Enforced Disappearance

Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance

Marthe Lot Vermeulen



Cambridge-Antwerp-Portland

TABLE OF CONTENTS

Pre	face		v
List	of Abbre	viations	xix
Int	RODUCTI	ON	
	apter 1 roduction		
1.1	Introduct	ion	1
1.2	The phen	omenon of enforced disappearance	
		e Nacht und Nebel decree issued by Adolf Hitler	2
		ctatorships in South and Central America	5
		2.2.1 Introduction	5
	1.2	2.2.2 Operation Condor: the international dimension of enforced	
		disappearance in South America	6
	1.2	2.2.3 Examples of dictatorships in South America	8
	1.2	2.2.4 The phenomenon of enforced disappearance in Central	
		America	11
	1.2	2.2.5 Responses to remedy gross human rights violations	
		of the past	14
	1.2.3 Re	cent situations of internal conflict or unrest	17
	1.2.4 Th	e fight against international terrorism	21
	1.2.5 Su	mmary	23
1.3	The road	towards an international convention for protection against	
	enforced	disappearance	25
	1.3.1 To	wards an international convention against enforced disappearance	25
		e content of the ICPPED	28
1.4	The main	research question of this study	29
	1.4.1 De	termining state responsibility	30
	1.4	.1.1 Attribution of international state responsibility	30
		.1.2 Interpretation methods	32
	1.4	.1.3 Proving state responsibility	37
		e 'experiences of victims'	37

Table of Contents

1.5		e and methodology of the study	38
	1.5.1	Scope of the study	38
	1.5.2	Methodology	40
1.6	Struc	ture of the book	43
1.7	Conc	luding remarks	44
Pal	RT I	PARAMETERS OF THE EVALUATIVE FRAMEWORK	
	apter :		
Pro	tectio	n under the ICPPED	
2.1		duction	49
2.2		Irafting of a binding international convention against enforced pearance	50
23		itional issues with respect to enforced disappearance	50 53
2.3	2 3 1	Definition of the right not to be subjected to enforced disappearance	53
	2.5.1	2.3.1.1 Deprivation of liberty	53 54
		2.3.1.2 Involvement of state agents, at least indirectly by	J 4
		acquiescence	54
		2.3.1.3 Refusal to acknowledge the deprivation of liberty or	5 1
		concealment of the fate or whereabouts of the disappeared	
		person	56
		2.3.1.4 Placing the person concerned outside the protection	
		of the law	56
		2.3.1.5 Relation to other rights	58
		The continuous nature of enforced disappearance	59
		Enforced disappearance as a crime against humanity	60
		Victims of enforced disappearance	62
	2.3.5	Room for the interpretation and application of the definitional issues	63
2.4		ight not to be subjected to enforced disappearance	64
		An absolute and non-derogable right	64
	2.4.2	Room for the interpretation and application of the right not to be	
		subjected to enforced disappearance	65
2.5		s related to the prevention of enforced disappearance	66
		Criminalising enforced disappearance in domestic law	66
		Detention: communication, information and supervision	68
	2.5.3	Other measures not related to a specific case of deprivation of liberty	73
	2.5.4	Room for the interpretation and application of the norms related to	
		prevention	74

