when the widespread or systematic attack agaisnt the civilian population has taken place after the entry into force of the ICC Statute, acts of enforced disappearance committed in the context of such attack will fall under the ICC's jurisdiction.

However, as pointed out by Ambos, this limitation is problematic as it would exclude acts of enforced disappearance committed after the entry into force of the ICC Statute, but before the widespread or systematic attack.[280]

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[276] *Situation in the Republic of Burundi* (n. 68) para.121

[277] ICC Statute, Article 24: '1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favorable to the person being investigated, prosecuted or convicted shall apply'

[278] K. Ambos (n. 235) 112. On the other hand, as Ambos and Böhm explain, the IACtHR in some cases has favored the retroactive effect in cases of enforced disappearance. Kai Ambos and María Laura Böhm, 'La Desaparición Forzada de Persona como Tipo Penal Autónomo' in K. Ambos (ed.) *Desaparición Forzada de Personas: Análisis Comparado e Internacional* (Editorial Temis, Bogotá 2009) 195, 240. On this point see: *Blake v Guatemala* (Merits) IACtHR, Series C No. 36 (24 January 1998); *Heliodoro Portugal v Panamá* (Judgment) IACtHR Series C No.186 (12 August 2008).

[279] Elements of Crimes, Article 7(1)(i) fn. 24.

[280] K. Ambos (n. 235) 112.

4 The Inter-American Court of Human Rights Jurisprudence as a Source of Inspiration for the Crime of Enforced Disappearances in the ICC Context

4.1 Introduction

As expressed at the beginning of this work, the practice of cross-fertilisation between ICTs and international human rights judicial bodies, has served as a tool of interpretation in order to in order to elucidate the definition, scope and application of crimes under their own statutes. This is because, as pointed out by Pons and Dukic, 'the impact of principles developed by human rights bodies such as the IACtHR on the ICC's interpretation and application of its own legal standards is specifically forseen in the Rome Statute'.[281] On this view, reliance of ICTs on human rights standards is, therefore, embraced and encouraged as human rights monitoring bodies jurisprudence is considered to be highly authoritative.[282] Additionally, as Maculan explains 'compliance with human rights standards is a condition of legitimacy for ICTs decisions in terms of both procedural standards and subject matter'.[283] This point, as will be develop below, is reflected by the wording of Article 21(3) of the ICC Statute, which allows the court to resort to international human rights standards in its interpretation and application of the ICC Statute.[284]

Under this provision, one may wonder if the human rights standards on enforced disappearance developed by the IACtHR would constitute a binding criterion in the ICC's interpretation of enforced disappearance as a crime against humanity; thus, contributing the harmonisation of the interpretation of international crimes. However, as Geneuss explains, given the legal regimes in which these two courts operate, the integration or transplatation of legal standards from one system to another, would require the adaptation of those standards to the context or legal system of the borrowing court, in this case the ICC.[285] Mainly, because in accordance to the principle of legality enshrined in Article 22 of the ICC Statute, the strict construction of the definition of crimes, would to a certain extent, deviate from the human rights standards developed by human rights judicial bodies.

In this sense, the present chapter will examine the possibility of establishing a judicial cross-fertilisation scenario between the ICC and the IACtHR in relation to the crime of enforced

[281] Niccolo Pons and Drazan Dukic 'Perspective on the interplay between the Inter-American Court of Human Rights and the International Criminal Court' [2014] 7 Inter-Am. & Eur. Hum Rts. J. 159, 160

[282] Vasiliev (n.9) 373

[283] Maculan (n.8) 457

[284] ICC Statute, Article 21(3)

[285] J. Geneuss (n. 12) 405-407

disappearance. As will be argued, this is necessary in order for the ICC to develop its own case law on enforced disappearance and, thereby held individuals criminally accountable this crime. In the first place, this chapter will analyse Article 21 of the ICC Statute as the legal basis for cross-fertilisation within the ICC context. Under this view, the notion of *internationally recognised human rights* would be considered as rule for the interpretation of the human rights standards developed by the IACtHR with respect to enforced disappearances. Accordingly, an assessment on whether these interpretative standards are suitable for the ICC's context, will be established. Lastly, a brief reference will be made in regards to the discrepancy between the State international responsibility and the criminal international responsibility of individuals for crime of enforced disappearance.

4.2 The applicable law under Article 21 of the ICC Statute: The legal framework for cross-fertilisation in the ICC context

The sources of international law are encompassed in Article 38 of the ICJ Statute. This provision stipulates that treaty law, customary international law, and the general principles of law recognised by civilized nations constitute the primary sources of international law. While judicial decisions and doctrine are only to be taken as subsidiary means for determining the law.[286] Notwithstanding this, Article 21 of the ICC Statute provides for a specific hierarchy on the sources of law that the ICC shall apply. This meaning, that in the first place the Court must apply the ICC Statute, the Elements of Crimes, and t the Rules of procedure and Evidence. In second place, the Court shall apply, where appropriate, the 'applicable treaties and the principles and rules of international law.'[287] As Ambos points out, this provision includes costumary international law and general principles in the sense of Article 38 of the ICJ Statute.[288] However, the ICC has been clear in stressing that resource to other sources of law is only possible when there is a *lacuna* within the sources established in Article 21(1)(a).[289]

Respectively, under this provision a reference to the human rights intruments on enforced disappearance and the principles enshrined therein could be apply in order to fill in existing gaps. For example, in the *Burundi* decision, the ICC cited the aforementioned instruments to indicate the continuous nature of the crime of enforced disappearance. In this respect, although this characteristic is not encompassed either in the ICC Statute nor the Elements of Crimes, it

[286] Statute of the International Court of Justice 39 AJIL Supp. 215 (1945) (ICJ Statute).

[287] ICC Statute, Article 21(1)(b)

[288] Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundation and General Part* (OUP, Oxford 2013), 74.

