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27 DEFINING ENFORCED DISAPPEARANCE AS A CRIME AGAINST HUMANITY

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After confirming the ‘extreme seriousness of enforced disappearance’, the fourth recital of the preamble of the International Convention for the Protection of All Persons from Enforced Disappearance states that enforced disappearance ‘constitutes a crime and, in certain circumstances defined in international law, a crime against humanity’. The point is further developed in article 5 of the Convention: ‘The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.’¹ The drafters of the Convention obviously recognised that not all enforced disappearances would also constitute crimes against humanity. They were well aware of the definition of the crime against humanity of enforced disappearance set out in the Rome Statute of the International Criminal Court but also quite deliberate in efforts to enlarge this so as to cover enforced disappearances that were not crimes against humanity.²

I. ENFORCED DISAPPEARANCE AT NUREMBERG

Although the modern expression ‘enforced disappearance’ was not used at the time, the substance of this crime was prosecuted by the earliest international criminal courts. Both the International Military Tribunal and the American Military Tribunals that sat at Nuremberg dealt with the *Nacht und Nebel Erlass*, the ‘night and fog decree’, issued on 7 December 1941, using the legal characterization of war crimes and crimes against humanity. The expression comes from the Tarnhelm spell, pronounced by Alberich to his brother Mime in *Das Rheingold*, the first of Richard Wagner’s four Ring Cycle works: ‘Nacht und

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¹ International Convention for the Protection of All Persons from Enforced Disappearance, (2010) 2716 UNTS 3.

² Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, UN Doc. E/CN.4/2004/59, paras. 17-18, 42-48.

Nebel, niemand gleich! Siehst du mich, Bruder?’ During the International Military Tribunal trial, Marie Claude Vaillant-Couturier described being taken to the NN or *Nacht und Nebel* block at Ravensbrück.³ Another witness called by the French prosecutor, Hans Cappelen, said he had been considered a ‘Nacht und Nebel prisoner’ when at the Natzweiler camp, in Alsace.⁴ As *Nuit et brouillard*, the term was used as the title of Alain Resnais’ short documentary about the Nazi concentration camps.

Filed as an American exhibit, an excerpt from the *Nacht und Nebel* decree was read into the record of the International Military Tribunal by the French deputy prosecutor, Charles Dubost: ‘Penalty for such offenses, consisting of loss of freedom and even a life sentence is a sign of weakness. Only death sentence or measures which entail ignorance of the fate of the guilty by local population will achieve real effectiveness.’⁵ In one of the subsequent proceedings, a version of the decree destined to be shown to prisoners was filed as an exhibit:

*“As it is the purpose of this decree to leave the relatives, friends, and acquaintances in uncertainty regarding the fate of the prisoners; they are not allowed to have any means of communication with the outside world. They may therefore neither write, nor receive letters, parcels, or visits. Nor will any kind of information regarding the prisoners be given to any agency outside. In cases of death, the relatives are not to be informed until further notice. There has not yet been a final ruling on this question.”*⁶

The chief of the legal division of the German armed forces, Rudolf Lehmann, testified about the origin of the decree:

“There arose in France, after the beginning of the Russian campaign, the resistance movement which became very active. Hitler complained to the justice administration of the armed forces that on account of their attitude they were not in a position to suppress that resistance movement. That is the general background for the Nacht und Nebel Decree.

In detail this is what happened-In the beginning of October 1941 I received a letter from Field Marshal Keitel-but I want to state here that Keitel was always at headquarters, whereas I was always in Berlin. In this letter, which all my assistants have read, Keitel passed on a directive which he had received from Hitler. The letter was quite long, several pages in handwriting. In that letter, it was expressed that Hitler considered the resistance movement in France a tremendous danger for the German troops. It could be seen that the methods previously used were not sufficient to suppress that movement. There was no sense in passing sentences of prison terms-considering conditions as they were-which were handed down after a long period. That was not the right deterrent which the armed forces should employ; therefore, new means would have to be found...

³ *France et al. v. Goering et al.*, Transcript, 28 January 1946, (1947) 6 IMT 203, at p. 220.

⁴ *France et al. v. Goering et al.*, Transcript, 29 January 1946, (1947) 6 IMT 268, at p. 283.

⁵ *France et al. v. Goering et al.*, Transcript, 25 January 1946, (1947) 6 IMT 177, at p. 182.

⁶ *United States of America v. Alstötter et al.*, Prosecution Exhibit 310, (1951) 3 TWC 786, at p. 787.

*The Fuehrer demanded that Frenchmen who were suspected of such acts, during night and fog - that is where the expression comes from - should be brought across the border and that in Germany they should be held completely incommunicado. That should only not apply in those cases where immediately a death sentence could be passed in France. This measure could be used as a deterrent...*⁷

It was discussed by the International Military Tribunal in its judgment of 30 September-1 October 1946:

*"The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror. On 7 December 1941 Hitler issued the directive since known as the 'Nacht und Nebel Erlass' (Night and Fog Decree), under which persons who committed offenses against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial or punishment in Germany. This decree was signed by the Defendant Keitel. After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came, or their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person. Hitler's purpose in issuing this decree was stated by the Defendant Keitel in a covering letter, dated 12 December 1941, to be as follows: 'Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.'*⁸

Because *Nacht und Nebel* was charged as a war crime, the International Military Tribunal did not rule on whether it could also be characterized as a crime against humanity.

However, the International Military Tribunal's findings were subsequently invoked and relied upon by the American Military Tribunal in the 'Justice Case' where the charge was crimes against humanity. This was a prosecution of leading judges and prosecutors for their implementation of Nazi decrees including *Nacht und Nebel*.⁹ The judges considered the brief account by the International Military Tribunal to be sufficient to show 'the illegality and cruelty of the entire NN plan or scheme'.¹⁰ The *Nacht und Nebel Erlass* was described in the indictment of the Nazi jurists under the heading 'War Crimes':

"Hitler's decree of 'Night and Fog' (Nacht und Nebel) whereby civilians of occupied territories who had been accused of crimes of resistance against occupying forces were spirited away for secret trial by certain Special Courts of

⁷ *United States of America v. Alstötter et al.*, Extracts from the Testimony of Prosecution Witness Rudolf Lehmann, (1951) 3 TWC 804, at p. 805.

