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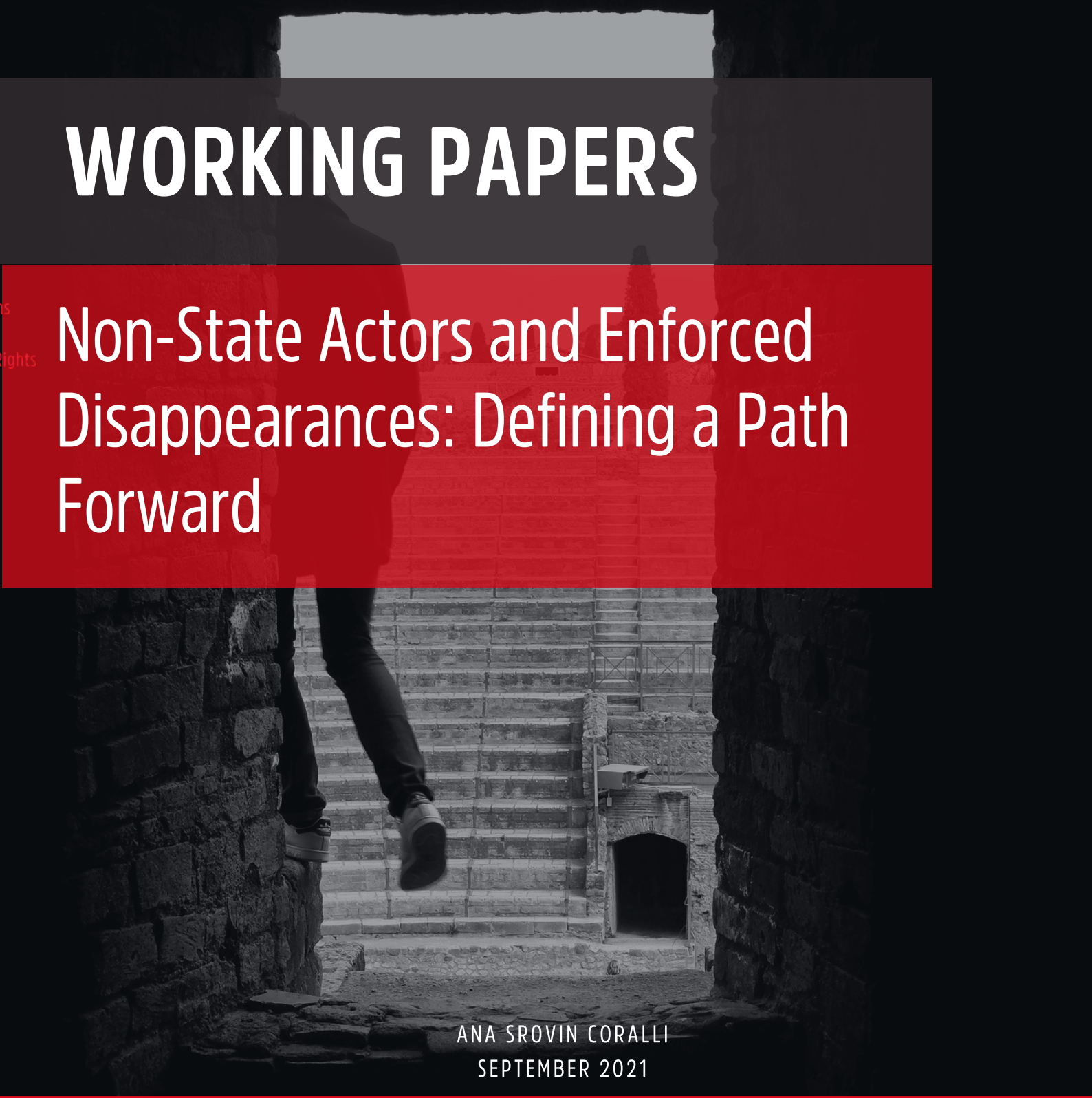
Non-State Actors and Enforced Disappearances: Defining a Path Forward



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SEPTEMBER 2021

THE GENEVA ACADEMY A JOINT CENTER OF

THE GRADUATE INSTITUTE GENEVA
INSTITUT DE HAUTES ÉTUDES INTERNATIONALES ET DU DÉVELOPPEMENT
GRADUATE INSTITUTE OF INTERNATIONAL AND DEVELOPMENT STUDIES

UNIVERSITÉ DE GENÈVE
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TABLE OF CONTENTS

AKNOWLEDGMENTS

I wish to thank Professor Andrew Clapham for inspiring me to write this paper, as well as to everyone else who helped me with their advice and comments. In particular, I am grateful to Professors Gabriella Citroni, Katharine Fortin and Olivier de Frouville, and to my PhD colleagues Lene Guercke, Marishet Mohammed Hamza, Tomáš Morochovič, Victoria Priori and Alexander Wolffenbuttel, for their remarks on the earlier version of this paper. My sincere gratitude goes also to my dear friends Sulekha Agarwal and Sara Botero, for their help with the language review.

1. INTRODUCTION

The first known systematic practices of enforced disappearances, which were perpetrated or in different ways supported by state apparatuses, are from the period of Nazi Germany[1] and Latin American military dictatorships of 1960s-1980s.[2] Public officials, military, and security forces, among others, are mostly responsible for the horrors lived by the families whose relatives were disappeared,[3] tortured or executed during the Nazi and Latin American dictatorship periods. Given the involvement – direct or indirect – of state officials, disappearances from that period qualify as enforced disappearances, which are defined as any form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by a refusal to provide information on the fate or whereabouts of the disappeared persons or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.[4] Enforced disappearance is regarded as one of the most grave and flagrant violations of human rights due to its widespread destructive consequences which go beyond the disappeared individual.[5] It violates various fundamental human rights of the disappeared person, including the prohibition of torture or cruel, inhuman or degrading treatment, right to liberty, right to protection under the law, etc.[6] Furthermore, enforced disappearance results in violation of certain human rights of the relatives of the disappeared person, for example the right to integrity and prohibition of cruel, inhuman or degrading ill-treatment,[7] as well as rights of the society affected by enforced disappearance, in particular the right to truth.[8]

Enforced disappearances are still perpetrated nowadays, and their practice has spread to every

[1] Some authors disagree that Nazi Germany is an accurate reference for origins of enforced disappearance. For example, Rainer Huhle suggests that objective of the Night and Fog decree (which is usually quoted as a precedent of enforced disappearance) was essentially different from the underlying causes of enforced disappearances, because the decree did not aim at eliminating political opponents, but to isolate them until the end of the war. R. Huhle, 'Noche y niebla. Mito y significado', in M. Casado and J. J. López Ortega (coords), *Desapariciones forzadas de niños en Europa y Latinoamérica: del convenio de la ONU a las búsquedas a través del ADN* (Barcelona: Universitat de Barcelona, 2014) 251-278, at 261. Huhle further suggests that ideological purposes and group of victims targeted by the Night and Fog decree differed from the ideology behind and victims targeted by enforced disappearances. *Ibid.*, at 251-252.

