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ENFORCED DISAPPEARANCE IN INTERNATIONAL HUMAN RIGHTS LAW

The institutional mechanism of the international legal protection of persons from enforced disappearance is analyzed in the article. The multiple-rights approach introduced by the international monitoring bodies is researched. The article presents the research of violation of human rights, such as: the right to life, the prohibition of torture and other inhuman or degrading treatment or punishment, the right to liberty and security of a person, the right to truth as the result of enforced disappearance. The approaches used by the international monitoring bodies have been compared and characterized. Next of keen of the disappeared person are considered to be indirect victims of enforced disappearance in the article.

Key words: enforced disappearance, human rights, international monitoring bodies, institutional mechanism.

Enforced disappearance is a particularly grave human rights violation usually associated with the most notorious cases that had been perpetrated by military regimes in Latin America in the second half of the 20th century. Despite the condemnation of this gross human rights violation by the international community, enforced disappearance has evolved from Latin America to a universal phenomenon. Furthermore, enforced disappearance was not considered as an independent human rights violation, rather it was understood as a complex and cumulative violation of different fundamental human rights: the right to life, the prohibition of torture and other inhuman or degrading treatment or punishment, the right to liberty and security of a person, the right to truth, the right to recognition before the law, etc.

These rights are enshrined in the general international human rights instruments. In addition, there are three specific instruments on enforced disappearance: the UN Declaration for the Protection of All Persons from Enforced Disappearance 1992¹ (UN Declaration 1992), the Inter-American Convention on Forced Disappearance of Persons 1994² (Inter-American Convention 1994) and the International Convention for the Protection of All Persons from Enforced Disappearance 2006³ (ICED). ICED is the first universal and legally binding instrument on enforced disappearance, which guarantees a new autonomous absolute right not to be subjected to enforced disappearance. According to the article 2 of the ICED, «*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*».

The institutional mechanism of international legal protection of persons from enforced disappearance includes next international human rights monitoring bodies: The Human Rights Committee (HRC), the Inter-American Court of Human Rights (IACtHR), the European Court of Human Rights (ECtHR), the African Commission of Human Rights, the Human Rights Chamber for Bosnia and Herzegovina, the United Nations Working Group on Enforced or Involuntary Disappearances (UNWGEID), the Committee on Enforced Disappearances (established by the ICED). The Committee on Enforced Disappearances and UNWGEID are the only international monitoring institutions that consider enforced disappearance as the integral autonomous human rights violation according to the provisions of ICED. Other international human rights bodies have adopted so-called «multiple-rights approach» in their case law⁴. Because they are under the mandate to refer to the specific rights guaranteed in their respective Conventions, they assess the individual facts in a case of enforced disappearance and decide which particular human rights enshrined in

¹ UNGA Res 47/133 (18 December 1992). <<http://www.un.org/documents/ga/res/47/a47r133.htm>>

² *Inter-American Convention on Forced Disappearance of Persons* (adopted 9 June 1994, entered into force 28 March 1996), <<http://www.oas.org/juridico/english/treaties/a-60.html>>

³ *International Convention for the Protection of All Persons from Enforced Disappearance* (adopted 20 December 2006, entered into force 23 December 2010)

<<https://treaties.un.org/doc/Publication/UNTS/Volume%202716/v2716.pdf>>(2016, November,2)

⁴ Perez, Solla Maria Fernanda (2006). *Enforced Disappearance in International Human Rights*. Jeferson (NC), 33

the different instruments were violated. The multiple-rights approach allows the consideration of the specific circumstances of each case of enforced disappearance and the determination of the specific measures to be undertaken by a State in response. Nevertheless, this approach has led to the consequence that the case law of different monitoring bodies is not wholly consistent in deciding which human rights are violated by enforced disappearance.

However, the tendency to consider enforced disappearance as the integral human rights violation still remains, as it was stated by the Inter-American Court in the case *Goiburú v. Paraguay*¹. Moreover, since the case *Varnava v. Turkey*² ECtHR has begun to make references to the UN Declaration 1992 (art. 1-3, 7-9), ICED (art. 1-8), Inter-American Convention 1994 (art.1-3) and also to the case law of the Inter-American Court as to the sources of international law. However, despite this tendency, monitoring bodies are under the mandate to monitor member States' compliance with the provisions enshrined in the respective conventions. That's why the multiple-rights approach is likely to remain dominant in the case-law. As a result of the act of enforced disappearance three layers of States' obligations deriving from each human right: duty to respect, duty to protect, duty to fulfill - are considered to be violated³.

