

2009

**The issue as presented to me is “Enforced Disappearance as a Crime Against Humanity (1975): Was Enforced Disappearance a Crime Against Humanity as part of customary international law in 1975?”**

Elisabeth Herron

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## **I. Introduction**

### **A. Issue\***

Enforced Disappearance is a crime manufactured for the express purpose of terrorizing innocent civilians, their families, friends, neighbors, and fellow citizens. Generally, Enforced Disappearance is a clandestine, State-run system, where civilians are taken away by uniformed or plain-clothed “policemen,” held in detention, often tortured, and usually executed. What makes this crime especially heinous is the complete secrecy with which the above acts are conducted.

The family and friends of the abducted individual are as much a victim of Enforced Disappearance as the abducted individual him or herself. They are never told where their relative or friend has been taken, why they have been taken, and usually never know anything about the victim’s subsequent detention, torture, and execution. The State denies any knowledge of the victim’s whereabouts and will not instigate an investigation to discover what has happened to the victim. Along with this painful secrecy is the intimidation factor fostered by the uncertainty of who will be the next to disappear. It is this secrecy and intimidation which make Enforced Disappearance such a powerful tool for a government wishing to control the population and implicates Enforced Disappearance as one of the cruelest forms of state controlled terror.

This paper will discuss the history and legalities of Enforced Disappearance, most importantly for this memorandum, Enforced Disappearance as a Crime Against Humanity under Customary International Law, particularly its status as such before 1975.

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\*The issue as presented to me is “Enforced Disappearance as a Crime Against Humanity (1975): Was Enforced Disappearance a Crime Against Humanity as part of customary international law in 1975?”

## **B. Summary of Conclusions**

First, the concept of Crimes Against Humanity is relatively new to International Law, and was even more so before 1975; therefore, it is a constantly evolving concept and as such has left room to include non-enumerated crimes, such as Enforced Disappearance.

Second, Enforced Disappearance was considered a Crime Against Humanity before 1975 based on decisions by the International Military Tribunal and the Nuremberg Military Tribunal, as well as evidence from custom and practice of the international community.

## **II. Background**

### **A. Crimes Against Humanity<sup>1</sup>**

#### **i. Introduction**

Crimes Against Humanity as a notion, or philosophy, is not a new concept; for centuries, the idea of protecting civilians during war time has been standard procedure practiced by warring nations,<sup>2</sup> and, in fact, Crimes Against Humanity stem directly from the Laws of War.<sup>3</sup>

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<sup>1</sup> See Corey Harkey, *Memorandum for the Office of the Prosecutor Extraordinary Chambers in the Courts of Cambodia, Issue: Crimes Against Humanity as Customary International Law in 1975 and The Evidentiary Threshold for Discriminatory Intent* (2008) (provides an in-depth discussion of Crimes Against Humanity as Customary International Law before 1975) [reproduced in accompanying notebook at Tab 36]; See also Geoffrey M. Dureska, *Memorandum for the Extraordinary Chambers in the Courts of Cambodia, Issue: Were the Offenses Described in Article 5 of the ECCC Statute Part of the Customary International Law in 1975? and What is the Evidentiary Threshold of the Discriminatory Intent for Crimes Against Humanity Described in the Chapeau of Article 5 of the ECCC Statute?* (2008) (an in-depth discussion of Crimes Against Humanity before 1975 as they relate to Article 5 of the ECCC statute) [reproduced in accompanying notebook at Tab 35]; See also Howard J. Taubenfeld, *The International Legal System: The Institutions and the Norms*, 1 Rutgers-Cam L. J. 272 (1969) (background discussion of the international legal system) [reproduced in accompanying notebook at Tab 32].

Originally expressed as an obtuse extension of War Crimes, Crimes Against Humanity was first mentioned in the 1907 Hague Convention Respecting the Laws and Customs of War.<sup>4</sup> Later, Crimes Against Humanity was included in the Charter of the International Military Tribunal,<sup>5</sup> followed by its inclusion by the Allies in Control Council Law No. 10<sup>6</sup> which governed the post-war trials of lesser German War Criminals Before the Nuremberg Military Tribunal. Under Allied Control Council Law No. 10, Crimes Against Humanity was defined as “[a]trocities and offenses, including, but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian

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<sup>2</sup> See generally M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW, (Martinus Nijhoff Publishers 1992) [portions reproduced in accompanying notebook at Tab 3]. Also see STEVEN R. RATNER AND JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, 46 (Oxford University Press 2001) (“Since the earliest days of international law, scholars and statesmen have referred to fundamental notions of humanity as governing the conduct of states. States used these concepts in justifying instances of intervention to assist minorities persecuted by their own government in the age before the UN Charter. They also became linked with a state’s conduct of war, eventually through incorporation in the first significant modern treaties on *jus in bello*, the Hague Conventions on the Laws and Customs of War.”) [reproduced in accompanying notebook at Tab 5].

<sup>3</sup> BASSIOUNI *supra* note 2, at 176-191 (discussing the connection between War Crimes and Crimes Against Humanity) [reproduced in accompanying notebook at Tab 3].

<sup>4</sup> Hague Convention Respecting the Laws and Customs of War (1907), Preamble, [reproduced in accompanying notebook at Tab 54].

<sup>5</sup> Charter of the International Military Tribunal, Article 6(c) (“Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law where perpetrated”) [reproduced in accompanying notebook at Tab 37].

<sup>6</sup> Control Council Law No. 10, Article II(1)(c) [reproduced in accompanying notebook at Tab 38].

population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.”<sup>7</sup>

The prohibition of Crimes Against Humanity is part of general Customary International Law and, therefore is binding on all states, regardless of whether or not the state feels duty bound by the law.<sup>8</sup> Because the prohibition of Crimes Against Humanity is customary there is no one treaty setting forth every crime considered to be a Crime Against Humanity; therefore, it is necessary to look to “prior prosecutions, other state practice, and deliberations of international organizations”<sup>9</sup> to determine what is considered a Crime Against Humanity under Customary International Law.

**ii. Crimes Against Humanity was Originally Subsumed in War Crimes before Attaining Independent Status.**

War is an act of the human race intended to destroy and conquer. Yet as far back as ancient Greek society there are writings indicating that early societies acknowledged certain rules of warfare.<sup>10</sup> Included in these writings is evidence “of the humanization and regulation of armed conflicts that clearly reveals that various civilizations, dating back several thousand years, have either specifically prohibited or . . . condemned unnecessary use of force and violence

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<sup>7</sup> Control Council Law No. 10, *supra* note 6 (The Allies expanded the enumerated Crimes Against Humanity in Control Council Law No. 10 by adding rape, which had not been included previously in the enumerated Crimes Against Humanity in the Charter of the International Military Tribunal.) [reproduced in accompanying notebook at Tab 38].

<sup>8</sup> M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 *Transnat'l L. & Contemp. Probs.* 199, 216-217 (1998) [reproduced in accompanying notebook at Tab 20].

<sup>9</sup> RATNER AND ABRAMS, *supra* note 2, at 49 [reproduced in accompanying notebook at Tab 5].

<sup>10</sup> BASSIOUNI, *supra* note 2, at 153-159 [reproduced in accompanying notebook at Tab 3].

against civilians.”<sup>11</sup> This humanitarian effort was continued after the signing of the Treaty of Westphalia in 1648, signifying Europe’s commitment to reining in the occurrence of war, “in order to minimize [war’s] harmful human consequence.”<sup>12</sup>

In 1899 the first Hague Convention on the Laws and Customs of War<sup>13</sup> was signed in the Hague, Netherlands, followed by the Fourth Hague Convention in 1907,<sup>14</sup> both of which contained “[t]he seeds of” prohibition of Crimes Against Humanity.<sup>15</sup> Both Conventions applied to War Crimes explicitly, and broadly allowed for the protection of civilians during war time based on the customs of war and international law.<sup>16</sup> The Preamble of the 1899 Convention states that the treaty is, “[a]nimated by the desire to serve, even in this extreme hypothesis, the interest of humanity and the ever increasing requirements of civilization.”<sup>17</sup> Similar language is found in the Preamble of the 1907 Hague Convention.<sup>18</sup>

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<sup>11</sup> *Id.* at 153.

