ESSAY

Enforced Disappearances: Applicable to Political Organizations?

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The definition of enforced disappearances in the Rome Statute for the International Criminal Court (ICC) includes "political organizations" as sub-state entities under Article 7 (Crimes Against Humanity). Other authoritative documents, such as the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), contain a conflicting definition of enforced disappearances, excluding political organizations that act without state authorization, support, or acquiescence. A lack of clarity remains for future cases at domestic trials, international human rights courts and international criminal tribunals, as to whether political organizations should be included or excluded from the definition of enforced disappearances.

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I. INTRODUCTION

Finding common ground in addressing political organizations in international criminal law has become more important in recent decades. The Rome Statute of the International Criminal Court (ICC), on the one hand, defines enforced disappearances to include disappearances supported not just by states, but also political organizations. Other authoritative documents, such as the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), contain conflicting definitions of enforced disappearances, which exclude political organizations acting without state authorization, support or acquiescence. As such, the crime at the ICC may be considered a "crystallization of a nascent rule", in the words of renowned international jurist Antonio Cassese.[1] With scarce material in customary international law on the definition of enforced disappearances, it remains unclear whether domestic courts, international human rights courts, and international criminal tribunals will find that political organizations, such as paramilitary and guerrilla groups among others, can commit enforced disappearances.

This essay inquires how political organizations and enforced disappearances relate to each other, and the international legal framework that applies to the crime of enforced disappearances. First, I consider the definition of "political organizations" and identify two separate approaches to defining political organizations: (1) "the political goals approach" and (2) "the protected interests' approach." For both approaches, I study practice at the ICC to identify which approach the ICC has taken. Second, I discuss the definitional discrepancy between the ICPPED and the Rome Statute concerning enforced disappearances. Finally, I suggest that the draft Convention on Crimes Against Humanity could resolve the conflicting definitions of enforced disappearances as a crime against humanity. The conflicting definitions of enforced disappearances need harmonization to ensure consistency and foreseeability of the law.

II. THE CONTROVERSY IN DEFINING "POLITICAL ORGANIZATIONS" AT THE INTERNATIONAL CRIMINAL COURT

When reading the Rome Statute and the Element of Crimes, it is not clear what constitutes a "political organization." To clarify the terms of the argument, this section focuses on the definition of political organizations in the Rome Statute and the ICC's Elements of Crimes. Do such organizations include, for example, terrorist groups? Further, are religious groups included

1. ANTONIO CASSESE, CASSESE'S INTERNATIONAL CRIMINAL LAW 98 (Oxford Univ. Press 3d. ed. 2013).

in the category of political groups, or are these considered as separate organizations?

A. *The Political Goals Approach*

There are two distinctive approaches to defining political organizations under the Rome Statute: the "political goals" approach and the "protected interest" approach. Under the "political goals" approach, an organization need only have a "political goal" in mind to be a political organization. This subjective approach only considers the political ambitions of an organization without considering whether an enforced disappearance it commits is directed towards the organization's political goal.[2] This idea is wholly based on the dictionary definition of political organizations as an organized group of people with "a particular purpose relating to the government of public affairs."[3] The goal or purpose is deemed the necessary element for an entity to qualify as a political organization.

A possible advantage of the political goals approach is that, in contrast to an approach that considers religious, ethnic, and racial groups, it includes groups that pose a bigger threat to the state itself. Namely, the objectives of an organization with "political goals" is more likely to directly conflict with the objectives of a state. By assuming the power of the state, there is arguably more risk that the political organization will escape prosecution. The organization may find support for its actions from sections of the state's population, which hinder the state's ability to hold the organization accountable for enforced disappearances. Thus, organizations with political goals may escape prosecution and have impunity for their actions in domestic courts. Because the ICC is a complementary court, the scope of the political goals approach would defeat the impunity of any group with political goals that commits enforced disappearances.

Nevertheless, what is "political" is fluid and differs between nations.[4] Many groups could be included if the only condition is that the organization should have any objective "relating to the government of public affairs" as defined in the Oxford Dictionary. One could also question the actual process behind identifying the objectives of an organization. For example, a group that may be defined a terrorist organization in one country could be considered as a political group in another, such as Hezbollah, the ELN, to

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2. *See* PHILIPPE CURRAT, LES CRIMES CONTRE L'HUMANITE DANS LE STATUT DE LA COUR PENALE INTERNATIONALE 512 (Schulthess 2006).