⁸ *France et al. v. Goering et al.*, Judgment, 30 September-1 October 1946, (1947) 1 IMT 171, at pp. 232-233.

⁹ *United States of America v. Alstötter et al.*, Opinion and Judgment, 4 January 1947, (1951) 3 TWC 954, at p. 1033.

¹⁰ *Ibid.*, p. 1034.

the Justice Ministry within the Reich, in the course of which the victims' whereabouts, trial, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorizing the victims' relatives and associates and barring recourse to any evidence, witnesses, or counsel for defense."¹¹

In establishing the illegality of *Nacht und Nebel*, the Tribunal referred to the list of violations of the laws and customs of war that appears in the report of the Commission on Responsibilities, issued during the Paris Peace Conference in 1919, noting that this included 'deportation of civilians'. The Tribunal found that this crime was subsequently reflected in Control Council Law No. 10, where the definition of crimes against humanity included acts of 'enslavement, deportation, imprisonment ... against any civilian population'.¹² It continued, noting that *Nacht und Nebel* prisoners

*"Were kept secretly and not permitted to communicate in any manner with their friends and relatives. This is inhumane treatment. It was meted out not only to the prisoners themselves but to their friends and relatives back home who were in constant distress of mind as to their whereabouts and fate. The families were deprived of the support of the husband, thus causing suffering and hunger. The purpose of the spiriting away of persons under the Night and Fog decree was to deliberately create constant fear and anxiety among the families, friends, and relatives as to the fate of the deportees. Thus, cruel punishment was meted out to the families and friends without any charge or claim that they actually did anything in violation of any occupation rule of the army or of any crime against the Reich. It is clear that mental cruelty may be inflicted as well as physical cruelty. Such was the express purpose of the NN decree, and thousands of innocent persons were so penalized by its enforcement."*¹³

Convicting several of the Nazi jurists for their role in implementation of the *Nacht und Nebel* decree, the Tribunal said that it was acting 'in harmony with the decision' of the International Military Tribunal in finding 'that the secret procedure which was instituted and enforced through the Ministry of Justice constituted a war crime and a crime against humanity'.¹⁴ Rudolf Lehman, the military lawyer who drafted the decree, was found guilty of war crimes and crimes against humanity in another trial for being 'a participant of the final production of this terror programme'.¹⁵

¹¹ *United States of America v. Alstötter et al.*, Indictment, 4 January 1947, (1951) 3 TWC 15, para. 13.

¹² *United States of America v. Alstötter et al.*, Opinion and Judgment, 4 January 1947, (1951) 3 TWC 954, at p. 1057.

¹³ *Ibid.*, p. 1058.

¹⁴ *Ibid.*, p. 1120.

¹⁵ *United States of America v. Von Leeb et al.* ('The High Command Case'), Judgment, 27 October 1948, (1950) 11 LWC 462, at p. 694.

II. THE CODE OF CRIMES AND THE INTERNATIONAL LAW COMMISSION

The issue of enforced disappearance returned to the international human rights agenda in the 1980s as a result of its widespread practice in Latin America.¹⁶ In a seminal ruling, the Inter-American Court of Human Rights found that the information before it, provided by the Inter-American Commission, tended to show that 'there existed in Honduras from 1981 to 1984 a systematic and selective practice of disappearances carried out with the assistance or tolerance of the government'.¹⁷ The Court noted that '[i]nternational practice and doctrine have often categorized disappearances as a crime against humanity, although there is no treaty in force which is applicable to the States Parties to the Convention and which uses this terminology'.¹⁸ It also cited a resolution of the General Assembly of the Organisation of American States declaring that disappearance is 'an affront to the conscience of the hemisphere and constitutes a crime against humanity'.¹⁹

Introduction of the notion of disappearance as an explicit category of crime against humanity is probably attributable to Professor Christian Tomuschat at the 1991 session of the International Law Commission, during consideration of the Code of Crimes Against the Peace and Security of Mankind. The Code had by then been debated within the Commission for more than four decades. On the proposal of the Special Rapporteur, Doudou Thiam, at the 1991 session the Commission had actually agreed to abandon the term 'crimes against humanity' in favour of 'systematic or mass violations of human rights', a temporary aberration that it would soon abandon.²⁰ Professor Tomuschat observed that 'the practice of systematic disappearances in certain countries was at present one of the main concerns with regard to human rights'. He said that it was not possible at the current stage of the debate to add 'systematic disappearance' to the provision, noting that it might be covered by the fifth sub-paragraph of the draft, dealing with persecution, adding that the question should be mentioned in the commentary and that the Commission should return to it on second reading.²¹ The commentary of the 1991 draft code contains the following: 'It was pointed out in the Commission that a practice of systematic disappearances of persons

¹⁶ Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, UN Doc. E/CN.4/2002/71, paras. 11-15. Also: Maureen R. Berman and Roger S. Clark, 'State Terrorism: Disappearances', (1982) 13 *Rutgers L.J.* 531.

¹⁷ *Velázquez Rodríguez v. Honduras*, 29 July 1988, Series C, no. 4, para. 119.

¹⁸ *Ibid.*, para. 153. Also: *Godínez Cruz v. Honduras*, 20 January 1989, Series C, no. 8, para. 161.

¹⁹ AG/RES. 666 (XIII-O/83), in Twelfth Regular Session, November 14-18 1993, OEA/Ser. P/XIII.O.2, Proceedings, Vol. I, p. 68.

