ILC Report on Prevention and Punishment of Crimes Against Humanity and Enforced Disappearance

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Abstract

This article values as an important milestone the Draft Articles on the Prevention and Punishment of Crimes Against Humanity. They greatly contribute to the development of international law, inter alia, seeking to prevent impunity and to establish the duty to prosecute or extradite those who have allegedly committed crimes against humanity. They are a solid basis for a possible diplomatic conference designed to adopt a convention that will establish binding obligations for all ratifying States. The Draft Articles took as a point of departure the Rome Statute of the International Criminal Court to list and define crimes against humanity, and, considering current developments in international law, departed from the Rome Statute so far in two matters: the definition of gender and the treatment of persecution. This article argues why it is essential to follow a similar approach and adopt the definition of enforced disappearance currently used in international conventions that deal with such a horrendous crime. The article also shows why the 'without prejudice' clause currently proposed by the Draft Articles is unsatisfactory, depriving States that do not follow the restrictive definition incorporated more than two decades ago in the Rome Statute from the benefits of the proposed convention.

Keywords: enforced disappearance, without prejudice clause, Draft Articles, crimes against humanity, commentaries.

1 Introduction

The Draft Articles adopted by the International Law Commission (ILC) on the Prevention and Punishment of Crimes Against Humanity are an important development in international law. The Draft Articles are a valuable attempt to contribute to the fight against the pervasive impunity that still exists concerning atrocious crimes. To achieve this goal, the ILC Special Rapporteur for the crimes against humanity topic, Sean Murphy shared that the purpose of the ILC's Draft Articles is to lead to the adoption of a convention. Accordingly, the articles are

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written to be "effective and likely acceptable to States, based on provisions often used in widely adhered-to treaties addressing crimes".[1] Such a convention would confirm the existing State obligations for crimes against humanity, mostly coming from their existing treaty obligations. The proposed convention would fill an important vacuum, since there is not yet a general convention concerning crimes against humanity. Additionally, it would establish horizontal obligations for the States, including to prosecute or extradite (*aut dedere aut judicare*) those who allegedly committed such heinous crimes, rather than be limited to the existing vertical obligations of a State to an international court.[2]

Generally, the ILC's Draft Articles conform to the Rome Statute of the International Criminal Court (ICC) to list and define crimes against humanity. This decision aimed to achieve extensive State adherence, avoiding reopening a discussion concerning the identification and definition of those crimes. While that is a valuable goal, the Rome Statute was adopted over 20 years ago and crucial developments have taken place in some areas of international law. Responding to new developments, the ILC diverged from the use of the Rome Statute in the definition of gender and in the area of persecution.[3] States generally responded positively to such departures from the Rome Statute in the Draft Articles. This edition of the African Journal of International Criminal Justice elaborates on those developments.

Unfortunately, the Commission did not depart from the Rome Statute's definition of enforced disappearance, failing to consider the substantive developments that had taken place concerning that crime. The Rome Statute's definitions followed by the ILC include the requirements of intent and duration of time. Those requirements do not comply with the state of international law today. International law recognizes a broader definition, stemming mostly from the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance to the 2006 International Convention on the Protection of All Persons from Enforced Disappearance. By the time the Rome Statute was adopted in 1998, the international community was already in the process of identifying the components of the crime of enforced disappearances. Accordingly, the Rome Statute definition is only meant to determine when the ICC has jurisdiction in the case of enforced disappearances.[4] States from Latin America explicitly expressed the need to incorporate the current definition of enforced disappearances as a crime against humanity in the Draft Articles, and no State specifically disputed the value of such definition.

1 Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, *in* Int'l Law Comm'n, *Report of on the Work of its Seventy-First Session*, UN Doc. A/74/10 (2019), p. 23.

2 C. Jalloh, 'The International Law Commission's First Draft Convention on Crimes Against Humanity: Codification, Progressive Development, or Both?', *Case Western Reserve Journal of International Law*, Vol. 52, No. 16, 2020, pp. 331-405.

