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THE MISSING PERSONS IN CYPRUS AND THE RIGHT TO THE TRUTH

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The right to the truth is a modern and a stand-alone right of particular importance and magnitude, as it relates to serious violations of International Human Rights Law, International Humanitarian Law and International Criminal Law. This right, which has emerged as an imperative necessity, is closely linked to the issue of enforced disappearances of persons and the issue of war reparations.

It is the right of the victims and their relatives to know the whole truth about the events that took place, the perpetrators, the circumstances under which the violations took place and their causes, the progress and the results of the investigations, the fate and the whereabouts of the victims, and the reasons of these persons' victimization.

The right provides increased protection for individuals, and it could be supported that it functions in general for the interest and vindication of the victims of such violations, namely "pro persona" and "pro victimā".

The right to the truth has individual nature, since the person who has been the victim of serious violations of International Human Rights, International Humanitarian Law and International Criminal Law can claim the investigation and revelation of the truth. It has also collective nature, which reflects the general need and the collective interest of the whole society to restore the truth and to administer justice. The administration of justice on such hideous crimes is linked to the known from the Ancient Greek tragedy notion of "catharsis" for the victims, for the progress of a democratic society, for humanity, and even perhaps for the perpetrators themselves.

In addition, the right to the truth concentrates features of first generation rights -since it is an individual right, enforceable, directly linked to fundamental human rights-, of second generation rights -because it contains social elements-, but it is more suited to third generation rights -since it involves solidarity, and is linked to our debt to future generations-.

In order to strengthen the binding and normative nature of the right, it could be argued that it has customary character, as it appears that the conditions for the crystallization of an international custom are fulfilled, namely: i) the existence of an unvarying, consistent and repetitive practice (*usus*), ii) *opinio juris* and iii) *opinio necessitatis*.

With regard to the ratio of the right, it could be argued that encourages the investigation, disclosure and remedy of serious violations, some of which could not be put forward in any other way. In addition, through this right legal voids could be covered; as International Law is evolving and International Criminal Law is being currently developing. In the absence of a sufficiently well-established legal framework, without prejudice to the hard core of the principle of non-retroactivity of criminal legislation, the application of the right to the truth -owing to its broadness and the guarantees it offers- could contribute to overcome formal obstacles for the prosecution of extremely serious crimes.

The term "right to the truth" is introduced for the first time on the crime of enforced disappearance of persons -by reflecting the right of their relatives to know the whole truth about the fate of their loved ones- and has significantly contributed to overcoming the initial difficulties of delimitation and prosecution of this crime. The contribution of this right to the administration of justice for the crime of enforced disappearance of persons establishes the above mentioned ratio of the right. In particular, in the case of enforced disappearances, due to the peculiar nature of the crime, the invocation of the right to the truth provided the legal basis for the obvious claims of their relatives. The fact that their relatives did not know the fate of the missing persons was not allowing them to invoke their possible death, illegal detention, torture, forced labor or anything else. This completely formal impediment of legal claim, which opposes to every principle of humanity and jeopardizes the administration of justice, has not only been put aside, but, in essence, it has itself become a legal basis claim.

The extreme seriousness of the crime lies in the fact that the victim is taken out of the state's jurisdiction, is deprived of any protection provided to him by the state as a guarantor of his rights, and is hence completely exposed to the commission of other crimes. The crime of enforced disappearance is particularly associated with extrajudicial executions, which often follow. Also, in many cases of disappearances, victims, who are illegally detained, are subjected to torture. In other cases, victims are subjected into forced labor, or to trafficking. In cases of enforced disappearances of children, especially in Latin American countries, illegal adoptions of them were followed.

Enforced disappearances of persons beyond a self-contained crime, as enshrined in the International Convention for the Protection of All Persons from Enforced Disappearance,¹ may constitute war crimes, crimes against humanity, genocide or terrorism.

¹ International Convention for the Protection of All Persons from Enforced Disappearance (2006) <http://www.ohchr.org/Documents/ProfessionalInterest/disappearance-convention.pdf>

Legally, the case of missing persons in Cyprus constitutes the self-contained crime of enforced disappearance of persons. Moreover, the disappearances of persons which were committed in Cyprus at the Turkey's aggression in 1974 and during the armed conflict, constitute war crimes. However, such acts which may have been committed after the cessation of hostilities in the occupied by Turkey territories, also constitute war crimes, since International Humanitarian Law is applied as *lex specialis* in case of illegal military occupation regime. In addition, these criminal acts fulfill the objective and subjective elements of crimes against humanity, since they have been a wide and systematic practice of the Turkish forces, as is shown by the Strasbourg case law.

