IN DEPTH

The phenomenon of enforced disappearances in transitions to peace

Elisenda Calvet Martínez
Assistant Professor of International Law at the University of Barcelona

In processes of transition to peace, states must face up to the atrocities of the past through truth, justice, reparation and guarantees of non-repetition. When hostilities end, the issue of disappeared persons is sometimes included in peace agreements, and if the number of disappeared is high, the authorities of the conflicting parties may create an organ to exchange information on the fate and whereabouts of these persons, and search for their remains in the event of death. One example is the 1996 Dayton Agreement, through which the International Commission on Missing Persons was established to find the nearly 40,000 people who disappeared in the context of the Balkan armed conflict between 1991 and 1995. In Nepal, where there were about 1,300 disappearances, the Commission of Investigation on Enforced Disappeared Persons was set up a decade after the 2006 Peace Agreements between the government and the Maoist forces. More recently, the 2016 Havana Agreements between the Colombian government and the FARC led to the creation of the Search Unit for Missing Persons, in order to coordinate and contribute to humanitarian actions in the search for and the localisation of disappeared persons, in a broad sense, within the context of and due to the armed conflict.

Enforced disappearances may be part of ethnic cleansing policy, genocide, war crimes or crimes against humanity, but today, this phenomenon also occurs in the context of the migrations that are taking place around the world. In situations of armed conflict, when enforced disappearances have taken place in the context of massacres or deliberate attacks on civilians, state authorities may have no interest in responding to

their families about their fate or whereabouts, either because they did not take appropriate measures to stop the attacks or to avoid recognising their own responsibility for such crimes. Thus, in the post-conflict scenario, enforced disappearances must not only be treated as a humanitarian issue, which requires urgent solutions, but also the perpetrators of such crimes must be held accountable in order to avoid impunity.

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The enforced disappearance of persons is a multiple and ongoing human rights violation, which can occur both in contexts of humanitarian crises and of armed conflicts, dictatorial regimes or situations of extreme violence. It begins with a deprivation of liberty, carried out by agents of the state or by other persons with their authorisation or acquiescence, followed by denial or concealment about the fate or whereabouts of the disappeared person. While enforced disappearances may be carried out by non-state actors, such as organised crime or armed or paramilitary groups, the definition included in the International Convention for the Protection of All Persons from Enforced Disappearance (International Convention), adopted by the United Nations General Assembly on 20 December 2006, only recognises as enforced disappearances those that directly or indirectly involve the state.

The phenomenon of enforced disappearances is a practice that has been carried out in all regions of the world and is currently occurring in countries such as Syria, Mexico or North Korea. In Europe, during the Second World War, Hitler adopted the *Nacht und Nebel* (Night and Fog) decree, under which those persons detained could not have any contact with the outside nor be visited by their families; they were thus “disappeared” into different concentration camps, with the subsequent anguish and suffering on the part of their relatives. Apart from the Balkans, mentioned above, in Europe there have also

been enforced disappearances in Cyprus, the Russian Federation, Turkey, Ukraine and in Spain during the Civil War and the Franco dictatorship. The secret detentions and "extraordinary renditions" carried out by the USA within the "war on terror", with the complicity of European countries, also constitute enforced disappearances. In Asia, there have been disappearances in Nepal, Sri Lanka, Japan or Thailand, to name but a few. In Africa, this phenomenon has occurred in Morocco, Algeria, Libya, Sudan, Uganda, Egypt and Senegal, among others. Finally, the region best known for practicing enforced disappearances is Latin America, where few states have remained free of this problem. We could highlight Mexico, Argentina, Brazil, Chile, Colombia, Peru, Guatemala, Honduras, El Salvador and Uruguay. Since its inception in 1980, the UN Working Group on Enforced or Involuntary Disappearances has received more than 55,000 cases, of which more than 44,000 continue unresolved, affecting more than 107 countries.

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Enforced disappearance is a multiple violation of fundamental human rights, such as the right to life, the right to personal integrity, the right to liberty and security of the person and the right to recognition as a person before the law, among others. Furthermore, the anguish and uncertainty suffered by the relatives of the disappeared person –as a result of not knowing where their loved one is and of the authorities' refusal to disclose any information about their fate– have been considered by various international human rights bodies to be inhuman or degrading treatment. Against this backdrop, the right to truth, justice, reparation and guarantees of non-repetition become essential elements of the struggle against the impunity of the perpetrators of disappearances, of preventing future human rights violations and for promoting a stable and lasting peace.

In this phenomenon, the right to truth includes two elements: on the one hand, the victims' families' right to know the fate or whereabouts of the disappeared person, and on the other, in the event of death, their right to the restitution and identification of their remains. Regarding the right to know the fate or whereabouts of the disappeared person, the state has the obligation to quickly and effectively investigate cases of disappearances without a prior need for the families to file a complaint. This obligation refers to the action rather than the result; in other words, the state is not obliged to successfully find all missing persons –with time this task can become very difficult– but it does have an obligation to do everything possible to try to find the disappeared persons, in order to meet the fair expectation of family members to know where their loved ones are.