3. Combined definition of "Political" and "Organization," Oxford Dictionary as mentioned in *Irena Giorgou, State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute*, 11 J. OF INT'L CRIM. JUST. 1001, 1020 (2013).

4. CARSTEN STAHN, A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 67 (Cambridge University Press 2018).

just name a few.[5] Thus, by taking a political goals approach, problems arise as to what constitutes a "political" goal.

Scholars have sought to narrow the definition of "political organization" by devising a "battle against the state" test, where political organizations would only be groups with a willingness to "battle against the government in power."[6] Namely, other groups with the state support, consent, or acquiescence would automatically fall under the auspices of the State and be prosecuted in that way.

There are several issues with this approach. First, the objective of a group is not always clear, which makes it difficult to assess whether there is a political goal in the first place. It may be very difficult to identify an intention to battle the state. Furthermore, organizations can have mixed objectives—for example, a mixture of economic and political purposes.[7] When objectives are mixed, it may be difficult to identify whether the group's objective is truly political. For example, groups that aim for economic power could use their political influence as a means to achieve economic goals.

One example of such a political group, with mixed goals, could be the Mafia.[8] Even though the Mafia nowadays has economic and political objectives, it emerged from peasants and local political parties that sought political subversion against the existing national political order and defended, for example, the weakest in Sicilian society during the fascist repression in the 1920's.[9] However, the "entrepreneurial Mafia" nowadays demonstrates a mixture of economic ambitions (the accumulation of wealth) through the use of political power. This example demonstrates how taking the political goals approach can be complex, as the nature of objectives can change over time, making it difficult to distinguish political objectives from other types of objectives.

Similar to the mixture of political and economic ambitions, an organization defined as a religious group with religious ambitions in one state might be defined as a group that entertains "political affairs" in another. For example, the Lord Resistance Army (LRA), a religious organization with the objective to "rule [the country] according to the Ten Commandments" of the bible.[10] For these groups, it is unclear as to whether

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5. *See* CHRISTINE BYRON, WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 238 (Machester University Press 2010).

6. Currat, *supra* note 2, at 512.

7. MARÍA FERNANDA PÉREZ SOLLA, ENFORCED DISAPPEARANCES IN INTERNATIONAL HUMAN RIGHTS 18 (McFarland 2006).

8. YANN JUROVICS, 'COMPETENCE, RECEVABILITE ET DROIT APPLICABLE', STATUT DE ROME DE LA COUR PÉNALE INTERNATIONALE. COMMENTAIRE ARTICLE PAR ARTICLE 452 (Pedone 2012).

9. SALVATORE LUPO, HISTORY OF THE MAFIA 4, 12 (Columbia University Press 2009).

10. *Q&A On Joseph Kony and the Lord's Resistance Army*, HUMAN RIGHTS WATCH (Mar. 21, 2012), https://www.hrw.org/news/2012/03/21/qa-joseph-kony-and-lords-resistance-army; Knut Holter,

a political objective, next to other objectives, would be sufficient to qualify as a political organization under the Rome Statute when taking the political goals approach.

An additional weakness of this approach, which is perhaps the most concerning for an institution reliant on state support, is that several states reject such a wide interpretation of "political organizations." This became apparent during the travaux préparatoires of the Rome Statute. Syria, Libya, and Iraq argued that the broad interpretation for political organizations threatens the empowerment of sub-national entities within international law.[11] Specifically Syria worries that the provision might be used in reference to liberation movements against the state.[12] States might worry for the rights and legitimization that sub-national entities might gain on the international scene that currently, only states have.[13]

In short, the weakness of this approach, is that it is too subjective with which to work. First, the definition of "political" differs between nations. Second, organizations can have a mixture of political and non-political means and ends, making it difficult to distinguish political organizations. Further, the approach lacks support from several states.

