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The Controversial Involvement of Non-State Actors in the Commission of Enforced Disappearances: An Introduction

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(Submitted 14 September 2022; revised 27 October 2022; accepted 17 November 2022)

Abstract

Enforced disappearance is one of the most horrific crimes of our time. This is a crime that causes excruciating suffering to its victims: the disappeared and their families and relatives. Thousands of people have suffered, and are still suffering, all over the world from enforced disappearances. To combat this scourge, a United Nations Convention was adopted in 2006 and entered into force in 2010. It adopted a definition of enforced disappearance that includes an important element: the direct or indirect involvement of the State Party in the commission of the enforced disappearance. Yet, private entities (commonly referred to as non-State actors) can also commit acts similar to enforced disappearances. However, in the absence of the element of the State Party's involvement, can we go so far as to qualify the acts perpetrated by non-State actors as enforced disappearances? This question has generated and continues to generate an interesting debate.

Keywords United Nations treaty bodies, enforced disappearances, Committee on Enforced Disappearances, criminal liability of non-State actors, victims of serious human rights violations

INTRODUCTION

Enforced disappearance is one of the most horrific crimes of our time that causes atrocious suffering to its victims: the disappeared and their families and loved ones. Thousands of people suffered from it during the 1970s and 1980s under the Latin American dictatorial regimes. That said, enforced disappearances are far from being the prerogative of a single region of the globe. Unfortunately, they have often been committed and continue to be committed all over the world. This happens especially under totalitarian regimes, during periods of armed conflict and in societies

This article is a summary of an oral intervention presented during the forum on Criminal Justice and Human rights organized at the Faculty of Law, Mohamed V University Rabat Morocco on the 12th and the 13th May 2022.

undermined by organized crime and violence. They are far from being just a nightmare belonging to a tormented past.

The fight against enforced disappearance mobilizes several legal disciplines. This concerns more particularly international human rights law, international humanitarian law, international criminal law and, of course, national criminal law.

THE UNITED NATIONS AND ENFORCED DISAPPEARANCES

At the level of international human rights law, two United Nations (UN) bodies are dedicated to the fight against enforced disappearances: The Working Group on Enforced or Involuntary Disappearances and the Committee on Enforced Disappearances.

The first mechanism is a special procedure created by the Commission on Human Rights, replaced in 2006 by the Human Rights Council. It is made up of five members. It fulfills a mission, essentially humanitarian, acting as a means of dialogue between the disappeared persons and the States concerned by the disappearance. To fulfill this mission, it notably applies the provisions of the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the UN General Assembly in its Resolution 47/133 of 18 December 1992.

The second mechanism is a treaty body created by the International Convention for the Protection of All Persons from Enforced Disappearance concluded in New York on 20 December 2006 and entered into force on 23 December 2010.¹

THE UNITED NATIONS CONVENTION

This paper is focused on the UN International Convention for the Protection of All Persons from Enforced Disappearance and its committee. So far, 68 States have ratified it. The committee it created is made up of 10 experts. It is responsible for monitoring the proper application of the Convention by Member States.

Under the UN Convention, enforced disappearance requires three conditions (Article 2 of the Convention):

A person must be deprived of his liberty;

The disappearance must be denied;

Or the person's whereabouts or fate is concealed by the captors.

The disappearance must also be ordered or, in one way or another, be authorized or tolerated by the State.

According to the UN International Convention for the Protection of All Persons from Enforced Disappearance, only States can commit enforced disappearances. This is due to the fact that the UN Convention is an international human rights treaty addressed to States. It only binds, as such, the States that have ratified it.

¹General Assembly of the United Nations, Resolution 47/133, International Convention for the Protection of All Persons from Enforced Disappearance, New York, 20 December 2006, entered into force 23 December 2010. Retrieved 25 January 2023 (<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced>).

