



## Missing Persons from the Communist Era in Albania as a Human Rights Challenge

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### Abstract

Although more than three decades have passed since the fall of communism in Albania, nothing is still known about the burial place of over 6,000 missing persons. Family members still do not know the truth about the fate of their missing relatives. Such a thing not only represents a serious violation of the right to life, but has been causing a continuous suffering to the relatives of the missing people. During the last decades, a number of international and domestic laws have focused on the state obligation to create the necessary approach and mechanisms to handle this issue. The paper aims to make an analysis of the legal status of the missing people from the communist era in international and domestic law. In particular, the paper aims to examine domestic measures about this issue. The paper supports the hypothesis that despite the legal and institutional measures undertaken, the issue of missing persons from the communist era in Albania still represents a social and human rights challenge.

**Keywords:** UN, The Disappearance Convention, Right to Truth, Human Rights, Council of Europe, European Union

### 1. Background of the Study

In Albania, as a result of systematic human rights violations during the communist era, thousands of individuals are still classified as missing. It is estimated that over 6,000 people are missing. According to official data, 5,501 people convicted for political reasons were executed and their bodies were never returned to their families (ICMP, Report 2021). Official data also shows that in addition 987 political prisoners have died of various causes in prisons and detention centers in Albania (Ibid, p.4) The communist ideology extended the punishment for the political convicts even after their death, therefore not allowing these people to have a burial place, nor allowing to their relatives to be informed about the whereabouts and to perform the rituals of their loved ones. The location of their remains is still unknown.

### 2. Research Methodology and Questions

This study provides a legal theoretical analysis of the status of the missing and enforced disappeared persons in International Law and Humanitarian Law. The normative and historical analysis in this research was conducted through the contextual interpretation of relevant international and domestic norms and practices regulating the issue of the missing persons. Using the historical method, the study highlights the evolution of the approaches and mechanisms designed to deal with this issue. The research focuses on the state obligation deriving from the principle of truth and justice for the victims and their relatives to carry out criminal and administrative investigations.

Deriving from the above-mentioned background the main question arising is what legal protection do the persons considered missing as a result of the ideology and criminal actions of communist regime enjoy? What kind of obligation

does the state have to finding the remains of missing persons? What are the rights provided by the law to the family members of the missing persons? This paper aims to answer these questions, starting from the examination of the status of "missing" and "enforced disappeared" persons in international law and the differences that exist between these two categories.

### 2.1 Hypothesis and results of the study

The study supports the hypothesis that the measures set up during these 33 years of democratic developments in Albania to investigate serious violations of fundamental rights committed by ex-communist officials did not contribute to achieve transitional justice goals. Regardless of the change of trajectory in dealing with issue of the remains of 6000 missing persons from communist period, there are no recent tangible results in Albania, thereby leaving the truth about the remains of the missing persons buried and converted into a serious social and legal challenge. The lack of the results on this issue is a serious concern to the relatives of the victims and a human rights violation.

## 3. Evaluating the Status of the Enforced Disappeared Persons in International Law

The status of the missing persons was recognized for the first time in international law in the Additional Protocol of the Geneva Convention (UN, Geneva Convention, Additional Protocol, 1977). This Convention laid the foundations about the ways through which parties in an armed conflict could operate to search for, identify and recover the dead from battlefield areas. Considering the impact that the loss of a person's life might have on his relatives, this act also recognized the right of the "parties to the conflict" and of the "international humanitarian organizations" to inform the relatives of the missing persons about the fate of their loved ones (Ibid, art.32)

Later in the 90s, this issue received greater attention. In 1992, the Declaration of UN General Assembly provided for the first time the definition of "enforced disappearance" offense and also supplied a framework of rules that all member states were required to follow as minimum standards to suppress the practice of enforced disappearances (UN, Res 47/133, 1992). This Declaration confirmed that "Any act of enforced disappearance is an offense to human dignity" and thereby "...it constitutes a violation of various human rights, inter alia, the right to recognition as a person before the law, the right to liberty and security of person and the right not to be subjected to torture and other cruel, inhuman or degrading punishment. It also violates or constitutes a grave threat to the right to life." (Ibid, art.1). According to this act enforced disappearance is considered as a continuing offence as long as the perpetrators persist in concealing the fate and the whereabouts of persons who have disappeared and these facts remain unclarified (Ibid, art.17). The above-mentioned Declaration contains the main obligations of states to combat enforced disappearances through effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction and it promotes the cooperation between states and the United Nations to contribute by all means to the prevention and eradication of enforced disappearance" (Ibid, art.2 and 3). Regardless of the fact that this Declaration did not have any binding force, it represents an important moment in the evolution of the "right not to be subjected to enforced disappearance".

