



**ENFORCED DISAPPEARANCES AS CONTINUING
VIOLATIONS**

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INTRODUCTION

This report is written on request of Human Rights Watch and the Chechnya Justice Project. It examines whether, and under what conditions, disappearances can be characterized as a continuing violation¹ of human rights. Secondly, the report examines what features other violations have, that are considered to be a continuing violation and whether the reasoning in those cases can be applied to disappearances. Thirdly, the report examines whether disappearance cases give indications that are similar to those of and applicable to continuing violations.

The question whether or not a disappearance can be considered to be a continuing violation of the European Convention on Human Rights is relevant for two issues in particular, being the determination of the moment from when the six months time limit starts to run and the determination of the admissibility of complaints concerning events which occurred before ratification of the Convention or recognition of the right of individual petition by the respondent Government.

The report adopts as a working definition of the term, the definition provided by Joost Pauwelyn:

"[...] a continuing violation is the breach of an international obligation by an act of a subject of international law extending in time and causing a duration or continuance in time of that breach."²

Continuing acts have to be distinguished from instantaneous acts. In case of a continuing act, the violation occurs and continues over a period of time until the violation ceases. In case of an instantaneous act, the violation itself does not continue over time, although the completion of such an act might take some time.

This definition can be applied to acts of disappearances, which can be qualified as a violation that occurs and continues over time, until it ceases, i.e. until the missing person is no longer

¹ The term 'continuing breach' is not used in this report, since in the case law and other materials examined the term 'violation' is used instead of 'breach'. In official documents the term 'continuing offence' is also used and in this report, quotes from such documents have not been adapted. The same goes for the use of the word 'continuous', where it is used instead of 'continuing'.



disappeared. Nigel Rodley, Special Rapporteur on Torture from 1993 until 2001, pointed out that:

"[...] the idea of 'disappearances' constituting a continuing offence is logical, since non-acknowledgement of the detention and non-disclosure of the fate or whereabouts of detained persons are key elements in the offence itself."³

The *European Court of Human Rights* has accepted that disappearances can be a continuing violation in the *Cyprus v. Turkey* case. However, this case leaves open several questions as to the conditions under which a disappearance is to be qualified as a continuing violation.

With a view to provide guidance on aspects that have not been addressed by the European Court, this report will also examine the practice of other institutions. These are the *Inter-American System of Human Rights*, the *U.N. Human Rights Committee* and several organs under the U.N. Commission on Human Rights, namely the *Working Group on Enforced or Involuntary Disappearances*, the *Sub-Commission on the Promotion and Protection of Human Rights*, the *Special Rapporteur on Torture* and the *Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions*.

In the request for research one of the questions was whether the International Criminal Tribunal for the former Yugoslavia (ICTY) and national courts have ever taken a position on the matter. As far as the ICTY is concerned, this research has not provided any indications that could help answer the question considered in the report. Although in the case law of this tribunal mention of 'forced disappearances' was found, in no case this event was linked to the notion of 'continuing violation'. No research of decisions of national courts has been carried out, because such research could not have been carried out within the preparation time of this report. More generally, no research was conducted in the field of criminal law cases.

For each of the institutions to be examined, the report will first discuss whether there are express findings on the question whether disappearances can be considered as continuing violations. Subsequently, practice will be considered on, respectively, continuing violations

² "The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems", Joost Pauwelyn, in *The British Yearbook of International Law*, vol. 66, 1996, p. 415-450.

³ "An Analysis of International Instruments on 'Disappearance'", Nunca Más, in *Human Rights Quarterly*, vol. 19, 1997, p. 389.



and disappearances in order to determine whether that practice can shed light on the question under what conditions disappearances can be considered as continuing violations.

The report is structured as follows. Chapter I provides background information on the institutions examined in the report. Chapter II examines the practice of the European Court of Human Rights. Due to time restraints, the question on what comprises the positive state obligation deriving from this practice has not been addressed.

The Inter-American System of Human Rights is discussed in chapter III. Some of the documents found, while examining this System, turned out to be in Spanish only. In light of the time limit for this report, these documents, such as the Annual Reports of the Inter-American Commission on Human Rights from before 1988 and resolutions from the Organisation of American States, were not included in the report.

Chapter IV deals with the U.N. Human Rights Committee. The inter-state procedure was not researched, because this procedure has hardly been used so far. The research into the reporting procedure did not produce any indications of disappearances as continuing violations, since the HRC comments on the states' reports in general terms and does not go into the specific details of the violations concerned.

The chapters V, VI and VII have a different structure, for they concern institutions that are very different from the (quasi-)judicial institutions dealt with in the other chapters. Chapter V deals with the U.N. Working Group on Enforced or Involuntary Disappearances. The direct communications between the Working Group and states could not be found, since these may be confidential. Chapter VI examines the work of the Sub-Commission on the Promotion and Protection of Human Rights and chapter VII discusses the two Special Rapporteurs. For this report only the reports by the Working Group and the Special Rapporteurs dating from 1993 and on were examined, for the Declaration on the Protection of All Persons from Enforced Disappearance, which is of essential relevance for this report, was adopted by the U.N. General Assembly in 1992. From this year onwards these organs have taken into account the provisions of the Declaration in their work.



CHAPTER 1 INSTITUTIONS DEALING WITH DISAPPEARANCES

1.1. European Court of Human Rights⁴

Historical background

The Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up within the Council of Europe. It was opened for signature in Rome on 4 November 1950 and entered into force in September 1953. In addition to laying down a catalogue of civil and political rights and freedoms, the Convention sets up a system of enforcement of the obligations entered into by State Parties. Three institutions were entrusted with this responsibility: The European Commission on Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe

From the beginning of the 1980's the case load increased enormously causing unacceptable length of proceedings. A debate started on the necessity for a reform of the Convention supervisory machinery. The solution ultimately adopted was the creation of a single full-time court. The aim was to simplify the structure with a view to shortening the length of the proceedings and at the same time to strengthen the judicial character of the system. The new European Court of Human Rights came into operation on 1 November 1998 with the entry into force of Protocol No. 11.

Organisation of the Court

The European Court of Human Rights set up under the Convention as amended is composed of a number of judges equal to that of the State Parties. Judges sit on the Court in their individual capacity and do not represent any State. Under the Rules of the Court, the Court is divided into four Sections, whose composition is geographically and gender balanced and takes into account the different legal systems of the State Parties. Each Section is divided in Committees of three judges who are responsible for much of the filtering of cases formerly carried out by the Commission, and Chambers of seven members on the basis of rotation.

Furthermore a Grand Chamber of seventeen judges is constituted for three years and is intended to reflect the different legal traditions. The Grand Chamber examines requests made by any Party on serious questions of interpretation or application or any other serious issue of general importance, such as a risk of departing from existing case-law, raised by the



judgement of a Chamber. The Grand Chamber also gives advisory opinions on legal questions concerning the interpretation of the Convention and Protocols.

Procedure before the Court

An individual claiming to be victim of a violation of the Convention may lodge an application directly with the Court. Each application is assigned to one of the four Sections, whose President designated a rapporteur. After a preliminary examination of the case, the rapporteur decides whether it should be dealt with by a three-member Committee, in case there are serious doubts about the admissibility of the case, or by a Chamber. A Committee may decide to declare inadmissible or strike out an application without further examination. Applications which are not declared inadmissible or which are referred to a Chamber are examined by a Chamber. Chambers determine both admissibility and merits.

Chambers decide by majority vote. A Chamber's judgement becomes final at the expiry of the three months period or earlier if the parties announce that they have no intention of requesting a referral to the Grand Chamber. All final judgements of the Court are binding on the respondent States concerned. Responsibility for supervising the execution of the judgements lies with the Committee of Ministers of the Council Europe.

1.2. Inter-American System of Human Rights⁵

The Inter-American Human Rights System is a creation of the Organization of American States (OAS). The protection of human rights is an integral part of the principles upon which the OAS has been based.⁶ The substantive guarantee of this protection is to be found mainly in the American Declaration of the Rights and Duties of Man 1948 and the American Convention on Human Rights 1969. Another relevant document in light of this report is the Inter-American Convention on Forced Disappearance of Persons, which entered into force on 28 March 1996 and has presently been ratified by eight countries.⁷

⁴ For this paragraph use has been made of the information document on the European Court of Human Rights issued by the Registrar.

⁵ For this paragraph use has been made of D. Harris, "Regional Protection of Human Rights: the Inter-American Achievement", in: D.J. Harris & S. Livingstone, *The Inter-American System of Human Rights*, Oxford: Clarendon Press 1998, p.1-29, S. Davidson, *The Inter-American Human Rights System*, Aldershot: Dartmouth 1997, chapter 1, Inter-American Commission on Human Rights, Basic Documents pertaining to Human Rights in the Inter-American System, WWW <<http://www.cidh.org/basic.htm>> (updated to May 2001)

⁶ See Charter of the OAS, chapter I and II.

⁷ See para. 3.1.2. and 3.3.2.



The Inter-American System distinguishes two bodies responsible for the promotion and protection of human rights, the Inter-American Commission on Human Rights (IACHR or the Commission) and the Inter-American Court of Human Rights (IACtHR or the Court).

Inter-American Commission on Human Rights

The Commission is both an OAS Charter organ and a Convention Institution⁸ and is, in addition to considering complaints of violations of the American Convention by States that are parties to the Convention, competent under the OAS Charter and the Commission's Statute to entertain alleged violations of the American Declaration by OAS Member States that are not yet parties to the American Convention.

In practice, the Commission has established as its main two tasks⁹ examining individual complaints and the preparation of country reports on the general state of human rights in a country, generally following an on-site visit. Under the Convention, the competence to consider individual complaints concerns all rights protected by the Convention and is obligatory upon ratification.¹⁰ The procedure for inter-State complaints is optional.¹¹ Conclusions and recommendations of the Commission are not legally binding.

Inter-American Court of Human Rights¹²

The IACtHR is an autonomous judicial organ, established by the American Convention on Human Rights for its interpretation and application and has contentious and advisory jurisdiction. Under its advisory function, OAS Member States and organs¹³ may consult the Court regarding the interpretation of the American Convention or other treaties concerning the protection of human rights.¹⁴ Furthermore, the Court is allowed to deliver an advisory opinion on compatibility of domestic laws with the American Convention or other treaties concerning the protection of human rights in OAS States.¹⁵ This advisory jurisdiction is irrespective of whether the state concerned has ratified the American Convention.

⁸ T. Buergenthal, "The Advisory Practice of the Inter-American Human Rights Court", *American Journal of International Law* volume 79, 1985, p. 1.

⁹ Article 41 American Convention specifies other functions of the Commission.

¹⁰ Article 44 American Convention. Final published reports of the IACHR regarding individual cases may be found in the Annual Reports of the Commission or in country reports.

¹¹ Article 45 American Convention.

¹² Chapter VIII American Convention.

¹³ Chapter X of the OAS Charter.

¹⁴ Article 64 (1) American Convention.

¹⁵ Article 64 (2) American Convention.



Under the Court's adjudicatory jurisdiction cases can be brought before the Court by State Parties and the Commission,¹⁶ provided that the state or states concerned has (have) recognized the Court's contentious jurisdiction. The Court's decisions in these proceedings are binding on all those states that have recognized its adjudicatory jurisdiction and not subject to appeal.

1.3 The Human Rights Committee¹⁷

After the U.N. General Assembly approved the Universal Declaration of Human Rights, the U.N. Commission on Human Rights (the Commission) submitted to it a preliminary draft of a Covenant containing legal obligations to be assumed by states and measures of implementation. This draft was referred back by the General Assembly. It was decided that there should be an international covenant on civil and political rights and one on social and economic rights.

The Commission, while making a draft for a covenant on civil and political rights, decided in favour of the establishment of a permanent Human Rights Committee (HRC) to consider complaints of violations of human rights on an inter-state basis. In the final draft this inter-state procedure became an optional system of fact finding and conciliation, applicable only in relation to States which have expressly agreed to this procedure, whereas a compulsory system of reporting to the new HRC is the principle measure of implementation of the Covenant.

Because there has been some reluctance on the part of the State Parties to the International Covenant on Civil and Political Rights (ICCPR) to develop the reporting procedure, it has taken the HRC some time to fully enforce it. The Committee now comments on state's reports individually, instead of just annually to the U.N. General Assembly. These concluding comments are divided into five parts: an introduction, statement of factors and difficulties affecting the implementation of the Covenant, identification of positive aspects in the state's record, identification of the HRC's principal subjects of concern and finally, suggestions and recommendations. It is the HRC's policy to not only point out to states where they are wrong or fail to comply with the Covenant, but to also compliment them where they are showing a real effort.

¹⁶ Article 61 (1) American Convention.

¹⁷ A.H. Robertson and J.G. Merrills, "Human Rights in the World, An introduction to the study of the international protection of human rights", Manchester University Press, 4th edition, p. 30-77.



This practice has led to the HRC giving out General Comments on the articles of the Covenant, in which it interprets the rights contained therein and gives guidelines as to their scope and the duty of the State Parties regarding these rights. The objective is to advance the quick and uniform implementation of the Covenant.

Having seen a Dutch proposal, regarding an optional article providing for the possibility of individual petitions, arrangements for individual communications to the HRC were laid down in a separate Optional Protocol to the Covenant, applicable only to States which, by separate act, ratified the Protocol.

In 1966 the International Covenant on Civil and Political Rights (ICCPR) was approved and it contains more rights than other international human rights instruments.¹⁸ In 1976 both the Covenant and the Optional Protocol came into force. In 1979 the HRC rendered its first decision under the Optional Protocol, in a complaint against Uruguay on account of mistreatment of the author of the complaint and three members of her family, alleging incommunicado detention among other things. This first case is typical of many considered by the HRC and in its decision the Committee expressed the view that the government of Uruguay was obliged to "take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective remedies to the victims".

Because there is no mention of oral hearings in the Protocol, it is assumed that this procedure is based purely on written information. New Communications are passed to a five-member working group, which can take a decision on the admissibility of the communication unanimously, otherwise the whole Committee decides on admissibility. The merits-stage is concluded with the forwarding of the HRC's views to the State and individual concerned. Interim measures commanded by the HRC are not binding. Finally, the State Party's duty to investigate alleged violations of the Covenant is contained in article 4 sub (2) of the Optional Protocol.

1.4 U.N. Working Group on Enforced or Involuntary Disappearances¹⁹

By resolution 20 (XXXVI) of 29 February 1980, the Commission on Human Rights decided to establish for a period of one year a working group consisting of five of its members, to

¹⁸ Such as article 10, which holds the right of detained persons to be treated with humanity and article 24, which entails the right of the child to protection.

¹⁹ For this paragraph use is made of Fact Sheet No.6 (Rev. 2) by the Office of the High Commissioner for Human Rights.



serve as experts in their individual capacities, to examine questions relevant to enforced or involuntary disappearances of persons. Since then the mandate and terms of reference of the Working Group have been renewed by the Commission on Human Rights and approved by the Economic and Social Council each year.

The basic mandate of the Working Group consists of acting as a channel of communication between the families of disappeared persons and governments. It seeks to ensure that the sufficiently documented and clearly defined individual cases brought to the attention of the Working group are investigated and that the whereabouts of the missing persons are clarified.

Two things are important to mention here. First, the Working Group deals with numerous individual cases of human rights violations on a purely humanitarian basis, irrespective whether the government concerned has ratified any of the existing legal instruments which provide for an individual complaints procedure. Furthermore, the Working Group's action is based on the principle that the State is responsible for human rights violations committed within its territory and is obligated to prevent such violations or to investigate them. It will not consider cases of disappearances that are not directly or indirectly attributable to a government. In addition to this original mandate the Working Group monitors states' compliance with the Declaration on the Protection of All Persons from Enforced Disappearance.²⁰

The sessions of the Working Group take place three times a year and are held in private. During these sessions the Working Group examines reports of disappearances submitted by relatives of missing persons or human rights organizations acting on their behalf. The reports which fulfil the requirements²¹ are transmitted to the governments concerned with a request to carry out investigations and to inform the Working Group of the results. It also reminds governments at least once a year of the total number of cases transmitted in the past which have not yet been clarified.

