

**THE PROHIBITION OF ENFORCED DISAPPEARANCES IN INTERNATIONAL
HUMANITARIAN LAW**

**LA PROHIBICIÓN SOBRE DESAPARICIÓN FORZADAS EN EL DERECHO
INTERNACIONAL HUMANITARIO**

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ABSTRACT: The fact that International Humanitarian Law does not contain a specific mention to enforced disappearances does not mean that there is no protection of such practice in those set of norms. Therefore the objective of this article is to analyse and show that the prohibition of enforced disappearances is contained within such body of law, by addressing two different sets of obligations, positive obligations and negative ones that touch upon the core elements of enforced disappearances.

KEY WORDS: Enforced Disappearances-International Humanitarian Law- Geneva Law-Positive and Negative obligations.

RESUMEN: El hecho que las normas de Derecho Internacional Humanitario no contengan de manera explícita mención alguna sobre desapariciones forzadas no implica que no exista protección alguna en contra de esa práctica, en tal cuerpo normativo. Por ello, el objeto del presente artículo es analizar y mostrar que la prohibición de desaparición forzada se encuentra contenida en las normas de Derecho Humanitario, mediante el abordaje de dos grupos de obligaciones, negativas y positivas que aluden a los elementos centrales de la desaparición forzada de personas.

PALABRAS CLAVE: Desaparición Forzada de Personas-Derecho Internacional Humanitario-Normas de Ginebra-Obligaciones positivas y negativas.

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1. Introduction

The first documented practice of enforced disappearances (ED) is the ‘Night and fog’ decree, through which, Hitler ordered to capture people that would put in danger German security in the occupied Nazi territories in 1941. The aim of the decree was to secretly arrest people, and disclose no information about its whereabouts to their family, in order to cause terror and intimidation to the population, operating thus as a deterrence of rebellion.¹

This practice was then resumed by Latin American States in their fight against subversion in the 60s-80s, and then during armed conflicts such as the former Yugoslavia and Sri Lanka. But it was not till 1990s that the crime was address in the context of international human rights law.

It can be said that ED is a criminal practice whose objective is to extract a person from the protection of the law by the denial or concealment of any information of his or her fate. The first instrument to address directly ED was Resolution 47/133 of the UN General Assembly in 1992, such resolution adopted the Declaration for the Protection of All Persons from Enforced Disappearances, although it does not contain a definition of the crime, it makes a clear statement on the content and the victims, article 1.2 states ‘Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families’. The Declaration became the predecessor for a universal binding document, the Convention Against Enforced Disappearances in 2006 (CED). However, the first international binding document was born within the Inter-American System in 1994, the Inter-American Convention on Forced Disappearance of Persons (ICFD) entered into force in 1996.

Both the ICFD and CED are similar in content, in their articles 2 define what an ED is; the constitutive elements of the crime are the same: involvement of the State either by active participation or by acquiescence, deprivation of a person’s liberty and the central issue, denial of information whether regarding the acknowledgment of the detention itself or the fate of the person. Unlike the ICFD, CED includes in the definition of victim not only

¹ FINUCANE, Brian. "Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War" (Social Science Research Network 2009) SSRN Scholarly Paper ID 1427062 <<http://papers.ssrn.com/abstract=1427062>> accessed 1 December 2015.

the disappeared person but ‘any individual who has suffered harm as the direct result of an enforced disappearance’,² hence his/her family.

The State element is explained by the fact that the international community addressed the practice in the context of the international protection of human rights, which is directed towards States. Nevertheless, this does not mean that other entities than States, like armed groups-non state actors- cannot commit the crime. In addition, in the Rome Statute is clear that the crime, as a crime against humanity, may be committed ‘by or with the authorization, support or acquiescence of, a State or a *political organization*’ (emphasis added),³ therefore adopting a wider interpretation of ED in comparison with other international instruments.⁴

It has been argued that International Humanitarian Law (IHL), although not addressing specifically the prohibition of ED, contains several prohibition in regards to the matter, the prohibition of ED is considered protected by the prohibition of arbitrary detention, murder and torture.⁵ Nevertheless, not all ED start with an arbitrary detention, the State or perpetrator might have legal grounds to detain a person, therefore a legal detention can be the first step towards the crime if the State (or group) then is reluctant to provide any information on the whereabouts or fate of the detainee. In the same way, torture may or may not take place during the detention. Even more, although the sad and normal fate of the disappeared is fatal, unless there are witnesses to the murder, a person remains disappeared until is found, dead or alive.

