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DROITS FONDAMENTAUX
Revue électronique du CRDH

Three challenges for the codification of Enforced Disappearance

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Pour citer cet article :

Hugo Relva, «Three challenges for the codification of enforced disappearance», *Droits fondamentaux,* n° 19, 2021, 5 p.

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Key words: *Committee on Enforced Disappearances, France, International Convention for the Protection of All Persons from Enforced Disappearance, law of treaties, treaty enforcement, Treaty Body, United Nations.*

I. Introduction

The adoption of the crime of enforced disappearance as one of the underlying acts for crimes against humanity in the Rome Statute of the International Criminal Court in 1998 and the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) in 2006 were major milestones for countless victims of the crime. Twice in less than ten years the crime of enforced disappearance was codified under international law. Both instruments did not 'create' a new crime out of the blue but, as said, codified a conduct as criminal under international law and whose legal origin may be traced back to the *Nacht und Nebel* decree by Adolf Hitler in 1941.

I want to briefly describe three challenges for the crime in present times.

II. The Draft articles on prevention and punishment of crimes against humanity: no need of any jurisdictional threshold for the crime against humanity of enforced disappearance

In 2019 the International Law Commission (ILC), a subsidiary organ of the General Assembly whose object is 'the promotion of the progressive development of international law and its codification', provisionally adopted the Draft articles on prevention and punishment of crimes against humanity ('Draft articles'). It also recommended the elaboration of a convention by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles.[1]

The definition of the crime against humanity of enforced disappearance in the Draft articles is verbatim the text of Article 7(2)(i) of the Rome Statute, which is problematic.

[1] Report of the International Law Commission Seventy-first session (29 April–7 June and 8 July–9 August 2019), UN Doc. A/74/10, Chapter IV, para.42. See also, A/RES/74/187 of 18 December 2019 and A/RES/75/136 of 15 December 2020.

"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

The Draft articles should not include the restrictive language in Article 7(2)(i) of the Rome Statute, that defines an enforced disappearance as one requiring the perpetrator to have had the double intent to remove a person from the protection of the law and to do so for a prolonged period of time. Such language is indeed a *jurisdictional threshold* adopted by states just for the purposes of attributing competence to the International Criminal Court and it is absent in the 1992 Declaration on the Protection of all Persons from Enforced Disappearance, the 1994 Inter-American Convention on Forced Disappearances and the 2006 Convention on Enforced Disappearance.

As Amnesty International explained in the past, the removal of the person from the protection of the law is a necessary result or, at most, a purely objective element of the crime, but there is no requirement under the actual scope of the crime as matter of general international law that the perpetrator have specifically intended to deprive the victim of the protection of the law and to do so for a prolong period of time. Requiring that perpetrators have the specific intent to remove the person concerned from the protection of the law - a necessary *consequence* of the other constitutive elements - may pose difficult, if not insurmountable, problems for prosecutors or investigative judges.[2]

It is worth mentioning that, regarding the expression 'for a prolong period of time', the Committee on Enforced Disappearances found in a contentious case that even if brief, even if for a few days, any deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of a person amounts to enforced disappearance.[3]

To sum it up, the language in question is an unfortunate *jurisdictional threshold* agreed by states for the purposes of limiting the jurisdiction of the International Criminal Court, it should not be encompassed by a treaty which is going to be exclusively applied by the national courts of states parties, and not by an international criminal court or tribunal.

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[2] See Amnesty International, 'No Impunity for Enforced Disappearances: Checklist for Effective Implementation of the International Convention for the Protection of All Persons from Enforced Disappearance', 9 November 2011, p. 5.

[3] Committee on Enforced Disappearances, UN Doc. CED/C/10/D/1/2013, para.10(4) ('the Committee concludes that the acts to which Mr. Yrusta was subject over the period of more than seven days following his transfer to Santa Fe constitute an enforced disappearance, in violation of articles 1 and 2 of the Convention').