<sup>12</sup> *Id.* at 159.

<sup>13</sup> Hague Convention respecting the Laws and Customs of War on Land (1899) [reproduced in accompanying notebook at Tab 53].

<sup>14</sup> Hague Convention (1907), *supra* note 4 [reproduced in accompanying notebook at Tab 54].

<sup>15</sup> BASSIOUNI, *supra* note 2, at 165 [reproduced in accompanying notebook at Tab 3].

<sup>16</sup> *Id.* at 166.

<sup>17</sup> Hague Convention (1899), *supra* note 13, Preamble [reproduced in the accompanying notebook at Tab 53].

<sup>18</sup> Hague Convention (1907), *supra* note 4, Preamble (“Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization”) [reproduced in accompanying notebook at Tab 54].

**iii. Crimes Against Humanity were First Prosecuted after World War II under the Charter of the International Military Tribunal for Major German War Criminals and Allied Control Council Law No. 10.**

The Charter of the International Military Tribunal for the Trials of Major German War Criminals contains the first explicit mention and definition of the term “Crimes Against Humanity.”<sup>19</sup> “Crimes Against Humanity” as used at the International Military Tribunal and after is different from War Crimes in that it applies to actions taken during peace time and can be applied to actions taken against a State’s own citizens,<sup>20</sup> whereas War Crimes applies only to actions taken during times of war and generally applies to actions against the citizens of another nation.<sup>21</sup> The Allies also included Crimes Against Humanity in Allied Control Council Law No. 10, which governed the trials of lesser German War Criminals following the International Tribunal.<sup>22</sup>

By including Crimes Against Humanity in the Charter for the International Military Tribunal and Control Council Law No. 10, and by prosecuting these crimes at the Tribunals, “the existence of certain fundamental rights superior to the law of the state and protected by international criminal sanction even if violated in pursuance of the law of the State”<sup>23</sup> was affirmed. However, the Allies were very cautious about prosecuting the Axis leaders for crimes which did not violate the Laws of War by being perpetrated against the citizens of another

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<sup>19</sup> BASSIOUNI, *supra* note 2, at 2 [reproduced in accompanying notebook at Tab 3].

<sup>20</sup> *Id.* at 179.

<sup>21</sup> *Id.*

<sup>22</sup> *See* discussion *supra* §II(A)(i).

<sup>23</sup> G.I.A.D. Draper, *Human Rights and the Law of War*, 12 Va. J. Int’l L. 326, 331 (1971-1972) [reproduced in accompanying notebook at Tab 25].

nation, but rather were crimes committed against their own people or before war had broken out.<sup>24</sup> As a result, the International Military Tribunal Charter requires a connection with War Crimes as a necessary component of prosecuting Crimes Against Humanity.<sup>25</sup> However, this requirement was soon discarded as Crimes Against Humanity became further established in International Criminal Law.<sup>26</sup> As Crimes Against Humanity jurisprudence developed and gained legitimacy, as well as independent status in international criminal law, it no longer required a connection to another, already well established, internationally recognized law.

#### **iv. Expanding the Definition of Crimes Against Humanity.**

Article 6(c) of the Charter for the International Military Tribunal lists specific Crimes Against Humanity, but also includes the expansive phrase, “other inhumane acts,”<sup>27</sup> which is likewise included in Article II(1)(c) of Control Council Law No. 10.<sup>28</sup> One of the leading scholars on International Criminal Law, M. Cherif Bassiouni argues that “Article 6(c) is no mere catch-all category for mass victimization, but rather a category of international crimes, distinguishable from other forms of mass victimization by the jurisdictional policy element of a

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<sup>24</sup> RATNER AND ABRAMS, *supra* note 2, at 47 [reproduced in accompanying notebook at Tab 5].

<sup>25</sup> BASSIOUNI, *supra* note 2, at 186 (“Indeed, the Nuremberg Tribunal interpreted “crimes against humanity” as meaning crimes committed in connection with war”) [reproduced in accompanying notebook at Tab 3].

<sup>26</sup> *Id.* at 257-259 (“But since the Charter, and particularly with the Post-Charter Legal Developments, ‘crimes against humanity’ have been established in positive international criminal law, therefore, this connection is no longer necessary”).

<sup>27</sup> Charter for the International Military Tribunal, *supra* note 5 [reproduced in accompanying notebook at Tab 37].

<sup>28</sup> Control Council Law No. 10, *supra* note 6 [reproduced in accompanying notebook at Tab 38].



‘state action or policy.’”<sup>29</sup> “Other inhumane acts,” therefore, was included to provide for those crimes which had not yet been considered by those who wrote the Charter, but which a State perpetrated on a systematic and widespread basis as part of its policy. The phrase “other inhumane acts” is expansive, however, crimes included under this phrase must meet the elements which are required for establishing the enumerated crimes, therefore limiting which crimes can be considered Crimes Against Humanity.

Crimes Against Humanity, therefore, has a “chapeau requirement” which requires the activity to be widespread and systematic. However, this requirement has been broadly interpreted “to qualify a wide variety of acts of violence of different scopes”.<sup>30</sup> For instance, for a territory to be “widespread,” it may be as small as three municipalities,<sup>31</sup> or, if there is an on-going war during which time the Crime Against Humanity is alleged to have been committed, systematic “civilian abuse” is deemed to be “common knowledge” and therefore does not need to be proven.<sup>32</sup>

It is important to realize and acknowledge that definitions of Crimes Against Humanity were developed to cover those atrocities which did not fit into the definition of genocide; “crimes against humanity were originally conceptualized as acts of so odious a nature that their commission was not just an assault on the victims involved, as with war crimes, but an offense

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<sup>29</sup> Bassiouni, *supra* note 8, at 209 [reproduced in accompanying notebook at Tab 20].

<sup>30</sup> Patricia M. Wald, *Genocide and Crimes Against Humanity*, 6:621 Washington University Global Studies Law Review 621, 629 (2007) [reproduced at accompanying Tab 34].

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 630.

against all humanity.”<sup>33</sup> This explains the inclusion of the phrase “other inhumane acts” in the Charters of the many War Crimes Tribunals which occurred at the end of the 20th century and beginning of the 21st century, such as those of the International Criminal Tribunal for the Former Yugoslavia,<sup>34</sup> the International Criminal Tribunal for Rwanda,<sup>35</sup> the Special Court for Sierra Leone,<sup>36</sup> and of course the Extraordinary Chambers in the Courts of Cambodia.<sup>37</sup>

## **B. History of Enforced Disappearance<sup>38</sup>**

### **i. The Nazi Regime was the First to Use Enforced Disappearance to Control, Terrorize, and Intimidate the Populations they Occupied.**

In 1942 Hitler issued an order, dubbed the Nacht und Nebel Erlass, or Night and Fog Decree, which was intended to instill terror and intimidate the populations of the occupied

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<sup>33</sup> *Id.* at 621.

<sup>34</sup> Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 5(i) [reproduced in accompanying notebook at Tab 60].

<sup>35</sup> Statute of the International Criminal Tribunal for Rwanda, Article 3(i) [reproduced in accompanying notebook at Tab 59].

<sup>36</sup> Statute of the Special Court for Sierra Leone, Article 2(i) [reproduced in accompanying notebook at Tab 61].

<sup>37</sup> Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Article 5 [reproduced in accompanying notebook at Tab 58].