B. The Protected Interest Approach

The second approach used to define political organizations under the Rome Statute is the "protected interest" approach. The protected interest approach narrows the definition of political organizations to quasi-state organizations with a state-like authority. The approach engenders entities that "replace a state in at least some of its functions" and are not "any kind of organizations with political purpose or ambition,"[14] making it more restrictive than the political goals approach.

The last sentence of Article 7(2)(i) of the Rome Statute provides the basis for this approach. It discusses how the perpetrator of a crime must have the purpose of removing a person "from the protection of the law".[15]

Thou Shalt Not Smoke: Content and Context in the Lord's Resistance Army's Concept of the Ten Commandments, 75 HTS THEOLOGICAL STUD. 1, 1 (2019).

11. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, ¶ 22-23, 85-86, 127-29, U.N. Doc. A/Conf.183/C.1/SR.3 (Nov. 20, 1998).

12. *Id.*

13. Pietro Sferrazza Taibi*, La Definición de La Desaparición Forzada En El Derecho Internacional* 25 IUS ET PRAXIS 131, 162 (2019).

14. LISA OTT, ENFORCED DISAPPEARANCE IN INTERNATIONAL LAW 25 (Intersentia Cambridge-Antwerp-Portland 2011).

15. *Id.*; *see also* INT'L CRIM. COURT, Elements of Crimes Article 7(2)(I) ("The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time").

The removal from the protection of the law derives from the idea that a disappeared person loses access to the administration of justice. [16]

The only political organizations included with this requirement are state-like entities, or at least organizations that have taken over the duty to provide access to the administration of justice from the state.[17] Some argue that "political organizations" are akin to state-replacing organizations, highlighting a certain point of conflict concerning the access to power that political organizations should have.[18] As a logical consequence of this removal from "protection of the law", an enforced disappearance under the Rome Statute means that the political organization must either deny access to its own judicial system or be capable of alienating an individual from the government's control and ensuring that the state cannot mobilize its resources to regain the person and its access to legal recourses of the state.[19]. In both cases, the political organization must be state-like, whether that be through the taking over judicial functions of the state or having territorial control that would belong to the state.

An argument can be made that the protected interests approach better aligns with the objectives of the ICC. As stated in the preamble of the Rome Statute, the aim of the institution is to fight impunity for perpetrators of horrendous crimes.[20] Following that objective, enforced disappearances by non-state-like political organizations do not *automatically* lead to impunity as normally the state would investigate the crimes committed as kidnapping or/and abduction.[21] Thus, perpetrators of such crimes would not automatically enjoy impunity. To focus on the protected interest, therefore, is to only include very powerful state-like/state-replacing political organizations where the state is incapable of holding accountable the criminals responsible for enforced disappearances.[22] This only includes those entities that automatically receive impunity as the entity battles and takes over functions of the state. This also includes political organizations that receive powers normally only given to the state and its agents, as they also receive impunity by becoming more state-like/state-replacing. Thus, one argument in favor of the protected interests' approach is that a focus on the protected interest of the protection of the law in article 7(2)(i) leads

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16. KAI AMBOS ET. AL, "DESAPARICIÓN FORZADA DE PERSONAS" ANÁLISIS COMPARADO E INTERNACIONAL. BOGOTÁ, COLOMBIA: NOMOS IMPRESORES 246 (2009); CHRISTOPH GRAMMER, DER TATBESTAND DES VERSCHWINDENLASSENS EINER PERSON: TRANSPOSITION EINER VÖLKERRECHTLICHEN FIGUR INS STRAFRECHT 101-102 (DUNCKER & HUMBLOT 2005).

17. In the words of Grammer: "welche den Staat verdrängt und originär staatliche Funktionen übernommen haben", Grammer, *supra* note 16, at 184.

18. *See e.g.,* Giorgou, *supra* note 3, at 1020.

19. Ambos et al., *supra* note 16, at 247.

20. Rome Statute of the International Criminal Court pmbl., *opened for signature* July 17, 1998, 2187 U.N.T.S. 90.

21. Giorgou, *supra* note 3, at 1013.

22. *See* Giorgou, *supra* note 3, at 1013.

to the benefit of adhering to an overall objective of the ICC, which is fighting impunity.

