

# Note

## Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War

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### I. INTRODUCTION

The criminal prohibition of enforced disappearance has a long and underappreciated history, deriving from the laws of war. In this Note, I challenge the notion that the criminal prohibition of enforced disappearance is a relatively recent product of human rights law.<sup>1</sup> In the conventional human rights conception, the international crime of enforced disappearance evolved out of human rights instruments and declarations created in response to disappearances perpetrated in Latin America during the 1960s, 1970s, and 1980s.<sup>2</sup> According to this account, the key milestones in the criminalization of

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1. “Enforced disappearance of persons” means “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.” Rome Statute of the International Criminal Court art. 7(2)(i), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

2. See MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT: GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES 526-27 (2002); STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG

the enforced disappearances are the 1992 Declaration on the Protection of All Persons from Enforced Disappearance,<sup>3</sup> the 1994 Inter-American Convention on Forced Disappearance of Persons,<sup>4</sup> and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.<sup>5</sup> In fact, the delegations negotiating the Rome Statute of the International Criminal Court (ICC) were unaware of any prior precedent for the prosecution of enforced disappearance and were initially reluctant to include the offense as a crime against humanity, on par with murder, rape, and torture.<sup>6</sup> This position is also articulated by Antonio Cassese, who argues that enforced disappearance was not criminal under customary international law (CIL) when the Statute of the ICC was enacted in 1998, but was rather a new crime representing “a nascent rule, evolved primarily out of treaty law.”<sup>7</sup>

My thesis is that conduct amounting to enforced disappearance has long been criminal under international law and that the origins of this criminal prohibition lie in the laws of war, not in human rights law.<sup>8</sup> I show that, like rape, enforced disappearance is an offense whose underlying conduct was deemed criminal under the laws of war, before any explicit reference to the crime was codified.<sup>9</sup> The foundational case law on enforced disappearance is found in the judgments of the Nuremberg war crimes tribunals, rather than in more recent human rights decisions by the Inter-American Court of Human Rights or the European Court of Human Rights. I argue that enforced disappearance was initially prohibited as criminal within a narrow context, belligerent occupation during armed conflict, but that this limited prohibition has subsequently been expanded to apply to additional contexts. The true contribution of human rights instruments, such as the 2006 International Convention on the Protection of All Persons from Enforced Disappearance, is not that they make enforced disappearance a crime under international law, but that they criminalize those disappearances which do not amount to war crimes or crimes against humanity.

Substantively, the laws of war and human rights law have become increasingly intermeshed since the Second World War.<sup>10</sup> However, the purposes of these bodies of law, their applicability, and the remedies for their violation have been historically distinct. Human rights law protects the bodily

LEGACY 128-29 (3d ed. 2009).

3. Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. Doc. A/RES/47/133 (Dec. 18, 1992).

4. Inter-American Convention on Forced Disappearance of Persons art. 3, June 9, 1994, 33 I.L.M. 1429 [hereinafter Inter-American Convention].

5. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. A/RES/61/177, U.N. Doc. A/HRC/RES/2006/1 (Dec. 20, 2006) [hereinafter Enforced Disappearance Convention].

6. Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 79, 102 (Roy S. Lee ed., 1999).

7. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 80 (2003).

8. Throughout this Note, the terms “laws of war” and “international humanitarian law” are used interchangeably.

9. See Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT’L L. 424, 425 (1993).

10. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT’L L. 239 (2000).

integrity and dignity of the governed from their governments and is intended to protect the individual in all circumstances. To the extent that remedies for violations of human rights law exist, they generally take the form of civil damages against states. In contrast, the laws of war are the *lex specialis* governing armed conflict and are derived from the medieval tradition of chivalry which seeks to ensure minimal fair play and minimize violence unrelated to legitimate military objectives. The traditional remedies for belligerents have been military reprisals against enemy troops, civilians, and property, as well as the prosecution of offending personnel before courts martial or other military tribunals. A critical distinction between the two bodies of law is that criminal sanctions against individuals have been available for violations of the laws of war but not for violations of international human rights law.<sup>11</sup>

By tracing the roots of the prohibition of enforced disappearance by the laws of war as interpreted by the Nuremberg Tribunals, I show that the criminalization of enforced disappearance initially served the humanitarian function of protecting “family rights” during armed conflict. Like other aspects of the laws of war, the prohibition of enforced disappearance protects noncombatants and promotes key international values by constraining the conduct of belligerents. Here, the protected object is the family and the international value is familial integrity. In contrast to the proscription of related offenses, such as unlawful detention and homicide, the criminal prohibition of enforced disappearance protects the interests of family members in knowing the fate of the missing person and provides retribution for the harm inflicted upon these secondary victims. Only through the prosecution of enforced disappearance are the specific harms caused by the continuing uncertainty of disappearance acknowledged and condemned.

The practical and contemporary relevance of enforced disappearance’s long-standing criminality have global implications. Dozens of states have incorporated the Rome Statute’s prohibition of enforced disappearance into their criminal codes.<sup>12</sup> Over eighty states have signed the Convention on the Protection of All Persons from Enforced Disappearance, which obliges parties to criminalize the offense under their domestic laws.<sup>13</sup> Even those states not party to the Rome Statute cite CIL generally or customary international humanitarian law (IHL) specifically as bodies of law which supplement or provide content to their domestic penal codes.<sup>14</sup> In many of these states, the

11. *Id.*

12. Representative codes include CÓDIGO PENAL arts. 364-66 (El Sal.); CRIMINAL CODE art. 269 (Eth.); CÓDIGO PENAL art. 201 ter (Guat.); and CÓDIGO PENAL art. 320 (Peru). *See also* Christopher K. Hall, *Enforced Disappearance of Persons*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 221, 226 n.324 (Otto Triffterer ed., 2d ed. 2008). Hall also provides an overview of the human rights instruments relating to enforced disappearance. Hall, *supra*, at 221-26.

13. Enforced Disappearance Convention, *supra* note 5; United Nations Treaty Collection, Ratifications, Enforced Disappearance Convention, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-16.en.pdf> (last visited Nov. 14, 2009).

14. U.S. CONST. art. I, § 8, cl. 10 (“The Congress shall have the Power . . . To define and punish . . . Offenses against the Law of Nations . . . .”); *see also* CONST. ARG. art. 118; 10 U.S.C. § 881 (2006) (“Any person subject to this chapter who conspires with any other person to commit an offense under the law of war . . . .”); Militärstrafgesetz [MStG], June 13, 1927, SR 321.0, art. 109 (Switz); Juzgado Nacional en lo Criminal y Correccional Federal, 6/3/2001, “Simón, Julio del Cerro, Juan

temporal scope of the criminal prohibition and the applicability of ex post facto prohibitions may be determined by the offense's history under international law. New Zealand incorporated Article 7 of the Rome Statute, which defines crimes against humanity (including disappearance), into its domestic penal code and gave it retrospective effect beginning on January 1, 1991.<sup>15</sup> Canada has gone farther by not only enacting a crimes-against-humanity statute with retrospective effect,<sup>16</sup> but also by convicting a Rwandan *génocidaire* under this retrospective law for atrocities committed in 1994.<sup>17</sup> Clarifying the evolution and criminal status of enforced disappearance is necessary in order to distinguish retrospective criminal statutes from retroactive criminal law. This exercise must be undertaken before domestic institutions can prosecute the offense in compliance with the principle of legality.

In Part II of this Note, I begin my historical study by examining the first state-sponsored system of enforced disappearance, the Third Reich's Night and Fog program, and by analyzing the Nuremberg Tribunals' application of existing international law to this offense. I dissect the prosecution of Wilhelm Keitel before the International Military Tribunal (IMT) at Nuremberg and the *Justice* defendants before the American Nuremberg Military Tribunal (NMT) operating under Control Council Law No. 10. This analysis demonstrates that the conduct underlying enforced disappearance constituted both a war crime and a crime against humanity at the time of the Second World War and that these offenses were understood to carry individual criminal liability. In Part III, I scrutinize the basis for the Nuremberg Tribunals' judgments and trace the century-old protection of the family by the laws of war.

In Part IV, I analyze the pioneering prosecution of enforced disappearance in the War Crimes Chamber (WCC) of the State Court of Bosnia and Herzegovina in order to demonstrate the practical significance of enforced disappearance's history under IHL. The WCC is the first court to convict defendants of the specific crime of enforced disappearance as defined by the Rome Statute and provides a useful case study for several reasons.<sup>18</sup> First, the conduct being prosecuted in the WCC occurred prior to the explicit prohibition of enforced disappearance in the country's domestic criminal law. In confronting the issue of ex post facto prosecution, the WCC has been

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Antonio s/Sustracción de Menores de 10 Años," Nueva Doctrina Penal (2000-B-527, 587) (Arg.); Alkotmánybíróság (AB) [Supreme Court] Oct. 13, 1993, 53/1993 (Hung.), translated in LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 273, 275 (2000).