3 *See* Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, *supra* note 1, Paras. 37-42.

4 UN Human Rights Special Procedures, G/SO 217/1/CAH, 3 December 2018.

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This contribution will address developments regarding the prohibition of enforced disappearances in international law and further expand on the reasons why a proposed convention on crimes against humanity should reflect the status of the law concerning this crime.

2 The Development of the Prohibition of Enforced Disappearances in International Law

The first recorded instance of enforced disappearance came out of the State-sponsored disappearances of thousands by the Third Reich during World War II to terrorize Jewish populations. Yet, it was a wave of systematic disappearances by Latin American governments in the 1960s that resulted in the coining of the term. Since then, this practice has resulted in hundreds of thousands of documented occurrences of enforced disappearances across the world. Over the last several decades, the law has developed to address this crime against humanity through codification, conventions and case law.

Prior to the 1990s, few legal regimes existed codifying the prohibition of enforced disappearances specifically, and instead semi-judicial and judicial organs found avenues to address this crime through interpretation of other prohibitions and rights recognized in international human rights law. While Latin America, for example, has experienced the scourge of dictators using the practice of enforced disappearance in the 1970 and 1980s, national judiciaries and international supervisory organs had not specified the crime and were unwilling or ill-equipped to fully respond to the need of prevention or punishment of such crime.

The Inter-American human rights system sought to bring to the international community's attention the gravity of this international crime and the importance of denouncing States that engaged in enforced disappearances. For that purpose, the Inter-American Commission of Human Rights resorted to the technique of issuing country reports – which broadly address the human rights situation of a country to identify the scope and characteristics of this atrocious practice in the context of multiple and widespread violations of other rights. The Commission's reports documented the development and implementation by dictatorial governments of a machinery of torture and death. In most cases, the fate of the disappeared person was murder and the governments simply denied or refused to provide any information. Hundreds of thousands of individuals were victims of this crime, including human rights defenders and lawyers, gravely affecting societies. At least in its form as mass atrocities, that criminal policy ended with the return of democracy in most of those countries. As the processes of democratization developed, the newly elected governments had to deal with the need to reform security forces that continued to use arbitrary detention and refusal to acknowledge it mostly this time in cases of detention of suspects of common crime.

It was not until 1988 in the *Velásquez Rodríguez v. Honduras* case that the Inter-American Court on Human Rights (IACtHR), the highest judicial organ in the Americas, established, under the American Convention on Human Rights, State responsibility for the crime of enforced disappearance and further detailed

its components.[5] The Inter-American Court was the first international organ to deal with disappearances and – in addition to defining it and describing its main features – called it a 'crime against humanity' in no uncertain terms, and proceeded to define the legal effects of that characterization, namely the State's obligation to the truth, to justice, and to reparations to its victims.

The universal human rights system, and the European and African regional systems followed by building the case law despite a lack of specific provisions prohibiting enforced disappearance.

Since 1988, regional and universal systems have resorted to their respective human rights conventions and international case law to develop the law of enforced disappearance as an international crime. The supervisory organs in those systems condemned the crime of enforced disappearance by determining that it constituted a violation of the right to life, to be free from arbitrary detention, to be recognized as a person before the law, and to be free from torture, among others. Additionally, the IACtHR framed enforced disappearances in the *Velásquez Rodríguez* case as a violation of human dignity. The European Court of Human Rights (ECtHR) also developed extensive case law in the absence of a definition on enforced disappearances by assessing individual violations that constitute crimes within the act of enforced disappearance, such as the prohibition on arbitrary detention. The African system instead embedded protections from enforced disappearances into its instruments. The Kampala Convention, which entered into force in 2012, included this protection among others, and the African Commission on Human and Peoples' Rights adopted a resolution making enforced disappearances a violation of the right to life. In 1994, the Inter-American human rights system became the only regional system to adopt a regional treaty on enforced disappearance, the Inter-American Convention on Forced Disappearance of Persons, ratified so far by all the Latin American States except the Dominican Republic, El Salvador and Nicaragua.