The weakness of this approach, however, is that a "removal from the protection of the law" might inappropriately capture kidnapping or abduction by minor non-state-like entities. If persons are forcefully detained and cannot be found by the state authorities, it is unclear whether the detaining organization is a "political organization", meaning that it can be prosecuted for the crimes against humanity of enforced disappearances. Ambos argues that such a deprivation of liberty can only occur if a person is kidnapped from the territorial area of the state and that the state cannot mobilize its resources to end the disappearance.[23] However, consider the hypothetical scenario of a person abducting people and locking them up in the cellar. There is a removal from the protection of the law, as the person is untraceable. This does not, however, say anything about whether a political organization is state-like, and whether the chapeau is met for a political organization committing the crime against humanity of enforced disappearances. Arguably, the state's effort to mobilize its recourses, even if the person is not found, leads to an effort to hold accountable those responsible for the crime, and the state-like nature of the organization is the only hindrance that can create impunity.

As such, the protected interests approach takes a more textual reading of the Rome Statute and the explanatory elements of crimes. The removal from the protection of the law inevitably means that only state-like or state-replacing political organizations can be included in the crime of enforced disappearances as they are the ones that normally can provide for access to justice or force a person to be removed from the protection of the law.

III. APPLYING THE POLITICAL GOALS AND PROTECTED INTERESTS APPROACH: THE 2017 BURUNDI DECISION

The 2017 authorization of an investigation for the Burundi situation refers to the Imbonerakure as an organization allegedly responsible for committing the crime of enforced disappearances in cooperation with the state.[24] The Imbonerakure serves as the youth wing of the Burundi ruling party (CNDD-FDD) and is by some considered by some to be a terrorist group.[25] With the 2017 Burundi decision, the ICC preliminarily indicated that political state-supported organizations (which grant them state like

23. Ambos et al., *supra* note 16, at 247.

24. Situation in the Republic of Burundi, Case No. ICC-01/17-X-9-US-Exp, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi, ¶ 129 (Nov. 9, 2017).

25. The Imbonerakure, TERRORISM RESEARCH & ANALYSIS CONSORTIUM (2010), https://www.trackingterrorism.org/group/imbonerakure.

powers) such as the Imbonerakure are included in the term "political organization" under enforced disappearance as a crime against humanity. There is, however, no clear documentation that the court would necessarily exclude non-state-like or non-government affiliated political organizations, especially if these receive impunity by state negligence to prosecute.

In the authorization of an investigation into Burundi in 2017, the ICC judges mention that state agents inter alia include "the police, the intelligence service and the army" and that, on the other hand, political organizations in this case includes "groups that are implementing state policies" such as the Imbonerakure.[26] The judges take the protected interests approach, holding that the Imbonerakure implemented the state's policies, and therefore received impunity because it received delegated state powers.[27] The judges specifically expand on the fact that both the Imbonerakure and state security forces were not genuinely prosecuted and that they were shielded "from criminal responsibility", the ICC made the decision to move forward with the investigation.[28] As such, it is the state-likeness and the protected interests that in this case determined what constitutes a political organization. An explanation of why the court chose the protected interests approach is that the crimes committed by the state (and state affiliated or state-like political organizations) would inevitably never be punished if left to the national prosecutorial authorities.

Thus, the political organization was too powerful and received state support (which effectively gave it powers normally only granted to the state and its agents) to such an extent that impunity exists for the perpetrators. If a political organization has no effective territorial control and is state-like or if it does not receive state support, the first assumption should be that domestic prosecutions are available for accountability of perpetrators of the crime of enforced disappearances, be it as enforced disappearances or kidnapping/abduction. The decision reflects the protected interest's approach that was taken in the light of impunity for the Imbonerakure in Burundi. There is currently no precedent showing, however, that the court would necessarily exclude non-state-like and/or non-government affiliated political organizations acting on their own, especially if these receive impunity by state negligence or incapability to prosecute.

26. Situation in the Republic of Burundi, Case No. ICC-01/17-X-9-US-Exp, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi," ¶ 119 (Nov. 9, 2017).