2.6	The d	uty to instigate investigations into alleged crimes of enforced	
		pearance	76
	2.6.1	Requirements for a thorough and impartial investigation	7€
	2.6.2	Room for the interpretation and application of the norms related to	
		investigating the crime of enforced disappearance	79
2.7	Norm	s related to the prosecution of the alleged perpetrators of the crime	
	of enf	orced disappearance	79
	2.7.1	Establishing jurisdiction over the crime of enforced disappearance	79
	2.7.2	The duty to either extradite or prosecute	80
	2.7.3	The compatibility of statutes of limitations with the ICPPED	82
		Amnesty laws: an unresolved issue	83
	2.7.5	Room for the interpretation and application of the norms related to	
		prosecution	84
2.8		ional norms related to investigation and prosecution	85
		Cooperation between States Parties	85
		The right to know the truth	86
	2.8.3	The right to unite efforts in the search for disappeared persons and	
		in assisting victims	87
	2.8.4	Room for the interpretation and application of the additional norms	
• •		related to investigation and prosecution	87
2.9		s related to the punishment of the perpetrators of the crime of enforced	
		pearance	88
	2.9.1	The duty to punish and possibilities for mitigating and aggravating	
	202	circumstances	88
	2.9.2	Room for the interpretation and application of the norms related to	0.0
2.10	N.T	punishment	89
2.10		s related to the compensation of victims of enforced disappearance	89
		The right to obtain reparation	89
		Administrative measures regarding the legal status of victims	91
	2.10.3	Room for the interpretation and application of the norms related to	92
2 11	Thod	reparation	92
2,11		uty to respond to crimes committed by non-state actors	
		The duty to investigate crimes and to bring the perpetrators to justice	92
	2.11.2	Room for the interpretation and application of the norms related to protection from crimes by non-state actors	92
2 12	Concl	uding remarks: interpretation conundrums in the ICPPED that need	72
4.14		r exploration	93

De	apter termir ligatio	ning State Responsibility through the Examination of State	
		duction	97
3.2	The 1	theory on typologies of state obligations	98
3.3	Type	ologies of state obligations applied by treaty bodies	101
	3.3.1	The Human Rights Committee	10I
	3.3.2	The European Court of Human Rights	103
	3.3.3	The Inter-American Court of Human Rights	109
		gations laid down in the ICPPED	115
3.5	Conc	luding remarks: types of obligations used for the purpose of this study	116
	apter 4	4 n Attuned to Experiences of Victims	
4.1		duction	
			119
7.2 1 3	Rene	ct on the disappeared person	120
т.Э	431	rcussions on the relatives of the disappeared person	123
	437	The frozen grief and continuing anguish of relatives Mental and physical deterioration	124
	433	The response of the state as an aggravating factor	127
	434	Legal impediments in bringing the perpetrators to justice	128
	435	Impact of an enforced disappearance on the family as a whole	133
4 4	Impa	et of an enforced disappearance on society	133
4.5	The e	valuative framework: five main causes of victims' suffering and the	136
	measi	ares that contribute either to preventing them in the first place or to	
	minin	nising their effects	120
		No trace of the disappeared person and denials by the state	138
	,,,,,,	authorities	120
	4.5.2	Uncooperative and offensive conduct, or complete inaction, on the	139
		part of the state authorities in discovering the whereabouts or fate	
		of the disappeared person	140
	4.5.3	De facto and de jure impunity	140 14I
	4.5.4	An unsafe environment to conduct the search and other activities	141
		related to the enforced disappearance	143
		4.5.4.1 Preventing state agents from committing enforced	143
		disappearances: a criminologist perspective	145
		4.5.4.2 Measures contributing to a safe environment for relatives	173
		of disappeared persons	1/18

4.5.5 Obstacles for victims to continue their 'normal' life	150
4.6 Concluding remarks	152
PART II COMPARATIVE CASE-LAW ANALYSIS	
Chapter 5 Definitional Issues in Relation to Enforced Disappearance	
5.1 Introduction	157
5.2 Enforced disappearance as a multiple violation of civil and political rig	ghts 158
5.2.1 Human Rights Committee	158
5.2.2 The Inter-American Court of Human Rights	160
5.2.3 The European Court of Human Rights	164
5.2.4 Comparative remarks on the multiple rights approach in light	of
the experiences of victims	167
5.3 The definition of enforced disappearance	169
5.3.1 Refusal to acknowledge the deprivation of liberty or disclose	the
fate or whereabouts of the person concerned	169
5.3.2 Placement of the person concerned outside the protection of the	e law 170
5.3.3 Enforced disappearance as a distinct human rights violation	171
5.3.3.1 Enforced disappearance and other forms of deprivation	n of
liberty	172
5.3.3.2 Difference between enforced disappearances and extra	a-
judicial killings	174
5.3.4 Comparative remarks on the definition of enforced disappeara	ınce
in light of the experiences of victims	176
5.4 Victims of enforced disappearance	179
5.4.1 The Human Rights Committee	179
5.4.2 The Inter-American Court of Human Rights	180
5.4.3 The European Court of Human Rights	184
5.4.4 Victims and their personal claims in relation to the exhaustion	ı of
domestic remedies	187
5.4.5 Comparative remarks in light of the experiences of victims	188
5.5 The continuous nature of enforced disappearance	189
5.5.1 The Human Rights Committee	191
5.5.2 The Inter-American Court of Human Rights	195
5.5.3 The European Court of Human Rights	199
5.5.4 Comparative remarks on the continuous nature in light of the	
experiences of victims	202