Over time, supervisory organs at the universal level applying their constitutive treaties began to similarly interpret enforced disappearances as a violation of other rights. For instance, both the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, do not include enforced disappearances as an expressly written violation. In the ICCPR, provisions such as Article 6 (right to life) and Article 9 (right to liberty and security of person) were found to include disappearances as an extreme form of arbitrary detention. Equally, in 2018, the General Comment on the Right to Life adopted by the Human Rights Committee as treaty supervisory body for the ICCPR included disappearances. The Comment also requires procedural guarantees written into Article 9 of the ICCPR to be implemented in preventing enforced disappearances.

Similarly, the Committee Against Torture (CAT) decided in *Guerrero Larez v. Venezuela* in 2015 that enforced disappearances constituted an act of torture.[6]

5 *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (Ser.C.) No. 4 (1988), at 37-34.

6 UN Committee against Torture, *Decision adopted by the Committee at Its Fifty-Fourth Session*, CAT/C.54/D/456/2011, 26 June 2015.

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Previously, in 2012, CAT had adopted General Comment No. 3, on Article 14 of the Convention Against Torture, including specific provisions on the obligation of redress and rehabilitation towards victims and their families in cases of crimes of enforced disappearances. The Convention, creating obligations for its current 170 States Parties, also includes the obligation to try or extradite (*aut dedere aut judicare*) those suspected of criminal responsibility who are present in any territory under the jurisdiction of a State Party.

At the universal level, by 18 December 1992, enforced disappearances had led to the adoption – without opposition – of the UN Declaration on the Protection of All Persons from Enforced Disappearance.[7] This Declaration, at a minimum, is an important step in the development of a customary rule involving disappearances. Its adoption, following an extensive and careful process starting in 1978, references binding obligations – including the UN Charter and the Human Rights and Humanitarian Law conventions. Its context and follow-up cannot be ignored. There are no instances of States ever claiming that there is no violation of the prohibition of disappearance because it is not legally binding, even when accused of engaging in this criminal practice or its facilitation. Even preceding the adoption of the UN Declaration, already in 1980 with Resolution 20 (XXXVI), the UN Commission on Human Rights Working Group on Enforced or Involuntary Disappearances (WGEID) started a process to create supervisory organs specifically entrusted to deal with the effects of enforced disappearances.

The international community followed these developments with the adoption of the International Convention for the Protection of All Persons from Enforced Disappearances (International Convention) on 20 December 2006. The Convention entered into force on 23 December 2010. As of July 2020, 98 States have signed and in principle accepted the Convention, of which 63 States have ratified. Oman acceded to the Convention on 12 June 2020, following the latest ratifications of the Convention in 2019 by Norway, Fiji, Dominica and Gambia. This convention created as its supervisory organ a Committee on Enforced Disappearances (CED) composed by independent experts. In addition to other supervisory techniques (State Party reporting), Article 30 of the Convention authorizes the Committee to receive requests for urgent actions, while a special declaration by States is required for the CED to be competent to receive individual or interstate communications, in accordance with Arts. 31 and 32 respectively.

Neither of these universal or regional developments in the international law of enforced disappearances requires the crime to be committed "with the intention of removing individuals from the protection of the law for a prolonged period of time",[8] as unnecessarily established by the Draft Articles. As stated before, no State ever claimed that the definition consistently adopted in these processes requires additional elements to typify a disappearance.

7 Office of the UN High Commissioner for Human Rights (OHCHR), Declaration on the Protection of all Persons from Enforced Disappearances, adopted by General Assembly resolution 47/133 of 18 December 1992.

8 Rome Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on 17 June 1998, entered into force on 1 July 2002, Art. 7(2).

