International Conference on Adoption Truth: Crimes Against Humanity, Enforced Disappearance and Forced Adoptions - November 26, 2025

Korean Parliament, Seoul

Obligations of States to prosecute illegal adoptions as crimes against humanity and/or enforced disappearances under international law

Working paper[*]

Olivier de Frouville

Professor at Paris-Pantheon-University

Vice-Chair of the UN Committee on Enforce Disappearances[**]

I would like to thank very much the organizers for inviting me to participate in this international conference.

As mentioned, I have been Chair – and I am now Vice-Chair – of the UN Committee on Enforced Disappearances. However, I will speak here in my personal capacity, both as an independent expert and as an international law academic, and my views do not necessarily reflect the position of the Committee nor of the United Nations.

I will speak about three legal issues in relation to illegal adoptions.

The first issue is whether the phenomenon of illegal adoptions can be contemplated and prosecuted through international crimes such as crimes against humanity and enforced disappearances.

The second issue is the extent of the obligation of States to prosecute those crimes under international law.

And finally, the third question relates to possible barriers to prosecution of illegal adoptions, such as the principle of non-retroactivity of criminal legislation and statute of limitations.

---

[*] This document is a working paper which is still work in progress and subject to further change.

[**] The views expressed in this paper are personal and do not necessarily reflect the position of the Committee on Enforced Disappearances nor of the United nations.

I. Illegal adoptions and international crimes

I would like to recall that in September 2022, two UN Treaty bodies, the Committee on Enforced Disappearances and the Committee on the Rights of the Child, and four special procedures (the Special rapporteur on sale and sexual exploitation of children, the Special rapporteur on trafficking in persons, the Special rapporteur on transitional justice, and the Working Group on enforced or involuntary disappearances) have adopted a joint statement on illegal intercountry adoptions. Paragraph 4 of the Statement deals with crimes:

> "Illegal intercountry adoptions may violate the prohibition of the abduction, the sale of, or the traffic of children, and, under specific circumstances, may also violate the prohibition of enforced disappearance. In certain conditions as provided for in international law, illegal intercountry adoptions may constitute serious crimes, such as genocide or crimes against humanity."[1]

Here I will focus on crimes against humanity, enforced disappearances and the specific crimes included in article 25 of the Convention for the Protection of all Persons against Enforced Disappearances (thereafter ICPPED).

A. Crimes against humanity

1. The RuSHA case

It's important to recall that the issue of illegal and even illegal intercountry adoptions was largely dealt with in one of the post-war international criminal cases, that is the so-called "RuSHA[2] case"[3]

The case concerns the policy of "germanization" of populations in occupied territories which were considered by the Nazis to have "good racial characteristics". The plan included the abduction of children and their adoptions in Germany[4], as prosecuted in count 1 against the defendants:

> "Count 1 Count one […] alleges that these "Acts, conduct, plans and enterprises * * * were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by elimination and suppression of national characteristics.

---

[1] Footnotes omitted. *Joint statement on illegal intercountry adoption*, CED/C/9, 5 December 2022.

[2] That is the "SS Race and Resettlement Office".

[3] United States v. Ulrich Greifelt, et al, "RuSHA case" before the US Military Tribunal in Nuremberg under Control Council Law n°10, TWC, vol. V.

[4] https://en.wikipedia.org/wiki/Kidnapping_of_children_by_Nazi_Germany

> The object of this program was to strengthen the German nation and the so-called 'Aryan' race at the expense of such other nations and groups by imposing Nazi and German characteristics upon individuals selected therefrom * * * and by the extermination of 'undesirable' racial elements. This program was carried out in part by
>
> a) Kidnaping children.
>
> b) Abortions.
>
> c) Taking away infants of Eastern workers.
>
> d) Punishment for sexual intercourse with Germans. […][5]

The Judgement quotes, among other evidence, a letter signed by Himmler on 18 June 1941:

> "I would consider it right if small children of Polish families who show especially good racial characteristics were apprehended and educated by us in special children's institutions and children's homes which must not be too large. The apprehension of the children would have to be explained with endangered health."""
>
> After half a year the genealogical tree and documents of descent of those children who. prove to be acceptable should be procured. After altogether one year it should be considered to give such children as foster children to childless families of good race"[6]

In case of pregnancy caused by sexual intercourse between a member of the SS and non-German woman residing the occupied Easter, abortion had to be carried out, *unless* the woman was evaluated to be "of good stock"[7]. In this case, the child was taken from the mother and sent to Germany and placed in children's home for foreigners or given for adoption to "private families".

Although the prosecutor used the word "genocide" to describe the plan, Control Council Law n°10 of 20 December 1945 did not include that particular crime that had just emerged conceptually (through Lemkin's work). Those defendants that were found guilty under count one were thus convicted for crimes against humanity and war crimes.