[289] *Prosecutor v Bosco Ntaganda* (Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9") ICC-01/04-02/06 OA5 (15 June 2017) paras. 53-54

has been recognized as a distinctive feature of the crime by treaty law and the case law of international human rights bodies.[290]

On the other hand, resource to international human rights law is provided in Article 21(3) which sets forth, '[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights'.[291] This provision has been interpreted as to allow international human rights standards as an interpretative tool of all the provisions within the ICC Statute, as well as, to constitute a legal basis for the consideration of an external body of law.[292] This was stated by the ICC Appeals Chamber in *Lubanga* where it held that 'human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights (…)'.[293]

In this view, the ICC under the framework of Article 21 has often referred to the jurisprudence of the regional courts, the ECtHR and the IACtHR, and to international human rights conventions, such as the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, among other international human rights instruments. Although, Article 21(3) does not provide clearly what may constitute 'internationally recognised human rights',[294] the ICC appears to interpret it in the broad sense.[295] In that respect, this article provides the legal basis under which the cross-fertilisation between the jurisprudence of the IACtHR and the ICC, with regards to the interpretation of the crime of enforced disappearances may arise.

As already seen, the ICC has taken a first stept in the *Burundi* decision, although not a significant one, by refering to the case-law of the international human rights bodies, including the IACtHR, when analyzing the elements of the crime.[296] Nonetheless, it must be emphasised, that despite the wording of Article 21 of the ICC Statute, the ICC is not legally bound to consult nor defer to other jurisdictions case law or rationales. Yet, human rights jurisprudence constitutes a source of useful guidance for ICTs to estabish and develop the meaning of relevant

[290] *Situation in the Republic of Burundi* (n.68) para. 121

[291] ICC Statute, Article 21(3)

[292] Pons/Dukic (n. 281) 161; W. Schabas (n.25) 530-531

[293] *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006) ICC-01/04-01/06 (OA4) (14 December 2006) para. 37. See also, *Prosecutor v Bosco Ntaganda* (n. 289) para. 53

[294]Some scholars have referred to the ambiguity of the provision as it could encompass a broad category of rights. As K. Ambos highlights "what is encompassed by 'internationally recognized human rights': only universally recognized and fundamental human rights; any right with some international recognition; or something in-between?" See Kai Ambos (n. 288) 80; Gilbert Bitti 'Part IV The ICC and its Applicable Law, 18 Article 21 and the Hierarchy of Sources of Law Before the ICC' in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (OUP Oxford, 2015) 411, 434

[295] G. Bitti (n. 294), 434.

[296]See. *Situation in the Republic of Burundi* (n. 68) paras.117-121 with further references.

human rights norms that interrelate with international crimes under their jurisdiction. This would ensure consitency with internationally recognized human rights, and at the same time, prevent the fragmentation of international law.[297]

4.3 The notion of 'internationally recognized human rights' as a general rule of interpretation of the ICC Statute

Having established that Article 21 of the ICC Statute constitutes an overriding rule of interpretation, it must now be considered the way in which those 'internationally recognized human rights' are to be interpreted in the ICC context. Under this provision, the question of whether the human rights standards developed by the IACtHR are transferable to the ICC context, particularly when interpreting international crimes, must be considered.

According to Antje Wiener and Philip Liste, when resourcing to cross-fertilisation, the transmission of a concept from one legal context to another, 'requires not only a shared understanding of the meaning, but also the willingness or readiness to change one's own normative structure.'[298] As Geneuss explains, this would require that 'the norms or legal concept to be referred to, must be translated from the language of the original legal system into the language of the receiving one.'[299] This in order to avoid risks of misinterpretation of the norm's original meaning.

As a consequence of the distinct nature of crimes and its prosecutorial purpose, reliance on international human rights law principles might conflict, to a certain extent with the principle of legality. The principle of legality establishes that the 'definition of a crime shall be strictly construed and shall not be extended by analogy'.[300] Consequently, the interpretation and adaptation of the human rights standards to the ICC context, could lead, in certain situations, to an expansion of the definition of the crimes and the modes of criminal liability.[301] This bearing in mind that human rights provisions are often broad and in constant evolution, therefore, resort to cross-fertilisation for the interpretation of ICL could have a transformative effect on the way ICTs interpret their core legal texts.

[297] Vasiliev (n.9) 379

[298] J Geneuss (n. 12) 406 reffering to A. Wiener and P. Liste, 'Lost Without Translation? Cross-Referencing and a New Global Community of Courts' [2014] 21Indiana J. of Global Legal Studies 266.

[299] Ibid.

[300] ICC Statute, Article 22 (2)

[301] J Geneuss (n. 12) 412

In this sense, academic scholarship has argued that the unique context in which ICTs operate a *re-interpetation* of the human rights standards to be applied is thus necessary.[302] This because the context in which human rights are developed, that being in order to 'bind states vis-á'vis their citizens', is not the same context human rights in ICL operate.[303] This is clear when refering to the offensive and defensive role of human rights in criminal law. On the one hand, the defensive role affords protection to the individual from the authorities in their exercise of the *ius puniendi*, whereas the offensive conceieves criminal law as a mechanism to enforce and protect human rights.[304] Under this premise, the legal standards on enforced disappearance developed by human rights bodies, namely the IACtHR, would require to re-interpret such standards in order to be able to prosecute individual for this crime.

This idea provides a compelling justification for the determining the standards to be used in order to elucidate the meaning of the ICC's definition of enforced disappearance. Accordingly, given that the definiton of the crime within the ICC Statute reflects to an extent the definition of the crime contained within the human rights instruments; the use of the intrepretative standards developed by those monitoring bodies, namely the IACtHR, on enforced disappearance, may be useful in a situation where the the ICC may require a strict construction of the definition of the crime.

In that regard, Article 31(1) of the VCLT provides that '[a] treaty shall be interpreted in good faith in accordance with theordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.[305] This means that only those provisions which would contribute to the object and purpose of the ICC Statute will be applicable. This point has also been acknowledged by the ICC in its case law.