3 Defining Enforced Disappearances

Generally, the term 'enforced disappearance' refers to the elimination of or deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person through the direct action or indirect knowledge of government officials. The adoption in 1992 of the UN Declaration on the Protection of All Persons from Enforced Disappearance reflected the codification of international developments already existing in international law. What was previously a cluster of different human rights violations now had a specific definition starting with the Declaration's adoption by the United Nations General Assembly. Having experienced a true 'epidemic' of enforced disappearances in the past decades, the Inter-American system followed the UN and included a similar definition into the Inter-American Convention on Forced Disappearance of Persons.

The International Convention for the Protection of All Persons from Enforced Disappearance, defined enforced disappearance identically to the UN Declaration and the Inter-American Convention recognized in 1992 and 1994 respectively. Its Article 2 states:

> "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.[9]

The 2006 International Convention, under Article 4 requires the criminalization of enforced disappearances within the national law of each State Party. The International Convention also includes a provision stating that enforced disappearance may constitute a crime against humanity under international law.[10] Additionally, the supervisory body under this Convention urged not only States Parties to the International Convention, but all parties to the Rome Statute of the

9 International Convention for the Protection of All Persons from Enforced Disappearance, adopted by General Assembly Resolution A/RES/61/177 on 20 December 2006 at New York, entered into force on 23 December 2010, UNTS, Art. 2.

10 The fact that the CED urged all parties to the Rome Statute to interpret the prohibition on enforced disappearance in accordance with the 2006 International Convention definition shows the overlap existing between human rights instruments and criminal law instruments, including in the duty of reparation to victims investigation and punishment of those who are found guilty of violations of human rights.

ICC to interpret the provision on enforced disappearance in line with the International Convention's definition of enforced disappearance.[11]

The definition contained in these documents requires three elements: deprivation of liberty, government involvement and withholding information. The crime of enforced disappearance is of a continuous nature. This led courts to find that they had jurisdiction over crimes occurring even before the ratification date of the pertinent convention. Examples can be seen in the Inter-American and European courts. In *Blake v. Guatemala* the IACtHR decided the effects of enforced disappearances last until the victim is freed or the knowledge of what happened to the individual is established.[12] Additionally, the ECtHR in 2009 issued a similar ruling in *Silih v. Slovenia*, binding the State to violations of enforced disappearances when the individual's death took place before adoption of the appropriate rule.[13] However, in *Janowiec v. Russia* in 2013, the ECtHR capped its jurisdiction within 10 years of the adoption of the relevant convention.[14] While the International Convention accepts this understanding of enforced disappearance, it limited its scope, applying the crime only after the responsible State's ratification of the convention.

The prohibition of the crime of enforced disappearances also requires the obligation to prevent them (*e.g.*, effective training), investigate their occurrence and punish those guilty for its commission. Even though the universal and regional systems of human rights derived the crime of enforced disappearance from other rights explicitly laid down in their conventions (*e.g.*, prohibition of torture, arbitrary detention), they determined that the State obligations to prevent, investigate and punish human rights violations equally apply in cases of enforced disappearance. The international community specifically incorporated those obligations into the instruments that explicitly prohibit enforced disap-

11 The CED issued a Statement on 1 June 2018 "following previous useful consultations with the special rapporteur of the International Law Commission out its draft convention on the crime against humanity". This statement was issued after the first lecture of the draft convention. No consultation took place later on, informing CED that modifications would take place on Article 2 of the Rome Statute within the Draft Articles. CED, when adopting its Statement, even without that knowledge, stated, however, the need to recall "the progress of customary law and the progressive development of international law". CED also welcomed the provision of Art. 3, Para. 4 of the Draft Articles, dealing with more protective instruments. CED's Statement, issued only after the first lecture, also did not have the benefit of knowing that the Commentary will exclude from important benefits of the Draft Articles the States that ratified the 2006 International Convention. *See* Committee on Enforced Disappearances, *Statement on the Draft Articles on Crimes Against Humanity adopted by the International Law Commission*, 1 June 2018, available at: https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_ced.pdf&lang=E.

12 *Blake v. Guatemala*, Inter-Am. Ct. H.R. (Ser.C.) No. 36 (1998), at 24.