Based on this Second World War experience, the *Convention on the Prevention and Punishment of the Crime of Genocide* was adopted on 9 December 1948 by the General Assembly and entered into force on 12 January 1951[8]. Article II of the Convention includes the act of "forcibly transferring children of the group to another group", a genocidal act if "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."

---

[5] "RuSHA case", p. 89.

[6] "RuSHA case", p. 103.

[7] *Id.*, p. 109.

[8] The Republic of Korea acceded to the Genocide Convention on 14 October 1950.

2. Crimes against humanity in post WWII

Crimes against humanity were included in the statutes of the *ad hoc* tribunals on former Yugoslavia and Rwanda, which developed a substantial case law and specified the definition of its constitutive elements. It is generally accepted that article 7 of the Rome Statute includes a restatement of the constitutive elements as they crystallized under customary international law:

> "For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: […]"

Article 7, Paragraph 2-a clarifies what is meant by an "attack directed against any civilian population" that is "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

The case law by the ICTY, ICTR, the ICC and hybrid tribunals such as the Special Court for Sierra Leone (SCSL) or the Extraordinary Chambers of Cambodian Tribunals (ECCT) have further clarified the exact meaning of the various notions included in paragraph 1 of article 7.

Article 7, paragraph 1 lists specific crimes that, if committed in the context of an "widespread or systematic attack against any civilian population" are crimes against humanity. Amongst these specific acts, several of them may be applicable to illegal adoptions including intercountry adoptions:

- deportation or forcible transfer of population,
- imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law,
- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court,
- enforced disappearance of persons,
- other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

In addition to those, other acts may be applicable if committed against children *in the context* of their illegal adoptions, depending on the circumstances of the case, such as:

- enslavement,

- torture,

- rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity,

3. Prosecutions in Argentina

To my knowledge – which might be incomplete – the only cases where illegal adoptions were successfully prosecuted as crimes against humanity took place in Argentina.

In this country, it is worth recalling that the military dictatorship – in coordination with other countries of the region ('plan Condor') led a massive campaign of enforced disappearances from 1976 to 1983. It is considered that about 30.000 persons have been disappeared, imprisoned in clandestine detention centre throughout the country, often subjected to torture and in many cases killed. Amongst the disappeared were pregnant women who were forced to give birth in detention. Their babies were forcibly taken from them and subsequently illegally adopted, with a falsified identity, most of them by families close to the dictatorship. It is estimated that about 400 children were "appropriated". The "grandmothers" the Plaza de Mayo have been searching for those children since then and managed to identify more than 140, but the search continues. Several cases were brought to justice in connection to these disappearances and illegal adoptions.

Among the cases of "systematic plan of minors appropriation",[9] the case of *Sampallo Barragán case, Rivas and ors (on behalf of Quintana) v Pleé*, concerned the 'appropriation' of the baby of Mirta Mabel Barragán ('Barragán') and Leonardo Rubén Sampallo. Mirta was six months pregnant when she was arrested. Her baby was appropriated by a former army captain who gave her to his friends Osvaldo Rivas and Maria Cristiana Maria Cristina Gómez Pinto with a forged birth certificate. Below are extracts of the summary of the case in *Oxford Reports on International Law*:

> "F5 On 4 April 2008 Criminal Federal Trial Court No 4 sentenced (a) Rivas to eight years of imprisonment and eight years of civil disqualification as a co-perpetrator of the forgery of the content of a public document and the abduction and concealment of a minor under 10 years old and as the perpetrator of the forgery of the content of a public document aimed at attesting the identity of persons; (b) Pinto to seven years of imprisonment and seven years of civil disqualification as co-perpetrator of the abduction and concealment of a minor under 10 years old; and (c) Berthier as abettor of the abduction and concealment of a minor under 10 years old. They were acquitted of various other charges.

[9] For a complete overview see the Document "Dossier de sentencias pronunciadas en juicios de Lesa Humanidad en Argentina", updated in 2024, https://www.mpf.gob.ar/lesa/files/2025/03/LH_Dossier_actualizacion-diciembre_2024-2.pdf

> F6 The defence counsel challenged the convictions before the Court of Cassation, soliciting the application of the statute of limitations. The Public Prosecutor and the private prosecution also filed an appeal challenging the acquittals and, consequently, the sentences finally imposed by the Court of Cassation.

The Court of Cassation handed its judgement on 8 September 2009:

> F8 The Chamber IV Judges unanimously decided to uphold the decision rendered by the Criminal Federal Trial Court No 5 as regards its refusal to apply the statute of limitations to the case. The Chamber IV Judges also unanimously held that the crimes amounted to crimes against humanity as analysed by the Criminal Federal Trial Court and partially quashed the conviction and, within the Chamber's procedural power, amended the charges to include the crime of alteration of identity and parental status of a minor under 10 years old in the conviction."

The crimes of eliminating identity and parental status and of forging documents were considered crimes against humanity because they were found by the Court to be "part of the execution of the plan designed to forcibly disappear persons".