<sup>38</sup> See Sévane Garibian, *Glossary Term: Enforced Disappearances of Persons*, ONLINE ENCYCLOPEDIA OF MASS VIOLENCE, (2008) available at <http://www.massviolence.org> (provides a concise history of Enforced Disappearances) [reproduced in accompanying notebook at Tab 48].

territories.<sup>39</sup> The Decree ordered that anyone in occupied territory suspected of acting against the Nazi Regime was to be arrested, held, and tried in secret:

the prisoners are in future to be transported to Germany *secretly*, and further dealings with the offenses will take place here; these measures will have a deterrent effect because (a) the prisoners will vanish without leaving a trace, (b) no information may be given as to their whereabouts or their fate.<sup>40</sup>

The Night and Fog program is the first known instance of state sponsored forced Disappearance.<sup>41</sup> Indeed, in a report submitted to the United Nations Economic and Social Council's Commission on Human Rights, Manfred Nowak claims that Adolf Hitler actually invented Enforced Disappearance.<sup>42</sup> Prisoners taken under the Nacht und Nebel Erlass were held in either prisons or concentration camps, they were never allowed to receive or send

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<sup>39</sup> NAZI CONSPIRACY AND AGGRESSION, Volume VII, Supreme Command of the Armed Forces, Office Foreign Countries (Amt Ausl.) Counter Intell./Dept. Abwher IIINr. 570/1.42(ZR/III C 2) Secret, Re: Prosecution of offenses against the German State or the Occupying Power in the occupied territories, 871-877 [reproduced in accompanying notebook at Tab 39]; *See also*, TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Volume III, *The Justice Case*, "Letter from the SS Economic and Administrative Main Office to Concentration Camp Commanders, 18 August 1942, Transmitting Instructions for Treatment of Night and Fog Prisoners," 786-787 [reproduced in accompanying notebook at Tab 44].

<sup>40</sup> NAZI CONSPIRACY AND AGGRESSION, *supra* note 39, at 872 [reproduced in accompanying notebook at Tab 39].

<sup>41</sup> Kirsten Anderson, *How Effective is the International Convention for the Protection of All Persons From Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?* 7 Melb. J. Int'l L., 246 (2006) [reproduced in accompanying notebook Tab 19].

<sup>42</sup> U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Human Rights, *Civil and Political Rights, Including Questions of: Disappearances and Summary Executions*, U.N.Doc. E/CN.4/2002/71, 7 (8 Jan. 2002) (*prepared by* Mr. Manfred Nowak) [reproduced in accompanying notebook at Tab 65].

communication to their families, and they generally were executed without due process of law.<sup>43</sup> The victims' families never heard from their loved one again.<sup>44</sup> The victims of the Nacht und Nebel Erlass literally disappeared into the night and fog, thereby fulfilling the express purpose of the program to create "[e]fficient and enduring intimidation."<sup>45</sup>

**ii. The Military Dictatorships of South and Central America commonly used Enforced Disappearance to Control Dissidents and Alleged Dissidents.**

In the 1960s, '70s and '80s many of the dictatorships in South and Central America used Enforced Disappearance as a "systematic policy of State repression,"<sup>46</sup> specifically in Guatemala, Brazil, Chile, Peru, El Salvador, Colombia, Uruguay, and Honduras.<sup>47</sup> The first reported Disappearances in South America occurred in Guatemala in 1966, followed by Chile after its military coup in 1973, and later by reports from Argentina after the military coup in 1976.<sup>48</sup>

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<sup>43</sup> NAZI CONSPIRACY AND AGGRESSION, *supra* note 39, at 872 [reproduced in accompanying notebook at Tab 39].

<sup>44</sup> TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Volume III, *The Justice Case*, Counts Two and Three: War Crimes and Crimes Against Humanity, 77 [reproduced in accompanying notebook at Tab 42].

<sup>45</sup> NAZI CONSPIRACY AND AGGRESSION, *supra* note 39, at 873 [reproduced in accompanying notebook at Tab 39].

<sup>46</sup> Nowak, Report to ECOSOC, Sub-Comm'n on Human Rights, *supra* note 42, at 7 [reproduced in accompanying notebook at Tab 65].

<sup>47</sup> Anderson, *supra* note 41, at 249-250 [reproduced in accompanying notebook at Tab 19].

<sup>48</sup> AMNESTY INTERNATIONAL, DISAPPEARANCES: A WORKBOOK, at 75-76 (1982) [reproduced in accompanying notebook at Tab 2].

**iii. The Response of the United Nations and other Non-Governmental Organizations.**

International response to the crime of Enforced Disappearance did not occur until the mid-1970s, when the term “Enforced Disappearance” was first used as a translation of “desparacion forzada,” the Spanish term “used by Latin American NGOs,”<sup>49</sup> to describe the widespread, state sponsored disappearances occurring throughout the region. The first international response came in 1974 when the Inter-American Commission on Human Rights “began denouncing the phenomenon.”<sup>50</sup> Soon after, the United Nations, through the Commission on Human Rights “began to respond to the phenomenon . . . both in general terms and with regard to specific cases”<sup>51</sup> of Enforced Disappearance.

One of the first actions taken by the United Nations as a whole was General Assembly Resolution 3448 (XXX) “Protection of human rights in Chile.”<sup>52</sup> This resolution proclaims the types of disappearances occurring, in Chile in particular, were being considered violations of the Universal Declaration of Human Rights<sup>53</sup> and the International Covenant on Civil and Political

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<sup>49</sup> Nowak, Report to ECOSOC Sub-Comm’n on Human Rights, *supra* note 42, at 7 [reproduced in accompanying notebook at Tab 65].

<sup>50</sup> *Id.* at 8.

<sup>51</sup> *Id.* at 7.

<sup>52</sup> UN General Assembly Resolution 3448 (XXX) “Protection of human rights in Chile,” 2433rd plenary meeting, (9 Dec. 1975) [reproduced in accompanying notebook at Tab 69].

<sup>53</sup> *Id.* (“[P]articularly articles 3, 5, 9, 10, and 11 which discuss the right to life, liberty and security of person, freedom from torture, freedom from arbitrary arrest, and detention, and the right to a fair and public trial”).

Rights,<sup>54</sup> and calls on the Government of Chile to investigate the disappearances already carried out and to prevent any future disappearances.

In 1978 the United Nations General Assembly made declaration 33/173: Disappeared persons,<sup>55</sup> which also reaffirmed that Enforced Disappearance is a violation of the Universal Declaration of Human Rights<sup>56</sup> and the International Covenant on Civil and Political Rights.<sup>57</sup> Two years later Resolution 20 (XXXVI)<sup>58</sup> of the Commission on Human Rights established the Working Group on Enforced or Involuntary Disappearances.<sup>59</sup> The Group was originally given a mandate of one year during which time they were to investigate and help resolve reports of

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<sup>54</sup> *Id.* (particularly the “provisions of articles 6, 7, 9 and 10”).

<sup>55</sup> U.N. General Assembly Resolution 33/173 Disappeared persons, 90th plenary meeting (20 Dec., 1978) [reproduced in accompanying notebook at Tab 68].

<sup>56</sup> Universal Declaration of Human Rights (1948) (specifically, the resolution lists articles 3, 5, 9, 10, and 11 of the Declaration, which protect life, liberty, and security of person; protection from torture, cruel, inhumane, and degrading treatment; protection from arbitrary arrest, detention, and exile; fair and public hearing; and the presumption of innocence and public trial) [reproduced in accompanying notebook at Tab 57].

<sup>57</sup> International Covenant on Civil and Political Rights (1976) (specifically articles 6, 7, 9, and 10, which protect the right to life, protection from torture, cruel, inhumane, and degrading treatment, liberty and security of person, and provides for all persons deprived of their liberty to be treated with humanity and respect) [reproduced in accompanying notebook at Tab 56].

<sup>58</sup> U.N. Econ. & Soc. Council [ECOSOC] Resolution 45/ (XXXVI) “Question of missing and disappeared persons” U.N. Doc. E/CN.4/RES/1980/20 (29 Feb. 1980) [reproduced in accompanying notebook at Tab 64].

<sup>59</sup> *See* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, In Particular: Question of Enforced or Involuntary Disappearances*, U.N.Doc. E/CN.4/1986/18 (24 January 1986) (prepared by The Working Group on Enforced or Involuntary Disappearances) (provides a comprehensive look at the work of the Working Group on Enforced or Involuntary Disappearances) [reproduced in accompanying notebook at Tab 67].