27. *Id.* at ¶ 119. On the Imbonerakure implementing state policies and Burundi Decision. *Id.* at ¶ 150. Concerning the shielding from criminal responsibility and the impunity followed by the delegated state powers.

28. *Id.* at ¶ 150.

IV. THE RISK OF CONFLICTING UNDERSTANDINGS OF ENFORCED DISAPPEARANCES

In contrast to the Rome Statute, the ICPPED excludes political organizations from the definition of enforced disappearances when they act without state authorization, support, or acquiescence.[29] This can be seen as taking the protected interests approach. However, excluding the option of prosecuting non-state-affiliated political organizations that battle the state and remove persons from the protection of the law.

Because the ICC prosecutes on the basis of the Rome Statute and the Element of Crimes, the difference in how the Rome Statute and the ICPPED treat political organizations is irrelevant for the ICC itself. However, with both documents obliging or encouraging state parties to criminalize enforced disappearances in their domestic criminal codes, a dilemma arises for national courts, international human rights courts and international criminal tribunals.

A. *The potential application of the nullum crimen sine lege principle in the absence of clear international law*

The conflict between these two documents creates problems for domestic trials, international criminal tribunals, and international human rights courts when they interpret the customary international law for enforced disappearances. As discussed in the next section, customary international law for enforced disappearances is currently unclear and even contradictory at times. In the words of Van der Wilt: such unclear international law "impedes the accused to predict whether his activities fit the standards or not" and determines whether such acts can be deemed illegal and not violate the nullum crimen sine lege (NCSL) principle.[30] The NCSL principle requires foreseeability of the law and accessibility to the penal norms.[31] According to both the European Court of Human Rights (ECHR) and the ICTY, laws must be foreseeable and accessible.[32]

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29. G.A. Res. 61/177, International Convention for the Protection of All Persons from Enforced Disappearance, art. 2 (Dec. 20, 2006), https://www.ohchr.org/en/hrbodies/ced/pages/conventionced.aspx; *Report of the International Law Commission*, U.N. GOAR, 67th Sess., A/70/10, 72 (Aug. 14, 2015).

30. Harmen Van der Wilt, *Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test*, 84 NORDIC J. OF INT'L L. 515, 527 (2015).

31. *See* THOMAS RAUTER, "NULLUM CRIMEN SINE LEGE," JUDICIAL PRACTICE, CUSTOMARY INTERNATIONAL CRIMINAL LAW AND NULLUM CRIMEN SINE LEGE 20 (Springer 2017).

32. Sunday Times v. United Kingdom, No. 6538/74, ¶ 49 (Apr. 26, 1979); Kononov v Latvia, No. 36376/04, ¶ 114 (May 17, 2010); Prosecutor v. Vasiljevic, No. IT-98-32-T, Judgment, ¶ 201 (Nov. 2002). Note that both the accessibility and foreseeability requirements are not referring to the perpetrators state of mind, but rather to the existence of the offence during the time that it was committed and the view that a perpetrator should have known about the illegality of the crime rather

Regarding the foreseeability of the law against enforced disappearance, one could argue that the Rome Statute does not violate the NCSL principle, as the prohibited behavior is in fact foreseeable for possible perpetrators. This argument relies on the idea that an act can be morally wrong, even if the act is not legally wrong per se.[33] The ECHR has, in two recent judgments, taken a very wide approach where the mere "risk of being prosecuted" would suffice for fulfilling the foreseeability requirement under NCSL (emphasis added).[34] When taking this approach, one could argue that the underlying acts, such as kidnapping and abduction, were already prohibited. Thus, a perpetrator cannot argue that he or she did not know that the act was morally wrong or not subject to prosecution.[35] Such moral blameworthiness, in addition to the approach developed by the ECHR with a "risk" of prosecution, would fulfill the foreseeability requirement despite the lack of clarity present in customary international law and conflicting provisions in domestic law.