15. See International Crimes and International Criminal Court Act 2000, § 8.

16. The Crimes Against Humanity and War Crimes Act, 2000 S.C., ch. 24 (Can.). The provisions of the Crimes Against Humanity Act "apply to the extent that, at the time and in the place of the act or omission, the act or omission constituted a contravention of customary international law or conventional international law or was criminal according to the general principles of law recognized by the community of nations, whether or not it constituted a contravention of the law in force at the time and in the place of its commission." *Id.* § 7(5).

17. R. c. Munyaneza, 2009 QCCS 2201, available at <http://www.jugements.qc.ca>.

18. Although other states such as Argentina have prosecuted the conduct underlying enforced disappearance, perpetrators were tried for the related offenses of kidnapping and murder, rather than enforced disappearance qua disappearance. Alejandro M. Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283, 319-29 (1987).

forced to examine the history of the criminal prohibition of enforced disappearance under international law. Second, the disappearances in Bosnia illustrate that a broader category of conduct qualifies as criminal than the paradigmatic disappearances—the targeted abductions of political dissidents in Latin America’s Southern Cone<sup>19</sup>—which spurred developments in human rights law. In contrast, the disappearances in Bosnia and Herzegovina occurred during a mixed international/noninternational armed conflict and represent wide-scale disappearance as a war crime, rather than a domestic mechanism of political repression. Third, the legal regime of the former Yugoslavia illustrates the ways in which a country’s international obligations and domestic penal code put individuals on heightened notice that violations of international law carry individual criminal liability at the domestic level.

I examine and critique the decisions of the WCC of Bosnia and Herzegovina on the question of whether prosecution for conduct occurring during the conflict of 1992 to 1995 amounts to the retroactive application of criminal law. Because of the special status of international law in the criminal codes of the former Yugoslavia and its successor states, defendants in countries like Bosnia and Herzegovina were on heightened notice that enforced disappearance carried individual criminal liability. Such notice allays concerns of retroactivity and bolsters the legitimacy of institutions such as the WCC.

## II. NIGHT AND FOG AND THE NUREMBERG TRIBUNALS

### A. *Enforced Disappearance Under the Third Reich*

The Third Reich’s Night and Fog program represents the earliest use of enforced disappearance as an explicit state policy.<sup>20</sup> The judgments of the Nuremberg Tribunals relating to the Night and Fog program are important because they represent the first application of international law to the conduct underlying enforced disappearance. The IMT’s conviction of Keitel and the NMT’s later conviction of the *Justice* defendants establish that enforced disappearance during an international armed conflict was prohibited by CIL. First, the case law of the Tribunals reveals that the conduct underlying enforced disappearance was prohibited by the customary laws of war and constituted a war crime carrying individual criminal liability. Second, the NMT’s ruling that enforced disappearance was a crime against humanity as well as a war crime is noteworthy both because it relied upon CIL and because it established that the offense would be criminal even when committed outside the context of military occupation. The possible victims of crimes against humanity form a much more inclusive group than those protected by the laws of war and include same-country nationals, the nationals of allied co-belligerents, and stateless persons. Third, even if the basis for the IMT’s

19. Maureen R. Berman & Roger S. Clark, *State Terrorism: Disappearances*, 13 RUTGERS L.J. 531 (1982).

20. See Hall, *supra* note 12, at 221. Hall suggests that Hitler was inspired by Stalin’s widespread practice of secret arrest and imprisonment in the Soviet Union. *Id.* at 221 n.292. Unfortunately, the Soviet government did not share the Third Reich’s penchant for thoroughly documenting its crimes. The origins of the Soviet practice of disappearance are therefore unclear.

judgment were flawed, the Tribunal's judgments themselves have been accepted as CIL. The precedent alone establishes that the offense of enforced disappearance carries individual criminal liability under CIL.

Field Marshal Wilhelm Keitel was tried, convicted, and hanged for, among other offenses, his role in implementing Hitler's December 7, 1941 *Nacht und Nebel Erlass* (Night and Fog Decree). A memorandum from the High Command of the German Armed Forces explained the basic elements of this counterinsurgency program. In a "fundamental innovation," suspected members of the resistance were to be tried by military courts only if the death penalty was certain.

In all other cases the prisoners are in the future to be transported to Germany *secretly*, and further dealings with the offenses will take place here; these measures will have a deterrent effect because

- A. the prisoner will vanish without leaving a trace,
- B. no information may be given as to their whereabouts or their fate.<sup>21</sup>

Or, as summarized by Wilhelm von Ammon, the Justice Ministry's expert on international law who supervised the Night and Fog program, "[t]he essential point of the NN [Night and Fog] procedure, in my estimation, consisted of the fact that the NN prisoners disappeared from the occupied territories and that their subsequent fate remained unknown."<sup>22</sup>

Keitel, who was charged with implementing the order, explained the purpose of the Night and Fog Decree in a cover letter attached to the Decree:

The Fuehrer is of the following opinion. If these offences are punished with imprisonment, even with hard labor for life, this will be looked upon as a sign of weakness. Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.<sup>23</sup>

The aim of the secret arrest and detention prescribed by the Night and Fog Decree was twofold. First, an individual was to be removed from the protection of law. Second, and more importantly, secret arrest and detention served as a form of general deterrence, achieved through the intimidation and anxiety caused by the persistent uncertainty among the missing person's family. By terrorizing the occupied populations of Western Europe through a program of enforced disappearance, Hitler hoped to suppress resistance.

21. Memorandum from the High Command of the Armed Forces to Office Foreign Countries, Counter Intel./Dep't Abwehr (Feb. 2, 1942), *translated in* 7 OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR THE PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 871, 872 (1946).

22. 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1042 (1949) [hereinafter NMT TRIALS].

23. Memorandum from the Chief of the High Command of the Armed Forces on Prosecution of Offenses Committed Within the Occupied Countries Against the German State or the Occupying Powers. (Dec. 12, 1941), *translated in* 7 OFFICE OF UNITED STATES CHIEF OF COUNSEL, *supra* note 21, at 873, 873.

### B. *Keitel's Trial by the IMT*

Created by an international agreement between the Allied Powers, the IMT was staffed with French, Russian, U.K., and U.S. prosecutors and applied international law as codified in the Charter of the International Military Tribunal. The IMT tried the twenty-four highest ranking officials of the Third Reich in a single trial. The characterization of the Night and Fog program by the IMT illustrates how the conduct underlying enforced disappearance violated international law at the time of the Second World War. The theories of both the prosecution and the judges of the IMT reveal that they believed the disappearance of civilians by German authorities to be a war crime because of its effects on the families of the missing persons.

In Count Three of the indictment, the prosecution characterized the implementation of the Night and Fog Decree as a war crime.<sup>24</sup> The prosecution alleged that:

Civilians of occupied countries were subjected systematically to “protective arrest” whereby they were arrested and imprisoned without any trial and any of the ordinary protections of the law, and they were imprisoned under the most unhealthy and inhumane conditions.

In the concentration camps were many prisoners who were classified “Nacht und Nebel.” These were entirely cut off from the world and were allowed neither to receive nor to send letters. They disappeared without trace and no announcement of their fate was ever made by the German authorities.<sup>25</sup>

The prosecution argued that

[s]uch murders and illtreatment [sic] were contrary to International Conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilised nations, the internal penal laws of the countries in which such crimes were committed, and to Article 6(b) of the Charter.<sup>26</sup>

During the prosecution’s closing arguments, the U.K. prosecutor Hartley Shawcross emphasized the disappearance of prisoners as distinguished from their execution or unlawful detention. Shawcross cited Keitel’s “efficient and enduring intimidation” letter in order to highlight the fact that the detention of prisoners “under circumstances which would deny any information with regard to their fate” was itself criminal.<sup>27</sup>

The IMT found that violations of Article 6(b) of the Charter and the Hague Regulations constituted war crimes. In the view of the Tribunal, Article 6(b) is “merely declaratory of the existing laws of war as expressed by the Hague Convention, Article 46.”<sup>28</sup> Article 46 of the 1907 Hague Regulations provides that “[f]amily honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”<sup>29</sup>

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24. Indictment, in 1 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY 2, 22 (1946) [hereinafter IMT TRIAL].

25. *Id.*

26. *Id.*

27. 19 *id.* at 438.

28. 22 *id.* at 453.