4. Prosecution of deportation and forced transfer of children as war crimes before the ICC

Even though the International Court has not addressed the issue of illegal adoption through crimes against humanity, still it is important to note that on 24 June 2024, Preliminary Chamber II of the ICC issued warrants of arrest against Vladimir Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights, "allegedly responsible for the war crime of unlawful deportation of population (children) and that unlawful transfer of population (children) from occupied areas of Ukraine to the Russian Federation (under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute."[10] These charges refer to the alleged forced deportation in Russia or forced transfer (in occupied territories in Ukraine) of Ukrainian children by Russia in various contexts. Some of the children were taken from orphanage and placed in foster care in Russia. Some have allegedly been stolen from their parents or after the death of their parents and some may have been adopted by Russian families. The exact scale of the phenomenon as well as the number of resulting adoptions by Russian families is uncertain, but cases have been documented in particular by the OHCHR.[11] Ukraine

---

[10] https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and

[11] See OHCHR report, *The impact of the armed conflict and occupation on children's rights in Ukraine*, 24 February 2022-31 December 2024, , §§ 74-85.

has launched a specific project called “brings kids back” alleging that about 19.546 children have reportedly been deported or transferred, while 1819 have been returned.[12]

Even though in this case, the issue is dealt with under the category of war crimes, note must be taken that the crimes of deportation and forced transfer are also listed as crimes against humanity under article 7 of the ICC Statute.

B. Enforced disappearances

Enforced disappearances was defined in several international instruments and is now recognized as a crime under customary international law and a jus cogens norms (see below on these aspects).

The 1994 InterAmerican Convention provides the following definition of enforced disappearance in its article II:

> For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

Preambular paragraph 6 reaffirms “that the systematic practice of the forced disappearance of persons constitutes a crime against humanity”.

The 2006 UN International Convention for the Protection of All Persons Against Enforced Disappearance (thereafter ICPPED)[13] gives the following definition under article 2:

> For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Under article 3, the Convention also creates an obligation for states parties to “take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.”

---

[12] https://www.bringkidsback.org.ua/

[13] The Republic of Korea acceded to the Convention On 4 January 2023.

Article 4 provides for an obligation of States parties to "take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law." Generally, this has been interpreted by the Committee as an obligation for States to legislate in order to include in their criminal codes a new "autonomous" crime (that without nexus to another category of crime such as crimes against humanity), reflecting all the elements of the crime listed in article 2. This obligation could also however be satisfied, in my opinion, by the recognition and the application of the crime under customary international law by a court of law – as the it is generally considered now that the definition under article 2 reflects international customary law.

This is also worth noting that States parties have an obligation, under article 7, to "make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness", and that aggravating circumstances must be established in particular for enforced disappearance of a minor person.

Preambular paragraph 5 of the Convention recalls the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity", whereas article 5 of the Convention states that:

> "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law."

Enforced disappearance as a crime against humanity is more specifically defined in article 7, paragraph 2-i of the Rome Statute of the International Criminal Court[14] as follows:

> "'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

Based on these definition, it appears that many cases of illegal adoption – including intercountry adoption – constitute the crime of enforced disappearance, either as an "autonomous crime" under the Convention or as a crime against humanity, provided that the contextual elements are also met (that is that the enforced disappearance took place in the context and in connection with a widespread or systematic attack against any civilian population, and with knowledge of the attack by the perpetrator)

[14] The Republic of Korea ratified the Rome Statute on 13 November 2002.

In the case of *Gelman v. Uruguay* before the InterAmerican Court of Human Rights[15] María Claudia García Iruretagoyena de Gelman was victim of an enforced disappearance in Buenos Aires, during the advanced stages of her pregnancy, from "which it is presumed that she was then transported to Uruguay where she gave birth to her daughter, who was then given to a Uruguayan family."

Considering the situation of the daughter, María Macarena Gelman García, who subsequently recovered her real identity, the Court said:

> "132. In recognition of the foregoing, the abduction and suppression of the identity of María Macarena Gelman García as a consequence of the detention and subsequent transfer of her pregnant mother to another State can be qualified as a particular form of enforced disappearance of persons, for having the same purpose or effect […]"

Along a similar pattern, Liliana Clelia Fontana Deharbe was abducted on 1st of July 1977 while she was 2 months and half pregnant and she gave birth to her son Pedro Sandoval Fontana during her disappearance. An Argentinian Court convicted Victori Enrique Rei, the adopting father of the stolen son, recognizing that acts of which he was accused constituted enforced disappearance:

> "In summary, we consider that the acts for which Víctor Enrique Rei was accused constitute a forced disappearance of persons, since the concealment and retention of Alejandro Adrián, previously taken from his biological mother, could only be maintained through the suppression and subsequent substitution of his civil status through the various ideological falsehoods of public documents, and such concomitant forms of commission cannot be considered, in this specific case, isolated from that original abduction."[16]

Illegal adoptions, including intercountry adoptions, take place in various circumstances. The application of the definition of enforced disappearances should thus be tested on a case by case basis. At least it is possible to test it against some commonly known patterns of abductions and illegal adoptions of children.