Any reply from the government containing information on the fate and whereabouts of a disappeared person is transmitted to the submitter of the report. If they do not respond within six months or they contest the received information on unreasonable grounds, the case is considered clarified. If the submitter of the report contests the government's information on reasonable grounds, the government is so informed and asked to comment.

²⁰ See Chapter 5.



The role of the Working Group ends when the fate and whereabouts of the missing person have been clarified as a result of investigations by the government or the family, irrespective of whether the person is alive or dead. It does not concern itself with determining responsibility for specific cases of enforced disappearance.

The Working Group reports annually to the Commission on Human Rights on the activities it has carried out. It informs the Commission of all cases of disappearances, the decisions it has taken thereon and the clarifications. The Working Group furthermore includes conclusions and recommendations in its report and makes observations on the situation of disappearances in individual countries.

Since 1993, the Working Group has also reported on the implementation of the Declaration on the Protection of All Persons from Enforced Disappearance and the obstacles encountered therein.

1.5 Sub-Commission on the Promotion and Protection of Human Rights²²

The Sub-Commission is the main subsidiary body of the Commission on Human Rights. It was established by the Commission at its first session in 1947 under the authority of the Economic and Social Council. In 1999 the Economic and Social Council changed its title from Sub-Commission on Prevention of Discrimination and Protection of Minorities to Sub-Commission on the Promotion and Protection of Human Rights.

Its functions comprise first to undertake studies, particularly in the light of the Universal Declaration of Human Rights, and to make recommendations to the Commission on Human Rights concerning the prevention of discrimination and the protection of racial, national, religious and linguistic minorities. Furthermore the Sub-Commission performs any other function which may be entrusted to it by the Economic and Social Council or the Commission on Human Rights.

The Sub-Commission is composed of 26 experts who act in their personal capacity and are elected by the Commission with due regard to equitable geographical distribution. Every two years half the members and their alternates are elected to serve for a term of four years. It holds an annual session in Geneva, which in addition to the members and their

²¹ *inter alia* full name of missing person, date and place of disappearance, indication that domestic remedies to determine the fate of the missing person were frustrated or inconclusive.

²² For this paragraph, use is made of Fact Sheet on Sub-Commission on the Promotion and Protection of Human Rights by the Office of the High Commissioner for Human Rights.



alternates may be attended by observers from States, UN bodies and specialized agencies and other organizations in consultative status with the Economic and Social Council.

At this moment, the Sub-Commission has six working groups: on Communications (which considers complaints on consistent patterns of gross human rights violations together with replies from Governments), on Contemporary Forms of Slavery, on Indigenous Populations, on Minorities, on Transnational Corporations and on the Administration of Justice.

1.6 Special Rapporteurs

The Special Rapporteurs on Torture and on Extrajudicial, Summary or Arbitrary Executions fall into the category of thematic mechanisms of the Commission on Human Rights, which deal with violations of a certain type occurring on a worldwide scale and have its legal basis in resolutions of organs of the United Nations.

1.6.1 Special Rapporteur on Torture²³

In addition to the drafting of the text of the Torture Convention, the Commission on Human Rights, in resolution 1985/33 appointed a Special Rapporteur to examine questions relevant to torture, requesting him to seek and receive credible and reliable information on such questions and to respond to that information without delay.

The Special Rapporteur is required to report to the Commission on the phenomenon of torture in general. The Special Rapporteur's task extends to all Member States of the United Nations and to all states with observer status: it is not confined to States Parties to the Convention against Torture. With respect to this mandate, the Special Rapporteur establishes contact with governments and asks them for information on the legislative and administrative measures taken to prevent torture and to remedy its consequences. He also receives requests for urgent action, which he brings to the attention of the governments concerned in order to ensure protection of the individual's right to physical and mental integrity. In addition, he holds consultations with government representatives who wishes to meet him and, in accordance with his mandate, makes on-site consultation visits.

²³ For this paragraph use is made of Fact Sheet No.4, para. 9 by the Office of the High Commissioner for Human Rights.



1.6.2 Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions²⁴

The Commission on Human Rights, by its resolution 1982/29 of 11 March 1982, recommended that the Economic and Social Council request the Chairman of the Commission to appoint an individual of recognized international standing as Special Rapporteur to submit a comprehensive report on the occurrence and extent of the practice of summary or arbitrary executions. The Commission further established its mandate which has been regularly renewed.

In carrying out his mandate the Special Rapporteur is required to continue to examine situations of extrajudicial, summary or arbitrary executions,²⁵ to respond effectively to information which comes before him, to enhance further dialogue with governments, to continue monitoring the implementation of existing international standards on safeguards and restrictions relating to the imposition of capital punishment and to apply a gender perspective in his work.

In order to carry out this mandate the Special Rapporteur examines and analyses the information brought to his attention. He transmits the allegations to the governments concerned as well as the requests for urgent appeals in case of a possibility of imminent threat of executions. Replies from governments are further examined and follow-up letters are sent to the submitter of the allegations informing them of the contents. Furthermore on-site visits form an essential component of the mandate of the Special Rapporteur in order to obtain first-hand information on the situation of the rights to life in the country considered as well as consults with representatives of states and non-governmental organizations.

²⁴ For this paragraph use is made of Fact Sheet No.11(Rev.1) by the Office of the High Commissioner for Human Rights.

²⁵ These situations include all acts and omissions of state representatives that constitute a violation of the general recognition of the right to life embodied in the Universal Declaration of Human Rights and the ICCPR.



CHAPTER 2 PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

2.1 Introduction

The concept of 'continuing situation' was first introduced in the *De Becker case*.²⁶ In this case the applicant complained that as a result of a conviction he was deprived for life of certain rights set forth in the Convention. He argued that this judgement marked the beginning of a repeated and perpetual state of affairs. The Commission confirmed this complaint and added that it therefore appeared that the applicant found himself in a continuing situation which amounted to a continuing violation. The Commission held that the six months period did not apply in this case.

The question whether or not a violation of one of the human rights set forth in the European Convention on Human Rights can be considered to be a continuing violation of that right, is relevant for two issues in particular. First it is relevant for determining the moment from when the six months time limit starts to run.²⁷ In case of continuing violations the six months rule does not apply if the situation has not ended yet. When a continuing violation ends, the time limit starts running from the date of ending.

Second, the question whether or not a violation is a continuing violation is relevant in case of complaints concerning events occurred before ratification of the Convention or recognition of the right of individual petition by the respondent Government. When the complaint relates to a continuing violation that still obtains at the present time, the Court has jurisdiction even if the situation started before the date of ratification or recognition.²⁸ For instance, the Court will also have jurisdiction in cases against Russia which relates to continuing violations that began before May 1998.²⁹

Both issues are normally raised during the admissibility stage. However, in the decisions of the Commission relating to continuing violations examined in this report, the Commission stated more than once that the determination of a continuing violation could only be done at the merits stage of the proceedings.³⁰ When it is not very clear if there is a

²⁶ *De Becker v. Belgium*, ECHR, 27 March 1962, Application No. 215/56.

²⁷ Article 35(1) European Convention on Human Rights and Fundamental Freedoms: "The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law and within a period of six months from the date on which the final decision was taken."

²⁸ *Loizidou v. Turkey*, ECtHR (preliminary objections), 23 March 1995, Application no. 40/93/435/514, para. 102-105. See also *Vasilescu v. Romania*, ECtHR, 22 May 1998, Application no. 53/1997/837/1043, para. 5.

²⁹ This is the date of ratification of the ECHR by Russia.

³⁰ *Varnava and others v. Turkey*, ECHR, 14 April 1998, Application no. 16064-16073/90; *Chrysostomos, Papachrysostomou and Loizidou v. Turkey*, ECHR, 4 March 1991, Application no. 15299/89, 15300/89, 15318/89 (joined cases), para. 45.



continuing violation, the Commission considered that it was necessary to look into the merits of the case to be able to decide this issue. In the situation before the entry into force of the 11th Protocol this was not the task of the Commission but of the Court. Therefore the Commission sometimes decided to reserve the final determination of the question for a later stage in the proceedings before the Court. The same decision has also been made by the Court, being that in case the issue of continuing violations can not be sufficiently assessed in the admissibility stage, the Court can come to the conclusion to assess the matter when looking into the merits.

2.2 Disappearances as a continuing violation: The Cyprus v. Turkey case

In the *Cyprus v. Turkey* case³¹ Cyprus alleged, with respect to the situation that has existed in Cyprus since the start of Turkey's military operations in northern Cyprus in July 1974 and the continuing division of the territory of Cyprus, that the Government of Turkey has continued to violate the European Convention on Human Rights and Fundamental Freedoms. The complaints were *inter alia* based on the alleged violations of the rights of Greek-Cypriot missing persons and their relatives.³² Cyprus claimed that about 1491 Greek-Cypriots were still missing twenty years after the cessation of hostilities. According to Cyprus, these persons were last seen alive in Turkish custody and their fate has never been accounted for by Turkey.³³

This is the only judgement of the Court that discusses expressly whether disappearances can be qualified as a continuing violation.³⁴ It is therefore discussed in detail. The Convention does not set forth a right not to be subjected to disappearances. However, acts constituting enforced disappearances can be declared to violate various rights under the Convention.

³¹ *Cyprus v. Turkey*, ECtHR 10 May 2001, Application no. 25781/94.

³² *Ibid.*, paras. 3 and 13.

³³ *Ibid.*, para. 20.

³⁴ The *Ersöz* case (see para. 2.4.2) can be considered to be also of relevance, however this case deals not with disappearances in particular but with a more general situation of various incidents and violations.



2.2.1 Admissibility: the six months rule

Turkey raised several objections to the admissibility of the application submitted by Cyprus, among which also the alleged failure of Cyprus to comply with the six months rule.³⁵

The Court confirmed that in so far as Cyprus alleged continuing violations resulting from administrative practices, it would disregard situations which ended six months before the date on which the application was introduced. Practices which are shown to have ended before this date will fall outside the scope of its examination.³⁶

However, the six months rule does not apply to applications which would constitute continuing violations. The Court held here that the acts constituting disappearances were continuing violations of article 2, 3 and 5, which will be discussed in the following paragraph. In this case the six months rule only starts running from the date on which the situation constituting the continuing violation ends.

2.2.2 Article 2 of the European Convention on Human Rights

Cyprus requested the Court to find that the facts disclosed a continuing violations of article 2 from the standpoint of both the substantive and procedural obligation contained in that provision. Article 2 provides:

"1. Everyone's right to life shall be protected by law."

The Court held that there was no substantive violation of article 2 of the Convention in respect of any of the missing persons since evidence of killings carried out directly by Turkish soldiers related to a period outside the scope of the application.³⁷

However, the Court further held that the allegations of Cyprus must be examined in the context of the State Parties' procedural obligation under article 2 to protect the right to life. It recalled that:

"[...] the obligation to protect the right to life under article 2 of the Convention, read in conjunction with the State's general duty under article 1 to 'secure to everyone within its jurisdiction the rights and freedoms defined in the Convention' requires by implication

³⁵ Ibid., para. 56.

³⁶ Ibid., para. 104.

³⁷ Ibid., para. 130.



that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State."³⁸

The Court recalled that in this case there is no proof that the disappeared persons have been unlawfully killed by agents of the State. However in its opinion, this procedural obligation arises also when a claim exists that an individual, who was last seen in the custody of agents of the State subsequently disappeared in a context which may be considered life-threatening. The Court observed that evidence exists that the disappeared persons were detained either by Turkish or Turkish-Cypriot forces. According to various reports from the area their detention occurred at a time when the conduct of military operations was accompanied by arrests and killings on a large scale, which could be described as a life-threatening situation.

The Court noted that the Turkish authorities had never undertaken any investigation into the claims made by the relatives of missing persons that they had disappeared after being detained in circumstances in which there was real cause to fear for their wellbeing. There was no official follow-up after alarming statements and no attempts were made to identify the names of persons who were in the hands of Turkish-Cypriot paramilitaries or to inquire into their whereabouts.³⁹

Moreover the Court referred here to the work of the United Nations Committee on Missing Persons ("CMP"). This Committee was set up in 1981 to "look into cases of persons reported missing in the inter-communal fighting as well as in the events of July 1974 and afterwards" and "to draw up comprehensive lists of missing persons of both communities, specifying as appropriate whether they are still alive or dead, and in the latter case approximate times of death." The scope of the investigation being conducted by the CMP was limited to determining whether or not any of the missing persons on its list were dead or alive; nor was the CMP empowered to make findings either on the cause of death or on the issue of responsibility for any deaths so established. Furthermore, the territorial jurisdiction of the CMP was limited to the island of Cyprus, thus excluding investigations in Turkey where some of the disappearances were claimed to have occurred.⁴⁰ The Court held that the respondent State's procedural obligation at issue cannot be discharged through its contribution to the investigatory work of the CMP. It noted that the CMP's procedures are not of themselves

³⁸ Ibid., para. 131.

³⁹ Ibid., paras. 132-134

⁴⁰ Ibid., paras. 16 and 27.



sufficient to meet the standard of an effective investigation required by Article 2 of the Convention.⁴¹

The Court concluded that "there has been a continuing violation of Article 2 on account of the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances."⁴²

2.2.3 Article 5 of the European Convention on Human Rights

Cyprus maintained that article 5 has been violated by Turkey as a matter of administrative practice. Article 5 states as far as relevant to this case:

"1. Everyone has the rights to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."

The Court firstly stressed that the unacknowledged detention of an individual is a complete negation of the guarantees of liberty and security of a person and therefore a violation of article 5. In case the assumption can be made that State authorities have control over an individual, they have to account for his or her whereabouts. Therefore article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt and effective investigation into an alleged case of disappearance.⁴³

The Court then referred to the evidence that Greek-Cypriots were held by Turkish-Cypriot forces and the fact that there was no indication of any records of either the identities of those detained or the dates or location of their detention. This failing could, according to the Court, not be excused with reference to the fighting which took place at that moment nor the tense state of affairs. The absence of this information has made it impossible to inform the relatives about the fate of the disappeared persons. Turkey should have made other inquiries in order to account for the disappearances and to allay the concerns of the relatives, however this had not been done.⁴⁴ The Court addressed the allegation from the angle of the procedural

⁴¹ Ibid., para. 135.

⁴² Ibid., para 136.

⁴³ Ibid., para 147.

⁴⁴ Ibid., paras. 148-150.



requirements of article 5 of the Convention and the obligations devolving on the respondent State as a Contracting Party to the Convention. The Court reiterates that those obligations cannot be discharged with reference to the nature of the CMP's investigation.⁴⁵

Therefore the Court concluded that, during the period under consideration, there has been a continuing violation of article 5 by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there was an arguable claim that they were in custody at the time they disappeared.⁴⁶

2.2.4 Article 3 of the European Convention on Human Rights

Cyprus requested furthermore to rule that the continuing suffering of the relatives of disappeared persons constituted a continuing violation of article 3 which states:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The alleged violation did not concern the disappeared person him or herself, but the relatives of the disappeared persons.

The Court recalled that the question whether a relative of a disappeared person is a victim of a violation of article 3 will depend on the existence of certain factors, which include the proximity of the family-tie - a certain weight will be attached to the parent-child bond -, the circumstances of the relationship, the extent to which the relative was witness of the events, the involvement of the relative in the attempts to gain information and the way in which the authorities responded to such requests. The Court further recalled that the essence of the violation lies in the reactions and attitudes of the State authorities to the situation brought to their attention.

The Court referred to the fact that the State authorities have failed to undertake any investigation into the alleged cases of disappearances. It observed that:

"In the absence of any information about the fate of the persons who disappeared during the event of July and August 1974, the relatives were condemned to live in a prolonged

⁴⁵ See para. 2.2.2.