29. Convention Respecting the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 36

The IMT held that the 1907 Hague Convention itself represented binding CIL and that “by 1939 these rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.”<sup>30</sup>

In the section of the judgment entitled “Murder and Ill-Treatment of Civilian Population,” the IMT accepted the prosecution’s characterization of the Night and Fog program as a war crime violating Article 46 of the Hague Regulations.<sup>31</sup> The IMT also cited Keitel’s cover letter in finding that the purpose of the Decree was to achieve “[e]fficient and enduring intimidation” through means “by which the relatives of the criminal and the population do not know the fate of the criminal.”<sup>32</sup>

The IMT condemned the Night and Fog program as a form of mistreatment inflicted upon the missing persons and their families, rather than as murder or as deportation qua deportation. The “fundamental innovation” of the Night and Fog program was the harm it caused to families, not its attack upon individual lives or liberties.<sup>33</sup> By emphasizing the effects of the Night and Fog program on the families of the missing, the judgment indicates that the IMT considered enforced disappearance a violation of the “family honors and rights” guaranteed by CIL and articulated in the 1907 Hague Regulations.

### C. *The Justice Case*

Following the trial of Keitel and the other high-level German officials before the IMT, the individual Allied Powers tried a number of lower-ranking German war criminals before national military tribunals sanctioned by the Control Council governing occupied Germany. The United States held twelve trials of second-tier war criminals before the U.S. Military Tribunal at Nuremberg (NMT). The NMT, created pursuant to an executive order issued by President Truman, was composed entirely of U.S. judges and prosecutors. Like the IMT, the NMT applied international law as codified in Control Council Law No. 10 (which incorporated the relevant provisions of the IMT Charter nearly verbatim) and as interpreted in the decisions of the IMT.

In the *Justice* case, the leading lawyers of the Third Reich were tried for their roles in implementing the Night and Fog program. The NMT built upon the earlier decision of the IMT regarding the criminality of enforced disappearance, but it also expanded upon the IMT’s judgment. The NMT’s prosecutors and judges grounded their arguments not only in the laws of war, but also in the “general principles of criminal law as derived from the criminal laws of all civilized nations”<sup>34</sup> and the “laws of humanity,”<sup>35</sup> and therefore

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Stat. 2277, 1 Bevans 631.

30. 22 IMT TRIAL, *supra* note 24, at 467. The finding that the Hague Regulations represented customary law was vital to the verdict of the IMT and later NMT, in that it rendered null the *si omnes* clause in Article 2 of the 1907 Hague Convention.

31. *Id.* at 453.

32. *Id.*

33. See Memorandum, *supra* note 21, at 871, 872 (noting that arrests will have a deterrent effect because “the prisoners will vanish without leaving a trace”).

34. 3 NMT TRIALS, *supra* note 22, at 25.

35. *Id.* at 1076 (quoting the 1907 Hague Convention).



classified enforced disappearance both as a war crime and as a crime against humanity. Even more than the prosecutors and judges of the IMT, their counterparts in the later NMT accentuated the effects of enforced disappearance upon the families of the missing.

The prosecution characterized the disappearances committed pursuant to the Night and Fog program both as war crimes directed against the civilians of occupied countries<sup>36</sup> and as crimes against humanity.<sup>37</sup> In the view of the prosecution, the Night and Fog program “flagrantly violated rights secured by the Hague Convention of citizens of countries occupied by the German armed forces—the right of family honor, the lives of persons, and the right to be judged under their own laws.”<sup>38</sup>

The prosecution emphasized in its opening statement that the Decree’s “first and foremost purpose” was “complete secrecy so far as their family and friends were concerned.”<sup>39</sup> The prosecution also quoted from the IMT’s judgment, which characterized the Decree’s goal as one of intimidation achieved through unexplained disappearances creating “anxiety in the minds of the family of the arrested person.”<sup>40</sup> The prosecution specifically condemned the *Justice* defendants for implementing the secrecy measures necessary to conceal the judicial proceedings of the Night and Fog prisoner such that “the families and friends of the convicted or innocent do not know their fate.”<sup>41</sup>

Like the IMT, the NMT held that the implementation of the Night and Fog program resulted in war crimes violating CIL as articulated in Articles 5, 23(h), 43, and 46 of the 1907 Hague Regulations.<sup>42</sup> The NMT observed that “[t]he international law of war has for a long period of time protected the civilian population of any territory or country occupied by an enemy war force” and held that the Hague Regulations themselves were declaratory of the customary law of war.<sup>43</sup> As evidence of *opinio juris*, the Tribunal cited a General Order issued by President McKinley to the U.S. military during the Spanish-American War, which

declared that the inhabitants of the occupied territory “are entitled to the security in their persons and property and in all their private rights and relations.” He further declared that it was the duty of the commander of the Army of Occupation “to protect them in their homes, in their employments, and in their personal and religious rights.”<sup>44</sup>

The NMT also held that the offenses carried out pursuant to the Night and Fog program were crimes against humanity. The Tribunal based this ruling partly on the Report by the Commission of Responsibilities for the Violation of the Laws and Customs of War of the 1919 Paris Peace Conference, which determined that “systematic terrorism” against a civilian

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36. 1 IMT TRIAL, *supra* note 24, at 21.

37. *Id.* at 23.

38. *Id.* at 78.

39. *Id.* at 75.

40. *Id.*

41. *Id.* at 78.

42. 3 NMT TRIALS, *supra* note 22, at 1061.

43. *Id.* at 1059.

44. *Id.* (quoting U.S. War Dep’t, General Orders No. 1010 (July 18, 1898)).

population was a criminal violation of the “laws of humanity.”<sup>45</sup> The Tribunal also held that the “enforcement and administration” of the Night and Fog program violated “international common law relating to recognized human rights” as well as Article II(1)(b) and (c) of Control Council Law 10.<sup>46</sup>

In reaching the conclusion that enforced disappearance was a crime against humanity, the NMT, like the prosecution, emphasized the effect of the Night and Fog program upon the families of the missing. The Tribunal noted that the program was instituted “for the purpose of making [civilians] disappear without trace and so that their subsequent fate remain secret. This practice created an atmosphere of constant fear and anxiety among their relatives, friends, and the population of the occupied countries.”<sup>47</sup> The Tribunal held that secret arrest and incommunicado detention of Night and Fog prisoners was inhumane treatment,

meted out not only to the prisoners themselves but to their friends and relatives back home who were in constant distress of mind as to their whereabouts and fate. . . . The purpose of the spiriting away of persons under the Night and Fog decree was to deliberately create constant fear and anxiety among the families, friends, and relatives as to the fate of the deportees. Thus, cruel punishment was meted out to the families and friends without any charge or claim that they actually did anything in violation of any occupation rule of the army or of any crime against the Reich.<sup>48</sup>

Such “mental cruelty” was the “express purpose of the NN decree . . . .”<sup>49</sup>

Quoting from the IMT’s judgment, the NMT observed that “[t]he brutal suppression of all opposition to the German occupation was not confined to severe measures against suspected members of the resistance movements themselves, but was also extended to their families.”<sup>50</sup> The NMT found that disappearance was one such “severe measure” taken against the families of the resistance.<sup>51</sup>

The NMT held that the “secrecy of the proceedings was a particularly obnoxious form of terroristic measure.”<sup>52</sup> The evidence presented at trial showed

without dispute that the NN victim was held incommunicado and the rest of the population only knew that a relative or citizen had disappeared in the night and fog; hence, the name of the decree. If relatives or friends inquired, they were given no information . . . . The population, relatives, or friends were not informed for what character of offense the victim had been arrested. Thus, they had no guide or standard by which to avoid committing the same offense as the unfortunate victims had committed which necessarily created in their minds terror and dread that a like fate awaited them.<sup>53</sup>

45. *Id.* at 1058 (citing CARNEGIE ENDOWMENT FOR INT’L PEACE, VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR 16-17 (1919)).

46. *Id.* at 1057.

47. *Id.*

48. *Id.* at 1058.

49. *Id.*

50. *Id.* at 1033 (quoting 1 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 232-33 (1947)).

51. *Id.* at 1059.

52. *Id.*

53. *Id.* at 1058.

The Tribunal noted that such “systematic terrorism” against civilian populations had already been deemed a violation of the “laws of humanity” at the 1919 Paris Peace Conference.<sup>54</sup>

With respect to the holding that enforced disappearance was a war crime, the NMT judgment was merely declaratory of existing international law. However, the Tribunal’s holding that enforced disappearance also constituted a crime against humanity was more innovative, and as with much of the Nuremberg case law on crimes against humanity, it represented a progressive development in international law. The NMT provided content to the nascent body of law defining crimes against humanity by drawing upon the protections contained within the well-established laws of war.<sup>55</sup> In determining what behavior constituted “systematic terrorism” against a civilian population or “recognized human rights,” the NMT looked to the minimal standards of conduct expected of occupying military powers, specifically the protection of the family and domestic relations. The NMT thus generalized prohibitions that existed in a relatively narrow context, the conduct of an occupying power toward an occupied population, to cover the conduct of a state toward any civilian population.

### III. ENFORCED DISAPPEARANCE AS A VIOLATION OF FAMILY RIGHTS

#### A. *Family Rights in the Nuremberg Judgments*

The Nuremberg Tribunals found the Night and Fog program to be criminal because the continuing uncertainty of enforced disappearance violated “family rights,” including the right to know the fate of a loved one, of the populations under German military occupation. The Tribunals held that the family rights of an occupied population were protected by CIL and that the Hague Regulations were merely declaratory in this respect.

