THE VANISHING ACT: PUNISHING AND DETERRING PERPETRATORS THROUGH THE CONCURRENT APPLICATION OF DIVERSE LEGAL REGIMES TO ENFORCED DISAPPEARANCES

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I. INTRODUCTION

Warfare has undergone radical changes since time immemorial allowing parties to experiment with asymmetric warfare to gain the upper hand in a conflict that is deemed to be just, as ascertained subjectively by each party to the conflict. Irrespective of the existence of rules and regulations to minimize the suffering that may be caused to the civilian population, or those who are no longer taking an active part in the hostilities, warring parties often bypass such regulations using law's loopholes which result in the denial of rights to individuals. This may also be accompanied by the circumvention of State Party's obligations towards individuals affected by war.

Notably, since Hitler's regime, "disappearances" have been used as a

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tool of war to stifle dissent and to cause terror to the masses resulting in psychological warfare.[1] National security and counter-insurgency strategies have often been resorted to by States as a justification for the restriction of personal liberties under emergency laws which deviate from the ordinary standards concerning the protection of life and liberty. This in turn, creates ample room for authorities to abuse discretion. The connection that lies between national security and internal instabilities caused by armed conflicts not of an international character has also led to the difficulty in ascertaining whether international humanitarian law (IHL) or international human rights law (IHRL) should apply to a given context. Jurisprudence from various international, *ad hoc* and regional courts indicate that the contemporary legal jurisprudence is receptive to the concurrent application of different legal regimes such as IHL, IHRL and International Criminal Law (ICL) in certain contexts. This is perhaps due to the blurring of lines between conflict classifications and conflicts and "peace" which complicates the process of identifying when *lex generalis* should grant primacy to *lex specialis*.

Protection of individual liberty and prevention of inhuman treatment are primary rights that have been upheld repeatedly in various international conventions.[2] With the adoption of the International Convention for the Protection of All Persons from Enforced Disappearances (Enforced Disappearances Convention), it has been recognized that no one shall be subjected to enforced disappearances irrespective of prevailing circumstances such as a state of war, a threat of war or political instability.[3] It is hence evident that what matters in relation to the prevention of disappearances of individuals is not necessarily the applicable regime, but the substance of the regimes which impose a legal obligation on State Parties to prevent disappearances within their territories. Even though the clear identification of the applicable legal regime may be necessary in certain contexts, this should not be to the detriment of utilizing all available legal, political, administrative and cultural means to promote and protect human rights.[4]

The four Geneva Conventions of 1949 do not comprise of direct

1. *See generally* JOSÉ ZALAQUETT, THE EMERGENCE OF 'DISAPPEARANCES' AS A NORMATIVE ISSUE (Carrie Booth Walling & Susan Waltz, Human Rights: From Practice to Policy 2010).

2. *See generally* Universal Declaration of Human Rights, art. 3 (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 9 (Dec. 16, 1966), 999 U.N.T.S. 171 [hereinafter International Covenant]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

3. International Convention for the Protection of All Persons from Enforced Disappearances, Dec. 20, 2006, 2716 U.N.T.S. 3 [Enforced Disappearances Convention].

4. *See* Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 63 (Sept. 22, 2009).

provisions dealing with missing persons or forcibly disappeared persons.[5] However, Article 3, common to all four conventions, which lists fundamental guarantees, grants sufficient coverage to prevent forced disappearances in contexts of armed conflicts.[6] In particular, Article 3(1)(a) prohibits any act including cruel treatment and torture that may cause violence to life and person. This is supplemented by Article 33 of Additional Protocol I (AP I) which requires States involved in international armed conflicts (IACs) to search for persons and record information as soon as circumstances permit or "at the latest from the end of active hostilities."[7] Article 4 of Additional Protocol II (AP II) lists "fundamental guarantees" that are expected to be protected in respect of persons who are not taking a direct part in the hostilities in contexts where there are armed conflicts on the territory of a high contracting party between its State armed forces and dissident or other organized armed groups which function under responsible command.[8] These fundamental guarantees prohibit any form of violence to life, any form of collective punishment and all acts resulting in inhuman or degrading treatment. Moreover, Rule 117 of the customary international humanitarian law (CIHL) states that: "each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate."[9]

Irrespective of the classification of the conflict, parties to the conflict, be it a State Party or a dissident armed force, are required, at least under customary international humanitarian law to search for and provide information concerning missing persons to their family members. Even in circumstances that rule out the application of IHL or ICL as *lex specialis*, IHRL concerning the State's obligation to protect life and

5. *But see* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 32-33, Jan. 8, 1977, 1125 U.N.T.S. 17512 [hereinafter Protocol I]. The application of AP I is however limited to international armed conflicts.

6. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

7. Protocol I, *supra* note 5, art. 3.

8. *See* Protocol Additional to the Geneva Conventions of 12 Aug 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, June 8, 1977, 1125 U.N.T.S. 609, 614 [hereinafter Protocol II].

9. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME 1: RULES 421 (2005).

liberty will continue to apply due to the international and domestic instruments that continue to bind States to their human rights obligations.

States often attempt to rely on the rule against retroactivity when called upon to fulfill international obligations for violating the right to be free from torture or disappearances. Thus, attempting to restrict State liability only to cases arising subsequent to the direct undertaking of a duty to prevent such violations domestically. However, contemporary jurisprudence supports the proposition that perpetrators of involuntary disappearances can be penalized under domestic jurisprudence based on ex-post facto legislative enactments without violating the principle of retroactivity provided that the fate of the missing person remains unclarified.[10] The principle against retroactivity does not apply to enforced disappearances which are categorized as permanent and continuous crimes which amount to a crime against humanity, especially when used as an illegal method of warfare. This warrants a separate assessment inquiring into the use of enforced disappearances as a method of warfare.

II. FORCIBLE DISAPPEARANCES AS A METHOD OF WARFARE

Illegal arrests, detentions, and extrajudicial executions are commonly associated with disappearances especially in States experiencing wars or political instability. The *Nacht und Nebel* (Night and Fog) directive of the Nazi regime,[11] devolution of arresting powers to "secret" police forces in Chile,[12] national security laws of Argentina during its military domination,[13] "national security doctrine" of Guatemala,[14] "anti-subversive strategies" justified under military jurisdiction of Peru,[15]

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10. *See* Human Rights Comm., Selimović v. Bosnia, Comm 2003/2010, ¶ 7.2, U.N. Doc. CCPR/C/111/D/2003/2010 (July 17, 2014).

11. Brian Finucane, *Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War*, 35 YALE J. INT'L L. 171, 175 (2010).

12. In Chile, under General Pinochet, powers of arrest were devolved to the secret police named *Dirección de Inteligencia Nacional,* which is regarded as having caused forced disappearances. *See, e.g.*, REPORT OF THE CHILEAN NATIONAL COMMISSION ON TRUTH AND RECONCILIATION 8 (University of Notre Dame Press ed. & trans., 1993), *available at* http://www.usip.org/files/resources/collections/truth_commissions/Chile90-Report/Chile90-Report.pdf (posted Feb. 22, 2002).