In regard to the issue of missing persons in Cyprus, we should refer to the Case of Cyprus v. Turkey before the European Commission for Human Rights (the Commission) and the European Court of Human Rights (ECHR) (6950/1975, 8007/1977, 25781/1994).²

The Commission saw its task as one of determining whether or not the alleged failure of Turkey to clarify the facts surrounding the disappearances constituted a continuing violation of the European Convention of Human Rights³ (the Convention). To that end, the Commission, in 2001, had particular regard to its earlier findings in its 1976 and 1983 Reports.

It recalled that in its 1976 Report it had stated that it was widely accepted that a considerable number of Cypriots were still missing as a result of armed conflict in Cyprus and that a number of persons declared to be missing were identified as Greek Cypriots taken prisoner by the Turkish army. This finding created a presumption of Turkish responsibility for the fate of persons shown to be in Turkish custody. The Commission further recalled that in its 1983 Report it found it established that there were sufficient indications in an indefinite number of cases that missing Greek Cypriots had been in Turkish custody in 1974, and that this finding once again created a presumption of Turkish responsibility for the fate of these persons. Moreover, the Commission had emphasized to Turkey's non-cooperation and failure to provide any information concerning the missing persons, and had pointed out the suffering that this situation causes to their relatives. It had also declared the violation of Article 5 of the Convention on the right to liberty and security, and had paralleled the case with murders of persons.

² Case of Cyprus v. Turkey before the European Commission for Human Rights and the European Court of Human Rights (6950/1975, 8007/1977, 25781/1994)

-Report of the European Commission of Human Rights, 10 July 1976

-Report of the European Commission of Human Rights, 4 October 1983

-Report of the European Commission of Human Rights, 4 June 1999

-Cyprus v. Turkey, Case no. 25781/94, ECHR 2001-IV

[http://hudoc.echr.coe.int/eng?i=001-59454#{"itemid":\["001-59454"\]}](http://hudoc.echr.coe.int/eng?i=001-59454#{)

³ European Convention of Human Rights (1950)

http://www.echr.coe.int/Documents/Convention_ENG.pdf

Furthermore, the Commission, in 2001, argued that the missing persons had disappeared in circumstances which were life-threatening, having regard, inter alia, to the fact that their disappearance had occurred at a time when there was clear evidence of large-scale killings, including as a result of acts of criminal behaviour outside the fighting zones. The Commission -with reference to the ECHR case-law-, found that Article 2 on the right to life had been violated by virtue of a lack of effective investigation by the Turkey's authorities, which constituted a positive obligation of the State.

Although the evidence adduced before the Commission confirmed a very high incidence of military and civilian deaths during the military operations of July and August 1974, the ECHR reiterated that it cannot speculate as to whether any of the missing persons have in fact been killed, by either the Turkish forces or Turkish-Cypriot paramilitaries into whose hands they may have fallen. For the ECHR, the allegations must be examined in the context of a Contracting State's procedural obligation under Article 2 to protect the right to life. It recalled that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 to "secure to everyone within its jurisdiction the rights and freedoms defined in the Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State or by non-State agents. So, it concluded that there has been a continuing violation of Article 2, on account of the failure of Turkey to conduct an effective investigation, aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances.

This position of the Commission and of the ECHR strengthens the framework for the prosecution of this crime. It also parallels and stipulates the same legal treatment for the crime of enforced disappearance of persons and for the crime of homicide.

Moreover, the Commission concluded that Turkey had failed in its obligation to carry out a prompt and effective investigation, in respect of an arguable claim that Greek-Cypriot persons who were detained by Turkish forces or their agents in 1974 disappeared thereafter. For the Commission, a breach of the Article 5 obligation had to be construed as a continuing violation, given that it had already found in its 1983 Report that no information had been provided. It stressed that there could be no limitation in time as regards the duty to investigate and inform, especially as it could not be ruled out that the detained persons who had disappeared might have been the victims of the most serious crimes, including war crimes or crimes against humanity.

The ECHR also concluded, at the same basis and for the same reasons, that during the period under consideration there has been a continuing violation of Article 5 of the Convention.

For the ECHR, the silence of Turkish authorities in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3, which establishes the prohibition of inhumane treatment. It further recalled that the essence of such a violation does not so much lie in the fact of the tragic event of the family member disappearance, but rather in the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.

