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## PAST CONFLICTS, PRESENT UNCERTAINTY: LEGAL ANSWERS TO THE QUEST FOR INFORMATION ON MISSING PERSONS AND VICTIMS OF ENFORCED DISAPPEARANCE. THREE CASE STUDIES FROM THE EUROPEAN CONTEXT

### **Abstract:**

*This article is intended to provide a legally sound explanation of why and how the contemporary International Humanitarian Law and International Human Rights Law legal frameworks offer tools to address the uncertainty, lack of information, and the consequences thereof in relation to missing persons and victims of enforced disappearances in the context of armed conflicts which predated the adoption of such frameworks. To this end, three scenarios will be examined: the contemporary claims of the families of those who were killed in the Katyń massacre in 1940; the claims for information and justice of the families of thousands who were subjected to enforced disappearances during the Spanish Civil War between 1936 and 1939; and the identification efforts concerning those reported missing while involved in military operations in the context of the 1944 Kaprolat/Hasselmann incident which took place during the Second World War. The analysis of these scenarios is conducive to the development of more general reflections that would feed into the debate over the legal relevance of the distant past in light of today's international legal framework.*

**Keywords:** Katyń, Spanish Civil War, Kaprolat/Hasselmann incident, enforced disappearances, missing persons, intertemporal law, continuing violation doctrine, European Court of Human Rights, International Humanitarian Law, armed conflicts

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## INTRODUCTION

Past conflicts can still be vivid in the minds of those who survived them as well as those who have been living with the hope of finding answers about their relatives reported missing in the conflicts. Recent examples that have raised the attention of State authorities and international adjudicators revolve around the requests for information of the families of those who were killed in Katyn in 1940; the claims for information and justice by the families of thousands who were subjected to enforced disappearances in the civil war in Spain between 1936 and 1939; and the identification efforts concerning those reported missing while involved in military operations in the context of the 1944 Kaprolat/Hasselmann incident during the Second World War (WWII).

During the Spanish civil war (1936-1939), in addition to the mutual and common practice of desecration of the dead, the nationalists (a falangist group led by General Francisco Franco) refused to issue death certificates for dead republicans.<sup>1</sup> Moreover, the nationalists carried out

the systematic abduction of children of Republican detainees [...], who were allegedly given to families who supported the Franco regime once their identities had been changed in the Civil Register. During the civil war, many Republican parents evacuated their children abroad. When the war was over, the Franco regime decided that all those children should return and, after repatriation, many were sent to *Auxilio Social* centers, whereupon parental rights were automatically transferred to the State, while their biological families were quite unaware of this situation. Many of these children were adopted without the knowledge or consent of their biological families.<sup>2</sup>

The effects of this conduct are still vivid and legally relevant at the time of this writing. It was only in 2007 that Spain, under both national<sup>3</sup> and international<sup>4</sup> pressure,

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<sup>1</sup> A. Gillespie, *A History of the Laws of War*, Volume 1: *The Customs and Laws of War with Regards to Combatants and Captives*, Hart Publishing, Oxford and Portland: 2011, p. 208.

<sup>2</sup> UN Working Group on Enforced and Involuntary Disappearance (WGEID), *Report of the WGEID. Addendum – Mission to Spain* (2014), UN Doc A/HRC/27/49/Add.1, para. 7.

<sup>3</sup> A national movement – made of NGOs, victim associations, relatives of the victims of crimes committed both during the civil war and the dictatorship – began to develop at the end of the 1990s. See S. Gálvez, *El proceso de Recuperación de la Memoria Histórica en España: Una aproximación a los Movimientos Sociales por la Memoria*, 19 *International Journal Iberian Studies* 25 (2006), pp. 32-36. This movement gained strength at the beginning of the twenty-first century through revived support by a new generation of politicians and activists at the national and international level. R. Escudero, *Road to impunity: The absence of transitional justice programs in Spain*, 36 *Human Rights Quarterly* 123 (2014), p. 141.

<sup>4</sup> In 2002 the UN WGEID listed Spain among those countries with disappearances cases. UN WGEID, *Question of enforced or involuntary disappearances: Report of the WGEID submitted in accordance with Commission Resolution 2002/41* (2003), UN Doc E/CN.4/2003/70, paras. 246-247. In 2006 the Parliamentary Assembly of the Council of Europe (CoE) released an official and public condemnation of Franco's Regime and of the crimes committed during the dictatorship. Parliamentary Assembly of the CoE, *Need for international condemnation of the Franco regime*, Recommendation 1736 (2006), paras. 8.1-8.2. Moreover, the European Parliament held a debate on the condemnation of Franco's Regime in 2006. European Parliament, Debates – 4 July 2006, Strasbourg, available at: <https://bit.ly/2pKpp3M> (accessed 30 June 2018).

enacted a law – the Historical Memory Act<sup>5</sup> – addressing the calls for the recovery of historical memory. This legislation requests the public authorities to facilitate the location and identification of persons who went missing as a result of both the civil war (1936-1939) and Franco's dictatorship that followed the conflict (1939-1975). Yet, pursuant to the Act the measures aimed at locating and identifying disappeared persons rely on initiatives taken by relatives and not by the State.<sup>6</sup> At the same time, access to information, including to the death registers of the civil war is not always possible due to, for instance, the destruction of these registers and denial of access on various grounds (e.g., the protection of personal information).<sup>7</sup> It is significant that the Committee on Enforced Disappearances (CED) – the treaty body of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) – has considered this part of the Act problematic. Accordingly, the CED has commented that

the search for persons who have been the victims of enforced disappearance and efforts to clarify their fate are obligations of the State even if no formal complaint has been laid, and that relatives are entitled, inter alia, to know the truth about the fate of their disappeared loved ones.<sup>8</sup>

In the 1944 Kaprolat/Hasselmann incident (in the Karelia region, at the border between the former USSR and Finland) a hundred Norwegian soldiers serving in the German army were killed in the course of a military operation. Their remains were left in the woods.<sup>9</sup> In the aftermath of the conflict, Norway did not undertake any initiative in order to collect and bury the deceased soldiers, who were considered traitors.<sup>10</sup> During the last two decades, the wider public has become aware of the remains of these soldiers: relatives of those who had gone missing in Karelia learned that artefacts belonging to the soldiers were being sold on the Internet and that memorabilia hunters had unearthed human remains at the site of the battle.<sup>11</sup> It was at this point that the families decided to step forward and contact the University of Bergen to recover and identify the remains.<sup>12</sup>

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<sup>5</sup> Articles 11 and 13, Ley 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura, available at: Agencia Estatal Boletín Oficial del Estado, [https://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2007-22296](https://www.boe.es/diario_boe/txt.php?id=BOE-A-2007-22296) (accessed 30 June 2018) (Ley 52/2007 (Spain)). The Historical Memory Act was followed by a Protocol in 2011 (Protocol for exhumation of victims of the civil war and the dictatorship).

<sup>6</sup> UN WGEID, *supra* note 2, para. 21.

<sup>7</sup> *Ibidem*, para. 30.

<sup>8</sup> Committee on Enforced Disappearances (CED), *Concluding Observations on the Report Submitted by Spain under Article 29, Paragraph 1, of the ICPPED* (2013), UN Doc CED/C/ESP/CO/1, paras. 31-32.

<sup>9</sup> I. Morild et al., *Identification of Missing Norwegian World War II Soldiers, in Karelia Russia*, 60 *Journal of Forensic Sciences* 1104 (2015), p. 1104.

<sup>10</sup> *Ibidem*, p. 1109.

<sup>11</sup> ICMP, *Under a Foreign Flag* by Rene Huel, 2015, available at: <http://www.icmp.int/news/under-a-foreign-flag/> (accessed 30 June 2018).

<sup>12</sup> Morild et al., *supra* note 9, p. 1104.

The scenario surrounding the Katyń massacres was different.<sup>13</sup> Between April and May 1940 more than 20,000 Polish Prisoners of War (POWs) and other detainees held in prison camps established by the Soviet People's Commissariat for Internal Affairs (NKVD) were arbitrarily executed and their bodies were buried in mass graves.<sup>14</sup> In 1942 and 1943, with the discovery of the mass grave sites, an international commission consisting of forensic experts carried out the exhumations (April to June 1943). After having identified 2,730 bodies, the commission declared that the Soviets were responsible for the massacre. However, the Soviet authorities denied any involvement, carried out their own investigation, and reached the opposite conclusion, i.e., that the Germans were responsible for the massacre. In 1959 Russian authorities destroyed the records of the persons shot in 1940; other relevant documents<sup>15</sup> were sealed and their content was made public only in 2010.<sup>16</sup> At the same time, Russian authorities recognized that the killing of Polish POWs on USSR territory during WWII had been an arbitrary act by the USSR.<sup>17</sup> Since the 1990s, families have undertaken a number of steps to gain access to the relevant information held by Russian authorities. In 2009 a group of relatives decided to bring their case before the European Court of Human Rights (ECtHR).

These brief accounts shed light on how situations generated in the context of past conflicts impact the possibility of gaining access to information decades later, after the termination of those conflicts. It would be pretentious to proffer that this article

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<sup>13</sup> The account of the facts is based on the following sources: ECtHR, *Janowiec and Others v. Russia* (App. Nos. 55508/08 and 29520/09), 16 April 2012, paras. 10–45; G. Citroni, *Janowiec and Others v. Russia: A Long History of Justice Delayed Turned into a Permanent Case of Justice Denied*, XXXIII Polish Yearbook of International Law 279 (2013), p. 280.

<sup>14</sup> The decision to carry out this mass execution was signed by all members of the Politburo, i.e., the highest body of the former USSR. Prisoners from the Kozelsk camp were killed at a site near Smolensk, known as the Katyń forest.

<sup>15</sup> These documents included the note of Mr. Beria, Head of the People's Commissariat for Internal Affairs (NKVD) of 5 March 1940 (containing the proposal to approve the shooting of Polish prisoners of war on the grounds that they were all “enemies of the Soviet authorities and full of hatred towards the Soviet system”); the Politburo's decision (concerning the approval of the proposal) of the same date; the pages removed from the minutes of the Politburo's meeting and the note of Mr. Shelepin, Chairman of the State Security Committee – KGB (concerning the precise numbers of murdered prisoners) of 3 March 1959. These documents were put into a special file called “package no. 1.” As reported in the ECtHR case law, “in Soviet times, only the Secretary General of the USSR Communist Party had the right of access to the file. On 28 April 2010 its contents were officially made public on the website of the Russian State Archives Service (rusarchives.ru).” See ECtHR, *Janowiec and Others v. Russia*, paras. 10–21.

<sup>16</sup> In 1991 around 200 bodies were recovered in the Kharkov, Tver and Smolensk regions, and 22 of them were identified. Between 1990 and 2004, Russian authorities opened a criminal investigation into the Katyń massacre, but the Chief Military Prosecutor eventually decided to discontinue the case on the grounds that all alleged suspects were dead. On 22 December 2004, the Russian Interagency Commission for the Protection of State Secrets classified 36 volumes of the case file – out of a total of 183 – as “top secret” and another eight volumes “for internal use only.” The decision to discontinue the investigation was also given a “top secret” classification and its existence was only revealed on 11 March 2005 at a press conference given by the Russian Chief Military Prosecutor. See Citroni, *supra* note 13, p. 280.

<sup>17</sup> ECtHR, *Janowiec and Others v. Russia*, para. 71.

intends to cast light on all the pending situations – *persons still missing* – resulting from all the conflicts which occurred in the “distant past.”<sup>18</sup> Moreover, it would also be misleading to affirm that, under international law, the State is required to address cases of persons reported missing during armed conflicts which occurred so long ago that any effort to account for them would be impossible to carry out and pointless. Thus, this article revolves around the contemporaneity of claims for information lodged by family members who are still alive and suffer from the events where their relatives went missing/were forcibly disappeared.

Although the claims themselves are contemporary, they relate to events which occurred prior to the adoption of the contemporary International Humanitarian Law (IHL) and International Human Rights Law (IHRL) frameworks on persons reported missing, including forcibly disappeared persons. This article places emphasis on two typologies of cases, which differ both semantically and substantively, i.e., persons reported missing in the context of armed conflicts, and persons subjected to enforced disappearance. Under international law, the presence of these distinct terminologies feature in two international treaties, i.e., the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts adopted in 1977 (AP I) and the ICPPED adopted in 2006. Clearly, the termination of the armed conflict scenarios described above predates the adoption of these treaties.

The international legal framework does not provide for a definition of “missing person”; the rationale behind this gap is that in armed conflicts a person can go missing for a variety of reasons, which include – but are not limited to – violations of IHL and IHRL. At the operational level, for instance, the International Committee of the Red Cross (ICRC) defines “missing persons” as follows: a missing person is one

whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority.<sup>19</sup>

This implies that while the IHL rules concerning missing persons also apply in those cases where a person has been forcibly disappeared in the context of an armed conflict, the ICPPED’s rules on enforced disappearances apply only to those cases that fit into the definition provided for under Article 2 ICPPED. Pursuant to this provision,

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<sup>18</sup> This very indefinite terminology is used, *inter alia*, in the human rights case law, particularly that of the ECtHR. *Ibidem*, para. 140

<sup>19</sup> ICRC - Advisory Service on IHL, *Missing Persons and Their Families* (2015), available at: <https://bit.ly/2IUhVDU> (accessed 30 June 2018).

whereabouts of the disappeared person, which place such a person outside the protection of the law.