5.6	The systematic practice of enforced disappearance as a crime against humanity	202
	5.6.1 The Inter-American Court of Human Rights	203
	5.6.2 The European Court of Human Rights	204
	5.6.3 Comparative remarks on the existence of a systematic practice	205
	light of the experiences of victims	
5.7	Concluding remarks	206 207
Ch	napter 6	
De	etermining State Responsibility for Enforced Disappearance on the Bee Duty to Respect	asis of
6.I	Introduction	213
6.2	Preliminary remarks on evidentiary matters	213
6.3	State agents as the perpetrators of the crime of enforced disappearance	216
	6.3.1 The Human Rights Committee	216
	6.3.1.1 The admissibility of evidence: types of evidence and	210
	time-limits	216
	6.3.1.2 The burden of proof	218
	6.3.1.3 The standard of proof and the evaluation of evidence	220
	6.3.2 The Inter-American Court of Human Rights	224
	6.3.2.1 The admissibility of evidence	224
	6.3.2.2 The burden of proof	227
	6.3.2.3 The standard of proof and the evaluation of evidence	229
	6.3.3 The European Court of Human Rights	235
	6.3.3.1 The admissibility of evidence: types of evidence and	
	time-limits	235
	6.3.3.2 The burden of proof	236
	6.3.3.3 The standard of proof and the evaluation of evidence	238
	6.3.4 Comparative remarks in light of the experiences of victims	247
5.4	- P out of the maneet involvement of the state	252
	6.4.1 The Inter-American Court of Human Rights	253
	6.4.2 The European Court of Human Rights	257
_	6.4.3 Comparative remarks in light of the experiences of victims	260
0.5	Concluding remarks	261

Chapter 7
Determining State Responsibility for Enforced Disappearance on the basis o
the Duty to Prevent

7.1	Introd	luction	265
		onableness' as the limiting factor to the scope of the duty to prevent	265
		ctive measures to prevent the enforced disappearance of persons	
		detention	268
	7.3.1	The Human Rights Committee	268
		The Inter-American Court of Human Rights	270
		The European Court of Human Rights	272
		Comparative remarks on protective measures in light of the	
		experiences of victims	274
7.4	Safeg	uards surrounding arrest and detention	27:
		The Human Rights Committee	276
		7.4.1.1 Safeguards under Article 9 ICCPR: the right to liberty and	
		security	276
		7.4.1.2 Articles 7, 10 and 16 ICCPR: contact between detainees	
		and their relatives	279
	7.4.2	The Inter-American Court of Human Rights	280
		7.4.2.1 Safeguards under Article 7 ACHR (the right to liberty and	
		security)	280
		7.4.2.2 Keeping track of detained persons through custody	
		records	28′
		7.4.2.3 Article 5 ACHR (the right to humane treatment) and the	
		communication between detainees and their relatives	28
	7.4.3	The European Court of Human Rights	288
		7.4.3.1 Article 5 ECHR (the right to liberty and security)	288
		7.4.3.2 Article 6 ECHR and access to a lawyer	293
		7.4.3.3 Article 8 ECHR and the possibility of communication	
		between detainees and relatives	294
	7.4.4	Comparative remarks on safeguards surrounding arrest	
		and detention in light of the experiences of victims	29:
7.5	Addit	cional obligations to prevent similar violations in the future	300
		Human Rights Committee	300
		The Inter-American Court of Human Rights	300
		The European Court of Human Rights	304
	7.5.4	Comparative remarks on measures of non-repetition in light of	
		experiences of victims	300
7.6	Concl	luding remarks	309