Enforced Disappearances.<sup>60</sup> However, after 1980 the mandate of the Working Group was reviewed and renewed yearly until 1986, after which it was reviewed biennially until 1992 after which the mandate was reviewed and renewed every three years.<sup>61</sup>

Most recently, the United Nations has created the International Convention for the Protection of All Persons from Enforced Disappearance (2006). The Convention requires, among other things, for signatories to prevent Enforced Disappearance by creating domestic laws outlawing the practice, guaranteeing that those held in incarceration have access to due process of the law, and to protect foreigners within their borders from being sent back to a country where they would be subjected to forced or involuntary disappearance.<sup>62</sup>

### III. Legal Analysis

#### A. The Trials of Major German War Criminals before the International Military Tribunal and the Trials of Lesser German War Criminals before the Nuremberg Military Tribunal.

In his article “Enforced Disappearance as a Crime Under International Law,” Brian Finucane argues: 1. “the jurisprudence of the [Nuremberg] Tribunals reveals that the conduct underlying Enforced Disappearance was prohibited by the Hague regulations,” 2. the Nuremberg

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<sup>60</sup> E/CN.4/RES/1980/20 (XXXVI), *supra* note 58, at ¶1 and ¶3 [reproduced in accompanying notebook at Tab 64].

<sup>61</sup> Website for the United Nations Working Group on Enforced or Involuntary Disappearance, Homepage, *available at* <http://www2.ohchr.org/english/issues/disappear/index.htm> [reproduced in accompanying notebook at Tab 71].

<sup>62</sup> International Convention for the Protection of all Persons from Enforced Disappearances (2006) [reproduced in accompanying notebook at Tab 55]; *See also* Website for the United Nations Working Group on Enforced or Involuntary Disappearances, “General Comment: Enforced disappearance as a crime against humanity.” *Available at* [www.2ohchr.org/english/issues/disappear/index.htm](http://www.2ohchr.org/english/issues/disappear/index.htm).

Military Tribunal found that Enforced Disappearance is a Crime Against Humanity by relying on customary international law, and 3. “the Tribunal’s judgments themselves have been accepted as C[ustomary] I[nternational] L[aw].”<sup>63</sup>

The decisions of the Nuremberg Tribunals form the bases for modern Crimes Against Humanity jurisprudence and, therefore, serve as the premier authority for determining what constitutes a Crime Against Humanity. The following discussion expands on Mr. Finucane’s argument and concludes that starting with the 1946 judgment of the International Military Tribunal, Enforced Disappearance is a Crime Against Humanity.

**i. The International Military Tribunal Found that Enforced Disappearance is a Violation of the Laws of War, but also Implied that Enforced Disappearance is a Crime Against Humanity.**

The International Military Tribunal at Nuremberg was presented with the crimes committed under the Nacht und Nebel Erlass<sup>64</sup> at the trial of Wilhelm Keitel. The indictment listed the Nacht und Nebel Erlass as a War Crime under Count Three<sup>65</sup> but did not include it in Count Four, Crimes Against Humanity.<sup>66</sup>

In his article for the Yale Journal of International Law, Mr. Finucane argues that it was not until the later trials of lesser war criminals at the Nuremberg Military Tribunal that the

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<sup>63</sup> Brian Finucane, *Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War*, 35 Yale J. of Int’l L. 6 (2009) [reproduced in accompanying notebook at Tab 26].

<sup>64</sup> See discussion *supra* §II(B)(i).

<sup>65</sup> Nuremberg Trial Proceedings Vol. 1: The Indictment, Section VIII(A), available at <http://avalon.law.yale.edu/imt/count3.asp> [reproduced in accompanying notebook at Tab 40].

<sup>66</sup> *Id.*



violations instigated under the Nacht und Nebel Erlass were considered Crimes Against Humanity;<sup>67</sup> however, there is evidence to suggest otherwise.

In its Judgment, the International Military Tribunal states that many, if not all, War Crimes “committed on a vast scale” were also Crimes Against Humanity.<sup>68</sup> The Nacht und Nebel Erlass was undeniably a War Crime in the eyes of the Tribunal, and even though the Judgment did not explicitly and absolutely include them as such, by their very nature the crimes committed under the Nacht und Nebel Erlass are Crimes Against Humanity.

The Charter of the International Military Tribunal defined Crimes Against Humanity as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>69</sup>

The Nacht und Nebel Erlass produced a systematic government action taken against the civilian population, namely individuals who opposed the Nazi Regime, with the direct and stated purpose

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<sup>67</sup> Finucane, *supra* note 63, at 8-13 [reproduced in accompany notebook at Tab 20].

<sup>68</sup> THE TRIALS OF GERMAN MAJOR WAR CRIMINALS, Part 22, Judgment and Opinion, “The Law Relating to War Crimes and Crimes Against Humanity,” 468, (September 30, 1946) (“The Tribunal . . . cannot make a general declaration that the acts before 1939 were Crimes Against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes Against Humanity; and in-so-far as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore considered Crimes Against Humanity.”) [reproduced in accompanying notebook at Tab 45].

<sup>69</sup> Charter of the International Military Tribunal, *supra* note 5, Article 6(c) [reproduced in accompanying notebook at Tab 37].

of “creat[ing] anxiety in the minds of the family of the arrested person,”<sup>70</sup> and created “[e]fficient and enduring intimidation.”<sup>71</sup> While this falls under the category of War Crime in that the Nacht und Nebel Erlass was carried out in the occupied nations, it also fits smoothly into the realm of Crime Against Humanity because of the persecution initiated against a civilian population based on their political views, the systematic nature of the Decree, and the intimidation and terror the Decree instilled on the occupied civilians.

**ii. The Decision of the Nuremberg Military Tribunal in *The Justice Case* Confirms that Enforced Disappearance was Considered a part of Crimes Against Humanity.**

Following the decisions and judgments of the International Military Tribunal,<sup>72</sup> the Nuremberg Military Tribunal<sup>73</sup> declared the crimes committed under the Nacht und Nebel Erlass

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<sup>70</sup> THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, Part 22, Judgment and Opinion, “War Crimes and Crimes Against Humanity: Murder and Ill-Treatment of Civilian Population,” 453, (September 30, 1946) [reproduced in accompanying notebook at Tab 46].

<sup>71</sup> NAZI CONSPIRACY AND AGGRESSION, *supra* note 39, at 873 [reproduced in accompanying notebook at Tab 39].

<sup>72</sup> TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Volume III, Section VII, Opinion and Judgment, Crimes Under the Night and Fog Decree (Nacht und Nebel Erlass) 1034 (“The evidence herein adduced sustains the foregoing findings and conclusions of the IMT”) [reproduced in accompanying notebook at Tab 43].

<sup>73</sup> The Nuremberg Military Tribunal for lesser war criminals was conducted under Allied Control Council Law No. 10, *supra* note 6. The argument that these post-IMT trials are composed of too few cases with too little international relevance has already been countered before the ECCC in the Co-Prosecutors’ Supplementary Observations on Joint Criminal Enterprise. As the Office of the Co-Prosecutors points out, “The Nuremberg Charter, Control Council Law Number 10 and related jurisprudence constituted what international law scholars term a ‘Grotian Moment’. Such a moment occurs when there is a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.” Case File No. 002/19-09-2007-ECCC/OCIJ, 7, (31 December 2008) [reproduced in accompanying notebook at Tab 47].

to be in violation of Article II(1)(b) and (c) of Control Council Law No. 10,<sup>74</sup> thereby explicitly acknowledging the Nacht und Nebel Erlass programs as not only amounting to War Crimes<sup>75</sup> but also as constituting a Crime Against Humanity.<sup>76</sup> “All of the defendants who entered into the plan or scheme, or who took part in enforcing or carrying it out knew . . . that it was a hard, cruel, and inhumane measure in aid of the military operations and the waging of war by the Nazi regime.”<sup>77</sup> The Nacht und Nebel Erlass produced a systematic plan, instituted by the Nazi state for a specific purpose, a purpose which was thoroughly documented and well known to those carrying out the order.