Against this backdrop, the present article investigates whether there exists an international obligation to address the claims of families of persons reported missing – including forcibly disappeared persons – in armed conflicts preceding the adoption of the contemporary<sup>20</sup> international legal framework.<sup>21</sup>

In order to respond to this question, the first step will be to provide a survey of the contemporary international legal framework on missing persons and enforced disappearance. This survey will be followed by an examination of whether it is legally tenable to affirm that, under international law, a treaty can impact on situations which occurred prior to its entry into force and whose consequences continued to exist after its entry into force (section 1). As a second step, this article will narrow down the focus to three case-scenarios where such a question has recently arisen in order to seek to define the place of contemporary IHL (section 2) and IHRL in addressing today's consequences arising from a distant past. The approach of the ECtHR vis-à-vis two of these case-scenarios – Spain and Katyn – will cast light upon the relevance of these consequences under the European Convention on Human Rights (ECHR). The perspective adopted by other judicial/quasi-judicial human rights bodies will examine whether similar consequences which arose in other contexts have received different responses (section 3).

## 1. THE PASSAGE OF TIME AND ITS EFFECTS ON LEGAL ENTITLEMENTS AND OBLIGATIONS CONCERNING THE ISSUES OF MISSING PERSONS AND ENFORCED DISAPPEARANCES

Before embarking on the examination of the effects of the passage of time on the contemporary rules governing the subject matter, it is important to emphasize that no specific rules on missing persons and on enforced disappearances existed at the time of the events described above. Indeed, prior to the Spanish civil war, while the IHRL framework was almost<sup>22</sup> non-existent, the IHL framework was already articulated in a

<sup>20</sup> In this article, the term “contemporary legal framework” with regard to the issue of missing and disappeared persons refers to those treaties that explicitly deal with the issue of missing persons and enforced disappearances. At the international level, these include both IHL and IHRL treaties. For more details, see subsection 1.1.

<sup>21</sup> This framework is discussed in subsection 1.1 of the present article.

<sup>22</sup> As noted by Hertig Randall, “[h]uman rights remained an essentially domestic concern until the second half of the 20th century. Several developments in international law had prepared the ground for the birth of international human rights in the aftermath of World War II.” Among these was the adoption of the Slavery Convention of 1926. M.H. Randall, *The History of International Human Rights Law*, in: G. Gaggioli & R. Kolb (eds.), *Research Handbook on Human Rights and Humanitarian Law*, Edward Elgar Publishing, Cheltenham: 2013, pp. 10-14.

set of treaties including, *inter alia*, the 1907 Hague Regulations (Convention IV)<sup>23</sup> and the 1929 Geneva Conventions<sup>24</sup> on the Wounded and Sick and on POWs. The conduct of the parties to the conflict in WWII thus fell under the scope<sup>25</sup> of, *inter alia*, the 1907 Hague Regulations and the 1929 Geneva Conventions.<sup>26</sup>

### 1.1. An overview of the contemporary international law treaty framework on missing persons and enforced disappearances

Under IHL treaties, only three provisions are specifically dedicated to the issue of missing persons: (i) Article 32 AP I revolves around the general principle that must be followed in the implementation of actions concerning missing persons, i.e., the right of families to know the fate of their relatives; (ii) Article 33 AP I deals with the obligations to be implemented by the parties to the conflict when persons are reported missing (e.g., the obligation to search for the missing, the obligation to transmit information on the missing to the Central Tracing Agency, and the obligation to record information concerning persons deprived of their liberty); and (iii) Article 34 AP I concerns the obligations of the parties to the conflict with regard to the treatment of the remains of the deceased. These provisions are applicable in international armed conflict (IAC) and in situations of belligerent occupation; the IHL treaty provisions concerning non-international armed conflict (NIAC) do not address the issue. Nevertheless, the ICRC study on customary IHL affirms that each party to the conflict has an obligation to account for persons reported missing as a result of armed conflict and to provide their family members with any information it has on their fate; such a rule is applicable to both NIAC and IAC.<sup>27</sup> AP I specifies the time limit within which the parties to

<sup>23</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague (18 October 1907) (1907 Hague Regulations (Convention IV)).

<sup>24</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva (27 July 1929) (1929 Geneva Convention on the wounded and sick); Convention relative to the Treatment of Prisoners of War, Geneva (27 July 1929) (1929 Geneva Convention on POWs).

<sup>25</sup> Both Russia and Norway were parties to The Hague Regulations of 1907 (Convention IV), and both were parties to the 1929 Convention on Wounded and Sick; while Norway was party to the 1929 Convention on POWs, Russia was not. Nevertheless, a set of rules on POWs were already present in the 1907 Hague Regulations (Convention IV), such as the obligation to treat POWs humanely (Article 4), available at: <https://ihl-databases.icrc.org> (accessed 30 June 2018).

<sup>26</sup> Nonetheless, the rules concerning the treatment of POWs were severely disregarded and violated. Germany treated Soviet, Polish, and other Slavic POWs with brutality. Of the approximately 5,700,000 Red Army soldiers captured by the Germans, only about 2,000,000 survived the war; more than 2,000,000 out of the 3,800,000 Soviet troops captured during the German invasion in 1941 were starved to death. The Soviets replied in kind and consigned hundreds of thousands of German POWs to the labor camps of the Gulag, where most of them died. See Encyclopædia Britannica, *Prisoner of War (POW)*, *International Law* (2015), available at: <https://www.britannica.com/topic/prisoner-of-war> (accessed 30 June 2018). See also S.P. MacKenzie, *The Treatment of Prisoners of War in World War II*, 66 *The Journal of Modern History* 487 (1994), p. 487.

<sup>27</sup> Rule 117, J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Volume 1: *Rules*, Cambridge University Press, Cambridge: 2005, pp. 421 ff.

the conflict must start searching for missing persons (i.e., “as soon as circumstances permit, and at the latest from the end of active hostilities”).<sup>28</sup> However, the Protocol does not mention the final moment of such operations.<sup>29</sup> Moreover, the IHL provisions on missing persons form part of those IHL provisions applicable at all times,<sup>30</sup> i.e., their application may continue beyond the conflict’s termination.<sup>31</sup> It would be illogical and contrary to the black letter law to affirm that the investigative activities aimed at searching for persons reported missing would abruptly end with the termination of the conflict. IHL is silent with regard to enforced disappearance; nevertheless, the ICRC study on Customary IHL recognizes that the prohibition of enforced disappearance is a customary rule which is applicable in both IAC and NIAC situations.<sup>32</sup>

Under IHRL, the ICPPED sets down the prohibition of enforced disappearance and provides for the right of any – direct and indirect – victim to know “the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”<sup>33</sup> The scope *ratione personae* of the right to know the truth is broader than that of the right to know enshrined in Article 32 AP I.<sup>34</sup> The former is to be understood in the broadest sense, thereby entitling the family, friends, and larger circles or communities<sup>35</sup> to the truth about the enforced disappearance of their beloved ones. Therefore, the notion of “victim” may have a collective dimension, and as a corollary the right to know the truth may be understood as both an individual and a collective right.<sup>36</sup> Nothing in the ICPPED excludes this twofold dimension. Moreover, pursuant to Article 12(2) ICPPED, “[w]here there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities [...] shall undertake an investigation, even if there has been no formal complaint.”

The question that emerges from this succinct overview of the legal framework concerning missing persons and enforced disappearances is whether such framework is relevant to the above-mentioned case-scenarios. Non-retroactivity, enshrined in the

<sup>28</sup> Article 33(1) AP I.

<sup>29</sup> Pursuant to Article 33 AP I, tracing activities shall be undertaken “as soon as circumstances permit, and at the latest from the end of active hostilities.”

<sup>30</sup> See Article 3(b) AP I.

<sup>31</sup> Y. Sandoz et al., *Commentary on the Additional Protocols: Of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Geneva: 1987, para. 149, pp. 66-67.

<sup>32</sup> Rule 98, Henckaerts & Doswald-Beck, *supra* note 27, p. 340.

<sup>33</sup> Articles 1 and 24 (2) of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), UNGA Res. 61/177, UN Doc A/RES/61/177, 2716 UNTS 3 (20 December 2006).

<sup>34</sup> UN Commission on Human Rights, *Report of the Inter-Sessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearances* (2003), UN Doc. E/CN.4/2003/71, para. 83.

<sup>35</sup> S. McCrory *The International Convention for the Protection of All Persons from Enforced Disappearance*, 7 Human Rights Law Review 545 (2007), p. 557.

<sup>36</sup> On this aspect, see UN Office of High Commissioner for Human Rights, *Study on the Right to the Truth* (2006), UN Doc E/CN.4/2006/91, para. 36.

Vienna Convention on the Law of Treaties – is a classical principle of international treaty law.<sup>37</sup> According to this principle, for each contracting party a treaty governs those facts which occur subsequent to the date of its entry into force with regard to the party concerned.<sup>38</sup> However, “continuing situations” have generated practical problems in relation to this principle, notably with regard to the non-retroactive applicability of human rights treaties.<sup>39</sup>

As stated by the Working Group on Enforced or Involuntary Disappearances (WGEID),

[e]nforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual. [...] Thus, when an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction.<sup>40</sup>

Accordingly, should a person be reported missing as a result of an enforced disappearance, the temporal dimension of the obligation to carry out an investigation shall reflect the continuous character of such crime.<sup>41</sup>

General human rights treaties do not address the issues of missing persons and enforced disappearances. However, the views of the Human Rights Committee (HRC), and the case law of the Inter-American Court of Human Rights (IACtHR) and of the European Court of Human Rights (ECtHR) contribute to shedding light upon the impact of uncertainty on the human rights of the family members of those persons reported missing as a result of violations of, *inter alia*, IHRL committed during an armed conflict (see *infra* section 3). For instance, the ECtHR has found that State authorities’ reaction and attitudes vis-à-vis the requests of family members for information *might*

<sup>37</sup> Article 28 of the Vienna Convention on the Law of Treaties (VCLT), adopted on 23 May 1969, 1155 UNTS 331; ECtHR, *Nielsen v. Denmark* (App. No. 343/57) Decision, 1959 (1959-1960) 2 Yearbook 412, p. 454, in R.C.A. White and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (4<sup>th</sup> ed.), Oxford University Press, Oxford: 2010, p. 87.

<sup>38</sup> O. Corten & P. Klein, *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I, Oxford University Press, Oxford: 2011, p. 724.

<sup>39</sup> D. Shelton, *Regional Protection of Human Rights*, Oxford University Press, New York: 2008, p. 634.

<sup>40</sup> UN WGEID, *General Comment on Enforced Disappearance as a Continuous Crime* (2011), UN Doc A/HRC/16/48, para. 39. See also IACtHR, *Velásquez-Rodríguez v. Honduras* (Series C No. 4), Merits, 29 July 1988, para. 181; CAT, *Concluding Observations on Spain* (2009) UN doc. CAT/C/ESP/CO/5, para. 21; G. Citroni *The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death* 12 Journal of International Criminal Justice 787 (2014), p. 793.

<sup>41</sup> UN WGEID, *General Comment on Enforced Disappearance as a Continuous Crime* (2011), UN Doc A/HRC/16/48, para. 39.

constitute a stand-alone violation of the prohibition of inhuman treatment under Article 3 ECHR. However, this finding will depend on the presence of a set of factors, i.e., the proximity of the family tie; the particular circumstances of the relationship; the extent to which the family member witnessed the events in question; the involvement of the family member(s) in the attempts to obtain information about the disappeared person; and the way in which the authorities responded to those enquiries.<sup>42</sup>

The ECtHR is the sole judicial body that has delineated a neat distinction between the procedural obligation to carry out an investigation into alleged violations of fundamental human rights (e.g., Article 2 ECHR, right to life) and the duty to account for missing persons and inform their families under Article 3 ECHR (prohibition of torture and inhuman and degrading treatment). In the view of the Court, these obligations entail investigative activities that are motivated by different purposes.<sup>43</sup> While the implementation of the obligation under Article 2 is aimed at clarifying the circumstances surrounding an alleged violation of the ECHR, the implementation of the obligation under Article 3 responds to the need for information of family members about the fate and whereabouts of their relatives.<sup>44</sup>

## 1.2. Observing the issue through the lens of the intertemporal law doctrine

Queries on the fate of those reported missing in armed conflicts can arise during the conflict, in the immediate aftermath thereof, or even decades after the termination of the conflict. Delay in undertaking measures to elucidate the fate and whereabouts of missing persons can be the result of a policy of silence<sup>45</sup> adopted by some societies

<sup>42</sup> See, *inter alia*, ECtHR, *Çakici v. Turkey* (App. No. 23657/94), Grand Chamber, 8 July 1999, para. 98.

<sup>43</sup> This interpretation is also confirmed by the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, which affirm that “[t]he purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death.” UN ECOSOC, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, Res. 1989/65 (Annex) (1989) UN ESCOR Supp. (No 1) at 52, UN Doc. E/1989/89, para. 9. At the same time, pursuant to the Principles on the Effective Investigation and Documentation of Torture, an effective investigation has multiple purposes, i.e., clarify the facts and establishment of individual and State responsibility for victims and family; identification of measures to prevent recurrence; and facilitation of prosecution and/or as appropriate disciplinary sanctions for those indicated by the investigation as being responsible. UNGA, *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Res. 55/89 Adopted on 4 December 2000 (1999), UN Doc. A/54/426, para. 1(a-c).