[2] A. E. Dulitzky, 'The Latin American Flavor of Enforced Disappearances', 19 *Chicago Journal of International Law* (2019) 423-489, at 429-435. Dulitzky also refers to Indochina and Algeria as contexts where, in the opinion of some, first forms of enforced disappearances were committed by the French between the 1960s and 1980s. *Ibid.*, at 431.

[3] In present text, the term 'disappeared' encompasses any person whose fate or whereabouts are unknown as a consequence of violations defined in Article 2 or/and Article 3 of the UN International Convention on the Protection of All Persons from Enforced Disappearance (ICPPED), depending on the context in which the term is used.

[4] The preamble of the UN Declaration on the Protection of All Persons from Enforced Disappearance of 1992, Article II of the Inter-American Convention on Forced Disappearance of Persons of 1994 and Article 2 of the ICPPED of 2006.

[5] UN Commission on Human Rights, 'Report of the Working Group on Enforced or Involuntary Disappearances' (23 January 1985) UN Doc. E/CN.4/1985/15, § 291.

[6] T. Scovazzi and G. Citroni, *The Struggle against the Enforced Disappearance and the 2007 United Nations Convention* (Leiden, Boston: Martinus Nijhoff, 2007), 1.

[7] See, for example, *Osmanoğlu v Turkey,* App No. 48804/99 (European Court of Human Rights, 24 January 2008) § 98 and *Case of González et al. v Mexico ('Cotton Field')*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Serie C No. 205 (16 November 2009) § 424.

[8] UN Human Rights Council, 'General Comment on the right to truth in relation to enforced disappearance' in 'Report of the Working Group on Enforced or Involuntary Disappearances' (26 January 2011) UN Doc. A/HRC/16/48, § 39.

region of the world.[9] In addition, disappearances are nowadays often perpetrated by non-state actors,[10] for example, for the purpose of human trafficking.[11] Disappearances of migrants by organized crime groups is another considerable issue in certain parts of the world,[12] and street gangs related violence may also lead to disappearances committed by non-state actors.[13] Furthermore, armed conflicts provide contexts for disappearances by non-state groups.[14] These different forms of disappearances are not always accompanied by direct or indirect state support, or a link with the state cannot be established upon the first examination of facts.[15] This is unfortunate because whenever a disappearance does not qualify as enforced disappearance, the protection and guarantees for disappeared persons as well as the relatives are significantly weaker. In view of the differences between the international legal framework on enforced disappearances and disappearances without state involvement, the question on whether the current definition of enforced disappearance should be rethought and expanded to include non-state actors as possible perpetrators is increasingly being raised.[16] It is time to ask ourselves whether the definition of enforced disappearance is conceptualized in a way that corresponds to reality and addresses the rights of all victims.[17] Indeed, there is a need to reflect on whether the unimaginable suffering of victims of different forms of disappearances has been sufficiently taken into account when deciding on the best terminology.

This paper will seek to argue that victims of enforced disappearances are privileged in comparison to victims of disappearances by non-state actors. It will suggest that expanding the definition of enforced disappearance would allow to improve the situation of the latter

[9] Amnesty International, 'Enforced Disappearances', available online at https://www.amnesty.org/en/what-we-do/enforced-disappearances/.

[10] At the outset, it must be explained what is meant by 'disappearances by non-state actors', given that this term is not used in the ICPPED. In the paper, this expression covers the conduct referred to in Article 3 of the ICPPED and thus includes acts defined in Article 2 of the ICPPED when committed by persons or groups of persons acting without the authorization, support or acquiescence of the State.

[11] Mexico is among states where human trafficking is one of the main reasons for widespread disappearances. L. Guercke, 'State Responsibility for Failure to Prevent Violations of the Right to Life by Organized Criminal Groups: Disappearances in Mexico', 21 *Human Rights Law Review* (2021) 329-357, at 345-346. For a general overview of the disappearances in Mexico see also G. Baranowska, *Disappeared Migrants and Refugees: The Relevance of the International Convention on Enforced Disappearance in their Search and Protection* (Berlin: German Institute for Human Rights, 2020), 14 and UN Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearance in the context of migration' (28 July 2017) UN Doc. A/HRC/36/39/Add.2, § 40.

[12] *Ibid.*, UN Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances in the context of migration', §§ 34-43.

[13] See, for example, Human Rights Watch, 'El Salvador. Events of 2020', available online at https://www.hrw.org/world-report/2021/country-chapters/el-salvador.

[14] UN Commission on Human Rights, 'Report of the Working Group on Enforced or Involuntary Disappearances' (27 December 2005) UN Doc. E/CN.4/2006/56, § 8.

[15] The failure of a state to clarify facts (which results in a limited possibility to determine the existence of a link between the acts occurred and the state) was criticized by the WGEID in its follow-up visit to Mexico. UN Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearance. Addendum. Follow-up Report. Mexico' (11 September 2015) UN Doc. A/HRC/30/38/Add.4, § 34.

[16] S. Gastélum Félix for Resilience Fund, 'Enforced disappearances: Who is the real perpetrator?' (2020), available online at https://resiliencefund.globalinitiative.net/enforced-disappearances-who-is-the-real-perpetrator/ and Committee on Accountability of Non-State Armed Groups, 'Not Only the State: Torture and Enforced Disappearance by Non-State Armed Groups' (2009), available online at http://www.europe-solidaire.org/spip.php?article26910.