²⁰ Ninth report on the draft Code of Crimes against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur, UN Doc. A/CN.4/435 and Add.1.

²¹ *Yearbook ... 1991*, UN Doc. A/CN.4/SER.A/1991, p. 219, para. 75.

was also a phenomenon that deserved to be specifically mentioned in the draft Code.²² In its observations on the 1991 draft Code, Australia endorsed the suggestion of Professor Tomuschat ‘that the practice of systematic disappearances of persons deserves special mention in the context of this draft article’. Australia added that it was ‘not certain that persecution on social, political, racial, religious or cultural grounds would cover the practice of systematic disappearances’.²³

Special Rapporteur Doudou Thiam submitted a revised draft code in 1995. He returned to the heading ‘crimes against humanity’, commenting on its use in the Statute of the International Criminal Tribunal for the former Yugoslavia.²⁴ He did not refer to the suggestion that disappearance be added to the list of punishable acts. Professor Tomuschat again took up the issue: ‘The list of crimes should be re-examined with a view to re-moving some of them and adding others, in particular enforced disappearances.’²⁵ Several members of the Commission voiced support, including Francisco Villagrán Kramer,²⁶ Andreas Jacovides,²⁷ and Edmundo Vargas Carreño, who said that

*“certain omissions from the list of crimes must be made good. He had in mind primarily enforced disappearances, which constituted one of the most serious crimes of the second half of the twentieth century in some parts of the world. Pursuant to State policy, thousands of persons had disappeared after arrest. The press had published the confession of the current Chilean Commander-in-Chief who had acknowledged ordering the arrest and execution of thousands of people whose bodies had then been dumped at sea. Those were very serious violations of human rights which truly constituted crimes against the peace and security of mankind and should be mentioned in the draft Code.”*²⁸

Vargas Carreño explained that enforced disappearance should be a crime ‘when committed by persons enjoying the protection or authorization of a State’, adding that ‘[t]he seriousness of a crime which justified inclusion in the Code lay precisely in the fact that it was committed by someone enjoying the protection or the consent of the State’.²⁹ He said the essential point was that perpetrators enjoyed impunity because they had the support or acquiescence of government organs and were acting, for all legal purposes, as agents of a State. The other essential point was that, following the kidnapping or arrest, the government authorities refused to provide information on the fate or whereabouts of the victim.³⁰

²² *Yearbook ... 1991*, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), p. 104, para. (10).

²³ *Yearbook ... 1993*, UN Doc. A/CN.4/SER.A/1993/Add.1 (Part 1), p. 65, para. 35.

²⁴ *Yearbook ... 1995*, UN Doc. A/CN.4/SER.A/1995/Add.1 (Part 2), p. 44, paras. 82-85.

²⁵ *Yearbook ... 1995*, UN Doc. A/CN.4/SER.A/1995, p. 43, para. 6.

²⁶ *Yearbook ... 1995*, UN Doc. A/CN.4/SER.A/1995, p. 44, para. 10.

²⁷ *Yearbook ... 1995*, UN Doc. A/CN.4/SER.A/1995, p. 21, para. 14.

²⁸ *Yearbook ... 1995*, UN Doc. A/CN.4/SER.A/1995, p. 17, para. 28.

²⁹ *Yearbook ... 1995*, UN Doc. A/CN.4/SER.A/1995, p. 33, para. 10.

³⁰ *Yearbook ... 1995*, UN Doc. A/CN.4/SER.A/1995, p. 34, para. 12.

The draft Code proposed by the Drafting Committee at the 1996 session of the International Law Commission included 'forced disappearance of persons' as a distinct crime against humanity.³¹ The Chairman of the Drafting Committee, Carlos Calero Rodrigues, explained that forced disappearance was listed explicitly 'in view of the fact of the rather wide commission of the crime and taking into account the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly in resolution 47/133 and the Inter-American Convention on Forced Disappearances of Persons'.³² The commentary cited the definitions that these instruments advanced for enforced disappearance, explaining that '[t]he term "forced disappearance of persons" is used as a term of art to refer to the type of criminal conduct which is addressed in the Declaration and the Convention'. The commentary said that forced disappearance was included in the definition of crimes against humanity 'because of its extreme cruelty and gravity'.³³

III. THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court, adopted in July 1998 also lists 'enforced disappearance of persons' in article 7(1) as a distinct act of crime against humanity.³⁴ Some but not all of the acts of crime against humanity enumerated in the Statute benefit from further definition. Accordingly, article 7(2)(i) specifies:

"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 organisation, 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 definition has been described as 'loosely based' on that of the 1992 General Assembly Declaration.³⁵ The Rome Statute also provides general contextual elements for crimes against humanity, applicable to all of the distinct punishable acts. Thus, a crime against humanity must be committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'.³⁶ Moreover, "[a]ttack directed against any civilian population" means a course of conduct involving the multiple commission of

³¹ *Yearbook ... 1996*, UN Doc. A/CN.4/SER.A/1996, p. 33.

³² *Yearbook ... 1996*, UN Doc. A/CN.4/SER.A/1996, p. 57.

³³ *Yearbook ... 1996*, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), p. 50.

³⁴ Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90.

³⁵ Herman von Hebel and Darryl Robinson, 'The Elements of Crimes Against Humanity', in Roy S. Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague/London/Boston: Kluwer Law International, 1999, pp. 57–108, at p. 102.

³⁶ Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 7(1).

acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.³⁷

In accordance with article 9 of the Statute, the definitions of crimes receive more elaborate treatment in the Elements of Crimes, a document that was only finalised nearly two years after the Rome Conference.³⁸ Often, the Elements of Crimes are little more than a banal reformulation of the terms of the Statute. However, this is not the case for the crime against humanity of enforced disappearance, where a rather elaborate text accompanied, unusually, by four footnotes, is proposed:

"Elements

1. The perpetrator:

(a) Arrested, detained^{25 26} or abducted one or more persons; or

(b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.