Chapter 8 Determing State Responsibility Based on the Duties to Investigate, Prosecute, Punish and Provide Reparation

8.1		duction	313
8.2	2 Lega	Legal basis of the duties to investigate, prosecute, punish and provide	
	repai	ration grant and provide	314
8.3	Justi	fications for the duties to investigate, prosecute and punish	318
	8.3.1	Locating the disappeared person	318
	8.3.2	Revealing the truth about the whereabouts or fate of the	310
		disappeared person	319
	8.3.3	Combating impunity and reinforcement of the rule of law	319
	8.3.4	Investigation and finding of guilt as prerequisites for administrative	319
		remedies and compensation	321
	8.3.5	Comparative remarks in light of the experiences of victims	321
8.4	i ne c	luty to investigate	322
	8.4.1	The Human Rights Committee	322
	8.4.2	The Inter-American Court of Human Rights	324
	8.4.3	The European Court of Human Rights	327
	8.4.4	Comparative remarks in light of the experiences of victims	330
8.5	The r	ight to know the truth	331
	8.5.1	The Human Rights Committee	332
	8.5.2	The Inter-American Court of Human Rights	334
	8.5.3	The European Court of Human Rights	337
	8.5.4	Comparative remarks in light of the experiences of victims	340
8.6	Comb	eating impunity	345
	8.6.1	The Human Rights Committee	346
		8.6.1.1 Legal impediments to prosecution	347
		8.6.1.2 The use of military courts	349
		8.6.1.3 The international dimension of the duties to investigate	•
		and prosecute	351
		8.6.1.4 Pardons and the duty to punish	352
	8.6.2	The Inter-American Court of Human Rights	353
		8.6.2.1 Factors leading to impunity: La Cantuta v. Peru	355
		8.6.2.2 The La Cantuta Case in context	362
	0.64	8.6.2.3 Duty to punish	369
	8.6.3	The European Court of Human Rights	371
		8.6.3.1 The nature of the duty to investigate and prosecute	371
		8.6.3.2 The independence of the investigating and adjudicating	
		authorities	375

		8.6.3.3 Legal impediments to criminal proceedings	377
		8.6.3.4 International cooperation and the duty to investigate	378
		8.6.3.5 The duty to punish	379
		Comparative remarks in light of the experiences of victims	380
8.7	Ratio	nale, scope and content of the duty to provide reparations	388
	8.7.1	Rationale behind the duty to provide reparations	388
	8.7.2	The content of the duty to provide reparations	389
		8.7.2.1 The Human Rights Committee	389
		8.7.2.2 The Inter-American Court of Human Rights	390
		8.7.2.3 The European Court of Human Rights	393
	8.7.3	Comparative remarks in light of the experiences of victims	395
8.8	Conc	luding remarks	397
	_		
	pter 9		
		to Protect Individuals at Risk of Being Subjected to Disappearan	nce
by .	Private	e Individuals or Groups of Individuals	
9.1	Introd	luction	399
		priate measures to investigate crimes committed by non-state actors	3,,,
		bring the perpetrators to justice	401
9.3		uty to take operational measures to protect	402
		The European Court: the scope and content of the duty to take	
		preventive operational measures in enforced disappearance cases	402
		9.3.1.1 Application of the Osman test in enforced disappearance	.02
		cases	404
		9.3.1.2 The limits of the Osman test in enforced disappearance	
		cases	411
		9.3.1.3 Preventive operational measures and the right to liberty	413
	9.3.2	The Inter-American Court of Human Rights	414
		9.3.2.1 The Pueblo Bello Massacre v. Colombia: the facts of the	
		case	414
		9.3.2.2 The Pueblo Bello Massacre v. Colombia: a violation of the	
		duty to prevent	417
		9.3.2.3 Acquiescence versus the duty to prevent	421
	9.3.3	Comparative remarks on taking operational measures in light of the	
		experiences of victims	424
9.4	Concl	uding remarks	429