[17] The term 'victim' in this paper is defined broadly than in Article 24(1) of the ICPPED (the latter stipulates that any person who has suffered harm as the direct result of enforced disappearance should be considered as victim) and encompasses victims who have suffered harm as the direct result of enforced disappearance and/or disappearance by a non-state actor.

victims in two ways: first, state obligations regarding disappearances by non-state actors would be equal to obligations for enforced disappearances and second, such expansion would facilitate holding non-state actors accountable for disappearances.[18] While acknowledging that the term 'non-state actor' has a variety of meanings in different contexts, this paper does not intend to discuss requirements that would have to be fulfilled by a non-state actor to qualify as a perpetrator of enforced disappearances,[19] neither answer the question on whether non-state actors should be bound by some or all human rights obligations regarding enforced disappearances.[20] Instead, the aim is to reflect on the consequences of shifting the focus from state-centric understanding of violation of enforced disappearance to disappearances that cannot qualify as enforced disappearances and thus enjoy weaker legal protection. The goal of the paper is to contribute to discussions within the global human rights regime on the need to recognize that non-state actors are bearers of human rights obligations and must therefore be held accountable for their wrongful behaviour.[21]

The paper will begin by examining the current status of non-state actors in the definition of enforced disappearance in international human rights law (IHRL). This analysis will encompass a brief historical background of discussions and key questions raised in the adoption of the existing legal framework. In order to understand how disappearances by non-state actors are perceived by the two specialized mechanisms created with the view of addressing enforced disappearance, the position of the UN Working Group on Enforced or Involuntary Disappearances (WGEID) and the UN Committee on Enforced Disappearances (CED) will be examined, together with the views of a few other institutions. Finally, the reasons and implications of expansion of the definition of enforced disappearances to include non-state actors will be analysed in the final part of this paper, followed by some concluding thoughts.

[18] The need to think of ways to include non-state actors in the definition of enforced disappearances and hold them accountable for such acts forms part of the general ongoing debates to consider non-state actors accountable for their human rights violations, which have intensified throughout the years. In this regard, see, for example, A. Müller, 'Can Armed Non-state Actors Exercise Jurisdiction and Thus Become Human Rights Duty Bearers?', 20 *Human Rights Law Review* (2020) 269-305.

[19] Nevertheless, it is the author's belief that at least those non-state actors which possess quasi-government territorial control in general have human rights obligations, including those related to enforced disappearance. In this regard, see the Joint Statement by independent United Nations human rights experts on human rights responsibilities of armed non-State actors, issued on 25 February 2021, available online at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797&LangID=E. See also J.-M. Henckaerts and C. Wiesener, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice', in E. Heffes, M. Kotlik and M. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law and Practice* (T.M.C. Asser Press, 2019) 195-227, at 195-196.

[20] As pointed out by Clapham, it is impossible to speak about human rights obligations of non-state actors in abstract terms; the context is crucial for deciding on the scope of obligations applicable. A. Clapham, 'Human Rights Obligations of Non-State Actors: Where are We Now?', in F. Lafontaine and F. Larocque (eds), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Cambridge: Intersentia, 2019) 11-35, at 15.

[21] While acknowledging that consideration of non-state actors in international human rights regime might require reformulating certain competences, mandates or methods of work of international human rights mechanisms, the author asserts that there are various ways how this could be done, dependently on each individual mechanism (for example, one of the decisive factors is whether the mechanism is a UN treaty body or a mechanism of the UN special procedures). However, the author also believes that considerations of non-state actors in IHRL does not necessarily call for the amendment of treaties or mandates of the international human rights mechanisms (see below a concrete example regarding the CED's already existing possibility to examine requests for urgent actions regarding all disappeared persons based on Article 30 of the ICPPED).

2. NON-STATE ACTORS IN THE DEFINITION OF ENFORCED DISAPPEARANCE

2.1 INTERNATIONAL CONVENTION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

The first prohibition of enforced disappearances was triggered by Latin American non-governmental organizations (NGOs), civil society and families of the disappeared, who through their own experiences insisted that enforced disappearance always requires state involvement.[22] As a result, both the UN Declaration on the Protection of All Persons from Enforced Disappearance and the Inter-American Convention on Forced Disappearance of Persons made no reference to non-state actors.[23] When the ICPPED was drafted, the question of non-state actors as potential perpetrators of enforced disappearances was seriously discussed.[24] On the one hand, there were some delegations which acknowledged the need for including non-state actors in the definition given that excluding them would not correspond to the situation on the ground.[25] Furthermore, justifications raised for expanding the definition included the argument that states are not anymore the only subjects of international law.[26] On the other hand, several delegations were concerned that the expanded definition would imply changing the nature of the violation.[27] In particular, states and NGOs from certain countries of South and Central America claimed that enforced disappearance requires specific measures because of the state involvement, and thus any reference to non-state actors in the ICPPED would have been inappropriate.[28] Also, an argument that including non-state actors in the definition would depart from the traditional human rights framework was raised by certain delegations.[29]

[22] O. de Frouville, 'La Convention des Nations Unies pour la Protection de Toutes les Personnes Contre les Disparitions Forcées: les Enjeux Juridiques d'une Négociation Exemplaire', 6 *Droits fondamentaux* (2006) 1-92, at 20-21.

[23] In the sphere of criminal law, the Rome Statute of the International Criminal Court (ICC), which was signed before the adoption of the ICPPED (in 1998), included political organizations as potential perpetrators of enforced disappearance as a crime against humanity (Article 7(2)(i) of the Rome Statute). The term 'political organization' has not yet been completely clarified, but the position of the ICC seems to be that only political organizations with certain characteristics fall within the definition. A. R. Wolffenbuttel, 'Enforced Disappearances: Applicable to Political Organizations?', 61 *Virginia Journal of International Law* (2021) 159-174, at 164-167.

[24] Given that the Rome Statute was adopted before the ICPPED, the discussions regarding non-state actors during the adoption of the ICPPED were partially influenced by the definition of enforced disappearance in the Rome Statute. For a detailed discussion on arguments in favour and against the inclusion of non-state actors in the definition of enforced disappearances raised during the negotiations of the ICPPED, see O. de Frouville, 'Criminalizing or Trivializing Enforced Disappearances? The Issue of 'Non-state Actors', in O. de Frouville and P. Šturma (eds), *Vers la pénalisation des droits de l'Homme* (Paris: Pedone, coll. Publications du C.R.D.H., to be published in 2021) 147-196, at 155-158. All in all, it is clear that position of states on this matter was highly unbalanced; however, since the beginning some states welcomed the idea of exploring responsibility of non-state actors. UN Commission on Human Rights, Report of the International Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance' (12 February 2003) UN Doc. E/CN.4/2003/71, § 35.

[25] UN Commission on Human Rights, 'Report of the International Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance' (2 February 2006) UN Doc. E/CN.4/2006/57, Annex II, 50.

[26] UN Commission on Human Rights, 'Report of the International Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance' (10 March 2005) UN Doc. E/CN.4/2005/66, § 30.

[27] *Ibid.*, § 31.

[28] A. Vranckx, 'A Long Road towards Universal Protection of Enforced Disappearance', *International Peace Information Service - Research* (2006) 1-19, at 10.