The U.N. War Crimes Commission also regarded the Night and Fog program to be a violation of family rights protected by IHL. The Commission observed that Article 46’s provisions “protecting life and property have been directly enforced in the war crime trials.”<sup>56</sup> The enforcement of these provisions was accomplished through convictions for crimes such as murder and pillage. The Commission noted that

[f]amily honor and rights have been only indirectly protected, in that the violation of family rights have [sic] not been explicitly made the subject of a charge. Many of the offenses for which war criminals have been condemned have, however, constituted violations of family rights. Examples are provided by . . . the operation of the *Nacht und Nebel Plan* . . . .<sup>57</sup>

#### B. *Roots of Family Rights in the Laws of War*

The origin of the criminal prohibition of enforced disappearance is found in the law of war granting protection to the family during military

54. *Id.*

55. See Egon Schwelb, *Crimes Against Humanity*, 1946 BRIT. Y.B. INT’L L. 178, 179-80.

56. 15 U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 113 (1949).

57. *Id.*

occupation. The Nuremberg Tribunals' reliance on "family rights," as articulated in Article 46 of the Hague Regulations, is consistent with protections of the family in the laws of war dating back to the early international instruments of the nineteenth century.<sup>58</sup> The phrase "[t]he honour and rights of the family" first appears in Article 38 of the 1874 Declaration of Brussels<sup>59</sup> and "family honor and rights" appears thereafter in Article 49 of the Oxford Manual.<sup>60</sup> These provisions were in turn inspired by Article 37 of the Lieber Code, which obligated the U.S. military to protect "the sacredness of domestic relations" in occupied territories and provide that "[o]ffenses to the contrary shall be rigorously punished."<sup>61</sup>

The Lieber Code illustrates that from its inception as an offense under military law, the violation of family rights carried criminal liability, even in the context of a purely internal conflict such as the American Civil War.<sup>62</sup> The obligation of belligerents to respect the family rights of occupied populations was also noted by late nineteenth-century legal scholars. William Winthrop observed in his authoritative study of military law that, regarding the population of an occupied territory, "respect [shall be] shown for their

58. See generally JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 379 (2005).

59. Project of an International Declaration Concerning the Laws and Customs of War art. 38, Aug. 27, 1874, 1 AM. J. INT'L L. 96, 101 (1907).

60. INST. OF INT'L LAW, THE LAWS OF WAR ON LAND, reprinted in RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW DEALING WITH THE LAWS OF NATIONS 36 (James Brown Scott ed., William S. Hein & Co. 2003) (1880).

61. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 37, at 14 (Gov't Printing Office 1898) (1863) (officially published as U.S. War Dep't, General Orders No. 100 (Apr. 24, 1863)) [hereinafter LIEBER CODE].

62. A number of authors have argued that the protection of "domestic relations" and "family honor and rights" by IHL represents an attempt to safeguard women from sexual violence. Kelly Askin argues that Article 46 of the Hague Convention "vaguely and indirectly prohibits sexual violence as a violation of 'family honour.'" Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 295 (2003). "The 1907 Hague Conventions and Regulations contain a provision that implicitly prohibits sexual violence by mandating that '[f]amily honour and rights . . . must be respected.' At the turn of the twentieth century, a violation of family 'honor' was commonly understood as encompassing sexual assault." *Id.* at 300 (citation omitted); see also Peggy Kuo, *Prosecuting Crimes of Sexual Violence in an International Tribunal*, 34 CASE W. RES. J. INT'L L. 305, 306 (2002) ("Thereafter, in conventions and treaties such as the Fourth Hague Convention of 1907, there is the concept of protection of family honor and rights. People understood what this term meant, even without specific reference to rape."); Meron, *supra* note 9, at 425 ("Under a broad construction, Article 46 of the Hague Regulations can be considered to cover rape . . .").

However, it is clear that the phrase is more than merely a quaint euphemism for the bodily integrity of women and the sexual prerogatives of husbands. It may be true that female virtue is one of the values alluded to by "family honor," but it is not the only one.

The protection of the family by the laws of war has never been limited to safeguarding the sanctity of the sexual relations between husband and wife. That the Lieber Code's protection of "domestic relations" in Article 37 is more than a proscription against rape is made clear by Articles 44 and 47 of the Code, which explicitly prohibit rape under threat of death. LIEBER CODE, *supra* note 61, arts. 37, 44, 47. The Fourth Geneva Convention expressly protects "family rights," while also separately providing that "[w]omen shall be especially protected against any attack on their honor, in particular against rape, forced prostitution, or any form of indecent assault." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 27, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. Thus, "domestic relations" and its successor "family honor and rights" encompass far more than female bodily integrity and the sexual prerogatives of husbands. Under the plain language of these provisions, IHL has consistently protected the integrity of the family unit and safeguarded familial relations independently of any prohibition of rape.

domestic affairs, their family relations and the exercise of their religion.”<sup>63</sup> Moreover, as cited by the NMT, the official policy of the U.S. government in both the Spanish-American War and the First World War had been to respect the “private rights and relations” of occupied populations and that the field commanders had an affirmative obligation to “protect [the occupied population] in their homes.”<sup>64</sup>

The protection of family rights was first incorporated into a binding international agreement by the regulations annexed to 1899 Hague Convention. The 1899 Regulations prefigure the later 1907 Hague Regulations by providing in Article 46 that, in the occupied territory of a hostile state, “[f]amily honour and rights, the lives of persons and private property, as well as religious convictions and practices, must be respected.”<sup>65</sup>

Early IHL sought to safeguard the family rights not only of the noncombatant populations of occupied territories, but of prisoners of war (POWs) as well. The 1929 Geneva Convention Relative to the Treatment of Prisoners of War requires parties to facilitate expeditious communication between POWs and their families.<sup>66</sup> The Convention also obligates parties to create information bureaus at the outbreak of hostilities which can promptly notify the families of POWs.<sup>67</sup>

### C. *Post-World War II Protections of the Family by IHL*

The protection of family rights by IHL is not an irrelevant artifact of the nineteenth century, but remains an important value safeguarded by the laws of war. Post-World War II instruments continue to emphasize the protection of the family during armed conflict. Like the Nuremberg Tribunals, these authorities have held that conduct amounting to enforced disappearance violates the protection of the family.

Article 27 of the Fourth Geneva Convention provides that “[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, [and] their family rights.”<sup>68</sup> As the official International Committee of the Red Cross (ICRC) commentary on the Geneva Conventions notes, Article 27, like Article 46 of the 1907 Hague Convention from which it is derived, “is intended to safeguard the marriage ties and that community of parents and children which constitutes a family, ‘the natural and fundamental group unit of society.’”<sup>69</sup> The Commentary notes that the Fourth Geneva Convention

63. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 812 (2d ed. 1920).

64. 3 NMT TRIALS, *supra* note 22, at 1059-60 (quoting U.S. War Dep’t, General Orders No. 1010 (July 18, 1898)).

65. Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864 art. 46, July 29, 1899, 32 Stat. 1827, 1 Bevans 263 [hereinafter 1899 Hague Convention].

66. Convention Relative to the Treatment of Prisoners of War art. 36, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343.

67. *Id.* art. 77.

68. Geneva Convention IV, *supra* note 62, art. 27.

69. INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 202 (Jean S. Pictet ed., 1958) (quoting the Universal Declaration of Human Rights art. 16, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948)).

contains numerous other provisions protecting family rights, including Article 82, which provides that members of the same family should be interned together, and Articles 25 and 26, which oblige parties to facilitate familial correspondence and the reunification of families.

The protection of family rights in post-World War II instruments, such as Article 27 of the Fourth Geneva Convention, is especially important, as violations of these provisions with respect to protected persons constitute grave breaches and carry individual criminal liability. Article 147 defines “inhuman treatment” as a grave breach of the Convention. The ICRC Commentary notes that although inhuman treatment “is rather difficult to define,” violations of Article 27 would constitute inhuman treatment.<sup>70</sup> “[B]y ‘inhuman treatment’ the Convention does not mean only physical injury or injury to health. Certain measures, for example, which might *cut the civilian internees off completely from the outside world and in particular from their families . . .* could conceivably be considered as inhuman treatment.”<sup>71</sup>

It should be noted that in contrast to the family rights enshrined in Article 46 of the 1907 Hague Convention, Article 27 of the Fourth Geneva Convention is concerned with the rights of the civilian prisoner, not those of his or her family. Thus, the inhuman treatment is the inability of the prisoner to communicate with his or her family, not the continuing uncertainty on the part of his or her family as to their fate. The victim is the prisoner, not the family.