It is worth asking what happens if there are no other (apparent) violations like torture, arbitrary detention or murder. The fact that IHL does not contain a specific mention to the crime, does not mean that no rules exist in order to protect persons from that phenomena. Furthermore, the Geneva Conventions (GC) and their additional Protocols contain two groups of norms, those which impose positive obligations on the parties, and those that impose negative obligations; and when follow aim to avoid ED.

The objective of this essay is to show that the prohibition of ED is contained within the norms of IHL, by analysing, first those set of positive obligations which protect the right

² Article 24.

³ Article 7 Rome Statute.

⁴ VITKAUSKAITĖ-MEURICE, Dalia and ŽILINSKAS, Justinas. "The Concept of Enforced Disappearances in International Law" (2010) 120 Jurisprudence 197.

⁵ See Rule 87 of the ICRC Customary Rules.

to families to know the fate of their relatives,⁶ and lately and most important, the nature of the inhumane treatment prohibition contained in Common article 3 of the GC.

2. Positive obligations: information disclosure

The Geneva laws contain rules directed to the parties of the conflict regarding communication, information of detainee and deaths, also search for missing people, the idea behind those norms is to respect the right of families to know the fate of their love ones.

2.a Search of the dead

Casualties of armed conflict regardless whether they were combatants or civilians must be search for and identified, the information must be given to the families and the other party. The provision is common to all conflicts, international and non-international. This prescription is contained in articles 15 IGC, 18 of IIGC, 16 IVGC, and articles 33(2)(b) Protocol I and 8 of Protocol II, with minor differences regarding the moment in which the search must be conducted, thus while IGC establishes that the search must be conducted ‘at all times’, in IIGC is only after engagement, making sense as it deals with naval and air warfare; IVGC takes into account military considerations in order to carry on the search, similar to Protocol I and II that consider circumstances, but Protocol II adds that the search must be taken specially after engagement.

Moreover, according to articles 17 IGC, 20 IIGC, 130 IVGC and 34 Protocol I,⁷ if buried,⁸ the graves need to be marked so that the relatives know where they are and they must be given access to the graveyards, and when circumstances allow medical examination should take place in order to establish identity or to gather information that would help to identify the person, these provisions, if looked closely, tend to respect the right to truth of the relatives, hence to have information about the fate of their love one. The right to truth is expressly recognized in art 32 of Protocol I.

2.b Detainees

Articles 122 of IIGC and 136-138 IV GC and 32(2)(a) of Protocol I comprises the duties of the State regarding the information they should collect from the detainees, whether prisoners of war or civilians, that includes not only identifying information (such as name,

⁶ FLECK, Dieter and BOTHE, Michael (eds), *The Handbook of International Humanitarian Law* (Third edition, Oxford University Press 2014) 337.

⁷ IIGC does not include a provision of the sort, since the dead are usually thrown to the sea, but if landed, then art 17 IGC shall apply.

⁸ Cremation is an exceptional option for religion or hygiene reasons.

birth, characteristics, address, etc) but also his/her state of health, information of transfers, escapes, hospitalization, births and deaths.⁹ Parties must give information of wounded, sick, and shipwrecked¹⁰ and detaining authorities have an obligation to answer inquiries about protected persons.¹¹

Furthermore, prisoners have the right to write to their families, informing about their situation, and maintain a fluid correspondence if possible, therefore uncommunicated detentions are forbidden.¹² This is also the case in situation of non-international armed conflicts, article 5(2)(b) Protocol II. In addition, the ICRC has the right to visit detained persons and interview them,¹³ and therefore, by interviewed they get registered; although this provision is regarding international armed conflicts, with respect to non-international ones, 'parties are encouraged to accept an ICRC offer to make such visits'.¹⁴