[29] UN Commission on Human Rights, 'Report of the International Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the

Eventually, non-state actors were not included in the definition of enforced disappearance enshrined in Article 2 of the Treaty, but Article 3 of the ICPPED requires states parties to investigate and punish disappearances committed by non-state actors. Hence, the ICPPED remained faithful to the traditional understanding of IHRL, according to which human rights violations can be committed only by states.[30] The concern on how to enforce obligations from the ICPPED against non-state actors, given that only states are the signatories of the Treaty, plausibly also played a role in deciding that non-state actors will be left out from the definition. In order to define disappearances committed by non-state actors, the ICPPED pointed to the definition of enforced disappearance (i.e. 'acts defined in Article 2'). The decision not to use the term 'enforced disappearance' for disappearances without state involvement shows that symbolism has prevailed over the increasing violence perpetrated by non-state groups, which was demanding a modification of the definition.[31]

2.2 GUIDING PRINCIPLES FOR THE SEARCH FOR DISAPPEARED PERSONS

Between 2016 and 2019, the phenomenon of disappearances by non-state actors was once again brought up during the adoption process of the UN Guiding Principles for the Search for Disappeared Persons (GPs), a soft law document adopted by the CED with the view of providing guidance for the search for disappeared persons to states that are parties and non-parties to the ICPPED.[32] Given the ultimate objective of the GPs, which is to improve search practices, as well as its nature (soft law), it can likewise be a useful reference for actors other than states (for example, NGOs or international organizations).

Non-state actors were explicitly mentioned in the draft version of the GPs.[33] Draft GP 6(1) stated: 'Each state in which cases of enforced disappearance occur or acts comparable to enforced disappearance are committed by non-state groups should have competent institutions with the capacity to search for disappeared persons'. Before adopting the final version of the GPs, the CED asked for inputs on the draft version of the GPs, and various submissions commented on the draft GP 6(1). Some contributors underlined the need to clarify that the GPs are applicable to all disappearances notwithstanding the perpetrator[34] or emphasized that excluding some disappeared persons from the GPs would result in disregarding the reality in which disappearances are committed nowadays.[35] Others, however, opposed to the inclusion of non-state actors in the GPs and claimed that any reference to disappearances by non-state actors would be inconsistent with the wording used in the ICPPED.[36] The final version of the GPs took into

Protection of All Persons from Enforced Disappearance' (23 February 2004) UN Doc. E/CN.4/2004/59, § 31.

[30] R. Huhle, 'Non-State Actors of Enforced Disappearance and the UN Convention for the Protection of All Persons from Enforced Disappearance', 26 *Humanitäres Völkerrecht – Informationsschriften/Journal of International Law of Peace and Armed Conflicts* (2013) 21-26, at 23.

[31] O. de Frouville, 'La Convention des Nations Unies pour la Protection de Toutes les Personnes Contre les Disparitions Forcées', *supra*, at 23.

[32] UN Committee on Enforced Disappearances, 'Guiding Principles for the Search for Disappeared Persons' (8 May 2019) UN Doc. CED/C/7. The GPs are a collection of a good practices based on a binding (the ICPPED) and non-binding (for example, the Minnesota Protocol on the Investigation of Potentially Unlawful Death) documents. They were adopted by the CED in consultation with civil society organizations, organizations of victims, experts, states, etc.

[33] Draft version of the GPs is available online at https://digitallibrary.un.org/record/1651402.

[34] Input received from the Foundation for Justice and the Democratic Rule of Law, available online at https://www.ohchr.org/EN/HRBodies/CED/Pages/Guiding-Principles.aspx.

[35] Input received from the *Ciudadanos en Apoyo a los Derechos Humanos* and the *Centro de Derechos Humanos de las Mujeres* (CADHAC y CEDEHM), available online at https://www.ohchr.org/EN/HRBodies/CED/Pages/Guiding-Principles.aspx.

[36] Inputs received by the *Campaña Nacional Contra la Desparición Forzada en México* and the Asian Federation

account both sides and excluded specific mentioning of the term 'non-state actor', but broadened the applicability of all provisions to any disappeared person, notwithstanding the perpetrator.[37]

3. A FLAVOUR OF DIFFERING VIEWS

3.1 WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

The WGEID, whose mandate is purely humanitarian (it serves as a channel for communication between the families and states aiming at clarifying the fate and whereabouts of victims of enforced disappearance), argued for years that its work cannot encompass cases if 'they are attributed to persons or groups not acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government', two examples being the terrorists and groups of insurgents.[38] It also stated that enforced disappearance is a violation perpetrated by a state, while kidnapping should be used for acts tantamount to enforced disappearances when committed by non-state actors.[39] The main justification the WGEID gave was that broadening the definition creates the danger of diluting state responsibility.[40] At the same time, it expressed its negative stance towards violence committed by non-state actors by saying that it 'condemns the practice of disappearance irrespective of who the perpetrators may be'.[41]

Despite its work being limited to enforced disappearances for many years, in the spirit of its humanitarian mandate the WGEID eventually began with the discussion on whether the scope of its work should be expanded to cover the review of cases regarding disappearances by certain non-state actors. In light of the fact the WGEID was receiving cases regarding such disappearances from Mexico, Syria, Nepal, the Western Balkans and Sri Lanka, among others, the WGEID decided to expand its mandate to include limited situations of disappearances by non-state actors in 2019. In order to justify its decision to review 'acts tantamount to enforced disappearances if committed by non-state actors that possess territorial governmental control or quasi-state functions', the WGEID referred to its humanitarian mandate and the lack of an effective remedy for victims.[42] Even though its changing stance was formulated cautiously and in limited terms (as the WGEID agreed to review only those cases of non-state actors which comply with a demanding standard), it is clear that the suffering of victims was put at the

Against Involuntary Disappearances, available online at https://www.ohchr.org/EN/HRBodies/CED/Pages/Guiding-Principles.aspx.

[37] It is unfortunate that the definition of a disappeared person is not explicitly spelled out in the GPs. Consequently, the scope of application of the document is somewhat vague. For a view which suggests that terminology in the GPs follows the ICPPED (consequently, the terms used in the GPs should have the same meaning as the meaning attributed to them in the ICPPED), but is also general enough to be applicable to different situations worldwide (on this basis, it could be argued the only reasonable conclusion is that the expression 'disappeared person' should go beyond the cases of enforced disappearance), see M. C. Galvis Patiño and N. S. Arias Ávila, *Los Principios Rectores para la Búsqueda de Personas Desaparecidas: origen y contenido*, (ideas verdes no. 19, Bogota: Fundación Heinrich Böll Oficina Bogotá – Colombia, 2019), 9.