⁴⁶ *Ibid.*, para. 151.



state of acute anxiety which cannot be said to have erased with the passage of time [...]
The overall context (*military operations resulting in loss of life, arrests, detentions and enforced separations of families*) must still be vivid in the minds of the relatives [...]
They endure the agony of not knowing whether family members were killed in the conflict or are still in detention or, if detained, have since died.⁴⁷

The Court considered that the situation in which the authorities of Turkey remain silent in the face of the real concerns of the relatives of the missing persons attains a level of severity to be categorised as inhuman treatment within the meaning of article 3. Therefore, the Court concludes that, during the period under consideration, there has been a continuing violation of article 3 in respect of the relatives of the Greek-Cypriot missing persons.⁴⁸

2.2.4 Conclusion

The *Cyprus-Turkey* case gives several relevant starting points for future applications which relate to disappearances. In particular the determination of the Court that enforced disappearances are continuing violations of articles 2, 3 and 5 can be considered of relevance for this report. However it does not address all elements that might arise in such applications. It is not clear, for instance, if the disappearance itself, in any case if this can be attributed to the state, can be considered as a continuing violation as long as the disappearance has not ended or, in other words, as long as the whereabouts of the missing person are not clear.

2.3 Case law pertaining to continuing violations

2.3.1 Introduction

In order to assess if and in which circumstances violations - in casu disappearances- can be seen as continuing violations, an examination of relevant cases concerning continuing situations follows. From other cases pertaining to continuing violations certain patterns can be deduced that may be relevant to disappearances.

⁴⁷ Ibid., para. 157.

⁴⁸ Ibid., paras. 156-158.



2.3.2 Cases

In *Obadasi v. Turkey*⁴⁹ the applicant complained of violation of numerous articles of the Convention, among which articles 2, 3 and 5, in regard to the threat that he would be killed if he did not cooperate with the authorities and to the resultant risk to his life. The applicant stated that the threat to which he was exposed gave rise to a situation of continuing violation, or, alternatively, that he did not apply earlier through fear. The six months rule should therefore not apply in his case. The Commission however considered the case not admissible as the application was not lodged within six months from the events or from the end of the investigation. It noted that:

"[...] the basis of the complaint is a specific incident and [the Commission] cannot find that the complaint can be considered to concern a continuing violation of the Convention."⁵⁰

Thus when a complaint is based on a specific incident, such as a death threat in order to persuade someone to cooperate, this could not be referred to as a continuing violation of rights under the Convention. With a 'specific incident' is meant an event which occurred in isolation from other events. Hereby is meant that the position in which the victim is placed represents a violation of its rights which clearly dates from the past (i.e. instantaneous violations).⁵¹ Any resulting effects, such as fear that seeking judicial remedies would constitute a risk to loss of life, are considered to be separate from the event itself and therefore not considered to be a continuing violation.

The same is stated in the case *McDaid & others v. United Kingdom*.⁵² The applicants claimed that the rights of the deceased (persons who lost their life on 'Bloody Sunday') under article 2 of the Convention had been violated. They submitted that the State has a positive duty to protect the right to life and that the Government of the United Kingdom failed to do so in this case. The applicants also claimed that the failure to examine thoroughly and impartially the circumstances of the deaths of the deceased and to take criminal or other proceedings against those involved in the killings is a continuing breach of that duty. The Commission then recalls that:

⁴⁹ *Obadasi v. Turkey*, ECHR, 28 November 1994, Application No. 23183/94.

⁵⁰ *Ibid.*, p. 5.

⁵¹ See also p. 5.

⁵² *McDaid & others v. United Kingdom*, ECHR of 9 April 1996, Application No. 25681/94.



"[...] *the concept of a "continuing situation" refers to a state of affairs which operates by continuous activities by or on the part of the State to render the applicants victims. Since the applicants' complaints have as their source specific events which occurred on identifiable dates, they cannot be construed as a "continuing situation" for the purposes of the six months rule. While the Commission does not doubt that the events of "Bloody Sunday" continue to have serious repercussions on the applicants' lives, this however can be said of any individual who has undergone a traumatic incident in the past. The fact that an event has significant consequences over time does not itself constitute a continuing situation.*"⁵³ (emphasis added)

The Commission states that prolonged significant consequences or effects resulting from an event in the past does not establish a violation which can be considered to be of a continuing nature.

In other cases the findings were that violations of rights set forth in the Convention were indeed of a continuing nature. In *Agrotexim & others v. Greece*⁵⁴ the applicants complained, in their capacity as shareholder of a company, that the various measures taken by the State authorities constitute an interference with their right to peaceful enjoyment of their possessions contrary to article 1 of Protocol 1 to the Convention. The Commission noted that although it is true that the complaints refer to measures which originated in 1979 and 1981, the measures continued. It emphasizes in this respect that:

"[...] the applicants do not complain of any 'instant' effect of these measures on their rights but of a continuing situation created by the said measures and still existing."⁵⁵

Moreover, certain measures occurred or persisted after the date of submission of the application. Consequently the Commission found that it was competent to examine the application. As regards to the governments objection that part of the application had not been introduced within the time limit of six months, the Commission recalled that the applicant's complaint relates to a continuing situation and that in such circumstances the six months period runs from the determination of the situation concerned. In this case the situation had not come to an end at that time.

⁵³ Ibid., p. 6.

⁵⁴ *Agrotexim & others v. Greece*, ECHR of 12 February 1992, Application No.14807/89.

⁵⁵ Ibid., p. 6.



In *Jecius v. Lithuania*⁵⁶ the applicant was arrested in February 1996. He was held in preventive detention and claimed that he was not informed of the reason for his detention or the charge against him. A month after his arrest the State authorities charged him with murder. The complaint before the Court was based on a violation of article 5. In the admissibility stage, the Government stated that the Court was not competent *ratione temporis* since the preventive detention has ended on 14 March 1996 and the application has been submitted on 30 December 1996. Therefore the application of the six months rule would prevent the Court from examining the case.⁵⁷ The Court confirmed the conclusion of the Commission that the preventive detention and the detention on remand must be taken as a whole for the purpose of applying the six months rule, since there had been no visible signs of a change of the applicant's status. The Court held:

"In respect of a complaint about the absence of a remedy for a continuing situation, such as a period of detention, the six months' time-limit under article 35 starts running from the end of that situation, such as release from custody. [...] As the applicant was still remanded in custody [...] the case cannot be dismissed as being out of time."⁵⁸

Thus, a period of detention, whether or not based on legitimate grounds, can be considered a continuing situation. The six months rule only starts running from the end of that situation or, in other words, in case of release from custody.

From the last two cases follows that measures or actions carried out by governments which entail a violation of the rights set forth in the Convention and which are still carried out or have not been ended constitute continuing situations. Therefore the resulting violations are of a continuing nature.

2.4 Case-law pertaining to disappearances

2.4.1 Introduction

In the *Cyprus-Turkey* case the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of, in casu, Greek-Cypriot

⁵⁶ *Jecius v. Lithuania*, ECtHR of 31 July 2000, Application No. 34578/97.

⁵⁷ *Ibid.*, para. 42.

⁵⁸ *Ibid.*, para. 44.



missing persons, was considered to be a continuing violation in respect of the missing persons as well as their relatives. However, the Court said nothing about the question whether the disappearance itself can be considered as a continuing violation.

In this paragraph an overview of disappearance cases is given in order to examine if there are other starting points, besides the failure of the state to conduct effective investigations, in assessing the question whether disappearances can be considered as continuing violations.

2.4.2 Cases

There are about a dozen of Turkish cases, which relate to disappearances. In these cases the complaints were based on the allegation of violation of different rights. Most frequently is the combination of violation of article 2, 3, 5 and 13. Besides complaints about the inability to learn about the whereabouts of the missing person and the inability to have an effective remedy, applicants have complained about the disappearance and the often prior (unlawful) detainment itself.

Almost all the applications of the Turkish relatives were lodged within six months after the disappearance. It was therefore not necessary for the Commission to examine its *ratione temporis*, at the admissibility stage. The question whether or not a disappearance can be considered as a continuing violation has never been raised. There are only a few cases where the applications were lodged more than six months after the disappearance started. These cases were struck out of the list or there was no objection *ratione temporis* made.

Only in *Ersöz v. Turkey*⁵⁹ the events complained about occurred more than six months before the application. The applicants submitted that the long list of incidents including the murder of journalists, disappearance and abduction constitutes an assault on the rights to freedom of expression and freedom of the press. They considered that the violations of which they complained were continuing and that the six months rule was therefore not applicable. The Commission, in assessing the admissibility of the case, stated the following:

"It (*Commission*) recalls that the applicants' complaints relate to a continuing general situation and that in such circumstances the six months period runs from the

⁵⁹ *Ersöz and others v. Turkey*, ECHR, 20 October 1995, Application no. 23144/93.



determination of the situation concerned [...] according to the applicants the situation [...] continued even after the application had been introduced. In these circumstances, the Commission finds that the Government's objection based on the six months rule must be rejected."⁶⁰

The Commission thus concluded that the complaints were based on a period of violations, which could be considered to be a continuing situation. The six months rule did not apply. The Commission did not refer to the disappearance separately, but stated in general that the events could be seen as continuing violations and constituted an assault on the right of freedom of expression and the freedom of press.

In the *Kurt* case⁶¹ an application was brought by Mrs. Kurt on behalf of herself and of her son who, she alleges, has disappeared in circumstances engaging the responsibility of the respondent State and on behalf of herself.⁶² The complaint was based on alleged violation of articles 2, 3 and 5. The Court firstly considered in respect of the disappearance of the son that the applicant complaint concerning the alleged violation of articles 2 and 3 were to be dealt with from the angle of article 5. The Court found that there was a violation of article 5.⁶³ However, since no problems were raised at the admissibility stage on the *ratione temporis*, nothing has been said on the issue whether or not the disappearance itself could be considered a continuing violation.

The importance of this case lays, however, in the alleged violation of article 3 in respect of the applicant herself. The mother of a disappeared person contended that she herself was victim of inhuman and degrading treatment on account of her son's disappearance at the hands of the authority. She requested the Court to find that the suffering which she had endured engages the responsibility of the respondent State under article 3 of the Convention.⁶⁴

The Court noted that ill-treatment must attain a minimum level of severity if it is to fall within the scope of article 3. It recalled that the applicant went to see the public prosecutor in the days following her son's disappearance. She had witnessed his detention in the village and his non-appearance since that last sighting made her fear for his safety. However, the public prosecutor gave no serious consideration to her complaint, but rather

⁶⁰ Ibid., para. iii.

⁶¹ *Kurt v. Turkey*, EctHR, 22 May 1998, Application no. 24276/94.

⁶² Ibid., para. 8.

⁶³ Ibid., paras. 117 and 129.

⁶⁴ Ibid., para. 130.



believed that her son had been kidnapped by the PKK. As a result, she has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time.⁶⁵ Therefore it follows that:

"Having regard to the circumstances described above (*i.e. the doubt and uncertainty suffered by the applicant over a prolonged and continuing period of time*) as well to the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress, the Court finds that the respondent is in breach of article 3 in respect of the applicant." ⁶⁶

This case clearly states that under certain conditions the uncertainty and anguish of relatives of disappeared persons when suffered over a prolonged and continuing period of time can constitute a violation of article 3 in respect of the relative.

No cases have been found which specifically address the issue of acts constituting disappearances proven to be carried out by non-state actors.⁶⁷ However, in *Ergi v. Turkey*,⁶⁸ dealing with the killing of the applicant's sister which constituted an alleged violation of article 2 of the Convention, this issue was indeed examined. Here a dispute arose on the identity of the perpetrator. According to the applicant, his sister was killed by a bullet fired by security forces, while the Government stated that the PKK had fired the bullet.⁶⁹ The applicant maintained however that the Government was responsible either way. The Court held that:

"[...] the responsibility of the State is not confined to circumstances where there is significant evidence that [...] agents of the State have killed a civilian. It may also be engaged where they fail to take all feasible precautions [...] with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.

⁶⁵ *Ibid.*, para. 133.

⁶⁶ *Ibid.*, para. 134.

⁶⁷ In many Turkish disappearances cases before the Court, the applicant stated that the State was responsible for the disappearance of his or her relative, for example since that person was last seen surrounded by security forces. The Turkish Government mostly held the opinion that the missing person was kidnapped by the PKK, left the country out of free will or joined the PKK. In these cases, the Court held that there was no evidence of PKK involvement or that it was more likely or even proven that there was State involvement and therefore held the State responsible.

⁶⁸ *Ergi v. Turkey*, EctHR 28 July 1998, Application No. 66/1997/850/1057.

⁶⁹ *Ibid.*, paras. 71 and 74.



[...]

In addition, the Court attached particular weight to the procedural requirement implicit in article 2 of the Convention that there should be some form of effective investigation when individuals have been killed as a result of the use of force [...] this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State [...] The mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation [...] to carry out effective investigations." ⁷⁰

This case may *mutatis mutandis* be applied analogically to disappearance cases.

2.5 Conclusion

Cyprus v. Turkey can be considered of great importance for the Chechnya Justice Project. The events that took place in Cyprus are quite similar to the events that took place in Chechnya (*inter alia* military operations, disappearances, violations against a specific group of people). In *Cyprus v. Turkey* the Court concluded that there has been a continuing violation of article 2, 3 and 5 of the Convention based on the failure of the Turkish authorities to conduct effective investigations into the fate and whereabouts of disappeared persons and to provide information to the relatives of the missing persons.

Besides the *Cyprus-Turkey* case, other cases on continuing situations support the statement that disappearances, beside the failure of the State to conduct investigations, can constitute continuing violations. From the cases which have been examined it follows that prolonged significant consequences or effects resulting from an event in the past in itself does not establish a violation which can be considered to be of a continuing nature. However, from other cases it can be concluded that measures or actions carried out by the government which entail a violation of the rights set forth in the Convention and are still carried out or have not been ended constitute continuing situations.

In the light of *Cyprus v. Turkey*, these examinations lead to the following conclusions. On the one hand and in contrary to what the Commission considered in *Obadasi v. Turkey* and *McDaid v. United Kingdom*, the Court held in *Cyprus v. Turkey* that effects resulting from an event in the past - in casu disappearances- can indeed be considered to constitute a continuing violation. The Court concluded that the suffering of the relatives of the missing

⁷⁰ Ibid., paras. 79 and 82.



persons as a consequence of the disappearance and the concealment of their fate was a continuing violation of article 3. On the other hand, the *Agrotexim* case and the *Jecius* case support the judgement of the Court in *Cyprus v. Turkey*. Acts carried out by State authorities, or a lack thereof being the failure to conduct effective investigations, which entail a violation of the rights under the Convention can constitute continuing violations in case these violations have not ended. The Court has not indicated whether the acts constituting disappearances itself can be considered as continuing violations. The Court merely examines if the respondent State conducted effective investigations into alleged cases of disappearances and did everything in its power to clarify the fate and whereabouts of the missing person. In particular cases the uncertainty and anguish of the relatives of missing persons amounts to a violation of article 3 in case they suffered over a prolonged time. However this violation is again based on the failure of the State to conduct investigations. Furthermore, in case the application was based on a period of violations, events - including disappearances - could be seen as continuing violations. However disappearances are not referred to separately.

While it thus now can be considered to be settled that, based on the failure of the State authorities to conduct effective investigations into the fate and whereabouts of disappeared persons and to provide information to the relatives, disappearance cases can constitute continuing violations of various rights set forth in the Convention, two questions have not been examined in detail.

The first question is if and under what conditions the disappearance itself can be designated a continuing violation of international law. The second question is when the duty of the State to conduct effective investigations has been violated. In the following sections other institutions dealing with disappearances will be examined in order to consider possible answers to these questions.



CHAPTER 3 INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

3.1 Disappearances as continuing violations

3.1.1. Cases

The principal case of the IACtHR on disappearances is the *Velásquez Rodríguez* case.⁷¹ The case did not represent problems with the six months time limit nor did the alleged violation take place prior to the date Honduras recognized the Court's contentious jurisdiction. However, the case is relevant here since the Court defined the legal nature of disappearances and the elements which characterize it.⁷²

The case originated in a petition against Honduras received by the IACHR in 1981, arguing that through its conduct Honduras had violated several articles of the American Convention on Human Rights. According to the petition Velásquez was arrested without warrant in 1981 by members of national security units of Honduras. The arrest was performed by armed men dressed in civilian clothes who abducted Velásquez in an unlicensed car. The petition referred to eyewitnesses reporting his detention, accusation of political crimes, "harsh interrogation and cruel torture". The police and security forces denied he had been detained but Velásquez had disappeared. In 1986 he was still missing and the Commission concluded that the Honduran government "had not offered convincing proof that would allow the Commission to determine that the allegations are not true". Since its decision had no effect, the Commission submitted the case to the Court.