There is no apparent difficulty in applying it to patterns that are near or present a nexus with political repression, mass criminality or war crimes, such as the illegal adoptions that occurred in Argentina, or illegal adoptions carried out as part of attacks against certain parts of the population.

---

[15] IACtHR, *Case Gelman v. Uruguay*, judgement of February 24, 2011 (Merits and Reparations).

[16] Sentencia condenatoria por crímenes contra la humanidad en contra el Comandante de Gendarmería Victor Enrique Rei por sustración de menores, 30 April 2009, Google translation from Spanish to English.

For instance, in the case of *Contreras and others v. El Salvador*, the InterAmerican Court considered the abduction of children in the context of the counterinsurgency strategy developed in El Salvador. The Court concluded that, "under that strategy, it was found useful to abduct children in order to separate them from the "enemy population" and "to educate them under the State's ideology at that time." The children were abducted during military operations after family members had been executed or forced to flee to save their lives, and they were frequently appropriated by military leaders, who included them within their immediate families as their children. […]".[17]

The Court continued:

> "Some former soldiers testified that, starting in 1982, they received orders to take any child found during an attack on enemy positions. In addition to the separation of children from their families as part of a counterinsurgency strategy, there were other reasons, including taking children to give them up for adoption.
>
> According to the evidence received, the possible destinations of the children after they had been separated from their families and disappeared can be broken down as follows:
>
> […] adoptions through a formal process within the judicial system, with the majority assigned to foreign families, mainly in the United States, France and Italy. [….]"[18]

In *Contreras*, the Court concluded that the abducted and appropriated children were victims of enforced disappearances. In the particular case of Herminia Contreras, "who was located in 2006, her situation must also be categorized as a forced disappearance that ceased when her identity was determined."[19]

Beyond these cases which are commonly associated with enforced disappearances, this crime may also apply, in my opinion, to patterns that are often associated with common criminality or "trafficking".

Take, for instance, a very common pattern which is the abduction of newborn babies at the maternity. After birth, the baby is taken away from the mother under the pretext of various checks or care, and the health personnel returns a little later, explaining to the mother that the

---

[17] IACtHR, *Case of Contreras and others v. El Salvador*, judgement of August 31, 2011 (Merits, Reparations, and Costs), par. 53.

[18] *Id.*, par. 54. In connection with El Salvador, see also IACtHR, *Case of the Serrano-Cruz Sisters v. El Salvador*, judgement of March 1, 2005 (Merits, Reparations and Costs) and *Case of Rochac Hernandez and others v. Salvador*, jugement of October 2014 (Merits, Reparations and Costs). About similar practices in Guatemala, IACtHR, *Case of the "Las Dos Erres" Massacre v. Guatemala*, judgement of November 24, 2009 (Preliminary objection, Merits, Reparations and Costs).

[19] IACtHR, *Case of Contreras and others v. El Salvador*, judgement of August 31, 2011 (Merits, Reparations, and Costs), par. 92.

baby died at birth. In fact, the baby is transferred to an orphanage or a secret location, and then subsequently given or sold to an adoptive family under a false identity with a falsified birth certificate. The operation might be carried out directly by public officials, or by private actors such as adoption agencies or trafficking organisations, but very often with the complicity of State authorities or at least their tacit acquiescence.

In such case, in my opinion, all elements of enforced disappearances are present:

- element 1 : "any form of deprivation of liberty", which is here the abduction of the newborn

- element 2-1: "by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State", that is either the state officials or the private persons acting with the passive or active complicity of state officials;

- element 2-2 (only applicable for enforced disappearances as a crime against humanity): "by, or with the authorization, support or acquiescence of, a State *or a political organization*" – meaning that in this case, enforced disappearance also applies to crimes committed by certain non-State actors having a certain degree of organization (such as armed groups or quasi-States).

- element 3: "the refusal to acknowledge the deprivation of liberty or the concealment of the fate or the whereabouts of the disappeared person": in the case of illegal adoption, this element is constituted by the "official" version provided to the mother (and the rest of the family) that the newborn died, and the subsequent falsification of the newborn's identity to ensure that he or she is never recovered (concealment).