The right to liberty and security has been violated in the great majority of cases of enforced disappearance treated monitoring organizations. This right is enshrined in article 9 of the International Covenant on Civil and Political Rights (ICCPR), article 7 of the American Convention on Human Rights (ACHR), article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Any form of deprivation of liberty constitutes a compulsory element of the crime of enforced disappearance.

In most cases of enforced disappearance, the Human Rights Committee examined whether article 9 ICCPR as a whole had been violated without going into further details on the different paragraphs. The Committee had recognized violation of this right in the majority of the cases of enforced disappearance and referred to the missing arrest warrant or to the fact that no charges had been brought against the detained⁴. Namely in the case of *El-Megreisi*, was underlined that the victim had been held in the custody for more than four years, during which no charges had been brought against him⁵. Moreover, although there were no evidence that the material victim had been abducted or detained by the State party, in the light of the prior threats against the victim and the total absence of cooperation by the State party in application of security as a separate aspect of the right to liberty and security, the Human Rights Committee held that article 9 had been violated.

Inter-American Court has also recognizes the violation of the right to liberty and security in the context of enforced disappearance. In its cases *Godínez Cruz v. Honduras*⁶ and in *Bamaca Velásquez v. Guatemala*⁷ the Inter-American Court stated generally « arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay for a judge and to invoke the appropriate procedures to review the legality of arrest, all in violation of the article 7 of the Convention». Depending on the circumstances of the case, the Inter-American Court usually determines which paragraph of article 7 was violated. Nevertheless, in the case of *Pueblo Bello*⁸, in which there had not been enough evidence to prove that the paramilitary united had acted with support of the State, the Court held that article 7 as a whole was violated because the State party had failed to prevent the act of enforced disappearance and to protect the victim.

The European Court of Human Rights conceives enforced disappearance as an aggravated form of arbitrary detention. The European Court has repeatedly underlined that « the unacknowledged detention of a person is a complete negation of these guarantees and the most grave violation of Article 5»⁹. Moreover, European Court usually holds the violation of this right when the State party failed to adequately investigate the alleged disappearance or to put an end to the apparent kidnapping although it had had the means to prevent such acts. Nevertheless, in the cases where it had not been proven that the State agents acting on behalf of the State had been involved in the act of enforced disappearance, the Court didn't find the violation of this right.

When enforced disappearance is committed by State agents or with acquiescence of a government, it

¹ *Goiburú v. Paraguay*, C/153 [2006], IACtHR- 22 September 2006

² *Varnava and others v. Turkey* (dec.) [GC] no. 16073/90, ECtHR – 18.09.2009

³ Kalin, Walter, Kunzli, Jorg (2009). *The Law of International Human Rights Protection*. Oxford, 97

⁴ *Sarma v. Sri Lanka*, CCPR/C/105/D/1863/2009

⁵ *El Megreisi v. Libya*, CCPR/C/91/D/1422/2005

⁶ *Godínez Cruz v. Honduras*, C/5 [1989], IACtHR – 21 July 1989

⁷ *Bamaca Velásquez v. Guatemala*, C/70[2000], IACtHR- 25 November 2000

⁸ *Pueblo Bello v. Colombia*, C/140 [2006], IACtHR- 31 January 2006

⁹ *Kurt v. Turkey* (des.) [GC] no. 24276/94 [1998], ECHR 44- 25 May 1998

violates the first and the third layers of obligations: duty to respect and duty to fulfill the right to liberty and security, because the State has failed to organize its penitentiary system in order to ensure protection from enforced disappearance. In such case writs of habeas corpus are not dully processed. State parties are under the duty to investigate arbitrary detentions even if a formal complaint had not been lodged¹. On the issue whether enforced disappearance may also involve the second layer of obligations, duty to protect, the case law is less certain. Regarding the definition of enforced disappearance, it has been concluded that third parties may commit similar acts to enforced disappearance². In cases where there were not enough evidence to prove that State agents had been involved in the abduction, the European Court has explicitly found no violation of article 5 ECHR. However, according to the general principles on duties arising from the human rights, the duty to protect the right to liberty and security is to be conceived as violated when individuals commit acts similar to enforced disappearance and the State party fails to prevent this although it has the necessary knowledge and means to do so.