The Court found to have been proved that during the period 1981 to 1984 a practice of disappearances carried out or tolerated by Honduran officials existed, that the case of Velásquez was one of those disappearances and that the government of Honduras failed to guarantee the human rights affected by that practice. It defined the legal nature of disappearances and the elements which characterize it, holding among other things:

"[...] forced disappearance of human beings is a multiple and *continuous*⁷³ violation of many rights under the Convention that State Parties are obligated to respect and guarantee."⁷⁴ (emphasis added)

⁷¹ *Velásquez Rodríguez v. Honduras*, IACtHR 29 July 1988, Ser. C No.4 (1988).

⁷² *Ibid.* paras. 149-158.

⁷³ In subsequent cases the Court and Commission use both 'continuous' and 'continuing' in this phrase.

⁷⁴ *Supra* note 71, para. 155.



According to the Court forced disappearance constitutes a violation of the right to personal liberty recognized in article 7 of the Convention, the right to integrity of the person (article 5) and often a violation of the right to life (article 4). The practice of disappearances, in addition to violating the aforementioned provisions, constitutes a breach of the concept of human dignity and of the most basic principles of the Inter-American System and the Convention. Moreover, the existence of the practice evinces a disregard of the duty to organize the state in such a manner as to guarantee the rights recognized in the Convention.⁷⁵

The same reasoning is used in subsequent judgements of the Court and reports from the Commission concerning disappearances. Examples of judgements by the Court are the *Godínez Cruz* case⁷⁶ and the *Fairen Garbi and Solís Corrales* case.⁷⁷ Examples of reports by the Commission where the same reasoning is used are the *Juárez* case,⁷⁸ the *Luis Gustavo Morroquín* case⁷⁹ and the *Juventino Cruz Soza* case.⁸⁰

In the *Blake* case⁸¹ the Court expanded on its *Velásquez* jurisprudence and explicitly applied it to the situation in which a disappearance had started (but not ended) before the State at issue had accepted the Court's contentious jurisdiction.

The case dealt with the alleged abduction, murder and disappearance of Nicolas Chapman Blake, a United States citizen and journalist residing in Guatemala, by agents of the Guatemalan State. Although Blake's abduction and murder took place in 1985, his disappearance lasted over seven years. His fate and whereabouts only were established in 1992. When the case was submitted to the Court in 1995, the government stated that the Court was not competent to rule in the case. The government reasoned that Blake's detention and death occurred in 1985 and thus that all events at issue took place and their effects ended before Guatemala had accepted the contentious jurisdiction of the Court in 1987.

The Court agreed that the action of Blake's murder was indeed completed in 1985 and thus, that at the same moment his deprivation of liberty ended. These actions could not be

⁷⁵ *Supra* note 71, para. 158.

⁷⁶ *Godínez Cruz v. Honduras*, IACtHR, 20 January 1989, Ser. C No. 5 (1989), para. 163.

⁷⁷ *Fairen Garbi and Solís Corrales v. Honduras*, IACtHR, 15 March 1989, Ser. C No. 6 (1989), para. 147.

⁷⁸ *Juárez v. El Salvador*, IACHR, 1 February 1994, Report No. 4/94 Case 10.517(1994), para. 4.d.

⁷⁹ *Luis Gustavo Morroquín v. Guatemala*, IACHR, 6 December 1996, Report No. 54/96 Case 8075 (1996), para. 22.

⁸⁰ *Juventino Cruz Soza v. Guatemala*, IACHR, 16 October 1996, Report No. 30/96 Case 10.897 (1997), para. 42.

⁸¹ *Blake v. Guatemala*, IACHR, 2 July 1996, Ser. C. No. 27 (1996)(Preliminary Objections) and IACtHR, 24 January 1998, Ser. C. No. 36 (1998).



considered *per se* continuous. Therefore, the Court lacked competence to rule on the government's responsibility with respect to these events. However, the Court pointed out that since the question was not that of murder and deprivation of liberty in itself but one of forced disappearance, the *consequences* of those acts extended to 1992, since Blake's fate or whereabouts were concealed for his relatives until then. The Court mentioned article 17(1) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance⁸² and article III of the Inter-American Convention of Forced Disappearance of Persons⁸³ and stated that, although the latter had not yet entered into force for Guatemala, these instruments embodied several principles of international law relevant to the subject. The Court continued:

"39. The foregoing means that, in accordance with the aforementioned principles of international law [...] forced disappearance implies the violation of various human rights recognized in international human rights treaties, including the American Convention, and that *the effects of such infringements* – even though some may have been completed, as in the instant case – *may be prolonged continuously or permanently until such time as the victim's fate or whereabouts are established.*

40. In the light of the above, as Mr. Blake's fate or whereabouts were not known to his family until [...] after the date on which Guatemala accepted the contentious jurisdiction of this Court, the preliminary objection raised by the Government must be deemed to be without merits insofar as it relates to effects and actions subsequent to its acceptance. The Court is therefore competent to examine the possible violations [...]"⁸⁴ (emphasis added)

Taking into account the Court's judgements in the *Velásquez* and the *Blake* case, it can be concluded that the Inter-American Court is of the opinion that the effects of a disappearance extend until the time a disappearance is entirely solved and that the forced disappearance is considered a continuing violation until that same day. Therefore, limitation of competence *ratione temporis* does not apply and the Court is competent to examine complaints about

⁸² See Chapter 5.

⁸³ See para. 3.1.2. and 3.3.2.

⁸⁴ *Blake v. Guatemala*, IACtHR, 2 July, 1996, Ser.C No. 27, paras. 30 – 4. See also IACtHR, 24 January, 1998, Ser.C No. 36, paras. 53 –54 and 62 – 67.



disappearances that started subsequent to acceptance by a State of the Court's contentious jurisdiction.

3.1.2. Inter-American Convention on Forced Disappearance of Persons

The case law of the Court and Commission on “forced disappearance” is incorporated into the Inter-American Convention on the Forced Disappearance of Persons, which entered into force 28 March 1996. This convention is of specific relevance in light of this report since it explicitly gives an answer to the question whether, in the Inter-American System, disappearance is considered a continuing violation. Article III states:

"[...] State Parties undertake to adopt [...] the legislative measures that may be needed to define the forced disappearance of persons as an offence and to impose an appropriate punishment commensurate with its extreme gravity. *This offence shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.*" (emphasis added)

The Convention thus clearly endorses the thesis that disappearances are considered a continuing violation of human rights. The violation lasts until the moment the fate or whereabouts of the victim can be established.

3.1.3. Other Materials

Recently the International Commission of Jurists (ICJ) dedicated an issue of its journal to the subject of enforced disappearances. The volume contained among the published documents the Legal Brief Amicus Curiae presented by the ICJ before the Inter-American Court in the *Efraín Bámaca Velásquez v. Guatemala* case.⁸⁵ The Legal Brief discusses in Point VIII the obligation of the State to investigate a disappearance. In paragraph 70 the ICJ states that in the case of forced disappearance, the obligation to investigate takes a particular dimension due its special character, which is partly a result of its *continuous or permanent nature*. Due to its character as a continuing violation of human rights, the obligation to investigate a forced disappearance remains in force as long as the circumstances in which the victim disappeared

⁸⁵ International Commission of Jurists, "Legal Brief Amicus Curiae Presented by the International Commission of Jurists before the Inter-American Court of Human Rights in the Case of Efraín Bámaca Velásquez vs. Guatemala", *Impunity, Crimes Against Humanity and Forced Disappearance* (Review 2001 n° 62-63), Geneva: 2001, p. 127- 158.



as well as his and fate and whereabouts haven not been elucidated.⁸⁶ Based on the foregoing, it can be concluded that the ICJ considers disappearance a continuing violation.

3.2 Continuing violations

In the *Peter Blaine v. Jamaica* case⁸⁷ the petitioner, a prisoner on death row, alleged Jamaica's responsibility for violations of his right to humane treatment,⁸⁸ resulting from the conditions of his post-conviction detention⁸⁹ and his right to a fair trial.⁹⁰ The latter consisted of lack of access to judicial guarantees resulting from the absence of legal aid for petitioner. In determining whether the six months time limit barred the admissibility of petitioner's claim, the Inter-American Commission distinguished two situations, those that are ongoing and those relating to specific events. It held that:

"the six-month rule does not apply where the allegations concern a *continuing situation* - where the rights of the victim are allegedly affected on an ongoing basis."⁹¹ (emphasis added)

Since the claims in question concerned a set of alleged conditions and consequences which continued to apply and unfold, their admissibility was not barred by the six months rule. The same reasoning was used in the comparable *Neville Lewis v. Jamaica* case.⁹² For the distinction between ongoing violations and those relating to specific events, the Commission did not formulate general principles itself but referred⁹³ to the practice of the European Commission of Human Right.⁹⁴

The Inter-American Commission also referred to the practice of the European Commission in its considerations on the inapplicability of *ratione temporis* arguments in the

⁸⁶ Ibid., p. 156, para. 71.

⁸⁷ Peter Blaine v. Jamaica, IACHR, 17 December 1998, Report No. 96/98 Case 11.827 (1998).

⁸⁸ Article 5(1) and (2) American Convention.

⁸⁹ The conditions of petitioner's pre-trial detention had already been raised before and decided by the UNHCR, and therefore inadmissible due to the prohibition of duplication set forth in art. 47(d) of the American Convention.

⁹⁰ Article 8(1) American Convention.

⁹¹ Supra 87, para. 52.

⁹² Neville Lewis v. Jamaica, IACHR, 17 December 1998, Report No. 97/98 Case 11.825 (1998), para. 51 - 52.

⁹³ Supra 87, note 9.

⁹⁴ E.g. Sporrang and Lönnroth v. Sweden, ECHR, 5 March 1979, Petition 7151/75 and 7152/75, D&R 15/15. See also Chapter 2.



Andrés Aylwin Azócar et al. case.⁹⁵ In this case the Inter-American Commission received complaints against the State of Chile alleging violations of the right to participate in government⁹⁶ and the right to equal protection,⁹⁷ relating to the situation left by the military government of General Augusto Pinochet. The events were a result of arbitrary and anti-democratic institutions and norms instituted by the aforementioned government. These institutions and norms remained in effect because the present government was not able to change them. Thus, the alleged violations were occurring at the time of the petition. The Chilean State maintained that since the petition referred to a constitutional standard established prior to the date of ratification of the American Convention by Chile it should be declared inadmissible *ratione temporis*.

In considering the State's objections, the Commission pointed out that the violations, while arising from norms issued prior to Chile's ratification, were ongoing post-ratification when the obligations of the Convention were in effect for the Chilean State.⁹⁸ The Commission considered itself competent – *ratione temporis* – to hear and rule on the matter because "the consequences or juridical and practical effects of the [...] norms and of their unchanging and continuing application [...] extend to the date of the presentation of the petition [...]."⁹⁹ The Commission confirmed its practice of extending the scope of application of the American Convention to:

"facts of a continuing nature that violate human rights prior to its ratification, *but whose effects remain after its entry into force.*"¹⁰⁰ (emphasis added)

It considered this practice coincident with that of the European Commission of Human Rights,¹⁰¹ of the European Court of Human Rights,¹⁰² as well as the United Nations Human Rights Committee.¹⁰³

⁹⁵ Andrés Aylwin Azócar v. Chile, IACHR, 9 December 1998, Report No. 95/98 Case 11.863 (1998).

⁹⁶ Article 23 (1)(b) and (c) American Convention.

⁹⁷ Article 24 American Convention.

⁹⁸ Supra note 95, para. 21.

⁹⁹ Supra note 95, para. 24.

¹⁰⁰ Supra note 95, para. 27. This is a confirmation of former practice of the Commission. E.g. Joao Canuto De Oliveira v. Brazil, IACHR, 7 April 1998, Report No.24/98 Case 11.287 (1997), paras 13-18.

¹⁰¹ E.g. Agrotexim Hellas S.A. and others v. Greece, ECHR, 12 February 1992, Application No. 14807/89 D&R 72/148, consideration i and iii. See also Chapter 2.

¹⁰² E.g. Agrotexim Hellas S.A. and others v. Greece, EctHR, 24 October 1995, Series A No. 330, p. 22, 58. See also Chapter 2.

¹⁰³ E.g. Millan Sequeira v. Uruguay, HRC, 29 July 1980, Comm. No. 6/1977 (1984), paras. 16-17. See also Chapter 4.



Concluding, the Commission considers a violation continuing "*where the rights of the victim are allegedly affected on an ongoing basis*".¹⁰⁴ For the distinction between ongoing violations and those relating to specific events, the Commission refers to practice of the European Commission of Human Rights on the matter.¹⁰⁵ The Commission considers itself competent - *ratione temporis* - in case the consequences or effects of a violation extend to the date of the presentation of the petition. It has extended the scope of application of the American Convention to facts of a continuing nature that violate human rights prior to its ratification, "*but whose effects remain after its entry into force*".¹⁰⁶ This conclusion does not have any additional value with regard to disappearance as continuing violation. In the Inter-American System it has been stated explicitly that a disappearance is considered a continuing violation until it is entirely solved,¹⁰⁷ it is not considered a specific event. As a result, the Commission does not reach the question whether the violation should be characterized as continuing based on the fact that the effects of the violation remain.

3.3 Disappearances

3.3.1. Cases

The Commission and Court in the Inter-American system have characterized disappearance in terms of multiple violations of many rights under the American Convention: right to personal liberty (article 7); the right of integrity of the person and in light of this not to be subjected to torture or to cruel, inhuman, or degrading punishment or treatment (article 5 (2)) and the right to a fair trial (article 8). Additionally, a disappearance often involves secret execution without trial, which constitutes a violation of the right to life (article 4). Article 1 of the Convention specifies the obligation assumed by State Parties in relation to each of the rights protected in the Convention. Each claim alleging that one of those rights has been infringed necessarily implies that article 1 (1) of the Convention has also been violated.¹⁰⁸

¹⁰⁴ Supra note 86, para. 52.

¹⁰⁵ See Chapter 2.

¹⁰⁶ Supra note 95, para. 27.

¹⁰⁷ See para. 3.1.

¹⁰⁸ Supra note 71, para. 162.



The question on the responsibility of a State in cases of disappeared persons was addressed in the *Velásquez* case.¹⁰⁹ In this case, the Court examined the obligations of Honduras under the American Convention and under which conditions a particular act, constituting a violation of one of the rights recognized by the Convention, could be imputed to a State Party thereby establishing its international responsibility.

Taking into account article 1 of the Convention, the Court stated that, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State.¹¹⁰ In addition, an illegal act which violates human rights and is initially not directly imputable to a State (for example, because the act is carried out by a private person or the responsible person has not been identified) can also lead to international responsibility of a State for reason of a lack of due diligence to prevent the violation or to respond to it as required by the Convention.¹¹¹

The responses required by the Convention consist of investigating and punishing any violation of the rights recognized by the Convention and moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.¹¹² If the State reacts in such a way that the violation stays unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State fails to comply with its duty to ensure the full and free exercise of those rights to the persons within its jurisdiction. This is also true when the State allows private persons or groups to violate freely and with impunity the rights recognized in the Convention.¹¹³

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.¹¹⁴ The existence of a particular violation does not, in itself, prove the failure to take preventive measures (duty to prevent),¹¹⁵ nor is the duty to investigate breached merely because the investigation does not produce a satisfactory result.¹¹⁶ What is decisive for establishing State's responsibility is whether a violation has occurred with the support of the acquiescence of the government, or whether the

¹⁰⁹ Supra note 71.