**B. Cases Arising out of South and Central America Generally Determined that Enforced Disappearance is a Multi-Violation Crime.**

The Inter-American Court of Human Rights, formed by the American Convention on Human Rights (1969),<sup>78</sup> has created the main body of jurisprudence for cases of Enforced Disappearance in South and Central America. While the Convention “does not explicitly

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<sup>74</sup> TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, Volume III, *The Justice Case*, Indictment, 19-25 (1951) [reproduced in accompanying notebook at Tab 41]; TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, *supra* note 72, at 1057 (“The enforcement and administration of the NN directives resulted in the commission of war crimes and crimes against humanity in violation of the international law of war and international common law relating to recognized human rights and of article II, paragraphs 1(b) and (c) of Control Council Law No. 10”) [reproduced in accompanying notebook at Tab 43].

<sup>75</sup> Control Council Law 10., *supra* note 6, at Article II(1)(b) [reproduced in accompanying notebook at Tab 38].

<sup>76</sup> *Id.* at Article II(1)(c).

<sup>77</sup> TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, *supra* note 72, at 1038 [reproduced in accompanying notebook at Tab 43].

<sup>78</sup> Nowak, Report to ECOSOC, Comm’n on Human Rights, *supra* note 42, at 13 [reproduced in accompanying notebook at Tab 65].

provide a right not to disappear,<sup>79</sup> it does contain provisions which, taken together, the Court has found are “relevant in Disappearance cases”<sup>80</sup> such as:

the general obligation to respect and ensure the rights in the Convention (art. 1), the right to judicial personality (art. 3), the right to life (art. 4), the right to humane treatment (art. 5), the right to personal liberty and security (art. 7), the right to a fair trial (art. 8), the rights of the child (art. 19), [and] the right to judicial protection (art. 25).<sup>81</sup>

One example of a case brought before the Inter-American Court of Human Rights is the Trujillo Oroza Case,<sup>82</sup> which was decided on January 26, 2000, and concerns the disappearance of a young man in Bolivia in 1972. The Court found that Bolivia’s actions regarding the disappearance violated certain Articles of the American Convention on Human Rights,<sup>83</sup> including the right to recognition before the law,<sup>84</sup> the right to life,<sup>85</sup> physical, mental and moral integrity,<sup>86</sup> protection from torture, cruel, inhuman or degrading treatment,<sup>87</sup> the rights to personal liberty,<sup>88</sup> due process,<sup>89</sup> and judicial protection.<sup>90</sup>

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<sup>79</sup>*Id.*

<sup>80</sup>*Id.*

<sup>81</sup> *Id.* at 13-14.

<sup>82</sup> *Trujillo Oroza v. Bolivia*, Series C No. 64, I/A Court H.R., Judgment on the Merits, (Jan. 26, 2000) [reproduced in accompanying notebook at Tab 18].

<sup>83</sup> American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc.6 rev.1 at 25 (1992) [reproduced in accompanying notebook at Tab 50].

<sup>84</sup> *Id.* at Article 3.

<sup>85</sup> *Id.* at Article 4.

<sup>86</sup>*Id.* at Article 5.1.

The United Nations Human Rights Committee has also heard cases coming from South America such as *Quinteros v. Uruguay*<sup>91</sup> regarding the disappearance of a young woman in Uruguay after her arrest by military officials in 1976, and *Bleier v. Uruguay*,<sup>92</sup> regarding the arrest of a man in Uruguay in 1975 and his subsequent disappearance in 1976. In both cases, the Committee found breaches of the International Covenant on Civil and Political Rights, in particular breaches of the protection from “torture . . . cruel, inhuman or degrading treatment or punishment,”<sup>93</sup> and protection of “liberty and security of person,”<sup>94</sup> due process of law,<sup>95</sup> and respect and humane treatment for those who have been “deprived of their liberty.”<sup>96</sup>

Other cases have been tried in domestic courts, such as the *Sandoval* Case from Chile. In 2004 the Supreme Court of Chile found that an aggravated abduction which occurred in 1975

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<sup>87</sup> *Id.* at Article 5.2.

<sup>88</sup> *Id.* at Article 7.

<sup>89</sup> *Id.* at Article 8.1.

<sup>90</sup> *Id.* at Article 25.

<sup>91</sup> *Quinteros v. Uruguay*, Human Rights Committee, Communication No. 107/1981 (July 21, 1983) [reproduced in accompanying notebook at Tab 17].

<sup>92</sup> *Bleier v. Uruguay*, Human Rights Committee, Communication No. R. 7/30, (March 29, 1982) [reproduced in accompanying notebook at Tab 6].

<sup>93</sup> International Covenant on Civil and Political Rights, *supra* note 57, at Article 7 [reproduced in accompanying notebook at Tab 56].

<sup>94</sup> *Id.* at Article 9.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at Article 10(1).

amounts to Enforced Disappearance.<sup>97</sup> The Court went on to follow the opinion of the Court of Appeals, which found that “forced Disappearance is an international crime, specifically a Crime Against Humanity,” and declared that “both the 1948 Universal Declaration and the International Covenant on Civil and Political Rights . . . prohibit, in fact, crimes against humanity.”<sup>98</sup>

While most of the cases discussed above found that Enforced Disappearance violates multiple human rights guarantees, the ultimate conclusion is that Enforced Disappearance is a distinct Crime Against Humanity. Customary International Law “depends upon the *consensus* of nation-state officials as to what the content of the law is.”<sup>99</sup> Currently there are 192 members in the United Nations and 194 countries in the world. The International Covenant on Civil and Political Rights<sup>100</sup> has 165 Parties, which means that over 85% of United Nations Member countries and over 85% of countries in the world have obligated themselves to the basic and fundamental human rights encapsulated in the International Covenant on Civil and Political Rights. This clearly shows a consensus among nations. Furthermore, the portions of the International Covenant on Civil and Political Rights that Enforced Disappearance is found to

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<sup>97</sup> Fannie Lafontaine, *No Amnesty or Statute of Limitation for Enforced Disappearances: The Sandoval Case before the Supreme Court of Chile*, 3 J. Int’l Crim. Just. 469 (2005) [reproduced in accompanying notebook at Tab 27].

<sup>98</sup> *Id.* at 479.

<sup>99</sup> ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW*, 33 (Cornell University Press 1971) [reproduced in accompanying notebook at Tab 4].

<sup>100</sup> The International Covenant on Civil and Political Rights, *supra* note 57 (one of the most “international” of the covenants that Enforced Disappearance is found to violate) [reproduced in accompanying notebook at Tab 56].

violate are foundational Crimes Against Humanity, such as torture, imprisonment, and the right to life, all of which are carried out as persecution based on political or ethnic grounds.

### **C. Enforced Disappearance as a Multiple Human Rights Violation<sup>101</sup>**

One criticism of current Enforced Disappearance jurisprudence is that, until recently,<sup>102</sup> there was not one instrument that imposed individual criminal responsibility for Enforced Disappearance as a crime in its own right. Rather, when Enforced Disappearance has been found, it is generally judged to be a breach of various Human Rights instruments,<sup>103</sup> such as the International Covenant on Civil and Political Rights,<sup>104</sup> the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment,<sup>105</sup> and the American Convention on Human Rights,<sup>106</sup> among others.<sup>107</sup>

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<sup>101</sup> See the Javier Leone Diaz Human Rights Law Page, *available at* [www.javier-Leone-diaz.com](http://www.javier-Leone-diaz.com) (provides a concise and informative information about Enforced Disappearance as a cumulative violation) [reproduced in accompanying notebook at Tab 49]; *also see* Reed Brody and Felipe Gonzalez, *Nunca Mas: An Analysis of International Instruments on "Disappearances,"* 19.2 Human Rights Quarterly 365 (1997) [reproduced in accompanying notebook at Tab 22].

<sup>102</sup> As of 2006 there is an International Convention which explicitly prohibits Enforced Disappearances: The International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 62 [reproduced in accompanying notebook at Tab 55].