III. The Draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes

The draft Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity and War Crimes is an ongoing initiative of Argentina, Belgium, Mongolia, the Netherlands, Senegal and Slovenia to set up a multilateral treaty on mutual legal assistance and extradition on crimes under international law. The Draft Convention, also known as the Mutual Legal Assistance (MLA) initiative, is aimed at facilitating cooperation between states in investigating and prosecuting genocide, crimes against humanity and war crimes and, for those states making a separate declaration, some additional crimes under international law on the basis of dual criminality.[4]

Drafters have defined genocide, crimes against humanity and war crimes, like is Articles 6, 7 and 8 of the Rome Statute, bar a few minor changes. Therefore, in the case of the crime against humanity of enforced disappearance the definition contains again the restrictive expression 'with the intention of removing them from the protection of the law for a prolonged period of time', explained above.

The Draft Convention also contains an important omission. Although states shall be able to apply the potential new treaty to the crimes listed in any of the annexes in relation to other states parties which have declared to apply the Convention to the same crime, Annex G (enforced disappearance) only sets out Article 2 of the CPED, to the exclusion of Article 3, that is, acts defined in Article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the state. In other words, states shall be unable to cooperate among them, or to extradite non-state agents - like members of armed opposition groups, suspected of criminal responsibility for disappearances. This is a major flaw that states are still able to fix, on the occasion of the conference of plenipotentiaries to be likely held in 2022 - COVID-19 permitting.

IV. Enforced disappearance and functional immunities (immunity *ratione materiae*)

In 2007 the ILC decided to include the topic 'Immunity of state officials from foreign criminal jurisdiction' (which substantially differs from the immunity of state officials from international courts' jurisdiction, and which is outside the scope of the ILC study), in its programme of work. To date the ILC has adopted some articles with the aim of codifying international law in the field.

[4] See the text of the Draft Convention at www.centruminternationaalrecht.nl/mla-initiative

One important article adopted is inspired in the ICJ Judgment in the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* case and provides: 'Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction' (Draft Article 3). Immunity *ratione personae* is considered to be absolute and enjoyed only during the term of office. It covers all acts performed, whether in a private or official capacity, by the so-called 'triad', during or prior to their term of office.[5] Unfortunately, in view of the *Arrest Warrant* case the chance for an exception to the rule with regard to crimes under international law is unlikely, even though several voices dissent.

A second important article provides also as a general rule: 'State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction' (Draft Article 5). State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity. It continues to subsist after the individuals concerned have ceased to be state officials. However, the rule set out in Draft Article 5 is crucially tempered by a clause providing that immunity *ratione materiae* shall not apply to genocide, crimes against humanity, war crimes, the crime of apartheid, torture and enforced disappearance (Draft Article 7). Despite the fact that state practice is widespread and generally consistent in the field,[6] such a key article was not adopted by consensus, but through an unusual, recorded vote (21 votes in favour; eight against and one abstention). A number of states also oppose Draft Article 7 and want it to be deleted, as shown by some interventions during the annual consideration of ILC Reports at the General Assembly Sixth Committee.

The non-applicability of functional immunities to those foreign state officials allegedly responsible of crimes under international law not only reflects customary international law but is also a key component in the fight against impunity. A possible reverse in the definitive adoption of Draft Article 7 would likely amount to the end of any proceeding on crimes under international law, including enforced disappearance, on extraterritorial basis over state officials. In other words, extraterritorial jurisdiction would only be applicable in view of some ILC members and states to non-state actors, like members of armed opposition groups, insurgents, etc.

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[5] See, ILC, Eighth report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc. A/CN.4/739, 28 Feb. 2020, p.28, Draft Articles 3 and 4, Annex I, 'Draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted by the Commission to date'.

[6] Amnesty International, 'International Law Commission should reaffirm that state officials do not enjoy functional immunity from foreign criminal jurisdictions with regard to genocide, crimes against humanity, war crimes, torture, enforced disappearance and extrajudicial execution', 23 April 2021.

V. Conclusion

States will have relatively soon the chance to codify again, twice, the crime against humanity of enforced disappearance. States should exclude any *jurisdictional threshold* from that definition, bearing in mind that a Convention on prevention and punishment of crimes against humanity and the Mutual Legal Assistance Convention will be applied only by states parties and not any international criminal court or tribunal. In addition, the provision on the non-applicability of functional immunities to foreign state officials suspected of criminal responsibility for enforced disappearance and other crimes under international law should be adopted by the ILC and later confirmed by states.