The negotiators of the UN Convention had difficulty in agreeing to go so far as to incriminate, as enforced disappearance, those committed by non-State actors. Several reasons may explain this reluctance. One of the main reasons is political. In fact, a broader definition of enforced disappearance including private actors would have had a worrying drawback for some States. The private groups, which are on their territories, and which sometimes proceed to the detention of people followed by the denial of this act or the concealment of the whereabouts or of the fate of the detained person, are often rebels and armed opponents who fight their regimes and covet their power. However, if it is maintained that these rebels must respect the International Convention for the Protection of All Persons from Enforced Disappearance, this is tantamount to recognizing their political legitimacy that the States that they oppose are resolutely striving to avoid. The States involved in this type of situation try to avoid recognizing any legal personality to this type of group. However, it is clear that private entities commit acts that result in the disappearance of their victims. In addition, the matter is too serious to be totally dismissed and ignored. Acts that are often described as kidnapping or hostage-taking followed by detention, prolonged or not, in secret places would be qualified as enforced disappearances if they were committed directly or indirectly by a State agent.

DISAPPEARANCES COMMITTED BY NON-STATE ACTORS

This question did not escape the drafters of the Convention. They even debated it for a long time. So, they ended up “cutting the pear in half”, providing it with an intermediate solution (“half fig, half grape”). Therefore, the drafters added to Article 2 of the Convention an Article 3 reserved only for acts committed by non-State actors. In the definition of enforced disappearance with its three constituent elements in Article 2, there is obviously the involvement of a State agent (see above).

Article 3 is reserved for the actions of non-State actors. It is worded this way:

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

In French, disappearance is without the adjective “forced” and is a broader term than forced disappearance. Disappearance (without this adjective) is usually translated into English with the word “missing” and not “disappearance”. In English this makes, at first glance, a relatively simple distinction between disappearance and enforced disappearance. As for “enforced disappearance”, it is a legal concept covered by the very precise definition provided for in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

Article 3 of the convention does not refer to enforced disappearances; it refers to acts defined in Article 2 perpetrated by actors operating without the authorization, support or acquiescence of the State. The acts that non-State actors commit may be exactly the same as those that would be committed by a State. That said, technically

and legally speaking, they cannot be qualified as “enforced disappearances”. This is because, again, the State is not involved in their commission. These acts lack one of the constituent elements of the definition in Article 2 of the Convention, namely the involvement of the State. These acts, sometimes informally, are referred to as acts similar or comparable to enforced disappearances, without qualifying them as enforced disappearances.

In fact, Article 3 of the International Convention for the Protection of All Persons from Enforced Disappearance obliges Member States to investigate the acts covered by Article 3 and to prosecute their perpetrators. This, of course, implies that these acts must be criminalized. In practice, States sanction them under different labels like kidnapping, arbitrary detention, hostage taking, torture or other. However, the debate has never ceased on the possibility of attributing the commission of enforced disappearances to non-State actors. Looming behind this incessant debate are several reasons.

First, there is the fact that enforced disappearances are far from being an epiphenomenon. They are being committed in some countries on a worrying scale. Then there is the fact that acts similar to enforced disappearance committed by non-State actors cause the same kinds of suffering that State-induced enforced disappearances cause to their victims. Added to this is the frustration felt by many human rights activists who believe that the UN Convention has not gone far enough in protecting victims of enforced disappearances by limiting their commission to acts or omissions of State actors. All of this constitutes a legitimate leitmotif for civil society organizations to continue to plead this case.

We can add to this list the fact that human rights are interpreted in an extensive, proactive and evolving way, an interpretation that aims to provide the best possible protection to victims of human rights violations. That said, the definition adopted by Article 2 of the UN International Convention for the Protection of All Persons from Enforced Disappearance prevents this broadening of the qualification. In favour of this restriction, we can cite the need to respect the will of the drafters of the Convention. And since an enforced disappearance is a crime, we must also add the imperative to respect the principle of legality which requires a strict interpretation of the penal text.

INTERNATIONAL CRIMINAL AND HUMANITARIAN LAW

The members of the Committee on Enforced Disappearances, particularly those who are lawyers, are very cautious. They generally defend this legalistic point of view. This does not rule out their constant interest in opening up to all informed possibilities of extending criminal responsibility for the commission of enforced disappearances in order to cover the actions of non-State actors. That said, as pointed out before, the problem posed by enforced disappearance does not only arise in the field of human rights. It straddles several legal disciplines, in particular international criminal law and international humanitarian law. A broadening of the responsibility of the perpetrators of disappearances to include enforced disappearance can come from these two disciplines.