2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or

(b) Such refusal was preceded or accompanied by that deprivation of freedom.

3. The perpetrator was aware that:²⁷

(a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons;²⁸ or

(b) Such refusal was preceded or accompanied by that deprivation of freedom.

4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.

5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.

6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.

7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

²⁵ *The word 'detained' would include a perpetrator who maintained an existing detention.*

²⁶ *It is understood that under certain circumstances an arrest or detention may have been lawful.*

²⁷ *This element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes.*

³⁷ *Ibid.*, art. 7(2)(a).

³⁸ Finalized draft text of the Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add.2.

²⁸ *It is understood that, in the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.*"

The Elements of Crimes are part of the applicable law, pursuant to article 21(1), and are to 'assist the Court in the interpretation and application' of the subject-matter provisions of the Rome Statute, including article 7.³⁹ Whether they are binding, in the absence of clear conflict with the Statute itself, remains a matter of dispute.⁴⁰ At the International Criminal Tribunal for the former Yugoslavia, where the Elements of Crimes have been invoked to assist in identifying the content of customary international law, judges have been quite dismissive of their significance.⁴¹

The initial draft of the Rome Statute was submitted to the United Nations General Assembly by the International Law Commission in 1994. It listed 'crimes against humanity' within the subject-matter jurisdiction but did not provide a list of punishable acts.⁴² Reference was made to earlier definitions, in the Charter of the International Military Tribunal, the Commission's own draft code of 1991, and the Statute of the International Criminal Tribunal for the former Yugoslavia. Some members of the Commission had argued that apartheid be included in the list but there is no mention in the report of the Commission of enforced disappearance.⁴³

The General Assembly constituted an Ad Hoc Committee for further study of the draft, this time at the political and not the expert level. In that forum, the International Commission on Jurists proposed that enforced disappearance be added to the definition of crimes against humanity.⁴⁴ Acting on the report of the Ad Hoc Committee, the General Assembly constituted a Preparatory Committee for further work on the draft statute. The Preparatory Committee met in several sessions over the course of 1996, 1997 and early 1998. Other NGOs joined the International Commission of Jurists in calling for an explicit reference to enforced disappearance in the provision on crimes against humanity.⁴⁵ The 1996 report of the Preparatory Committee contained a draft proposal for a crime against humanity defined as 'kidnapping followed by the disappearance of the

³⁹ Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 9.

⁴⁰ Bashir (ICC-02/05-01/09), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, paras. 117–133; Bashir (ICC-02/05-01/09), Separate and Partly Dissenting Opinion of Judge Anita Ušacka, 4 March 2009, para. 17.

⁴¹ *Krstić* (IT-98-33-A), Judgment, 19 April 2004, para. 224, fn. 366. Also: *Milutinović et al.* (IT-05-87-T), Judgment, Volume 1 of 4, 26 February 2009, para. 196, fn. 354.

⁴² UN Doc. A/CN.4/SER.A/1994/Add.1 (Part2), p. 38.

⁴³ *Ibid.*, pp. 38–41.

⁴⁴ International Commission of Jurists, Third ICJ Position Paper, August 1995.

⁴⁵ Lawyers Committee for Human Rights, A Position Paper of the Lawyers Committee for Human Rights August 1996/Updated.

person'.⁴⁶ Although the record is silent on the authorship, years later this was claimed by Argentina, together with Chile.⁴⁷

In February 1997, the Preparatory Committee's Working Group on the definitions of crimes incorporated 'enforced disappearance of persons' in the enumeration of crimes against humanity.⁴⁸ Moreover, the Working Group proposed a detailed definition that was taken verbatim from the third preambular paragraph of the 1992 General Assembly resolution:

*"enforced disappearance of persons means when persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law."*⁴⁹

A proposal for a definition of crimes against humanity from France also contained a distinct paragraph for '[f]orced disappearance of persons' but without any attempt at detailed definition⁵⁰

A consolidated text emerged with a paragraph on 'enforced disappearance of persons', accompanied by a footnote: 'It was suggested that some more time was needed to reflect upon the inclusion of this subparagraph.'⁵¹ The consolidated text also included two alternative proposals for a definitional paragraph:

"['enforced disappearance of persons' means when persons are arrested, detained or abducted against their will by or with the authorization, support or acquiescence of the 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, thereby placing them outside the protection of the law]

['enforced disappearance of persons' as defined in the Inter-American Convention on the Forced Disappearance of Persons of 9 June 1994, as referred to in the Declaration on the Protection of All Persons from Enforced Disappearance (General Assembly resolution 47/133 of 18 December 1992)]."

The first of the two texts draws upon language used in both the General Assembly Declaration and the Inter-American Convention but it also contains novel elements, notably the reference to 'political organisation'. The second text appears to equate the crime against humanity of enforced disappearance with the definition of enforced disappearance in the earlier instruments, although the

⁴⁶ Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II (Compilation of Proposals), UN Doc. A/51/22, p. 69.

⁴⁷ Note verbale of Argentina, 2 October 2000, reproduced in: Question of enforced or involuntary disappearances, Note by the secretariat, UN Doc. E/CN.4/2001/69, pp. 4-5.

⁴⁸ UN Doc. A/AC.249/1997/WG.1/CRP.3, p. 2.

⁴⁹ *Ibid.*

⁵⁰ UN Doc. A/AC.249/1997/WG.1/CRP.4.