<sup>44</sup> ECtHR, *Janowiec and Others v. Russia*, para. 152. See also the opinions of the UNMIK Human Rights Advisory Panel: *Nebojša Petković against UNMIK* (Case No. 125/09), opinion, final, 2013, para. 107; *GR against UNMIK* (Case no. 12/09) opinion, final, 2013, para. 103; *Jočić against UNMIK* (Case No. 34/09), opinion, final, 2013, para. 103.

<sup>45</sup> As explained by Kovras, a decision to “silence” contentious incidents of the past, such as the Spanish Civil War, or “selectively remembering” the past in a way that accentuates a culture of victimhood, as in Cyprus, are frequently considered as the most appropriate bases for consensus in transition democracy. I. Kovras, *Truth Recovery and Transitional Justice: Deferring Human Rights Issues*, Routledge, New York: 2014, p. 67. Kenny points out that after the death of Franco in 1975 Spain faced the monumental task of “restoring peace and democracy.” The responsibility of doing so fell to the generation who inherited the

vis-à-vis human rights and IHL violations. However, with the passage of time these same societies have decided to resolve these pending issues, leading to the phenomenon of “post-transitional justice.”<sup>46</sup> While this perspective is fascinating and sheds light on the political and societal reasons for disclosing information after the passage of decades, it says nothing about the legal implications of such policies and decisions under international law.

Although an obligation to account for missing persons is not enshrined in past IHL treaties applicable to the events mentioned in the introduction to this article,<sup>47</sup> we reject the assumption that the consequences of these events must uniquely be read in light of the past treaties in effect at the time of the triggering events. The question whether contemporary international treaties apply to events which occurred prior to their entry into force involves the temporal sphere of application of the law, with a specific focus on “the temporal applicability (and not validity) of the norms at stake.”<sup>48</sup>

Under public international law, controversies over whether to apply the old or the contemporary norms have emerged mainly in the context of treaty interpretation and territorial claims.<sup>49</sup> With regard to the latter, in the *Island of Palmas* case<sup>50</sup> – a case focused on the question of title to territory – Arbitrator Huber posited that inter-temporal law is about “the rules determining which of successive legal systems is to be applied” in a particular case.<sup>51</sup> According to the doctrine, “a juridical fact must be appreciated in

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trauma of the civil war from their parents “and lived their formative years surrounded by the misery, ... and repression of the Francoist dictatorship. Hence in order to avoid confrontation of contested memories [...] the choice was made to hold back the tide of history and silence it. [...] It was deemed beneficial to avoid discussion of the past, opting instead for a policy of silence and amnesia.” This was also known as the “pacto del olvido.” N. Kenny. *The Novels of Josefina Aldecoa. Women, Society and Cultural Memory in Contemporary Spain*, Tamesis, Woodbridge: 2012, p. 184. In fact, during a recent meeting on the issue of the missing organized by the International Commission on Missing Persons (ICMP), participants pointed out that “in Spain, after the end of Franco’s regime, silence was instituted and the Spanish judiciary stood against the disinterment of dead bodies with the aim of protecting certain political prerogatives and avoiding reopening deep fractures in Spanish society. State-sponsored memorializing has different purposes from memorializing enacted by individual families.” ICMP, *Conference Report. The Missing: An Agenda for the Future* (29 October – 1 November 2013), The Hague, p. 33.

<sup>46</sup> See Kovras, *supra* note 45, pp. 148 et seq.

<sup>47</sup> For instance, nothing is said about missing persons in the two 1929 Geneva Conventions or in the 1907 Hague Regulations (Convention IV).

<sup>48</sup> See M. Kotzur, *Inter-temporal Law*, in: Max Planck Encyclopedia of Public International Law 2008, available at: <https://bit.ly/2GbQiJ1> (accessed 30 June 2018); Judge Weeramantry (ICJ), *Separate Opinion - Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Merits, Judgment, 1997, ICJ Rep. 7, p. 112.

<sup>49</sup> Kotzur, *supra* note 48; A. D’Amato, *International Law: Intertemporal Problems*, in: R. Bernhardt (ed.), *Encyclopedia of International Public Law*, vol. 2, North-Holland, Amsterdam: 1995, p. 1234; T.O. Elias, *The Doctrine of Intertemporal Law*, 74 *American Journal of International Law* 285 (1980), p. 285.

<sup>50</sup> For a summary of the case, see L. Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 *European Journal of International Law* 543 (2010), pp. 579–580.

<sup>51</sup> Permanent Court of Arbitration, *Island of Palmas Case (United States of America v. The Netherlands)*, Award of the Tribunal, 1928, p. 15.

the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.”<sup>52</sup> In other words, one has “to look at the law of the era and not at the law as it may have later developed, or as it stood at the time any dispute arose or fell to be resolved.”<sup>53</sup> Therefore, the doctrine of inter-temporal law applied in these types of cases implies that the rules of law “contemporaneous with the acts in the distant past,”<sup>54</sup> and not the present rules, control the legal significance of those acts.

As the Institut de Droit International points out, an inter-temporal problem arises, *inter alia*, “whenever a rule refers to a concept the scope or significance of which has changed in the course of time.”<sup>55</sup> In the context of the interpretation of treaties,<sup>56</sup> as explained by the International Law Commission (ILC), the doctrine of inter-temporal law has two aspects, i.e. “one affirming ‘contemporaneity’, the other allowing the changes in the law to be taken into account.”<sup>57</sup> According to former, the treaty has to be interpreted “in the light of the law in force at the time when the treaty was drawn up”; the latter aspect requires, however, that ‘the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied’ (footnotes omitted).<sup>58</sup>

These two rationales, therefore, point “to the past as a guide for finding party intent” as well as “to the present for the exactly same reason.”<sup>59</sup> The ILC makes it clear that it

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<sup>52</sup> *Ibidem*, p. 14. The International Law Commission (ILC) assessed the possibility of including part of the *dictum* of Arbitrator Huber in the VCLT (e.g., with regard to the interpretation of the treaties). Eventually, due to disagreement among the members, this possibility was dropped. H. Waldock, *Third Report on the Law of Treaties*, Yearbook of the International Law Commission (1964), ii, 5, pp. 8 ff. (draft Article 56) in Grover, *supra* note 50, p. 580; Elias, *supra* note 49, pp. 302-304. The principle of non-retroactivity, by contrast, is embedded in the VCLT, which proves that this principle cannot be considered as a synonym for inter-temporal law.

<sup>53</sup> R. Higgins, *Themes and Theories: Selected Essays, Speeches and Writings in International Law*, Oxford University Press, Oxford: 2009, pp. 867-868. See also R. Higgins, *Time and the Law: International Perspectives on an Old Problem*, 46 International and Comparative Law Quarterly 501 (1997), p. 516.

<sup>54</sup> D’Amato, *supra* note 49, p. 1234.

<sup>55</sup> Institut de Droit International (IDI), *Resolution on the Inter-Temporal Problem in Public International Law* (1975), Session of Wiesbaden Fourth Recital (Preamble).

<sup>56</sup> The United Nations International Law Commission (ILC), in its report on the fragmentation of international law, has examined the question of “what should be the right moment in time (critical date) for the assessment of the rules that should be “taken into account” under article 31 (3) (c)?.” ILC, *Report of the International Law Commission, Fifty-Seventh Session, Chapter XI “Fragmentation of International Law: Difficulties Arising from Diversification and Expansion of International Law”* (2005), UN Doc A/60/10, para. 475.

<sup>57</sup> *Ibidem*.

<sup>58</sup> *Ibidem*. According to D’Amato, in the context of treaty interpretation, the doctrine of inter-temporal law includes two aspects: first, the language of a treaty must be interpreted in light of “the definitions of words that were prevalent at the time the treaty was made”; and second, a treaty should be construed in light of “the rules of international law in force at the time the treaty was made.” D’Amato, *supra* note 49, p. 1234.

<sup>59</sup> ILC, *supra* note 56, para. 477.

is “pointless to try to set any general and abstract preference between the past and the present.”<sup>60</sup> Therefore,

when deciding whether to apply article 31(3)(c) (VCLT) so as to ‘take account’ of those ‘other obligations’ as they existed when the treaty was concluded or as they exist when it is being applied, (...) the starting-point must be (...) the fact that deciding this issue is a matter of interpreting the treaty itself.<sup>61</sup>

As suggested by Higgins, IHRL treaties – due to their nature – fall into a special category insofar as inter-temporal law<sup>62</sup> is concerned.<sup>63</sup> In the interpretative approach adopted by both the ECtHR and the IACtHR, these bodies look at the present and not at the past, thereby considering possible “changes in the law” which occurred subsequent to its adoption. In the *Tyrer* case, the ECtHR crafted a formula which became a recurrent one in its ensuing case law:

the Convention is *a living instrument* which [...] must be interpreted in the light of present-day conditions. [...] [T]he Court cannot but be influenced by the developments and *commonly accepted standards in general policy of the member States of the Council of Europe* in this field [emphasis added].<sup>64</sup>

The special character of the Convention has also been emphasized, together with the importance of considering the Convention within the international legal system.<sup>65</sup> In this respect, the Court has highlighted that

the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention’s special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction [...].<sup>66</sup>

Along the same lines, the IACtHR has held that

[...] it is necessary to point out that to determine the legal status of the American Declaration it is appropriate to look *to the Inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration*, rather than to examine the normative value and significance which that instrument was believed to have had in 1948.<sup>67</sup>

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<sup>60</sup> *Ibidem*, para. 478.

<sup>61</sup> *Ibidem*.

<sup>62</sup> In his considerations on human rights law treaties, Fitzmaurice refers to the principle of contemporaneity and the doctrine of inter-temporal law as interchangeable terms. M. Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties*, 21 Hague Yearbook of International Law 101 (2008), p. 104, in: Grover, *supra* note 50, p. 579.

<sup>63</sup> Higgins (*Themes and Theories*), *supra* note 53, p. 868.

<sup>64</sup> ECtHR, *Tyrer v. The UK* (App. No. 5856/72), 15 March 1978, para. 31.

<sup>65</sup> ECtHR, *Loizidou v. Turkey* (App. No. 15318/89), 28 November 1996, para. 43.

<sup>66</sup> *Ibidem*.

<sup>67</sup> IACtHR, *Advisory Opinion - Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the ACHR Requested by the Government of the Republic of Colombia* (Doc no. OC-10/89), 1989, para. 37 (emphasis added).

From the foregoing, it can be inferred that the States upon whom the obligations fall are not required to reopen legal acts or pay compensation for “incorrect applications” of the obligations in the past,<sup>68</sup> unless the consequences of this conduct are still continuing in present times. In the latter instance, such consequences should be read in light of the contemporary framework.

## 2. THE PLACE OF IHL IN ADDRESSING TODAY’S CONSEQUENCES RESULTING FROM PAST CONFLICTS

Very few scholars have tackled the doctrine of inter-temporal law in conjunction with IHL.<sup>69</sup> Nevertheless, the issue of whether to apply contemporary rules to a conduct held in a situation which occurred prior to the entry into force of the relevant treaty for the State concerned, or whether to apply an old rule read in light of contemporary developments under IHL has arisen in a few cases related to past conflicts (e.g., WWII). Thus, subsection 2.1 of this section will depict the three case-scenarios briefly introduced above with a focus on the legal framework applicable at the time of their occurrence and its interrelation with the contemporary legal framework outlined in subsection 1.1. Next, subsection 2.2, will examine these two issues in light of the theoretical remarks put forward in subsection 1.2 of the present article.

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<sup>68</sup> Higgins (*Themes and Theories*), *supra* note 53, pp. 869–870. Along the same lines, in dealing with the inter-temporal aspect of interpretation, the ICJ seems to have relied on the nature of the instrument at issue: in the case of instruments relating to human rights or environmental issues, the ICJ seems “to be inclined towards applying and interpreting them within the framework of contemporary international law.” See ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Merits, Judgment, 25 September 1997, ICJ Rep. 7, paras. 112, 140–141, in G. Zyberi, *The Humanitarian Face of the International Court of Justice: Its Contribution to Interpreting and Developing International Human Rights and Humanitarian Law Rules and Principles*, Intersentia, Cambridge/Mortsel: 2008, p. 30. In this regard, in his separate opinion in the *Gabčíkovo-Nagymaros* case, Judge Weeramantry stressed that “[t]he ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today’s problems in this field the standards of yesterday. [...] In the application of an environmental treaty, it is vitally important that the standards in force at the time of application would be the governing standards.” Judge Weeramantry (ICJ), Separate Opinion, *supra* note 48, pp. 111–112. See Y. Tanaka, *Reflections on Time Elements in the International Law of the Environment*, 73 ZaöRV (Heidelberg Journal of International Law) 139 (2013).

<sup>69</sup> E.g. A. Petrig, *The War Dead and Their Gravesites*, 874 International Review of the Red Cross 341 (2009); S. Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford: 2014, p. 175. With regard to the applicability of ancient norms to contemporary problems, see generally M. Bedjaoui, *The Gulf War of 1980–1988 and the Islamic Conception of International Law*, in: I.F. Dekker & H. H.G. Post (eds.), *The Gulf War of 1980–1988: The Iran–Iraq War in International Legal Perspective*, Martinus Nijhoff Publishers, Leiden/Boston: 1992. *Contra* (interpretative): K. Macak, *Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law*, 48 Israel Law Review 55 (2015), pp. 69–71.