13 *Silih v. Slovenia*, ECHR (2019), No. 71463/01, at 61-2.

14 *Janowiec v. Russia*, ECHR (2013), Nos. 55509/07 & 29520/09, at 39-42.

pearance. Additionally, they included specific norms confirming that this crime, as a crime against humanity, is of a non-derogable nature.[15]

Further developments of the definition of enforced disappearances occurred in the international criminal law context. The 1998 Rome Statute of the ICC included enforced disappearance as a crime against humanity stating that:

> 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.[16]

As with other crimes against humanity, as a contextual threshold, a widespread and systematic attack against the civilian population is required. The requirements of intention to remove from the protection of the law and the need for a prolonged duration of time were not intended to dispute the definition of disappearance existing in international law, but to determine a jurisdictional threshold – when the ICC had jurisdiction. For all crimes against humanity as defined in the Rome Statute, the "widespread or systematic attack on a civilian population" is also a jurisdictional clause, not a definitional one. That is why the new 2006 Convention on Disappearances – like the Convention Against Torture – establishes State responsibility even for a single or isolated case of disappearance, without having to determine that an act is part of a pattern or policy, and that State responsibility applies also to the specific obligations a State has in the presence of a disappearance (*i.e.*, to investigate, prosecute and punish, etc.).

4 The Need to Include a Broader Definition of Enforced Disappearance as a Crime Against Humanity

When States engage in adopting a convention on Crimes Against Humanity, it is necessary to reflect the developments in international law concerning the prohi-

15 *See infra,* discussions in *The Need to Include a Broader Definition of Enforced Disappearance as a Crime Against Humanity & Conclusion*, furthering arguments concerning the need to include a broad definition of disappearances in the Draft Articles, including the statement by the Office of the High Commissioner for Human Rights and response to counter arguments; *See also* S. Murphy (Special Rapporteur on Crimes Against Humanity), *Fourth Report on Crimes Against Humanity*, UN Doc. A/CN.4/725 + Add. 1, 18 February 2019, p. 75. *Contra* United Kingdom, *ILC Draft Articles on Crimes Against Humanity Written Comments*, Paras. 9-10, 24-26, 29 November 2018, available at: https://legal.un.org/docs/?path=../ilc/sessions/71/pdfs/english/cah_uk.pdf&lang=E; S. Murphy, *International Law Commission*, A/CN.4/725, Para. 76.

16 Rome Statute, ICC, Art. 7(2).

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bition of enforced disappearance.[17] This will serve to align the standards developed in international human rights law instruments to those in the area of international criminal law.

The need to avoid any exception or addition strongly influenced support for using the Rome Statute's list and definitions in the ILC. However, the change concerning persecution and gender created a new situation to address exceptionally a need to reflect legal developments.

Concerning gender – other contributions in this publication expand on this matter, as well as on persecution – the Rome Statute defined the term narrowly by sex, and the ILC chose to diverge from this, accepting the reality that gender is shaped by society and culture. The ILC's correctly explains in its commentaries to the Draft Articles that "several developments in international human rights law and international criminal law have occurred, reflecting the current understanding as to the meaning of the term "gender"'.[18] Accepting this evolution of the definition of gender acknowledges that exceptions might be necessary to the use of the Rome Statute's definitions.

In the light of the multiple normative developments concerning the prohibition against enforced disappearance at the universal and regional levels, it is extremely difficult to argue – utilizing the language of the commentaries – that that there is a lack of 'several developments' in international human rights law and criminal law concerning enforced disappearances. Equally, there is no basis to claim that an attack against the civilian population of a country resorting to disappearances is a crime against humanity only if committed with the intention to remove individuals from the protection of the law for a prolonged duration of time. As stated in this article, there has been a consistent development at the universal and regional levels, including declarations, conventions and international jurisprudence that recognize that enforced disappearances do not require, to constitute a crime against humanity, an "intention for a prolonged period of time". In fact, denial of the arbitrary arrest or refusal to report it or acknowledge it are definitely elements of enforced disappearances: they are tantamount to and equal to the requisite of "removing individuals from the protection of the law". This removal is an *effect* of the practice, and not a specific intent requirement, as shown by the wording of "which place" in the definition of the 2006 International Convention.