The analysis of the case allows to the conclusion that the general recognition of enforced disappearance as a violation of the right to humane treatment has not become an international standard yet. This prohibition of torture and other inhuman or degrading treatment enshrined in articles 7 ICCPR, 3 ECHR, 5 ACHR. Unlike the European Court of Human Rights, the Inter-American Court and the Human Rights Committee consider act of enforced disappearance to violate the right to humane treatment when the victim was held in incommunicado detention for a prolonged period of time. In *El-Greimsi* the Human Rights Committee stated that by keeping the victim «in prolonged incommunicado detention in unknown location», the State party had violated article 7 of the ICCPR³. The consequence being that a victim who is killed shortly after abduction is not necessarily a victim of a violation of the right to humane treatment. However, as pointed out by Inter-American Court, a case of enforced disappearance may also constitute a violation of the prohibition of the torture when there was only a short period of incommunicado detention. This issue has been confirmed in cases in which there was enough evidence to conclude that the victims had suffered of extreme fear because they could anticipate their violent execution⁴. Inter-American Court has introduced the most progressive approach⁵ and has found violation of article 5 ACHR in most cases of enforced disappearances, regardless whether there was enough evidence to prove particular acts of torture⁶.

Finding a violation of the duty to investigate allegations of torture, as the European Court has done doesn't lead to the consequence that enforced disappearance or incommunicado detention per se amount to a violation of the right to human treatment⁷. In particular because it concerns such a fundamental right and with the view to the difficulties of proof inherent in cases of enforced disappearance, this restrictive approach taken by the European Court has been criticized as «an impediment to an effective protection and enforcement of human rights». If there was not enough evident to prove that the victim was subjected to ill-treatment, the European Court hold only that the procedural limb of the right to life had been violated⁸, because the authorities of the state had failed to investigate that case.

International monitoring bodies do not usually consider whether enforced disappearance constitutes torture or inhuman or degrading treatment or punishment. The Inter-American Court has used such formulations in its decisions, as: «grave psychological torture», «cruel inhuman or degrading treatment⁹». In many instances the act of enforced disappearance is committed in order to receive information from victim or to punish subversive activities. If the level of suffering of the victim meets the required threshold, enforced disappearance is qualified to torture¹⁰. In other cases act of enforced disappearance amounts to

¹ Leach Philipp (2008). *The Chechen Conflict: Analyzing the Oversight of the European Court of Human Rights*. E.H.R.L.R., 742

² Ott Lisa(2011). *Enforced Disappearance in International Law*. Intersentia, Cambridge-Antwerp-Portland,52

³ El Megreisi v. Libya, CCPR/C/91/D/1422/2005

⁴ La Cantuta v. Peru, C/162[2006], IACtHR- 29 November 2006

⁵ Rodley Nigel, Pollard Matt (2009). *The Treatment of Prisoners under International Law*. 3 edition, Oxford/ New York/ Auckland, 350

⁶ Velasquez Rodriguez v. Honduras, C/4 [1988], IACtHR- 29 July 1988

⁷ Claude Ophelia (2010). A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence. *Intercultural Human Rights Law Review* 5, 433

⁸ Khashiyev v. Russia (des.) [GC] no. 57945/00 [2005], ECHR- 6 July 2005

⁹ La Cantuta v. Peru, C/162[2006], IACtHR- 29 November 2006

¹⁰ Anderson Kristen (2006). How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Responsible for Acts of Enforced Disappearance. *7/2 Melbourne Journal of International Law*, 62

inhuman treatment. To sum up, not only enforced disappearance consisting of incommunicado detention but enforced disappearance in general at least constitutes inhuman treatment and violates respective articles. Any way the qualification of enforced disappearance can't be generalized, rather it depends on the circumstances of each case.