## 2.1. Specific cases of lingering uncertainty on missing persons/victims of enforced disappearances which have emerged from past conflicts

### 2.1.1. The Spanish civil war

Uncertainty about those reported missing during the Spanish civil war and the legal obstacles preventing families from knowing the fate and whereabouts of their relatives are still present and continuing to date. The first aspect to be addressed vis-à-vis this pending situation is the definition of the rules that applied to the Spanish Civil War (NIAC<sup>70</sup>) and clarification of whether the content of these rules has changed over the course of time.

At first glance, it might be submitted that no IHL rule in force at the time of the Spanish civil war was applicable to a NIAC. Although the nationalists requested recognition of belligerency, their request was rejected.<sup>71</sup> In 1936, on the initiative of the ICRC,<sup>72</sup> the parties to the conflict – the Republican Government and the Nationalists<sup>73</sup> – agreed to apply the 1929 Geneva Convention on the Wounded and Sick through the intermediary of formal declarations to the ICRC;<sup>74</sup> they also agreed to cooperate in the establishment of a POW Information Agency.<sup>75</sup>

The agreement between the parties under the auspices of the ICRC replicated some of the rules provided for in the 1929 Geneva Conventions. Cassese explains that this was possible because “some of the rules on civil war evolved on the pattern of those governing inter-State conflicts.”<sup>76</sup> From a practical point of view, the exchange of messages and the collection of information concerning those in enemy hands were possible only in very limited circumstances.<sup>77</sup> While records concerning those detained

<sup>70</sup> F. Bugnion, *Jus ad bellum, jus in bello and non-international armed conflicts*, 6 Yearbook of International Humanitarian Law 198 (2003), p. 218.

<sup>71</sup> A. Cassese, *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, Oxford University Press, Oxford: 2008, p. 131.

<sup>72</sup> The ICRC played a major role in searching for missing persons and providing answers to their families. See F. Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan Education, Geneva: 2003, pp. 271-278.

<sup>73</sup> The opposition forces to the Republicans were the Nationalists; these had their first National Defense Council's meeting in Burgos. In the literature, these are often referred to as “the Burgos authorities.” Cassese, *supra* note 71, p. 131.

<sup>74</sup> However, in a circular letter sent, in 1937, to all national Societies of the Red Cross, the ICRC pointed out that “the application by analogy” of the 1929 Geneva Convention on Wounded and Sick was in a general way admitted in fact by both contending parties. *L'Action de la Croix-Rouge en Espagne*, 335<sup>me</sup> Circulaire du Comité international de la Croix-Rouge (Geneva 31 March 1937), p. 4 in *ibidem*, p. 132. For a thorough analysis of the activities carried out by the ICRC during the Spanish civil war concerning persons deprived of their liberty and the civilian population, see Bugnion, *supra* note 72, pp. 266-283.

<sup>75</sup> Cassese, *supra* note 71, pp. 132-133.

<sup>76</sup> *Ibidem*, p. 146.

<sup>77</sup> Political prisoners were never recorded and the Parties to the conflict did not transmit details concerning their fate and whereabouts, as this information would have been tantamount to admitting the existence of an unimaginable number of detainees: G. Đurović, *L'Agence centrale de recherches du Comité international de la Croix-rouge. Activité du CICR en vue du soulagement des souffrances morales des victimes de guerre*, University of Geneva – Institut Henry Dunant, Geneva: 1981, pp. 97-99.

by the two parties to the conflict existed, these were not handed over to the ICRC,<sup>78</sup> which had to count on unofficial lists.<sup>79</sup>

It became clear right from the outbreak of the conflict that the commitment to respect the 1929 Geneva Conventions was not as strong as expected with respect to both sides.<sup>80</sup> The illegal detentions, accompanied by the concealment of the whereabouts of those detained, resulted in the disappearances of many persons during the Civil War<sup>81</sup> and the dictatorship that followed.<sup>82</sup> This attitude rendered the embryonic system concerning the handling of information set out by the 1929 Geneva Conventions meaningless, as this was blatantly disregarded. It is submitted that the 1949 Geneva Conventions I and III – the revised version<sup>83</sup> of the 1929 Geneva Conventions – developed the embryonic version of the preceding obligations and/or made them explicit.<sup>84</sup> However, this consideration does not allow a retroactive application of the 1949 Geneva Conventions to the events which occurred during the civil war.

Some informal exhumations started after the death of Franco – at the end of the 1970s.<sup>85</sup> However, it was only at the beginning of the twenty-first century that

<sup>78</sup> *Ibidem*, p. 99.

<sup>79</sup> These lists were the result of an informal sharing of records by the directors of detention centers, members of the civilian/military administration, the commanders of the camps where detainees were held, and the prisoners themselves (*ibidem*, p. 114).

<sup>80</sup> The forces led by Franco as well as the republicans violated the laws of war during the Civil War. H. Graham, *The Spanish Civil War: A Very Short Introduction*, Oxford University Press, Oxford/New York: 2005, pp. 133-134. From a historical perspective, the republican violence has received far less attention than that committed by the nationalists. One scholar who has examined this part of the historic account of the civil war is José Luis Ledesma. See generally J.L. Ledesma, *Los días de llamas de la revolución: Violencia y política en la retaguardia republicana de Zaragoza durante la guerra civil*, Institución Fernando el Católico, Zaragoza: 2003. Due to word limit constraints, the focus will remain on the practice of enforced disappearance committed by the nationalists, which continued to be perpetrated during the dictatorship – i.e., after the termination of the civil war.

<sup>81</sup> As for disappearances committed during the war, the Spanish decree no. 67, enacted in 1936 by the Coup Government (i.e., the nationalists), declared in its preamble that any disappearance was the natural consequence of the war; for this reason, any absence, disappearance or death of persons had to be recorded as resulting from the national fight against Marxism. Decreto núm. 67 - Dictando reglas a las que habrá de sujetarse la inscripción del fallecimiento o desaparición de personas, ocurridos con motivo de la actual lucha nacional contra el marxismo, B.O.E. núm. 27, de 11/11/1936 in P. Galella, *Contra El Miedo a Prevaricar. El Punto de Vista Del Derecho Internacional Sobre La Investigación Y Reparación de Las Desapariciones Forzadas Ocurridas Durante El Franquismo* (Tesis Doctoral, Universidad Complutense de Madrid, 2015), p. 172.

<sup>82</sup> UN WGEID, *Mission to Spain*, *supra* note 2; CED, *supra* note 8, paras. 31-32.

<sup>83</sup> E.g. ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2<sup>nd</sup> ed.) (2016), *Introduction to the commentary on Geneva Convention (I) of 1949*, paras. 62, 71, 73, available at: <https://bit.ly/2GboYdN> (accessed 30 June 2018); ECtHR, *Varnava and Others v. Turkey* (App. No. 16064/90 and others), Grand Chamber, 18 September 2009, para. 130.

<sup>84</sup> See J.S. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, vol. I, ICRC, Geneva: 1952, pp. 134, 137.

<sup>85</sup> This was the case of the informal exhumations carried out in the late 1970s in Navarre, Extremadura, and La Rioja. See P. Galella, *Privatising the search and identification of human remains: the case of Spain*, 1(1) Human Remains and Violence: An Interdisciplinary Journal 57 (2015), p. 60.

a systematic documentation of the mass graves began.<sup>86</sup> Among the reasons that delayed the process of elucidation of the fate and whereabouts of many of those reported missing during the conflict was the thirty-six year dictatorship that ensued after the end of the civil war. During that period, only those victims who were loyal to the dictatorship obtained reparations and saw the crimes committed by Franco's opponents documented in the *Causa General*, which led to the exhumation of mass graves where their loved ones were buried.<sup>87</sup> Moreover, the dictatorship featured a continuation of the practice of enforced disappearances against those who expressed their dissent.<sup>88</sup> Another reason lies in the subsequent enactment of an Amnesty Law (1977)<sup>89</sup> – still in force to date – that posed obstacles for the carrying out of investigations into the violations committed in the past (including enforced disappearances).<sup>90</sup>

Only recently has the struggle for the recovery of historical memory gained a new centrality in Spanish politics, along with a “wave of remembering” in other fields, including the rise of NGOs working on recovery of historical memory (e.g., associations of the lost children of the war and of refugees of the civil war).<sup>91</sup> Pursuant to the Historical Memory Act,<sup>92</sup> State authorities have “an obligation to cooperate with individuals and to facilitate investigation, search and identification”<sup>93</sup> of disappeared persons, thereby shifting the burden from the State to the families. The authorities have to “facilitate” the location and identification of persons who went missing as a result of, *inter alia*, the civil war (1936-1939), as well as the recovery and reburial of human remains by the families. Since the measures provided for in the Act do not create a State obligation to

<sup>86</sup> F. Ferrandiz, *Exhumaciones y relatos de la derrota en la España actual*, 84 Revista de Historia Jerónimo Zurita 135 (2009), p. 138.

<sup>87</sup> Causa General informativa de los hechos delictivos y otros aspectos de la vida en la zona roja desde el 18 de julio de 1936 hasta la liberación, Decreto del Ministerio de Justicia, 26 April 1940, available at: <http://www.causageneral.org/> (accessed 30 June 2018).

<sup>88</sup> The Francoist regime launched systematic purges – also known as *limpieza* (cleansing) – to eliminate threats to the new order. A. Suhrke, *Post-War States: Differentiating Patterns of Peace*, in: C. Stahn, J.S. Easterday, J. Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations*, Oxford University Press, Oxford: 2014, p. 275.

<sup>89</sup> For more details on the scope of application *ratione materiae* of the Amnesty, see: Article 2, Ley 46/1977 (Spain), de 15 de octubre, de Amnistía in Noticias Jurídicas, available at: [http://noticias.juridicas.com/base\\_datos/Penal/l46-1977.html](http://noticias.juridicas.com/base_datos/Penal/l46-1977.html) (accessed 30 June 2018).

<sup>90</sup> See CED, *supra* note 8, paras. 11-12.

<sup>91</sup> Kovras, *supra* note 45, pp. 82-83.

<sup>92</sup> Articles 11 and 13, Ley 52/2007 (Spain). The Historical Memory Act has fostered the intervention of local authorities in removing monuments related to the Francoism; the Act has also constituted the basis for regional laws and public policies of remembrance. Nevertheless, actions/initiatives concerning the handling of the past were implemented well before the enactment of the Historical Memory Act. For instance, the Catalan Government established the General Agency of Democratic Remembrance in 2003. A. Aragonés, *Legal Silences and the Memory of Francoism in Spain*, in: U. Belavusau & A. Gliszczynska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, Cambridge: 2017, pp. 185-191.

<sup>93</sup> UN WGEID, *Mission to Spain*, *supra* note 2, para. 21.

act *ex officio*, they generate a number of difficulties<sup>94</sup> for the families trying to exercise the rights contained in the Act itself, including the right to have access to (historical) information on the civil war.<sup>95</sup>

The current conduct of the government against the families and their actual situation generated by the disappearance of their relatives is covered by those rules that prohibit the concealment of the fate and whereabouts of persons deprived of their liberty. Since “any rule which relates to an actual situation shall apply to situations existing while the rule is in force, even if these situations have been created previously”,<sup>96</sup> the government is obliged not only to cooperate with the families, but also to act in accordance with the international rules outlawing enforced disappearances. Indeed, pursuant to the ICPPED (ratified by Spain in 2009), relatives remain entitled to know the truth about the fate of their disappeared loved ones.<sup>97</sup> Moreover, the CED has urged Spain

to ensure that all disappearances are investigated thoroughly and impartially, regardless of the time that has elapsed since they took place and even if there has been no formal complaint; the necessary legislative or judicial measures are adopted to remove any legal impediments to such investigations in domestic law[...]; suspected perpetrators are prosecuted and, if found guilty, punished in accordance with the seriousness of their actions; and victims receive adequate reparation that includes the means for their rehabilitation and takes account of gender issue.<sup>98</sup>

### 2.1.2. Two cases from the Second World War

The Kaprolat/Hasselman incident and the Katyn massacre have very little in common, apart from the fact that both occurred during WWII and that in both cases the families of the victims were left without news. The main distinctive aspect is the nature of the *fait générateur* of the situations at issue: while the former corresponds to a typical scenario generated in the course of a conflict - soldiers caught in an ambush and killed by enemy soldiers;<sup>99</sup> the latter – the mass killing of POWs by Soviet soldiers – constitutes a war crime.

#### 2.1.2.1. The Kaprolat/Hasselman incident

The recent debate in Norway on the treatment of human remains from WWII is best reflected in what the then-Prime Minister stated in 2005: no international legal obligation binds Norway vis-à-vis the fallen soldiers in Kaprolat, particularly with

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<sup>94</sup> E.g. access to information, including to the death registers containing information on the victims of the civil war, is still difficult and in certain instances almost impossible to obtain due to, *inter alia*, the denial of access on various grounds. UN WGEID, *Mission to Spain*, *supra* note 2, paras. 30, 40.

<sup>95</sup> *Exposición de motivos*, Ley 52/2007 (Spain).

<sup>96</sup> IDI, *supra* note 55, para. 2(c).

<sup>97</sup> In its concluding observations concerning Spain, the Committee on Enforced Disappearances (CED) “recalls that the search for persons who have been the victims of enforced disappearance and efforts to clarify their fate are obligations of the State even if no formal complaint has been laid, and that relatives are entitled, *inter alia*, to know the truth about the fate of their disappeared loved ones.” CED, *supra* note 8, para. 32.