The grave breach provision of the Fourth Geneva Convention protects the family rights of civilians in the hands of an occupying power or party to a conflict of which they are not nationals.<sup>72</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that the Convention is applicable to mixed international and noninternational conflicts, and that a person may be protected under the grave breach provision of the Convention, even if that individual has the same legal nationality of an occupying power.<sup>73</sup> It is ethnicity, not nationality, which is dispositive in an ethnosectarian conflict. Disappearance committed by an ethnic group to which the victim did not belong would constitute a grave breach of the Convention, provided that the offender treats the victim as a non-national on account of the individual’s ethnicity and the offending party acted as the “*de facto* organs of another State.”<sup>74</sup>

Additional Protocol I protects with criminal sanctions the family rights of all civilians, not only those in the control of another state. Furthermore, Additional Protocol I specifies in greater detail than the Geneva or Hague Conventions the protections which are to be provided for families during international armed conflicts.<sup>75</sup> It recognizes as a general principle “the right

70. *Id.* at 598.

71. *Id.* (emphasis added).

72. Geneva Convention IV, *supra* note 62, art. 4.

73. Prosecutor v. Tadić, Case No. IT-94-1-I, Judgment of the Appeals Chamber, ¶¶ 164-66 (July 15, 1999).

74. *Id.* ¶ 167. Because many, if not most, of the disappearances in Bosnia and Herzegovina were committed by Bosnian Serb forces acting in conjunction with the Yugoslav National Army, these offenses would qualify as grave breaches.

75. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the

of families to know the fate of their relatives.”<sup>76</sup> Parties are obliged to facilitate and, if necessary, carry out search activities and convey information regarding individuals reported missing during the conflict.<sup>77</sup> The parties are also obligated to facilitate the return of the remains of deceased persons.<sup>78</sup> Under Additional Protocol I, grave breaches of the Geneva Conventions “shall be regarded as war crimes.”<sup>79</sup> One hundred sixty-nine states are parties to the Protocol,<sup>80</sup> and nonparty states such as the United States regard many of the its provisions as CIL.<sup>81</sup>

IHL also protects the family in noninternational conflicts. Common Article 3 provides that noncombatants “shall in all circumstances be treated humanely” and prohibits “cruel treatment.”<sup>82</sup> Additional Protocol II expands upon Common Article 3’s protections, prohibiting “violence to . . . mental well-being,” as well as “cruel treatment” and “acts of terrorism.”<sup>83</sup> In light of the NMT’s finding that the Night and Fog program inflicted “mental cruelty” upon the missing person’s family and that the program was a form of “terrorism,” enforced disappearance in an internal conflict could violate Additional Protocol II.<sup>84</sup> Moreover, the official report of the ICRC on customary IHL states that “[e]nforced disappearance is prohibited . . . . State practice establishes this rule as a norm of customary international law applicable in both international and noninternational armed conflicts.”<sup>85</sup>

Breaches of family rights can be criminal violations of IHL even within the context of internal conflicts. Violations of Common Article 3, Additional Protocol II, and customary IHL generally are not per se grave breaches incurring individual criminal responsibility.<sup>86</sup> However, the ICTY, relying upon *opinio juris* and practice of states such as Germany, the United Kingdom, and the United States, held in *Tadić* that “customary international

Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

76. *Id.* art. 32.

77. *Id.* art. 33.

78. *Id.* art. 34.

79. *Id.* art. 85(5).

80. See Int’l Comm. for the Red Cross, *International Humanitarian Law: State Parties/Signatories*, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=470> (last visited Dec. 1, 2009).

81. See *Additional Protocol I as an Expression of Customary International Law*, in U.S. ARMY JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., INT’L & OPERATIONAL LAW DEP’T, *LAW OF WAR DOCUMENTARY SUPPLEMENT 221* (2009); Michael Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 428 (1987); William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 321-22 (2003).

82. Geneva Convention IV, *supra* note 62, art. 3.

83. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts art. 4(3)(b), June 8, 1977, 1125 U.N.T.S. 609.

84. Bosnia and Herzegovina, as well as the Socialist Federal Republic of Yugoslavia (SFRY), were both parties to Additional Protocol II at the time of the conflict. It is noteworthy that Article 142 of the 1977 Criminal Code of the SFRY lists “application of measures of intimidation and terror” against civilians as a war crime. CRIMINAL CODE art. 142 (1977), available at <http://www.unhcr.org/refworld/docid/3ae6b5fe0.html>.

85. HENCKAERTS & DOSWALD-BECK, *supra* note 58, at 340.

86. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 128 (Oct. 2, 1995) (“It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions.”); see also Lindsay Moir, *Grave Breaches and Internal Armed Conflicts*, 7 J. INT’L CRIM. JUST. 763, 764 (2009).

law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict . . . .”<sup>87</sup> Under the *Tadić* standard, enforced disappearance constitutes a serious violation of customary IHL, because there is “a breach of a rule protecting important values” (for example, familial integrity), and because the breach involves “grave consequences for the victim[s].”<sup>88</sup> Enforced disappearance is therefore a war crime carrying individual liability whether committed in an international or noninternational conflict.<sup>89</sup>

#### D. *Post-Nuremberg Case Law on Enforced Disappearance as a Crime During Armed Conflict*

The significance of the Nuremberg precedents, that enforced disappearance was both a war crime and a crime against humanity, was largely forgotten in the decades after World War II. It is unsurprising that the early case law on enforced disappearance as an international crime fell into obscurity, given the absence of any international criminal court prior to the creation of the ICTY. Domestic courts that applied international law in their prosecution of wartime atrocities, such as Israel at the trial of Adolf Eichmann, tended to focus on large-scale extermination.<sup>90</sup> When enforced disappearance was prosecuted in national courts under purely domestic law, as in Argentina’s 1985 trial of the Juntas, it was not prosecuted as disappearance *qua* disappearance, but rather as murder or kidnapping.<sup>91</sup> The international courts that did consider the illegality of enforced disappearance under international law, such as the Inter-American Court of Human Rights in the seminal case of *Velasquez-Rodriguez*, focused on the offense as a human rights violation.<sup>92</sup> These courts did not address the issue of individual criminal liability.

Only in the 1990s did courts once again confront the status of enforced disappearance as a war crime. A federal court in the United States suggested that by the 1980s, enforced disappearance was a war crime under CIL for which an individual could be held liable, even when the offense was committed in a purely internal conflict. The court in *Xuncax v. Gramajo* awarded seven million dollars in compensatory and punitive damages to a Guatemalan citizen against that country’s former minister of defense for the disappearance of the plaintiff’s father by the military in 1989.<sup>93</sup> The court held that enforced disappearance was an offense against the law of nations at the time of the events in question.<sup>94</sup>

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87. *Tadić*, Case No. IT-94-1-I, ¶ 134; *see also* Prosecutor v. Delalic, Case No. IT-96-21, Judgment of the Appeals Chamber, ¶¶ 153-59 (Feb. 20, 2001).

88. *Tadić*, Case No. IT-94-1-I, ¶ 94.

89. *Id.* ¶¶ 94-137.

90. CrimC (Jer) 40/61 Attorney Gen. Gov’t of Isr. v. Eichmann [1961] IsrDC 45(3), *translated in* 36 INT’L L. REP. 5 (E. Lauterpacht ed., 1968).

91. Garro & Dahl, *supra* note 18, at 319-29.

92. *Velasquez-Rodriguez Case*, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 153 (July 29, 1988).

93. 886 F. Supp. 162 (D. Mass. 1995).

94. *Id.* at 185-86.



Although not explicitly stating that the offense of enforced disappearance was criminal, the district court's analysis implied that enforced disappearance was a war crime. In determining the liability of the defendant, the court relied upon the command responsibility doctrine for war crimes enunciated by the U.S. Supreme Court in *Yamashita*,<sup>95</sup> rather than on the tort doctrine of respondeat superior. Quoting *Yamashita*, the court observed that "the law of war presupposes that its violation is to be avoided through the control of operations of war by commanders who are to some extent responsible for their subordinates."<sup>96</sup> The court held that "[u]nder international law, responsibility for torture, summary execution, or disappearances extends beyond the person or persons who actually committed those acts—anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them."<sup>97</sup> In holding Gramajo responsible for the acts of his subordinates, the court found that "Gramajo was aware of and supported widespread acts of brutality committed by personnel under his command resulting in thousands of civilian deaths."<sup>98</sup> The court's reasoning indicates that enforced disappearance was an international crime giving rise to individual liability.