[38] UN Human Rights Council, 'Methods of Work of the Working Group on Enforced or Involuntary Disappearances' (2 May 2014) UN Doc. A/HRC/WGEID/102/2, § 8. These working methods are currently under review.

[39] UN Commission on Human Rights, 'Report of the Working Group on Enforced and Involuntary Disappearances. Addendum: Mission to Colombia' (17 January 2006) UN Doc. E/CN.4/2006/56/Add.1, §§ 48-49.

[40] *Ibid.*, § 49.

[41] UN Commission on Human Rights, 'Report of the Working Group on Enforced or Involuntary Disappearances' (27 December 2005), *supra*, § 8.

[42] UN Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances' (30 July 2019) UN Doc. A/HRC/42/40, § 94.

forefront as the main reason for the change in approach.

The WGEID's accommodating stance when addressing the question of non-state actors' violence is also reflected in some other decisions: for example, in 2019, the WGEID acknowledged that 'there is growing authority that customary IHRL applies also to non-state armed groups obligations' and 'insofar as human rights obligations are directly applicable to it, the non-state armed group is under a duty to provide effective remedies to victims in situations of alleged violations of customary human rights law and alleged serious violations of customary humanitarian law'.[43] Furthermore, in March 2021, the WGEID referred to both state and non-state actors as 'duty bearers' when discussing the context of enforced disappearances in Syria,[44] which suggests that it considers non-state actors to be bound by IHRL.[45]

Despite this noteworthy progress, the high threshold established by the WGEID in 2019 indicates that most cases of disappearances by non-state actors, including those committed by street gangs and organized criminal groups, would not be considered for review by the WGEID. This is from the perspective of those who are affected by the disappearances of such groups disappointing, because in cases of violation of human rights, including non-state actors in the definition results in improved protection for victims.[46] Furthermore, it is the view of the author that the WGEID could, given the nature of its mandate, which does not deal with establishing responsibility and is also independent from state ratifications, adopt a more flexible approach and admit broader scope of cases. It could go one step further and consider other forms of scrutiny over behaviour of non-state actors. In this regard, the practice of the UN Security Council (UNSC) Working Group on Children and Armed Conflict could be a useful reference. This Working Group is in charge of reviewing the reports on violations against children affected by armed conflict issued by the UN Special Representative of the Secretary-General on Children and Armed Conflict.[47] These reports are prepared on the basis of direct engagement with any armed group listed in the annexes of the Secretary-General's report on children and armed conflict, meaning any armed group which has been identified as perpetrating a series of certain violent acts against children (independent of the level of organization of the armed group, its nature and other characteristics).

3.2 COMMITTEE ON ENFORCED DISAPPEARANCES

The CED, which is a UN treaty body in charge of monitoring states parties' implementation of the ICPPED by reviewing their reports, registering urgent actions, documenting

[43] Mandates of the WGEID; the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 'Communication to the De facto authorities of Sana'a, Yemen' (3 December 2019) UN Doc. OTH 55/2019.

[44] UN Web TV, 'B. Duhaime (Working Group on Enforced Disappearances) on the situation in the Middle East (Syria) - Security Council VTC Briefing' (15 March 2021), available online at https://media.un.org/en/asset/k1j/k1j8lzqkbc.

[45] In her report from 2018, the Special Rapporteur on extrajudicial, summary or arbitrary executions used terms 'duty bearers' and 'bound by human rights obligations' interchangeably. UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on armed non-State actors: the protection of the right to life' (5 June 2018) UN Doc. A/HRC/38/44, §§ 8, 19, 37, etc.

[46] UN Commission on Human Rights, 'Report of the Working Group on Enforced and Involuntary Disappearances. Addendum: Mission to Colombia', *supra*, § 48. The WGEID then pointed to enforced disappearances as an exception to this rule, saying that expansion of the definition would result in diluting state responsibility. Upon careful reading, however, it can be noticed that the WGEID in this case referred to the definition of enforced disappearance as a crime under international law, and not as a human rights violation.

[47] UN Security Council, 'Resolution 1612' (26 July 2005) UN Doc. S/RES/1612 (2005), § 8. For more detail on the UN Special Representative of the Secretary-General on Children and Armed Conflict, see subsection 5.1.

individual communications of victims claiming violation of the Treaty by a state party, etc., left no doubt about its discomfort with expanding the definition of enforced disappearances to include non-state actors when discussing the report of Colombia. Colombian's legislation provides for a definition of enforced disappearances pursuant to which state involvement is not a precondition for the crime to be committed (an offense can be committed either by an individual belonging to an armed group, public official or someone acting under control or with acquiescence of a state official).[48] As a consequence of limiting the term enforced disappearance to state violations, the CED has interpreted the ICPPED in a way as to primarily deal with state obligations for enforced disappearances.[49]

However, the CED would have a possibility to apply the ICPPED in a more extensive manner as to include disappearances by non-state actors, and such approach would result in broadening the legal protection for victims of disappearances by non-state actors. For example, regarding Article 30 of the ICPPED on urgent actions, the CED's position in 2017 was that whenever information 'provided by the parties in the course of urgent action procedure' indicates that state agents are not involved in concerned enforced disappearance, the urgent action would be immediately closed by the CED.[50] In light of the fact that most requests from urgent actions submitted to the CED relate to presumed enforced disappearances in Iraq and Mexico, [51] where both state and non-state actors are committing different forms of violence, it is crucial that the CED reviews requests with uncertainty about state involvement. In the author's view, the case should not be discontinued by the CED even when the involvement of the state is eventually acknowledged as non-existing because of the negative consequences which such decision might have on the victim (namely, to be left without any legal protection, in particular if the state is failing to fulfil its obligations regarding investigation of acts as mentioned in Article 3 of the ICPPED). In fact, if the CED wishes to do so, it is not precluded to deal with urgent actions concerning disappearances by non-state actors,[52] as Article 30 of the ICPPED at no point refers to victim of enforced disappearance, and speaks about disappeared persons instead.[53]

3.3 OTHERS

Differently from the WGEID and the CED, some other institutions seem to be in favour of labelling disappearances by non-state actors as enforced disappearances. For example, the UN Human Rights Committee suggested that enforced disappearance is an appropriate term for disappearances perpetrated by 'forces independent of or hostile to a state party, in

[48] UN Committee on Enforced Disappearances, 'Concluding observations on the report submitted by Colombia under article 29(1) of the Convention' (27 October 2016) UN Doc. CED/C/COL/CO/1, §§ 15-16. In the recent discussion with Colombia (in April 2021), the CED repeated its concern. UN Committee on Enforced Disappearances, 'Concluding observations on the additional information submitted by Colombia under article 29(4) of the Convention' (2 June 2021) UN Doc. CED/C/COL/OAI/1, § 4.