<sup>98</sup> *Ibidem*, para. 12.

<sup>99</sup> A combatant is a legitimate military target in light of Article 48 AP I.

regard to financial support for the identification of human remains and their subsequent repatriation.<sup>100</sup> In his view, it was Germany's responsibility to identify and repatriate their remains.<sup>101</sup> The same attitude has been displayed by Norway vis-à-vis the exhumation of the fallen soldiers in its own territory; in this respect the Norwegian National Red Cross has pointed out that this conduct violates IHL.<sup>102</sup> Can it be argued that Norway must recover these soldiers' human remains pursuant to contemporary IHL? Petrig suggests that this question could be answered in the affirmative from both a normative and practical perspective. From the normative point of view, Petrig notes that the acts at stake

cannot be qualified as completed or isolated acts lying in the past. Rather, they are of a continuing or even present nature. [...] The continuing nature of these facts is also reflected by the wording of various gravesite provisions. [...] Obligations ensuring that the dead are accounted for [...] do not cease at a given moment but persist over time. Other obligations can be dormant and may only materialize long after death, such as those pertaining to exhumation, identification or return of mortal remains.<sup>103</sup>

From a practical perspective, Petrig states that

Application of the law as in force at the time of death or burial would ... [lead] to a fragmented legal regime, since a fact pattern often comprises elements attributable to different points of time in the past. Applying the IHL rules as in force today enables the situation to be taken into account as it has evolved with the passage of time [...]. The situation is thereby governed by one and the same set of rules.<sup>104</sup>

Another approach that might be undertaken to answer the question posed above is to consider the right of families to know the fate of their relatives – which is provided for under Article 32 AP I – as part of customary international law.<sup>105</sup> It can be argued that the AP I's provision makes explicit what was implicitly inherent in Article 46 of the 1907 Hague Regulations (Convention IV). The latter, whose customary character was acknowledged by the International Military Tribunal (IMT) in Nuremberg,<sup>106</sup> obliges

<sup>100</sup> V. Trellevik, *Ligger Fortsatt På Slagmarken* (Documentary Is Still on the Battlefield), NRK 24.02.2009, available at: <https://www.nrk.no/dokumentar/dodsmarkene-1.6488248> (accessed 30 June 2018). See also Ch. Jennings, *Bosnia's Million Bones: Solving the World's Greatest Forensic Puzzle*, Macmillan, New York: 2013, p. 162.

<sup>101</sup> Trellevik, *supra* note 100.

<sup>102</sup> E. Veum, *Giske Opptrer Arrogant* (Giske Acting Arrogant), NRK 15.06.2008, available at: <https://www.nrk.no/norge/-giske-opptrer-arrogant-1.6010263> (accessed 30 June 2018).

<sup>103</sup> Petrig, *supra* note 69, p. 367.

<sup>104</sup> *Ibidem*, p. 368.

<sup>105</sup> Đurović observes that the right enshrined in Article 32 represents the confirmation of a principle of customary international law. Đurović, *supra* note 77, p. 272; cf. Rule 117 "Accounting for Missing Persons", in: Henckaerts & Doswald-Beck, *supra* note 27, pp. 421 ff.

<sup>106</sup> *Trial of the Major War Criminals before the IMT*, Nuremberg, 14 November 1945 – 1 October 1946, Official Documents and Proceedings, Nuremberg, 1947, pp. 301-304 and 317-320. See also Eritrea-Ethiopia Claims Commission, Central Front-Eritrea's claims 2, 4, 6, 7, 8, and 22 between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Partial Award, 2004, para. 22.

the parties to the conflict to respect family rights and honour. The IMT held that the disappearance of many persons resulting from the Night and Fog program set up by the Nazi regime amounted to a war crime, and that such a conduct was contrary to, *inter alia*, the above-mentioned Article 46 of the 1907 Hague Regulations (Convention IV) and to Article 6(b) of the Charter of the Nuremberg Tribunal.<sup>107</sup> In reaching this conclusion, the Tribunal took into account the consequences of the implementation of the Night and Fog program: no word of the prisoners captured in the context of Night and Fog program was allowed to reach their country of origin, nor their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person.<sup>108</sup>

Since the early codification of IHL, its rationale consisted in diminishing “the evils of war, as far as military requirements permit” (Preamble, 1907 Hague Regulations (Convention IV)) and in mitigating its “inevitable rigours,” (Preamble, 1929 Geneva Convention on POWs) which include alleviating the suffering of those who remain without news of their loved ones because of the war. In light of these considerations, it can be submitted that the *general principle* of the right of families to know the fate of their relatives (Article 32 AP I) makes explicit what was implicitly embedded in the 1907 Hague Regulations (Convention IV). This is not a question which arises out of “an amendment of a law and which should be decided on the basis of the principle [...] of non-retroactivity.”<sup>109</sup> Indeed, “the recognition of the generation of a new customary international law” concerning the right of families to know the fate of their relatives

is nothing other than a simple clarification of what was not so clear [decades] ago. What ought to have been clear [at that time] has been revealed by the creation of a new customary law which plays the role of authentic interpretation, the effect of which is retroactive.<sup>110</sup>

Despite Norway’s public statement vis-à-vis its international obligations, the State has offered support to the families in order to facilitate the repatriation of human remains on the basis of humanitarian reasons, and not as a consequence of any international

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<sup>107</sup> Pursuant to Article 6(b) of the Charter of the International Military Tribunal, “war crimes – namely, violations of the laws or customs of war” – are crimes falling within the jurisdiction of the Tribunal. Cf. Article 6(b), Charter of the International Military Tribunal, London, 8 August 1945. Indeed, the IMT confirmed the indictment by adding that the acts listed in Article 6(b) of the Charter were “already” recognized as war crimes under international law, for these were covered by, *inter alia*, Article 46 of the 1907 Hague Regulations.

<sup>108</sup> IMT, *Trial of the Major War Criminals – Proceedings of the IMT* (1948) Vol. 22 (14 November 1945 – 1 October 1946), p. 476.

<sup>109</sup> This point was raised by Judge Tanaka in his Dissenting Opinion in the *South West Africa cases* (1966), in which South Africa argued that its mandate over South West Africa was to be interpreted by reference to the law as it stood in 1920 and without reference to the subsequently-developed right to self-determination. In contrast, Tanaka pointed out that contemporary law, and not the law as it stood when the mandate was set up, should apply. Judge Tanaka (ICJ), *Dissenting Opinion – South West Africa (Liberia v. South Africa)*, Second Phase, Merits, Judgment, 1966, ICJ Rep. 6, pp. 293–294.

<sup>110</sup> See *ibidem*.

law obligation.<sup>111</sup> However, the distinction between these two courses of action (i.e., humanitarian reasons v. international law obligations) does not appear clear, since the treatment of human remains, their identification, and their return to the families are measures required by the law. This standpoint does not advocate for a retroactive application of the law but is rather focused on the aspect of contemporaneity between the law and the situation at stake, which is evident in the present case.

#### 2.1.2.2. The Katyn massacre

The other situation mentioned at the outset of this subsection – the Katyn massacre – was carried out by the Soviet secret police against Polish POWs and amounted, at the time of its occurrence, to a war crime.<sup>112</sup> Viewed in this perspective, the question asked at the beginning of this article is no longer based on an inter-temporal issue; rather, it focuses on the temporal scope of the duty to investigate international crimes and on the interrelated right of the families to know the fate of their relatives.<sup>113</sup> It is submitted that under international law there is an *erga omnes* obligation<sup>114</sup> to prosecute war crimes.<sup>115</sup> The pre-WWII customary international law prohibition of war crimes,

<sup>111</sup> The families' pressure on the Government resulted in financial support aimed at finding, identifying, and repatriating the remains. Jennings, *supra* note 100, p. 162.

<sup>112</sup> Pursuant to the 1907 Hague Regulations (Convention IV), POWs must be treated humanely (Article 4); it is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army as well as to kill or wound an enemy who, having laid down his arms, or no longer having a means of defense, has surrendered at discretion (Article 23(b) and (c)). The 1929 Geneva Convention on POW adds that measures of reprisal against POWs are forbidden (Article 2); and that no POW shall be sentenced without being given the opportunity to defend himself (Article 61). Moreover, pursuant to Article 6 of the Charter of the IMT (London, 8 August 1945), the murder or ill-treatment of a POW constitutes a war crime. *E.g.* P. Grzebyk, *Katyn: Riposte*, 4 The Polish Quarterly of International Affairs 72 (2011), p. 73; M. Tuszynski & D.F. Denda, *Soviet war crimes against Poland during the Second World War and its aftermath: a review of the factual record and outstanding questions*, 44(2) The Polish Review 183 (1999), p. 185; M. Kobielska *Endless aftershock. The Katyn Massacre in Contemporary Polish Culture*, in: P. Lees & J. Crouthamel (eds.), *Traumatic Memories of the Second World War and After*, Palgrave Macmillan, Cham: 2016, p. 202. Some scholars have explored whether the Katyn Massacre could amount to the crime of genocide: *see e.g.* M. Sterio, *Katyn Forest Massacre: Of Genocide, State Lies, and Secrecy*, 44 Case Western Reserve Journal of International Law 615 (2012); K. Karski, *The Katyn Massacre as a Crime of Genocide in International Law*, 4 The Polish Quarterly of International Affairs 5 (2011).

<sup>113</sup> UN Commission on Human Rights, *Promotion and Protection of Human Rights: Impunity. Add. 1 "Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Orentlicher Principles)"* (2005), UN Doc E/CN.4/2005/102/Add.1, Principle 2.

<sup>114</sup> ICJ, *Barcelona Traction Light and Power Co, Ltd (Belgium v. Spain)*, Merits, Judgment, 5 February 1970, ICJ Rep. 3, paras. 33-34.

<sup>115</sup> This stance is based on the fact that under the 1949 Geneva Conventions I-IV, which are universally ratified treaties, each High Contracting Party is obliged to search for the alleged perpetrators of violations qualified as grave breaches and to bring them before its own courts; on this last point, the High Contracting Party "may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case" (in other words, this can be boiled down to the principle *aut dedere aut judicare*). Common Article 49 /50/129/146, Convention (I) for the Amelioration of the Condition of

with no statutory limitation<sup>116</sup> on prosecution, implied a continuing obligation to investigate, prosecute, and punish those crimes.<sup>117</sup> In addition to that, under IHRL, despite the passage of time “the authorities are under an obligation to take further investigative measures”<sup>118</sup> whenever there is a “plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrators” of unlawful killings (see *infra* section 3).<sup>119</sup>

## 2.2. Cutting the Gordian knot: The limited relevance of contemporary IHL against the lingering consequences of past conflicts

The application of contemporary IHL to the contemporary consequences of an armed conflict that occurred too long ago generates practical effects. In the case of persons reported missing in combat scenarios (e.g., in the Kaprolat/Hasselman incident), contemporary rules can be guiding standards vis-à-vis specific actions; in the case of persons who went missing as a result of international crimes, these rules can reinforce the applicable standards and provide for avenues of action. Although a retroactive application of contemporary IHL is not legally tenable, the 1987 Commentary to AP I emphasized that

[i]n principle the Parties to the Protocol are only required to apply it *inter se* in order to resolve problems relating to the consequences of conflicts breaking out between them or relating to the aftermath of such conflicts. Obviously we would not wish to defend the idea of retroactive application of the Protocol, but even so it is to be hoped that Parties bound by it will refer to it to resolve problems still unresolved at the end of a conflict, which had ended before they had become bound by the Protocol. Questions relating to missing persons, and to an even greater extent, those concerning the remains of the deceased, actually pose problems well after the end of an armed conflict.<sup>120</sup>

The subsections above cast light upon the contemporary relevance of IHL rules vis-à-vis the lingering consequences generated in the context of armed conflicts that occurred prior to the entry into force of contemporary IHL. The question of whether this relevance remains purely theoretical has to be answered in the negative. Domestic courts have used contemporary IHL treaties to assess situations related to or being

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the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (1949 Geneva Convention I); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 (1949 Geneva Convention II); Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 (1949 Geneva Convention III); Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (1949 Geneva Convention IV).

<sup>116</sup> Article I(a) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 26 November 1968, UN Doc. A/7218, 754 UNTS 73.

<sup>117</sup> Amnesty International, *Written Observations. Case of Janowiec and Others v. Russia - App Nos 55508/07 and 29520/09*, (2012) 8.

<sup>118</sup> ECtHR, *Janowiec and Others v. Russia*, para. 133.

<sup>119</sup> *Ibidem*.

<sup>120</sup> Sandoz et al., *supra* note 31, para. 1193, p. 341 (emphasis added).

direct consequences of events that occurred before the entry into force of the relevant treaties for the State concerned.<sup>121</sup> States have been guided by contemporary IHL vis-à-vis families' requests for measures concerning exhumations and identification of persons who went missing in WWII. In this respect, the Kaprolat case shows that, despite the official declaration of acting for humanitarian reasons and not under any international obligation, the recent measures implemented by Norway have aligned themselves with contemporary IHL standards<sup>122</sup> regarding the treatment of the deceased and the right of families to know the fate of their relatives.