- element 4-1, "which place such a person outside the protection of the law" – that is the deprivation of access to legal remedies against the abduction and the disappearance, and in relation to the violation of human rights as a consequence, such as the right to identity or the right to family protection. The denial of the legal personality in practice deprives that person of any remedy against the violation he or she has suffered. Similarly, the mother and the family find themselves in a situation of complete legal void and defencelessness.[20]

---

[20] See IACtHR, *Case of Contreras and others v. El Salvador*, judgement of August 31, 2011 (Merits, Reparations, and Costs), par. 88-89: "88. Thus forced disappearance also leads to a violation of the right to recognition of juridical personality established in Article 3 of the American Convention given that forced disappearance seeks not only one of the most serious ways of removing a person from the whole sphere of the legal system, but also denies his existence and leaves him in a sort of limbo or situation of juridical uncertainty before society and the State, especially when his identity has been altered illegally. 89. It has been proved that many of the disappeared children were registered under false information or had their personal data altered, as in the case of Gregoria Herminia. The effects of this are twofold: on the one hand, for the children who were appropriated, it makes it impossible to find their family and to learn their biological identity and, on the other, for the family of origin, who are prevented from exercising the legal remedies to re- establish the biological identity and the family ties and end

- element 4-2 (only applicable for enforced disappearances as a crime against humanity[21]): "with the intention of removing them from the protection of the law for a prolonged period of time", a condition which is met by the perpetrator – or the chain of perpetrators – who intends to remove the child, falsify their identity and thus "remove" them as a particular person with an original identity and family history from the protection of the law.

Other patterns could be tested in a similar manner: for instance, a family who entrusts their child to a childcare facility, and one day finds that the child has "disappeared"; a single mother who is pressed to give the child to adoption with the false promise that she will be able to keep contact with her child, and the child is never seen again; a family that is fraudulently persuaded to entrust their child to an association with the promise that the child will be hosted by a foreign family and well educated and will come back after a certain period of time etc.

C. Specific crimes: wrongful removal of children, falsification, concealment or destruction of documents

Article 25 of the ICPPED imposes additional obligations to States parties, including in criminal matters, as state in paragraph 1 and 2:

> "1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:
>
> (*a*) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;
>
> (*b*) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (*a*) above."

The Committee on Enforced Disappearances generally encourage State parties to consider reviewing their criminal legislation to incorporate those specific offenses. These offenses are not *lex specialis* with regard to enforced disappearances, as it clearly appears from the language of (a): "the wrongful removal of children *who are subjected to enforced disappearances* […]"

---

the deprivation of liberty. […] That violation only ceases when the truth about the identity is revealed in some way and the victims are guaranteed the legal and real possibility of recovering their true identity and, where appropriate, the family ties, with the pertinent legal consequences."

[21] Note however that this intentional element and its temporary component is not part of the definition of enforced disappearances under international customary law : see African Extraordinary Chambers, *Ministère public v. Hissène Habré*, judgement, 30 May 2016, par. 1471; Kosovo Specialist Chambers, *Public redacted version of Decision on the Confirmation of the Indictement against* Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020, KSC-BC-2020-06, par. 77: "[U]nder customary international law as applicable at the relevant time, there is no need to demonstrate or even presume the special intention of the perpetrators to remove the victim from the protection of the law."

In other words, *enforced disappearance of a child, the wrongful removal of a child and falsification, concealment or destruction of documents attesting to the true identity of the child can come as cumulative convictions in the same case*. Abduction of a child followed by the concealment of their fate or whereabouts, placing that child outside the protection of law is an enforced disappearance. In some cases, the investigation may lead to the conclusion that the enforced disappearance has led to the falsification of identity and wrongful removal through adoption, which then come as additional crimes.

II. The obligation to prosecute illegal adoptions under international law

There is an obligation for States to prosecute illegal adoption under both customary international law and treaties. This obligation results from treaties and from international customary law.

In its General Comment n°31[22], the UN Human Rights Committee, guardian of the International Covenant on Civil and Political Rights[23], underscores the obligation of States, as part of the right to an effective remedy to ensure that persons responsible for serious violations, including enforced disappearances, be brought to justice:

> "18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7)."

Specific obligations to investigate and prosecute can be found in other human rights conventions. The Convention against torture includes several provisions relating to the obligation of States parties to establish their jurisdiction over torture (art. 5), including in

---

[22] General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add. 13 26 May 2004 Adopted on 29 March 2004 (2187th meeting).

[23] The Republic of Korea acceded to the ICCPR on 10 April 1990.

relation to acts committed outside the territory of the State ("extra-territorial jurisdiction"), conduct a preliminary inquiry, take the suspect into custody (art. 6), and either try or extradite the alleged perpetrator (principle *aut dedere, aut judicare*, art. 7). Similar provisions exists in the ICPPED (art. 9-11). Moreover, article 12, paragraph 1 of ICPPED provides an obligation for States parties to "ensure that any individual who alleges that a person has been subject to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially, and where necessary, undertake without delay a thorough and impartial investigation." This obligation to undertake an investigation also exists even if there has been no formal complaint "where there are reasonable grounds for believing that a person has been subjected to enforced disappearance" (art. 12, par. 2 ICPPED). Specific conditions are set out in relation to the "authorities" in charge of the investigation in paragraph 3 of the same article.

The States' obligation to investigate and prosecute finds its counterpart with the right of "[e]ach 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." '(art. 24, par 2 ICPPED). The right to truth also results in the obligation of States to "take all appropriate measures to search for, locate and release disappeared person and, in the event of death, to locate, respect and return their remains." (art. 24, par 3 ICPPED).