¹¹⁰ Supra note 71, para. 164.

¹¹¹ Supra note 71, para. 172.

¹¹² Supra note 71, para. 166.

¹¹³ Supra note 71, para. 176.

¹¹⁴ Supra note 71, para. 174.

¹¹⁵ Supra note 71, para. 175.

¹¹⁶ Supra note 71, para. 177.



State has allowed the act to take place without taking reasonable measures to prevent it or punish those responsible.¹¹⁷ The State's duty to investigate continues until the fate of the victim has been established and his remains located and turned over to the family. In the case that those individually responsible can not be legally punished, the State is still obligated to use the means at its disposal to inform the relatives of the fate of the victim and, if the victim has been killed, the location of the remains.¹¹⁸

The *Velásquez* case was followed by two other judgements that involved disappearances in Honduras: the *Godinez Cruz* Judgement¹¹⁹ and the *Fairen Garbi and Solis Corrales* Judgment.¹²⁰ The *Godinez* case was substantially similar to the *Velásquez* case and the Court reached a similar decision, but in the *Garbi and Corrales* case the Court came to a different conclusion. In this case the disappeared persons were of Costa Rican nationality and as far as was known they were not involved in activities considered dangerous by the government. The Court held that establishment of a general practice of disappearances by the government is insufficient to prove that a person whose whereabouts are unknown was the victim of that practice. To create a legal presumption that a specific person was the victim of the practice, other corroborative evidence is needed.¹²¹ There was insufficient evidence to relate the disappearances of Fairen Garbi and Solis Corrales to the governmental practice of disappearances and therefore Honduras' responsibility was not established.¹²²

3.3.2. Inter-American Convention on Forced Disappearance of Persons

As mentioned in paragraph 1.2. and paragraph 3.1.2., the Inter-American system provides for a Convention specifically regulating forced disappearances. It states that States Parties undertake not to practice, permit or tolerate the forced disappearance of persons¹²³ and pledge to punish those persons within their jurisdictions who commit or attempt to commit the crime of forced disappearance of persons, as well as their accomplices and accessories.¹²⁴ They further pledge to cooperate with one another to prevent, punish, and eliminate the forced

¹¹⁷ Supra note 71, para. 173.

¹¹⁸ Supra note 71, para. 181.

¹¹⁹ Supra note 76.

¹²⁰ Supra note 77.

¹²¹ Supra note 77, para. 157.

¹²² Supra note 77, para. 158.

¹²³ Article I (a) Inter-American Convention.

¹²⁴ Article I (b) Inter-American Convention.



disappearance of persons, taking the measures necessary to comply with the commitments undertaken in the Convention¹²⁵ and to take any legislative measures necessary to criminalize forced disappearance.¹²⁶ It contains a detailed definition of forced disappearance and of who shall be held guilty of this crime. The definition in article II makes clear that kidnapping of a person by criminals, for example for ransom, is not included. In drafting this article, the Commission more specifically had in mind, disappearances carried out by government agents, either uniformed or in civilian clothing, as members of police organizations or the armed forces, or by paramilitary or parapolice groups.¹²⁷ It must be reminded however, that the Court held in the *Velásquez* case¹²⁸ that also a disappearance which is not directly imputable to a State can lead to international responsibility of a State for reason of a lack of due diligence to prevent the violation or to respond to it as required by the Convention.¹²⁹ Another element of disappearance is that the government provides no information which allows determination of the whereabouts or fate of the abducted or arrested person. The Convention makes forced disappearance an extraditable offense (article V), thus no one charged with the crime will be able to escape punishment by fleeing to the territory of another State Party.

3.3.3. Other materials

In its Annual Report 1987-1988¹³⁰ the IACHR discussed the Draft Inter-American Convention of the Forced Disappearance on Persons it had prepared. The Commission decided to prepare this Draft Convention on the basis of the experience that the policy of forced disappearances had become an important instrument for the repression and physical suppression of dissidents in many Latin American countries. The extreme cruelty of the practice called for the adoption of special measures both nationally and internationally to help eliminate that policy for good. Article 4 of the Draft Convention stated:

"The forced disappearance of a person is a crime against humanity. Under the terms of this Convention, it engages the personal responsibility of its perpetrators and the

¹²⁵ Article I (c) Inter-American Convention.

¹²⁶ Article I (d) Inter-American Convention.

¹²⁷ <http://www.cidh.org/annualrep/87.88eng/chap5.htm>> para. II, in the comment on article 2.

¹²⁸ Supra note 71.

¹²⁹ See para. 3.3.1.

¹³⁰ Supra note 127.



responsibility of the State whose authorities executed the disappearance or consented to it."

The Commission indicated in its Annual Report that this might well be the most important article in the entire Draft Convention, since it characterizes forced disappearance of persons as a crime against humanity. Furthermore, this provision indicates that the Commission explicitly wanted to establish the responsibility of the State whose authorities executed the disappearance or consented to the disappearance. This article has not been included in the final Convention, presumably as a result of observations or comments by States on the Draft Convention. The Commission's intention to establish responsibility of a State whose authorities executed the disappearance or consented to the disappearance has nevertheless been attained through the Court's practice under the American Convention on Human Rights.¹³¹

In the Legal Brief Amicus Curiae presented by the ICJ before the Inter-American Court in the *Efraín Bámaca Velásquez v. Guatemala* case,¹³² the ICJ affirmed that a State is charged with the obligation to investigate a forced disappearance and that this obligation remains in force as long as the circumstances in which the victim disappeared as well as his and fate and whereabouts have not been elucidated.¹³³

¹³¹ See para. 3.3.1.

¹³² Supra note 85.

¹³³ Supra note 85, para. 71. See also § 3.1.3.



CHAPTER 4 HUMAN RIGHTS COMMITTEE

4.1 Disappearances as continuing violations

Since it started its work under the Optional Protocol to the ICCPR, the Human Rights Committee has not dealt with many disappearance cases. This may be the reason why the HRC has not named disappearances as such a continuing violation. The Committee has, however, given views from which the Committee's position on the matter can be deduced. Under certain circumstances disappearances can well be characterized as continuing violations.

The case of *Eduardo Bleier v. Uruguay*¹³⁴ is the most relevant in this respect. The victim was arrested without a court order in Montevideo, Uruguay, at the end of October 1975. The authorities did not acknowledge his arrest and he was held incommunicado at an unknown place of detention. Indirectly, however, his detention was confirmed because his name was on a list of prisoners, which was read out once a week at an army unit in Montevideo. Furthermore there were statements from eyewitnesses and other detailed information, given to the HRC by Bleier's family. On 24 March 1980, the Committee decided, *inter alia*:

"[...] That the communication was admissible in so far as it related to events which have allegedly continued or taken place after 23 march 1976 (the date of entry into force of the Covenant and the Optional Protocol for Uruguay)"¹³⁵

In accordance with article 4 of the Optional Protocol, the Committee repeatedly requested the Uruguayan Government to submit explanations or statements clarifying the matter. Uruguay did not take this opportunity to refute any of the evidence put forward by the authors of the communication, nor did it conduct any thorough inquiry into the authors' allegations. Therefore the HRC decided on the facts as presented by the authors. In an interim decision the HRC stated that:

"The failure of the State Party to address in substance the serious allegations brought against it and corroborated by unrefuted information, cannot but lead to the conclusion

¹³⁴ *Eduardo Bleier v. Uruguay*, Communication no. R. 7/30, 23 May 1978.

¹³⁵ *Ibid.*, par. 7 (b).



that Eduardo Bleier is either still detained, incommunicado, by the Uruguayan authorities or has died while in custody at the hands of the Uruguayan authorities."¹³⁶

The Committee also decided that it was the clear duty of the Government of Uruguay to investigate the allegations concerning Mr. Bleier's arrest and his treatment while in detention prior to 26 August 1976 and as to his apparent disappearance and the circumstances in which a warrant for his arrest was issued on 26 August 1976. The ICCPR and the Optional Protocol entered into force for Uruguay on 23 March 1976 and the HRC urged the Uruguayan Government to take effective steps to establish what has happened to Eduardo Bleier since October 1975. Although his arrest took place before the entry into force of the ICCPR and the Optional Protocol, his whereabouts were still unknown subsequent to the "crucial date" and the Uruguayan Government did not fulfil its obligation to investigate his fate. This means that the HRC took the position that the disappearance of Eduardo Bleier was a continuing violation, because it can only declare a communication admissible, if it concerns events which continued or took place after the entry into force of the ICCPR and the Optional Protocol.

The problem of disappearances was addressed by Mr. Bertil Wennergren in two other cases.¹³⁷ These cases both involve disappearances in Argentina, that occurred prior to entry into force of the ICCPR and the Optional Protocol in that State on 8 November 1986.¹³⁸ The HRC has repeatedly indicated that it has no competence over events that have occurred before the entry into force of the ICCPR and its Optional Protocol for the State in question, unless there is a continuing situation and in these cases the HRC decided that this was not the case:

"[...] However, the events of disappearance and death, which could have constituted violations of several articles of the Covenant, and in respect of which remedies could have been invoked, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina."¹³⁹

¹³⁶ Ibid., para. 11.2 sub 13

¹³⁷ Rules of Procedure of the Human Rights Committee, CCPR/C/3/Rev. 6; Rule 98: Any member of the Committee who has participated in a decision may request that his [or] her individual opinion be appended to the Committee's Views or decision.

¹³⁸ R. A. V. N. et al. v. Argentina, Communication nos. 343, 344 and 345/1988, S. E. v. Argentina, Communication no. 275/1988.

¹³⁹ Ibid., para. 5.3



It is very clear that the entry into force of the Covenant and the Optional Protocol is the only criterion for the HRC in determining whether a communication is admissible *ratione temporis*. The view that in these cases there was no continuing violation, was based on the ground that the fate and whereabouts of the victims were known at the moment of entry into force of the ICCPR and its Protocol for Argentina. Thus, there was no further obligation upon the State to conduct investigations and therefore no continuing violation.

According to Mr. B. Wennergren, disappearances that cannot be attributed to natural causes (accidents, suicides, etc.) but that give rise to reasonable assumptions of illegal acts, may lead to claims under the respective material articles in the Covenant (i.e. articles 6, 7, 9 and 10) and cause state responsibility under article 2. He draws the following conclusion:

"A disappearance per se does not raise any issue under the Covenant. For it to do so, a link to some of the material articles of the Covenant is required. And it is solely with such a link that art. 2 of the Covenant may become applicable and an issue may arise under that article too. [...] Only when it is unimaginable that any act, fact or situation which would constitute a violation of the Covenant may have continued to exist or have occurred subsequent to the "crucial date", such an obligation does not arise."¹⁴⁰

Until there are apparent indications that a person's disappearance cannot be attributed to the violation of one or more of the material articles of the Covenant, the duty of the State to investigate the allegation and provide appropriate remedies continues, until the fate and whereabouts of the missing person have been established.

Mr. B. Wennergren does not name disappearances a continuing violation. We can, however, deduce from his exposition that the definition of a continuing violation as given by the HRC (see § 4.2.1) is also applicable to disappearance cases, insofar as it has not been proven that the disappearance and/or death of the person concerned took place before the entry into force of the ICCPR and the Optional Protocol.

¹⁴⁰ Article 2 of the Covenant entails the state's obligation to undertake the necessary steps to give effect to the rights recognized in the Covenant. We will see below which are the necessary steps when dealing with disappearance cases. The "crucial date" is the date of entry into force of the CCPR and the Optional Protocol.



4.2 Continuing Violations

4.2.1 Cases

The HRC has given a definition of continuing violation in the case *Simunek, Hastings, Tuzilova and Prochazka v. The Czech Republic*.¹⁴¹ This case involved the allegedly unlawful expropriation of the claimants' property by the Czech Republic. After stating that the HRC cannot declare admissible those cases that relate to events that happened before the entry into force of the Covenant for the State in question, unless the violation complained of continues after the entry into force of the Optional Protocol, the HRC gives the following definition of a continuing violation:

"A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or clear implication, of the previous violations of the State party."¹⁴²

In the case *Esther Soriano de Bouton v. Uruguay*,¹⁴³ the HRC did not use this definition, but the meaning of this definition becomes very clear. She was arrested without warrant in Montevideo, Uruguay, on 19 February 1976 and submitted to inhuman and degrading treatment, while kept in detention. The HRC decided:

"[...] Although her arrest took place before the coming into force of the CCPR and of the Optional Protocol thereto on 23 March 1976 in respect of Uruguay, her detention without trial continued after 23 March 1976 [...]"¹⁴⁴

The continuance of her detention without trial after the coming into force of the Covenant and the Optional Protocol for Uruguay, is the affirmation of the previous violation of the Uruguayan Government, i.e. the arrest without warrant and the inhuman and degrading detention.

However, it is not necessary for the violation itself to continue after the entry into force of the Optional Protocol for the State in question. The HRC will also declare a claim admissible if there are continuing effects of a violation. In the case *Mónaco de Gallicchio v.*

¹⁴¹ *Simunek, Hastings, Tuzilova and Prochazka v. the Czech Republic*, Communication no. 516/1992, para. 4.5.

¹⁴² The same definition is used in the case *Ivan Summers v. Hungary*, Communication no. 566/1993, para. 6.3.

¹⁴³ *Esther Soriano de Bouton v. Uruguay*, Communication no. 37/1978, para. 10.

¹⁴⁴ See also *Moriana Hernandez Valentini de Bazzano v. Uruguay*, Communication no. 5/1977, para. 9 sub (i).



Argentina, where her granddaughter had been deprived of recognition of her legal identity, the HRC made the following statement:

"These acts, however, occurred prior to the entry into force of the Covenant and the Optional Protocol for Argentina on 8 November 1986, [...] and the Committee is not in a position ratione temporis to emit a decision in their respect. The Committee could, however, make a finding of a violation of the Covenant if the continuing effects of those violations were found themselves to constitute violations of the Covenant."¹⁴⁵

In this case, the duration of the various judicial proceedings extended for over ten years, after which some of them still had not been completed. Therefore the HRC decided that although the initial violation of article 24 of the Covenant, which holds the right to protection of the child, occurred before the entry into force of the Covenant and the Optional Protocol, the extended judicial proceedings should be qualified as the continuing effects of the initial violation. These continuing effects constituted violations under the Covenant themselves, because article 24 of the Covenant required the State to take affirmative action to grant the child prompt and effective relief from her predicament.¹⁴⁶

The HRC upheld the same view in the case *Evan Julian et al. v. New Zealand*, although in this case it found that the claimants did not show any continuing effects.¹⁴⁷ This case was about a Peace Treaty between Japan and New Zealand, which entered into force for these States before the Covenant and the Optional Protocol did and which allegedly discriminated against the claimants in respect to their services in the Second World War. The authors of the communication claimed that New Zealand had waived their right to compensation from Japan other than as provided for in the Treaty, but the HRC found that:

"[...]they] have not shown that there were any acts done by New Zealand in affirmation of the Peace Treaty after the entry into force of the Covenant that had effects that in themselves would constitute violations of the Covenant by New Zealand after that date."¹⁴⁸

¹⁴⁵ Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario v. Argentina, Communication no. 400/1990, para. 10.4.

¹⁴⁶ Ibid., para. 10.5

¹⁴⁷ Evan Julian et al. V. New Zealand, Communication no. 601/1994, para. 8.2.

¹⁴⁸ Ibid.



This is a combination of the definition of continuing violation, as adopted by the HRC in *Simunek et al. v. The Czech Republic* and the view in *Mónaco de Gallicchio v. Argentina*. In case of a disappearance this combination is applied in the same way. As shown, the HRC has qualified a disappearance as a continuing violation, when the State in question affirms the violation of causing, or not preventing, a person to disappear by not investigating the fate and whereabouts of that person. The non-acknowledgement of the detention and/or non-disclosure of the facts surrounding the disappearance are to be interpreted as the continuing effects of the previous violation by the state in question, which themselves constitute a violation of the State's obligation to conduct an effective investigation.