[49] The only exception is the state obligation to take appropriate measures for investigating acts tantamount to enforced disappearances and to bring those responsible to justice, which is stipulated in Article 3 of the ICCPED.

[50] UN Committee on Enforced Disappearances, 'Report on requests for urgent action submitted under article 30 of the Convention' (6 April 2017) UN Doc. CED/C/12/2, §§ 5-8.

[51] UN Committee on Enforced Disappearances, 'Report on requests for urgent actions submitted under article 30 of the Convention' (12 May 2021) UN Doc. CED/C/20, § 16.

[52] A. Clapham, 'Armed Non-state Actors and the UN Convention on Enforced Disappearances', in *Réciprocité et universalité : sources et régimes du droit international des droits de l'homme : mélanges en l'honneur du professeur Emmanuel Decaux* (Paris: Pedone, 2017) 443-448, at 448.

[53] The ICPPED provides no clarification on whether the terms 'victim of enforced disappearance' and 'disappeared person' are used interchangeably in the text of the Treaty. The decision to use both terms in the ICPPED could be relied on by the CED to justify that a person disappeared by non-state actors falls within the meaning of 'disappeared person'.

addition to disappearances attributable to a state party'.[54] The UN Commission of Inquiry on Syria said that states, individuals and non-state actors are at a minimum bound by human rights obligations that have a status of jus cogens, including enforced disappearances.[55] The Parliamentary Assembly of the Council of Europe also acknowledged the need to establish responsibility of non-state actors for enforced disappearances and impose duties on non-state actors directly.[56] It instructed all member states of the Council of Europe to ratify the ICPPED by a way of compromise (meaning to address duties borne by non-state actors, given that this matter has not been settled by the ICPPED).[57]

4. NEED FOR AN EXPANSION OF THE DEFINITION OF ENFORCED DISAPPEARANCE

4.1 SIMILARITIES BETWEEN THE EFFECTS ON VICTIMS

The most convincing reason for expanding the definition of enforced disappearance to include non-state actors is the harmful outcome of such violations and negative effects on victims, which are essentially the same in cases of enforced disappearances and disappearances by non-state actors. In both scenarios, the disappeared persons are placed outside the protection of law and usually subjected to absolute control of the perpetrator, without any possibilities to refer to legal guarantees. Also, families of disappeared persons live in constant uncertainty and often fear being exposed to disappearances and other forms of violence if they start inquiring about their loved one.[58] Equally destructive effects of disappearances by non-state actors and enforced disappearances further reflect in the scope of mandates of institutions in charge of the search, which is usually not limited to one type of disappearance.[59] It would be against the nature

[54] UN Human Rights Committee, 'Communication No. 2143/2012' (10 November 2015) UN Doc. CPR/C/114/D/2143/2012, § 11.3.

[55] UN Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic (22 February 2012) UN Doc. A/HRC/19/69, § 106. Further examples of situations, where jus cogens norms were referred to as binding on armed non-state actors, are mentioned in Geneva Call, 'Positive Obligations of Armed Non-State Actors: Legal and Policy Issues. Report from the 2015 Garance Talks. The Garance Series: Issue 1' (2016) 7.

[56] Council of Europe, Parliamentary Assembly, 'Report: The International Convention for the Protection of all Persons from Enforced Disappearance' (23 February 2012) Doc. 12880, § 65.

[57] *Ibid.*, § 75.

[58] M. L. Vermeulen, 'Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance', PhD thesis (Utrecht: Utrecht University, 2012) 429.

[59] For example, the Missing Persons Institute in Bosnia and Herzegovina searches for all missing persons from the armed conflict, including those that were disappeared by a non-state entity Republika Srpska. Another example is the Mexican National Search Commission, whose mandate for

and purpose of the work of such institutions to discriminate between victims and offer assistance only to a certain group based on an argument that the perpetrator does not fulfil requirements of a legal definition.

4.2 MIRROR OF REALITY

Expansion of the definition seems justified due to the high number of disappearances committed by non-state actors, which has increased significantly throughout the years.[60] In this regard, insistence to see enforced disappearance as a state violation by certain NGOs is a concern that must be seriously considered.[61] As previously explained, some states and NGOs were against the expansion of the definition of enforced disappearance in the ICPPED due to the belief that the state element forms an essential part of an enforced disappearance. Strong resistance was due to the fact that enforced disappearances were used as a tool of state policy to achieve a certain aim, including to spread terror and suppress anyone considered to be a rebel or political opponent.[62] This heinous human rights violation was thus perceived as inherently dependent on the state apparatus. However, the diversity of forms in which disappearances are committed today and by whom have begun to alter the views on this matter. This change is already reflected in the scope of application of the GPs, which goes beyond enforced disappearances.

Also, states have discovered new ways to hide behind the violence by non-state groups, meaning that identifying the link between the acts in question and the state has become more complex, especially in scenarios where both state and non-state actors are perpetrating violations.[63] Since the refusal to share information on the disappeared and concealment of facts are inherent in the perpetration of violations such as enforced disappearance, states are unlikely to acknowledge their part of responsibility. With all this in mind, altering the law or adopting a different approach to its interpretation is needed to ensure that it corresponds to reality. Such solution could also make non-state actors understand that committing disappearances, irrespective of the perpetrator, are relevant concerns for IHRL, and will not be overlooked by the international community.[64] This is because labelling a violation as 'enforced disappearance' is often determinative for exerting pressure from abroad to advance a national human rights agenda, including the right to truth of the relatives of disappeared persons.[65]

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the search includes any person whose disappearance is presumably linked with the commission of a crime.

[60] UN Secretary General, 'Amid Growing Use of Enforced Disappearances by Non-State Actors, Secretary-General Urges Prompt Action in Message on International Day Commemorating Victims' (28 August 2015) SG/SM/17038-OBV/1508, available online at https://www.un.org/press/en/2015/sgsm17038.doc.htm.

[61] See, for example, AFAD, 'Position Paper on the Proposed Mandate Expansion of the UN WGEID' (15 March 2016), available online at https://www.afad-online.org/18-resources/288-position-paper-on-the-proposed-mandate-expansion-of-the-un-wgeid.

[62] Scovazzi and Citroni, *supra*, 7-8.

[63] In such situations, the identity of perpetrators become 'muddy'. J. Gallagher, '(Enforced) disappearances – when state and criminal perpetrators blur', *Völkerrechtsblog* (18 December 2020), available online at https://voelkerrechtsblog.org/enforced-disappearances-when-state-and-criminal-perpetrators-blur/.