The Geneva Conventions require States to investigate war crimes, to prosecute, and try or extradite those responsible (First Geneva Convention, article 49, Second Geneva Convention, Article 50, Third Geneva Convention, article 129, Fourth Geneva Convention, Article 146). This rule is also part of customary international law.[24]

A similar obligation exists in relation to genocide based on the 1948 Convention (articles IV and VI) and customary international law.

As far as crimes against humanity are concerned, the International Law Commission has adopted "draft articles on prevention and punishment of crimes against humanity" in 2019 in order to codify customary international law on the matter.[25] In the preamble, the Commission recognizes that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*) and that "it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity". Draft articles 7-10 contain similar

[24] See Rule 158 of Customary IHL identified in the 2005 ICRC study.

[25] See the ICL report, A/74/10, Chapter IV, p. 10.

provisions as those of the Convention against torture and the ICPPED on the obligations of states to investigate, take preliminary measures, try or extradite a suspected perpetrator.

Beyond international instruments, there are multiple cases where international human rights tribunals or committees have reaffirmed the obligation of states to investigate and prosecute serious human rights violations, such as crimes against humanity and enforced disappearances. For instance, in the *Gelman case* (already cited above), the InterAmerican Court underscores the centrality of the right to investigate and its relation to the right to the truth of victims:

> "183. This Court has emphasized the importance of the State's duty to investigate and punish human rights violations, obligation to investigate and, where appropriate, prosecute and punish, is particularly important given the seriousness of the crimes committed and the nature of the infringed rights, particularly because the prohibition of enforced disappearance and its corresponding obligation to investigate and punish those responsible has reached *jus cogens* nature.
>
> […]
>
> 185. In regard to enforced disappearance and given that one of its objectives is to prevent the exercise of the appropriate legal remedies and procedural guarantees, if the victim itself cannot access the remedies available, it is fundamental that the next or kin or other people close to the person be able to access prompt and effective proceedings or judicial remedies as means to determine their whereabouts or state of health or to identify the authority that ordered the deprivation of liberty or made it effective.
>
> 186. Specifically, any time there is reason to suspect that a person has undergone an enforced disappearance, an investigation shall be initiated. This obligation exists regardless of the filing of a complaint, since in cases of enforced disappearance international law and the general duty to guarantee, impose the obligation to investigate the case *ex officio*, without delay, and in a serious, impartial, and effective manner. This investigation should be carried out in all available legal mediums and be aimed at obtaining the truth. This is a fundamental and conditioning element for the protection of certain rights affected by these situations, which encompasses in any case, all state authorities, public officials, or individuals who have received news about acts regarding the enforced disappearance of persons, all of whom shall denounce them immediately.
>
> […]
>
> 192. The satisfaction of the collective dimension of the right to truth requires the procedural determination of the most complete historical record possible. This determination must include a description of the patterns of joint action and should identify all those who participated in various ways in the violations and their corresponding responsibilities."[26]

[26] IACtHR, *Case Gelman v. Uruguay*, judgement of February 24, 2011 (Merits and Reparations). Footnotes omitted.

In *Goiburu and Others*, the Court established that both the prohibition of enforced disappearances and the corresponding obligation to investigate and punish perpetrators has attained the status of *jus cogens* – that is peremptory norm of international.[27]

And in *Contreras and others*, the Court also made clear that the establishment of such institutions as truth commissions did "not fulfil or substitute to the State's obligation to establish the truth through judicial proceedings"[28]

III. Possible obstacles to the prosecution of illegal adoptions

What are the obstacles that could be invoked against the prosecution of illegal adoptions? In its General Comment n°31, the Human Rights Committee dealt with several of them such as amnesties, pardons and excuses that may relieve the responsible from their responsibilities:

> "[W]here public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law."

I will deal her more specifically with two issues which have been invoked in cases of abductions and illegal adoptions: the principle of non-retroactivity of criminal offences and statute of limitations.

None of these may be invoked to prevent the prosecution of perpetrators of illegal adoptions involving the "wrongful removal" and the falsification of the identity of a child. The reason is that – whatever the specific crime used as a legal basis for the prosecution – such an illegal adoption is a continuing act, with two major consequences: a) if a statute of limitation exists, it only starts when the crime ceases, that is when the child – who may have become an adult –

---

[27] IACtHR, *Case of Goiburu and others v. Paraguay*, judgement of September 22, 2006, par. 84.

[28] IACtHR, *Case of Contreras and others v. El Salvador*, judgement of August 31, 2011 (Merits, Reparations, and Costs), par. 135.

recover their true identity, and b) similarly, the law applicable to the illegal adoption is the law applicable when the crime ceases, that is when the person recovers their true identity.