### 3. ADDRESSING TODAY'S CONSEQUENCES OF A DISTANT PAST: THE APPROACH OF HUMAN RIGHTS JUDICIAL AND QUASI-JUDICIAL BODIES

Pauwelyn has stressed that

in [IHL], where the individual is the victim of the crime, s/he should *a priori* be able to invoke the most favorable law. This argument could then be used to plead in favor of retroactive effect for rules of *jus cogens*, involving individuals as victims, more favorable to the individual.<sup>123</sup>

The “most favourable law” argument is appealing but, as noted by Ago in his Fifth Report on State Responsibility and also by Pauwelyn himself, “allowing such exceptions would have an effect of such magnitude hardly acceptable to the legal conscience of members of the international community.”<sup>124</sup>

<sup>121</sup> The application of contemporary IHL treaties to events preceding their adoption has not been rare in domestic courts: e.g., *Aboitiz and Company, Incorporated v. Price*, Trial judgment, (1951), 99 F. Supp. 602, ILDC 931 (District Court for the District of Utah), paras. 118-119; *United States v. Batchelor* (1955), 19 CMR 452 (Army Court of Criminal Appeals), pp. 503-504; *Dolenc and Petan*, Constitutional complaint (2006) U-I-266/04, OG RS No 118/2006, ILDC 570 (SI 2006) (Constitutional Court (Slovenia)).

<sup>122</sup> Pursuant to Article 34 AP I, the “next of kin” can request the return of the remains of the deceased and of personal effects, but the “home country” can exercise a right of veto (“unless that country objects”). However, the driver of the conduct of States is the right of families to know the fate of their relatives. Indeed, Article 34 is encompassed under Section III Part II of the API. Pursuant to Article 32 AP I, “[i]n the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.” Moreover, IHL sets out detailed obligations concerning the treatment of human remains and the transmission of information concerning the dead, including the obligation to mark and respect the graves (Article 17 – Prescriptions regarding the Dead – 1949 Geneva Convention I; Article 130 – Burial and cremation - 1949 Geneva Convention IV; Article 34 – Remains of deceased - AP I); and the obligation to record and forward information on the dead (Article 16 – Recording and forwarding of information – 1949 Geneva Convention I; Article 130 – Burial and cremation – 1949 Geneva Convention IV; Article 33 – Missing Persons – AP I).

<sup>123</sup> J. Pauwelyn, *The Concept of a “Continuing Violation” of an International Obligation: Selected Problems*, 66 British Yearbook of International Law 415 (1996), p. 442.

<sup>124</sup> 5<sup>th</sup> Report of Ago 20 in *ibidem*, p. 441.

Human rights bodies have conceived the notion of a “continuing situation” and have acknowledged the continuous nature of certain violations. In this respect, the triggering event might not fall under their competence insofar as it predated the State’s acceptance of such competence and the adoption of the human rights treaty concerned; nevertheless, the continuous character of the effects of the disappearance triggers the responsibility of States for action/inaction contrary to human rights treaties.

In the human rights case law, considerations on the temporal scope of the human rights treaties intertwine with issues concerning both the duration of the violation/obligation of the States and the jurisdiction *ratione temporis* of the human rights judicial bodies. This phenomenon will be expounded upon in light of the ECtHR’s case law (subsection 3.1), as both the Spanish civil war and WWII scenarios have been at the centre of the Court’s judicial assessment. In light of the ECtHR’s approach and that of other judicial bodies (subsection 3.2), this section will elucidate whether State authorities in the case-scenarios above can consider themselves discharged from the obligation to investigate cases of persons who went missing in the context of human rights violations, on the grounds that they went missing too long ago.

### 3.1. The effects of the passage of time on the States’ obligation to carry out an investigation under IHRL: the ECtHR’s approach

In given instances the circumstances surrounding the disappearance of persons in an armed conflict substantiate the likelihood that the persons concerned were subjected to severe violations of their rights. As it emerges from the ECtHR’s case law, it is possible that, after several years of uncertainty, the body of a missing person is recovered and shows evident signs of abusive acts and violations; the fact that the body is no longer missing does not waive the obligation to investigate.<sup>125</sup> More generally, in the human rights case law, the continuous nature of enforced disappearances<sup>126</sup> has affected the judicial assessment at multiple levels, including at the admissibility level.<sup>127</sup>

States bear positive obligations to protect the right to life; these include the obligation to carry out an investigation in order to elucidate the circumstances of death – even when this took place in the distant past – and to establish responsibility for

<sup>125</sup> ECtHR, *Aslakhanova and Others v. Russia* (App. No. 2944/06 and others), 18 December 2012, para. 145; ECtHR, *Varnava and Others v. Turkey* (GC), para. 145.

<sup>126</sup> See *supra* subsection 1.1. See also UN WGEID, *General Comment on Article 17 of the Declaration in Report of the WGEID* (2000), UN Doc E/CN.4/2001/68, paras 27–32.

<sup>127</sup> See HRC, *Edouardo Bleier v. Uruguay* (Comm No. 30/1978), UN Doc. Supp. No. 40 (A/37/40) 1982, para. 15; HRC, *Norma Yurich v. Chile* (Comm No. 1078/2002), UN Doc CCPR/C/85/D/1078/2002, 2005, paras. 6.3–6.5; HRC, *SE v. Argentina* (Comm No. 2751/1988, UN Doc CCPR/C/38/D/275/1988, 1990, paras. 5.2–5.3; IACtHR, *Radilla Pacheco v. Mexico* (Series C No. 209), Preliminary Objections, Merits, Reparations and Costs, 2009, para. 166; IACtHR, *Ibsen Cárdenas and Ibsen Peña v. Bolivia* (Series C No. 217) Merits, Reparation, and Costs, 2010, paras. 126, 130; IACtHR, *La Cantuta v. Peru* (Series C No. 162), Merits, Reparations and Costs, 2006, para. 125; ECtHR, *Varnava and Others v. Turkey* (GC), paras. 161 ff.; AfCommHPR, *JE Zitha and PJJ Zitha v. Mozambique (represented by Prof. Dr. Liesbeth Zegveld) v. Mozambique* (Comm No. 361/08), 2011, para. 84.

it.<sup>128</sup> Where the contours of an enforced disappearance are absent, the continuous nature argument is not easily tenable. A bridge between the present and the past must judicially be drawn up in order to assess an event that might have occurred before the ratification of a certain IHRL treaty or before the acceptance of the competence of a certain international adjudicator in assessing individual petitions.

The States parties to the ECHR – including Spain and Russia – have an obligation to carry out an effective investigation<sup>129</sup> into the circumstances of death (including suspicious deaths).<sup>130</sup> The effectiveness of the investigation depends on whether it will be capable of leading to the identification of those responsible.<sup>131</sup> As part of the positive obligations<sup>132</sup> of the State, the procedural obligation under Article 2 ECHR “has evolved into a separate and autonomous duty capable of binding the State even when the death took place before the critical date [i.e., the entry into force of the ECHR for the State concerned].”<sup>133</sup>

Furthermore, the Court has acknowledged that the suffering and psychological distress of the families of the missing does not fade away with the passage of time.<sup>134</sup> The fact of not knowing and of not being able to access the relevant information has an extreme impact on the life of all family members, including those who were unborn at the time of the disappearance.<sup>135</sup> The “continuous and callous” disregard of the obligation to

<sup>128</sup> The prime characteristic of positive obligations is that they require national authorities to take the necessary measures to safeguard a right or, more precisely, to adopt reasonable and suitable measures to protect the rights of the individual. ECtHR, *Hokkanen v. Finland* (App. No. 19823/92), 23 September 1994, paras. 55-59; ECtHR, *López-Ostra v. Spain* (App. No. 16798/90), 9 December 1994, para. 51. As part of the positive obligations of the State, the procedural obligation under Article 2 ECHR “has evolved into a separate and autonomous duty capable of binding the State even when the death took place before the critical date [i.e., the entry into force of the ECHR for the State concerned].” ECtHR, *Šilih v. Slovenia* (App. No. 71463/01), Grand Chamber, 9 April 2009, paras. 159-160. *Mutatis mutandis* see also ECtHR, *Calvelli and Ciglio v. Italy* (App. No. 32967/96), Grand Chamber, 17 January 2002, paras. 41-57; ECtHR, *Byrzykowski v. Poland* (App. No. 11562/05), 27 June 2006, paras. 86, 94-118; ECtHR, *Brecknell v. the UK* (App. No. 32457/04), 12 December 2007, para. 53; ECtHR, *Janowiec and Others v. Russia*, para. 131.

<sup>129</sup> ECtHR, *McCann and Others v. the UK* (App. No. 19009/04), 13 May 2008, para. 161.

<sup>130</sup> See ECtHR, *Janowiec and Others v. Russia*, para. 130; ECtHR, *Nachova and Others v. Bulgaria* (App. No. 43577/98 and 43579/98), Grand Chamber, 6 July 2005, paras. 110-113.

<sup>131</sup> E.g. ECtHR, *Orhan v. Turkey* (App. No. 25656/94), 18 June 2002, para. 335; ECtHR, *Öğür v. Turkey* (App. No. 21954/93), Grand Chamber, 20 May 1999, para. 88.

<sup>132</sup> E.g. ECtHR, *Hokkanen v. Finland*, paras. 55-59.

<sup>133</sup> ECtHR, *Šilih v. Slovenia* (GC), paras. 159-160. *Mutatis mutandis*, ECtHR, *Brecknell v. The UK*, para. 53. See also W.A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford: 2015, p. 2004.

<sup>134</sup> ECtHR, *Šilih v. Slovenia* (GC), para. 157.

<sup>135</sup> P. Boss, *Ambiguous Loss in Families of the Missing*, 360 *Medicine and Conflict – The Lancet Supplement* 39 (2002); S.M. Drawdy, C. Katzmarzy, *When X Doesn't Mark the Spot: Historical Investigation and Identifying Remains from the Korean War*, in: D. Congram (ed.), *Missing Persons: Multidisciplinary Perspectives on the Disappeared*, Canadian Scholars' Press, Toronto: 2016, p. 150; L. Holmes, *Missing Someone: Exploring the Experiences of Family Members*, in: S. Morewitz & C. Sturdy Colls (eds.), *Handbook of Missing Persons*, Springer, Cham: 2016, pp. 108-110; P. Boss, *Ambiguous Loss: Working with Families of the Missing*, 17 *Family Process* 14 (2002); J. Edkins, *Missing: Persons and Politics*, Cornell University Press, Ithaca: 2011, pp. 4-5.

account for the whereabouts and the fate of a missing person amounts to a violation of the prohibition of inhuman and degrading treatment against the relatives of the missing persons.<sup>136</sup> For instance, the ECtHR has recognized that “the essence of the violation is not that there has been a serious human rights violation concerning the missing person; it lies in the authorities’ reactions and attitudes to the situation when it has been brought to their attention.”<sup>137</sup> It is “[t]he silence of the authorities of the respondent State in face of the real concerns of the relatives” that amounts to inhuman treatment.<sup>138</sup>

In the Cyprus/Turkey-related cases, the Court recognized that the queries of the families and their quest for any piece of information could not remain unanswered using the excuse that the disappearance occurred too long ago. Specifically, in *Cyprus v. Turkey* and *Varnava v. Turkey* the ECtHR, in ruling on preliminary objections, stressed that

a disappearance is [...] characterized by an ongoing situation of uncertainty and unaccountability in which there is a lack of information. [...] This situation is very often drawn out over time, prolonging the torment of the victim’s relatives.<sup>139</sup>

A State’s infringement of the human rights of the relatives takes place when the State’s response to the relatives’ quest for information, or the obstacles placed in their way, cause them “to bear the brunt of the efforts to uncover any facts.”<sup>140</sup> The length of time without information is not considered the sole factor that determines whether the States infringed the rights of the relatives of the victim;<sup>141</sup> however, the “length of time over which the ordeal of the relatives has been dragged out” contributes to creating a situation “attaining the requisite level of severity”<sup>142</sup> which is in violation of the prohibition of inhuman and degrading treatment vis-à-vis the relatives of the missing person.<sup>143</sup> The Court went on to remark that since “the subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for.”<sup>144</sup> Thus, “the ongoing failure to provide the requisite investigation will be regarded as a continuing violation.”<sup>145</sup>

<sup>136</sup> ECtHR, *Varnava and Others v. Turkey* (GC), para. 200.

<sup>137</sup> *Ibidem. Contra*: IACtHR, *Blake v. Guatemala* (Series C No. 36), Merits, 1998, paras. 110, 112–116.

<sup>138</sup> ECtHR, *Cyprus v. Turkey* (App. No. 25781/94), Grand Chamber, 10 May 2001, para. 157; ECtHR, *Varnava and Others v. Turkey* (GC), para. 201.

<sup>139</sup> ECtHR, *Cyprus v. Turkey* (GC), para. 136; ECtHR, *Varnava and Others v. Turkey* (GC), para. 148.

<sup>140</sup> *E.g.* ECtHR, *Varnava and Others v. Turkey* (GC), para. 200; ECtHR, *Janowiec and Others v. Russia*, para. 164.

<sup>141</sup> L. Doswald-Beck, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, Oxford: 2011, p. 239.

<sup>142</sup> ECtHR, *Varnava and Others v. Turkey* (GC), para. 202; ECtHR, *Skendžić and Krznarić v. Croatia* (App. No. 16212/08), 20 January 2011, para. 93.

<sup>143</sup> ECtHR, *Varnava and Others v. Turkey* (GC), paras. 166–167, 170.

<sup>144</sup> *Ibidem*; ECtHR, *Cyprus v. Turkey*, para. 136.