The most important instrument in international law acknowledging the autonomous "right not to be subjected to enforced disappearance" is the UN Convention of Disappearance of 2006 (UN, Disappearance Convention, 2006). The Convention is a useful tool in combating the major injustice of enforced disappearance. The main aim of the Convention is the prevention of the phenomenon of enforced disappearances through enacting a new framework in international criminal law related to this issue. The Convention sanctions that "1. No one shall be subjected to enforced disappearance. 2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance." (Ibid, art.1): The above-mentioned instrument renders the "right not to be subjected to enforced disappearance" a non-derogable right (Ibid, art.17, para 2/f)

One of the most important provisions of the Convention, is the definition given to enforced disappearance as "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 the concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."(Ibid, art. 2). The Convention requires that member states implement the necessary steps to ensure that enforced disappearance is regarded as an offense in terms of their criminal law. The Disappearance Convention criminalizes any failure on the part of the authorities to investigate acts of disappearance

(Ibid, art.6). Enforced disappearance of persons is considered to be a continuous offense as long as the fate of the disappeared person remains unknown (Ibid, art.8, para.1/b).

The crime of enforced disappearance affects a number of people who suffer harm as the direct result of an enforced disappearance besides the primary victim. The family and friends of the main victim, are all capable of being victims as a result of the anguish, fear and uncertainty that this offence invokes (Scovazzi and Citroni, 2007). The Convention considers the relatives of enforced disappeared persons as victims and provides them with two main rights. The first, is the right to reparation considered as a state obligation to cover material and moral damages and, where appropriate, other forms of reparation such as restitution, rehabilitation, satisfaction (including restoration of dignity and reputation) and guarantee of non-repetition (Disappearance Convention, art.24, para 5). The second is the right of the relatives of the primary 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 (Ibid, art.24, para.2). The adoption of such an international binding mechanism is a significant achievement and an important step towards addressing the phenomenon of enforced disappearance in all jurisdictions. The Enforced Disappearance Convention as a binding and normative instrument provides the international community and member jurisdictions with specific obligation to investigate and punish such criminal acts.

#### **4. Making the Difference Between Missing and Enforced Disappeared**

International law has contributed to establish legal protection about the issue of enforced disappearance considering it as criminal offense. According to the Disappearance Convention, enforced disappearance occurs always as a criminal activity. Meanwhile, many societies face another challenge, that of the missing persons, a problem considered similar to and often interchangeable with that of enforced disappearance. The persons go missed not always as result of a criminal activity. The missing persons problem is multifaceted, broad, and of complex nature (Silva et al, 2022). Above all, the circumstances and causes of the disappearance play an important role in determining whether we are facing or not an enforced disappearance act.

The issue of persons that go missed is not a topic related to the international law but mainly belongs to the humanitarian field. This is the reason why "missing person" is not a defined term in international law (Melzer, 2016). Regardless of the different status in between "missing" and "enforced disappeared" person it should be said that in terms of consequences, families left behind have the same experiences, they search for them and go through phases of ambiguous loss. The suffering of family members can be further exacerbated if state authorities refuse to conduct a search, do so in an ineffective manner, or deny the disappearance (Baranowska, 2022, p.31).