2.c Missing

Article 33 of Protocol I specifically addresses the issue of missing people, stating that states have an obligation to trace missing person of the adverse party. According to Fleck,¹⁵ the article draws on other provisions in the GC regarding the duty to provide and exchange information regarding detainees and dead. The provision deserves a couple of considerations, first a person is considered 'missing' when someone reported that person as such, hence in order for the State to comply with its duty under article 33, relatives or friends must file a claim so as to trigger the State obligation. Second, it only refers to persons of the 'adverse party', leaving aside its own nationals that might be missing in the territory of the State. In addition, as Sassoli argues, sometimes the parties 'will be genuinely unable to provide answers partly because they did not comply with their duties during the conflict'.¹⁶

The provision set in Protocol I only corresponds to international armed conflicts, according to Novak 'there is considerable practice indicating that such an obligation exists as a matter of customary law (...) in practice, the ICRC Central Tracing Agency undertakes

⁹ The parties must establish an Information Bureau, in order to facilitate the collection and transmission of information, articles 122 IIIGC and 136-137 IVGC.

¹⁰ Articles 16 IGC, and 19 IICG.

¹¹ SASSOLI, Marco and TOUGAS, Marie-Louise. "The ICRC and the Missing" (2002) 84 International Review of the Red Cross 731.

¹² Articles 71 IIIGC, and 170 IVGC.

¹³ Articles 124 IIIGC and 143 of IV GC.

¹⁴ SASSOLI and TOUGAS (n 11) 733.

¹⁵ FLECK and BOTHE (n 6) 609.

¹⁶ SASSOLI and TOUGAS (n 11).

tracing activities regardless of the type of conflict'.¹⁷ The concept of 'missing' is broadened and includes all types of missing, those whose detention have not been acknowledged, and those missing for other reasons as consequences of the conflict.¹⁸

The prescriptions contained in the GC impose positive obligations to the parties that can be synthesised in the obligation to disclose information. The meaning behind it is that the parties cannot withhold the fate of a person, which constitutes the central core of the prohibition of ED.

3. Negative obligations: prohibition of inhumane treatment

Within Humanitarian Law, the principle of humanity was incorporated in the preambles of the both Hague Conventions of 1899 and 1907 regarding the Law of War, in the form of the 'Martens Clause', which invokes the principle when it refers to 'laws of humanity'. This principle turned into a core provision in all humanitarian law, as the aim of those set of norms is to 'alleviate as much as possible the calamities of war',¹⁹ the idea is to minimize human suffering, becoming a transversal rule to both international and non-international armed conflicts. Furthermore, the principle is present in all the Fourth GC and their additional Protocols, it specially addresses civilians and everyone that is not taking active part on the hostilities, like wounded, sick, detainees, etc.²⁰

Thus, article 12. 2 IGC establishes that 'They (members of the armed forces and other mentioned in art 13 who are wounded and sick) *shall be treated humanely* and cared for by the Party to the conflict in whose power they may be'. In identical sense with respect to the wounded, sick or shipwrecked article 12.2 IIGC, article 13 of IIIGC states 'Prisoners of war must at all times *be humanely treated*'; and IVGC article 27.2 'They (protected persons) shall at all times *be humanely treated*'. Protocol I invokes the principle of humanity in articles 1.2 which introduces the Martens Clause,²¹ and 75.1 when it mentions that

¹⁷ UN Commission on Human Rights, 'Report Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, pursuant to Paragraph 11 of Commission Resolution 2001/46' (UN Commission on Human Rights 2002) <<http://www.refworld.org/docid/3d6ce3c50.html>> accessed 21 December 2015.

¹⁸ WILMSHURST, Elizabeth and others (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2011).

¹⁹ The phrase was used in the Declaration Renouncing the Use, in time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November 1868.

²⁰ The most important parts of the basic provision regarding humane treatment can be found also in articles 4-20 of the Hague Regulations.

²¹ Article 1.2 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from

‘persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol *shall be treated humanely* in all circumstances’. Protocol II article 4.1 states ‘All persons who do not take a direct part or who have ceased to take part in hostilities (...) *shall in all circumstances be treated humanely*’ (all emphasis added).