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In the event of death, the state has an obligation to search for, identify, respect and restore the remains of the disappeared person to their family so that they can bury them in accordance with their religious beliefs and traditions. We must bear in mind that the anguish of not knowing if the disappeared person is alive or dead leads their relatives to suffer “frozen mourning”. Among the various measures that the state can adopt, truth commissions are an ideal mechanism for knowing the truth of the facts and, to some extent, those responsible for these atrocities. In Argentina, the National Commission on the Disappearance of Persons noted in its final report, “Nunca Más” (“Never Again”), the enforced disappearance of 30,000 people considered by the military dictatorship to be part of the “internal” enemy. Subsequently, various trials have been carried out against members of the Argentine military junta responsible for crimes against humanity. Meanwhile, the use of forensic methods to identify remains can significantly contribute to the right to truth. In the Balkans, for example, the

International Commission on Missing Persons has found 70 percent of those who were disappeared during the conflict and has identified nearly 23,000 bodies thanks to new technologies and DNA testing. In any case, it is important for the state to take the lead in searching for disappeared persons, whether through a truth commission or a specific body and the application of forensic anthropology techniques. What is not acceptable is that the State leaves in the hands of relatives the search for victims, as is the case in Spain, which has more than 2,300 mass graves across its territory, and where it is estimated that the whereabouts of between 45,000 and 114,000 persons remain unknown.

“ The offence of enforced disappearance continues to be committed until the fate of the disappeared person has been discovered or their identity has been recovered ”

In relation to the right to justice and safeguards against impunity, the state has an obligation to prosecute and, where appropriate, punish the people responsible for enforced disappearances. It is worth noting that when disappearances form part of a systematic or widespread practice against the civilian population, they constitute a crime against humanity, according to the Rome Statute, which established the International Criminal Court in 1998. Although amnesties are not prohibited under international law and are accepted as a measure of reconciliation, they are not admissible with respect to more serious crimes such as enforced disappearances. States, therefore, must always investigate and prosecute the perpetrators of enforced disappearances as a crime under international law. Thus Guatemala, in its National Reconciliation Law of 1996 adopted after the Peace Accords, explicitly excluded enforced disappearances from the crimes that could be subject to amnesty. This has allowed some of the senior officials responsible for grave human rights violations during the internal armed conflict to be brought to justice before domestic courts.

On the other hand, it is important for states to explicitly codify the crime of enforced disappearance, with a penalty commensurate with its seriousness, to prevent future violations and at the same time to punish the perpetrators for such crime. Likewise, the ongoing nature of enforced disappearances must also be taken into account, in the sense that the offence continues to be committed until the fate or whereabouts of the disappeared person has been found or their identity has been recovered. This aspect is relevant for the statute of limitations and for establishing the competence of international and national courts in cases where the original disappearance took place prior to their jurisdiction being recognised.

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Finally, victims have the right to full reparation, and in such cases the state has an obligation to carry out the necessary institutional reforms to ensure the non-repetition of past grave human rights violations. With respect to reparation, victims’ families have the right not only to compensation but also to the return of those disappeared who are still alive (for example, in Morocco and Algeria some people who had been disappeared for nearly 20 years were released) or their remains in the event of death so that they can bury and “close” the grieving process. Furthermore, victims’ families also have the right to redress and reparation, such as having the state ask for forgiveness for past atrocities, placing a memorial in honour of the victims, setting an official day to commemorate the disappeared persons, naming a square or a school in honour of one of the victims, etc. The Inter-American Court of Human Rights has developed extensive jurisprudence in this regard, although truth commissions also play an important role, insofar as they can recommend the appropriate type of reparation for victims.
Frequently, family members never lose hope of getting their loved ones back alive, and

any information can help them to keep hoping that they are still live. That is why they often reject the economic compensation offered by the state, because they see this as a means for closing the case of disappearance prematurely to move on with the peace process.

Thus, in the context of the transition to peace, it is important for the state to take measures to satisfy the right to truth, justice, reparation and guarantees of non-repetition for the victims of enforced disappearance. The suffering of family members persists after the war and is transmitted from generation to generation. For example, in the case of Spain, it is now the grandchildren who are looking for grandparents who disappeared during the Civil War and under the Franco regime, after more than 80 years of the events. It is not enough to create truth commissions or specific units for the search for missing persons if these measures are not accompanied by a real will of the state to repair and restore the dignity of the victims. In order to promote a long and lasting peace, it is essential to deal with the atrocities of the past, such as the issue of enforced disappearances, not only from a humanitarian standpoint but also from the judicial sphere, through a quick and effective investigation of the facts, together with comprehensive reparation for the victims. Enforced disappearances are crimes committed by state agents, and the refusal of the authorities to provide information and to conduct an investigation to find out the fate or whereabouts of disappeared persons causes suffering and distrust in the institutions of the state. Therefore it is important that the state, once the conflict is over, takes the initiative in searching for the disappeared persons and in prosecuting those responsible, in order to restore society's trust in the institutions and to build a true rule of law in which human rights are respected and it is possible to prevent the recurrence of the grave violations of the past.

ABOUT THE AUTHOR

Elisenda Calvet Martínez is Assistant Professor of Public International Law and coordinator of the Legal clinic on the fight against impunity at the University of Barcelona. Law graduate from the Pompeu Fabra University and PhD in Law from the University of Barcelona, she has worked at the Spanish Red Cross, the Inter-American Court of Human Rights (Costa Rica) and at the Office of the United Nations High Commissioner for Human Rights (Switzerland). Her main lines of research are

transitional justice, human rights, international humanitarian law and international criminal law. She is a member of the Historical Memory Commission of the Barcelona Bar Association (ICAB) and a member of the Scientific Committee of the Observatory on the Enforced Disappearances of Children, of the Rovira i Virgili University, Tarragona. Among her recent publications, we highlight the book *Desapariciones forzadas y justicia transicional* ("Enforced Disappearances and Transitional Justice"), Ed. Tirant Lo Blanch, Spanish Red Cross, Valencia, 2018.

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Photography Putumayo, Colombia. Juan Joven composes coplas (*popular four-line verses) and poems in memory of his brother Jaime.

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