Nevertheless, there are several dilemmas arising in the cases of the missing persons, for example what kind of assistance and protection should be provided to the victims and to their relatives? Or what approach should be adopted when dealing with the issue of the missing persons in specific jurisdictions? An immense contribution on this topic was given by the ICRC, through a dedicated approach, known as "Guiding Principles/Model Law on the Missing Persons." (ICRC, 2009). According to this instrument, a "missing person" is defined "as someone whose whereabouts are unknown and who – based on reliable information – has been reported missing in accordance with national legislation in connection with armed conflict and internal violence, natural catastrophes, or any other situation that could require the intervention of a state authority" (ibid, art. 2, para.1) This is a very broad definition because it includes a series of causes of going missed, some of which are expressly recognized, like "armed conflict", "internal violence" or "natural disasters", but also "any other situation that may require the intervention of a state authority". Despite being a non-binding act, ICRC through the Model law, requires from national jurisdictions to adopt a broad umbrella definition of the term "missing person". The model law offers a framework legislation aiming to help national authorities to bring legislation into conformity with the requirements of international law (UN, 2010, A/HRC/AC/4/CRP.2/Rev.1). If the state adopts such a legal framework regarding this matter, the approach might bring benefits and advantages to the relatives of the missing persons, as it allows them to file cases, regardless of the cause.

Despite the fact that the issue of "missing persons" is not regulated in international law, this category is not deprived from the protection of international human rights law. As Baranowska (2022) states "the categorization does not deprive missing persons of all protection: due diligence obligations under international human rights law will apply irrespective of how the person is categorized" (p.30). States must take all appropriate measures to reduce the likelihood that people will go missing. The main argument here is that the international human rights law applies at all times and in all circumstances to all persons within the jurisdiction of a state party. The state has the obligation to guarantee fundamental rights as right to life, right not to be subjected to torture and other cruel, inhuman or degrading treatment or

punishment, right to liberty and security, right to fair trial, right to respect for private and family life, to a great extent, and in this context to prevent persons from going missing (UN, 2010, A/HRC/AC/4/CRP.2/Rev.1, p.4) Therefore, accounting for missing persons, establishing the circumstances of their disappearance and protecting persons against going missing or disappearing is an integral element of the State responsibility (ICMP, Report, 2021, para 5)

As above mentioned, going missing or disappearing are distinct phenomena, characterized by ongoing situations of uncertainty and unaccountability very often drawn out over time. Failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation in both cases (Ibid). In such cases, the procedural obligation will, potentially, persist as long as the person is unaccounted for or adequate measures have been taken to investigate the disappearance. Accordingly, persons who go missing or are victims of enforced disappearance, even decades ago, are entitled to protection under the law, and their relatives and others close to a missing or disappeared person have a continuing right to an effective inquiry or investigation (Ibid). The states have the responsibility to search, identify and recover the bodies of the person who have died in situations of internal violence. This means that the remains of missed individuals must be identified and honorably buried, if the possible according to the rites of the religion to which they belonged (ICRC, 2002). Failure to comply with the obligations set out in international and domestic law for managing the issue of missing persons in situations of internal violence and the inability to carry out the necessary policies might show a lack of respect for the dead, disregard for the rights and needs of their relatives and might prolong their suffering. In order to fulfill the above-mentioned obligation states faced with this kind of challenge must adopt a dedicated strategy and a broad policy.

## 5. Qualifying the "Missed" Under the Communism as Enforce Disappeared

The circumstances of disappearance play an important role in determining whether a person can be considered "missing" or "enforced disappeared". From this point of view, the missing from the communist era might be considered as enforce disappeared if they were deprived of freedom, tortured and then died or killed by the state officials without an official legal act of that regime. As a result of the communist ideology the relatives of the victim were not informed of this fact and even the victim's corpse was not delivered to the families to perform the funeral ceremony. A considerable number of persons are considered missing in such circumstances in Albania. This interpretation finds full support in Article 2 of the Disappearance Convention, which stipulates that enforced disappearance is "any form of deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person" (Disappearance Convention, Art. 2)