In *Prosecutor v. Jean-Pierre Bemba*, the PTC established that:

> "a teleological interpretation which is mirrored in the principle of effectiveness and based on the object and purpose of a treaty means that the provisions of the treaty are to be "interpreted so as to give it its full meaning and to enable the system (...) to attain its 'appropriate effects'", while preventing any restrictions of interpretation that would render the provisions of the treaty "inoperative"[306]

In that sense, the interpretation of the crime of enforced disappearance within the ICC Statute by referral to international human rights law, aims to establish the 'scope and the contents of a treaty and its effects in the internal law of its parties.'[307]

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[302] Ibid, 409-412

[303] Ibid.

[304] Ibid. 411-412

[305] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS vol. 1155, p. 331

[306] *Prosecutor v. Jean- Pierre Bemba* (n. 170) para. 36

[307] Oliver Dörr; Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties- A commentary* (2ed Springer, 2018) 568

Moreover, following the rules of treaty interpretation contained in the VCLT, any interpretation to the ICC Statute must be done considering, firstly, the ordinary meaning of the text; secondly, its context and, thirdly, the object and purpose of the provision.
Consequently, the terms of Article 21(3), when read in accordance to the rules of interpretation, suggests a normative superiotity in regards to the other provisions of Article 21 of the ICC Statute. [308] Therefore, all the sources of law expressly identified in Article 21 of the ICC Statute must be interpreted and applied in accordance to *internationally recgonised human rights*.[309] This obligation as academic scholarship has contended extends to 'all provisions of the Rome Statute, including the application and interpretation of crimes'.[310] Likewise, in the *Lubanga* case Judge Pikis stated that:

> Article 21 (3) of the Statute binds the Court to apply and interpret the law applicable under the Statute in a manner consistent with "internationally recognized human rights". Internationally recognized may be regarded those human rights acknowledged by customary international law and international treaties and conventions.[311]

In view of this interpretation, the IACtHR jurisprudence with regards to enforced disappearance would fall under the scope of Article 21(3), as it has been acknowledged to establish a set of legal interpretative standards that have been applied and recognised by the international community when interpreting and the determining international responsibility for enforced disappearance.

This idea finds further support when analysing Article 21(3) in light of its object and purpose of this provision, in connection with the object and purpose of the ICC Statute. As Davidson argues, a teleological interpretation of Article 21(3) in light of the object and purpose of the ICC Statute – to gurantee lasting respect for and the enforcement of criminal justice[312] – demonstrates the evolutative aim to ensure that the law applied by the Court is consistent with internationally recognised human rights.[313] Consequently, the inclusion of the notion 'internationally recognised human rights' in the final text of the ICC Statue, had the purpose to 'ensure that broad and accessible scope of human rights sources were available for the Court'[314] in the exercise of its functions.

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[308] Alain Pellet, 'Applicable Law' in A. Cassese, P. Gaeta and J. R. W. D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002), 1079-1080

[309] Alex Davidson, 'Human Rights Protection before the International Criminal Court, Assesing the Scope and application of Article 21(3) of the Rome Statute' [2016] 18 International Community Law Rev 72, 83

[310] Ibid.

[311] *Prosecutor v Thomas Lubanga* (Decision on the Prosecutor's "Application for Leave to Reply to "Conclusions de la défense en response au mémoire d'appel du Procureur") ICC-01/04-01/06 (12 September 2006), Separate Opinion para 3.

[312] ICC Statute, preambular para 11.

[313] A.Davidson, (n. 309) 86

[314] Ibid. 87

On this note, the practice of ICTs has shown their deference to human rights instruments and case law in their interpretation and application of ICL. For instance, the definition of torture in ICL has been a paradigmatic case for cross-fertilisation between ICTs and international human rights courts.[315] In particular, the ICTY, and to a lesser extent the ICTR, has sought interpretative guidance on several ocassion in relation to the principles developed by the ECtHR regarding the definition and elements of torture. [316] On the other hand the ICC, has often referred to the jurisprudence of the ECtHR and IACtHR when interpreting its own foundational text.[317] For example, the ICC has taken guidence from the IACtHR jurisprudence when addressing fair trial issues under the provisions of Article 58 and Article 67 of the ICC Statute.[318] Conversely, the IACtHR's citation of international criminal jurisprudence has been relatively limited. In few cases, the IACtHR has referred to the ICC's judicial interpretations on crimes that directly bear to substantive human rights under the jurisdiction of the IACtHR.[319]

However, to this author's knowledge, contrary to the practice of the *ad hoc* Tribunals the ICC has not yet specify on how the case-law of human rights bodies is being used and adopted. In the case of *Prosecutor v Jean-Bosco Brayagwiza* the ICTR stressed that:

> Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed thereunder, are persuasive authority which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own

[315] For an in-depth analysis on the definition of torture by ICTs, *see*: Maculan (n.8); Michelle Farrell, 'Just How Ill-Treated Were You: An Investigation of Cross-Fertilization in the Interpretative Approaches to Torture at the European Court of Human Rights and in International Criminal Law (2015) 84 Nordic J. Int'l L. 482.

[316] *See*, inter alia: *Prosecutor v. Delalic et al.* (TC Judgment) ICTY, IT-96-21-T (16 November 1998); *Prosecutor v. Jean-Paul Akayesu* (TC I Judgment) ICTR-96-4-T (2 September 1998) ; *Prosecutor v Kunarac* (TC Judgment) ICTY, IT-96-23 T & IT-96-23/1-T (22 February 2001); *Prosecutor v Furundžija* (TC Judgment) ICTY IT-95-17/1 (10 December 1998) *; Prosecutor v Munic et al (Celebici Camp)* (TC Judgment) ICTY IT-96-21-T (16 November 1998).

[317] See, Vasiliev (n.9) 385 fn. 50.