Most of the cases of enforced disappearance lead to the death of the victim. The right to life is enshrined in article 6 ICCPR, article 2 ECHR, article 4 ACHR. Both the European Court and the Inter-American Court rely on circumstantial evidence in order to presume the death of the victim. The European Court usually relies on the time period elapsed since the victim had been seen for the last time. This approach was criticized by Scovazzi and Citroni¹, who argue that it rather depends on the context factor, for instance, on the political situation in the state, in which enforced disappearance occurred and not on the duration. The monitoring bodies generally find violations of the right to life when there is enough evidence to assume that the victim has actually died. It should be noted that in cases, where substantive indications to believe that the victim was still alive, the Human Rights Committee restrained from making any findings on this right. In fact, the Human Rights Committee has found article 6 ICCPR violated only in cases, where the author of communication had invoked this article.

Moreover, in the later decisions the Committee has introduced approach, according to which, due to the failure of the state to protect and ensure the right to life the violation of the right to life should be found, even if it hadn't been established that the missing person had died and without presuming the death. Furthermore, if a state has failed to prevent an act similar enforced disappearance committed by non-state actors although it had necessary knowledge to do so and the act ended with the killing of the person, the second layer of obligations is violated. This was confirmed by the Inter-American Court and the European Court.

According to the article 24 ICED, «victim» means the disappeared person and any individual who has suffered harm as the direct result of enforced disappearance. It means that enforced disappearance can lead to suffering not only of the disappeared persons themselves (so called material victims) but also of their next of kin who are left with uncertainty about the fate of their beloved ones and are troubled by the inaction of authorities. This broad interpretation of victim has found its reflection in the case law of the international monitoring bodies. Nevertheless the recognition of suffering of next of kin as an independent human rights violation is a subject to controversy in their case law. The most developed in the case law is the concept of the violation of the right of family members to humane treatment.

In 1983, the Human Rights Committee first recognized that the mother of a disappeared person had been herself a victim of an article 7 violation² (prohibition of torture). The Committee held in his decisions that «the anguish and distress caused by the disappearance to the victim's close family disclose a violation of article 7 without providing further reasoning».

In the major of cases of enforced disappearance the Inter-American Court has found that the families of the disappeared person may be considered as the victims of the violation of the prohibition of torture since the case of Blake³. Moreover, the burning of the mortal remains in order to destroy the evidence had been also been qualified as the inhuman treatment by the Court. While holding that article 5 of the ACHR had been violated to the detriment of the next of kin of the disappeared, the Inter-American Court has taken the following factors into consideration: 1) the closeness of the relationship between the material victim and the family member; 2) the fact that the family members had been present during the victims' arbitrary detention; 3) the uncertainty suffered; 4) the efforts undertaken in order to find out about the fate of missing person; 5) the threats and attempts of intimidation to which the family was subjected; 6) the disrespectful manner in which the remains of the disappeared were treated; 7) the necessity to move another country and other impact of the disappearance on the social and labor relations of the family.

The European Court has pointed out that the essence of the inhuman treatment suffered by the family members of the disappeared doesn't lie in the disappearance itself, but rather in the inappropriate conduct of the authorities after having informed about enforced disappearance⁴. In the number of the cases, where the European Court had found the violation of the procedural limb of article 2 (right to life), it didn't hold the violation of article 3 to the detriment of the next of kin. Moreover it has held that the shortcomings of the

¹ Scovazzi, Citroni (2007). *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention*. Leiden, 198

² Quinteros v. Uruguay, CCPR/C/79/Add.95/1998

³ Blake v. Guatemala, C/36 [1998], IACtHR- 24 January 1998

⁴ Cakici v. Turkey (des.) [GC] no. 23657/94 [1999], ECHR- 8 July 1999

investigation do not constitute the inhuman or degrading treatment. Moreover, the European Court has underlined that if there is not enough evidence to prove that State agents had been involved in the abduction, the State can't be held responsible for the applicants' mental distress caused by the commission of the crime itself.

The case law of different monitoring bodies has shown that there is in fact a consensus that the families of the disappeared person may be considered as victims of the violation of the prohibition of torture, but it's not a general rule¹. Each international institution relies on its standards for the assessment whether family members are considered to be victims. The most progressive still remains the case law of the Inter-American Court, which due to the difficult situation of proof imminent in all cases of enforced disappearance has introduced the presumption *iuris tantum* in favor of direct relatives. More restrictive and formalistic approach is used by the European Court. According to this approach, the Court takes into consideration the proximity of the family tie, with weight attached to the parent-child relations as one of the crucial factors.