Not only has IHL consistently recognized enforced disappearance as a war crime, but following the NMT's precedent, the ICTY has also indicated in dicta that the offense is a crime against humanity. The ICTY's characterization is especially significant because the NMT's decisions suggest that the conflict nexus is no longer a definitional element of crimes against humanity.<sup>99</sup> Enforced disappearance qualifies as "other inhumane acts," as proscribed by Article 5(i) of the ICTY statute and Article 3(i) of the ICTR statute.<sup>100</sup> In order to limit the breadth of "other inhumane acts" and abide by the specificity requirements of the principle of legality, the ICTY has looked to international human rights instruments for the operative standards.<sup>101</sup> A trial panel in the *Kupreskic* case stated that enforced disappearance is a crime against humanity, so long as it is "carried out in a systematic manner and on a large scale."<sup>102</sup> The panel cited the prohibition of the enforced disappearance provision in the U.N. Declaration and the Inter-American Convention to support this proposition.<sup>103</sup> The *Kupreskic* argument for enforced disappearance as an "inhumane act" was subsequently cited with approval by

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95. *In re Yamashita*, 327 U.S. 1 (1946).

96. *Gramajo*, 886 F. Supp. at 172 (quoting *Yamashita*, 327 U.S. at 15).

97. *Id.* (quoting S. REP. NO. 102-249, at 9 (1991)).

98. *Id.*

99. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 140-41 (Oct. 2, 1995) ("[C]ustomary international law may not require a connection between crimes against humanity and any conflict at all.").

100. Prosecutor v. Kupreskic, Case No. IT-95-16-A, Judgment of Trial Chamber, ¶ 566 (Jan. 14, 2000). These provisions of the ICTY and ICTR statutes are drawn from Article 6(c) of the Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284, *annexed to* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, and Article II(1)(c) of Control Council Law No. 10, 3 NMT TRIALS, *supra* note 22, at XIX.

101. *Kupreskic*, Case No. IT-95-16-A, ¶ 566.

102. *Id.*

103. *Id.*

the trial panel in the *Kvočka* case.<sup>104</sup> This characterization of enforced disappearance echoes the finding of the Nuremberg Tribunals that disappearance amounted to inhumane treatment of the missing person's family.

The evidence in this Part illustrates three key facts. First, the conduct underlying enforced disappearance has been prohibited by IHL since the nineteenth century. Second, the prohibition is rooted in the protection of the family and familial integrity. Third, violations of this prohibition carry individual criminal liability. The relevance of these points is illustrated by the case study presented in the following Part.

#### IV. CASE STUDY: BOSNIA AND HERZEGOVINA

##### A. *Enforced Disappearance During the Bosnian War*

The situation in Bosnia and Herzegovina illustrates the scale and nature of enforced disappearance during armed conflict. Just as the criminal prohibition in the laws of war has been overshadowed by developments in human rights law, so too has pride of place been given to disappearances resulting from political persecution, rather than disappearances occurring in the context of armed conflict. This Section briefly explores the problem of enforced disappearance in Bosnia and Herzegovina and examines one of the early decisions of the WCC related to enforced disappearance. It then critiques the reasoning of the WCC related to the issue of retroactivity and the prosecution of enforced disappearance.

Approximately twenty-seven thousand persons were missing in Bosnia and Herzegovina by the end of the war in 1995.<sup>105</sup> The overwhelming majority of these persons were Muslims who disappeared during the "ethnic cleansing" of eastern Bosnia by Bosnian Serb forces.<sup>106</sup> Despite over a decade of work by organizations such as the ICRC, the International Commission for Missing Persons, and the Missing Persons Institute of Bosnia and Herzegovina, over ten thousand individuals remain unaccounted for in Bosnia and Herzegovina.<sup>107</sup> The WCC has held that many of the missing persons in the country disappeared under conditions satisfying the definition of enforced disappearance as a crime against humanity.

The facts underlying *Prosecutor v. Rašević and Todović* are representative of many of the disappearances committed in eastern Bosnia and Herzegovina during the ethnic cleansing of the region.<sup>108</sup> The case illustrates

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104. *Prosecutor v. Kvočka*, Case No. I-98-30/1-T, Judgment of Trial Chamber, ¶ 208 (Nov. 2, 2001).

105. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, Report: Question of Enforced or Involuntary Disappearances, Special Process on Missing Persons in the Territory of the Former Yugoslavia, ¶ 1, U.N. Doc. E/CN.4/1996/36 (Mar. 4, 1996) (prepared by Manfred Nowak).

106. ECOSOC, Comm'n on Human Rights, Report: Question of Enforced or Involuntary Disappearances, Special Process on Missing Persons in the Territory of the Former Yugoslavia, ¶ 91, U.N. Doc. E/CN.4/1997/55 (Jan. 15, 1997) (prepared by Manfred Nowak).

107. Int'l Comm'n on Missing Persons, Bosnia and Herzegovina, [http://www.ic-mp.org/about-icmp/?page\\_id=561](http://www.ic-mp.org/about-icmp/?page_id=561) (last visited Oct. 31, 2009).

108. *Prosecutor v. Rašević & Todović*, Case No. X-KR-06/275, First Instance Verdict (Feb. 28, 2008).

that conduct very different from the paradigmatic political disappearances of Latin America satisfies the elements of the offense. Mitar Rašević and Savo Todović were the head guard and deputy warden, respectively, of the KP Dom prison in Foča municipality between 1992 and 1994. Foča lies in territory controlled by the Republika Srpska and the KP Dom served as an internment camp for Bosnian Muslim civilians being ethnically cleansed from the region. Between 1992 and 1994, at least two hundred of the detainees were removed from the camp for the ostensible purposes of a prisoner exchange and fruit picking. The trial panel concluded that the detainees were instead transferred by the camp's guards to the control of the Bosnian Serb military and military police. Thereafter, the prisoners were never seen alive again. The remains of many of these individuals were subsequently recovered from mass graves in the Foča region.<sup>109</sup> Despite inquiries by the families of the missing prisoners over the course of a decade and half, the defendants and other Bosnian Serb authorities failed to provide any information regarding their fates or whereabouts.<sup>110</sup>

#### B. *Decision of the Bosnian War Crimes Chamber: Liability and Elements of the Crime*

The panel convicted both Rašević and Todović of enforced disappearance under the liability theory of co-perpetration through systematic joint criminal enterprise.<sup>111</sup> The mens rea for this form of liability is “personal knowledge of the organized system in place and the types of crimes committed in that system” and the intent to further the system.<sup>112</sup> The panel had little difficulty concluding that the defendants had the requisite knowledge and intent and that the conduct proved at trial satisfied the elements of the offence. These elements are found in Article 7(2)(i) of the Rome Statute<sup>113</sup> and are incorporated into the 2003 Criminal Code of Bosnia and Herzegovina (CC of BiH) as Article 172(1)(i):

- (1) the arrest, detention or abduction of persons;
- (2) by or with the authorization, support or acquiescence of a State or a political organization;
- (3) followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons; and
- (4) with the aim of removing those persons from the protection of the law for a prolonged period of time.<sup>114</sup>

The trial panel found that both the detention and subsequent removal of the prisoners from the camp was authorized by the Foča Tactical Group, a military organ of the Republika Srpska.<sup>115</sup> The transfer of the prisoners from the camp to the control of the military and military police was undertaken

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109. *Id.* at 93-98.

110. *Id.* at 94.

111. *Id.* at 160-61.

112. *Id.* at 144-45.

113. Rome Statute, *supra* note 1, art. 7(2)(i).

114. *Rašević*, Case No. X-KR-06/275, at 98 (citing CRIMINAL CODE art. 172(1)(i) (Bosn. & Herz.)).

115. *Id.*

with the aim of removing the prisoners from the protection of law, permanently.

The panel's analysis of the third element of the offense, the "refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts," is significant, as this feature has been the hallmark of disappearance from the Night and Fog program to the present day. The panel interpreted "refusal" to include "the failure to acknowledge the deprivation of freedom or provide information. It is clearly implicit that giving false information about the victim's whereabouts or fate constitutes refusal or failure to give information and satisfies the third element of the offense."<sup>116</sup> The subsequent misinformation provided by the defendants to the remaining inmates of the concentration camp regarding the fates of the missing prisoners satisfied this element, as did the failure by the staff of KP Dom and the Republika Srpska to provide information on the whereabouts of the missing to the Bosnian Federation's Institute of Missing Persons after the war.<sup>117</sup>

In a footnote, the panel cited another key feature of enforced disappearance, especially when committed during armed conflict: the nonexclusivity of the offense.

The Panel notes in this regard that, as noted below, the bodies of some of those detainees who were forcibly disappeared from the KP Dom have been discovered in mass graves, particularly within the last few years. Although it is clear from the legal elements of the offense, it is worth emphasizing that it is not necessary to establish that persons forcibly disappeared either are alive or deceased. That is, the crime of enforced disappearance is legally distinct from other crimes that may have been committed following the forcible disappearance. For that reason, it is not legally or factually inconsistent to conclude that persons were forcibly disappeared and killed, as these are separate acts and crimes.<sup>118</sup>

Although the application of Article 7(2)(i) of the Rome Statute to wartime disappearances may not have been the usage envisioned by its drafters, the panel's application of the law to the facts was correct. However, the question of whether the panel applied this provision of the law retroactively or whether the conduct at issue was already criminal is one which the WCC has not satisfactorily addressed. The WCC's struggle with charges of *ex post facto* prosecution is the subject of the next Section.