[64] N. Carillo Santarelli, 'Necessity And Possibilities Of The International Protection Of Human Dignity From Non-State Violations', PhD Thesis (Madrid: Universidad Autonóma de Madrid, 2013) 123-124.

[65] Nevertheless, we must be aware that expansion of the definition might encourage governments to point to disappearances committed by non-state actors in order to distract from enforced disappearances with state involvement. Yet, the risk of scapegoating, where the state is likely to transfer responsibility for its own violations to non-state actors, should not be the reason for closing the doors to expanding the definition.

5. IMPLICATIONS OF AN EXPANSION OF THE DEFINITION OF ENFORCED DISAPPEARANCE

5.1 STATE OBLIGATIONS AND ACCOUNTABILITY OF NON-STATE ACTORS

The expansion of the term of enforced disappearance could have consequences at two different levels: first, it could broaden the scope of state obligations regarding disappearances by non-state actors and second, it could open the doors to holding non-state actors directly accountable for their violations. In both cases, the position of the victims would be improved: for example, the WGEID's change of stance in the definition could imply that a significant number of victims feel their voices are being heard.

If the expansion of the term resulted in placing disappearances by non-state actors to the level of enforced disappearances, all the ICPPED's provisions could undoubtedly apply to disappearances by non-state actors. This would result in strengthening the position of victims of disappearances perpetrated by non-state actors, as they would have at their disposal the same legal tools as victims of enforced disappearance. For the time being, international law affords different levels of protection to disappeared persons and their relatives, depending on whether the state is involved in the violation. For example, the ICPPED stipulates that states are bound to ensure that victims of enforced disappearance have the right to acquire reparation and compensation,[66] but it fails to provide any similar guarantees for victims of disappearances by non-state actors.[67] The most victim friendly solution would be to expand duty to grant reparations to non-state actors,[68] but also to the state as an alternative, at least in those cases where a state is failing to investigate acts perpetrated by non-state actors or/and exercise due diligence in demanding reparation from them. Also, obligation of states to extradite perpetrators involved in the perpetration of disappearances where no link with the state exists would be indisputable if non-state actors are included in the definition.[69] Extraterritorial prosecution of enforced disappearance with no state involvement would be facilitated, and states would be obliged to provide mutual legal assistance and cooperation for all disappearances, no matter who is the

[66] Article 24(4) of the ICPPED.

[67] The Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) are insufficient to fill the protection gap, as the issue of responsibility (as well as the duty of reparation and compensation) of non-state actors is outside their scope. International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries' in 'Report of the International Law Commission on the Work of Its Fifty-third Session, vol II, Part 2 (12 December 2001) UN Doc. A/56/10, General Commentary, § 4(d). Furthermore, applying the ARSIWA to non-state actors by analogy does not seem a suitable solution, because the ARSIWA cannot really capture the peculiarities of non-state actors (an example of such peculiarity is their temporary existence). J. d' Aspremont, A. Nollkaemper, I. Plakokefalos, and C. Ryngaert, 'Sharing Responsibility Between No-State Actors and States in International Law: Introduction', 62 *Netherlands International Law Review* (2015) 49-67, at 61.

[68] In this regard, see Article 15 of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which stipulates that a person, a legal person, or other entity should provide reparation to the victim if he/she/it is found liable for such reparation. While discussion on the most appropriate reparation regime for human rights violations by non-state actors is beyond the scope of this paper, it has been suggested that such regime would possibly have characteristics different from those of the reparation regime for states and international organizations. International Law Association, 'Washington Conference (2014). Non-State Actors' (2014) 10-11.

[69] Although it could be argued that Article 13 of the ICPPED already implies the duty to demand extradition regarding disappearances by non-state actors if there is no domestic prosecution. Clapham, 'Armed Non-state Actors and the UN Convention on Enforced Disappearances', *supra*, at 447.

perpetrator.[70] The CED's indisputable competence to consider urgent actions concerning disappearances perpetrated by non-state actors would be another consequence of broadening the definition.[71]

Expanding the definition would also open the doors to consider non-state actors to be directly bound by the ICPPED. By endorsing the idea that non-state actors have human rights obligations, the ICPPED would contribute to establishing a parallel system of responsibility, with the ultimate purpose of protecting people and preserving human dignity. Such approach would go hand in hand with several developments in IHRL more generally: for example, in 2013, the UN Committee on the Elimination of Violence against Women said the UN Convention on All Forms of Discrimination against Women can provide simultaneous and complementary obligations for various actors,[72] and then called upon non-state actors to respect women's rights in conflict and post-conflict situations as well as to commit themselves from committing gender based violence.[73] A similar approach could be adopted by the CED with respect to the obligations laid in the ICPPED.

The CED's pronouncement on obligations of non-state actors flowing from the ICPPED could be used as a normative basis by the UNSC, which has the power to adopt binding decisions for violations of IHRL (for example, by imposing bans or freezing assets) or any mechanism created by the UNSC with the purpose of engaging with non-state actors directly.[74] While particularly relevant for the WGEID, it can be mentioned that such solution would not be a novelty in the broader system of the UN machinery: for example, the UN Special Representative of the Secretary-General on Children and Armed Conflict, created on the basis of the UNSC resolution, has been conducting such practice since 2003.[75] The Special Representative engages in a dialogue with armed groups, which are listed as recruiting children in violation of international law, in order to prepare an action plan to end any among six listed violations armed group is perpetrating.[76] If the group complies with this action plan, it is eventually delisted. Despite the differences in their normative bases and mandates, the Special Representative's practice could be of guidance to the WGEID regarding

[70] In this regard, see Articles 14 and 15 of the ICPPED. Victims of disappearances committed by non-state actors are now more exposed to danger that the perpetrator will never be prosecuted if he or she escapes to a foreign territory. Vranckx, *supra*, at 11.

[71] A brief clarification on what would be the obligations of a state regarding disappearances by non-state actors perpetrated within its jurisdiction must be made, in cases where a non-state actor would be the addressee of the requests before the WGEID or the CED: in the paragraph of the text, only a few examples are introduced, whereas the whole list of state obligations would depend on the possibility of the WGEID or the CED to interact with non-state actors directly and in the case of the CED, also to hold them accountable for disappearances. If the options to engage with non-state actors directly existed, state obligations would have been less expansive than if only a state could be held responsible for disappearances by non-state actors. In the latter scenario, it is clear that all the ICPPED provisions would be applicable and have to be implemented directly by a state. In this connection, a concern with broadening the scope of state obligations to such extent is placing an unreasonable burden on states.