13. *See generally* ARGENTINE NATIONAL COMMISSION ON DISAPPEARED, NUNCA MAS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED (Farrar Straus & Giroux 1986).

14. Rio Negro Massacres v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250 ¶ 57 (Sept. 4, 2012).

15. La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, at 9, "Partial Acknowledgement of Liability" (Nov. 29, 2006).

apartheid laws of South Africa,[16] Khmer Rouge regime's violations in Cambodia,[17] martial laws and counter-insurgency programs in the Philippines,[18] Nepal's Terrorist and Disruptive Activities (Prevention and Control) Ordinance authorizing arrests on suspicion,[19] and war and political instabilities in Sri Lanka,[20] have led to the commission of many disappearances with impunity. Patterns with which disappearances have occurred in all parts of the world indicate that enforced disappearances have been utilized as a tool of warfare particularly to eliminate "enemies" extra-judicially and to stifle dissent.

What supports the contention that involuntary or forced disappearances have been resorted to as a tool of warfare is the systematic nature in which large numbers of individuals are completely removed from the protection of the law. Often, there is no evidence to prove the death of a missing individual and the circumstances leading to the arrest or detention remain ambiguous. Records pertaining to arrests and detentions are not made available to family members and any knowledge concerning arrests and detentions which have subsequently resulted in a person's disappearance are generally denied by responsible authorities. Domestic legal remedies such as a writ of *habeas corpus*, a writ of *Amparo*, fundamental rights jurisprudence, and criminal law habitually prove inadequate in ascertaining the rights of family members in their search for truth concerning the disappearance of loved ones. Their plight is further aggravated by having to lodge complaints continuously at different commissions of inquiry and other bodies to no avail. Confusion that arises with not knowing what came of their loved ones are further increased by having to make sense of conflicting responses given by different authorities and/or the media.[21] Family members are also exposed to other tragic occurrences owing to the stress caused by the ambiguity associated with disappearances.[22]

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16. TIMOTHY J. STAPLETON, A MILITARY HISTORY OF SOUTH AFRICA: FROM THE DUTCH KHOI WARS TO THE END OF APARTHEID 152 (2010).

17. *See generally* THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA: ASSESSING THEIR CONTRIBUTION TO THE INTERNATIONAL CRIMINAL LAW (Simon M. Meisenberg & Ignaz Stegmiller eds., 2016).

18. Lorena P. Santos & Maria Esmeralda de la Paz-Macaspac, *Families of the Desaparecidos in the Philippines: Turning Sadness and Longing to Flames of Justice*, *in* WE NEED THE TRUTH: ENFORCED DISAPPEARANCES IN ASIA 88, 97 (Franc Kernjak ed., 2009).

19. *See* Human Rights Comm., ¶ 2.1, U.N. Doc. CCPR/C/112/D/2051/2011 (Oct. 29, 2014).

20. *See generally* ASOKA BANDARAGE, THE SEPARATIST CONFLICT IN SRI LANKA: TERRORISM, ETHNICITY, POLITICAL ECONOMY (2009).

21. Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 297 (Feb. 24, 2011).

22. *See* Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 253, ¶ 151 (Nov. 20, 2012). *See also* Maharjan v.

Unlawful arrests and detentions, prolonged exposure to torture and isolation, secret executions, concealment of mortal remains, and the refusal of authorities to acknowledge that a person is missing or dead makes disappearances an extremely problematic tool of warfare. This promotes terror and mistrust amongst the civilian population and renders null the faith in legal frameworks and remedies. States generally dispute actions filed by the next of kin in international or regional courts or committees, concerning the disappearance of a loved one, on the basis of not exhausting domestic remedies.[23] In *Sedhai v. Nepal*, Nepal attempted to contest the merits of the application arguing that two commissions are expected to be established subsequent to the enactment of enabling legislation which seek to provide an opportunity for the next of kin of missing persons to "present their cases and express their views."[24] This was contested by Sedhai who argued that "[t]here is no certainty that the Bills will be passed, when they will be passed, or how they will affect victims' rights[.]"[25] The Human Rights Committee (HRC) accepted Sedhai's arguments and concluded that Nepal is under an obligation to provide an effective remedy by conducting a prompt and thorough investigation, providing the next of kin with detailed information about the State investigation, releasing the missing person if he is still in incommunicado detention, handing over remains if the victim is deceased, and providing adequate compensation to the victims.[26] The conclusions of the HRC in relation to such violations are also accompanied by the HRC's monitoring mechanism, which in this case was activated by HRC requesting Nepal to submit information concerning the measures that Nepal has adopted with respect to HRC's views within 180 days.[27] However, the expected fulfillment of the obligations undertaken by States is, according to the HRC, "not an obligation of results, but of means," which is required to be interpreted in a manner that does not impose on the State an undue burden.[28] This

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Nepal, ¶ 2.8, U.N. Doc. CCPR/C/105/D/1863/2009 (July 19, 2012). In *Maharjan* it was discovered that the victim's father suffered from ill health and the victim's wife who was eight months pregnant at the time of her husband's disappearance suffered complications at child birth caused by the mental trauma associated with the disappearance. Moreover, the family had also slid into economic crisis due to the disappearance of the sole breadwinner of the family.

23. *See, e.g.*, Human Rights Comm., Sedhai v. Nepal, ¶ 7.3 U.N. Doc. CCPR/C/108/D/1865 /2009 (July 19, 2013). *But see* Human Rights Comm., Pratt & Morgan v. Jamaica, ¶ 12.3 U.N. Doc. CCPR/C/35/D/210/1986 (Apr. 6, 1989) (explaining that the HRC stated that the rule on exhausting domestic remedies does not require to resort to actions with no prospect of success).

24. Human Rights Comm., Sedhai, *supra*, note 23.

25. *Id.* ¶ 5.1.

26. *Id.* ¶ 10.

27. *Id.* ¶ 11.

28. Human Rights Comm., Rizvanovic v. Bosnia, ¶ 9.5, U.N. Doc. CCPR/C/110/D/

approach was reiterated in *Duric v. Bosnia*.[29] This could perhaps mean that families of the disappeared may not be awarded adequate compensation if it is considered to be imposing a great financial burden on the State.