In addition, the principle underlines the prohibition of inhumane treatment in common article 3.1 to the four GC, which puts emphasis on the protection of persons in enemy hands,²² the article states:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, *shall in all circumstances be treated humanely* (...) To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) (...) *cruel treatment* (...)

The prohibition of inhumane treatment or cruel treatment included in common article 3, and therefore its content, has been developed by the international Tribunals, specially the International Criminal Tribunal for the former Yugoslavia (ICTY) and followed by the International Criminal Tribunal for Rwanda (ICTR). In *Blaskic*,

[I]nhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity (...) Thus, *inhuman treatment* is intentional treatment which *does not conform with the fundamental principle of humanity*, and forms the umbrella under which the remainder of the listed “grave breaches” in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment.²³

For an act to constitute cruel or inhumane treatment as a breach of humanitarian law, besides the serious harm, the act needs to be carried on intentionally and against a person that is not taking active part of the hostilities.²⁴ It bears asking whether ED fit the elements to be considered inhumane treatment.

established custom, from the principles of humanity and from the dictates of public conscience’. According to the ICJ in its Advisory Opinion of the Use of Nuclear Weapons ‘a modern version of the (Martens) clause is art 1.2 Protocol I’.

²² PEJIC, Jelena. "The Protective Scope of Common Article 3: More Than Meets the Eye" (2011) 93 International Review of the Red Cross 189.

²³ ICTY *Blaskic*, (Trial Chamber) Case No. IT-95-14, March 3, 2000 pa 154-55

²⁴ ICTY *Blaskic*, (Appeals Chamber) Case No. IT-95-14-A, July 29, 2004, pa 595: “The Appeals Chamber has defined ‘cruel treatment’ as follows: Cruel treatment as a violation of the laws or customs of war is a. an intentional act or omission (...) which causes serious mental or physical suffering or injury or constitutes a

The first thing to notice is that ED not only harms the ‘disappeared’, but his/her family as well, it is clear that there are two type of victims, the direct victim or disappeared and indirect victims, the family. The object of ED is to place the disappeared ‘outside the law’ by depriving the person of any communication and by the lack of acknowledge of his/her fate by the perpetrator (State or group). The harm here lies in the incommunication and the fear caused by that fact, in this sense it has been understood by different Human Rights Committees that ‘incommunicado detention²⁵ causes suffering and fear, and, as a consequence amounts to inhumane and degrading treatment’.²⁶ Moreover, the Inter-American Court of Human Rights has upheld in those cases that detained ‘is kept in an exacerbated situation of vulnerability’,²⁷ therefore, according to Cançado-Trindade, the right to humane treatment must ‘apply even more forcefully’.²⁸

When it comes to the family, the lack of disclosure regarding the whereabouts and fate of the detained causes unnecessary constant suffering by keeping the family in permanent despair, according to the ICRC ‘(the enforced disappearance) not only places them (the family) in a situation of cruel uncertainty, but is a denial of the right to know the fate of their relatives’²⁹. The Declaration for the Protection of All Persons from Enforced Disappearances states that the practice ‘inflicts severe suffering on them and their families’.

With regard to the intention, the purpose States or armed group conduct the practice is to make people vanish without a trace while deliberately concealing all evidence of the crime. In the fact that the perpetrator is reticent to acknowledge or give any type of information lies the intention of the crime. Moreover, in armed conflicts, it can also operate

serious attack on human dignity, b. committed against a person taking no active part in the hostilities.” See also ICTY Limaj et al., (Trial Chamber), Case No. IT-03-66- November 30, 2005, pa 231

²⁵‘Incommunicado detention’ makes reference to a detention that prohibits the detained person from contacting the outside world. For further information see Nigel S Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (3rd ed, Oxford University Press 2011).

²⁶Human Rights Committee; Celis Laureano vs Peru, Communication No 540/1993, pa 8.5. Human Rights Chamber for Bosnia and Herzegovina; Avdo and Esmá Palíc vs. the Republika Srpska, decision on Admissibility and merits (ch /99/ 3196), 11 January 2001, pa 74.