[72] UN Committee on the Elimination of Violence against Women, 'General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations' (1 November 2013) UN Doc. CEDAW/C/GC/30, § 13.

[73] *Ibid.*, § 18. For further examples of situations, in which the UNSC and other UN mechanisms issued a call upon non-state armed groups to stop committing human rights violations, see International Law Association, *supra*, at 6.

[74] For examples of the UNSC's accountability measures for non-state actors in conflict situations, see A. Clapham, 'Challenging the Myths which Suggest that Human Rights Bodies Cannot Address Armed Non-state Actors in Situations of Armed Conflict: With Special Emphasis on the Case of Agnes Taylor', in G. Gaggioli (ed), *The Role of Human Rights Mechanisms in Implementing International Humanitarian Law* (Edward Elgar Publishing, to be published).

[75] UN Security Council, 'Resolution 1460' (30 January 2003) UN Doc. S/RES/1460, § 4.

[76] More information on action plans is available online at https://childrenandarmedconflict.un.org/tools-for-action/action-plans/.

how to accommodate its approach towards non-state actors in order to strengthen the protection of victims, provided, of course, that a mechanism similar to the Special Representative's is established by the UNSC to suppress disappearances by non-state actors. Similarly, to the UN mechanisms working on children and armed conflict, any non-state actor engaging in a series of disappearances could be considered as legible, regardless of its level of organization, de facto control, etc. to fall within the mandate of the WGEID.

Since many provisions in the ICPPED regulate relationships between states, they could serve as a basis to govern relationship between non-state actors. For example, a non-state actor would have to adhere to the obligations such as mutual assistance and prohibition of deportation of a person to a place (in the same or a different state) where substantial grounds for believing there is a risk of being subjected to disappearance by a different non-state group exist.[77] Whereas a necessary precondition for the CED to be able to supervise such relationship would be the expansion of its mandate (based on the amendments of the ICPPED), at the time being the Treaty could be used as a guidance for non-state entities interested in taking upon certain IHRL commitments.[78]

5.2 POLITICAL IMPLICATIONS

Certain difficulties might arise if the WGEID or the CED decide to expand their mandates due to expansion of the term 'enforced disappearance'.[79] For example, this would imply the need to consider much larger number of cases of disappearances for which these two bodies might not have the resources and the capacity. Consequently, in order to afford equal protection to all categories of victims, the number of staff and budget assigned to the WGEID's and the CED's work would have to be increased. Another real concern with expanding the definition of enforced disappearances to non-state actors is that the ICPPED might receive less political support because states are likely to fear that the scope of their obligations under the ICPPED will become too broad.[80] There is, however, also a chance that certain states would see a broader definition as a possibility to switch the CED's attention away from state violations to non-state actors' violence or an opportunity to strengthen their international human rights protection, which could result in their increasing will to ratify the ICPPED.[81]

[77] In this regard, see Articles 15 and 16 of the ICPPED.

[78] In more general terms, a possible way of guaranteeing accountability of non-state actors interesting in promoting human rights agenda is to establish a supervisory mechanism in charge of monitoring commitments made by a non-state actor. Such a mechanism would ideally have the powers to hold non-state actors accountable in cases of violation of their commitment(s). Albeit in different context (i.e. shared responsibility), this solution is suggested by d' Aspremont, Nollkaemper, Plakokefalos and Ryngaert who argue that since the law of responsibility is so modest concerning non-state actors, accountability and thinking outside of the box are essential for addressing their behaviour. J. d' Aspremont, A. Nollkaemper, I. Plakokefalos, and C. Ryngaert, *supra*, at 60-62.

[79] In the case of the CED, the expansion of the term would have to be done through amendment of the ICPPED.

[80] For example, states would surely oppose possibility of being held internationally responsible for every disappearance by a non-state actor. It would be important to think how to incorporate such a change in way to ensure feasibility to apply the CED's functions as designed in the ICPPED (see, for example, Articles 33 and 34 of the ICPPED) and encourage new ratifications, given that the number of ratifications of this Treaty is already quite low (64 states as of September 2021).

[81] In other words, the switch of focus from state to non-state actors' violations is likely to please some of those states where non-state actors are committing widespread violations, and willingness to adhere to the CED's expansion of powers could be perceived as an advantage for states interested in improving their international reputation in human rights matters.

6. CONCLUDING THOUGHTS

The above analysis shows that characterization of the violation matters because it determines what the consequences in terms of obligations are, on whom they lie and what the implications are for victims. Under the current framework, many victims feel rejected, in particular because they cannot lodge a complaint against a non-state actor or submit a case to the WGEID or the CED given that disappearance of their loved one is considered outside the ambit of the definition. The expansion of definition of enforced disappearance to include disappearances by non-state actors would make the victims of violence conducted by non-state actors believe that their suffering is recognized and considered no less grave than the one experienced by victims of enforced disappearances. Victims of disappearances by non-state actors would be protected by the 'best law', which can capture the true essence of committed violations. By placing implications for victims at the centre of consideration, the expansion of the definition would contribute to achieving one of the key aims of IHRL, which is to protect human dignity.

Expansion of the notion enforced disappearance to include non-state actors would be worthwhile to consider also in the light of the pressing challenges such as the growth of disappearances by non-state actors and common lack of obvious link with the state apparatus. It would enable to broaden and clarify the scope of state obligations from the ICPPED regarding such disappearances as well as to contribute to the discussions on holding non-state actors directly accountable for human rights violations. In the future, the WGEID and the CED should, within the scope of their different mandates, be inspired by the international institutions which have already pronounced themselves on the inclusion of non-state actors in the human rights agenda and reflect on the need to adapt their mandates in order to correspond to the circumstances in which disappearances are perpetrated nowadays. In parallel, the accountability measures by the UNSC can be likewise explored as an option to address disappearances by a non-state actor.

In conclusion, a question that the WGEID and the CED will soon have to address is what would be the most suitable solution to deal with disappearances by non-state actors. While the WGEID's change in stance will depend on its members, the CED might be at first sight confronted with more obstacles, given that certain changes in the CED's mandate would be needed in order for the Committee to adopt a different perspective on non-state actors, and that only state parties might amend the functions of the CED. However, as explained in more detail above, the CED already has (albeit limited) the possibility to deal with disappearances by non-state actors at its disposal. If amendment of the ICPPED sounds a better solution because it would allow for more significant change in position of the CED, it is likely that many current state parties would be in favour of establishing a parallel framework to responsibility of states and, what is more, such change could potentially encourage new state parties, which are facing high level of violence by non-state actors on their territory, to ratify the Treaty.

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