III. ENFORCED DISAPPEARANCES COMMITTED BY PRIVATE PERSONS AND NON-STATE ACTORS

Involuntary disappearances cause the highest form of danger when carried out by private persons whose acts cannot be attributed to a State Party. However, it may be possible to contend that such acts can be attributed to the State, as States are required by law to protect their citizens from harm irrespective from the source of harm. In *Goiburú et al. v. Paraguay*, Judge Cançado-Trindade, in conceptualizing crimes against humanity, argued that even if such crimes are committed by private persons, the acts can be attributed to State policies. He contended:

> Such crimes are perpetrated by individuals, but following State policies, with the powerlessness or tolerance or connivance of society, which does nothing to prevent them; explicit or implicit, State policy is present in crimes against humanity, which even rely on the use of State institutions, personnel and resources. Such crimes are not limited to a simple isolated action of deluded individuals. They are coldly calculated, planned and executed.[30]

This approach may be applicable to internal conflict situation where national security, emergency regulations, laws against terrorism and sectarian ideologies are used by State officials to arouse negative public sentiments against identified groups of vulnerable individuals. In such contexts, even if the State may not have directly committed the crime, liability cannot be stripped off of the State for its implicit involvement in inciting the crime as well as for inaction and abstention concerning crime prevention.[31]

The above line of arguments is unemployable in contexts of non-international armed conflict, where non-state armed actors may have

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1997/2010 (Mar. 21, 2014).

29. *See* Human Rights Comm., Duric v. Bosnia, ¶ 9.5, U.N. Doc. CCPR/C/111/D/1956/2010 (July 16, 2014).

30. Goiburú et al. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 40 (Sept. 22, 2006).

31. *See generally* U.S. Diplomatic and Consular Staff in Tehran (United States v. Iran), Judgment, 1980 I.C.J. Rep. 3 (May 24) (for instance analogically relevant arguments were raised).

carried out enforced disappearances as a mechanism of terrorizing the general public in areas that are effectively not under the control of the State. This challenges the notion of attributability. Recognizing this reality, Professor Neuman, writing a separate opinion in *Rizvanovic v. Bosnia*, noted that the existence of enforced disappearances does not automatically lead to the conclusion that the State is liable for violating the right to liberty or inherent dignity of persons.[32] However, he emphasized that States have an obligation to adopt positive measures to prevent the infliction of torture on persons within their power.[33] The HRC observed in *Duric v. Bosnia* that the term "enforced disappearances" may be used in an extended sense to refer to enforced disappearances that may have been carried out by forces "independent of, or hostile to, a State [P]arty," meaning that States should be liable even in such contexts.[34] However, the separate opinions attached to both *Rizvanovic* and *Duric* manifest the differences of opinions held by the members of the HRC in deciding to attribute to States the liability for disappearances committed by non-State actors.

The stance adopted by the HRC in the above cases may pose two distinct challenges. Firstly, the State Parties may seek to attribute liability to non-State actors thereby effectively evading State obligations. This may especially be so in circumstances where there is sufficient proof to indicate that the non-State actors have had effective territorial and/or administrative control of a certain portion of a State Party's territory during a distinct time period. Hence, any involuntary disappearances that may have been committed in such a geographical scope within the said temporal scope may remain unresolved. Secondly, the next of kin of disappeared individuals may face victimization as the State may refuse to grant reparations for an offense, which is not directly attributed to the State. This may, in turn, contribute to impunity of State Parties which may resort to committing enforced disappearances during turbulent time periods within conflict ridden territories as the legal framework does not appear to be sufficiently wide to affix liability on a State party. It is however, preposterous to propose that States can absolve themselves from the obligation to prosecute individuals who have committed crimes against humanity such as enforced disappearances within their territories.

In *Hero v. Bosnia* it was argued that State obligation arises not on a basis of attributability, but on the basis of "the duty of the State to protect

32. Human Rights Comm., Rizvanovic v. Bosnia, Individual opinion of Committee member Gerald L. Neuman, joined by Committee member Anja Seibert-Fohr (concurring), at 15, U.N. Doc. CCPR/C/110/D/1997/2010 (Mar. 21, 2014).

33. *Id.*

34. Human Rights Comm., Duric, *supra* note 29, ¶ 9.3; *see also* Human Rights Comm., Kozljak v. Bosnia, ¶ 9.3, U.N. Doc. CCPR/C/112/D/1970/2010 (Oct. 28, 2014).

all individuals under its jurisdiction from acts committed by private persons, or groups of persons, which may impede the enjoyment of their human rights."[35] The HRC reiterated the stance adopted in *Duric* and observed that the authors of the case have neither alleged that the State was directly responsible nor denied the violations committed by the armed forces of a foreign State that did not recognize the independence of Bosnia and Herzegovina. Bosnia did not contest the characterization of the events described by the authors in *Hero*. Moreover, the HRC has previously accepted the extended liability of States in respect of enforced disappearances. Accordingly, in *Hero*, the HRC noted that Bosnia is liable for disappearances alleged therein. This approach is more consistent with the ideological underpinnings of IHL, ICL and IHRL which seek to reduce human suffering and protect individual rights of civilians irrespective of the prevailing sociopolitical contexts of countries.

Removal of individuals from the protection of the law due to various reasons such as the complicity of private persons in international criminal acts results in the denial of juridical personality to individuals. This further complicates access to justice sought by the next of kin of missing persons.[36] It is also incorrect to assume that State responsibility for preventing disappearances only arises if an "unlawful" arrest or detention is made. *Gelman v. Uruguay* reiterated the stance of the United Nations Working Group on Enforced Disappearances stating that "[t]he protection of a victim from enforced disappearances must be effective upon the act of deprivation of liberty, whatever form such deprivation of liberty takes, and not be limited to cases of illegitimate deprivations of liberty."[37] This could be interpreted to mean that States should extend protection to individuals not only when unlawful deprivations of liberty occur, but also in connection to lawful detentions to ensure than an individual so detained remains protected and accounted for and safe from being subject to an involuntary disappearance.

IV. ENFORCED DISAPPEARANCES AS CONTINUING CRIMES

Involuntary disappearances transcend from a one-time single offense

35. Human Rights Comm., Hero v. Bosnia, ¶ 3.2, U.N. Doc. CCPR/C/112/D/1966/2010 (Oct. 28, 2014).

36. González Medina v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 240, ¶ 186 (Feb. 27 2012); Human Rights Comm., Selimovic, *supra* note 10, ¶ 3.6.

37. Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 67 (Feb. 24, 2011).

into a continuing crime that generates other violations, the effects of which will spill over after the end of hostilities or instabilities.[38] The acceptance by various courts and institutions of the practical reality of continuity associated with the commission of a disappearance is significant in ascertaining the liability of State Parties. For instance, at the end of a protracted conflict which may have lasted for several decades, family members of missing persons may begin to search for their loved ones. The States, in such circumstances may attempt to prevent quests for missing persons on the basis that a long time has lapsed since the occurrence of the alleged violation. If this approach is to be accepted, impunity concerning past violations will continue unabated. This is nonetheless pre-empted by the general acceptance of involuntary disappearances as a continuing offense. Even if an argument on *ratione temporis* is raised in a case concerning disappearances, a court would only accept such a preliminary objection on exceptional grounds on a case by case basis.[39] Moreover, courts determining the extent of international law's reach in cases of disappearances have determined that both general liability of States and individual criminal liability of perpetrators of crimes against humanity have to be ascertained[40] and that perpetrators should be penalized to avoid impunity arising out of the commission of enforced disappearances.[41]

Prosecutor v. Krnojelac reiterates the notion that many other violations arise in conjunction with forced disappearances.[42] Milorad Krnojelac served as the commander of a Serb detention camp commonly referred to as "KP Dom" in a village named Foča in the Bosnian border adjoining Serbia and Montenegro. He was prosecuted in the International

38. *See* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, ¶ 86 (July 6, 2010); Gelman, (ser. C) No. 221, ¶ 73; Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 179 (Nov. 24, 2010) (emphasizing the continuing nature of enforced disappearances to a temporal scope that transcends an armed conflict or a situation of political instability).