### C. *Decisions of the Bosnian War Crimes Chamber: Retroactivity*

As one of the first states to prosecute enforced disappearance *qua* disappearance, the situation in Bosnia and Herzegovina also illustrates how courts address the history and status of disappearance under international law. The example of the WCC demonstrates the pitfalls facing courts on this issue and illustrates the continuing tension between ending impunity for mass atrocities and upholding the legal principles which distinguish criminal justice from victor's vengeance.<sup>119</sup>

116. *Id.*

117. *Id.* at 99.

118. *Id.* at 94 n.85.

119. Beth van Schaack, *Crimen sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119 (2008).

Both the trial<sup>120</sup> and the appellate<sup>121</sup> panels of the WCC have convicted defendants of enforced disappearance and have held that the offense was an international crime at the time of the 1992 conflict. The WCC applies the CC of BiH in accordance with the principle of legality, as defined in Article 3(2) of the CC of BiH: “No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.”<sup>122</sup> Thus, the accused may only be convicted of offenses that were either prohibited by the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia (CC of SFRY), in force at the time of the conflict, or recognized as criminal by international law at the time of the conflict.<sup>123</sup> Although the elements of the offense may be defined by the CC of BiH, in order to be actionable, the underlying conduct must already have been prohibited by criminal law.

The WCC has addressed the *ex post facto* challenge to the prosecution of enforced disappearance in two cases: *Prosecutor v. Šimšić* and *Prosecutor v. Rašević and Todović*. The appellate panel in *Šimšić* held that enforced disappearance and rape were both crimes against humanity under CIL at the time of the 1992 conflict: “To wit, the Court notes that the stated actions are indisputably criminal offenses which at the time of war acquire the characteristics and the meaning of war crimes . . . .”<sup>124</sup> The appellate panel also held that it had the discretion to characterize war crimes as crimes against humanity, stating that if a certain action “is committed with a high degree of cruelty, inhumanity and general criminal conduct, which, in addition, is a part of a plan and system in the crime commission[,] judges have a discretion to qualify such action as a crime against humanity too.”<sup>125</sup> In support of the proposition that enforced disappearance was prohibited by international law, the appellate panel cited unspecified case law of the ICTY that categorized enforced disappearance as one of a number of “other inhumane offenses,” which qualify as crimes against humanity.<sup>126</sup>

The trial panel in *Rašević and Tadović* observed that enforced disappearance “is a relatively ‘new’ crime, both in itself and as a crime against humanity.”<sup>127</sup> Nonetheless, relying upon the case law of the IMT and international human rights instruments, the panel held that enforced disappearance was a crime against humanity.<sup>128</sup> The panel fleetingly alluded to the IMT judgment on the Night and Fog program, observing that “Field Marshal Wilhelm Keitel was convicted of war crimes against the civilian

120. *Prosecutor v. Rašević & Todović*, Case No. X-KR/06/275, First Instance Verdict (Feb. 28, 2008); *Prosecutor v. Damjanović*, Case No. X-KR-05/51, First Instance Verdict (Dec. 15, 2006); *Prosecutor v. Šimšić*, Case No. X-KR-05/04, First Instance Verdict (July 11, 2006).

121. *Prosecutor v. Šimšić*, Case No. X-KRŽ-05/04, Second Instance Verdict (Aug. 7, 2007); *Prosecutor v. Damjanović*, Case No. X-KR-05/51, Second Instance Verdict (June 13, 2007).

122. CRIMINAL CODE art. 3(2) (Bosn. & Herz.).

123. *Id.* arts. 3, 4.

124. *Šimšić*, Case No. X-KRŽ-05/04, at 47.

125. *Id.*

126. *Id.* at 48.

127. *Prosecutor v. Rašević & Todović*, Case No. X-KR-06/275, First Instance Verdict, at 88 (Feb. 28, 2008).

128. *Id.*

population for his participation in these acts; however, the acts were not described as enforced disappearance as such.”<sup>129</sup> Instead, the panel drew more heavily upon human rights instruments and declarations in its judgment. The panel quoted the Inter-American Court’s decision in *Velasquez-Rodriguez*, which stated that “[i]nternational practice and doctrine have often categorized disappearances as a crime against humanity.”<sup>130</sup> The panel also cited declarations by the OAS General Assembly and the Parliamentary Assembly of the Council of Europe, as well as the U.N. General Assembly’s Declaration on the Protection of All Persons from Enforced Disappearance, all of which declare enforced disappearance to be a crime against humanity.<sup>131</sup> The judgment concluded by making reference to the Rome Statute, the 2006 Convention on the Protection of All Persons from Enforced Disappearance, and the 1994 Inter-American Convention on the Forced Disappearance of Persons in support of the proposition that CIL recognized at the time of the 1992 conflict that the “the systematic practice of the forced disappearance of persons constitutes a crime against humanity.”<sup>132</sup>

Although the panels in both cases correctly held that the offense carried individual criminal liability under international law at the time of the conflict in Bosnia and Herzegovina, the reasoning of the judgments is flawed and incomplete.

#### D. *Decisions of the War Crimes Chamber: Critique*

The *Šimšić* and *Rašević and Tadović* judgments of the WCC fail to adequately address two key issues relating to the defendants’ claims that the criminal prosecution of enforced disappearance amounts to an ex post facto application of law. First, how did enforced disappearance violate international law? Second, did the defendants have notice that enforced disappearance carried individual criminal liability?

Both judgments fail to identify the roots of the prohibition on enforced disappearance in the laws of war. The *Šimšić* judgment merely asserts that enforced disappearance was “indisputably criminal” and therefore a war crime when committed during conflict without citing any authority for this proposition.<sup>133</sup> The *Rašević and Tadović* judgment’s brief reference to the IMT’s holding that disappearance is a war crime is also inadequate. The judgment fails to analyze the basis of the Tribunal’s conclusion that enforced disappearance was a war crime at the time of the Second World War, and it does not examine the theories of either the IMT or the NMT regarding the criminality of enforced disappearance as carried out in the Night and Fog

129. *Id.* at 89.

130. *Id.* (citing *Velasquez-Rodriguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 153 (July 29, 1988)).

131. See G.A. Res. 47/133, U.N. Doc. A/RES/47/133 (Feb. 12, 1993); Organization of American States [OAS], G.A. Res. 666, ¶ 4, OAS Doc. AG/Res. 666 (XIII-0/83) (Nov. 18, 1983); Eur. Parl. Ass., Resolution 828, *On Enforced Disappearances*, arts. 12-13 (1984), <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta84/eres828.htm>.

132. Inter-American Convention, *supra* note 4, at 1.

133. Prosecutor v. Šimšić, Case No. X-KRŽ-05/04, Second Instance Verdict, at 47 (Aug. 7, 2007).

program. Both judgments overlook the fact that the IMT and the NMT held that enforced disappearance violated protections of the family under existing IHL.

Furthermore, the Nuremberg Tribunals only addressed enforced disappearance as a war crime committed against the civilian populations of occupied territories during an international armed conflict. The WCC did not address the applicability of the Nuremberg war crimes precedents to a conflict with both international and noninternational elements, such as that in Bosnia and Herzegovina.

Despite the *Šimšić* panel's apparent conflation of war crimes and crimes against humanity, the offenses have distinct contextual elements (chapeaux) which the *Šimšić* appellate panel does not address. Given that the WCC had convicted the defendants of enforced disappearance as a crime against humanity, the *Šimšić* panel's failure to examine the NMT judgment in the *Justice* case, which held that enforced disappearance was both a war crime and a crime against humanity, is particularly notable.

More troubling is the *Rašević and Tadović* trial panel's reliance upon the decisions and declarations by international human rights bodies. These authorities are simply irrelevant to the issue of ex post facto criminal prosecution. To the extent that these authorities stand for anything under CIL, it is the proposition that enforced disappearance is a human rights offense carrying civil liability for states, not criminal liability for individuals. The Rome Statute, Inter-American Convention, and the Convention on the Protection of All Persons from Enforced Disappearance do not in and of themselves support the proposition that the criminal prohibition of enforced disappearance was well established under CIL at the time these agreements came into existence. In sum, the judgment erred by equating unlawful behavior with criminal conduct.

By confusing illegality with criminality, both judgments also failed to address the related issue of individual liability. The fact that conduct may violate international human rights law and thus subject a state to civil liability is insufficient to place a defendant on notice that such conduct also exposes him to individual criminal liability. Although there has been a gradual convergence of IHL and human rights law, these bodies of rules have distinct pedigrees and distinct consequences for their violation.<sup>134</sup> By conflating criminal liability for war crimes and civil liability for human rights violations, the judgments unnecessarily muddy the issue of notice and undermine the principle of legality.