<sup>145</sup> *See* ECtHR, *Šilih v. Slovenia* (GC), paras. 161–162; ECtHR, *Varnava and Others v. Turkey* (GC), para. 150; B. Rainey, E. Wicks and C. Ovey, *The European Convention on Human Rights* (6<sup>th</sup> ed.), Oxford University Press, Oxford: 2014, p. 89.

The ECtHR's approach to the temporal dimension of the obligation to carry out an investigation has intertwined with its analysis for determining its *ratione temporis* jurisdiction, as well as with its assessment of the temporal scope of the Convention. In those instances when this has occurred, the results reached have been bizarre and at odds with the rest of the Court's case law. The case of *Janowiec and Others v. Russia* (Grand Chamber, GC), addressing the Katyn massacre, sheds lights on the Court's approach to the determination of its competence *ratione temporis* and on the application of this approach to historical cases.

The Court's reasoning was articulated as follows: (i) the obligation to investigate the death of individuals is of a detachable character in relation to the substantive aspect;<sup>146</sup> (ii) where the triggering event occurred before the critical date, the Court's jurisdiction applies only to procedural acts/omissions<sup>147</sup> in the period subsequent to the critical date; (iii) the procedural obligation will come into effect only if there was a "genuine connection" between the death as the triggering event and the entry into force of the Convention; (iv) the verification of the 'genuine connection test' is based on two criteria, i.e., a) the temporal proximity between the triggering event and the critical date (which period should not exceed ten years)<sup>148</sup> and b) the moment in which most of the omissions/procedural acts took place/ought to have taken place should be situated after the entry into force of the ECHR;<sup>149</sup> (v) "the discovery of new material after the critical date may give rise to a fresh obligation to investigate only if either the 'genuine connection' test or the 'Convention values' test (...) (see *pt.* (vi)) has been met";<sup>150</sup> (vi) the Court's jurisdiction might be established in any case where it is necessary for ensuring that "the guarantees and the underlying values" of the ECHR are protected in "a real and effective way."<sup>151</sup> The "Convention values test" – also called "humanitarian clause"<sup>152</sup> – is met<sup>153</sup> when the triggering event is "of a larger dimension than an ordinary criminal offence" (e.g., an international crime), constitutes a negation of the very foundations of the Convention, and occurred after the date of the adoption of the ECHR (i.e., 4 November 1950).<sup>154</sup>

<sup>146</sup> ECtHR, *Janowiec and Others v. Russia* (App No. 55508/08 and others), Grand Chamber, 21 October 2013, para. 114.

<sup>147</sup> The procedural acts to be assessed include those acts undertaken in the context of "criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible" (*ibidem*, para. 143).

<sup>148</sup> The Court admitted that there are no "apparent legal criteria by which the absolute limit in the duration of that period may be defined" (*ibidem*, paras. 146-147).

<sup>149</sup> ECtHR, *Janowiec and Others v. Russia*, para. 140.

<sup>150</sup> Since neither of the tests had been met the Court did not examine whether any new developments after the critical date might justify a "fresh obligation" to carry out an investigation. ECtHR, *Janowiec and others v. Russia* (GC), paras. 136 (recalling the criteria laid out in *Šilih v. Slovenia*, (GC)), 141, 143-148.

<sup>151</sup> *Ibidem*, para. 149.

<sup>152</sup> Concurring Opinion of Judge Gyulumyan and Jointly Partly Dissenting Opinion of Judges Ziemeles, De Gaetano, Laffranque, and Keller - *Janowiec and Others v. Russia* (GC).

<sup>153</sup> ECtHR, *Janowiec and Others v. Russia*, GC, para. 146.

<sup>154</sup> The Court eventually recognized that the Katyn massacre was a war crime but stressed that the "Convention values" clause cannot be applied since the loss of life occurred ten years prior to the adoption

Although the *Janowiec and Others* case was not qualified as a disappearance case, the claims of the family members and the Court's approach to historical cases involving international crimes make this a landmark case, with likely effects on other cases with a similar temporal structure. The approach outlined above shows that the passage of time is a relevant factor in the Court's assessment. Based on the evaluation of the above criteria, it may be concluded that the Court has demonstrated a conservative approach and attachment to the non-retroactivity principle. The specification of the time limit (1950) – non-existent in previous ECtHR case law – with regard to the “Convention values test” seems to be driven by strategic considerations of internal judicial policy. The “unwarranted arithmetic considerations”<sup>155</sup> related to the “genuine connection test” culminate in a distorted time-bound interpretation of the Convention values. Indeed, the temporal limit of 1950 automatically avoids the possibility of opening the “Pandora's box” (e.g., submission of complaints relating to international crimes preceding the ECHR's adoption).<sup>156</sup> The final result is that the scope of the “humanitarian clause” has been restrained in the most “non-humanitarian way.”<sup>157</sup>

A month before the Chamber's judgment in the *Janowiec and Others* case, the Court addressed the obligation to carry out an investigation in relation to another historical case, which concerned the disappearance of Mr. Dorado Luque in the context of the Spanish Civil War.<sup>158</sup> The Court pointed out that

there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.<sup>159</sup>

Despite this consideration, the Court anticipated the *Janowiec* case's approach to the obligation to investigate under Article 2 ECHR (the “Convention values test” was incidentally mentioned)<sup>160</sup> and found that there was no temporal proximity between the triggering event (which occurred in 1936) and the critical date (Spain ratified the ECHR in 1979).<sup>161</sup> The substantive difference between the *Janowiec* case and the *Dorado*

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of the Convention (i.e., 4 November 1950) and too long ago with respect to the critical date (*see ibidem*, para. 150).

<sup>155</sup> Citroni, *supra* note 13, p. 285.

<sup>156</sup> For a critique of the Court's approach to the Convention values' test, *see* W.A. Schabas, *Do the “Underlying Values” of the European Convention on Human Rights Begin in 1950?*, XXXIII Polish Yearbook of International Law 247 (2013).

<sup>157</sup> Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque, and Keller - *Janowiec and Others v. Russia* (GC), para. 35.

<sup>158</sup> ECtHR, *Antonio Gutiérrez Dorado and Carmen Dorado Ortiz v. Spain* (App. No. 30141/09), Decision, 27 March 2012. For a critical assessment of the case, *see* J.J. García Blesa and V.L. Gutiérrez Castillo, *The Rights of the Victims of Past Atrocities in Spain: Reparation without Truth and Justice?*, 29 Connecticut Journal of International Law 227 (2014), pp. 250-254.

<sup>159</sup> ECtHR, *Dorado and Dorado Ortiz v. Spain*, para. 34.

<sup>160</sup> *Ibidem*, para. 35.

<sup>161</sup> *Ibidem*, para. 36.

case lies in the fact that the latter was a disappearance case. However, the Court did not assess the merits of the application, since another procedural factor played a major role, i.e., the six-month rule (*cf.* Article 35(1) ECHR). The rule's rationale is to protect legal certainty; therefore, it provides that after the exhaustion of domestic remedies applicants have a six-month period, running from the final decision in the process of the exhaustion of domestic remedies, in which to lodge an application before the Court. Such a rule is not applicable if a continuing situation (e.g., a disappearance<sup>162</sup>) is at stake, as no remedy might be available at all in the course of such a situation. Nonetheless, should the applicants' case be a disappearance case, the applicants cannot wait an indefinite time before lodging an application with the Court.<sup>163</sup> Indeed, they "must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay."<sup>164</sup>

In the *Dorado* case, since the application was lodged in 2009, "the applicants did not display the diligence required to comply with the requisites derived from the Convention and the case law of the Court concerning disappearances."<sup>165</sup> Among other elements,<sup>166</sup> in assessing the admissibility of the case the Court disregarded the fact that the Supreme Court's Investigating Judge no. 5 ordered several institutions to provide information on the disappearance of Mr. Dorado and of others and issued a ruling accepting jurisdiction. However, the Public Prosecutor in Spain appealed against the Investigating Judge's decision on the acceptance of jurisdiction, requesting the closure of the proceedings. In the relinquishment's decision, the Investigating Judge pointed out that "the lack of official *ex officio* investigation for many years coupled with the numerous obstacles introduced by the Public Prosecutor to the opening of an investigation was in conflict with the ECHR [...]."<sup>167</sup>

### 3.2. The approach of other judicial bodies

At the international level, the HRC has adopted a different approach from that of the ECtHR when dealing with alleged violations of the prohibition of torture and of inhuman and degrading treatment (Article 7 of the International Covenant on Civil and Political Rights – ICCPR) due to the suffering of the families generated by the uncertainty on the fate of their beloved ones.<sup>168</sup> In cases where the death of the relative

<sup>162</sup> ECtHR, *Varnava and Others v. Turkey* (GC), paras. 161 et seq.

<sup>163</sup> *Ibidem*, para. 161.

<sup>164</sup> ECtHR, *Dorado and Dorado Ortiz v. Spain*, para. 37.

<sup>165</sup> *Ibidem*.

<sup>166</sup> For instance, the applicants kept having this contact with the authorities and, together with victims' associations, filed a complaint before the Spanish Supreme Court (*Audiencia Nacional*).

<sup>167</sup> ECtHR, *Dorado and Dorado Ortiz v. Spain*, para. 17.

<sup>168</sup> HRC, *Mariam Sankara and Others v. Burkina Faso* (Comm No. 1159/2003), UN Doc. CCPR/C/86/D/1159/2003, 2006, para. 12.2 (a case where the circumstances of the death remained unclear and the whereabouts of the human remains unknown); HRC, *Sarma v. Sri Lanka* (Comm No. 950/2000), UN Doc. CCPR/C/78/D950/2000, 2003, para. 9.5 (a case where a person was removed by members of the military and not seen alive afterward).

occurred before the acceptance by the State concerned of the HRC's competence under the ICCPR Optional Protocol,<sup>169</sup> the Committee has stressed that the State has a duty "to provide the author and his family with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son [...]" under Article 2(3) ICCPR (right to effective remedy).<sup>170</sup> In this context, the State has an obligation to investigate matters which occurred before the entry into force of the Optional Protocol. This, however, has not been a constant finding in cases where the events predated either the entry into force of the ICCPR or the date from which the HRC acquired competence to assess the conduct of the State under the Covenant<sup>171</sup> (or both<sup>172</sup>). The Committee has been reluctant to give priority to the continuous nature of the disappearance to overcome a *ratione temporis* objection. However, some of the HRC's members, in expressing their criticism of the HRC's approach to disappearances, have emphasized that

a disappearance [...] inherently has continuing effects on a number of Covenant rights. It has a continuing character because of the continuing violative impact, which it inevitably has on Covenant rights. The continuity of this negative impact is irrespective of at what point in time the acts constituting the disappearance itself occurred. Inevitably the State party's obligations continue in relation to those rights.<sup>173</sup>

At the regional level, the approach of the IACtHR and of the African Commission on Human and Peoples' Rights (AfCommHPR) slightly differ from that of the ECtHR. According to the IACtHR, the obligation to carry out an investigation is more broadly couched. The IACtHR has held that, under the obligation to respect and guarantee the rights provided for by the American Convention on Human Rights (ACHR)

the duty to investigate facts of this type [i.e., enforced disappearance] continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.<sup>174</sup>

<sup>169</sup> Article 1, Optional Protocol to the ICCPR, December 16, 1966, 999 UNTS 171.

<sup>170</sup> HRC, *Sarma v. Sri Lanka*, para. 11.

<sup>171</sup> HRC, *Cifuentes Elgueta v. Chile* (Comm No. 1536/2006), UN Doc CCPR/C/96/D/1536/2006, 2009, paras. 8.3-8.5. Contradictorily, the Committee considered "enforced disappearance as a continuing offence", see *ibidem* para. 8.5. However, in earlier case law, the Committee assessed the detachable nature of the obligation to investigate a disappearance even if the material fact occurred before the ratification of the Optional Protocol by the State concerned. See in this respect HRC, *Edouardo Bleier v. Uruguay*, para. 15.

<sup>172</sup> HRC, *Norma Yurich v. Chile*, paras. 6.3-6.5; HRC, *S E v. Argentina*, paras. 5.2-5.3.

<sup>173</sup> Individual opinion of Committee members Christine Chanet, Rajsoomer Lallah and Zonke Majodina (dissenting) in *Cifuentes Elgueta v. Chile*, Appendix; Individual opinion of Committee members Christine Chanet, Rajsoomer Lallah, Michael O'Flaherty, Elisabeth Palm, Hipólito Solari-Yrigoyen (dissenting) in *Norma Yurich v. Chile*, Appendix.

<sup>174</sup> IACtHR, *Velásquez-Rodríguez v. Honduras*, Merits, para. 181.

Where the disappearances pre-dated (e.g., in 1978) the ratification by the State of the ACHR (e.g., 1992) as well as the acceptance of the Court's contentious jurisdiction (e.g., 1998), the IACtHR has noted that "acts of a continuous or permanent nature extend throughout time wherein the event continues, maintaining a lack of conformity with international obligations."<sup>175</sup> As Judge Cançado Trindade underscored, obligations under the Convention bind the State from the moment of the ratification of/accession to the ACHR, and regardless of whether the State has accepted the contentious jurisdiction of the Court; as a matter of fact, this acceptance "conditions only the judicial means of settlement" of a case under the ACHR.<sup>176</sup> The emphasis should be placed "not on the sword of Damocles" (i.e. the date on which the State accepted the jurisdiction of the Court), "but rather on the nature of the alleged multiple and interrelated violations of protected human rights, prolonged in time, with which the [...] case of disappearance is concerned."<sup>177</sup>

However, some States have made reservations stating that only those events which occurred after the submission of the instruments of acceptance could be addressed by the Court.<sup>178</sup> For instance, in the *Serrano Cruz Sisters* case, the State reservation served the purpose of avoiding the jurisdiction of the Court with regard to events which occurred during the NIAC in El Salvador.<sup>179</sup> However, such reservation did not waive the responsibility of the State vis-à-vis the victims.<sup>180</sup> Indeed, the passage of time does

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<sup>175</sup> IACtHR, *Gomes-Lund and Others (Guerrilha do Araguaia) v. Brazil* (Series C No. 219), Preliminary Objections, Merits, Reparations, and Costs, 2010, para. 17.