<sup>103</sup> See discussion *supra* at §III(B).

<sup>104</sup> International Covenant on Civil and Political Rights, *supra* note 57 [reproduced in accompanying notebook at Tab 56].

<sup>105</sup> Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (1975) [reproduced in accompanying notebook at Tab 51].

<sup>106</sup> American Convention on Human Rights, *supra* note 83 [reproduced in accompanying notebook at Tab 50].

<sup>107</sup> Anderson, *supra* note 41, at 556 [reproduced in accompanying notebook at Tab 19].

According to the 1986 report of the Independent Commission on International Humanitarian Issues, Enforced Disappearance violates “[t]he right to life . . . the right to liberty and security of the person . . . the right not to be subjected to arbitrary arrest, the right to fair trial . . . the right to recognition as a person before the law”, “[t]he right to humane conditions of detention, and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>108</sup>

Paragraph 11 of the Draft Code of Offenses against the Peace and Security of Mankind (1954) states that included in crimes against peace and security are “[i]nhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.”<sup>109</sup> By definition Enforced Disappearance falls into this description, based on the upheaval of society caused by the systematic disappearance and subsequent lack of information regarding the victim’s whereabouts, as well as the fact that Enforced Disappearance is always a state sponsored, if not state run, activity.

In *Cyprus v. Turkey* the European Court of Human Rights found that the disappearance of individuals in Cyprus as a result of Turkey’s invasion in 1974 violated The Convention for the

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<sup>108</sup> A REPORT FOR THE INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN RIGHTS, DISAPPEARED! TECHNIQUE OF TERROR, 49 (Zed Books Ltd. 1986) [reproduced in accompanying notebook at Tab 1].

<sup>109</sup> INTERNATIONAL LAW COMMISSION, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION Vol. II, *Draft Code of Offenses against the Peace and Security of Mankind*, U.N. Doc. A/Cn.4/85 (1954) (prepared by J. Spiropoulos, Special Rapporteur) [reproduced in accompanying notebook at Tab 62].



Protection of Human Rights and Fundamental Freedoms (1950).<sup>110</sup> Specifically the case cites Article 5, which guarantees liberty and security of person, and Article 3, which guarantees protection from torture, inhumane, or degrading treatment and punishment.<sup>111</sup>

Additionally, in its 3rd Report, put out in 1983, the Working Group on Enforced Disappearances stated that

[t]he information in this and prior reports shows that a wide range of the human rights of the victim himself and his family which are recognized in various international human rights instruments are violated or infringed by enforced or involuntary disappearances. These include civil and political rights and economic, social and cultural rights.<sup>112</sup>

Enforced Disappearance is a crime that is very hard to document and therefore is rarely reported on. This could explain the failure of the international community to follow the decisions of the International Military Tribunal, and more specifically, the Nuremberg Military Tribunal and consider Enforced Disappearance a Crime Against Humanity, rather than finding it to be a breach of multiple human rights documents.

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<sup>110</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4.XI.1950 (1950) [reproduced in accompanying notebook at Tab 52].

<sup>111</sup> *Cyprus v. Turkey*, 11 BHRC 45 (2001) [reproduced in accompanying notebook at Tab 7].

<sup>112</sup> U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Human Rights, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, In Particular: Question of Enforced or Involuntary Disappearances*, U.N. Doc. E/CN.4/1983/14 (21 Jan. 1983) (prepared by the Working Group on Enforced or Involuntary Disappearances) [reproduced in accompanying notebook at Tab 66].

**D. Enforced Disappearance as a Crime Against Humanity.**

Enforced Disappearances is a Crime Against Humanity, based most recently on the International Convention for the Protection of all Persons from Enforced Disappearance<sup>113</sup> and the Rome Statute creating the International Criminal Court. But, more importantly for this memorandum, this conclusion is based on the judgments and decisions of the International Military Tribunal and, more conclusively, the Nuremberg Military Tribunal. Therefore, Enforced Disappearance was a Crime Against Humanity under Customary International Law before 1975.

Because prohibition of Crimes Against Humanity is Customary International Law, such crimes do not need to be, and should not be, confined to a definite list of offenses. Additionally, simply because Enforced Disappearance is not explicitly listed as a Crime Against Humanity in the statutes of the various tribunals does not mean it is not. It is necessary to look to the actions of States and International Bodies to determine if there was the appropriate mental state and legal obligation regarding Enforced Disappearance to make it a Crime Against Humanity. As one scholar put it, “[t]he person who engages in disappearances belongs to the same category as other international criminals, the pirate, the slave trader, the genocidist and those guilty of complicity in apartheid. Existing customary law is . . . sufficient to establish Disappearance as an international crime committed by individuals.”<sup>114</sup>

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<sup>113</sup> International Convention for the Protection of All Persons from Enforced Disappearance, *supra* note 62 [reproduced in accompanying notebook at Tab 55].

<sup>114</sup> Maureen R. Berman and Roger S. Clark, *State Terrorism: Disappearances*, 13 Rutgers L.J. 531, 549 (1981-1982) [reproduced in accompanying notebook at Tab 21].

The International Military Tribunal implied that the Nacht und Nebel Erlass program was a Crime Against Humanity, and the Nuremberg Military Tribunal explicitly stated that the Nacht und Nebel Erlass program constituted not only War Crimes, but Crimes Against Humanity.<sup>115</sup> Since that time the decisions made by those two Tribunals have been considered Customary International Law.<sup>116</sup>

Aside from the decisions of the Nuremberg tribunals, there is other evidence which shows Enforced Disappearance is a Crime Against Humanity based on the wording of the commonly used definition of Crimes Against Humanity. In its 1950 Formulation of Nurnberg Principles, the Commission on International Law set forth that “[a] violation of international law may constitute an international crime even if no legal instrument characterizes it as such.”<sup>117</sup> Therefore, a lack of specific enumeration is not a barrier to inclusion as a Crime Against Humanity. The various statutes of the established international tribunals<sup>118</sup> list enumerated Crimes Against Humanity, but also include the phrase “other inhumane acts.”<sup>119</sup> This phrase has

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<sup>115</sup> See discussion *supra* §III(A).

<sup>116</sup> See Finucane, *supra* note 63, at 6 [reproduced in accompanying notebook at Tab 26].

<sup>117</sup> INTERNATIONAL LAW COMMISSION, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION Vol. I, *Formulation of Nurnberg Principles*, U.N. Doc. A/CN.4/22 (12 April 1950) (*prepared by J. Spiropoulos, Special Rapporteur*) [reproduced in accompanying notebook at Tab 63].

<sup>118</sup> See the Charter of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 34 [reproduced in accompanying notebook at Tab 60]; The Charter of the International Criminal Tribunal for Rwanda, *supra* note 35 [reproduced in accompanying notebook at Tab 59]; Charter of the International Military Tribunal, *supra* note 5 [reproduced in accompanying notebook at Tab 37]; Statute of the Special Court for Sierra Leone, *supra* note 36 [reproduced in accompanying notebook at Tab 61].

<sup>119</sup> See the Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 34, Article 5(i) [reproduced in accompanying notebook at Tab 6-]; Statute of the International

allowed non-enumerated crimes such as rape and forced marriage independent recognition as Crimes Against Humanity. Based on the process by which an act is considered an “other inhumane act,” Enforced Disappearance should be considered a Crime Against Humanity.

Additionally, the United States District Court for the Northern District of California holds that Enforced Disappearance is an “international tort.”<sup>120</sup> International torts are “violations of current customary international law [which] are characterized by universal consensus in the international community as to their binding status and their content. That is, they are universal, definable, and obligatory international norms.”<sup>121</sup>

**i. The Decisions of the International Military Tribunal and the Nuremberg Military Tribunal Considered Enforced Disappearance a Crime Against Humanity.**

As previously discussed,<sup>122</sup> the International Military Tribunal did not explicitly call Enforced Disappearance a Crime Against Humanity. However, the International Military Tribunal implies this classification in several of its statements.<sup>123</sup> The Nuremberg Military Tribunal did explicitly name Enforced Disappearance as a Crime Against Humanity, not only in

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Criminal Tribunal for Rwanda, *supra* note 35 Article 3(i) [reproduced in accompanying notebook at Tab 59]; Statute of the Special Court for Sierra Leone, *supra* note 36, Article 2(i) [reproduced in accompanying notebook at Tab 61]; and the Charter of the International Military Tribunal, *supra* note 5, Article 6(c) [reproduced in accompanying notebook at Tab 37].