In its *General Comment on enforced disappearances as a continuous crime*, the UN Working Group on Enforced disappearances remarked that "[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. […] an enforced disappearance is a unique and consolidated act, not of combination of acts. Even if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and should not be fragmented."[29]

The Working Group went on to deduct the necessary consequences of that continuous nature on criminal matters:

> "[I]n criminal law, the Working Group is of the opinion that one consequence of the continuing character of enforced disappearance is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non-retroactivity. The crime cannot be separated, and the conviction should cover the enforced disappearance as a whole"

Article 8 of the ICPPED sets rules related to statute of limitations for the crime of enforced disappearance taking into consideration its continuous nature:

> Without prejudice to article 5 [enforced disappearance as a crime against humanity, which is imprescriptible],
>
> 1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:
>
> (*a*) Is of long duration and is proportionate to the extreme seriousness of this offence;
>
> (*b*) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.
>
> 2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.

---

[29] UN Working Group on Enforced or Involuntary Disappearances, *General comment on enforced disappearances as a continuous crime*, UN doc. A/HRC/16/48, par. 39.

The UN *Joint statement on illegal intercountry adoptions* of 2022 recalls that "States States shall prohibit illegal intercountry adoptions as a continuing offence under criminal law" and "shall ensure that statutes of limitations are not an obstacle for victims seeking access to judicial remedies, given the particular difficulties for child victims to make complaints, and the continuing nature of the offence."[30]

In the case of *Radilla-Pacheco v. Mexico*[31], the InterAmerican Court opposed the continuous nature of enforced disappearances to the argument of the State party based on the principle of non-retroactivity.

> "240. For this Tribunal the State's argument according to which in this case there was an "unsurpassable obstacle" for the application of the crime of forced disappearance of persons in force in Mexico, based on the fact that the alleged responsible party had gone into retirement prior to the going into force of the criminal definition, is inadmissible. The Court considers that as long as the fate or whereabouts of the victim have not been established, the forced disappearance remains invariable regardless of the changes in the nature of "public official" of the author. In cases such as the present, in which the victim has been missing for 35 years, it is reasonable to assume that the characteristic required by the active subject can vary in time. In that sense, if the State's argument were to be accepted, impunity would be favored.
>
> 241. Taking into account the aforementioned, this Court considers that pursuant with the principle of *nullum crimen nulla poena sine lege praevia*, the figure of forced disappearance constitutes the legal classification applicable to the facts of the present case."

The InterAmerican Court cited several precedents of supreme or constitutional courts of the continent in support of its position, in particular the case of *Villegas Namuche* before the Constitutional Court of Peru, where this Court held the following in relation to the principle of legality:

> "Finally, although the crime of enforced disappearance was not in force in our Penal Code when the alleged detention of Genaro Villegas Namuche occurred, this does not constitute an impediment to carrying out the corresponding criminal process and sanctioning those responsible for the other crimes involved in the events.
>
> In any case, although the principle of criminal legality, recognized in article 2.24,d of the Constitution, includes among its guarantees that of the *Lex previa* , according to which the prohibitive norm must be prior to the criminal act, in the case of crimes of a permanent nature, the applicable criminal law will not necessarily be the one that was in force when the crime was committed.
>
> The principle of prior law guarantees that, at the time the crime is committed, a penal law establishing a specific penalty must be in force. Thus, in the case of instantaneous crimes,

---

[30] UN Joint statement, CED/C/, par. 12.

[31] IACtHR, *Case of Radilla-Pacheco v. Mexico*, Judgement of November 23, 2009 (Preliminary Objections, Merits, Reparations, and Costs), par. 240-241.

> the applicable penal law will always be prior to the criminal act. In contrast, in continuing crimes, new penal laws may arise, which will be applicable to those who commit the crime at that time, without this implying retroactive application of the penal law.
>
> Such is the case of the crime of enforced disappearance, which, according to Article III of the Inter-American Convention on Forced Disappearance of Persons, must be considered as a continuing crime until the fate or whereabouts of the victim are established."[32]

More specifically in the Argentinian case of "systematic plan of baby kidnapping I"[33], the Court in first instance found that

> "the law applicable to each case must be determined based on the law in force on the date the commission of the crime ceased, which has been specifically established as the date on which the results of the expert study were made public in court, in cases where this has occurred. And for cases where the cessation has not occurred, the applicable law is the date of the judgment that proves the abduction, retention, and/or concealment of a child under 10 years of age."

In the case of *Juan Manuel Contreras Sepúlveda*, the Supreme Court of Chile confirmed the decision of the Court of Appeal not to apply the Amnesty law to an abduction that occurred on 7 January 1975, although the Amnesty Law covered almost all crimes committed between 1973 and 1978. The conviction was based on the crime of "kidnapping" provided for in Article 141 of the Criminal Code and the Court recognized the continuous character of the crime, which could be assumed to have extended beyond the time limit established by the Amnesty Law[34].

