6. Enforced Disappearances and Border Deaths Along the Migrant Trail

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Abstract

Following an emerging theoretical approach towards border deaths as ‘enforced disappearances’, this chapter explores the question of disappearance in the context of global migration. By placing the disappeared at the intersection of different historical settings and legal and political discourses, the chapter questions how ‘enforced disappearance’ operates as strategy of power, deterrence and control over migrant populations. By learning from experiences from other historical and political contexts it intends to offer a conceptual toolbox that can enable us to study the relationship between ‘disappearance’ and border deaths, the evolution of state violence across time and space, and the way counter-practices have reacted by pointing at state responsibility and impunity.

Keywords: desaparecido, International Law, necropolitics, decolonization, colonial legacy, missing

Since the autumn of 2018, a large group of migrants – also known as the Migrant Caravan – has been travelling through South and Central American countries towards the US southern border. The caravan gained a lot of

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1 This chapter is inspired by the conversations and debates among participants of the workshop on ‘Enforced Disappearances’, including academics, activists, lawyers, representatives of the families of the victims of enforced disappearances, humanitarian workers and forensic scientists. I would like to thank them all. In particular I would like to thank Robin Reineke, Estela Schindel, Ninna Nyberg Sørensen, Laura Huttunen and Agnes Callamard, who directly contributed to the conversation with insightful and thought provoking papers. Special thanks go to Estela Schindel for reading and commenting generously on earlier drafts of this chapter, and to Kouceila Zerguine and Carolyn Horn for their valuable observations and advice.


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attention by the media and was attacked by US President Trump who first associated the migrants with security threats, terrorism, disease and criminality, and then sent the army to the Mexican border to push them back. The people in the caravan – who are escaping political violence or seeking a better life – move in a compact group as a way to avoid the risk of being abducted by traffickers and drug gangs during their journey (Perugini and Gordon 2018) and under the complicit eye of corrupted local state officials. Travelling in groups is indeed a tactic of self-protection from the threat of what in legal terms could be categorized as an enforced or involuntary disappearance.

As different uses and contexts may prove, the concept of ‘enforced disappearances’ is commensurate with state violence. It addresses people who have ‘disappeared’ following displacements, arrests, arbitrary deprivation of liberty, or torture and killings (or any other wrongful act) committed by state officials or third parties who act on behalf of or with the complicit silence of the state. This is followed by state authorities’ lack of accountability and their refusal to acknowledge a ‘disappearance’ and hence deliberately denying information to the families and the communities about the fate of those who have ‘vanished’.

In a nutshell, ‘enforced disappearances’ tell us about the condition of victimhood and human rights violations, but they also address the way in which state violence is perpetrated with impunity, and how this operates as a strategy of power, deterrence and control over individuals and whole populations, going far beyond the most directly affected – the disappeared. Indeed, this strategy of power is also based on the infliction of fear and terror on the victims’ communities and families (see Chapter 5).

The notion of ‘enforced disappearances’ has recently entered the public debate on global migration and border deaths. There is mounting interest among critical scholars in legal studies and migration studies, humanitarian practitioners, NGO workers, activists and, most of all, among the families and relatives of the disappeared, who struggle for truth and justice and demand accountability for such crimes (see Chapter 4). Within this context, this chapter suggests that (at least some) border deaths can be interpreted as enforced disappearances. Arguably, the notion of enforced disappearances has both political and legal implications, as it helps make (representatives of) state authorities accountable, not just smugglers and traffickers.

Following an emerging theoretical approach towards border deaths as ‘enforced disappearances’, the chapter poses a series of questions inspired by different streams of thought, scholarship, multidisciplinary approaches, histories and the testimonies of political activism and struggles. By providing
a tentative genealogy of the legal framework of customary international law – from International Humanitarian Law (IHL) to International Human Rights Law (IHRL) – the chapter looks at the legal instruments and bodies available to identify and tackle ‘disappearances’ along the migrant trail. Then, by reading into the case of an ‘enforced disappearance’ the figure of the desaparecido, which across the second half of the 20th century has been tragically central to the implementation of state violence in Latin America, the chapter looks at the ‘disappeared’ as a cross-national category that combines similar forms of political struggle across history (Schindel forthcoming). Finally, by referring to both the Mediterranean and the US/Mexico border, it suggests framing ‘enforced disappearances’ within the broader context (temporally and spatially) of colonial history and legacies. By considering it as part of the legacy of colonialism’s history of violence, this chapter puts the concept of ‘enforced disappearance’ among those rationalities and practices that despite the end of formal colonial rule, have survived and remain operational.