At the level of international criminal law: enforced disappearances can be committed in a generalized or systematic manner. They therefore constitute crimes against humanity, and they must be criminalized and punished as such. The UN International Convention for the Protection of All Persons from Enforced Disappearance takes this into account and recommends it. States that have ratified the UN Convention are required to criminalize enforced disappearances as crimes against humanity, of course when committed in a widespread or systematic manner.

Furthermore, the Convention itself refers to international law for the definition of enforced disappearance as a crime against humanity. However, it happens that the definition of enforced disappearance in international law presents some differences from the definition provided for in Article 2 of the Convention. Among these differences is the fact that enforced disappearances can be perpetrated by State actors as well as by political organizations (Article 7 of the Treaty of Rome of the International Criminal Court)². However, political organizations are essentially private entities and in principle non-State actors. In international criminal law, the question has therefore been decided in favour of greater protection for the victims of disappearances, a protection that tends to criminalize disappearance as enforced disappearance even when it is committed by non-State actors, in this case political organizations.

In addition, in international humanitarian law, which moreover is closely related to international criminal law, we note that certain non-State organizations engaged in armed conflicts can take on a significant scope in the field. These organizations sometimes become so powerful that their *de facto* power becomes equal to or greater than that of the State or States that they oppose. Their capacity to act and to harm can increase considerably. This is how their actions during armed conflicts can be very detrimental to civilian victims, without the State or States being able to prevent or repress these harmful actions. There is therefore a tendency to make these non-State entities bear criminal responsibility for the serious violations attributable to them. They are then asked to respect international humanitarian law. This encourages them to avoid committing violations of international humanitarian law and international criminal law. Above all, this makes it possible to strengthen the normative safeguards aimed at protecting civilian victims from all kinds of abuses and violence, including enforced disappearances. Incidentally, it can be said that in some situations it is the private organizations that are protagonists in armed conflicts who voluntarily choose to respect international humanitarian law and human rights. This allows them to gain legitimacy in the eyes of the international community. In this sense, the responsibility of these non-State actors has been considered in the following two cases:

The first case concerns enforced disappearances perpetrated by non-State actors who exercise effective control over a given territory. These non-State actors then become, in a way, the *de facto* rulers of the territory in question. They must then bear the consequences.

²Rome Statute of the International Criminal Court, Rome, 17 July 1998, entered into force 1 July 2002. Retrieved 25 January 2023 (<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>).

The second case is when the enforced disappearance is perpetrated by “an organized armed group” when there is a link with a non-international conflict. The focus here is on the degree of organization and structuring of these private entities.

This view is currently the subject of a draft statement by the Committee on Enforced Disappearances. Obviously, in the two cases highlighted above, criminal liability should be incurred. Those responsible for the commission of enforced disappearances must be punished.

CONCLUSION

To conclude, I would say that this whole debate sometimes turns out to be very technical and even convoluted. However, we must never forget that behind these controversies there are always victims. The UN protection mechanisms are sometimes the only and last resort available to the families of the disappeared to clarify their fate and possibly save them from the horrors of torture or certain death. In this regard, the UN International Convention for the Protection of All Persons from Enforced Disappearance has so far received more than 1500 requests for urgent action. Of these more than 1500 cases, the committee was able to find 146 people, meaning that it saved their lives. But this proportion, even if we can congratulate ourselves on it, remains very modest. This modesty invites us both to remain vigilant and to continue to fight relentlessly against the scourge of enforced disappearances.

TRANSLATED ABSTRACTS

Abstracto

La desaparición forzada es uno de los crímenes más horribles de nuestro tiempo. Un crimen que causa un sufrimiento atroz a sus víctimas: los desaparecidos y sus familiares y allegados. Miles de personas han sufrido y siguen sufriendo, en todo el mundo, por las desapariciones forzadas. Para combatir este flagelo se adoptó una Convención de las Naciones Unidas en 2006 y entró en vigor en 2010. Adoptó una definición de desaparición forzada que incluye un elemento importante: la participación directa o indirecta del Estado Parte en la comisión de la desaparición forzada. Sin embargo, las entidades privadas (comúnmente conocidas como actores no estatales) también pueden cometer actos similares a las desapariciones forzadas. Pero, en ausencia del elemento de participación del Estado Parte, ¿podemos llegar a calificar los actos perpetrados por actores no estatales como desapariciones forzadas? Esta pregunta ha generado y sigue generando un interesante debate.