⁵¹ UN Doc. A/AC.249/1997/WG.1/CRP.5, p. 2. Also: UN Doc. A/AC.249/1997/L.5, pp. 5-6.

latter were quite explicit in distinguishing between enforced disappearance in general and enforced disappearance as a crime against humanity, where 'systematic practice' was required.⁵²

The alternative drafts remained unchanged until through the remaining sessions of the Preparatory Committee.⁵³ At the final meeting, in April 1998, the second option of the definitional paragraph, referring to the Inter-American Convention and the General Assembly Declaration, was removed.⁵⁴ Shortly before the Conference, the United States issued a document entitled 'Elements of offences for the International Criminal Court'. Presented as 'an illustration of how a set of criminal elements, annexed to the Statute, might appear', it included 'enforced disappearance of persons' within the definition of crimes against humanity but did not attempt to provide detailed elements.⁵⁵

At the Rome Conference some delegations expressed support for inclusion of enforced disappearance within the definition of crimes against humanity.⁵⁶ It was argued that in any event it would be subsumed within 'other inhumane acts', and that it was better to include the crime explicitly.⁵⁷ But the view was not unanimous. Syria's representative said 'that the wording "enforced disappearance of persons" in paragraph 1(i) was unclear because it could be used in reference to liberation movements fighting for their freedom and to regain their territory'.⁵⁸ India and Russia opposed inclusion of enforced disappearance.⁵⁹ The United Kingdom said it would be happy to include the crime 'if the definition was clear', adding that the definitions in paragraph 2 might assist in reaching agreement on enforced disappearance.⁶⁰ Likewise, Mexico said that enforced disappearance 'would benefit from a definition'.⁶¹ Summarizing the initial debates in the Committee of the Whole, the Chairman said that '[s]ubparagraph (i) on enforced disappearance of persons had given rise to more substantive comments, which would have to be addressed in due course'.⁶²

⁵² Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133, preambular paragraph 4; Inter-American Convention on Forced Disappearance of Persons, preambular paragraph 6;

⁵³ Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, UN Doc. A/AC.249/1998/L.13, pp. 33-34; UN Doc. A/AC.249/1998/CRP.8, pp. 17-18.

⁵⁴ UN Doc. A/CONF.183/2/Add.1, pp. 26-27.

⁵⁵ Proposal submitted by the United States of America, Elements of offences for the International Criminal Court, UN Doc. A/AC.249/1998/DP.11.

⁵⁶ UN Doc. A/CONF.183/SR.3, para. 74 (Costa Rica); UN Doc. A/CONF.183/SR.4, para. 66 (Chile); UN Doc. A/CONF.183/C.1/SR.3, para. 105 (Jordan); A/CONF.183/C.1/SR.4 (Chile).

⁵⁷ Herman von Hebel and Darryl Robinson, 'The Elements of Crimes Against Humanity', in S. Roy Lee, ed., *op.cit.* ft. 35, pp. 57-108, at p. 102.

⁵⁸ UN Doc. A/CONF.183/C.1/SR.3, para. 23.

⁵⁹ *Ibid.*, para. 47 (India); UN Doc. A/CONF.183/C.1/SR.4, para. 6 (Russia).

⁶⁰ UN Doc. A/CONF.183/C.1/SR.3, para. 91. For a similar view: UN Doc. A/CONF.183/C.1/SR.4, para. 17 (Japan).

⁶¹ UN Doc. A/CONF.183/C.1/SR.3, para. 125.

⁶² *Ibid.*, para. 177.

On 6 July 1998, with less than two weeks remaining in the Conference, the Bureau issued a discussion paper with a view to resolving some of the most contentious issues. The provision on crimes against humanity proposed by the Bureau included enforced disappearance and was accompanied by a definitional paragraph, changed slightly from the version of the Preparatory Committee by addition of the words 'for a prolonged period of time'.⁶³ No further changes were made to what became article 7(2)(i) in the final version of the Rome Statute

Only when the Elements of Crimes were being prepared, in 1998 and 1999, did the complexities of definition of the crime against humanity of enforced disappearance become fully apparent. Negotiations of the Elements in the Preparatory Commission were 'intensive and controversial'.⁶⁴ The starting point in the preparation of the Elements of Crimes was a draft proposed by the United States in early 1999.⁶⁵ It covered the abduction component of disappearance but said nothing about the refusal to provide information.⁶⁶ Several Arab States submitted an alternative that required participation by the suspect at both stages of perpetration.⁶⁷ Canada and Germany put out a revised draft that presented the crime in two stages, the first being the arrest, detention or abduction, followed by the 'circumstance' of a refusal of information.⁶⁸ All three proposals were deemed to be too narrow.⁶⁹ Eventually, a consensus draft emerged reflecting 'a bifurcated structure for most of the elements, which is unique to the elements on enforced disappearance'.⁷⁰

The Elements of Crimes makes clear the two-dimensional aspect of the *actus reus* of enforced disappearance, and the possibility that the perpetrator participate in only one stage and not the other. Nevertheless, the suspect must have knowledge of the circumstances of the crime as a whole. Someone who conducted an abduction without awareness that any subsequent deprivation of liberty would be denied by the authorities could not be convicted of the crime. Indeed, the initial deprivation of liberty, through arrest rather than abduction,

⁶³ Bureau: discussion paper regarding part 2, UN Doc. A/CONF.183/C.1/L.53. Also: Recommendations of the Coordinator regarding article 5, UN Doc. A/CONF.183/C.1/L.44; Bureau: proposal regarding part 2, UN Doc. A/CONF.183/C.1/L.59.

⁶⁴ Georg Witschel and Wiebke Rückert, 'Article 7(1)(i) – Crime Against Humanity of Enforced Disappearance of Persons', in Roy S. Lee, ed., *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, NY: Transnational Publishers, 2001, pp. 98-103, at p. 99.

⁶⁵ Proposal submitted by the United States, Draft elements of crimes, Addendum, UN Doc. PCNICC/1999/DP.4/Add.1, p. 8.

⁶⁶ Georg Witschel and Wiebke Rückert, 'Article 7(1)(i) – Crime Against Humanity of Enforced Disappearance of Persons', in Roy S. Lee, ed., *op. cit.* ft. 64, pp. 98-103, at p. 100.