4.2.2 Other Materials

The HRC repeated the definition given in the case of *Simunek et al. v. The Czech Republic* in its Annual Report to the U.N. General Assembly of 1994.¹⁴⁹ In this report the HRC stated that although the State party's obligations under the Covenant start at the moment of its entry into force, the competence of the HRC to consider complaints of alleged violations under the Optional Protocol is engaged also in case there is a violation that continues after the entry into force of the Covenant and Protocol.

4.3 Disappearances

4.3.1 Cases

Apart from the case of Eduardo Bleier and the two disappearance cases from Argentina¹⁵⁰ the HRC has dealt with a few other disappearance cases. In these cases the obligation of the State to conduct effective investigations and provide appropriate remedies is emphasized.

In the case of Eduardo Bleier this obligation was mentioned and a similar obligation on the part of the State involved in a case was confirmed by the HRC in the case *Mojica v. Dominican Republic*.¹⁵¹ In this case the HRC stated:

¹⁴⁹ Annual Report to General Assembly, U.N. Doc. A/49/40 vol. 1 (1994).

¹⁵⁰ See paragraph 4.1

¹⁵¹ *Mojica v. Dominican Republic*, Communication no. 449/1991.



"[...] States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances that may involve a violation of the right to life."¹⁵²

The HRC decided that, under article 2 paragraph 3 of the Covenant, the State Party is under an obligation to provide the claimant with an effective remedy and urged the Government of the Dominican Republic to investigate, to bring to justice those responsible and to pay appropriate compensation to his family.¹⁵³

In the case *Delia Saldias de Lopez v. Uruguay*,¹⁵⁴ it was Sergio Lopez Burgos, the applicant's husband, who had disappeared from Buenos Aires, Argentina. He reappeared in Montevideo, Uruguay, but was then submitted to ill-treatment and torture and kept at a secret place of detention. The initial kidnapping took place after the entry into force of the Covenant and the Optional Protocol for Uruguay, so there was no question of admissibility *ratione temporis*, however, here too, the HRC found that the State Party was under an obligation to investigate the allegations in accordance with its laws and its obligations under the Covenant and the Optional Protocol.¹⁵⁵

In the cases mentioned in paragraph 4.1,¹⁵⁶ the State Party's obligation to investigate and provide effective remedies was also affirmed. The HRC stated in both these cases:

"The Committee finds it necessary to remind the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies where applicable, for victims or their dependants."¹⁵⁷

The question becomes relevant, what a State must undertake in order to meet its obligation to investigate alleged violations of the Covenant. In the case *Leopoldo Buffo Carballal v. Uruguay*¹⁵⁸ the HRC stated that:

"[...] A refutation in general terms to the effect that "in no Uruguayan place of detention

¹⁵² Ibid., para. 5.5.

¹⁵³ Ibid., para. 7.

¹⁵⁴ *Delia Saldias de Lopez v. Uruguay*, Communication no. 52/1979.

¹⁵⁵ Ibid., para. 11.2, 11.3 and 11.5.

¹⁵⁶ Supra note 138.

¹⁵⁷ Supra note 138 both cases para. 5.4.

¹⁵⁸ *Leopoldo Buffo Carballal v. Uruguay*, Communication no. 33/1978, para. 10.



may any situation be found which could be regarded as violating the integrity of persons" is not sufficient."¹⁵⁹

In the case of *William Torres Ramirez v. Uruguay*¹⁶⁰ the HRC made the same statement.

4.3.2 Other materials

In its General Comment on article 6 of the ICCPR,¹⁶¹ containing the right to life, the HRC again confirmed the obligation on the part of the State to investigate and to ensure that persons would not be abducted. The HRC stated that States should take specific and effective measures to prevent the disappearance of individuals, because a violation of the right to life is often involved in case of a disappearance.

Furthermore the HRC, in its consideration of reports submitted to it by States Parties under article 40 of the Covenant, mentions enforced and involuntary disappearances, among other crimes. It expresses its deep concern over these serious human rights violations and states to be disturbed and to deplore that these violations were not duly investigated and that no sufficient steps were taken to punish those responsible.¹⁶²

¹⁵⁹ Ibid, para. 10.

¹⁶⁰ *William Torres Ramirez v. Uruguay*, Communication no. R. 1/4, 13 February 1977, para. 16.

¹⁶¹ General Comment 6/16, 37 U.N. GAOR Supp. (No. 40), Annex V at 93, U.N. Doc. A/37/40 (1982).

¹⁶² For instance: Comments on Venezuela, U.N. Doc. CCPR/C/79/Add.13 and Comments on Nepal, U.N. Doc. CCPR/C/79/Add.42.



CHAPTER 5 U.N. WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

5.1 Declaration on the Protection of All Persons from Enforced Disappearance

5.1.1. Introduction

On 18 December 1992 the General Assembly of the United Nations proclaimed the Declaration on the Protection of All Persons from Enforced Disappearance.¹⁶³ According to the Declaration, the systematic practice of disappearance constitutes a violation of the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture and the right to life (article 1). States are under the obligation to take effective measures to prevent and end acts of enforced disappearance occurring within its jurisdiction (article 3). The Declaration refers also to the right to a prompt and effective judicial remedy as a means of determining the whereabouts of the disappeared persons (article 9) and the duty of the State to investigate fully all alleged cases of disappearance and to try the perpetrators (article 13).

Since 1993 the Commission on Human Rights has regularly adopted resolutions on the issue of disappearances and thereby has made reference to provisions of the Declaration and the implementation thereof. In these resolutions the Commission has requested the Working Group on Enforced or Involuntary Disappearances to take into account the provisions of the Declaration while acting out their mandate¹⁶⁴ and to monitor the compliance by States to these provisions.

5.1.2 Definition and Characterization

The preamble of this Declaration contains a definition of enforced disappearances stating that enforced disappearances occur in cases where:

"[...] persons are arrested, detained or abducted against their will or otherwise deprived of

¹⁶³ UN Doc. A/RES/47/133, 18 December 1992. Declarations are instruments which are not legally binding in a customary sense, but when widely supported they do create a presumption that behaviour contrary to them is *prima facie* unlawful. Since declarations are meant to reflect or crystallise customary law, states are bound to comply in accordance with their obligations under general international law (see N.D. White, *The law of international organisations*, Manchester University Press 1996, pp. 97 and 106.)

¹⁶⁴ See for example UN Doc. E/CN.4/RES/2000/37.



their liberty by officials of different branches of levels of the Governments, 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."

It follows from this definition that a certain degree of involvement of the State is required in order to establish an act constituting enforced disappearance.

According to article 1(1) of the 1992 Declaration, an act constituting enforced disappearance is a offence to human dignity. It is said to be a "grave and flagrant violation of human rights." By this form of human rights violations, a number of irrevocable rights are infringed. International law requires clear priority to be given to action against the most serious forms of violations of human rights in order to ensure that justice is done and that those responsible are punished, so stated the Working Group in its annual report of 2000.¹⁶⁵

Article 1 (2) of the Declaration states that disappearance constitutes a violation of *inter alia* the right to recognition as a person before the law, the right to liberty and security of the person and also the right not be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a great threat to the rights of life.

5.2 Disappearances as continuing violations

5.2.1 Declaration on the Protection of All Persons from Enforced Disappearance

During the process of evaluation and modification of the original draft declaration drawn by the Working Group on Detention, the comments and observations provided by the Working Group on enforced or Involuntary Disappearances were taken into consideration. Subsequently a new article 18 was included in the draft, which stated:

"The prosecution and punishment of offences of enforced or involuntary disappearances referred to in article 4 shall not be subject to a statute of limitations."¹⁶⁶

¹⁶⁵ UN Doc. E/CN.4/2001/68, 18 December 2000, para. 31.

¹⁶⁶ UN Doc. E/CN.4/Sub.2/1990/32, p. 16.



This article gave rise to discussions at further meetings. In the interest of clarity and in order to take account of the complexity of the question and the diversity of legal systems, the Working Group on Detention decided to divide the article into three paragraphs which were then adopted.¹⁶⁷ In the final draft, which was adopted in 1992 by the General Assembly as the Declaration on the Protection of All Persons from Enforced Disappearance, the original article 18 was included as article 17. This article states:

"1) Acts constituting enforced disappearance shall be considered a *continuing offence* as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared.

2) When the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.

3) Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and commensurate with the extreme seriousness of the offence."
(emphasis added)

5.2.2 Other materials

General comment

In its annual report to the Commission on Human Rights of 18 December 2000, the Working Group adopted a general comment on article 17. It decided to adopt such general comments on those provisions of the Declaration that might need further explanation with a view to focusing the attention of governments on the effective implementation of the relevant provisions of the Declaration.¹⁶⁸

According to the Working Group, article 17 entails fundamental principles which are intended to "clarify the nature of enforced disappearance and their criminal consequences". The general purpose of the article is to ensure conditions such that those responsible for acts constituting enforced disappearance are brought to justice within a restrictive approach to statutory limitations.¹⁶⁹

¹⁶⁷ UN Doc. E/CN.4/1992/19/Rev.1, p. 7, para. 37.

¹⁶⁸ UN Doc. E/CN.4/2001/68, p. 5, para. 25.

¹⁶⁹ *Ibid.*, para. 27.



Paragraph 1, which defines disappearances as continuing offences, is considered to be of crucial importance in order to establish the responsibilities of the State authorities. The article is intended to minimize the advantages of statutes of limitations for the perpetrators of acts constituting disappearances and therefore it must be interpreted in this way.

Furthermore, since the criminal codes of many countries have statutes of limitations for various offences, paragraph 2 states that these shall be suspended when the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective.¹⁷⁰ The Covenant refers hereby to the possibility of having "an effective remedy" when a human rights violation "has been committed by persons acting in an official capacity".¹⁷¹

The Working Group explains that this restrictive approach to the application of statutes of limitations can be justified by taking into account the assumption that the interpretation of article 17 must be consistent with the provisions of articles 1(1), 2(1), 3 and 4 of the Declaration,¹⁷² which seek to punish these crimes severely in order to end this criminal practice.

Other references

In the annual reports of the Working Group reviewing information concerning the handling of cases of enforced disappearances in various states, article 17 or any other possible link to disappearances as continuing breaches are not frequently mentioned.

In its country-specific observation on Ethiopia in the annual report of 12 January 1998, the Working Group stipulated:

"It (*Working Group*) stresses, however, that under article 17 of the Declaration, acts constituting enforced disappearances shall be considered a continuing offence for as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared. The Working Group, therefore, reminds the Government that it remains under an obligation to investigate thoroughly all outstanding cases of enforced disappearance and to bring the perpetrators to justice."¹⁷³

¹⁷⁰ This connection between ineffective remedies and a State's obligation with reference to a continuing violation can further be found in the case law of the Human Rights Committee operating under the auspice of the International Covenant on Civil and Political Rights, see par. 4.3.1.

¹⁷¹ *Ibid.*, para. 28.

¹⁷² See para. 5.3.1.

¹⁷³ UN Doc. E/CN.4/1998/43, para. 179.



The country-specific observation on Morocco in the same annual report states:

"The Working Group wishes to remind the Government that acts constituting offence as long as the perpetrators continue to conceal the fate and the whereabouts of disappeared persons. The Government, therefore, shall take all measures to bring the perpetrators to justice, irrespective of the fact that the disappearance occurred 20 years ago."¹⁷⁴

These are the only two references in the reports of the Working Group since 1993, when the Working Group began to take into account the provisions of the Declaration.

No direct communications between governments and the Working Group on individual cases or on the issue of enforced disappearances as continuing violations have been discovered. It is deemed possible that this kind of information, except for the comments and observations in the annual reports, has not been published at all.

5.3 State obligations

5.3.1 Declaration on the Protection of All Persons from Enforced Disappearance

The 1992 Declaration sets forth in several articles the duties of the State in order to eradicate the practice of enforced disappearances. Article 2 (1) states that "no State shall practise, permit or tolerate enforced disappearances". According to article 3 "each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction". The need for severe punishment is established in article 4(1) which reads that "all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness". Furthermore, the Declaration refers to the right to a prompt and effective judicial remedy, as well as unhampered access of national authorities to all places of detention, the right to habeas corpus, the duty to maintain centralized registers of persons deprived of their liberty, the duty to try alleged perpetrators of disappearance before ordinary courts, the exemption from statutes of limitations and amnesty laws leading to

¹⁷⁴ Ibid., para. 278.



impunity. It also provides for adequate compensation for the victims or, in the event of death, to the relatives.¹⁷⁵

The provision which can be considered to be of most interest in relation to this report is article 13. This article contains the duty to fully investigate all cases of alleged disappearance. It states:

"(1) Each State shall ensure that any person having knowledge or a legitimate interest...has the right to complain to a competent and independent State authority and to have that complaint *promptly, thoroughly and impartially investigated* by that authority.

(2) Each State shall ensure that the competent authority shall have the necessary powers and resources to *conduct the investigation effectively*...

(3)...

(4) The findings of such investigation shall be made available upon request to all persons concerned...

(5)..

(6) *An investigation*, in accordance with the procedures described above, *should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.*" (emphasis added)

Thus, a complaint on a case of alleged disappearance must be investigated fully and effectively by the competent authority, the findings must be made available to the persons who have an interest. Moreover, this investigation should be conducted for as long as the fate and whereabouts of the victim remains unclarified.

The conclusion can therefore be drawn that the State is under the continuing obligation to pursue effective investigations in order to clarify the disappearance cases, which establishes State responsibility. However, this responsibility does not vanish at the moment the fate and whereabouts of the disappeared person has been indeed clarified. As mentioned earlier the State is also under the obligation to try the perpetrators and to provide for adequate compensation. These are ongoing obligations which continue to give rise to State responsibility for as long as they are not carried out and thereby constitutes continuing violations.

¹⁷⁵ Articles 9, 10, 14, 17, 18, 19. The Working Group continues to remind the Government of these duties imposed on them, not only in the context of clarifying individual cases, but also by taking action of a more



5.3.2 *Other materials*

General comment on article 3

According to the Working Group it is crucial that, in accordance with the Declaration, the governments take effective legislative, administrative and judicial measures aimed at preventing the occurrence of disappearance in the future.¹⁷⁶

In 1996, the Working Group adopted a general comment on article 3 with a view on focusing the attention of the government on this article. The Working Group stipulated that article 3 is a broad obligation for the State to undertake action. It serves as a general model for the content of the international responsibility of the State on the issue of disappearances. The purpose of the measures to be taken is "to prevent and terminate acts of enforced disappearance". This provision calls upon all States to establish appropriate machinery for preventing and terminating acts of disappearance.

With regard to the nature of the measures to be taken, it is not enough to have formal "legislative" provisions. It is essential that the entire government machinery should adopt measures to combat the crime of disappearance. The article also refers to "other measures", thus making clear that the responsibility of the State does not stop at legislative, administrative or judicial measures. They are only mentioned as examples and must be understood as giving the State a wide range of responsibility for defining policies suited to the proposed objective. Moreover, the measures to be taken must also be "effective". If the facts show that the measures taken were ineffective, the international responsibility of the State would be to take other measures and to adapt its policies so that effective results would be achieved. The main criterion for determining whether or not the measures are suitable is that they are effective in preventing and terminating acts of enforced disappearance.

Consequently, article 3 must be interpreted in the way that the international responsibility of States arises not only when acts of enforced disappearance occur, but also when there is lack of appropriate action to prevent or terminate such acts. Such responsibility derives not only from omissions or acts by the government and the authorities and officials subordinate to it, but also from all the other governments functions and mechanism, such as legislature and the judiciary, whose acts or omissions may affect the implementation of this provision.¹⁷⁷

general nature.

¹⁷⁶ UN. Doc. E/CN.4/1999/62, 28 December 1998, para. 338. It concerns article 3 of the Declaration.