The Legal Framework

As different legal scholars and human rights practitioners have pointed out (Callamard 2017; Duhaime and A. Thibault 2018; Nyberg Sørensen 2019; Sarkin 2017) the relationship between ‘enforced disappearances’ and border deaths needs to be analysed and framed within the sphere of international law. Specifically, this needs to distinguish between two legal concepts: the one of the ‘missing’, and that of ‘enforced’ or ‘involuntary disappearance’. While the former predominantly applies to war and armed conflict under IHL, ‘enforced disappearances’ is governed by IHRL. According to IHL, the concept of the missing person refers to an individual ‘whose whereabouts are unknown as a result of armed conflict’. 2 In contrast, ‘disappearances’ – as stated by Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance – refers to:

‘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

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2 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977, (AP I), Art. 33.
or whereabouts of the disappeared person, which place such a person outside the protection of the law.3

The convention historically builds on different international and regional treaties, customary international law and domestic legal systems, which are set generally around the protection of the right to life, and also secured by the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Regional agreements such as the Inter-American Convention on the Forced Disappearance of Persons and the Rome Statute of the International Criminal Court represent other strong points of reference. Together with the convention, the Declaration on the Protection of all Persons from Enforced Disappearance also establishes state duties in terms of prevention, sanction, investigation and compensation. The core of these statutes and conventions is the protection of life without discrimination, the prevention of unlawful disappearances and killing, and the proper investigation of all wrongful acts.

However, despite the boundaries set by these legal apparatuses, scholars have agreed that there are no specific international legal instruments that deal directly with the enforced disappearances of migrants (Duhaime and Thibault 2018), and that these crimes are very difficult to prosecute. This happens for two main reasons: firstly, investigations focus solely on the criminal activities of smugglers and traffickers and rarely lead to trials, and leave out state agents and representatives (see Preface, Chapter 1 and Afterword). Secondly, with the disappearance of the body or the impossibility of identifying the victim, such crimes are hardly prosecuted, even if jurisdiction would exist.

As a way to tackle these voids and impasses, since 2010 new human rights bodies and treaties have been created: the International Convention for the Protection of all Persons from Enforced Disappearances, the Committee on Enforced Disappearances together with the Working Group on Enforced or Involuntary Disappearances – both of which are operating under the aegis of the United Nations. Since then, the Committee and the Working Group coexist side by side, allowing the legal representatives of the families of victims to issue complaints alleging violations of state parties – which often materialize under the guise of urgent appeals and communications to the Working Group, and in parallel, as communications to the United Nations Human Rights Committee. Specifically, by adopting the notion

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of ‘enforced disappearance’, the Working Group has increased the state's obligation to investigate. However, all those actions are limited by structural limitations and the reluctance of governments, state representatives and parties: lack of transparency in immigration detentions and deportations, the militarization of borders and the lack of inter-state cooperation in prevention (Duhaime and Thibault 2018).

However, for a better understanding of enforced disappearance and its relationship to the proliferation of deaths on border crossings, this chapter claims that we should understand the genealogy of ‘enforced disappearances’ as a legal notion, as part of a complex political and historical process, which is grounded in the intersection between different political and historical contexts.

The Genealogy of ‘enforced disappearances’

During the 1970s ‘enforced disappearances’ became infamously associated with desaparecidos in the era of Latin America’s military dictatorships (Argentina, Chile and Guatemala). There, ‘disappearance’ was a technique to eliminate political dissidents and opposition movements: carried out by secret abduction and detention, then torture, execution and secret disposal of the bodies. ‘Disappearance’ was also a method of deterrence to inflict fear and terror among the population. Afterwards, during the 1990s the question of ‘disappearances’ became a useful category (together with that of the ‘missing’) and central to the principles of universal jurisdiction and the statutes of the international tribunals for the Balkans and Rwanda that were afflicted by civil war and genocides in the first half of that decade. While not being governed under IHL, article 7 of the Statute of the emerging International Criminal Court (1998-1999) has considered ‘disappearances’ – together with other crimes such as extermination, torture, enslavement, rape – to be a crime against humanity, as part of the ‘widespread or systematic attack directed against any civilian population, with knowledge of the attack’. 4

Once truth commissions, ‘transitional justice’ programmes and (heavily contested) paths of the elaboration of gross human rights violations began in Latin America, the Balkans and Rwanda, the concept of disappearances became ever more present in the grassroots struggles for truth and justice for the families and communities of the victims. In this way, the effectiveness of

the concept was tested in court as well as in the public arena, as an outcome of contested political transition following violent conflict.\footnote{While being aware that in conflict-resolution theories the notion of transitional justice has been widely in use (more or less successfully from South America to South Africa and the North of Ireland), it is important to specify that the transitional framing is also heavily disputed – especially within a (post)colonial frame – as it is more linked to globalized discourses mobilized from the North than to local struggles and vocabularies.}

Overall, these experiences show that by building on previous historical/political experiences, there seems to be a legal ramification around the use of the notion of ‘enforced disappearance’ which is based on the principle of universal jurisdiction, namely that any court of any country can prosecute any individual (including representatives of state authorities of any country) responsible for serious crimes such as enforced disappearances. Furthermore, the crime of enforced disappearances may trigger the competence of the International Criminal Court.

Because of these possibilities, as well as of those offered by the Committee on Enforced Disappearances and the Working Group on Enforced or Involuntary Disappearances, legal scholars and human rights lawyers are now using the concept of ‘enforced disappearances’ to explore – on a large scale – the phenomenon of border deaths in the context of migration governance. Possible factors that contribute to the conflation of the ‘disappearance’ and the death of migrants, include the following: trafficking and abductions of migrants by armed groups who buy the complicity of corrupted state officials, arrests and detention of migrants in transit, and deportation and pushbacks. (For a framework for modelling these various dimensions, see Chapter 7).