The ILC's attempt to alleviate this issue by adding a 'without prejudice' in the current Draft Articles appears to be superfluous because ALL International Human Rights Law norms are understood to allow States to depart from them as long as other valid provisions are more protective of the exercise of the relevant

17 The Working Group on Enforced or Involuntary Disappearances makes similar arguments in favour of a broader definition of enforced disappearances, arguing that enforced disappearances is a crime where the victim is subjected to it outside of the law and therefore the Working Group admits cases without requiring intent and additionally considered short-term enforced disappearance cases to protect all people from such atrocities. *See* UN Human Rights Special Procedures, *supra* note 4.

18 Draft Articles on Prevention and Punishment of Crimes Against Humanity, with commentaries, *supra* note 1, Para. 41.

right. Even if that would not be the case, the clause fails to address fully the problems that are created by keeping a narrow definition of enforced disappearances.

The purpose of the 'without prejudice' clause in Article 2(3) of the Crimes Against Humanity project is to preserve the obligations established under customary international law, international instruments and national laws. The commentary to the ILC definition, as adopted on second reading, uses enforced disappearances as an example of when this provision applies. This 'without prejudice' clause allows States to avoid implementing a restrictive definition of disappearances that does not reflect their national laws or their international obligations, for example as States Parties to the International Convention for the Protection of All Persons from Enforced Disappearance or another instrument with an analogous formulation. It is also important to note that the 'without prejudice' clause includes national and customary law, allowing then States to dispute a restrictive definition that adds requirements of intentionality and duration to the definition of enforced disappearance. While this clause could protect the populations of States that fall under the clause – the developments that have occurred in international law are not considered by keeping an unnecessary restrictive definition used in the ILC's Draft Articles.

Additionally, as the ILC Draft Articles' commentary notes, except if States otherwise agree, this 'without prejudice' clause excludes some benefits of the Draft Articles, such as mutual legal assistance and extradition norms, if States use any other definition of disappearances than the restrictive definition of this atrocity crime.[19] These provisions were some of the most important reasons to develop this project. Accordingly, States that adhere to the definition of enforced disappearance without the requirements of intention for a prolonged period cannot avail themselves of the possibilities of cooperation – even among themselves – in cases of enforced disappearances that do not satisfy those additional conditions. This directly applies to those States that have ratified the International and/or the Inter-American Convention, have national laws applying a broad definition or definitions under customary international law. Of course, States might agree to cooperate in cases not covered by the definition contained in the Draft Articles, but such possibility is not an obligation and would not flow from the ratification of a proposed convention using the Draft Articles, as explicitly stated in the commentaries.

The commentaries to the Draft Articles unfortunately did not consider on alternatives to this exclusion of interstate cooperation. Other than incorporating the definition of enforced disappearance reflected in the 2006 Convention (as it should have been done), a possibility could have been not to exclude from the

19 This interpretation of the 'without prejudice' clause could be seen as unduly positivistic and likely not reflecting international criminal law practice. See for example, the submission of Madaline George (Whitney R. Harris World Law Institute at Washington University School of Law) concerning the problem of the 'without prejudice' clause (as found in Art. 2(3) as well as the commentary to Art. 6) in a 2019 *Opinio Juris* piece, available at: http://opiniojuris.org/2019/10/08/prospects-for-a-convention-on-the-prevention-and-punishment-of-crimes-against-humanity/. The commentaries, however, as an authoritative text, greatly reduce – if not eliminate – the benefits of the 'without prejudice' clause.