Palabras clave órganos de tratados de Naciones Unidas, desapariciones forzadas, Comité contra la Desaparición Forzada, responsabilidad penal de los actores no estatales, víctimas de graves violaciones a los derechos humanos

Abstrait

La disparition forcée est un des crimes les plus horribles de notre temps. Un crime qui cause des souffrances atroces à ses victimes : les disparus et leurs familles et proches. Des milliers de personnes en ont souffert et en souffrent encore partout dans le monde. Pour combattre ce fléau une convention onusienne a été adoptée en 2006 et entrée en vigueur en 2010. Elle a adopté une définition de la disparition forcée qui inclue un élément important à savoir : l'implication directe ou indirecte de l'Etat partie dans la commission de la disparition forcée. Ceci dit, les entités privées (communément qualifiées d'acteurs non étatiques) peuvent être aussi commettre des actes qui s'apparentent à des disparitions forcées. Mais en l'absence de l'élément de l'implication de l'Etat partie peut-on aller jusqu'à qualifier les actes des acteurs non étatiques de disparitions forcées ? Cette question suscite et continue à susciter un débat intéressant.

Mots-clés organes de traités des Nations Unies, disparitions forcées, Comité des disparitions forcées, responsabilité pénale des acteurs non étatiques, victimes de violations graves des droits de l'homme

抽象的

强迫失踪是我们这个时代最可怕的罪行之一。一种对其直接和间接受害者造成极度痛苦的罪行：失踪者及其家人和亲属。世界各地有成千上万的人已经并且仍在遭受强迫失踪之苦。为打击这一祸害，2006年通过了一项联合国公约，并于2010年生效。它通过了强迫失踪的定义，其中包括一个重要因素：缔约国直接或间接参与强迫失踪的实施。然而，私人实体（通常称为非国家行为者）也可以实施类似于强迫失踪的行为。但是，在没有缔约国参与的情况下，我们是否可以将非国家行为者实施的行为定性为强迫失踪？这个问题已经产生并将继续产生有趣的争论。

关键字：联合国条约机构，强迫失踪，强迫失踪问题委员会，非国家行为者的刑事责任，严重侵犯人权行为的受害者。

الملخص

يُعتبر الاختفاء القسري من أفظع الجرائم في عصرنا. جريمة تسبب معاناة رهيبه لضحاياه: المختفين وذويهم وأقاربهم. لقد عانى آلاف الأشخاص وما زالوا يعانون في جميع أنحاء العالم من الاختفاء القسري. لمكافحة هذه الآفة، تم اعتماد اتفاقية للأمم المتحدة في عام 2006 ودخلت حيز التنفيذ في عام 2010. واعتمدت تعريفا للاختفاء القسري يتضمن عنصرا هاما: المشاركة المباشرة أو غير المباشرة للدولة الطرف في ارتكاب الاختفاء القسري. ومع ذلك، يمكن للكيانات الخاصة (التي يشار إليها عادة باسم الجهات الفاعلة من غير الدول) أن ترتكب أعمالا مشابهة لحالات الاختفاء القسري. ولكن، في ظل غياب عنصر مشاركة الدولة الطرف، هل يمكننا أن نذهب إلى حد وصف الأفعال التي ترتكبها جهات فاعلة من غير الدول بأنها عمليات اختفاء قسري؟ لقد أثار هذا السؤال ولا زال يثير نقاشا مهما.

الكلمات الدالة. هيئات معاداة الأمم المتحدة. الاختفاء القسري. لجنة الاختفاء القسري. المسؤولية الجنائية للجهات الفاعلة من غير الدول. ضحايا الانتهاكات الجسيمة لحقوق الإنسان

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Cite this article: Ayat, M. 2022. The Controversial Involvement of Non-State Actors in the Commission of Enforced Disappearances: An Introduction. *International Annals of Criminology* **60**, 309–316. <https://doi.org/10.1017/cri.2023.4>