²⁷ Maritza Urrutia v.Guatemala ICtHR, Judgement 27 November 2003 pa 87; Juan Humberto Sanchez v.Honduras ICtHR Judgement 7 June 2003 pa 96; Cantoral Benavides v Peru ICtHR Judgement 25 November 2000 pa 150.

²⁸ CANÇADO-TRINDADE, Fernando. "Some Reflections on the Principle of Humanity in Its Wide Dimension" in Robert KOLB and Gloria GAGGIOLI (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar Publishing 2013) 193.

²⁹ Statement by the International Committee of the Red Cross to the United Nations Human Rights Council, 27 June 2006, concerning the draft International Convention for the Protection of all Persons from Enforced Disappearances. See <https://www.icrc.org/eng/resources/documents/statement/human-rights-council-statement-270606.htm>.

as a mechanism in order to cause at the same time fear and intimidation among the adversary party.

The protection of common article 3 is intended to those who do not take active part in the hostilities,³⁰ meaning that the violation must take place when the victim is not taking part in the fight,³¹ thus for the purposes of ED, the disappeared would never be taking part of the hostilities at the time of the commission of the crime, therefore, he or she, would be entitled to the protection of the article as ED always start with the-lawful or unlawful-detention of the person.

The importance of the content of common article 3 lies in its nature. Despite the fact that the GC apply ‘to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties’,³² that is to say international armed conflicts, common article 3 was introduced as the first substantive provision to address directly non-international armed conflicts,³³ and in doing so set a minimum core of mandatory rules applicable to both international and non-international armed conflicts that have to be respected by all the parties in the conflict.

[A]rticle 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity.’³⁴

³⁰ ICTY Jelisić, (Trial Chamber), Case No. IT-95-10 December 14, 1999, pa 34: “Common Article 3 protects ‘[p]ersons taking no active part in the hostilities’ including persons ‘placed hors de combat by sickness, wounds, detention, or any other cause.’ Victims of murder, bodily harm and theft, all placed hors de combat by their detention, are clearly protected persons within the meaning of common Article 3.”

³¹ ICTR Bagosora et al. (Trial Chamber) Case No. ICTR-98-41-T December 18, 2008, pa 229: “In connection with crimes within the scope of Article 4 of the Statute, the Prosecution must prove (...) that the victims were not directly taking part in the hostilities at the time of the alleged violation.” See also ICTR Kamuhanda, (Trial Chamber) Case No. ICTR-95-54A-T January 22, 2004, pa 737 (similar); ICTR Ntakirutimana et al (Trial Chamber), Case No. ICTR-96-10- ICTR-96-17-T February 21, 2003, pa 859

³² Common article 2 of the GC.

³³ CULLEN, Anthony. *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010) <<http://Bangor.ebib.com/patron/FullRecord.aspx?p=501381>> accessed 16 December 2015.

³⁴ International Court of Justice (ICJ), Case concerning Military and Paramilitary Activities in and against Nicaragua, 27 June 1986, Judgment, pa 218. In the same sense, ICTY Prosecutor v. Delalić et al (Appeals Chamber) Case No. IT-96-21, February 20, 2001 pa. 143, 150: ‘It is indisputable that common article 3 reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based (...) The rules of common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. [S]omething which is

Moreover, due to the content and the protection given by common article 3, the rule has become customary norm,³⁵ meaning it must be respected regardless of the State ratification to the treaties and by non- state actors as well.³⁶ Violations to common article 3 are considered grave breaches of the GC, hence war crimes.