[318] For a further analysis on these matters *see,* Pons/Dukic (n. 281)

[319]Ibid. 161. For example, in the case of *Almonacid-Arellano et al v. Chile* (n. 167) paras.93-99, the Court referred to certain provisions of ICL, including the ICCst, in order to determine if the extra-legal execution of Mr Almonacid Arellano constituted crimes against humanity. The reasoning employed by the IACtHR was later referred in the case of *Miguel Castro-Castro Prison v Perú* (Merits, Reparations and Costs) IACtHR Series C No. 160 (25 November 2006) para 402. However, the analysis provided by the IACtHR on the contextual elements of the crimes against humanity has been subject of debate, particularly, since the IACtHR does not have jurisdiction over these crimes. In addition, the IACtHR reliance on the statutes of ICTs, mainly the Nuremberg IMT, without giving due consideration to the existing jurisprudence of ICTs, resulted in an imprecise analysis of the elements of crimes against humanity. For an in-depth critique on the IACtHR interpretation of crimes agaisnt humanity, *see*. J. Dondé Matue 'Los elementos contextuales de los crímenes de lesa humanidad y la Corte Interamericana de Derechos Humanos' in *Sistema Interamericano de Protección de los derechos humanos y derecho penal internacional* (Konrad-Adenauer-Stiftung e V, 2011) <https://biblio.juridicas.unam.mx/bjv/detalle-libro/3801-sistema-interamericano-de-proteccion-de-los-derechos-humanos-y-derecho-penal-internacional-tomo-ii> accessed: 27 August 2018.

accord on the Tribunal. They are, however, authoritative as evidence of international custom.[320]

Consequently, it has been contended by academic scholarship that the ICC's application of human rights convention under the scope of Article 21(3) of the ICC Statute has, thus, allow the Court, in the process of interpretation of these conventions provisions, to consider and adopt the case-law of the their monitoring bodies.[321] This would mean, for example, that when interpreting the crime of enforced disappearance under the ICC Statute, and thus resorting to the international human rights instruments on this crime, namely the IACFD, the jurisprudence of the IACtHR will also have to be considered. However, as Sheppard points out, '[g]iven that the court makes reference to such decisions in connection with Article 21(3), on what basis do these judgments constitute part of the corpus of internationally recognized human rights?'[322]. In this respect, he argues that considering the regional character of this conventions it is not clear if those norms would impose a binding obigation on the ICC pursuant to Article 21(3); conversely, '[i]f a given provision were common to all of the regional human rights instruments, then the views of one of the courts could certainly be persuasive authority on the more general proposition.'[323]

In light of the above, bearing in mind that all international instruments on enforced disapperance share, to certain extend, the same definiton of the crime, hence, the jurisprudence developed by the IACtHR would be considered persuasive authotity for the interpretation of the crime in the ICC's context. This, however, does not prevent possible discrepancies that may arise from the interpretation of the crime by different tribunals because of the context in which they operate. Therefore, resource to external judicial rationales of human rights bodies, especially when determining the scope of international crimes, would require an adaptation of those rationales to the specific context of the ICC. This due to the different regimes and subject matters these tribunals address. All of the above, however, does not prevent the ICC to depart from those rationales and opt for a more appropriate interpretation, as lons as it is in accordance to internationally recognised human rights.

4.4 Addressing the internationational criminal responsibility for Enforced Disappearance of Persons

[320] *Prosecutor v Jean-Bosco Brayagwiza* (Decision) ICTR-97-19-AR72 (3 November 1999)

[321] Daniel Sheppard, 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21 (3) of the Rome Statute' [2010] 10 International Criminal Law Review 43, 52

[322]Ibid. 53

[323] Ibid. 53

In respect to the practice of cross-fertilisation, one of the main points to consider is in regards the issue of international responsibility for crimes under international law. This because when assessing the cross-fertilisation between ICTs, on the one hand, and international human rights courts on the other; it must be beard in mind the fact that these two bodies operate in separate, but yet contiguous legal regimes. The notion of international liability becomes even more relevant when analyzing the cross-communication between international tribunals with regards to the crime of enforced disappearance. In first place, because acts of enforced disappearance fall under the framework of ICL and international human rights law. And in second place, because, as illustrated in Chapter 3, the commission of enforced requires, to a certain extent, the involvement of the State.
In this regard, when addressing enforced disappearances, an analysis with respect to both, the State and the individual international responsibility is thus required as these two concepts seem to be intertwined within the definition of the crime. And also, considering that the same act or situation of enforced disappearance can be addressed by both ICTs and human rights courts.

In that respect, it needs to be considered that within the framework of international human rights law the role of the state is central, while in ICL is strictly peripheral.[324] However, as Bianchi points out, '[d]espite their different operation, the two regimes may act in a complementary way and enhance the effectiveness of international criminal justice'.[325] This point becomes particularly evident when dealing with situations where the 'same analogous, performed respectively by individuals and by states, gives rise to both individual and state crimes'.[326]

This point of view was highlighted by Judge Cançado Trindade in his separate opinion in the case of *Plan de Sánchez Masacre v. Guatemala.* The Judge established that:

> "[T]he *concomitant* determination of the State's international responsibility and the criminal liability of the perpetrators is essential. Even though the [IACtHR] can only deal with the former, there are complementarities between the responsibility of the State and that of the individual. It is not possible to deal with individual responsibility alone, as contemporary international criminal law does. Convergence must be promoted between the latter and international human rights law (…)" [327]

Accordingly, the relationship between individual criminal responsibility and international state responsibility was referred to in the *Genocide case* where the ICJ addressed the issue of whether genocide was carried out in Bosnia in 1995, and if Serbia was internationally

[324] Farrell (n. 315) 487

[325] Andre Bianchi, 'State Responsibility and Criminal Liability of Individuals' in A. Cassese (ed.) *The Oxford Companion to International Criminal Justice* (OUP, 2009) 16, 24.

[326] Beatrice I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (Martinus Nijhoff, 2009) 1

[327] *Plan de Sanchez Massacre v. Guatemala* (Reparations) IACtHR Series C no. 116 (19 November 2004) Separate Opinion of Judge A.A. Cançado Trindade. para 9.

responsible for such acts.[328] The same situation was previously considered by the ICTY in the *Krstic* case, where the ICTY found General Krstic interenationally responsible for aiding and abetting genecide.[329] Similarly, in *Furundzija,* the ICTY recognized the dual responsibility of the state and the individual for the crime of torture.[330]

However, one of the main distinctions between these two regimes of responsibility, is perphaps the element of intent, This because the element of intent in ICL is central central when determining the international responsibility of an individual, while for deteminig the international responsibility of the State the element of intent is tangential. This las point, however, has been contended by academic scholarship to be rather controversial when determining the State's responsibility within framework of international human rights law. [331] Mainly, because the regime of state responsibility may or may not be required to prove the mental element when determining the State's international responsibility.