However, both the moral blameworthiness and the "risk of prosecution" arguments have been heavily criticized. Some have argued that this wide interpretation could lead to judicial activism, where moral taste determines what is and what is not included in customary international law.[36] Furthermore, both the ICTY and ECCC rejected the "moral blameworthiness" argument.[37]

One could argue that the Rome Statute is incorporated into the ICC member states' domestic criminal codes, either because these states treat international law as self-executing or because they have adopted parallel legislation implementing the Rome Statute. If so, the illegal conduct as defined in the Rome Statute is at least accessible to possible perpetrators. Such awareness of the domestic codification of crimes was previously mentioned during the US Military Tribunal, where a perpetrator should have foreseen the punishment, as the crime was a punishable act under the domestic law of the perpetrators nationality.[38] Still, in the case of enforced disappearances, the issue is not a problem of accessibility, but rather conflicting definitions across documents that are accessible to perpetrators.

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than whether a perpetrator did know about the crime itself. See K. Ambos, Treatise on International Criminal Law, Volume I (Foundations and General Part) (Oxford University Press, Oxford, 2013), 91.

33. Rauter, *supra* note 31, at 28.

34. Kononov v Latvia, ¶ 238. & Ould Dah v France, App No. 13113/03 (Mar. 17, 2009), ¶ 19.

35. Shane Darcy, T*he Principle of Legality at the Crossroads of Human Rights and International Criminal Law*, in ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS 215 (Oxford University Press 2018).

36. Rauter, *supra* note 31, at 72.

37. *See* Prosecutor v. Kaing alias Duch, No. 001/18-07- 2007/ECCC/TC, Judgment (Jul. 26, 2010) ¶ 32. cited from Prosecutor v. Milutinović et al., No. IT-99-37-AR72, Decision on Dragoljub Ojdanić''s Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶ 42 (21 May 2003).

38. *The Justice Case, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Volume III,* 977.

Perhaps foreseeability could be created through settled case law, which can be used as an indication of customary international law.[39] A lack of clarity in jurisprudence and law, on the other hand, would likely give the accused the benefit of the doubt.[40]

The Durić and Tija Hero cases at the UN Human Rights Committee (HRC), which concerned political-paramilitary groups in Bosnia and Herzegovina, form settled case law that ground foreseeability.[41] In the Durić v. Bosnia, the difference between the ICPPED and the Rome Statute was noted, where the HRC included enforced disappearances by "forces independent of, or hostile to a State party, in addition to disappearances attributable to a State party".[42] A similar approach was taken in the case of Tija Hero.[43] Footnotes in both cases explain how an approach where disappearances attributable to a state party committed by groups that act with the authorization, support, or acquiescence of the state (Rome Statute and ICPPED definition) can be taken, in addition to the "forces … hostile to a State party (solely defined as such in the Rome statute definition). Even though the ICPPED does have Article 3 describing the obligation of states to investigate enforced disappearances by persons acting "without the authorization, support or acquiescence of the State", this is not included in the definition of the crime of enforced disappearance in Article 2 of the ICPPED. Thus, the settled case law at the HRC shows an approach where a wider definition of enforced disappearances is taken, as stipulated in the Rome Statute, which includes political organizations independent or hostile to a state party.

The HRC that both examined the Rome Statute and the ICPPED favors the Rome Statute definition and recognizes the overlap between the two documents. As such, there is no conflicting jurisprudence, thus, helping establishment of a non-violation of the NCSL principle as the crime was foreseeable. Of course, a conflicting judgment or a domestic/international court that takes a different approach would undermine this constant interpretation. However, a different approach has not occurred at present.

Alternatively, the ICPPED could be interpreted to addresses only the obligations of states and not individual perpetrators. The NCSL principle is based on individual criminal responsibility and is inapplicable to state

39. *See* Kokkinakis v Greece App No. 14307/88, ¶ 40 (May 25, 1993).

40. Rauter, *supra* note 31, at 80.

41. *See* Nevzeta Durić and Nedzad Durić v. Bosnia and Herzegovina, Communication No. 1956/2010, Special Rapporteur's Rule 97 Decision (Oct. 15, 2014); Tija Hero et al. v. Bosnia and Herzegovina, Communication No. 1966/2010, Special Rapporteur's Rule 97 Decision (Nov. 27, 2014).

42. Nevzeta Durić and Nedzad Durić v. Bosnia and Herzegovina, Communication No. 1956/2010, Special Rapporteur's Rule 97 Decision, ¶ 9.3 (Oct. 15, 2014).