The Greek Commissioner Georgios Tenekidis argued that, given the inability of the Republic of Cyprus to collect evidence -due to non-access to the occupied part of Cyprus and to Turkey-, there should be a kind of reversal of the burden of proof, and on the basis of the principle of effective control, Turkey should be the one to provide proof. Furthermore, he supported that as Turkey refuses to conduct any investigation, it would be necessary to apply the "evidence-based proof", namely that the allegations against Turkey are presumed to be true.

In procedural terms, the denial of conducting effective investigation and of providing any information is equivalent to confession of committing the crime, and therefore to full proof. Thus, there is a transition from the presumption of innocence to a "presumption of guilt", in order to oblige the state to provide the due cooperation, and to prevent the invocation of the category of missing persons in order to extend impunity. Turkey's failure to conduct any investigation and to provide any information on the issue of missing Greek Cypriots is a mala-fide attitude, it is an attempt to conceal committed international crimes, and is a way of not implementing the State's international obligations of jus cogens character.

Furthermore, in the Case *Varnava and others v. Turkey*,⁴ the ECHR did not differ from its previous judgment on the Case *Cyprus v. Turkey* (IV, 25781/1994) and adopted it.

The position that long-term uncertainty and anxiety about a person's fate causes his relatives psychological pain that constitutes inhuman treatment is a particularly important contribution of the Strasbourg Court's case law to the promotion of the right to the truth. It is emphasized both by the Commission and by the ECHR on the Case *Cyprus v. Turkey*, but also in earlier case law of the ECHR. The suffering of relatives -in addition to the disappearance of their beloved person- is connected and is also caused by the attitude of the state authorities towards them. The investigation must not be terminated by finding the missing person's body or by presuming his death, but by finding and prosecuting perpetrators and dealing out justice.

⁴ Case of *Varnava and others v. Turkey*: (Third Section, 2008, Grand Chamber, 2009)
[http://hudoc.echr.coe.int/eng#{"itemid":\["001-84336"\]}](http://hudoc.echr.coe.int/eng#{)
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In the same direction, the International Convention for the Protection of All Persons from Enforced Disappearance in Article 24 (1) gives a broader definition of the notion of victim, by including at the victims of the crime both the disappeared person and any other person who suffered because of this disappearance.

In the legal claims, a combined exercise of the individual and of the collective dimension of the right should be made. On the one hand, individuals -given that they are specific subjects and not abstract entities and have a strong personal interest- can act more effectively in claiming the right. On the other hand, diplomatic protection by states or inter-state application -in parallel with individual petition- to mechanisms for the protection of human rights empowers the person's position. This happens because: (i) there are two additional mechanisms for the protection of the person's rights; (ii) the state becomes a party to the proceedings; (iii) procedural obstacles may be overcome; and (iv) the state may raise other issues of a more general nature.

Moreover, the issue of missing persons in Cyprus, due to the continuing nature of the crime, could be brought to the International Criminal Court (ICC) by the Republic of Cyprus. The fact that it is recorded -with absolute clarity and with detailed documentation- as a continuous crime in the case law of the ECHR reinforces the possibilities for further legal claims.

In particular, the International Criminal Court (in accordance with article 11 of its Statute)⁵ has jurisdiction only with respect to crimes committed after its entry into force, namely after 2002. Given that the commission of the crime of missing persons has been extended until today -since its continuous character lies in Turkey's failing to carry out an effective investigation and to ascertain the fate of missing persons- the crime falls within the *ratione temporis* of the ICC. Also, as regards the crimes within the jurisdiction of the ICC, the issue of missing persons in Cyprus fulfills the objective and subjective elements of war crimes and crimes against humanity, which fall within the *ratione materiae* of the ICC (according to article 5). With regard to the *ratione personae* and the *ratione loci*, the ICC has jurisdiction in accordance with article 25 and article 12 (2), since the crimes were committed in Cyprus, namely in the territory of a State which has ratified its Statute. In this way, the fact that Turkey has not ratified the Statute of the ICC is overcome. Therefore, as all the above mentioned conditions are met; on the basis of Article 13 (a) and 14, the Republic of Cyprus can appeal to the International Criminal Court for the issue of missing persons.