In this respect, following the work of the ILC on state responsibility,[332] the mental element can be considered as the equivalent to notion 'fault'. Accordingly, fault has been regarded as an element of attribution with respect to a prohibited conduct under international law carried out by a state organ, and to the intent of that state organ.[333] Consequently, 'if no intent of the organ can be proved, attribution of the prohibited conduct alone would not be sufficient to entail state responsibility'.[334] This is similar to the ICL regime, considering that the attribution of a crime must be intrinsically related to the intentionality of the perpetrator. However, a conflicting point arises when analysing international crimes, which by definition, can only be carried out with a specific intent, such as: genocide, persecution or enforced disappearance.

As discussed in Chapter 3, the wording of defition of enforced disappearance under the ICC Statute provides that the perpetrator must have acted 'with the intention of removing the [victim(s)] from the protection of the law for a prolonged period of time'.[335] Although, it is well established by a great part of academic scholarship, as well as the jurisprudence of the IACtHR, conceive that the removal of the person outside the protection of the law refers to the natural consequence of the crime; it is pertinent to consider, if, the ICC, given the wording of defintion of the crime within the ICC Statute, would share the same interpretation as the IACtHR.

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[328] *Case concerning the application of the Conventions on the Prevention and Punishment of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro) (Judgement) ICJ Reports 2007 (26 February 2007)

[329] *Prosecutor v, Kristic* (TC Judgment) ICTY IT-98-33-T (02 August 2001); *Prosecutor v, Kristic* (AC Judgment) ICTY IT-98-33-A (19 April August 2004)

[330] *Prosecutor v Furundžija* (TC Judgment) ICTY IT-95-17/1 (10 December 1998)

[331] Bonafè (n. 326) 119

[332] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10)

[333] Bonafè (n. 326) 121

[334] Ibid.

[335] ICC Statute, Article 7(2)(i)

For instance, if the ICC interprets this element of the crime as requiring a *dolus specialis* in light, this would require for the ICC to detemine that from the moment of the deprivation of liberty took place the perpetrator had the intent to removing the person out of the protection of the law. Consequently, bearing in mind that enforced disappearances are committed *by* or *with the support or acquiesence of the State or politcal organisation*, the inclusion of a special intent would require, as Bonafé argues, to prove the general involvement of the state aparatus.[336] This reasoning would raise difficulties when detemining the mental element of single state organs, which would mean that in such cases, it would be almost impossible to equate state responsibility, with individual criminal responsibility.[337]

Finally, although there is an overlapping relationship between ICL and human rights law, when it comes to the international responsibility of individual the regimes diverge from one another. This because as has been established since Nuremberg 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[338] Consequently, the criminal liability of the individual is carried independently from the establishment of the state's interational responsibility. Thus, as pointed out by Bonafé, '[e]ven if the mens rea element overlapped with the fault requirement, this would entail no relationship between state and individual responsibility for international crimes.'[339]

[336] Bonafè (n. 326) 123

[337] Ibid.

[338] IMT Judgment (n. 14) at 223

[339] Bonafè (326) 125

5 Conclusions

The evolution and subsequent development of enforced disappearances in international law reflect the existence of a peremptory norm prohibiting this practice. Its codification within, both human rights and criminal law, international instruments recognises its character as a human rights violation and an international crime. This recognition is of uttermost importance when analysing this practice under the scope of cross-fertilisation. This because both, international human rights judicial bodies and the ICC exercise jurisdiction *ratione materiae* over this crime. Consequently, in the process of transjudicial communication the courts may resort to each other's judicial rationales in the process of interpreting its own statutes.

In the case of enforced disappearance, this scenario is likely to happen, due to the interrelation between international criminal law and human rights law at a matter of common concern. However, as demonstrated throughout this thesis, contrary to the practice and experience of international human rights bodies, namely the IACtHR, within the area of international the case law on enforced disappearance has been undeveloped. The practice of ICTs, as has been evidenced, have not only shown, in the majority of cases, reluctance to prosecute this crime, but also an improper or deplorable interpretation on the elements of the crime.

Consequently, the increasing practice of enforced disappearance around the world, poses the need for the ICC to address and prosecute this crime in its aim to protect and guarantee international justice, and therefore set a clear precedent that this crime, due to its gravity cannot go unpunished. In that respect, bearing in mind that the ICC has yet to issue its first judgment addressing this crime, the Court can opt to resort to human rights bodies case law in the process of creating its own jurisprudence.

In that sense, bearing in mind that commonalities between the definitions of the crime in all international instruments, and the obligation enshrined within Article 23 of the ICC Statute, allows the ICC, not only to consider the international human rights instruments on enforced, but also, the way in which these instruments have been interpreted by their monitoring bodies. Therefore, referral to to the human rights jurisprudence would contribute to the harmonious interpretation of enforced disappearance within the various bodies of law, hence preventing the fragmentation of international law in respect to this crime. This, however, does not mean that divergencies between international human rights law and international criminal law, would cease to exist when interpreting and addressing cases on enforced disappearance.

This because, on the one hand, the distinct context in which these tribunals operate, requires that when addressing enforced disappearances under the framework of crimes against humanity additional element must be considered and fulfilled in order to determine individual criminal responsibility for the crime. Mainly, the element of intentionality is one of the key issues of discrepancy. This because under the human rights framework this particular element is peripheral when determining the responsibility of the State; whereas the element of intent is central to determine the criminal responsibility of the individual.