The European Court of Human Rights – although not on a case of enforced disappearance – adopted a similar position, when it considered not contrary to article 7, paragraph 1 of the European Convention of Human Rights the conviction of the applicant for the offence of "abusing a person living under the same roof" introduced into the Criminal Code in 2004, in relation to a conduct that continued between 2000 and 2006.[35]

---

[32] The case can be found here : https://www.tc.gob.pe/jurisprudencia/2004/02488-2002-HC.html Google translation from Spanish to English. See also a presentation of the case in the Oxford reports: *ILDC 332* (PE 2004), 18 March 2004.

[33] Índice de la Sentencia recaída en el marco de las causas N° 1351, 1499, 1584, 1604, 1730 y 1772 del Registro del Tribunal Oral en lo Criminal Federal N° 6.

[34] *Sepúlveda (Juan Manuel Contreras), Re and ors, Action to annul*, Rol No 517-2004, ILDC 394 (CL 2004), 17th December 2004, Chile; Supreme Court.

[35] ECtHR, Grand Chamber, case of Rohlena v. the Czech Republic *Application no. 59552/08*, judgement of 27 January 2015, par. 63-70.

In relation to statute of limitation, the French Court of Cassation, in the case of the request for extradition by Argentina of Mario Sandoval[36], ruled that it was not applicable to an "arbitrary detention or confinement" that started in 1976 but that continued after the end of the military dictatorship in 1983: "in this situation the limitation period for the false imprisonment of which he was a victim has not begun to run, as the offence has not ended".

In conclusion, neither the principle of non-retroactivity nor statute of limitation can legally prevent prosecutions of abductions followed by illegal adoptions, since these are continuous acts until the true identity of the child has been officially reestablished. Prosecution can be based on the crime of enforced disappearance if present in the criminal code, even *ex post facto* – that is in relation to acts that started before the adoption of the law that incorporated enforced disappearances in the code. Prosecutions can also be based on other relevant crimes such as arbitrary detention, kidnaping, concealment, falsification of documents etc., which should then be understood in these cases not as instantaneous crimes but as continuous crimes. Moreover, if a prescription is associated to those crimes, it only starts to run when the crime ceases, that is when the identity of the child is recovered.

In addition to this, it is also important to mention that the principle of non-retroactivity and statute of limitation are also neutralized if abduction of children and illegal adoptions are prosecuted as a crime against humanity, that is when these acts have taken place in connection with a widespread or systematic attack against a civilian population, with the knowledge by the perpetrator of this attack. This is because it is generally admitted that a) genocide, crimes against humanity and war crimes can be prosecuted on the basis of an *ex post facto law* because they were already recognized as crimes under international law at least since the 1950s, and b) such serious crimes in international law are imprescriptible.

In relation to crimes committed during the Second World War, the French Court of Cassation in the *case of Klaus Barbie*, ruled that the law of 26 December 1964 only "confirmed" crimes against humanity and the principle of their imprescriptibly, which had already been established before in international law.

More generally, the European Court of Human Rights established that the principle of non-retroactivity contained in article 7, paragraph 1 of the European Convention does not prevent the conviction of a perpetrator based on a law criminalizing serious crimes under general

[36] Cour de Cassation, chambre criminelle, 24 mai 2018, 17-86.340, Bull. See also the decision by the Constitutional Council in the same case n°2019-785 QPC, 24 May 2009 recognizing the constitutionality of the suspension of statute of limitation for continuous crimes.

international law adopted after the act were committed. In the case of *Boban Šimšić v. Bosnia and Herzegovina*[37], the Court said that

> "[i]ts function under Article 7 § 1 is to consider whether the applicant's acts, at the time when they were committed, constituted an offence defined with sufficient accessibility and foreseeability by domestic or international law"

In the case, the Court found that the applicant was convicted in 2007 of persecution as a crime against humanity about acts which had taken place in 1992. It however found no violation of article 7, paragraph 1 of the Convention:

> "While the impugned acts had not constituted a crime against humanity under domestic law until the entry into force of the 2003 Criminal Code, it is evident from the documents cited in paragraph 8-13 above that the impugned acts constituted, at the time when they were committed, a crime against humanity under international law."

Regarding statute of limitations, serious crimes such as genocide and crimes against humanity are generally recognized as imprescriptible. This is a rule of customary international law reflected in various statutes and treaties, including article 29 of the Rome Statute of the International Criminal Court.[38] As the International Law Commission observed in the commentary to draft article 6 of its draft articles on crimes against humanity:

> "At present, there appears to be no State with a law on crimes against humanity that also bars prosecution after a period of time has elapsed. Rather, numerous States have specifically legislated against any such limitation."[39]

---

[37] ECtHR, Application n°51552/10, Decision of 10 April 2012. See also, on command responsibility, ECtHR, *Case of Milanković v. Croatia (Application no. 33351/20)*, judgement of 20 January 2022.

[38] See the International Law Commission Draft articles on prevention and punishment of crimes against humanity, article 6, and its commentary: A/74/10, pp. 77-78.

[39] *Id*., p. 78.