39. *See generally* Gomes, (ser. C) No. 219, ¶¶ 15-19.; Serrano Cruz Sisters v. El Salvador, Preliminary Objections, Inter-Am. Ct. H.R. (ser. C) No. 118, ¶¶ 78-79 (Nov. 23, 2004).

40. La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 157, "Partial Acknowledgement of Liability" (Nov. 29, 2006).

41. Ticona Estrada v. Bolivia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 191, ¶ 85 (Nov. 27, 2008).

42. *See generally* Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia, ¶¶ 110-12 Sept. 17, 2003); Gómez-Palomino v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 136, ¶¶ 54.2-54.3 (Nov. 22, 2005); Ticona Estrada v. Bolivia, Merits, Reparations, and Costs, Judgment, ¶ 87; Río Negro Massacres v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶¶ 109, 118 (Sept. 4, 2012); González Medina and Family v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 240, ¶ 172 (Feb. 27, 2012).

Criminal Tribunal for former Yugoslavia (ICTY) where many witnesses described unlawful arrests followed by inhumane treatment such as being forced to eat grass and subsequently being tortured or forcibly disappeared. He was convicted by the ICTY for knowing or having reason to know that the subordinates under his command were committing violations including forced disappearances. This conviction was further justified as it was proven that the highest number of disappearances associated with arrests made by KP Dom officials occurred from August 1992—October 1992, the period within which Krnojelac was the commander of the said detention camp.

In *Kupreškić et al.*, the ICTY's Trial Chamber broadly defined what may fall into the category of "other inhumane acts" under crimes against humanity referred to in Article 5 of the ICTY Statute. Accordingly, the Trial Chamber determined that enforced disappearances constitute "other inhumane acts" such as the suffering caused to family members. It was also held in *Prosecutor v Jelisić* that causing the disappearance of even a limited number of persons selected from within a community may amount to genocide if such disappearances results in an impact upon the survival of the entire community.[43] Accordingly, it is clear that enforced disappearance not only affect the individuals subject to the disappearance but also the society at large.

V. ENFORCED DISAPPEARANCES AS A CRIME AGAINST HUMANITY

Respectively, Article 50, 51, 130 and 147 of GC I – IV list, *inter alia*, willful killing, torture or inhuman treatment, and willfully causing great suffering or serious injury to body or health as a grave breach of the obligations undertaken under the Geneva Conventions.[44] Since disappearances that occur during conflict periods are often linked to subsequent extra-judicial executions,[45] torture or the causing of bodily or mental suffering to victimized individuals, States committing such acts or omitting to take effective measures to prevent the commission of such acts within their territories despite their capacity to adopt such preventive measures, can be regarded as committing a grave breach of the obligations listed in the Geneva Conventions. Not only does international law recognize the commission of involuntary or forced disappearances as

43. Prosecutor v Radislav Krstic, Case No. IT-98-33-A, Judgment, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

44. GC I, *supra* note 6, art. 50; GC II, *supra* note 6, art. 51; GC III, *supra* note 6, art. 130; GC IV, *supra* note 6, art. 147.

45. *See* 19 Merchants v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, ¶ 154 (July 5, 2004).

an international crime, but it also regards such commissions as amounting to a crime against humanity resulting in grave breaches violating fundamental guarantees sought to be protected under the Geneva Conventions.[46]

Even though the ICTY and the International Criminal Tribunal for Rwanda (ICTR) tried cases concerning enforced disappearances and missing persons, the statutes setting up the tribunals have not specifically referred to the commission of forced disappearances as a crime against humanity. However, the Inter American Court of Human Rights (Inter-Am. Ct. H.R.) assertively declared in *Goiburú et al. v. Paraguay* that enforced disappearances should be regarded as an absolutely prohibited crime within *jus cogens* norms of law, which, if violated, would result in a grave breach of international law.[47] Further developing the *jus cogens* norms pertaining to disappearances, the IACHR stated in *Contreras et al. v. El Salvador* that the "corresponding duty to investigate and punish"[48] perpetrators responsible for causing individuals to disappear has become a *jus cogens* norm. Judge Cançado-Trinidate, writing a separate opinion for Inter-Am. Ct. H.R. in *Efrain Bámaca Velásquez v. Guatemala*, noted that not even cultural diversity can prevent the criminalization of grave violations of human rights.[49] He further noted that there is a rising tendency to advance ICL which has resulted in the creation of a "true international legal regime" against crimes such as forced disappearances.[50] This view entrenches the notion that the prohibition against heinous crimes in international law has achieved the status of *jus cogens* and *erga omnes* norms.

The Rome Statute of the International Criminal Court lists the commission of enforced disappearances under Article 7—crimes against humanity and explains enforced disappearances as:

> 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

46. *See* International Covenant, *supra* note 2, art. 5.

47. Goiburú et al. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 62 (Sept. 22, 2006); Río Negro Massacres v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 114 (Sept. 4, 2012).

48. La Cantuta (ser. C) No. 162 at ¶ 157; Contreras et al. v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 83 (Aug. 31, 2011); Human Rights Comm., Selimović, *supra* note 10, ¶ 3.2.

49. *See* Bámaca Velásquez v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶¶ 25-26 (Nov. 25, 2000).

50. *Id.* at 26.

whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.[51]

An explanation of elements of enforced disappearances under Article 7 of the Rome Statute is contained in *Situation in the Republic of Côte d'Ivoire* in the Pre-trial Chamber decision of the International Criminal Court (ICC).[52] This decision emphasizes that the acts of arrests, detention or abduction should be followed or accompanied by a refusal to acknowledge or reveal information pertaining to the loss of liberty of the individual for the crime of enforced disappearances to be complete.[53] This case further reveals the systematic nature of the crime of enforced disappearances which were committed "on a large scale, as part of plan or in furtherance of a policy, or in the context of, or in association with armed conflict."[54] The ICC emphasized the necessity of admitting the situation that has arisen in Côte d'Ivoire in the event of its investigation being domestically authorized as it was evident to the chambers that national proceedings are either absent or insufficient to prosecute crimes of such gravity.[55] "It is important to note however, that liability for crimes against humanity under the Rome Statute is not dependent on the existence of an armed conflict."[56]

The continuing impact of disappearances, which spill over into the post-war or post-conflict era, is evident in the nature of remedies that are sought by the family members of victims of disappearances. This aspect may be highlighted with reference to the prosecutor's arguments that were raised in the famous *Lubanga* judgment.[57] In *Lubanga*, the prosecutor argued that "reparations should not be limited to financial awards" and that remedies could be provided in other ways such as through a "full public disclosure of the truth; the search for individuals who disappeared and information on the identities of those who were abducted; an official declaration or a judicial decision . . . ; a public apology; and public commemorations and tributes to victims."[58]

The extent of State liability that arises due to the permanent and continuing nature of enforced disappearances was explained in *Río Negro*

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51. Rome Statute of the International Criminal Court, art. 7, July 1, 2002, 2187 U.N.T.S. 3.

52. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-02/11-14, Decision on the Situation in the Republic of Cote D'Ivoire, ¶¶ 27-29 (Oct. 3, 2011).

53. *See id.* at 33, ¶ 77.

54. *See id.* at 82, ¶ 205.

55. *See id.* at 83, ¶ 206.

56. David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflicts*, 42 ISRAEL L. REV. 8, 38 (2009).

57. Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations (Mar. 14, 2012).

58. *See id.* at 43, ¶ 110.

Massacres v. Guatemala.[59] The Inter-Am. Ct. H.R. held that States cannot absolve themselves from liability even upon discovering the remains of a person declared missing, as the States are logically required to collect evidence and examine the remains in order to ascertain whether the remains belong to the individual concerned.[60] It was further remarked that the crime of enforced disappearances continues until the remains are identified by a "competent professional."[61]

However, it is questionable whether the liability of the State can be eliminated by the release of an individual who had been held in incommunicado detention resulting in him/her being regarded, even temporarily, as a "missing person." It is proposed that this unique situation should be viewed from the humanitarian perspective considering the threat that is posed to the life of the individual. The liability that the State should bear in such contexts was articulated best in the separate concurring opinion written by Christine Chanet and Cornelis Flinterman in *Aboufaied v. Libya*.[62]

Chanet and Flinterman contend that: "In the matter of enforced disappearance, whether the victim is alive or dead, the mere fact of incommunicado detention which cuts the individual concerned off from the human community by severing contact between them, even temporarily, entails a risk to life for which the State is accountable."[63] Inquiry into enforced disappearances is habitually complicated by the requirement of proof. Family members seeking redress for suffering caused by the disappearances of a loved one may be required to provide proof of their suffering which cannot be expressed in quantifiable terms.

Taking this factor into account, the Inter-Am. Ct. H.R. held in *La Cantuta v. Peru* that proof of suffering, distress or terror is unnecessary given that "it is human nature" for an individual affected by disappearances to experience such trauma.[64] Such determinations further indicate that judges should play a proactive role to expand the parameters of legal protection that can be awarded to victims of crimes against humanity.[65] In this respect, it is unfortunate for judges to solely rely on technicalities when there is sufficient evidence to indicate that an

59. Río Negro Massacres v. Guatemala, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, (Sept. 4, 2012).

60. *See id.* at 54, ¶ 113.

61. *Id.*

62. Human Rights Comm., Aboufaied v. Libya, 21, U.N. Doc. CCPR/C/104/D/1782/2008 (Mar. 21, 2012).

63. *Id.* at 21; *see also* Human Rights Comm., Djebrouni v. Algeria, U.N. Doc. CCPR/C/103/D/1781/2008 (Oct. 31, 2011).

64. La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 217, "Partial Acknowledgement of Liability" (Nov. 29, 2006).

65. *Id.* at 23.

individual has been subject to a crime against humanity.

In *Gomez-Palomino v. Peru*, when Peru submitted the argument that the prosecution should submit "due proof" of the forced disappearance, the Inter-Am. Ct. H.R. stated that legal provisions demanding due proof complicate statutory construction as disappearances are generally characterized by clandestine activities.[66] The Inter-Am. Ct. H.R.further noted that the State should comply with its international obligations in good faith especially due to the State being in a position to control the mechanisms to investigate incidents that have occurred within its territory.[67] The court further affirmed the Peruvian Ombudsman's position that there is no precedent in international law to impose the additional condition of "due proof" on family members of missing persons and that such a construction would lead to fostering impunity.[68]

Inter-Am. Ct. H.R.has further remarked that there is a heightened necessity to detach the burden of proof from next of kin when the State is hindering the possibility of ascertaining facts.[69] Even though IHL and ICL recognize the commission of enforced disappearances as a grave breach and a crime against humanity, IHRL only recognized the commission of involuntary disappearances as a crime formally under IHRL in 2006 with the adoption of the International Convention for the Protection of All Persons from Enforced Disappearances (Enforced Disappearances Convention).[70] This is perhaps due to international law's stance that such disappearances mostly occur during wars and other political instabilities as opposed to in peace times where IHRL takes precedence of application.

Proof of the above line of thinking can further be found in Article 1(2) of the Enforced Disappearances Convention which seeks to prevent the possibility of State Parties from resorting to exceptional circumstances such as war and political instabilities to justify enforced disappearance.[71] This pre-empts any future attempt to deny State liability in retrospect regardless of the circumstances leading to disappearances. However, even prior to the adoption of the Enforced Disappearances Convention, the general norm of IHRL was that prohibition against enforced disappearance is absolute under the provisions guaranteeing right to life

66. Gomez-Palomino v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 136, ¶¶ 105-06. (Nov. 22, 2005).

67. *Id.* ¶ 106.

68. *Id.* ¶ 107.

69. Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 197 (Nov. 23, 2009).

70. Enforced Disappearance Convention, *supra* note 3.

71. *Id.*

and liberty and freedom from torture.[72]

The conceptual parameters of "crimes against humanity" should be reassessed in relation to the causing of persons to disappear in conflict contexts, and in any context for that matter, as the victimization transcends the direct victim who is made to disappear.[73] The family members continue to live in ambiguity that is created by State officials who either deny knowledge of disappearances or abstain from adopting effective measures to inquire into the disappearances. Prolonged judicial processes could also aggravate the suffering of family members. It was held in *La Cantuta v. Peru* that perpetrators of disappearances "attempted to create a 'legal limbo' through the [S]tate's failure to admit that they were being held in its custody."[74] It further held that "the violation of the right to mental and moral integrity of the victim's next of kin," caused by continued refusal of State authorities to supply information on the victim's whereabouts, amounts to a "direct consequence" of the disappearance.[75] In some contexts, the suffering experienced by the family members has been aggravated by unjust domestic legal procedures which have been put in place by States by requiring such families to obtain "Declarations of Death" through a non-litigation procedure.[76] Such processes not only results in the re-victimization of family members of missing persons, but also renders domestic remedies futile as the families are compelled to seek alternative procedures to redress the suffering experienced.