References to article 13

The Working Group stresses in most of their annual reports that impunity is the main cause of the ongoing practice of disappearances and at the same time one of the major obstacles to clarify past cases. It is therefore important that all States comply with the Declaration which obliges them in particular to maintain an official register of all persons deprived of their liberty, by promptly informing the families and legal counsel and by investigating all cases of disappearance.¹⁷⁸

In its annual report of 1998, the Working Group refers to the obligation under article 13 on several occasions.¹⁷⁹ In these country-specific observations, the Working Group states that while it understands the difficulties involved in gathering information necessary to determine the whereabouts of victims of enforced disappearances, the government remains under the continuous obligation under article 13 to conduct effective, thorough and impartial investigations for as long as the fate and whereabouts of the victims of enforced disappearance remain unclarified.¹⁸⁰

¹⁷⁷ UN Doc. E/CN.4/1996/38, 15 January 1996, para. 48-53.

¹⁷⁸ UN Doc. E/CN.4/1999/62, 28 December 1998, para. 336.

¹⁷⁹ In this report, the Working Group has made separate observations on each state about their ineffective compliance with certain provisions of the Declaration. This has not been the case in other annual reports where only statements of facts have been found.

¹⁸⁰ See for example UN Doc. E/CN.4/1998/43, 12 January 1998, paras. 101, 129, 170, 190, 202, 269, 288, 292 and ff.



CHAPTER 6 SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS

6.1 Draft International Convention for the Protection of All Persons from Forced Disappearance

6.1.1 Introduction

According to the international community, the responses to the issue of enforced disappearances continued to be insufficient despite the efforts which have been made to eradicate this practice. In order to terminate enforced disappearance and the impunity which often follows, a universal legally binding instrument was considered to be necessary, containing an universally agreed definition of the crime of enforced disappearance and establishing obligations with regard to the prevention, investigation and repression of this practice.¹⁸¹

A preliminary draft of a international Convention was prepared and presented by the sessional Working Group on the Administration of Justice of the Sub-Commission on Prevention of Discrimination and Protection of Minorities¹⁸² in 1995. The draft text was elaborated by the Working Group following four years of work and various consultative meetings with experts from the UN and non-governmental organisations.¹⁸³ In 1998 the Working Group approved the draft after amending it conform the comments made during earlier meetings. Subsequently it requested the Sub-Commission to transmit the revised draft to the Commission on Human Rights.¹⁸⁴ In 1998 the Sub-Commission adopted the draft convention and transmitted it to the Commission on Human Rights for its consideration.¹⁸⁵

Since 1999 the Commission on Human Rights has been considering the draft and it has requested to other UN instruments, such as the Working Group on Enforced Disappearances,¹⁸⁶ non-governmental organisations and governments to comment the draft. In its 57th session the Commission on Human Rights established two concrete mechanisms to

¹⁸¹ Federico Andreu-Guzmán, "The Draft International Convention on the Protection of All Persons from Forced Disappearance", in *The ICJ Review: Impunity, Crimes against Humanity and Forced Disappearance*, September 2001, No 62-63, pp. 74 and 78.

¹⁸² Currently transformed to Sub-Commission on the Promotion and Protection of Human Rights.

¹⁸³ See for example E/CN.4/Sub.2/1996/16, para. 35 and ff.

¹⁸⁴ E/CN.4/Sub.2/1998/19, para. 64 and Annex.

¹⁸⁵ E/CN.4/Sub.2/RES/1998/25.



initiate the process of examining the draft convention.¹⁸⁷ Firstly, an independent expert shall be appointed to examine the existing international criminal and human rights framework with a view to identify the currently existing gaps, if any. Furthermore an intersessional open-ended Working Group shall be established to elaborate a draft legally binding instrument in the light of the findings of the independent expert, while taking into account the draft convention transmitted by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in its resolution 1998/25. This Working Group will begin its work in 2002 on the basis of the draft convention.¹⁸⁸

6.1.2 Substance of the draft Convention

The draft Convention consist of a preamble and three parts. Part I (article 1-24) comprises substantive provisions on the definition of enforced disappearance and the obligations as regards prevention, investigation, suppression, international cooperation and reparation. Part II (articles 25-33) contains provisions relating to the monitoring mechanism and international procedures of supervision and protection. Part III (articles 34-39) refers to the final clauses.¹⁸⁹

6.1.3 Definition and Characterization

The draft Convention establishes in article 1 paragraph 1 the following definition of enforced disappearance:

"[...] forced disappearance is considered to be the deprivation of a person's liberty, in whatever form or for whatever reason, brought about by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information, or refusal to acknowledge the deprivation of liberty or information, or concealment of the fate or whereabouts of the disappeared person."

This definition is based on the definition contained in the Inter-American Convention on Forced Disappearance of Persons (article II) and the Declaration on the Protection of All Persons from Enforced Disappearance (paragraph 3 of the Preamble). It incorporates the

¹⁸⁶ E/CN.4/RES/2000/37, para. 2(j); E/CN.4/2001/68, Annex III.

¹⁸⁷ E.CN.4/RES/2001/46, para. 11-12.

¹⁸⁸ Federico Andreu-Guzmán, see note 181 p. 105.



characteristic elements of disappearances, being the deprivation of liberty and the official refusal to acknowledge the detention by concealment of the fate and whereabouts of the disappeared person. The definition entails various types of actions, which can be active as well as passive. The definition contains furthermore a phrase on the perpetrator of enforced disappearance. It includes 'agent of the State' as well as 'indirect State agents' i.e. private individuals who commit this crime with the authorization, acquiescence or complicity of State agents.¹⁹⁰

The definition proposed by the Draft Convention does not include a reference to the impossibility of exercising legal remedies.¹⁹¹ This omission is based on the consideration that the situation in which the victim of enforced disappearance finds himself outside the protection of the law and therefore unable to exercise legal recourses, is more an inherent consequence of the act of disappearance.¹⁹²

Article 2 of the draft Convention criminalizes forms of participation to acts constituting enforced disappearance, such as instigation, abetment, incitement, conspiracy and attempts as well as the deliberate concealment of the offence. Furthermore paragraph 2 of article 2 states that non-fulfilment of the legal duty to act in order to prevent enforced disappearance shall be punished.

Article 3 of the draft Convention differentiates between enforced disappearance committed as part of a massive or systematic practice and that committed outside of such a context. Thus it characterizes enforced disappearance as a crime against humanity only when the actions involved are committed within the framework of a massive or systematic practice and otherwise as an international crime.¹⁹³

¹⁸⁹ Ibid. p, 81.

¹⁹⁰ Federico Andreu-Guzmán, *supra* note 181 p. 82.

¹⁹¹ Such a reference is indeed included in the Inter-American Convention on Forced Disappearance of Persons. This involves the final part of article II: "thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

¹⁹² Federico Andreu-Guzmán, *supra* note 181 p. 83.

¹⁹³ Ibid., p. 85.



6.2 Disappearances as continuing violations

6.2.1 Draft International Convention for the Protection of All Persons from Forced Disappearance

The draft Convention establishes the obligation to define enforced disappearance as a crime in domestic law, of continuous and permanent character corresponding to the serious and continuing nature of enforced disappearance. Article 5(1) states:

"The States Parties undertake to adopt the necessary legislative measures to define the forced disappearance of persons as an independent offence, as defined in article 1 of this Convention, and to define a crime against humanity, as defined in article 3 of this Convention, as separate offences, and to impose an appropriate punishment commensurate with their extreme gravity. The death penalty shall not be imposed in any circumstances. *This offence is continuous and permanent as long as the fate or whereabouts of the disappeared person have not been determined with certainty.*"
(emphasis added)

According to the drafters, this draft Convention is in principle based on the 1992 Declaration on the Protection of All Persons from Enforced Disappearance.¹⁹⁴ Therefore it can be said that article 5 of this draft has developed from article 17 of the Declaration¹⁹⁵ and is supported by the general comment of the Working Group on Enforced or Involuntary Disappearances on the issue of the continuous nature of the crime of enforced disappearance.¹⁹⁶

6.2.2 Other materials

In the *travaux préparatoires* and other documents of the Working Group on the Administration of Justice and the Sub-Commission, references or comments to article 5 of the draft Convention have not been found. Furthermore, the Working Group on Enforced or Involuntary Disappearances, which has made several comments on the provisions of the draft Convention in its annual report of 18 December 2000, has not mentioned this article.

The conclusion can thus be drawn that no problems occurred when identifying the nature and character of acts constituting enforced disappearances. There has not been any

¹⁹⁴ E/CN.4/Sub.2/1996, para 38.

¹⁹⁵ See para. 5.2.1.

¹⁹⁶ See para. 5.2.2.



significant discussion on the continuous aspect of this crime. Therefore it is deemed possible to state that the international community agrees on the thesis that enforced disappearance constitutes a continuing violation of international law and that a international consensus has arised.

6.3 State obligations

6.3.1 Draft International Convention for the Protection of All Persons from Forced Disappearance

The draft Convention lays down in various provisions the duties of the State which must be undertaken in order to combat impunity and to end the practice of enforced disappearances and the factors which give rise to them. Article 4(1) can be seen as an overall general provision which states among others that States Parties undertake "not to practise, permit or tolerate forced disappearance, to investigate immediately and swiftly any complaint of forced disappearance and to inform the family of the disappeared person about his or her fate and whereabouts and to impose sanctions."

The subsequent provisions of the draft Convention can be differentiated between articles which serve as safeguards against impunity and articles which contain the obligation to take preventive measures. To start with the first category, article 5 establishes first of all the obligation to define enforced disappearance as a crime in its domestic law, corresponding to the serious and continuous nature of enforced disappearance. Furthermore the draft refers to the duty to prohibit granting of amnesties¹⁹⁷ and asylum or refuge to alleged perpetrators of acts constituting enforced disappearance.¹⁹⁸ These provisions should be interpreted in conjunction with the obligation to exercise extra-territorial jurisdiction or to extradite any person suspected of having committed acts of enforced disappearance and who is found in their territory, regardless of his nationality or that of the victim or of the territory in which the crime was committed.¹⁹⁹ Finally, the draft Convention establishes the non-applicability of statutory limitations to criminal proceedings and to any punishment arising from enforced disappearance when this involves acts committed within the framework of a systematic or massive practice. In case of forced disappearance, which do not constitute a crime against

¹⁹⁷ Article 17 of the draft Convention.

¹⁹⁸ Article 14 of the draft Convention.

¹⁹⁹ Articles 6, 7, 12 of the draft Convention.



humanity,²⁰⁰ the draft Convention establishes safeguards to prevent statutory limitation from being a factor contributing to impunity.²⁰¹

The draft Convention contains furthermore various provisions with respect to the prevention of enforced disappearances. Most of these articles are based on the Declaration on the Protection of All Persons from Enforced Disappearances and other international standards on the subject of deprivation of liberty. The provisions refer to the duty to hold persons deprived of their liberty solely in an official recognized place of detention, the duty to maintain official and centralized registers of persons deprived of their liberty, the duty to control the legality of the deprivation of liberty by a judicial body, the duty to guarantee the right to a prompt, simple and effective judicial remedy at all times and under any circumstances in order to determine the fate and whereabouts of the missing person and the duty to prohibit the expulsion or extradition of a person when there are reasons to believe that that person is in danger of becoming the victim of enforced disappearance.²⁰²

The provision which can be considered to be of relevance in relation to this report is article 11. This article stipulates among others that:

"1) Each State Party shall ensure that any person who alleged that someone has been subjected to forced disappearance has the right to complain to a competent and independent State authority and to have that complaint *immediately, thoroughly and impartially investigated* by that authority.

[...]

7) It must be possible to *conduct an investigation*, in accordance with the procedures described above, *for as long as the fate or whereabouts of the disappeared person have not been established with certainty.*" (emphasis added)

The State is therefore under the obligation to fully and effectively investigate a case of alleged enforced disappearance for as long as the fate and whereabouts of the missing person remain uncertain. The State should thus take active steps to ensure that the competent national authority has the necessary powers and resources to conduct such an investigation. Furthermore, any information found during the investigation must be made available upon request to all persons concerned, unless this would gravely hinder the investigation. However,

²⁰⁰ See supra note 162 and accompanying text.

²⁰¹ Article 16 of the draft Convention: Federico Andreu-Guzmán, supra note 181 p. 92-93. See also on the issue of statutory limitations article 17 of the Declaration on the Protection of All Persons from Enforced Disappearances, para. 5.2.1.

²⁰² Articles 22, 21, 20 and 15 of the draft Convention.



the competent authority must communicate regularly and without delay the results of inquiry conducted so far to the relatives²⁰³

Also here²⁰⁴ the conclusion can be drawn that the State is not only under the continuing obligation to pursue effective investigations in order to clarify the disappearance cases, which establishes state responsibility but is also obliged to try the perpetrators and to provide for adequate compensation. These are ongoing obligations which continue to give rise to State responsibility for as long as they are not carried out and thereby constitute continuing violations.

6.3.2 Other materials

The *travaux préparatoires* of the Working Group on the Administration of Justice and the Sub-Commission comprises mostly textual comments on the provisions containing duties for the State Parties.²⁰⁵ Only a few references have been made on the substance, however these are not considered to be of any relevance to this report.²⁰⁶ Article 11 of the draft Convention with respect to the duty of State to fully and effectively investigate any complaint on the case of disappearances has not been referred to in these documents.

Furthermore the Working Group on Enforced or Involuntary Disappearance, which has been requested to submit comments on the draft Convention,²⁰⁷ has not made any relevant substantial comment on the characterization on the duties of States with regard to the prevention of the practice of enforced disappearance.²⁰⁸

Therefore it can be concluded that the identification and characterization of States' obligations under the draft International Convention on the Protection of All Persons from Enforced Disappearance in order to combat impunity and to eradicate the practice of disappearances did not raise great difficulties.

²⁰³ Article 11 (3) and (6).

²⁰⁴ See para. 5.3.1.

²⁰⁵ E/CN.4/Sub.2/1998/19, 19 August 1998, para. 23 and ff.

²⁰⁶ E/CN.4/Sub.2/1996/16, 13 August 1996, para. 46.

²⁰⁷ E/CN.4/RES/2000/37, 20 April 2000, para. 2(j).

²⁰⁸ E/CN.4/2001/68, 18 December 2000, Annex III.



CHAPTER 7 SPECIAL RAPORTEURS

7.1 Special Rapporteur on Torture

At first sight, the question of disappearances seems to fall outside the mandate of the Special Rapporteur on Torture.²⁰⁹ However these two violations of human rights are certainly considered to be related. A victim of torture has reasonable chance to become victim of enforced disappearance in order to cover up the evidence of torture. Moreover, a victim of enforced disappearance is likely to be subjected to torture as the disappeared person does to have access to judicial remedies to file a complaint about his treatment.

Furthermore, the Working Group on Enforced Disappearances has acknowledged the view that a disappearance itself constitutes torture by stating that "the very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture."²¹⁰ This also follows from article 1(2) of the Declaration on the Protection of All Persons from Enforced Disappearance.²¹¹ However, the Working Group does not address the position of the relatives of the missing person.²¹²

This relation between disappearances and torture has been confirmed by the Special Rapporteur on Torture. The Rapporteur identified an emerging trend towards recognizing that enforced disappearances constitutes torture or ill-treatment prohibited under international law, with regard to both the relatives of the disappeared person²¹³ and the victim him or herself as long as the disappearance remains unresolved.²¹⁴ In acting out his mandate, the Special Rapporteur has also taken into account resolutions and reports of the Working Group on Enforced or Involuntary Disappearances.²¹⁵ Furthermore the Special Rapporteur has sought to

²⁰⁹ See para. 1.6.1

²¹⁰ UN Doc. E/CN.4/1983/14, para. 131.

²¹¹ Article 1(2):...*It (disappearance) constitutes a violation of... the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.* UN Doc. A/RES/47/133, 18 December 1992.

²¹² This in contrast to the *Kurt* case, para. 2.4.2.

²¹³ The torture amounts to the anguish and distress of the relatives of the disappeared person deriving from the situation that the fate or whereabouts of their loved one remain unknown.

²¹⁴ Sir N.S. Rodley, *The Treatment of Prisoners under International Law*, Clarendon Press: Oxford 1999, p. 261; see also Amnesty International, "Chile: Torture. An International Crime", ai-index AMR 22/010/1999, 7 April 1999.