During the communist era people went missing as result of communist ideology and violence. Numerous reports determine that political prisoners died in prisons or labor camps as a result of torture or other causes such as suicide. The body of the victims was not handed over to the families because they were considered an enemy of the people. Going missed under the communist violence in Albania includes other circumstances as: a) executions of persons as a result of a conviction according to the law of the time, b) deaths in prisons or internment camps, rehabilitation centers or c) the murders of the persons while trying to surpass the state border. In the above-mentioned circumstances there is a contested assumption that the perpetrators had acted in accordance with the law in force at the time. The main argument here is that the actions of ex-communist officials cannot be qualified as "forms 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". Therefore, the disappearances that occurred in such circumstances might not fall under the protection of the Disappearance Convention. As Bllaca and Piliika (2021) emphasize the argument that the perpetrators had acted in accordance with the law then in force obstructs the right to the truth and justice (p.21)

Regardless of the fact that Albania has experienced a long and brutal period of human rights violations, accompanied by the disappearance of persons, there is still no case of criminal prosecution of the perpetrators of these crimes. The main concern is that the General Prosecution Office in Albania have considered "that prosecutors have no role to play in investigating the cases of several thousand Albanians who disappeared during Communist rule" (Erebara, 2021). Specifically, the General Prosecution Office has argued that the problem of those who were executed or died in forced labour camps or in other circumstances during the repressive rule of dictator Enver Hoxha's regime is (only) an administrative matter (Ibid). The Prosecutor's office has given various justifications about their inactivity during these decades, starting from its lack of experience in mass exhumations to its lack of financial resources. Unwillingness and failure to deal with the past crimes is considered in violation of the international law, the Disappearance Convention and automatically of the Article 122 of the Albanian Constitution.

Anyway, dealing with the issue of the missing from the communist era requires the involvement of the Prosecutor's

Office in the process of exhumations (Law 7905/1995, art. 200) and undoubtedly carrying out a criminal investigation to identify the remains of the victims, and then to evaluate and determine the circumstances of the disappearance. This is of great importance in enabling or impeding the implementation of the provisions of the Convention and the Criminal Code regarding the criminal prosecution of the perpetrators. In the same vein, the UN Monitoring Report on Albania calls for the investigation and prosecution of all cases of disappearances that occurred during the communist era (UN, A/HRC/16/48). This report argues that "enforced disappearance is a single consolidated act, not a combination of isolated, unconnected facts and prototypical continuous crime" (Ibid, para. 39). Therefore, Albania must fully respect the principles of the Disappearance Convention stating that "no circumstances whatever may be invoked to justify enforced disappearance" (Disappearance Convention, art.2 para 1)

## **6. Tracking the Evolution of the Domestic Legal Approach and Mechanisms**

The most important documents of international human rights law like, UN Universal Declaration on Human Rights and Freedoms and European Convention of Human Rights, which Albania has ratified, provides for the protection by law of the right to life, and creates a procedural obligation for parties to carry out investigations. The essential purpose of an investigation under right to life is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (CoE, 2022, p.32) According to international law the state bears the responsibility to carry out effective inquiries to account for the missing and to establish the circumstances of their disappearance (ICMP Report 2021, para 8). In this context, obligations derived from international law relating to the issue of missing and enforced disappeared persons are incumbent for member states ((UN, 2010, A/HRC/AC/4/CRP.2/Rev.1, para 12)

The international law in Albanian legal order enjoys a high-ranking position than the domestic law (Law nr.8417/1998, art 122). This is an important principle embedded in Article 122 of the Albanian Constitution. This principle foresees that the international law applies directly, except when it is not self-executable and its application requires the promulgation of a law. The domestic legal approach related to the protection from the enforced disappearance requires promulgation of a law which criminalizes the enforced disappearance offence. Therefore, Albania has the obligation to enact domestic legislation dealing with this issue implying preventing disappearances, searching for the remains of the missing persons, ensuring the proper management of information and supporting their families etc.

After the fall of the communist system in Albania the search for the remains and the excavation of suspected burial sites have been undertaken by families of the missing, with their own financial resources without any expert or forensic support from the State institutions (Billca and Piliika 2021) The most important legal norms on this issue are determined in the Code of Criminal Procedure relating to exhumation process (Law no. 7905/1995). According to this law the request for "the examination of a human corpse is a legal responsibility of the proceeding authority with the presence of a forensic doctor. With the purpose of carrying out the examination of a dead body, the judge or prosecutor may order for its exhumation, by informing a member of the dead person's family to participate, except for when the participation may harm the purpose of the examination" (Law no. 7905/1995, art.200). Since the act of disappearance has a criminal nature, the rights of family members to know about the fate of their loved missing ones must be pursued at the competent prosecutor's office.