In many conflict contexts, especially those concerning conflicts not of an international character, when an arrest is made under emergency laws or prevention of terrorism laws, the society's tendency is to attribute terrorism to the individual being arrested as well as his/her next of kin. Social ostracization and stigmatization that occur simultaneously with such events contribute to the further victimization of family members in the event the arrested person is later declared missing. In such contexts where the disappeared individual has been branded as a traitor or a terrorist, the family members themselves face stigmatization by association.[77] Family dynamics are invariably and irretrievably affected

72. Human Rights Comm., Giri v. Nepal, ¶ 5.4, U.N. Doc. CCPR/C/101/D/1761/2008 (Mar. 24, 2011).

73. Rome Statute, *supra* note 51, art. 7.

74. La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 118, "Partial Acknowledgement of Liability" (Nov. 29, 2006).

75. *Id.* ¶ 123.

76. Human Rights Comm., Selimović, *supra* note 10, ¶ 13.

77. *See generally* 19 Merchants v. Columbia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, at 33 (July 5, 2004; La Cantuta, (ser. C) No. 162, at 70, ¶ 125(d); U.N. Secretary General, *Report of the Secretary General's Panel of Accountability in Sri Lanka*, ¶ 352 (Mar. 31, 2011); Radilla-Pacheco v. Mexico, Preliminary Objections, Merits,

due to the socio-legal prejudices such as those analyzed above.[78]

VI. INVOCATION OF UNIVERSAL JURISDICTION TO TRY CASES OF ENFORCED DISAPPEARANCES

According to Bantekas and Nash, acts resulting in grave breaches of humanitarian law and crimes against humanity have attracted universal jurisdiction *inter alia*, based on the heinous, repugnant nature and scale of such offenses.[79] Universal jurisdiction has also been upheld in cases concerning IHRL and ICL.[80] Thus, in circumstances where a State Party refuses to investigate and prosecute enforced disappearances that have occurred within its territory, the international community should be in a position to demand that the State concerned conduct an effective investigation into such offenses. Such mobilization should be effected to compel States to provide effective remedies and to deter and prevent recurrence of enforced disappearances.[81] In fact, in cases where States have refused to adopt effective domestic measures to combat impunity arising out of enforced disappearances or extrajudicial executions, the international community has sought to adopt special measures including the adoption of special conventions, suspension of statutes of limitations, and the invocation of universal jurisdiction.[82] As enforced disappearances are considered continuing, permanent and imprescriptible offenses, Statutes of Limitations are generally considered to be inapplicable.[83]

Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 136 (Nov. 23, 2009).

78. La Cantuta, (ser. C) No. 162, ¶ 126.

79. ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 156 (2d ed. 2003).

80. Goiburú et al. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 33 (Sept. 22, 2006).

81. *See also* Inst. of Int'l L., Krakow Sess. Res. 2005, Universal Criminal Jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes, in Seventeenth Commission, ¶ 3(c) (2005) (dictating that a State having custody over an alleged offender should ask the State where the crime was committed or the alleged perpetrator's State of nationality whether it is prepared to prosecute the alleged perpetrator. The State having custody of a perpetrator may only commence proceedings against such person if the States with territorial or nationality liaisons are manifestly unwilling or unable to prosecute the alleged perpetrator.).

82. Ignacio Ellacuria et al. v. Salvador, Case 10.488, Inter-Am. Comm'n H.R., Report No. 136/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999); *see also* Irma Meneses Reyes et al. v. Chile, Case 11.228, 11.229, 11.231, 11.182, Inter-Am. Comm'n H.R., Report No. 34/96, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 47 (1996); Samuel Alfonso Catalan Lincoleo v. Chile, Case 11.771, Inter-Am. Comm'n H.R., Report No. 61/01, OEA/Ser.L/V/II.111, doc. 20 rev. ¶ 36 (2001); Lucio Parada Cea et al. v. Salvador, Case 10.480, Inter-Am. Comm'n H.R., Report No. 1/99, OEA/Ser.L/V/II.106, doc. 6 rev. ¶ 113 (1999).

83. Chanfeau Orayce v. Chile, 39.Case 11.505, Inter-Am. Comm'n H.R., Report No. 25/98, OEA/Ser.L/V/II.102, doc. 6 rev. ¶ 39 (1998); *See also* Monsenor Oscar Arnulfo Romero y Galdamez v. El Salvador, 134.Case 11.481, Inter-Am. Comm'n H.R., Report No. 37/00,

When enforced disappearances are resorted to as a method of warfare, systematic and widespread commissions of the crime are invariably implied. The "nature and scale" of offenses referred to in the first criterion listed by Bantekas and Nash undoubtedly encompass the crime of enforced disappearances, especially when carried out in a widespread and systematic manner so as to endanger vulnerable groups thus resulting in them being ousted from the protection of ordinary law. Purposive interpretation of enforced disappearances should hence permit the invocation of universal jurisdiction to try offences of enforced disappearances.

Even if the above line of arguments concerning the possibility of invoking universal jurisdiction to deter and penalize the commission of enforced disappearances is opposed, it is difficult to contend, if not absolutely impossible, that the right to be free from enforced disappearances is a *jus cogens* and *erga omnes* norm. Therefore, States cannot construe this right as non-absolute even under challenging circumstances such as an internal armed conflict or political instability. This position has also found judicial currency in *Blake v. Guatemala* where Judge Cançado-Trinidade opined that:

> In our days, no one would dare to deny the objective illegality of systematic practices of torture, of summary and extra-legal executions, and of forced disappearances of persons, - practices which constitute crimes against humanity, - condemned by the universal juridical conscience, parallel to the application of treaties.[84]

He elevates the *jus cogens* norms to the same height of adherence that is commanded for instance by a treaty which a State Party has officially undertaken. Moreover, the Institute of International Law has declared in "Universal Criminal Jurisdiction with regard to the Crime of Genocide, Crimes against Humanity and War Crimes" that:

> Universal jurisdiction may be exercised over international crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law

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OEA/Ser.L/V/II.106, doc. 3 rev. ¶ 134 (2000).

84. Blake v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 25 (Jan. 24, 1998).

committed in international or non-international armed conflict.[85]

As enforced disappearances which have been committed within conflict contexts unquestionably fall within the grave breaches of Geneva Conventions, universal jurisdiction can be invoked in *jus post bellum* contexts when trying perpetrators. This stance was quoted with approval in the ICJ's decision concerning jurisdictional immunities in the matter between *Germany v. Italy*.[86]

Even if State Parties posit that international courts lack jurisdiction to try cases on enforced disappearances that have been committed within a State Party's territory during a conflict, there is the possibility of invoking universal jurisdiction under the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT) which can be interpreted as comprising a State obligation to try enforced disappearances committed within is territory. States are in other words obliged to try offenses under CAT without impediments. ICJ, in its judgment concerning *Belgium v. Senegal*, noted that States have undertaken an obligation to criminalize torture which contains a "preventive and deterrent character."[87] The ICJ further stated that the said preventive character becomes more evident as the number of State Parties to CAT increases. The number of State Parties to CAT has increased from 150 in 2012, when the above judgment was written, to 162 as of February 2018, thus further establishing the arguments propounded by the ICJ. The ICJ has also noted that the State Parties have committed themselves to "prosecuting suspects in particular on the basis of universal jurisdiction."[88] The Inter-Am. Ct. H.R. has also adopted a similar view concerning the necessity to resort to universal jurisdiction in criminalizing grave violations of IHRL and IHL.[89] Judge Cançado-Trindade, in yet another separate opinion, contended that "the category of crimes against humanity . . . is yet another expression of the universal juridical conscience, of its immediate reaction against crimes that affect humanity as a whole."[90]

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85. Inst. of Int'l L., *supra* note 81, ¶ 3(a).