It is worth noting three provisions of the International Convention for the Protection of All Persons from Enforced Disappearance, which are highly indicative of the extreme gravity of the particular crime, and which could be utilized in the present case. Firstly, the authorities shall undertake an

⁵ Rome Statute of the International Criminal Court
<http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>

investigation, even if there has been no formal complaint. Secondly, no exceptional circumstances may be invoked as a justification for this crime. Thirdly, it shall not be regarded as a political offense, or as an offence inspired by political motives.

Furthermore, it could be supported that the right to the truth is closely linked to the International Criminal Law. In this way, this right and the possibilities of reparation and administration of justice for the crime of enforced disappearance in Cyprus are strengthened. In particular, it could be argued that the right to the truth pertains to *jus cogens*, as it arises from international crimes, the legal framework of which constitutes *jus cogens*. As a result, the committed crimes in Cyprus fall within the framework of international, peremptory fundamental principles or norms from which no derogation is permitted. This body of principles of International Law overrides the national law of states, regardless of whether the states have accepted and adopted them. In addition, since international crimes are not subject to prescription, it could be argued that the violations which give rise to the right to the truth and the related claims are inalienable. As a result, the crime of missing persons in Cyprus is not subject to prescription, the claims are not weakened and can be applied at any time. Also, since international crimes have been judged to offend "humanity" and "global collective consciousness," the connection of the right with these notions contributes to its empowerment.

It must be highlighted that the Republic of Cyprus has never resigned from its right to claim reparation for this crime. Instead, it has appealed on this issue to the European Commission for Human Rights and the European Court of Human Rights. In any case, such a resignation -which is not the case here- is doubtful whether it would be legally binding. First of all, it involves a large number of individual claims, so if there is an individual right to reparation of the victims, any resignation on the part of the state does not mean that their right and claims are extinct. Moreover, as it concerns issues connected with *jus cogens*, it is legally problematic whether such a resignation would be legally valid.

Towards giving an end to impunity, it could be argued that at international level, there is a need for quantification and further specification of certain terms, parameters and rules of the legal framework relating to the crime of enforced disappearance of persons. In particular, it could be suggested that a rebuttable presumption should be introduced that after a certain period of time the victim should be presumed dead, which -of course- would not result in the termination of the investigation. Such a presumption would facilitate court proceedings, aggravate the position of perpetrators, and limit the impunity. In addition, after a certain period of time if the state has not investigated or failed to provide relevant information and evidence about the crime, that would be an aggravating factor. Indeed, it could be introduced a state obligation to initiate a thorough and impartial investigation, within a certain period of time, if there were reasonable grounds. It would also be possible to set a point in time after which the state would be obliged to provide remedies to the relatives of the missing person. Finally, it would be possible, for the state in which such cases

are pending to be obliged to submit periodic progress reports/updates, concerning these cases, to an international entity of common acceptance.

Some significant principles of the international legislation and of the case law of the European Court of Human Rights and of the Inter-American Court of Human Rights, concerning the crime of enforced disappearance of persons, are set out below: i) its recognition as a continuous crime, ii) the state obligation to continue the investigation until the clarification of the fate of the missing person and of the violations committed, as well as the prosecution of the perpetrators, iii) the widening of the notion of victim, iv) the recognition that the state violates the prohibition of inhuman treatment as regards the relatives of the missing person as long as the crime has not been fully elucidated, v) the prohibition to accept justifications or restrict reparations, vi) the obligation of international co-operation. They constitute, therefore, an extremely important legal acquis for the prevention and repression of the crime of enforced disappearance of persons, and leave no room for invoking the category of missing persons by the perpetrator or a third party for extending impunity. This valuable acquis must be used and exploited appropriately and adequately for the necessity of administration of justice on the issue of missing persons in Cyprus.

In conclusion, it could be argued that the crime of enforced disappearance of persons goes beyond death, because in the absence of confirmation by the offending state whether the disappeared is alive or not and by concealing the location of his body the "core of human existence" is being questioned. In addition, human dignity is completely violated; neither the body of the dead is respected. Concerning this crime, the right to the truth is based, among other rights, on "the right to mourning". This wording -which stresses the hideous character of the crime- is an oxymoron, as the content of human rights is usually positive, but in the case of enforced disappearances not even the right to mourning is self-evident for their relatives. The possibilities of further legal claims, the entire existing legal framework, and the potential of the right to the truth -as analyzed in the current paper- should be utilized in order to administer justice for the crime of missing persons in Cyprus, such an outrageous crime, which offends "humanity" and the "global collective consciousness".

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