Table of Contents

Table of Contents

Conclusion

Chapter 10 Conclusions and Recommendations

Introduction	435
A victim perspective to the determination of international state	
responsibility for enforced disappearance: the parameters of the research	436
Definitional issues with respect to enforced disappearance	439
10.3.1 Towards an all-encompassing definition of enforced	,
disappearance that captures the seriousness of the crime	440
10.3.1.1 The meaning of 'fate or whereabouts'	440
10.3.1.2 Constructive use of the fourth element of the definition.	
'placing the person outside the protection of the law'	441
10.3.1.3 Enforced disappearance as a distinct human rights	
violation	443
10.3.2 The beginning and end of a continuous violation	445
10.3.3 A well-defined yet inclusive notion of the victim	447
10.3.4 A clear and transparent definition of enforced disappearance as	
a crime against humanity	449
Determining state responsibility for the enforced disappearance itself:	
a violation of the duty to respect	451
10.4.1 Acquiescence as the minimum threshold for the 'state'	
•	451
10.4.2 Proving state involvement: the importance of modified rules of	
	455
The duty to prevent $-A$ state apparatus that minimises the possibilities	
that persons are subjected to enforced disappearance	459
10.5.1 Institutional safeguards surrounding arrest and detention	460
10.5.1.1 Conditions for the deprivation of liberty	460
	461
10.5.1.3 Right to communicate with the outside world	463
10.5.1.4 Prompt and diligent action by the judiciary: habeas	
corpus and access to places of detention	463
10.3.2 General measures aimed at curbing the criminal behaviour of	
	465
The obligation to respond when the sign of the obligation to respond when the	468
committed: the duties to investigate and the	
commucu. the duties to investigate and to prosecute	469
	A victim perspective to the determination of international state responsibility for enforced disappearance: the parameters of the research Definitional issues with respect to enforced disappearance 10.3.1 Towards an all-encompassing definition of enforced disappearance that captures the seriousness of the crime 10.3.1.1 The meaning of 'fate or whereabouts' 10.3.1.2 Constructive use of the fourth element of the definition, 'placing the person outside the protection of the law' 10.3.1.3 Enforced disappearance as a distinct human rights violation 10.3.2 The beginning and end of a continuous violation 10.3.3 A well-defined yet inclusive notion of the victim 10.3.4 A clear and transparent definition of enforced disappearance as a crime against humanity

	10.6.1 Due diligence in the investigation	469
	10.6.2 The investigation with the aim of prosecution	472
	10.6.3 Legal standing and victim participation	473
	10.6.4 Limited room for legal impediments barring prosecution	474
	10.6.5 The use of military courts in enforced disappearance cases	476
	10.6.6 Evaluation of evidence in domestic courts	477
	10.6.7 Different shades in the right to know the truth	478
10.7	The duty to punish the perpetrators for the crime of enforced	
	disappearance	480
10.8	Determining state responsibility based on a failure to provide reparations	
	to victims	481
10.9	The standard related to the duty to protect against acts committed by non-	
	state actors	482
10.10	Is the ICPPED apt for protection from transnational disappearances?	483
	Guiding recommendations to the Committee on Enforced	
	Disappearances	484
Same	nvatting (Summary in Dutch)	497
Biblic	ography	509
Table	of Cases, Views and Decisions	529
Index		539
Currio	culum Vitae	543

xvi xvii