43. *See* Tija Hero et al. v. Bosnia and Herzegovina, Communication No. 1966/2010, Special Rapporteur's Rule 97 Decision ¶ 9.3, (Nov. 27, 2014).

responsibilities.[44] Thus, the primary addressee in the ICPPED is states rather than individuals. This difference in terms of addressing individual responsibility versus state obligations is another argument in favor of the foreseeability of prosecution of individual perpetrators in accordance with the definition contained in the Rome Statute.

B. Preexisting customary international law does not resolve the conflict

Early definitions of enforced disappearances emerged from the International Military Tribunal (IMT) trials, where the forced removal of Jews during the Second World War was merely defined as a crime of "murders and ill treatment".[45] At the time, this was categorized under war crimes instead of crimes against humanity, where the ill-treatment was codified in Article 46 of the 1907 Hague Regulations, which provides for family honor and rights.[46] There was no law yet to define the crimes that the Nazis committed and so refuge was sought under this article to hold accountable those responsible for the enforced disappearance of Jews during the Second World War. No clear definition of enforced disappearances was found at that time.

The U.S. Military Tribunal for Nuremberg (NMT) was the first tribunal to argue that the forced removal of Jews during the Second World War constituted crimes against humanity or in their words, the "laws of humanity".[47]

After a dearth of discussion regarding the crime of enforced disappearances as a crime against humanity, the International Criminal Tribunal for the Former Yugoslavia (ICTY) included the crime in its jurisprudence. Without defining enforced disappearances explicitly, the crime was implied by dicta in the Kvocka and Kupreskić cases, where the crime was defined as an "other inhumane act" under crimes against humanity.[48] Until the 1990's, human rights law did not define enforced disappearance as a separate crime, but rather described the crime as a violation of the rights to life and right to personal liberty/liberty and security. The non-binding Declaration on the Protection of All Persons from Enforced Disappearance in 1992 and the regional legally binding Inter-American Convention on Forced Disappearance of Persons (IACFDP)

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44. Rauter, *supra* note 31, at 71.

45. *Nuremberg Trial Proceedings Vol. 1, Indictment: Count Three – War Crimes*, THE AVALON PROJECT https://avalon.law.yale.edu/imt/count3.asp.

46. Hague Convention art. 6.

47. THE JUSTICE CASE, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, VOL. III, 1076.

48. The "other inhumane acts" are outlined in article 5 (i) of the ICTY statute and article 3 (i) of the ICTR. Prosecutor v. Kupreskić, No. IT-95-16-A, Judgment, ¶ 566 (Jan. 14, 2000); Prosecutor v. Kvocka, No. 1-98-30/1-T, Judgment, ¶ 208 (Nov. 2, 2001).

from 1994 were the first to define "enforced disappearance" as an independent crime under international law.

Only during the turn of the millennium were enforced disappearances and its criminal elements defined in legally binding documents such as the 2002 Rome Statute and the ICPPED in 2010. Both these documents, however, have a different approach towards political organizations as entities capable of committing the crime of enforced disappearances. There is no clear answer as to which document better reflects customary international law. Perhaps the Rome Statute is better recognized by states, as more nations have ratified the document (122 as of 2019).[49] The ICPPED received 60 ratifications as of 2019.[50]

C. *Can the Crimes Against Humanity Convention resolve the conflicting definitions of enforced disappearances?*

Perhaps the Crimes Against Humanity Convention, currently in the drafting phase, could cut the Gordian knot on the inclusion or exclusion of political organizations in the actus reus of enforced disappearances, including its definition as a crime against humanity. Such progress could, if ratified by many states, create a stronger basis for customary international law on enforced disappearance and for that reason, make the elements of the crime clearer and more foreseeable.