⁶⁷ Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and United Arab Emirates concerning the elements of crimes against humanity, UN Doc. PCNICC/1999/WGEC/DP.39, p. 4.

⁶⁸ Proposal submitted by Canada and Germany on article 7, UN Doc. PCNICC/1999/WGEC/DP.36.

⁶⁹ Georg Witschel and Wiebke Rückert, 'Article 7(1)(i) – Crime Against Humanity of Enforced Disappearance of Persons', in Roy S. Lee, ed., *op. cit.* ft. 64, pp. 98-103, at p. 100.

⁷⁰ *Ibid.*

may be lawful in itself, as footnote 26 to the Elements explains.⁷¹ A difference in the English and French versions of article 7(2)(i) explains a clarification in the Elements of Crimes. The English text of article 7(2)(i) refers to 'the authorization, support or acquiescence of, a State or a political organization' whereas the French text speaks of 'l'autorisation, l'appui ou l'assentiment de cet État ou de cette organisation'. Paragraph 4 of the Elements confirms that this phrase applies only to the arrest, detention or abduction. Paragraph 5 indicates that for the second stage, the refusal to acknowledge, mere acquiescence is not sufficient.⁷²

There has been no significant interpretation of article 7(2)(i) of the Rome Statute and of the associated Elements in the case law of the International Criminal Court. The Prosecutor's application to the Pre-Trial Chamber for authorisation to begin an investigation into the *Situation in the Republic of Côte d'Ivoire* included allegations, largely based on a Human Rights Watch report⁷³ with corroboration from Amnesty International and UN observers,⁷⁴ that crimes against humanity of enforced disappearance had been perpetrated⁷⁵ 'on a large scale'.⁷⁶ Authorising the investigation in accordance with article 15(3) of the Rome Statute, the Pre-Trial Chamber concluded that there was a reasonable basis to believe that pro-Gbagbo forces were responsible for enforced disappearances.⁷⁷ However, the crime has not actually been charged in the three Côte d'Ivoire cases before the Court.⁷⁸ The Prosecutor has also pointed to allegations of enforced disappearance in situations under preliminary examination in Guinea⁷⁹ and Honduras,⁸⁰ pursuant to article 15(1) and (2) of the Statute.

⁷¹ Georg Witschel and Wiebke Rückert, 'Article 7(1)(i) – Crime Against Humanity of Enforced Disappearance of Persons', in Roy S. Lee, ed., *op. cit.* ft. 64, pp. 98-103, at p. 101.

⁷² *Ibid.*, p. 102.

⁷³ *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Request for authorisation of an investigation pursuant to article 15, 23 June 2011, paras. 84, 100, 111, 128.

⁷⁴ *Ibid.*, 127.

⁷⁵ *Ibid.*, paras. 3, 39, 113, 117.

⁷⁶ *Ibid.*, para. 58.

⁷⁷ *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, para. 82.

⁷⁸ *Gbagbo, Simone* (ICC-02/11-01/12), Warrant of Arrest for Simone Gbagbo, 29 February 2012, para. 7; *Gbagbo, Laurent et al.* (ICC-02/11-01/11, ICC-02/11-02/11), Decision on Prosecution requests to join the cases of *The Prosecutor v. Laurent Gbagbo* and *The Prosecutor v. Charles Blé Goudé* and related matters, 11 March 2015, para. 53, fn. 111.

⁷⁹ Report of the International Criminal Court on its activities in 2014/15, UN Doc. A/70/350, para. 111.

⁸⁰ Office of the Prosecutor, *Report on Preliminary Examination Activities 2014*, 2 December 2014, para. 35; Office of the Prosecutor, *Situation in Honduras, Article 5 Report*, October 2015, paras. 25, 128,

IV. ELEMENTS OF THE CRIME AGAINST HUMANITY OF ENFORCED DISAPPEARANCE

Article 7(2)(i) of the Rome Statute combined with the Elements of Crimes provides a thorough codification of the crime against humanity of enforced disappearance. Lacking the authority of judicial decisions, their application and interpretation remain uncertain. As is the case with other international crimes, there is room for dispute as to whether the codified text may be broader or narrower than the definition of the crime under customary international law. The question is of little or no interest in prosecutions under the Rome Statute, where the applicable law is clearly set out in relevant texts. However, the validity of definitions of international crimes is a question that may arise in other contexts: in domestic courts, where legislation may suggest the relevance of customary international law; at other international criminal tribunals; in international human rights courts where the *nullum crimen sine lege* principle is at issue; and in international adjudication of issues such as the obligation to try or extradite, the prohibition of statutory limitation, and the rejection of immunities.

Article 7(2)(a) of the Rome Statute demands that the attack on a civilian population be ‘pursuant to a State or organizational policy’. It applies to prosecutions for all crimes against humanity including enforced disappearance. This policy element has been dismissed by judges at the International Criminal Tribunal for the former Yugoslavia as being inconsistent with customary international law, which judges of the Tribunal invoke in the interpretation of the provisions of their Statute.⁸¹ Nevertheless, it is relatively clear that the drafters of the Rome Statute considered that they were codifying existing customary international law with respect to crimes against humanity rather than engaging in its progressive development.⁸² To that extent, the consensus reached by some 160 States provides persuasive evidence of customary international law. National judges, in the application and interpretation of domestic legal provisions on crimes against humanity, may be torn between the very different perspectives on the policy element taken by the Yugoslavia Tribunal and the International Criminal Court.

Within the International Criminal Court itself there has been some debate about the policy element set out in article 7(2)(a), essentially with respect to the scope of the term ‘organisational’. At one extreme is the position adopted by the late Judge Hans-Peter Kaul who said that ‘organisational policy’ should be confined to organisations that are ‘State-like’.⁸³ At the other are the views of Judge Chile

⁸¹ *Kunarac et al.* (IT-96-23/1-A), Judgment, 12 June 2002, para. 95.