On the other hand, although the ICC is not bound to refer to human rights jurisprudence, under the framework of Article 21(3) of the ICC Statute, the ICC is obliged to interpret its foundational text in light of *internationally recognised human rights.* In this sense, considering the peremptory character of enforced disappearance and the sources of international law under Article 38 of the ICJ Statute, it could be considered that the interpretation of human rights norms by human rights tribunal would also bound the ICC to consider them when interpreting the elements of the crime of enforce disappearance. Nonetheless, given the auxiliary criterion of the human rights jurisprudence in accordance to the structure of Article 21, the ICC could opt to depart from said jurisprudence, in the exercise of its discretion.

Overall, the ICC could benefit enormously from the case law of the IACtHR given this latter level of expertise on enforced disappearance. This due to the complexity and vagueness of certain provisions within the definition under the ICC Statute. Therefore, reliance on the human rights jurisprudence con in fact contribute to a more strict interpretation in light of the principle of legality.

Bibliography

Ambos K, *Treatise on International Criminal Law - Volume II: The Crimes and Sentencing* (OUP, Oxford 2014)

Ambos K and Böhm ML, 'La Desaparición Forzada de Persona como Tipo Penal Autónomo' in K. Ambos (ed.) *Desaparición Forzada de Personas: Análisis Comparado e Internacional* (Editorial Temis, Bogotá 2009)

Bianchi A, 'State Responsibility and Criminal Liability of Individuals' in A. Cassese (ed.) *The Oxford Companion to International Criminal Justice* (OUP, 2009)

Bonafé BI, *The Relationship Between State and Individual Responsibility for International Crimes* (Martinus Nijhoff, 2009)

Brown C, 'The emergence of a Common Law of International Adjudication against a background of Proliferation' in Chester Brown, *A Common Law of International Adjudication* (OUP, 2007)

Cassese A, *International Criminal Law* (3rd ed. OUP 2013)

Citroni G, 'The Specialist Chambers of Kosovo, the applicable Law and the Special Challenges Related to the Crime of Enforced Disappearances' [2016] 14 JICJ 123

Citroni G, 'When is it enough? Enforced Disappearance and the "Temporal Element" ' [2013] 9 Droits Fondamentaux 1

Citroni G and Scovazzi T, 'Recent Developments in International Law to Combat Enforced Disappearances' [2009] 3 Revista Internacional de Direito e Cidadania 89

Claude O, 'A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence' [2010] 5 Intercultural Hum. Rts. L. Rev. 407

Davidson A, 'Human Rights Protection before the International Criminal Court, Assessing the Scope and application of Article 21(3) of the Rome Statute' [2016] 18 International Community Law Rev. 72

Dixon R, 'II. Paragraph 2: Definitions of crimes or their elements- (a) Attack' in Triffterer O, (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' notes* (2a edn. C.H. Beck, Munich 2008)

Dixon R, 'Article 7. B. Analysis and Interpretation of Elements- Chapeau' in in Triffterer O, (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' notes* (2a edn. C.H. Beck, Munich 2008)

Dörr O and Schmalenbach K, *Vienna Convention on the Law of Treaties- A commentary* (2ed Springer, 2018)

Ebert FC and Sijniensky RI, 'Preventing Violations of the Right to life in the European and the Inter-American Human Rights Systems: From the *Osman* Test to a Coherent Doctrine on Risk Prevention? (2015) 15 Human Rights Review 2

Farrell M, 'Just How Ill-Treated Were You: An Investigation of Cross-Fertilization in the Interpretative Approaches to Torture at the European Court of Human Rights and in International Criminal Law (2015) 84 Nordic J. Int'l L. 482

Finucane B, 'Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War' [2010] 35 Yale J. Int'l L. 171

Geneuss J, 'Obstacles to Cross-Fertilisation: The International Criminal Tribunals' Unique Context and the Flexibility of the European Court of Human Rights' Case Law' [2015] 84 Nordic J. Int'l L. 404

Giorgou I, 'State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute' [2013] 11 JICJ 1001

Giorgou I, 'State Responsibility and Individual Criminal Liability, A Comparison Between Torture and Enforced Disappearance' (Master Thesis, Geneva Academy of International Humanitarian Law and Human Rights 2011)

Hall CK, 'Art. 7 para 2. (i) Enforced Disappearance of Persons' in Triffterer O, (ed) *Commentary on the Rome Statute of the International Criminal Court: Observers' notes* (2a edn. C.H. Beck, Munich 2008)

Ivanišević B, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court,* (International Center for Transitional Justice, 2008)

Kyriakou N, 'An Affront to the Conscience of Humanity: Enforced Disappearances in the Case Law of the Inter-American Court of Human Rights' [2014] 7 Inter-Am. & Eur. Hum. Rts. J. 17

Kyriakou N, 'An affront to the Conscience of Humanity: Enforced Disappearance in International Human Rights Law' (JD Thesis, European University Institute 2012)

Maculan E, 'Judicial Definition of Torture as a paradigm of Cross-fertilisation: Combining Harmonisation and Expansion' [2015] 84 Nordic J. Int'l L. 456

Modolell Gonzalez JL, 'The crime of Forced Disappearance of Persons According to the Decisions of the Inter-American Court of Human Rights', 10 Int'l Cim. L. Rev. 475 (2010)

Perez Solla MF, *Enforced Disappearances in International Human Rights* (Mc Farland & Company, Inc,. Publishers 2006) 10

Pons N and Dukic D, 'Perspective on the interplay between the Inter-American Court of Human Rights and the International Criminal Court' [2014] 7 Inter-Am. & Eur. Hum Rts. J. 159

Rodenhäuser T, 'Beyond State Crimes: Non-State Entities and Crimes against Humanity' (2014) 27 Leiden J Int'l L 4

Sarkin J, ‘Putting in place Processes and Mechanisms to Prevent and Eradicate Enforced Disappearances around the World’ [2013] 38 S. Afr. Y.B Int’l L. 20

Sarkin J, ‘Why the prohibition of Enforced Disappearance has Attained Jus Cogens Status in International Law’ [2012] 81 Nordic J. Int’l L. 537

Schabas WA, International Criminal Court- A Commentary on the Rome Statute (2nd edn OUP 2016)