<sup>120</sup> *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (1988) [reproduced in accompanying notebook at Tab 8].

<sup>121</sup> *Id.*

<sup>122</sup> See discussion *supra* §III(A)(i).

<sup>123</sup> *Id.*

its indictment of the war criminals,<sup>124</sup> but also in its judgment and reasoning.<sup>125</sup> Although this alone shows that Enforced Disappearance was a Crime Against Humanity before 1975, further evidence backs up this conclusion.

**ii. Inclusion of the Phrase “Other Inhumane Acts” in the Definition of Crimes Against Humanity is Used to Expand Upon the Definition.**

The charters, or statutes, of the six main ad hoc tribunals,<sup>126</sup> including Chapter 1, Article 5 of the Laws establishing the Extraordinary Chambers in the Courts of Cambodia, spell out certain enumerated acts as Crimes Against Humanity; however, they also all include “other inhumane acts.” This small phrase allows for acts which were not yet considered by the authors of these definitions, and proves that Crimes Against Humanity is an expansive concept, not limited to only those acts which are written down and commonly known, such as enslavement or murder.

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<sup>124</sup> TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, *supra* note 44, at 75 [reproduced in accompanying notebook at Tab 42].

<sup>125</sup> TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, *supra* note 72, at 1031-1063 [reproduced in accompanying notebook at Tab 43].

<sup>126</sup> The Charter of the International Military Tribunal, *supra* note 5 [reproduced in accompanying notebook at Tab 37]; Statute for the International Criminal Tribunal for the former Yugoslavia, *supra* note 34 [reproduced in accompanying notebook at Tab 60]; International Criminal Tribunal for Rwanda, *supra* note 35 [reproduced in accompanying notebook at Tab 59]; Special Court for Sierra Leone, *supra* note 36 [reproduced in accompanying notebook at Tab 61]; and Control Council No. 10, *supra* note 6 [reproduced in accompanying notebook at Tab 38].

### iii. Rape and Forced Marriage as Crimes Against Humanity.

Two related examples help show the expansiveness of the phrase “other inhumane acts,” such that it would encompass Enforced Disappearance.

#### 1. Rape

The history of rape as a War Crime, and later a Crime Against Humanity, is one of evolution. Originally treated as an expected part of war, rape was later seen as a crime against family honor before being considered a crime against the woman herself.<sup>127</sup> Rape was not listed as an enumerated Crime Against Humanity in the Charter of the International Military Tribunal; however, it was added to the Allied Control Council Law No. 10<sup>128</sup> Despite widespread reports of sexual assaults, and the fact that the International Military Tribunal Charter “granted enough flexibility for the prosecution of rape and other sexual assaults,”<sup>129</sup> and even despite the fact that rape was specifically enumerated in Control Council Law No.10, it was never prosecuted at Nuremberg. In fact, rape was tried as a Crime Against Humanity for the first time at the International Tribunal for the Former Yugoslavia.<sup>130</sup>

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<sup>127</sup> Andrea R. Phelps, *Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution*, 12 Wm & Mary J. of Women & L. 499, 501 (2006) [reproduced in accompanying notebook at Tab 30].

<sup>128</sup> See discussion *supra* §II(A)(i).

<sup>129</sup> Jocelyn Campanaro, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 Geo. L.J. 2557, at Section I (2001) [reproduced in accompanying notebook at Tab 23].

<sup>130</sup> See *Prosecutor v. Gagovic*, Case No. IT-96-23-I, Indictment, ( June 14, 1996 [reproduced in accompanying notebook at Tab 11]; see also *Prosecutor v. Kunarac, Kovac, and Vukovic*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, at §D, ¶436-464 (Feb. 22, 2001) [reproduced in

Article 6(c) of the Charter for the International Military Tribunal enumerates a set of Crimes Against Humanity, as well as the now common “other inhumane acts,” although rape was not added to the list of offenses until the issuance of Allied Control Council Law No. 10. However, in “[a]dhering to the principles of the world’s major legal systems, the [International Military] tribunal’s jurisdiction was interpreted as applying to violations such as ‘murder, rape, assault, battery, theft, robbery, destruction of property, slavery, kidnapping, forcible confinement, and abduction.’”<sup>131</sup> Based on this information, rape not only should have been included as a Crime Against Humanity in the International Military Tribunal charter, but it also should have been tried as such.

Similarly, Enforced Disappearance was not listed as a Crime Against Humanity, yet *was* tried as such under Control Council Law No. 10, and inferred to be such under the decision and judgment of the International Military Tribunal. Therefore, while rape was among the more obvious and recognized Crimes Against Humanity at the Nuremberg Tribunals, it was not given this status through trial, but only through enumeration and custom. Conversely, Enforced Disappearance was actually tried and judged to be a Crime Against Humanity at Nuremberg.

When rape was finally tried as a Crime Against Humanity during the tribunals for the former Yugoslavia and Rwanda, the court explained the definition of Crime Against Humanity,

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accompanying notebook at Tab 13]; *see also Prosecutor v. Tadic*, ICTY Case No. IT-94-1-I, Indictment, (Dec. 14, 1995) [reproduced in accompanying notebook at Tab 16]; *see also* James R. McHenry III, *The Prosecution of Rape Under International Law: Justice that is Long Overdue*, 35 Vand. J. Transnat’l L. 1269 (2002) [reproduced in accompanying notebook at Tab 28].

<sup>131</sup> Campanaro, *supra* note 129, at Section I(A) [reproduced in accompanying notebook at Tab 23].

and particularly rape as a Crime Against Humanity, as being composed of three parts: “[the crime] (a) was part of a wide spread or systematic attack; (b) on a civilian population; and (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial or religious grounds.”<sup>132</sup> In applying this breakdown to Enforced Disappearance it is easy to see the correlation. Enforced Disappearance by definition is a systematic tool used by Governments under a state run or sponsored plan, targeted mainly at political opponents who may also constitute a different ethnic group.<sup>133</sup> Additionally, “[l]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.”<sup>134</sup> These motives align precisely with the reasons a state chooses to use Enforced Disappearance, as evidenced by the Nacht und Nebel Erlass program.<sup>135</sup> The key characteristics of Enforced Disappearance are terror and secrecy:

[e]nforced disappearances are a form of deliberate terror. As a strategy, it draws its particular strength from the mystery surrounding the identity of those responsible, and from the anguish over the fate of the disappeared person which it perpetuates . . . Those who instigate, support, and apply this method, hope that the

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<sup>132</sup> Katie C. Richey, *Several Steps Sideways: International Legal Developments Concerning War Rape and the Human Rights of Women*, 17 *Tex. J. Women & L.* 109, 114-115 (2007) [reproduced in accompanying notebook at Tab 31].

<sup>133</sup> Such as in the case of the Nacht und Nebel Erlass where the Nazi’s targeted not only those opposed to the Nazi regime, but who also happened to be occupied citizens, and many times of a different ethnic group.

<sup>134</sup> *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 687 (Sept. 2, 1998) [reproduced in accompanying notebook at Tab 12]; *See also*, Phelps, *supra* note 127, at 506 [reproduced in accompanying notebook at Tab 30].