⁸² Darryl Robinson, ‘Defining “Crimes Against Humanity” at the Rome Conference’, (1999) 93 *American Journal of International Law* 43, at p. 55.

⁸³ *Situation in the Republic of Kenya* (ICC-01/09), Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010; *Muthaura et al.* (ICC-01/09-02/11), Dissenting Opinion of Judge Hans-Peter Kaul, 23 January 2012.

Eboe-Osuji, who virtually ignores the policy element altogether.⁸⁴ Several judges have held that the organisation need not be State-like although they have endeavoured to retain flexibility and resisted identifying organisations that would not fall within the terms of the Statute.⁸⁵

The Committee on Enforced Disappearances has reminded States of their obligation under the Convention to incorporate the crime against humanity of enforced disappearance within domestic legislation.⁸⁶ It has criticised them for including requirements that are not found in the Convention, such as a requirement that the offence be committed 'as part of a concerted plan'.⁸⁷ But whether compliance with the Convention is achieved by incorporating the Rome Statute definition, accompanied by the 'State or organisational policy' element, or whether it requires the broader approach whereby there is no policy requirement, a view defended by the International Criminal Tribunal for the former Yugoslavia as one that is consistent with customary international law, remains unsettled. There may also be debate about the references to 'political organisation', the intention of removing victims from the protection of the law, and the reference to 'a prolonged period of time'. Furthermore there are the additional details added to the text of article 7(2)(i) as a result of the Elements of Crimes.

The issue of State or organisational policy takes on special features when the crime against humanity of enforced disappearance is concerned because of explicit references that must be added to the more general formulation in article 7(2)(a). Article 7(2)(i) appears to limit the crime to the acts of a State or 'a political organisation'. In this respect, the definition is probably more extensive than that of the 1992 General Assembly Declaration. The 1992 Declaration contemplated a role for 'non-State actors' but only to the extent that they were acting directly or indirectly for a State. This may explain the comment by Antonio Cassese who provided enforced disappearance as an example of crime against humanity set out in article 7 that is 'broader than customary international law' and an 'expansion' of 'general international law'.⁸⁸ The Rome Statute

⁸⁴ *Ruto et al.* (ICC-01/09-01/11), Reasons of Judge Eboe-Osuji, 5 April 2016.

⁸⁵ *Situation in the Republic of Kenya* (ICC-01/09), Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 93; *Prosecutor v. Ruto et al.* (ICC-01/09-01/11), Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, para. 185; *Situation in the Republic of Côte d'Ivoire* (ICC-02/11), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para. 46; *Katanga* (ICC-01/04-01/07), Judgment pursuant to article 74 of the Statute, 7 March 2014, paras. 1119-1120. For an overview of the case law of the Court, see: First report on crimes against humanity, by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/680, paras. 147-151.

⁸⁶ Report of the Committee on Enforced Disappearances, Seventh session^[1] (15-26 September 2014), Eighth session^[2] (2-13 February 2015), UN Doc. A/70/56, para. 5.

⁸⁷ Report of the Committee on Enforced Disappearances, Third session^[3] (29 October–9 November 2012), Fourth session (8–19 April 2013), UN Doc. A/68/56, pp. 15-16.

⁸⁸ Antonio Cassese, 'Crimes against humanity', in Antonio Cassese, *The Oxford Companion to International Criminal Justice*, Oxford: Oxford University Press, 2009, pp. 353-378, at p. 376. For a

definition is nevertheless narrower than that of the 2006 International Convention, where article 3 – a provision that is not without its own ambiguities – envisages perpetration of enforced disappearance by ‘persons or groups of persons acting without the authorisation, support or acquiescence of the State’. Under the Rome Statute, non-State actors may commit the crime against humanity of enforced disappearance to the extent that they are associated with ‘a political organisation’. The distinction between the definition of enforced disappearance in the two instruments has been noticed by the United Nations Human Rights Committee.⁸⁹

The term ‘political organisation’ is not defined in the Elements of Crimes and nothing in the *travaux préparatoires* assists in its interpretation. Clearly, because of the modifier ‘political’ not any organization can be considered. The words ‘political organisation’ do not seem to be very far removed from the ‘State-like organisation’ invoked by Judge Kaul, and might be taken to confirm his approach to crimes against humanity as a whole. The term would not apply to a ‘criminal organisation’ although there are surely some cases where the line between the criminal and the political is hard to discern. For Yann Jurovics, use of the term ‘apporte alors une certaine restriction, en excluant probablement de la répression les disparitions imputables aux organisations non politiques mais par exemple militaires ou mafieuses’.⁹⁰ According to Kai Ambos, ‘[g]iven that one of the legal interests protected by the crime of enforced disappearance is the effective access to the administration of justice (or any legal remedy), the offence can only refer to organisations that can grant such an access’.⁹¹ For Christopher K. Hall and Larissa van den Herik, ‘the crime of enforced disappearance is premised on the performance of state functions’, although they concede that ‘[p]erhaps other acts of crimes against humanity are more amenable to a certain privatization’.⁹² Philippe Currat has proposed that ‘political organisation’ be interpreted broadly so as to encompass all groups capable of committing the crime of enforced disappearance,⁹³ but this formulation seems somewhat tautological.

contrary view, see Brian Finucane, ‘Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War’, (2010) 35 *Yale J Int’l L* 171.

⁸⁹ *Durić et al. v. Bosnia and Herzegovina* (No. 1956/2010), UN Doc. CCPR/C/111/D/1956/2010, para. 9.3, fn. 21; *Tija Hero et al. v. Bosnia and Herzegovina* (No. 1966/2010), UN Doc. CCPR/C/112/D/1966/2010, para. 9.3, fn. 16.

⁹⁰ Yann Jurovics, ‘Article 7’, in Julian Fernandez and Xavier Pacreau, dir., *Statut de Rome de la Cour pénale internationale, Commentaire article par articles*, Paris : Pedone, 2012, pp. 417–480, at p. 452.