As it currently stands, the draft convention favors the Rome Statute's articulation of enforced disappearance over the ICPPED's and includes political organizations, with or without state authorization, support, or acquiescence, within the scope of the crime.[51] However, noting the difference in the inclusion of political organizations, the International Law Commission decided to allow for international and national laws to include a "broader" definition of enforced disappearances under Article 3(4), hinting at the definitions of enforced disappearance as they stand in the IACFPD and the ICPPED.[52] The broader definition refers to one that is less restrictive, such those under the ICPPED or the IACFDP , as they do not include high intent requirements and the "prolonged period of time" requirement.[53]

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49. The State Parties to the Rome Statute, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

50. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, art. 2, U.N. Doc. A/RES/61/177 (Dec. 20, 2006), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en.

51. *Report of the International Law Commission*, U.N. GOAR, 67th Sess., A/70/10, 72 (Aug. 14, 2015).

52. *Id.*

53. *Id.*

Paradoxically, the political organizations aspect, in reality, makes the definition of the crime more restrictive in the ICPPED and the IACFPD than in the Rome Statute. As such, the provision in the draft convention makes it unclear whether a "broader" definition from the Rome Statute, which includes political organizations, is to be taken or if a "broader" definition from the ICPPED and the IACFDP, which removes the prolonged period of time requirement can be adopted in national criminal codes. This also would count for statutes of future human rights courts and international criminal tribunals. As mentioned, the problem of the inclusion of this paragraph is that the difference in definition makes the Rome Statute, on certain aspects such as the inclusion of political organizations generally, contain a broader definition of enforced disappearances, whereas the prolonged period of time requirement makes the ICPPED and IACFDP less restrictive.

V. CONCLUSION

The current applicability of enforced disappearance to political organizations remains unclear. Two distinct approaches to political organizations—the political goals and protected interest approaches—have been taken internationally in the Rome Statute and in the ICPPED, resulting in a disconnect in customary international law regarding whether non-state political organizations can commit enforced disappearances.

The first approach is the political goals approach. This perspective only considers the political ambitions of an entity. This approach is beneficial when holding accountable a larger subset of the members of political organizations. This addresses the entities that constitute the highest threat to the state itself, thereby addressing the groups most likely to receive impunity in domestic jurisdictions. The weakness identified in this approach is that it is too subjective of an approach to work with. The notion of what is "political" is fluid. The intention of an organization can also be difficult to assess.

The other approach is the protected interests approach. This approach includes state-like or state-supported political organizations. The textual reading of the definition of enforced disappearances under the Rome Statute shows that a "removal from the protection of the law" could normally only happen when members of a political organization are capable of alienating an individual from the government's control and of ensuring that the state cannot mobilize its resources to regain the person and its access to legal resources of the state. Such impunity demands a high level of state support, giving capabilities to members of political organizations that are normally reserved for the state and its agents.

As mentioned, whereas the Rome Statute has only published a decision on authorization of an investigation that includes a state-supported political entity in Burundi, a future decision might include political organizations acting without the authorization, support, or acquiescence of a state but merely of the political organization itself. Whereas this option is available at the ICC, the ICPPED definition excludes political organizations from enforced disappearances when they act without state authorization, support, or acquiescence. As the *Durić v. Bosnia* and *Tija Hero* cases demonstrate, the crime of enforced disappearances has been interpreted to apply to organizations acting without such state involvement in order to cover political-paramilitary groups. This means that a broader definition as defined in the Rome Statute has been adopted in settled case law by the HRC. Further case law could solidify this approach, whereas diverging jurisprudence could undermine the current interpretation.

A broader definition has also been adopted in the draft of the Crimes Against Humanity convention, and it could possibly settle any remaining doubt as to whether political organizations are included in the crime of enforced disappearance or not. However, Draft Paragraph 4 of Article 3 was included in the Draft Convention, allowing for a broader definition of enforced disappearances, since the Rome Statute has the stringent "prolonged period of time" requirement. However, definition-wise, the Rome Statute actually contains a broader definition by including political organizations generally. The precaution, which was meant as a way to resolve the conflicting definitions, hinders the ability to clearly identify enforced disappearance as a crime against humanity.

It is true that the inclusion of political organizations in the crime of enforced disappearances, apart from the state, is a crystallization of a nascent rule. However, it is paramount that this crystallization is in harmony with other international documents defining the crime of enforced disappearances. To ensure accessibility and foreseeability of the law, the conflicting definitions of enforced disappearances must be resolved.