<sup>135</sup> *See* discussion *supra* §II(A)(ii).



fear it inspires will paralyse any potential opposition to the established order and increase the power of the regime they represent.<sup>136</sup>

The “gravity and characteristics”<sup>137</sup> of Enforced Disappearance corresponds closely with those of rape and therefore “justify its categorization as a crime against humanity.”<sup>138</sup>

## 2. Forced Marriage

The Special Court for Sierra Leone<sup>139</sup> was faced with the question of whether or not Forced Marriage is a Crime Against Humanity and ultimately, the Court decided it is.<sup>140</sup> Article 2 of the Statute of the Special Court for Sierra Leone<sup>141</sup> describes Crimes Against Humanity as

crimes [committed] as part of a systematic or widespread attack against any civilian population: a. Murder; b. Extermination; c. Enslavement; d. Deportation; e. Imprisonment; f. Torture; e. Rape, sexual slavery, enforced prostitution, forced

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<sup>136</sup> A REPORT FOR THE INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, *supra* note 108, at 39 [reproduced in accompanying notebook at Tab 1].

<sup>137</sup> Wilder Tayler, “Background to the Elaboration of the Draft International Convention for the Protection of All Persons from Forced Disappearance,” No. 62-63 International Commission of Jurists, *The Review*, 68 (2001) [reproduced in accompanying notebook at Tab 33].

<sup>138</sup> *Id.*

<sup>139</sup> See Hon. Teresa Doherty, Justice of the Special Court for Sierra Leone, *Prosecuting Sexual and Gender-Based Crimes Before Internationalized Criminal Courts: Developments in the Prosecution of Gender-Based Crimes – The Special Court for Sierra Leone Experience*, 17 Am. U.J. Gender Soc. Pol’y & L. 327 (2009) ( provides a concise legal analysis and summarization of the SCSL’s finding of enforced marriage as a Crime Against Humanity) [reproduced in accompanying notebook at Tab 24].

<sup>140</sup> *Prosecutor v. Sessay, Kallon, & Gbao*, SCSL-04-15-A, Judgment, (Oct. 26, 2009) [reproduced in accompanying notebook at Tab 14].

<sup>141</sup> Statute of the Special Court for Sierra Leone, *supra* note 36 [reproduced in accompanying notebook at Tab 61].

pregnancy and any other form of sexual violence; h. Persecution on political, racial, ethnic or religious grounds; i. Other inhumane acts.<sup>142</sup>

According to the Court “the crime of other inhumane acts is a residual category for serious acts which are not otherwise enumerated in Article 2 but which nevertheless require proof of the same general requirements.”<sup>143</sup> The phrase “other inhumane acts” is acknowledged by the Special Court for Sierra Leone as having been used since the Nuremberg Tribunals as a way of expanding upon Crimes Against Humanity.<sup>144</sup> The Court’s Appeals Chamber goes on to say that the phrase is used in numerous other international legal instruments describing Crimes Against Humanity.<sup>145</sup>

The Special Court for Sierra Leone determined that there are four elements that must be met for a crime to be considered under “other inhumane acts.” They are:

[1] the occurrence of an act or omission that inflicts great suffering or serious injury to body, or to mental or physical health; . . . [2] the act or omission is sufficiently similar in gravity to the acts referred to in Article 2(a) to Article 2(h) of the Statute . . . [3] [t]he Accused was aware of the factual circumstances that established the character of the gravity of the act; and . . . [4] [t]he Accused, at the time of the act or omission, had the intention to commit the inhumane act or acted in the knowledge that this would likely occur.<sup>146</sup>

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<sup>142</sup> *Id.* at §2.

<sup>143</sup> *Prosecutor v. Sessay, Kallon & Gbao*, Case No. SCSL-04-15-T, Judgment, ¶165, 54 (March 2, 2009) [reproduced in accompanying notebook at Tab 15].

<sup>144</sup> *Prosecutor v. Brima, Kamara, & Kanu*, Case No. SCSL-2004-16-A, Judgment, ¶183, 59 (Feb. 22, 2008) [reproduced in accompanying notebook at Tab 9].

<sup>145</sup> *Id.*

<sup>146</sup> *The Prosecutor v. Sesay*, *supra* note 143 ¶168, 55 [reproduced in accompanying notebook at Tab 15].

It was not until after much analysis, and a decision which initially determined that Forced Marriage was actually subsumed in Sexual Slavery,<sup>147</sup> that the Court determined that Forced Marriage fit the criteria for “other inhumane acts.”

Originally, Forced Marriage was considered a part of sexual slavery and was not given autonomy as its own crime by the Special Court for Sierra Leone.<sup>148</sup> In *The Prosecutor v. Brima, Kamara, and Kanu*, the Appeals Chamber of the Special Court for Sierra Leone distinguishes Forced Marriage from the crime of Sexual Slavery by pointing out how it is different, even though some elements of the two crimes overlap.<sup>149</sup> The Court clarifies that “[w]hile forced marriage shares certain elements with sexual slavery, such as non-consensual sex and deprivation of liberty, there are also distinguishing factors.”<sup>150</sup> The main distinguishing factors of Forced Marriage are the “forced conjugal association”<sup>151</sup> and “a relationship of exclusivity between ‘husband’ and ‘wife’”<sup>152</sup> with penalties for “breach of the exclusive arrangement.”<sup>153</sup> While Sexual Slavery is a “predominantly . . . sexual crime,”<sup>154</sup> Forced Marriage is not.<sup>155</sup>

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<sup>147</sup> *Prosecutor v. Brima, Kamara & Kamo*, Case No. SCSL-2004-16-T, Judgment, (June 20, 2007) [reproduced in accompanying notebook at Tab 10].

<sup>148</sup> Amy Palmer, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of “Forced Marriage,”* 7 Nw. U. J. Int’l Hum. Rts. 133 (2009) [reproduced in accompanying notebook at Tab 29].

<sup>149</sup> *Prosecutor v. Brima*, *supra* note 144, at ¶195, 64 [reproduced in accompanying notebook at Tab 9].

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Similarly, Enforced Disappearance can be distinguished from other crimes; most notably by the fact that the state refuses to acknowledge the arrest or detention of the individual, and the State's refusal to offer up any information regarding the detainee's whereabouts or status or to instigate an investigation into the victim's disappearance. The Workbook on Disappearances published by Amnesty International in 1982 distinguishes Enforced Disappearances from "missing persons, victims of kidnappings, prisoners held in incommunicado detention, and the victims of extrajudicial execution"<sup>156</sup> by pointing to the state run, systematic nature, and the enduring uncertainty associated with Enforced Disappearances.

These same characteristics also allow Enforced Disappearance to fulfill the four elements established by the Special Court for Sierra Leone for "other inhumane acts". As already discussed, Enforced Disappearance inflicts great physical pain and suffering on the disappeared victim, but more importantly, it inflicts serious mental pain on the victim's family, friends and community.<sup>157</sup> As has already been discussed, Enforced Disappearance is of the same gravity as the other crimes listed in the Special Court for Sierra Leone Statute (as well as virtually all other documents describing Crimes Against Humanity). And last, Enforced Disappearances, by

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> AMNESTY INTERNATIONAL, *supra* note 48, at 83 [reproduced in accompanying notebook at Tab 2].

<sup>157</sup> Not only are the family and friends of the victim faced with the mental pain of losing a loved one with no information as to the reason why, they are also faced with the fear that others, or they themselves will fall to the same fate.

definition, fulfill the remaining elements because Enforced Disappearances are state sponsored there can be no question as to the intent or knowledge of the perpetrators.

#### **IV. Conclusion**

Enforced Disappearance is, and has since the 1940s been, a Crime Against Humanity. While the International Military Tribunal failed to explicitly state so, it impliedly did through its reasoning and judgment. Furthermore, the Nuremberg Military Tribunals did explicitly judge Enforced Disappearance to be a Crime Against Humanity when deciding the case of the Nacht und Nebel Erlass.

Additionally, “Crimes Against Humanity” is not an exclusionary list of a few special crimes. Rather, “Crimes Against Humanity” is purposely defined in an expansive fashion, mainly through the use of the term “other inhumane acts.” Based on the criteria set forth by the International Criminal Tribunals for Rwanda and the former Yugoslavia, and the Special Court for Sierra Leone, as well as prominent international scholars, Enforced Disappearance qualifies as a Crime Against Humanity, and did so well before 1975.