Vasiliev S, ‘International Criminal Tribunals in the Shadow of Strasbourg and Politics of Cross-Fertilisation’ [2015] 84 Nordic J. Int’l L. 371

Werle G and Jessberger F, *Principles of International Criminal Law* (3rd edn. OUP 2014)

Online Sources

Dondé Matue J, ‘Los elementos contextuales de los crímenes de lesa humanidad y la Corte Interamericana de Derechos Humanos’ in *Sistema Interamericano de Protección de los derechos humanos y derecho penal internacional* (Konrad-Adenauer-Stiftung e V, 2011). Available at: <https://biblio.juridicas.unam.mx/bjv/detalle-libro/3801-sistema-interamericano-de-proteccion-de-los-derechos-humanos-y-derecho-penal-internacional-tomo-ii>

Giorgou I, ‘Enforced disappearance: time to open up the exclusive club?’ OUP Blog, 2013. Available at: <https://blog.oup.com/2013/12/enforced-disappearance-pil/>

United States Holocaust Memorial Museum, ‘Night and Fog Decree’ (*Holocaust Encyclopedia*, 2018) <https://encyclopedia.ushmm.org/content/en/article/night-and-fog-decree> accessed 5 May 2018.

Williams S, ‘The Conviction of Cambodian Khmer Rouge Leaders– Justice At Last?’ (Ejiltalk.org, 2014) <https://www.ejiltalk.org/the-conviction-of-cambodian-khmer-rouge-leaders-eccc-case-00201-justice-at-last/> accessed 6 May 2018.

List of International Instruments

Conventions and Statutes

American Convention on Human Rights 'Pact of Jan José of Costa Rica' (entered into force 7 August 1978) OAS Treaty Series N 36

Draft Code of Crimes Against the Peace and Security of Mankind, *Yearbook of the International Law Commission*, 1996, 2(2) A/CN.4/SER.A/1996/Add.l, Part 2

Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) 68 OAS Treaty Series 33 ILM 1429

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3; UNGA Res. 61/177 (20 December 2006)

International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3

International Criminal Court, Elements of Crimes ISBN No 92-9227-232-3 (2011)

Rome Statute of the International Criminal Court U.N. Doc.A/CONF.183.9 (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

Statute of the Special Court for Sierra Leone, UN Security Council 1315 (2000) 2178 UNTS 138 (16 January 2002)

Statute of the International Criminal Tribunal for Rwanda (ICTR) UNSC Res. 955 (adopted 8 November 1994)

Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) UNSC, UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN Doc. S/RES/827 (1993)

United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331

Other International Instruments

International Committee of the Red Cross (ICRC) 'Practice relating to Rule 98, Enforced Disappearance' in *IHL Database- Customary IHL,* available at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter32_rule98 >

International Committee of the Red Cross (ICRC) 'Rule 5 Definition of Civilians' in *IHL Database-Customary IHL,* available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule5

Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of crimes committed during the period of Democratic Kampuchea no. 41723 (entered into force 29 April 2005) 2329 UNTS 117

UNTAET, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (6 June 2000) UNATET/REG/2000/15

UNGA Res. 47/133 (18 December 1992) UN Doc. A/47/49

UN Commission on Human Rights 'Question of missing and disappeared persons' Res.20 (XXXVI) (29 February 1980)

Reports

ECOSOC Commission on Human Rights, 'Question of Enforced or Involuntary Disappearances, Special process on missing persons in the territory of former Yugoslavia. Report submitted by MrManfred Nowak, expert member of the Working Group on Enforced or Involuntary Disappearances, responsible for the special process, pursuant to paragraph 4 of Commission resolution 1995/35' (4 March 1996) UN Doc. E/CN.4/1996/36

Inter-American Commission on Human Rights (IACHR) 'Report on the status of human rights in Chile' (25 October 1974) OEA/Ser.L/V/II.

International Criminal Court (ICC), *Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crimes* (2 November 2000) PCNICC/2000/1/Add.2.

ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2017* (4 December 2017)

UNCHR, 'Report submitted by MrManfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46' (7 January 2002) UN Doc. E/CN.4/2002/71

UNGA 'Report of the Working Group on Enforced or Involuntary Disappearances' (31 July 2017) UN Doc. A/HRC/36/39

UNGA, 'Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Mission to Timor-Leste' UN Doc. A/HRC/19/58/Add.1 (26 December 2011)

UNGA 'Communications, cases examined, observations and other activities conducted by the Working Group on Enforced or Involuntary Disappearances' (24 November 2017) UN Doc. A/HRC/WGEID/113/1

Report of the Preparatory Commission for the International Criminal Court. Addendum. Part II, Finalized draft text of the Elements of Crimes (2 November 2000) PCNICC/2000/1/Add.2.

Summary records of the plenary meeting and of the meetings of the Committee of the Whole' *UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (Rome 15 June–17 July 1998) (2002) UN Doc A/CONF.183/13 (Vol. II)

Other Legislation

Bosnia and Herzegovina: Criminal Code (BiH) Official Gazette of Bosnia and Herzegovina nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10 (entered into force 1 March 2003, last amended 2 February 2010)

Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (with inclusion of amendments) Legislative Act of Cambodia NS/RKM/1004/006 (promulgated 27 October 2004)

Table of Cases

Extraordinary Chambers in the Courts of Cambodia

Case 002 (Closing Order) ECCC No. 002/19-09-2007-ECCC/SC (15 September 2010)

Case 002/01 (Judgment) ECCC No. 002/19-09-2007/ECCC/TC (07 August 2014)

Case 002/1 (Appeal Judgement) Supreme Court Chamber ECCC No. No 002/19-09-2007-ECCC/SC (23 November 2016)

Inter-American Court of Human Rights

Case of *Almonacid Arellano v Chile*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 154 (IACtHR, 26 September 2006)

Case of *Anzualdo-Castro v Perú*, Preliminary Objection, Merits, Reparations and Costs, Series C No. 202 (IACtHR, 22 September 2009)