The Human Rights Committee has stated in a number of its decisions that enforced disappearance may violate article 7 ICCPR with regard to the next of kin and hasn't qualified the kind of ill-treatment to which the family members were subjected². The Inter-American Court also holds that article 5 ACHR has been violated to the detriment of the family members, because their mental and moral integrity had been violated. In the case of *Humberto Sanchez* it has also stated that the unworthy treatment of the remains also constituted cruel and inhuman treatment for the families³.

The right to privacy and family life hasn't been violated in many cases of enforced disappearance. Anyway, different aspects of this right are guaranteed in articles 11 and 17 ACHR, article 8 ECHR, article 17 ICCPR. Act of enforced disappearance violates following aspects of this right: right to privacy and the inviolability of the home, family life and correspondence. The role of this right is especially important in cases, when suffering of either disappeared person or the next of kin is considered not to amount to the prohibition of torture by international monitoring bodies. In these cases the violation of the physical and mental integrity constitutes an interference with the right to privacy⁴. Moreover, the European Court has stated in several cases, in which it had found the violation of articles 2 (right to life) and 3 (prohibition of the torture) of ECHR that the invoked violation of article 8 referred to the same set of facts as those examined with the respect to articles 2 and 3⁵. On the other hand, the analyze of the case law of Inter-American Court allows the conclusion that enforced disappearance as such doesn't violate the right to privacy and family life: the effects of the incommunicado detention may have had on the victims family would derive from the violation of the right to humane treatment and the right to personal liberty. Nevertheless, it has found violation of the right to privacy only in the cases, where there had been a forceful intrusion into the residence of a family or if the enforced disappearance had taken place in a specific cultural context and circumstances.

As a result of enforced disappearance the right to truth is always violated with regard to the families of the disappeared person. The concept of this right was introduced under international humanitarian law: in the context of international armed conflicts States are under the duty to search after missing persons and to guarantee the right of the families to know about the fate of their relatives (art. 32 of Additional Protocol 1 to the Geneva Conventions)⁶. With the exception of ICED, which guarantees the right to truth (art. 24), the international conventions on human rights don't specifically refer to this right. The existence of this right has been recognized by UNGWEID, which adopted the General Comment on Right to the Truth in the Relation to Enforced Disappearance.

In the major of the cases of enforced disappearance the Inter-American Court hasn't considered the violation of the next of kin's right to the truth including the right to obtain information about the fate and whereabouts of the disappeared person as an independent right. Instead of this it has hold the violation of

¹ Feldman Tamar (2009). *Indirect Victims, Direct Injury: Recognizing Relatives as Victims Under the European Human Rights System*. E.H.R.L.R 2009/1, 52

² HRC, *Quinteros v. Uruguay*, CCPR/C/79/Add.95/1998

³ *Humberto Sanchez v. Honduras*, C/99 [2003], IACtHR- 7 June 2003

⁴ Kalin, Walter, Kunzli, Jorg (2009). *The Law of International Human Rights Protection*. Oxford, 393

⁵ *Bazorkina v. Russia (des.)*[GC] no. 69481/01[2006], ECHR- 11 December 2006

⁶ Naqvi Yasmin (2006). *The Right to Truth in International Law: Fact or Fiction?*. 88(2006) *International Review of the Red Cross*, 248.

article 8 (the right to a fair trial) and article 25 (the right to judicial protection) of the ACHR¹. The European hasn't referred to this right explicitly. However, in its case law the European Court has included some aspects of the right to truth in the right to an effective remedy (article 13 ECHR) and the procedural limbs of the right of the next keen not to be subjected to ill-treatment (article 3 ECHR). To sum up one can underline that both the Inter-American Court and the European Court that the content of the right to truth is fulfilled by the obligation to investigate the facts that lead to human rights violation in general.

Due to the introduction of the multiple-rights approach by the international monitoring bodies other rights have been considered to be violated in some decisions depending on circumstances of each of enforced disappearance: freedom of association, freedom of thought and expression, freedom of movement and residence, the right to political participation and the prohibition of discrimination. The research of the case on each human right illustrates the advantage of the multiple-rights approach, since it allows to consider the specific circumstances of the case of enforced disappearance.

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¹ *Bamaca Velasquez v. Guatemala*, C/70[2000], IACtHR- 25 November 2000