Had the WCC recognized the roots of the prohibition of the enforced disappearance in IHL, this problem could have been avoided. Centuries of state practice had already established by the time of the Nuremberg trials that violations of the laws and customs of war carried individual criminal liability.<sup>135</sup> War criminals have traditionally had notice of their individual criminal liability under international law.

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134. Meron, *supra* note 10.

135. See generally H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 1944 BRIT. Y.B. INT'L L. 58; Georg Schwarzenberger, *The Judgment of Nuremberg*, 21 TUL. L. REV. 329 (1947); Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38 (1947). As these

The WCC paid surprisingly scant attention to those features of the former Yugoslavia's legal regime which provided heightened notice to defendants in Bosnia and Herzegovina, notice above and beyond that provided by the clear criminality of enforced disappearance under CIL and the existence of individual liability for war crimes under IHL.

E. *International Law and Notice in the Former Yugoslavia*

Continuing with the case study of Bosnia and Herzegovina, I now illustrate how a country's treaty obligations and domestic penal codes can provide its citizens with additional notice both of internationally protected values and of the possibility of individual criminal liability for the violation of these values. My purpose is not to address the thorny issue of whether treaty obligations were passed between Yugoslavia and its predecessor and successor states. Instead, I argue that the historic obligations of these states constituted special notice to the citizens of these polities that enforced disappearance was an international crime. As international criminal law deals with the liability of individuals, rather than states, for violations of international law, the legitimate expectation of the individual is the relevant issue. Such heightened notice further undercuts claims of retroactivity.

The citizens of Yugoslavia and Bosnia and Herzegovina have been aware that family rights enjoy protection under the laws of war since the emergence of these states as independent polities. Serbia, Montenegro, and the Austro-Hungarian Empire all signed and ratified the 1899 Hague Convention.<sup>136</sup> More importantly, Yugoslavia and its successor states recognized and accepted that conduct violating family rights and amounting to enforced disappearance was a war crime carrying individual liability. Yugoslavia was one of nineteen countries adhering to the London Agreement of August 8, 1945, which established the IMT as defined by the London Charter.<sup>137</sup>

The citizens of Yugoslavia and its successor states enjoyed heightened notice not only because of their countries' historic obligations under the Hague Conventions and the London Agreement, but also under the Geneva Conventions. Yugoslavia ratified the Geneva Conventions as well as the two Additional Protocols. It implemented the Additional Protocol through domestic legislation in 1978.<sup>138</sup> Bosnia and Herzegovina independently became a state party to the Conventions and Additional Protocols in 1992.<sup>139</sup> Moreover, in Bosnia and Herzegovina, the warring parties signed agreements requiring the prosecution of those responsible for the violations of IHL generally and grave breaches in particular, even within the context of the internal conflict.<sup>140</sup>

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authors make clear, the *ex post facto* claims of the Nuremberg defendants regarding war crimes prosecution were baseless. Prosecution for crimes against the peace was a different matter.

136. See 1899 Hague Convention, *supra* note 65.

137. 22 IMT TRIALS, *supra* note 24, at 411.

138. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 135 (Oct. 2, 1995).

139. *Id.*

140. *Id.* ¶ 136 (citing an Agreement of May 22, 1992, and an Agreement on Release and



International law was not only incorporated through reference into the domestic law of Yugoslavia, but more specifically into the country's domestic criminal law. The CC of SFRY provided for the death penalty for

[w]hoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, . . . application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial . . . .<sup>141</sup>

Within the context of war, armed conflict, or occupation, these substantive offenses against civilians are characterized by the CC of SFRY as “war crimes against civilian population” which are in turn considered “criminal acts against humanity and international law.”<sup>142</sup> The ICTY has interpreted this provision of the Criminal Code of SFRY to criminalize violations of IHL in both international and internal conflicts.<sup>143</sup> Furthermore, under Article 210 of the constitution of the SFRY, both Additional Protocols were directly applicable in the country's courts from 1978 onward.<sup>144</sup>

These special features of Yugoslav law put the citizens of the former Yugoslavia and its successor states on heightened notice that enforced disappearance was a criminal offense carrying individual liability. As the ICTY observed in *Tadić*, “[n]ationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.”<sup>145</sup>

## V. CONCLUSION

The prohibition of enforced disappearance is rooted in the protection of the family during armed conflict. The offense's historic roots in the laws of war are significant because they show that enforced disappearance carried individual criminal liability long before recent developments in international human rights law. The history of the offense also illustrates that the criminal prohibition of enforced disappearance serves to punish harms separate from those addressed by the related prohibitions against homicide and unlawful detention. Prosecution of the offense is necessary in order to condemn the specific harms caused to the families of the missing by the continuing uncertainty regarding the fate of the missing.

The case study of Bosnia and Herzegovina illustrates the prevalence and character of enforced disappearance during armed conflict. The criminal

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Transfer of Prisoners of October 1, 1992).

141. CRIMINAL CODE art. 142(1) (1977).

142. *Id.*

143. *Tadić*, Case No. IT-94-1-I, ¶¶ 132, 134 (noting that the CC of SFRY criminalized violations of the Geneva Conventions even in the context of purely internal conflicts and observing that “these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”).

144. *Id.*

145. *Id.* ¶ 135.

prosecution of disappearance demonstrates the practical relevance of the historical distinction between enforced disappearance's origins as an offense in IHL and human rights law. The flawed and incomplete judgments of the WCC raise serious concerns regarding the retroactive application of criminal law. By rooting the criminal prohibition of enforced disappearance in IHL, Bosnia and Herzegovina and other postconflict states can better balance accountability for mass atrocities with the principle of legality.

The historic roots of enforced disappearance also have contemporary relevance for the U.S. war on terror. The International Committee of the Red Cross has characterized the CIA's clandestine detention program as involving enforced disappearance and asserted that the practice violates customary IHL.<sup>146</sup> A concrete example illustrates one such disappearance. In November 2002, the CIA held an uncooperative Afghan detainee at the Salt Pit detention facility north of Kabul. This detainee was unregistered and did not even appear on the agency's list of "ghost detainees."<sup>147</sup> In order to elicit information from the prisoner, a CIA officer ordered local guards to strip the detainee naked and chain him to the floor of his cell overnight. After the detainee predictably died of hypothermia, his captors buried his body in a clandestine grave in an unmarked, unacknowledged cemetery. The U.S. government has never notified the detainee's family of his fate. "He just disappeared from the face of the earth," said one U.S. government official with knowledge of the case."<sup>148</sup>

Concerns over potential criminal liability led the Bush Administration to attempt to water down the language of the draft International Convention on the Protection of All Persons from Enforced Disappearance.<sup>149</sup> One senior Bush Administration policymaker acknowledged that "[o]ur negotiators were certainly aware that there was this program where people were being held, and were not in touch with people."<sup>150</sup> The Administration objected to provisions in the Convention which established a right to know, codified command responsibility as a mode of liability, eliminated the defense of superior orders, and established a requirement to disobey an order to engage in enforced disappearance.<sup>151</sup> If, as I have argued, enforced disappearance has long been a war crime as well as a crime against humanity under customary international law, the U.S. government employees responsible for the Afghan prisoner's disappearance could face liability not only for homicide, but also for the disappearance itself. Such liability could extend not only to those responsible

146. INT'L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY 24 (2007), available at <http://www.nybooks.com/icrc-report.pdf>. This report marked "strictly confidential" was submitted to John Rizzo, Acting General Counsel of the CIA, and later leaked to media.

147. Dana Priest, *CIA Avoids Scrutiny of Detainee Treatment: Afghan's Death Took Two Years To Come to Light; Agency Says Abuse Claims Are Probed Fully*, WASH. POST, Mar. 3, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A2576-2005Mar2.html>.

148. *Id.*

149. R. Jeffrey Smith, *U.S. Tried To Soften Treaty on Detainees: Bush White House Sought To Shield Those Running Secret CIA Prisons*, WASH. POST, Sept. 8, 2009, at A3.

150. *Id.*

151. Nonpaper from the U.S. Delegation to the Chair of the Working Group for the Elaboration of the Treaty To Punish and Prohibit Enforced Disappearance, [http://www.washingtonpost.com/wp-srv/nation/documents/nonpaper\\_to\\_french\\_chair\\_090309pdf.pdf](http://www.washingtonpost.com/wp-srv/nation/documents/nonpaper_to_french_chair_090309pdf.pdf) (last visited Dec. 1, 2009).

for the prisoner's initial capture and detention, but also to those individuals who failed to inform the prisoner's family of his fate. Furthermore, the case law of the Nuremberg Tribunals, especially the U.S. military tribunal's decision in the *Justice* case, exposes the Bush Administration's revisions as amnesic at best. An appreciation by the U.S. government of the history of enforced disappearance under international law and the instrumental role played by the United States from the Lieber Code to the Nuremberg Tribunals in the development of this prohibition would buttress the lawfulness of the ongoing war on terror.