Albania has ratified UN International Convention "On the Protection of All Persons from Enforced Disappearances" several weeks after the approval from General Assembly (Law no. 9802/2007). According to the Disappearance Convention the state must carry out "ex officio" investigations about the missing persons from the communist era. A formal attempt to implement the provisions of the Convention and deal with the issue of the missing persons from communist era can be traced in 2010. In that year, the Albanian Government decided to create an inter-ministerial mechanism to deal with the identification and search of the remains of the missing persons from the communist regime. In fact, such a thing remained only a formal statement because it was not integrated into the framework of a broader strategy to provide a solution to this problem. Searching for the persons missing from communism is a multifaceted and complex process because it requires the involvement of several institutions, such as the state police, forensic medicine authorities, relatives of the victims, and above all the prosecution office.

The process of criminalizing the act of "enforced disappearance" under the Criminal Law has taken several years (Law no.144/2013, article 2). This approach shows that Albania has carried out formally the obligations arising from international law about this issue.

A serious obstacle in the process of searching for the missing persons until 2017, has been the absence of a dedicated mechanism to carry out the identification of the missing because the state documents were considered as

secret and there was no process of declassification and no way to access them. An important engagement to this matter is the ratification in 2018 of the cooperation agreement between the Council of Ministers of the Republic of Albania and the International Commission on Missing Persons (Law 83/2018). Through this act, ICMP committed to assist the Albanian government to draw up the list of missing persons and their family members, provide technical assistance and regularly inform the families of the victims in the process of the recovery and identification of remains in collaboration with the Albanian authorities (Law no. 83/2018, art.2).

Another useful legal regulation was enacted in 2020, by recognizing the same definition of “missing persons” under the communism as to those who are considered as “enforced disappeared” by the Convention (Law no.114/2020, art.2, p.4). This legal approach is very helpful in terms of the protection of the missing persons therefore it may be used by the state institutions, especially the prosecution office to qualify the major un-condemned crimes of the communist past in Albania.

The legal framework on this matter was fully contoured only in 2022 through the authorization of a mechanism to deal with the issue of the missing persons under the communist regime (Law no 72/2022). According to the law, the Authority on Access to Information on Former State Security Service, together with the Ministry of the Interior Affairs and ICMP, has the responsibility for gathering information, tracing for the remains of the missing persons and identifying the victims (Law 72/2022, Art 10).

As argued above, partial efforts to deal with the issue of the missing persons have been made in Albania. In order to be successful, a legal reform needs to be part of a comprehensive approach within the framework of a well-thought-out strategy. Bllaca and Plika (2021) in their study argue that yet none of the legal efforts have been part of a comprehensive truth-seeking State policy (p.20). However, it must be said that more than 30 years since the fall of communism, the Albanian state has taken responsibility by establishing a specific mechanism for dealing with the issue of missing persons. The most important thing now is the result of such a policy. Achieving the expected results in practice undoubtedly requires human and infrastructural resources and above all political and institutional will, support and commitment. Otherwise, the issue of the persons missing from the communist regime will be a real concern for the families of the victims and a challenge to human rights.

## 7. Conclusions

In Albania there has been slow progress in addressing the issue of persons missing from the communist era. For more than 30 years there has been a lack of political will to adopt an efficient legal approach and to establish the appropriate mechanisms for dealing with the issue. Only recently there seems to be a shift toward reaching a solution. This shift was marked through the setup of a single institution to carry out the collection of the information about the victims, the identification of the places of their execution and eventually the search for the place of their burial. This in turn serves to speed up the process and overcome skepticism and bureaucracy thereby bringing hope to the relatives of the victims.

The main challenge remains the enforcement of the law, specifically in terms of developing action plans on gathering information, identifying the possible burial places, making exhumation process etc. and over all investigating and prosecuting the perpetrators. That is the reason why dealing with the issue of the missing from the communist era requires the involvement of the prosecutor's office in the process of exhumation and demands criminal investigations.

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