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benefits of the proposed convention the concept of disappearances protected by the without prejudice clause. The ratification of the proposed convention should have been enough, without any additional requirement, to resort to the mechanisms of cooperation established by it. For those States that have ratified the conventions against enforced disappearance, there could be an additional issue. The Draft Articles require the incorporation of its norms in their domestic legislation. Are they obliged to do so, going against their own view and obligations of the definition of enforced disappearance?

The Commentary also argued that the intent element used in the ILC's definition of enforced disappearances is less significant because the definition should be seen in the context of crimes against humanity. Intention is read into the contextual elements of a crime against humanity when requiring a State or organizational policy to commit a widespread or systematic attack against a civilian population. However, the argument that specific intent is not significant because crimes against humanity require State or organizational policy is not convincing. The same is true concerning genocide, and there the specific intent is mandated by the 1948 Convention; it is significant that the specific intent (*dolus specialis*) of destroying a community in whole or in part on account of its race, religion, national origin or ethnicity did in fact create serious problems in prosecutions at the International Criminal Tribunal for the former Yugoslavia (ICTY). Similarly, inserting a specific intent (plus a prolonged timeline) will make investigating and prosecuting disappearance inordinately difficult. That may still be necessary to keep the jurisdiction of the ICC manageable; but in terms of a convention on State responsibility for disappearances, it would give some States a 'pass' not to investigate in good faith.

Rather than justifying the adherence to a restrictive definition, the abovementioned reasoning concerning the limited significance of the intent element seems to strengthen the case for the futility in keeping such definition. Additionally, this futility is more evident because the developments in international law show that enforced disappearance is a form of torture, as stated earlier in this contribution. Accordingly, in the unlikely case that a State were to claim that it only engaged in 'temporary disappearance' while committing a widespread or systematic attack against the civilian population, such criminal conduct would amount to torture as a crime against humanity.

5 Conclusion

The crime of enforced disappearance developed consistently during the last decades including the adoption of a definition of the crime. The 1998 Rome Statute of the ICC requires intent and temporal element. Those requirements appear, however, superfluous as they are subsumed in the conditions needed for a crime to be a crime against humanity. Additionally, other crimes, such as torture, from a practical point of view, would be invoked if a restrictive concept of disappearance would apply.

If no exceptions to the definitions of the Rome Statute existed within the Draft Articles, a stronger case could have been made against exceptional changes. It is a legitimate goal to align the definitions with the Rome Statute and allow departing from it only as an exception. The developments that this article has summarized concerning enforced disappearances constitute such exception, as noted among others by the Office of the High Commissioner for Human Rights and other authoritative academic or civil society actors.[20] No State asserted that the broader definition of enforced disappearances is not a valid definition of the crime under international law. Judging from States' reactions, it is not likely that incorporating the definition of enforced disappearance would open some type of Pandora's box allowing for the change of more definitions within the crimes against humanity project.

The United Kingdom raised technical objections, expressing concern about deviations from the Rome Statute should the States incorporate the Draft Articles into a convention.[21] The convention, it argued, needs not to compete with States that incorporated the Rome Statute definitions into their national law. This is far from an insurmountable objection, as international and domestic law deals regularly with adaptation. The cases of gender and persecution fall into that category and due to the evolution of the law, change was necessary. In the case of enforced disappearance, an important group of States already ratified the 1998 Rome Statute and the conventions against enforced disappearance, the Convention Against Torture, and Universal or Regional treaties. Incorporating the restrictive definition of enforced disappearance of the Rome Statute most likely would be a violation of those other conventions.

Finally, a possible convention on crimes against humanity is a good opportunity to unify in its text the concept of enforced disappearance developed in international law. This would hardly be a radical departure from the Rome Statute increasing States' obligations considering that the definition should be applied satisfying the requirements of a crime against humanity. This opportunity should not be missed.

20 UN Human Rights Special Procedures, *supra* note 4; Committee on Enforced Disappearances, *supra* note 11; Amnesty International, *17-Point Program for a Convention on Crimes Against Humanity*, 20 February 2018.

21 United Kingdom, *supra* note 15, Paras. 9-10, 24-26.

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