4. Conclusion

Although the criminalization of ED was addressed recently by international human rights norms, it can be said that what is new is not the practice but its recognition as an autonomous crime. The phenomena is old, and has been used in armed conflicts to inflict fear and terror. When looking at IHL provisions we find that IHL contain enough rules to address the phenomena, and that the practice was prohibited in armed conflicts long before it was recognized as a crime; since one of the key aspects of international humanitarian law is the assignation of highest value to the human being, hence individuals are protected and assisted when they suffer the effects of armed conflicts.”³⁷

In doing so, among the provisions of IHL, two sets of obligations can be found, those which impose a certain conduct, that is to say that impose ‘to do’, and those which impose and abstention, hence ‘not to do’. It has been demonstrated that the positive obligations, regarding ED, aim to disclose information about the fate of the person, and alternatively to help find what had happened, and when this rules are followed, they help to avoid ED. In addition, the positive obligations, when talking about ED, complement a negative mandate, the prohibition of inhumane treatment. It is also clear that ED constitute inhumane treatment, as established in Common article 3. And unlike the positive obligations, which

prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader’.

³⁵ICTY Tadic, (Appeals Chamber), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1 October 2, 1995, pa 98: ‘[S]ome treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions’. ICTR Akayesu, (Trial Chamber) Case No. ICTR-96-4-T September 2, 1998, pa. 608: ‘The Chamber concluded that Common Article 3 is customary law’. ICTY Kunarac et al, (Appeals Chamber) Case No. IT-96-23 and IT-96-23/1, June 12, 2002 pa 68: Common Article 3 “is indeed regarded as being part of customary international law.” See also ICTY Halilovic, (Trial Chamber) Case No. IT-01-48-T November 16, 2005 pa 31: ‘ It is well established that Common Article 3 is part of international customary law’.

³⁶ Appeals Chamber of the Special Court for Sierra Leone in the Decision on Challenge to Jurisdiction: Lome´ Accord Amnesty: ‘a convincing theory is that [armed groups] are bound as a matter of international customary law to observe the obligations declared by Common Article 3 (Decision on Challenge to Jurisdiction: Lome´ Accord Amnesty, Appeals Chamber, SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E) 13 March 2004 pa47.)

³⁷ THÜRER, Daniel. *International Humanitarian Law: Theory, Practice, Context* (Hague Academy of International Law 2011) 48.

will depend upon ratifications of the States, and type of conflict, common article 3 has developed into a customary norm.

Moreover, It cannot be said that those norms enjoy the same hierarchy within IHL, while the violation of the mentioned positive obligation, only implies a breach to GC (and its additional Protocols), a violation of the negative prohibition, on the other hand, represents a grave breach of the GC, and it is considered a war crime. Furthermore, in most cases the violation of prohibition of inhumane treatment, regarding ED, will most likely imply violations to positive obligation as well.

Thanks to the influence and development of human rights law, some scholars argue that the crime of ED has reached the category of customary rule,³⁸ others, like the International Committee of the Red Cross, considers that ED is prohibited in both international and non-international armed conflicts because it ‘violates, or threatens to violate, a range of customary rules of international humanitarian law including the prohibition of arbitrary detention, murder, torture and cruel or inhumane treatment’.³⁹

The truth is that it would have been enough to mention that ED is prohibited because it violates the customary norm of prohibition of inhumane treatment, as the crime of ED is a different an autonomous one with respect to torture and murder of protected persons. Nevertheless, in most cases will imply also one-or more- of the above, as it often takes place in concurrence with other violations or leads to other violations, but it might not necessarily be the case. The core of the crime is the denial of information-in a broader sense- regarding the person and the inhumane treatment that comes as a consequence.

Finally, ED are certainly prohibited under IHL, whether carried out by the State or by a non-state actor, in international or non-international armed conflicts. It is important to remember that although IHL does not address directly a criminal practice it does not mean that such practice is not forbidden, the core of IHL is the principle of humanity, and it

³⁸ FINUCANE, Brian . "Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War" (Social Science Research Network 2009) SSRN Scholarly Paper ID 1427062 <<http://papers.ssrn.com/abstract=1427062>> accessed 1 December 2015; Nikolas Kyriakou, ‘The “International Convention” for the Protection of All Persons from Enforced Disappearance and Its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Rendition’ (2012) 13 Melbourne Journal of International Law 424.

³⁹ ICRC Study on Customary Rules, Rule 98 < https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule98> Accessed 2nd December 2015.

should be used as a guide to establish the limits of war-in the most general sense of the word-.

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