<sup>176</sup> Separate Opinion of Judge Cançado Trindade – *Blake v. Guatemala* (Series C No. 36), Merits, IACtHR 1998, para. 33.

<sup>177</sup> Separate Opinion of Judge Cançado Trindade – *Blake v. Guatemala* (Series C No. 27), Preliminary Objections, IACtHR 1996, para. 12.

<sup>178</sup> In the leading case of *Blake v. Guatemala*, the State raised the preliminary objections with respect to the competence *ratione temporis* of the Court, as the alleged violations pre-dated the acceptance of the compulsory jurisdiction; moreover, the acceptance *per se* had been accompanied with a reservation that only those events which occurred after the State had submitted the instruments of acceptance could be taken into account. IACtHR, *Blake v. Guatemala*, Preliminary Objections; IACtHR, *Serrano-Cruz Sisters v. El Salvador* (Series C no 118), Preliminary Objections, 2004.

<sup>179</sup> L. Burgogue-Larsen, A.U. de Torres, & R. Greenstein, *The Inter-American Court of Human Rights: Case Law and Commentary*, Oxford University Press, Oxford: 2011, p. 311.

<sup>180</sup> Pursuant to Article 28 VCLT (the non-retroactivity principle), the Court stressed that it would not override the will of the States "when the alleged facts or the conduct of the defendant State, which might involve international responsibility, precede recognition of the Court's jurisdiction." See IACtHR, *Serrano-Cruz Sisters v. El Salvador*, Preliminary Objections, para. 66. Despite such a traditional interpretative approach to the scope of the *ratione temporis* competence in contentious matters, the IACtHR has held that if the events began before the State recognized such competence and if they continued after the date of submission of the instrument of acceptance, then the Court would have jurisdiction to decide upon the events which occurred after that date. IACtHR, *Blake v. Guatemala*, Preliminary Objections, paras. 39-40. See also IACtHR, *Serrano-Cruz Sisters v. El Salvador* (Series C No. 120), Merits, reparations and costs, 2005, para. 67. This principle has been restated in several enforced disappearance-related cases, where the Court primarily considered the continuing nature of the enforced disappearance and detached it from the instantaneous character of the circumstances of the death of the victim. IACtHR, *Heliodoro Portugal v. Panama*

not modify the obligation to conduct an investigation, as it is the full implementation of this obligation that sheds light upon the non-viability of any prosecution against the alleged perpetrators, and not the other way around.

The stance taken by the IACtHR is in contrast with the reluctance of the ECtHR and the HRC vis-à-vis the dismissal of *ratione temporis* preliminary objections in light of the occurrence of the triggering event prior to the entry into force of the corresponding human rights treaties. In cases where the disappearance occurred before the entry into force of the ACHR for the State concerned, the Court has stated that acts of a continuous or permanent nature

extend through the entire time period during which the fact continues and the lack of conformity with the international obligation is maintained. Due to its characteristics, once the treaty goes into force, those continuous or permanent acts that persist after that date, may generate international obligations for the State Party, without this implying a violation to the principle of non-retroactivity of treaties. The forced disappearance of persons [...] falls within this category of acts.<sup>181</sup> [Footnotes omitted]

Thus, in referring to the continuous character of the disappearance in its dismissal of the preliminary objection *ratione temporis*, the Court has found the State responsible for having continuously deprived the next of kin of the “truth regarding the fate of a disappeared person”, which “constitutes a form of cruel and inhuman treatment for the close relatives.”<sup>182</sup> In this respect, the Court has acknowledged that “the State [...] has the obligation to guarantee the right to humane treatment of the next of kin through effective investigations.”<sup>183</sup>

In *Zitha & Zitha v. Mozambique*, the AfCommHPR has recognized that

[i]t is a well-established rule of international law that a State can be held responsible for its acts or omissions only if these acts and omissions are not in conformity with the obligations imposed on that State at the time that they were committed.<sup>184</sup>

It has also acknowledged that “in some cases, an act or an omission committed before the ratification of a human rights treaty may keep affecting the right(s) of a person protected under the treaty.”<sup>185</sup> As a matter of fact,

(Series C No.186), Preliminary objections, merits, reparations, and costs, 2008, paras. 32, 36-37. Such an approach has also allowed the Court to find violations of the rights of the victims’ relatives. The “constant uncertainty in which the next of kin [had to] live as a result of not knowing the victim’s whereabouts” has been one of the issues to be considered when assessing the violations of the rights of the relatives. IACtHR, *Blake v. Guatemala*, Merits, para. 114; IACtHR, *Cantoral Huamani and García Santa Cruz*, Preliminary Objections, Merits, reparations and costs, para. 117; IACtHR, *Albán Cornejo and Others v. Ecuador* (Series C No. 171), Merits, reparations and costs, 2007, para. 50.

<sup>181</sup> IACtHR, *Radilla Pacheco v. Mexico*, paras. 22-23; IACtHR, *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, paras. 21, 60.

<sup>182</sup> E.g. IACtHR, *Radilla Pacheco v. Mexico*, para. 166; IACtHR, *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, paras. 126, 130; IACtHR, *La Cantuta v. Peru*, para. 125.

<sup>183</sup> IACtHR, *Radilla Pacheco v. Mexico*, para. 167.

<sup>184</sup> AfCommHPR, *E Zitha and PJL Zitha v. Mozambique*, para. 84.

<sup>185</sup> *Ibidem*.

a similar situation may be observed when an application is lodged with an international organ whose competence was recognized by the relevant State after the complained act or omission had been committed. The effects of an event which occurred before the recognition might be continuing. Problems arising from these situations are generally resolved with reference to the doctrine of continuing violation under international law.<sup>186</sup>

The impact on the family members was not assessed in the same case, as the Commission considered the Communication inadmissible.<sup>187</sup> However, in light of previous pronouncements by the Commission in *Amnesty International and Others v. Sudan*, where the withholding of information on the detainee's fate and whereabouts amounted to inhuman treatment against the family members, the reasoning above may play a role in subsequent case law where the family members' rights are at stake.

The judicial narrative highlights that although a disappearance pre-dated the entry into force of human rights treaties, the State is not freed from the obligation to carry out an investigation<sup>188</sup> into the circumstances surrounding the suspicious death and/or the disappearance.<sup>189</sup>

## CONCLUSIONS – AN UNCEASING DUTY TO INVESTIGATE THE LINGERING CONSEQUENCES OF PAST HUMAN RIGHTS VIOLATIONS?

The assertion that contemporary IHL and IHRL treaties apply to events preceding their adoption and entry into force appears at first glance to be legally unsound. In order to explore this hypothesis, three case-scenarios have been examined. The Spanish civil war, the Kaprolat/Hasselman incident, and the Katyn massacre provide an illustration of how difficult it can be for families to obtain access to information on missing persons decades after the termination of the armed conflicts at issue.

<sup>186</sup> Based on this reasoning and on the corresponding improper conduct of the State, the Commission considered the disappearance of the victim concerned to be a continuing violation of his human rights, thereby affirming its competence *ratione temporis* to examine the matter (*ibidem*).

<sup>187</sup> *Ibidem*, para. 94. The Commission did not decide on the merits of the case, as the requirement of the exhaustion of the local remedies – cf. Article 56 of the African Charter on Human and Peoples Rights – had not been fulfilled by the applicant, thus causing, the Commission to find the communication inadmissible (*ibidem*, paras. 95-115).

<sup>188</sup> The *Janowiec* case has raised widespread criticism among scholars and practitioners with regard to several points, including the one outlined above on the procedural limb of Article 2 ECHR, raised by the Court both in its Chamber and in its Grand Chamber judgment. E.g. I. Kamiński, *Comments on Janowiec and Others v. Russia: The Katyn Massacre before the European Court of Human Rights: A Personal Account*, XXXIII Polish Yearbook of International Law 205 (2013); C. Heri, *Enforced Disappearance and the European Court of Human Rights' Ratione Temporis Jurisdiction. A Discussion of Temporal Elements in Janowiec and Others v. Russia*, 12 Journal of International Criminal Justice 751 (2014); Schabas, *supra* note 156; Y. Kozheurov, *The Case of Janowiec and Others v. Russia: Relinquishment of Jurisdiction in Favour of the Court of History* XXXIII Polish Yearbook of International Law 227 (2013).

<sup>189</sup> See ECtHR, *Cyprus v. Turkey* (GC), para. 132.

Contemporary IHL treaty law sets down obligations that were under-developed under the early IHL treaties. However, this is not tantamount to saying that contemporary IHL, in its entirety, applies to the pending consequences of past armed conflicts. In the case of persons who went missing in the context of traditional military operations (e.g., in the Kaprolat/Hasselmann incident), contemporary rules can constitute guiding standards vis-à-vis specific actions (e.g., exhumations and recovery of the bodies); in the case of persons who went missing in the context of international crimes they can reinforce the applicable international law rules.

With regard to the cases dating back to WWII, the fact that the core of the right of families to know the fate of their relatives is grounded in Article 46 of the 1907 Hague Regulations (Convention IV) – considered customary since 1939<sup>190</sup> – suggests that the right to know is *per se* an explicit statement of a new international norm whose customary character derives from a direct link with the 1907 Hague Regulations (Convention IV). Thus, it represents

nothing other than a simple clarification of what was not so clear [a long time ago]. What ought to have been clear [a long time ago] has been revealed by the creation of a new customary law which plays the role of authentic interpretation [of previous provisions], the effect of which is retroactive.<sup>191</sup>

Hence, this confirms that contemporary law is of relevance to the assessment of the contemporary consequences of a situation/action/fact which occurred after 1939.

In the cases of both the Spanish civil war as well as the Katyń massacre, no inter-temporal problem arises, as the situations at stake entail considerations related to the continuity of the consequences generated by international crimes, which create a bridge between the distant past and the present. Thus, the present article has explored the temporal dimension of the obligation to carry out an investigation and to address the queries of families under IHRL in light of the ECtHR's case law.

The duration of the violation of the rights generated by the disappearance of a person determines the duration of the obligation to carry out investigative operations aimed at accounting for the person reported missing. In this way, although the disappearance occurred before the entry into force of the ECHR, the continuing nature of the disappearance bridges the past with the present. However, a bridge between the past and the present is not always possible, as the ECtHR's case law shows. A contracting party of the ECHR will not be held responsible under the Convention for not investigating even the most serious crimes under international law if these pre-dated the adoption of the Convention.<sup>192</sup>

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<sup>190</sup> Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Official Documents and Proceedings, Nuremberg, 1947, pp. 301-304 and 317-320.

<sup>191</sup> Judge Tanaka (ICJ), Dissenting Opinion, *supra* note 109. See also Sandoz et al., *supra* note 31, para. 1193, p. 341.

<sup>192</sup> Although the Court recognized that “even today some countries have successfully tried those responsible for war crimes committed during [WWII]”, it emphasized “the fundamental difference between

The analysis of the temporal dimension of the obligation to carry out an investigation also highlights that judicial reflections on the temporal scope of the human rights treaties intertwine with issues concerning both the duration of the violation/obligations of the States and the jurisdiction *ratione temporis* of the judicial bodies. In spite of the fact that the triggering event causing distress - the disappearance – may have occurred before the ratification of/accession to the relevant treaty by the concerned State or before the acceptance of the right to individual petition, the international judicial bodies have used various techniques (e.g., the continuing violation doctrine) in order to ensure legal certainty. The cases of disappearance addressed by international judicial bodies show that the queries of the families and their quest for information about their missing relatives cannot remain unanswered using the excuse that the disappearance occurred too long ago. In this respect, this article follows the approach of the ECtHR in *Janowiec and Others v. Russia* (2012): the obligation to carry out an investigation subsumed under Article 3 ECHR (prohibition of torture and inhuman and degrading treatment) is of “a more general humanitarian nature, for it enjoins the authorities to react to the plight of the relatives of the dead or disappeared individual in a humane and compassionate way.”<sup>193</sup>

International law, while duly safeguarding the legitimate interests of States, still “must gradually turn to the protection of human beings.”<sup>194</sup> Can a State be asked to do the impossible to solve cases of persons reported missing in the context of events that occurred in the distant past? The answer is no. However, State authorities should be required to do what is within their power in order to guarantee the rights of family members of missing persons and forcibly disappeared persons.

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having the possibility to prosecute an individual for a serious crime under international law where circumstances allow it and being obliged to do so by the Convention” (ECtHR, *Janowiec and Others v. Russia* (GC), para. 151).

<sup>193</sup> ECtHR, *Janowiec and Others v. Russia*, para. 152.

<sup>194</sup> ICTY, *Prosecutor v. Duško Tadić aka ‘Dule’* (Case no. IT-94-1-A), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 97.