⁹¹ Kai Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing*, Oxford: Oxford University Press, 2014, p. 111.

⁹² Christopher K. Hall and Larissa van den Herik, ‘Crimes against humanity’, in Otto Triffterer and Kai Ambos, eds., *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article*, 3rd edn., Munich: C.H. Beck, Baden-Baden: Nomos, Oxford: Hart, 2015, pp. 130–280, at p. 268.

⁹³ Philippe Currat, *Les crimes contre l’humanité dans le statut de la Cour pénale internationale*, Paris : LGDJ, 2006, at p. 512.

When the 2006 Convention was being drafted there was some anxiety about the relationship its definition of enforced disappearance might have with that of the Rome Statute. Canada, then at the zenith of its enthusiasm for international human rights law, initially opposed the whole idea of a convention out of concern this might 'undermine' the Rome Statute system.⁹⁴ The drafters of the Convention considered including a reference to 'political organisation'.⁹⁵ On the proposal of the Chairman of the Working Group, instead of such a reference a provision that became article 3 was adopted.⁹⁶

That there are manifestations of enforced disappearance that do not fall within the rubric of crimes against humanity can hardly be disputed. Both the Preamble and article 5 of the 2006 Convention makes this quite clear. Using language borrowed from the *chapeau* of article 7(1) of the Rome Statute, the Convention equates the 'widespread or systematic practice of enforced disappearance' with crimes against humanity. Such succinct formulations are a bit of an oversimplification because they tend to conceal the debate about the policy element. Tracing the line between the crime against humanity of enforced disappearance and other forms of enforced disappearance involves determining whether the approach of the Rome Statute or that of the International Criminal Tribunal for the former Yugoslavia is authoritative.

In its General Comment on crimes against humanity, the Working Group on Enforced or Involuntary Disappearances referred favourably to article 7(1) of the Rome Statute but ignored entirely the policy element in article 7(2)(a) and the 'political organisation' element in article 7(2)(i). The reference to the *Kunarac* decision of the International Criminal Tribunal for the former Yugoslavia, which is not about enforced disappearance but which is authority for the absence of any policy requirement, hints at the Working Group's perspective.⁹⁷ A similar inference may be drawn from a comment by the chairman of the drafting committee of the International Law Commission, Matthias Forteau, in explanation of paragraph 4 of the definition of crimes against humanity adopted on first reading at the 2015 session. It states: 'This draft article is without prejudice to any broader definition provided for in any international instrument or national law.'⁹⁸ Professor Forteau made explicit reference to the 2006 Convention:

⁹⁴ Note verbale of 28 November 2000, in Question of enforced or involuntary disappearances, Note by the secretariat, Addendum, UN Doc. E/CN.4/2001/69/Add.1, p. 2.

⁹⁵ Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, UN Doc. E/CN.4/2004/59, para. 30.

⁹⁶ *Ibid.*, para. 35. See also: Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, UN Doc. E/CN.4/2006/57, para. 12-15.

⁹⁷ General comment on enforced disappearance as a crime against humanity, UN Doc. A/HRC/13/31, para. 39.

⁹⁸ Crimes against humanity, Text of draft articles 1, 2, 3 and 4 provisionally adopted by the Drafting Committee on 28 and 29 May and on 1 and 2 June 2015, UN Doc. A/CN.4/L.853, p. 3.

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*“The purpose of paragraph 4 is to indicate that the definition adopted for these draft articles has no effect upon broader definitions that may exist currently in other instruments, such as the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, or in national laws. It also makes clear that the present draft articles have no effect on the adoption, in the future, of a broader definition of crimes against humanity in an international instrument or a national law.”*⁹⁹

The commentary on paragraph 4, provisionally adopted by the International Law Commission, notes the differences between the definition of enforced disappearance in article 7 of the Rome Statute and the formulation in other international instruments. ‘Those differences principally are that the latter instruments do not include the element “with the intention of removing them from the protection of the law,” do not include the words “for a prolonged period of time”, and do not refer to organizations as potential perpetrators of the crime when they act without State participation’, it declares.¹⁰⁰

The draft definition of crimes against humanity proposed by the Special Rapporteur of the International Law Commission and adopted provisionally mimics the terms of article 7 of the Rome Statute. None of the other international instruments purport to define crimes against humanity and all seem to acknowledge that the crime against humanity of enforced disappearance is a narrower subset of the broader notion of enforced disappearance. Nevertheless, the Working Group on Enforced or Involuntary Disappearances has implied its dissatisfaction with the text in the Rome Statute. Furthermore, speaking of the 2006 Convention the Working Group has said that ‘[t]he *travaux préparatoires* confirm that States did not intend to give a “definition” of enforced disappearances as a crime against humanity, but mainly to recall that, in accordance with other instruments and sources of international law, this qualification was accepted’.¹⁰¹ Paragraph 4 of the International Law Commission draft, taken together with draft commentary, also seems to imply a degree of unease with the definition of crimes against humanity in the Rome Statute, and an impatience for its enlargement so that the two concepts, the crime of enforced disappearance and the crime against humanity of enforced disappearance, are brought closer together. These views are likely to resonate with judges at both the national and international level, who have been inclined to opt for expansive approaches to the interpretation of crimes against humanity. Warnings that such liberal approaches may discourage ratification of instruments like the Rome Statute, and hinder the adoption of a full-blown convention dealing with crimes against humanity, do not seem to have raised serious concerns.

⁹⁹ Crimes against humanity, Statement of the Chairman of the Drafting Committee, Mr. Mathias Forteau, 5 June 2015, p.

¹⁰⁰ Report of the International Law Commission, Sixty-seventh session (4 May-5 June and 6 July-7 August 2015), UN Doc. A/70/10, para. 117(40).

¹⁰¹ General comment on enforced disappearance as a crime against humanity, UN Doc. A/HRC/13/31, para. 39.