Case of *Blake v Guatemala*, Merits, Series C No. 36 (IACtHR, 24 January 1998)

Case of *Blanco-Romero et. al. v Venezuela*, Merits, Reparations and Costs, Series C No. 138 (IACtHR, 28 November 2005)

Case of *Chitay Nech et al. v Guatemala*, Preliminary Objection, Merits, Reparations and Costs, Series C No. 212 (IACtHR, 25 May 2010)

Case of *Goiburú et al. v Paraguay*, Merits, Reparations and Costs, Series C No. 153 (IACtHR, 22 September 2006)

Case of *Gomes Lund et. al ("Guerrilha do Araguaia") v Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Series C No 219 (IACtHR, 24 November 2010)

Case of *Gómez-Palomino v Perú*, Merits, Reparations and Costs, Series C No. 136 (IACtHR, 22 November 2005)

Case of *Gónzalez Medina and Family v Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 240 (IACtHR, 27 February 2012)

Case of *Heliodoro Portugal v Panamá*, Preliminary Objections, Merits, Reparations, and Costs, Series C No.186 (IACtHR, 12 August 2008)

Case of *Ibsen Cárdenas and Ibsen Peña v Bolivia*, Merits, Reparations and Costs, Series C No. 217 (IACtHR, 1 September 2010)

Case of *Osorio Rivera and Family members v Perú* , Preliminary Objections, Merits, Reparations and Costs, Series C No. 274 (26 November 2013)

Case of *Pueblo Bello Massacre v Colombia* (Merits, Reparations and Costs) Series C No. 140 (IACtHR, 31 January 2006)

Case of *Radilla Pacheco v México*, Preliminary Objections, Merits, Reparations, and Costs, Series C No. 209 (IACtHR, 23 November 2009)

Case of *Rodríguez Vera et al. 'The disappeared from the Palace of Justice' v Colombia*, Preliminary Objection, Merits, Reparations and Costs, Series C. No. 287 (IACtHR, 14 November 2014)

Case of *Valle Jaramillo et al. v Colombia*, Merits, Reparations and Costs, Series C No. 192 (IACtHR, 27 November 2008)

Case of *Velásquez Rodríguez v Honduras*, Merits, Series C No. 4 (IACtHR, 29 July 1988).

International Criminal Court

Prosecutor v Thomas Lubanga Dyilo (Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006) ICC-01/04-01/06 (OA4) (14 December 2006)

Prosecutor v Bosco Ntaganda (Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9) ICC-01/04-02/06 OA5 (15 June 2017),

Prosecutor v. Jean Pierre-Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo' ICC-01/05-01/08 (15 June 2009)

Prosecutor v. Jean-Pierre Bemba ('Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo' ICC-01/05-01/08 (10 June 2008)

Prosecutor v Germain Katanga (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/07 (7 March 2014) para 1109.

Prosecutor v. Katanga and Mathieu Ngudjolo Chui (Decision on the confirmation of charges) ICC-01/04-01/07 (30 September 2008)

Prosecutor V. Laurent Gbagbo (Decision on the confirmation of charges against Laurent Gbagbo) ICC-02/11-01/11 (12 June 2014)

Situation in the Republic of Burundi (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi) ICC-01/17-X-9-US-Exp (25 October 2017)

Situation in the Republic of Côte d'Ivoire (Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire") ICC-02/11 (15 November 2011)

Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya') ICC-01-09 (31 March 2010)

International Criminal Tribunal for the Former Yugoslavia

Prosecutor v Furundžija, IT-95-17/1, Trial Chamber (ICTY, 10 December 1998)

Prosecutor v. Kupreškić, IT-95-16-T (ICTY, Trial Chamber 14 January 2000)

Prosecutor v Kvočka, IT-98-30/1-T, Trial Chamber (ICTY, 2 November 2001)

Prosecutor v Kunarac et al, IT-96-23-T and IT-96-23/1-T, Trial Chamber, (ICTY, 22 February 2001)

Prosecutor v Kunarac et al, IT-96-23 & 23/1, Appeal Chamber (ICTY, 12 June 2002)

Prosecutor v Kordić et al, IT-95-14/2-T, Trial Chamber (ICTY, 26 February 2001)

Prosecutor v Tadic, IT-94-1-T, Trial Chamber (ICTY, 7 May 1997)

Prosecutor v Tadic, ICTY IT-94-1, Appeal Chamber, (ICTY, 2 October 1995)

Prosecutor v, Kristic (TC Judgment) IT-98-33-T (ICTY, 02 August 2001)

Prosecutor v, Kristic, IT-98-33-A, Appeal Chamber, (ICTY, 19 April August 2004)

International Criminal Tribunal for Rwanda

Prosecutor v Jean-Paul Akayesu, ICTR-96-4-T, Trial Chamber (ICTR, 2 September 1998)

Nuremberg Military Tribunals

Trial of the Major War Criminals before the International Military Tribunal Nuremberg (IMT) 14 November 1945-1 October 1946 (Official English Text) Compiled by the Secretariat of the Tribunal under the authority of the Allied Control Authority for Germany. Nuremberg: International Military Tribunal., 1947-1949. (Distributed in the United States by the Department of State.) Vol 1

'*The Justice case'* Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law no.10 (NMT) October 1946-April1949 (Distributed by United States Government Printing Office) Vol 3

Special Court for Sierra Leone

Prosecutor v Brima et al (Appeals Chamber, Judgment) SCSL-2004-16-A (22 February 2008)

Special Panels for Serious Crimes in East Timor

Prosecutor v Rusdin Maubere, Case. No. 23/2003, Trial Chamber (SPSC, 5 July 2004)

War Crimes Chamber of the Court of Bosnia and Herzegovina

Prosecutor v Rašević and Todović, (First Instance Verdict) Case No. X-KR/06/275 (WCC, 28 February 2008)

Prosecutor v. Damjanović, (First Instance Verdict) Case No. X-KR-05/51 (WCC, 15 December 2006)

Prosecutor v. Simsić, (First Instance Verdict) Case No. X-KR-05/04 (WCC ,11 July 2006)