²¹⁵ UN Doc. A/54/426, 1 October 1999, para. 7.



cooperate with, among others, the Working Group on questions of grave human rights violations, such as enforced disappearances.²¹⁶

With respect to the question of State duties regarding the issue of disappearances the Special Rapporteur holds that States, which are confronted with a case of disappearance, are under the obligation to fully and effectively investigate allegations of torture, summary executions and enforced disappearance, to bring the perpetrators to justice and to provide compensation. The existence of these obligations follows evidently from the provisions under international law²¹⁷ and case law.²¹⁸

Sir Nigel Rodley pointed out that:²¹⁹

"[...] the idea of 'disappearances' constituting a continuing offence is logical, since non-acknowledgement of the detention and non-disclosure of the fate or whereabouts of detained persons are key elements in the offence itself."²²⁰

Other substantial references or comments on the question of disappearances as continuing violations have not been found.

7.2 Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

The Special Rapporteur examines violations of the right to life committed by authorities of the State, such as police, security forces and armed forces, as well as by other groups or individuals cooperating with or tolerated by the State.²²¹ From this mandate follows the relation with enforced disappearances since this constitutes a great threat to the right of life, in accordance with article 1(1) of the Declaration of the Protection of All Persons from Enforced Disappearance.

²¹⁶ Ibid., para. 23.

²¹⁷ Inter-American Convention on Forced Disappearances of Persons, Declaration on the Protection of All Persons from Enforced Disappearance, Draft International Convention on the Protection of All Persons from Forced Disappearance.

²¹⁸ Sir N.S. Rodley, supra note 214 p. 266; see also UN Doc. E/CN.4/1995/111, 16 January 1995, para. 115 and ff.

²¹⁹ It is not clear whether he was acting in his capacity as Special Rapporteur on Torture or in his private capacity as an expert while making this statement.

²²⁰ "An Analysis of International Instruments on 'Disappearance', *Nunca Más*", in: *Human Rights Quarterly*, vol. 19, 1997, p. 389.

²²¹ Fact Sheet No.11(Rev. 1) by the Office of the High Commissioner for Human Rights, p. 7.



As the Special Rapporteur on Torture, the Special Rapporteur on Summary Executions takes into account reports of Working Group as well as the Declaration on the Protection of All Persons from Enforced Disappearance.²²² The Special Rapporteur, in his report concerning a mission to Indonesia and East Timor in 1994, specifically recalls a number of articles of special importance, among which article 17 considering enforced disappearance a continuing violation.²²³ The Special Rapporteur also mentions the obligation of the State to take measures to prevent and terminate acts of enforced disappearances²²⁴ as well as the obligation to thoroughly investigate alleged cases of enforced disappearances and violations to the right to life.²²⁵

Further references or comments to this article have not been found in any documents of the Special Rapporteur.

²²² See for example UN Doc. E/CN.4/1995/61/Add.1, 1 November 1994, paras 4 and 6.

²²³ *Ibid.*, para. 69.

²²⁴ *Ibid.*, para. 86.

²²⁵ *Ibid.*, para. 61; Fact Sheet No. 11 (Rev. 1) by the Office of the High Commissioner for Human Rights, p. 9.



CONCLUSION

This report focuses primarily on the question whether disappearances can be considered a 'continuing violation'. Based on the research performed for the present report it seems safe to conclude there is a broad international consensus that this question should be answered in the affirmative.

European case law

The question has been specifically addressed by the European Court of Human Rights in the *Cyprus v. Turkey* case,²²⁶ which should be considered of much relevance since it represents a factual situation comparable to that in Chechnya. The Court concluded that the disappearances constituted continuing violations of articles 2, 3 and 5 of the European Convention on Human Rights based on the failure of the Turkish authorities to conduct effective investigations into the fate and whereabouts of disappeared persons and to provide information to the relatives. Although the Commission held in *Obadasi v. Turkey*²²⁷ and the *McDaid & others v. United Kingdom*²²⁸ that effects resulting from specific events in the past did not constitute a continuing violation, the Court concluded in *Cyprus v. Turkey* that the suffering of the relatives of the missing persons as a consequence of the disappearance and the concealment of their fate did constitute a continuing violation of article 3 of the European Convention.

Apart from the *Cyprus v. Turkey* case, European cases on continuing violation support the statement that disappearances can constitute continuing violations. In *Agrotexim & others v. Greece*²²⁹ and *Jecius v. Lithuania*²³⁰ it was made clear that acts carried out by State authorities, or a lack thereof being the failure to conduct effective investigations, which entailed a violation of the rights under the Convention could constitute continuing violations in case these violations had not ended.

In *Cyprus v. Turkey* the Court did not indicate whether the acts constituting disappearance itself can be considered continuing violations. The Court merely focussed on the question whether the State at issue conducted effective investigations into alleged cases of disappearances and did everything in its power to clarify the fate and whereabouts of the

²²⁶ Supra note 36.

²²⁷ Supra note 54.

²²⁸ Supra note 56.

²²⁹ Supra note 58.



missing person. As mentioned before, also the violation of article 3, caused by the uncertainty and anguish of the relatives of the missing person, is based on the failure of the State to conduct investigations. In other disappearance cases that have been researched, the question whether a disappearance in itself constitutes a continuing violation has never been raised. In case the application was based on a period in which violations occurred, the events could be seen as continuing violations. Although disappearances can be included, they have not been referred to separately (*Ersöz v. Turkey*).²³¹

In *Ergi v. Turkey* the European Court held that the responsibility of the State to take feasible precautions to prevent and to carry out effective investigations into the circumstances of an alleged violation is not confined to the situation where it has been established that the violation was caused by agents of the State. Mere knowledge of the violation establishes obligations for the State.²³² Although this case did not concern a disappearance, this assessment may be applied analogically to disappearance cases.

Concluding, in the European Human Rights Systems it can be considered to be settled that, based on the failure of the State authorities to conduct effective investigation into the fate and whereabouts of disappeared persons and to provide information to the relatives, disappearance cases can constitute continuing violations of rights set forth in the European Convention. However, some questions remain unanswered in the European System. First, the European System does not answer the question, if and under what conditions a disappearance in itself can be qualified as a continuing violation. If a disappearance is considered a continuing violation the question rises when the violation ends. The other main question that remains unanswered is that of the responsibility and obligations of the State. More specifically, what comprises the duty to conduct effective investigations, what does a State have to undertake to comply with its duties and when have these duties has been violated?

Disappearance as continuing violation

The question, if and under what conditions disappearance can be designated a continuing violation, has been answered more or less clearly by other institutions that have been included in this research.

²³⁰ Supra note 60.

²³¹ Supra note 57.



In the Inter-American System, it is settled case law that the effects of a disappearance extend until such time as the disappearance is entirely solved and that the crime of forced disappearance is considered a continuing crime until that same day (e.g. *Velásquez Rodríguez* case).²³³ Since a disappearance in itself is considered a continuing violation, the case law on continuing violation stating that a violation can be considered continuing when rights are violated on an ongoing basis or when the effects of the violation remain, does not add anything. The Inter-American Convention on the Forced Disappearance of Persons also explicitly states that the crime of disappearance is considered continuing as long as the fate or whereabouts of the victim has not been determined.

The same clearness of opinion is found with regard to the U.N. Working Group on Enforced or Involuntary Disappearances. Especially taking into account article 17 of the Declaration on the Protection of All Persons from Enforced Disappearance stating that the crime of enforced disappearance is considered a continuing offence as long as the perpetrators continue to conceal the fate and whereabouts of the disappeared persons. However, it should be reminded that despite the fact that article 17 is deemed to have great importance, in the annual reports reviewing information concerning the handling of cases of forced disappearances, article 17 or any other possible link to disappearances as continuing violation are not frequently mentioned.

The draft International Convention for the Protection of All Persons from Forced Disappearance adopted by the Sub-Commission on the Promotion and Protection of Human Rights²³⁴ is based on the foregoing Declaration. This instrument too specifically endorses the thesis that a forced disappearance is continuous as long as the fate and whereabouts of the disappeared person have not been determined with certainty.²³⁵ Based on the fact that no significant discussion occurred on the issue, it seems possible to state that the international community agrees on the characterization of disappearance as a continuing violation.

On the other hand, the Human Rights Committee has not named disappearance as such a continuing violation. However, the opinion that under certain circumstances a disappearance can be qualified as a continuing violation, can be deduced from its practice. This is the case when the event of disappearance is linked to violation of one or more of the material articles of the ICCPR. The HRC has taken the position that if a disappearance can be linked to one of

²³² Supra note 68 and accompanying text.

²³³ Supra note 71.

²³⁴ At the time the Commission was called Sub-Commission on Prevention of Discrimination and Protection of Minorities.



the material articles of the Covenant, the respondent State is under an obligation to conduct thorough investigations and provide for effective remedies for the victims. The duty to conduct investigation ends, when the fate and whereabouts of the victim have been established (*Eduardo Bleier v. Uruguay*)²³⁶ and the individual opinion by Mr. B. Wennergren).²³⁷ Furthermore, it follows from the Committee's case law on continuing violation, that it qualifies a violation as continuing not only if the initial violation continues, but also if the effects of the violation themselves constitute violations under the ICCPR (*Mónaco de Gallicchio v. Argentina*).²³⁸ These continuing effects have to be shown by the authors of the communication (*Evan Julian et al. v. New Zealand*).²³⁹ This reasoning applies to disappearances, as long as the fate and whereabouts of the missing person have not been established, because the respondent State affirms the initial violation of disappearance by not investigating the matter, which in itself is a violation under the Covenant, that can be seen as a continuing effect of the disappearance.

In sum, it can be said that the greater part of the institutions and their instruments that have been researched consider enforced disappearance as such a continuing violation and have stated this explicitly. The violation extends until such time as the disappearance is entirely solved. Although the HRC has not stated so explicitly, it can nevertheless be deduced from its practice on disappearance and continuing violation that it holds the same opinion. Therefore, it seems safe to conclude that an international consensus has been reached on the matter.

Obligations of the State

The European Court has held that the responsibility of the State to take feasible precautions to prevent and to carry out effective investigations into the circumstances of an alleged violation is not confined to the situation where it has been established that the violation was caused by agents of the State. Mere knowledge of the violation establishes obligations for the State (*Ergi v. Turkey*). Although this assessment may be applied analogically to disappearance cases, it

²³⁵ Article 5 Draft International Convention for the Protection of All Persons from Forced Disappearance.

²³⁶ Supra note 134.

²³⁷ Supra note 138.

²³⁸ Supra note 145.

²³⁹ Supra note 147.



still leaves several questions unanswered, i.e. what comprises the duty to conduct effective investigations, what does a State have to undertake to comply with its duties and when have these duties has been violated?

In contrast what can be concluded so far from the practice of the European Court, the Inter-American Convention on the Forced Disappearance of Persons does require involvement of the State. The definition of enforced disappearance in article II makes clear that disappearance conducted by private persons carried out for their own purposes and thus not linked to the State do not fall under it. Another element of disappearance under the Inter-American Convention is that the government provides no information which allows determination of the whereabouts or fate of the disappeared person. Equally, a certain degree of involvement is required under the Declaration on the Protection of All Persons from Enforced Disappearances in order to establish an act constituting enforced disappearance, as is a refusal to disclose the fate or whereabouts of the person concerned. Since the definition of enforced disappearance given in the Draft Convention is based on both the Inter-American Convention and the U.N. Declaration, it contains the same elements.

On the other hand, the definition of enforced disappearance of the American Court has a broader scope. Not only disappearances carried out by an act of public authority or by persons who use their position of authority is imputable to the State, but also acts that are initially not directly imputable to the State (e.g. because the act is carried out by a private person) can lead to international responsibility of the State when it fails to fulfill certain obligations with which it is charged. Furthermore, the HRC has not made any difference between the kidnapping of persons by State organs or private persons. Concluding, it might be possible that the European Court, like the HRC and in the Inter-American System, does not require State involvement in order to establish responsibility of the State to take feasible precautions to prevent and to carry out effective investigations into the circumstances of a disappearance. Some institutions do require some degree of involvement of the State as an element of enforced disappearance.

As mentioned above, according to the European Court failure of the respondent State to conduct effective investigations can constitute a continuing violation. The European case law, which has been examined for this report, does not expand on what comprises 'effective investigations' and when the duty to conduct such investigation has been violated.



The HRC addresses specifically in its case law the duties of a State in case of disappearances. The HRC emphasizes the State's obligation to conduct effective investigations, like in the European system, and to provide appropriate remedies. The obligation to investigate entails the condition that these investigations should be effective. This means that they should lead to the establishment of the fate or whereabouts of the missing person. A refutation of the allegations in general terms is not sufficient. The HRC has also repeatedly mentioned the duty to prosecute ("bring to justice") those who are responsible for the disappearance, which can be seen as part of the appropriate remedy of the victims. It is not clear whether this latter obligation on the part of the State is to be interpreted as inherent to the violation(s) caused by the disappearance, or as an obligation invoking State responsibility under general international law. The State's obligation to investigate and to provide remedies exists in any disappearance case, if linked to one or more of the material articles of the ICCPR, which occurs after the entry into force of the ICCPR and its Optional Protocol for the State in question.

Under the American Convention the State has a legal duty to take reasonable steps to prevent human right violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose appropriate punishment and to ensure the victim adequate compensation. As indicated above, an act that constitutes a human rights violation carried out by a private person can establish international responsibility of the State when it does not respond as required. The Court has indicated that the existence of a particular violation does not, in itself, prove the failure to take preventive measures, nor is the duty to investigate breached merely because the investigation does not produce a satisfactory result. What is decisive for establishing State's responsibility is whether a violation has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking reasonable measures to prevent it or to punish those responsible. The responsibility of the State continues until the fate or whereabouts of the victim has been established, his remains located and turned over to the family, the perpetrators have been identified and prosecuted, and reparations have been made to the family. In case the perpetrators can not be legally punished, the State remains obligated to use the means at its disposal to inform the relatives of the fate or whereabouts of the victim and, if the victim has been killed, the location of the remains.

Obligations of a State under the U.N. Declaration on the Protection of All Persons from Enforced Person are in the same line as under the ICCPR and the American Convention.



The State has a legal duty to take effective measures to prevent acts of enforced disappearance. A complaint of disappearance must be investigated fully and effectively by the competent authority and the findings must be made available to the persons who have an interest. The obligation to investigate continues for as long as the fate or whereabouts of the victim remains. However, the State's responsibility does not end at the moment the fate or whereabouts of the victim has been established. The State is also charged with the obligation to try the perpetrators and to provide adequate compensation to the victim.

The Draft International Convention for the Protection of All Persons from Forced Disappearance and the Special Rapporteur on Torture impose the same obligations on States as under the U.N. Declaration, whereas the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions indicates that States are under the obligation to take measures to prevent and terminate acts of enforced disappearances as well as under the obligation to thoroughly investigate alleged cases of enforced disappearances.

In sum, a disappearance under the ICCPR, the American Convention, the Declaration on the Protection of All Persons from Enforced Disappearance, the Draft International Convention for the Protection of All Persons from Forced Disappearance leads to more obligations than the European Convention seems to charge a State with. The Special Rapporteur on Torture is of the same opinion. The obligation to investigate continues until the fate or whereabouts of the victim has been established, furthermore the State is under the continuing obligation to punish the perpetrators and to provide adequate compensation to the victim. These obligations are ongoing and continue to give rise to State responsibility until the State has fulfilled the duties that result from it and should be considered to constitute continuing violations until that same day.

As a result of the foregoing conclusion that a disappearance constitutes a continuing violation, *ratione temporis* limitations do not apply when the violation has not ended, i.e. the fate of the victim has not been clarified and the State failed to comply with its obligations under international law in case of disappearances. When the continuing situation has ended before the complaint was brought before the Court, the time limit has started to run from the date of ending. Furthermore, when a complaint relates to a violation that occurred prior to the date of Russia's ratification of the European Convention on Human Rights or its recognition of the right of individual petition being May 1998, the Court has jurisdiction when the situation is



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continuing at the crucial date even if the situation started before the date of ratification or recognition.