86. *See* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 143, ¶ 45 (Feb. 3).

87. Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 144, ¶ 75 (July 20).

88. *Id.*

89. Myrna Mack Chang v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 10 (Nov. 25, 2003). The Inter-Am. Ct. H.R. stated herein that "criminalization of grave violations of human rights and of International Humanitarian Law has, in our time, been expressed in the enshrinement of the principle of universal jurisdiction."

90. Gimenez v. Paraguay, separate opinion of Judge A.A. Cançado-Trindade, ¶ 26 Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R., ¶ 41 (Sept. 22, 2006).

The above line of arguments appears to be more applicable in today's conflicts which have blurred the distinction between international armed conflicts and non-international armed conflicts. One may perhaps argue that the application of IHRL to, for instance, enforced disappearances that have occurred during a conflict situation produces an absurd result as the legal regime that should be applied in such circumstances is IHL and not IHRL. However, the increasing complexity in modern day conflicts necessitates the concurrent application of IHRL along with *lex specialis* in certain selected circumstances. The State obligation to protect its citizens from being subject to arbitrary loss of right to life or liberty is one such aspect where both IHL and IHRL can cooperate in promoting respect for life amongst the warring factions. Hence, the classification of enforced disappearances as a war crime, which is connected to the absolute prohibition against torture, creates the possibility of invoking universal jurisdiction to deter States from resorting to the guerrilla technique of committing forced disappearances amongst its citizenry to stifle dissent, control riots or quell armed struggles.

It is evident from HRC's views that were assessed elsewhere in this paper that States are reluctant to accept liability for disappearances that have been committed by private persons or forces unconnected to or hostile to the State. In such circumstances, even if disappearances have taken place in connection to a conflict, it may become impossible to hold the State liable under the provisions of Geneva Conventions and protocols additional to the Geneva Conventions. However, States which are parties to CAT are bound by Article 7 which requires State Parties to "give its courts universal jurisdiction" to try cases under CAT.[91] Upon undertaking the obligation to prevent torture under CAT, none of the 162 parties have entered reservations, understandings or declarations concerning Article 7.[92] This indicates that States have not officially filed objections to the universality of jurisdiction that arises in relation to the obligation to absolutely prohibit torture within their territories.[93] Accordingly, even if an allegation of enforced disappearance is not attributed to the State, if the said disappearance has occurred within the State's geographical area, each State is bound to prosecute perpetrators under CAT.[94]

Article 5(1) of CAT states that States are required to establish jurisdiction over torture, attempted torture and complicity and participation in torture as defined in Article 4 of the convention under following circumstances:

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91. Belgium v. Senegal, General List No. 144, Judgment (I.C.J) ¶ 91.

92. *See* Convention Against Torture, *supra* note 2, art. 7.

93. *Id.* art. 5.

94. *Id.* art. 5(2).

(a) when the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
(b) when the alleged offender is a national of that State;
(c) when the victim is a national of that State if that State considers it appropriate.

Article 5(2) further requires States to "take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction . . . ."[95] It is further important to note that the application of universal jurisdiction under CAT does not exclude the State's capacity to exercise internal criminal jurisdiction concerning an act of torture that has occurred within its territory.[96] The possibility of invoking universal jurisdiction however, rests on the passing of enabling legislation domestically as was affirmed by the Committee against Torture.[97]

The references to nationality, passive personality and territoriality woven into both Article 5 and 7 of CAT may prevent the effective invocation of universal jurisdiction in cases of torture. This limitation however, does not prevent the categorization of torture and enforced disappearances, under customary international law, as grave breaches of IHL, ICL, and IHRL. Thus, it was stated in *Guterres* that "each perpetrator can be brought to trial anywhere and anytime regardless the *locus and tempus delicti*, and regardless the perpetrator's and the victim's citizenship."[98] However, the controversy concerning the territoriality's necessity in generating universal jurisdiction is far from settled. It has been stated that: "the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State or on board a vessel flying its flag or an aircraft registered under its laws, or other lawful forms of control over the alleged offender."[99] The stance adopted in *Guterres* was however, reiterated in *Osorio Soares* which also went on to hold that the nationality of the victim or the perpetrator is irrelevant in crimes categorized as crimes against humanity coming within the scope of universal jurisdiction.[100] The rationale underpinning

95. *Id.*

96. *Id.*

97. Human Rights Comm., Selimović, *supra* note 10, ¶¶ 7.13-7.14. The Committee has stated that the manner in which legislative procedures should be adopted to ensure establishment of universal jurisdiction over crimes cannot be dictated.

98. Prosecutor v. Guterres, Case No. 04/PID.HAM/AD.HOC/2002/PH.JKT.PST, Judgment (Feb. 18, 2002), http://www.worldcourts.com/hrahc/eng/decisions/2002.02.18_Prosecutor_v_Guterres.htm.

99. M. Christian Tomuschat, *Universal Criminal* Jurisdiction, ¶ 3(b).

100. Prosecutor v. Osorio Soares, Case No. 01/PID.HAM/AD.Hoc/2002/ph.JKT.PST., Judgment (Aug. 7, 2002).

the justification for universal jurisdiction according to the Inter American Commission on Human Rights (IACmHR) is the impact caused by such crimes on all of humanity and world order.[101]

Irrespective of attempts to establish universal jurisdiction over heinous crimes such as torture, it is significant to note that the question of legality of universal jurisdiction in international law remains controversial. Thus, in *Belgium v. Senegal*, the ICJ appears to have felt compelled to state as follows:

> Only if the Court had found that international law required States to establish universal criminal jurisdiction over the categories of offences in question would it have ruled, *a fortiori*, in respect of the legality of such jurisdiction. If, however, . . . the Court had found that there is no rule of customary law requiring States to give themselves universal criminal jurisdiction, such a finding would have left entirely open the (separate) question of the legality of universal jurisdiction.[102]

This indicates the uneasiness that arises when attempting to establish universal jurisdiction to tackle violations that are too broad to be restricted to the domestic jurisdiction of a single State which may, in more circumstances than not, also be the perpetrator of the offense. However, if one is to comprehend the rationale underpinning both the IHL and IHRL, it is unquestionably for the protection of as many lives as possible from the infliction of unnecessary harm irrespective of whether vulnerable individuals find themselves in contexts of war or peace. IACmHR has categorically stated in *Espinoza* that "the State, if it does not wish to or cannot fulfill its obligation to punish those responsible, must accept the application of universal jurisdiction for that purpose[]" meaning that States unable and/or unwilling to prosecute offenders should submit matters for trial under universal jurisdiction.[103]

Bantekas and Nash opine that when States exercise universal jurisdiction over a crime of which the elements are unattributable to the State, the "domestic courts assume more than an international character" as the State would, through the Courts, fulfill its *erga omnes* obligation of protecting and enforcing fundamental human rights "to the whole of the international community[.]"[104] They further contend that the necessity

101. *See* Carmelo Soria Espinoza v. Chile, Case 11.725, Inter-Am. Comm'n H.R., Report No. 133/99, OEA/SER.L/V/II.106, doc. 6 rev. ¶ 139 (1999).

102. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. Rep. 144, ¶ 30 (July 20).

103. Espinoza v. Chile, 1999 Inter-Am. Comm'n H.R., ¶ 149.

104. BANTEKAS & NASH, *supra* note 79, at 9.

for States to exercise universal jurisdiction over such matters arise not due to the pressure to maintain international cooperation but due to the necessity of preventing impunity.[105] This position aids in the substantiation of the argument posited in this paper that States should prosecute enforced disappearances within domestic courts in accordance with accepted international *jus cogens* and *erga omnes* norms irrespective of whether the offense, be it torture and/or enforced disappearances, is attributed to the State.

As per Article 7(2)(i) of the Rome Statute, enforced disappearances form a crime against humanity.[106] Even if many States are yet to become parties to the Rome Statute, crimes against humanity have for over a century, been regarded under international law as resulting in serious breaches of international law justifying the invocation of war crimes jurisdictions. In the celebrated *Velásquez-Rodríguez v. Honduras* judgment, the IACmHR stated that even in the absence of a treaty provision referring to forced disappearances as a crime against humanity, international practice and doctrine have often categorized it as such.[107] In contemporary times, where IHL, IHRL, and ICL have all contributed to the building up of jurisprudence supporting the notion that enforced disappearances are a crime against humanity, the possibility of setting war crimes jurisdictions in motion concerning the commission of forced disappearances in conflict contexts should not be questioned.

Prosecution of enforced disappearances that may not be attributable to States, especially in non-international armed conflicts, may be problematic also due to the challenges posed in the interpretation of laws. For instance, Article 6(5) of AP II declares that: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[108] This may perhaps be resorted to by States in justifying their positions regarding their inability to prosecute non-State armed actors against whom allegations of enforced disappearances have been lodged. However, the acceptable approach is to abstain from construing the above provision in a manner that would prevent punishment of war criminals.[109] Henckaerts and Beck contend that the granting of amnesties in such circumstances "would . . . be incompatible with the rule obliging States to investigate and prosecute

105. *Id.* at 9.

106. Rome Statute, *supra* note 51, art. 7(2)(i).

107. Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 153 (July 29, 1988).

108. *See* Protocol II, *supra* note 8, art. 6(5).

109. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 9, at 612.

persons suspected of having committed war crimes in non-international armed conflicts[.]"[110] This position has been adopted in relation to Rule 158 of customary IHL which requires States to investigate war crimes committed by nationals, armed forces or on their territory.[111] In a non-international armed conflict, the non-State armed actors are invariably considered to be nationals of the State concerned thus granting jurisdiction to the State to try persons who have formerly functioned in connection with non-State groups during a non-international armed conflict. The obligation of the State to prosecute such persons cannot be overridden by mere references to the necessity to grant "broad amnesties" under Article 6(5) of AP II.[112] The compilation of State practices incorporated in the Customary International Humanitarian Law Study commissioned by the International Committee of the Red Cross, further indicates that the obligation to investigate war crimes is a norm of customary IHL applicable to both international and non-international armed conflicts.[113] The same approach has been adopted in the Special Court for Sierra Leone where it was held that amnesties granted domestically cannot be made applicable to crimes to which universal jurisdiction applies under international law.[114] This stance was reaffirmed by the Extraordinary Chambers in the Courts of Cambodia as well.[115]

The necessity to prosecute perpetrators associated with non-State armed groups was perhaps best described by Professor Kretzmer in the following passage where he contended that:

> All the acts forbidden under Common Article 3, when carried out as part of a wide-spread or systematic attack on a civilian population, will incur international criminal liability for members of non-State groups. Hence, even if armed groups are not directly bound by human rights norms, members of these groups could face both domestic and international criminal liability for violation of most, if not all, the norms in Common Article 3.[116]

Kretzmer further posits that an interpretation which enables State

110. *Id.*

111. *Id.*

112. *See* Protocol II, *supra* note 8, at 614.

113. *Id.* at 607.

114. Prosecutor v. Kallon, Case No. SCSL-04-15-AR72(E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty, ¶ 71 (Mar. 13, 2004); Prosecutor v. Kamara, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, Case No. SCSL-04-16-AR72(E), ¶ 71 (Mar. 13, 2004).

115. *See* Co-Prosecutors v. Nuon, Case No. 002/19-09-2007/ECCC/TC, Decision on Ieng Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), ¶ 46 (ECCC Trial Chamber) (Nov. 3, 2011).

116. KRETZMER, *supra* note 56, at 38.

Parties to prosecute members of non-State groups for the violations that they have committed is perhaps the sole manner in which symmetry can be introduced into non-international armed conflicts.[117] Given that States are justified in refusing to accept criminal liability for offenses in which the State has played no part, this approach could perhaps encourage the States to prosecute individuals belonging to non-State groups in the event allegations of war crimes or crimes against humanity are raised against them. States could then be encouraged to adopt reparatory mechanisms which would do justice to victimized civilians while abstaining from accepting criminal liability in cases that are not attributed to the State. Kretzmer further contends that the symmetry that is introduced by opening up non-State actors to the possibility of post-war or post-conflict prosecutions, would aid in ensuring that minimum humanitarian standards are maintained not only by States, but also by non-State actors irrespective of the existence of an armed conflict.[118]

VIII. CONCLUSION

Political instability and contexts of armed conflicts often lead to the use of enforced disappearances as a method of warfare not only by non-State actors and private persons but also by States which are party to international humanitarian and human rights conventions. This paper posits that the categorization of enforced disappearance as being encompassed within IHL, IHRL, and ICL aids in imposing an obligation on States to inquire into and prosecute suspected perpetrators who are alleged to have committed enforced disappearances irrespective of whether such violations were committed by individuals whose actions can or cannot be attributed to the State.

Citing the necessity to provide closure to the ambiguity and loss of protection of law experienced by family members of missing persons, it is further argued that the States which are unable and/or unwilling to conduct prosecutions to inquire into alleged enforced disappearances that have been committed within their territories, should submit to universal jurisdiction which can encompass enforced disappearances identified as a crime against humanity by all notable international and regional courts of the world. It is further argued that States should be held liable for adopting effective reparatory mechanisms even concerning the enforced disappearances that have been committed by private persons and non-State actors based on the State's obligation to adopt effective *jus post bellum* procedures when responding to post-conflict or post-war contexts.

117. *Id.*
118. *Id.*