The study of the phenomenon of enforced disappearance allows us to concentrate attention on the intersection between border deaths and disappearances, by combining questions of the militarization of borders, the externalization of frontiers (that rely on the cooperation of third parties or states), the use of force (i.e. ‘push backs’ and ‘pull-backs’), and the criminalization of assistance, which defy and often openly violate the principle of non-refoulement in International Law (from the case of Rohingyas in Bangladesh, to the US/Mexico border, Australia and the Mediterranean) as well as the civilian technologies of deterrence of migration, i.e. restrictions on visa regulations.

However, beyond this discussion on the relationship between death and disappearance, we should bear in mind that this debate has deeper political considerations. In fact, as part of the study of such policies of deterrence, it should be noted that the disappearance of a person is a process that starts
earlier than actual travel (Grant 2011). As an event that does not strictly depend on death for its own realization, disappearance is generated by the process of illegalization of the migrant, where the illegality manifests itself as ‘an erasure of legal personhood – a space of forced invisibility, exclusion, subjugation and repression’ (De Genova 2002: 427). Disappearance is both a result of policies and laws, but also a tactic that has its roots in the restrictions on visa regulations, the criminalization of assistance, the decreasing incidents of rescue operations and the subsequent use of the ‘environment argument’, where bare nature and its ‘hostile conditions’ (in the shape of open seas and deserts, for instance) are presented by official state narratives as the causes of disappearance and death (De Leon 2015; Heller and Pezzani 2017; see also Preface). Disappearances, before death, can also start when migrants move without identity documents because of the fear of detection, denied entry, refusal of asylum, and the threat of immediate forced repatriation to their country of origin or non-safe areas. Disappearance materializes, indeed, as a political issue that exists before death.

The Disappeared as a Cross-national Category

The distinction between disappearance and death is also grounded in multiple historical experiences of grassroots struggles for justice. The case of the desaparecidos offers important insights, explaining specific mechanisms of state violence, and the way political activism and resistance react to it. The terror inflicted by the military juntas in Argentina, Chile and Guatemala relied on a shared strategy: forcing the family, comrades and beloved of the ‘disappeared’ into a state of collective fear and a permanent social and existential limbo with no hope of seeking justice before the courts. Counting on impunity, it inflicted a sense of never-ending (or unachievable) mourning to the families of the disappeared (Gatti 2014; Riquelme 1994; Schindel forthcoming). Such a scheme of terror was brought to an end by the political activism of the Argentinian Mothers and Grandmothers of Plaza de Mayo, who developed their political campaign around the refusal to accept the death of their beloved before the state. In this regard, Schindel stresses the importance of framing disappearances as matters that need to be marked as different from deaths.6 By refusing to acknowledge death, the mothers

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6 In the context of migration, specifically to the question of the difference between the fear of dying and the fear of disappearing as felt by African migrants en route to Europe, please see Kobelinsky (2017).
strengthened their political demand to the state to respond to its crimes, take responsibility for the search of the missing and explain and certify the death of the disappeared. In the context of migrant disappearances, a comparable campaign, ‘From One Shore to the Other: Lives that Matter’, was started in 2011 by the relatives of 300 disappeared Tunisian migrants together with the Italian feminist collective Le Venticinqueundici. As with the Plaza de Mayo scheme, the mothers of the disappeared migrants (who have formed the collective La Terre pur Tous) refuse to acknowledge the deaths of their sons before the Italian and Tunisian governments as there is no evidence yet proving them. The initiative is aimed at making the Tunisian and Italian governments responsible for the search of the missing and accountable for the disappearances and the border deaths, by pointing at the overall role played by the EU visa system and migration policies (Tazzioli 2017). In so doing, this has become a transnational campaign that de facto re-politicized the question of border deaths in the Mediterranean (Oliveri 2016).

However, as the cases from Latin America prove, the search for the bodies of those who disappeared did not bring the struggle to an end. Although systematic violence ceased, the struggle continued as the post-junta government opened programs of search and exhumations. In fact, the Argentinian mothers refused a process that was limited to documenting crimes without punishing the perpetrators. The political lesson learned from the Plaza de Mayo political activism is a tactic of resistance and politics that put under scrutiny state accountability vis-à-vis the ‘absent’ body of the victim.

Interestingly, the cross-national nature of the disappearances ties together experiences, forms of resistance, solidarity and activism that would look spatially and temporally distant. It is possible to see that the obstacles encountered by the families of the disappeared in exercising their right to truth and justice, share similarities across different paradigms. The cross-national role played by the disappeared is also determined by the technologies and tools that have been applied in support of the struggles of the families of the victims throughout history and across continents.

Over the years, from Latin America to the Balkans and Rwanda, forensic anthropology and exhumations increasingly became essential tools for humanitarian practices at a global level. In the context of border deaths, the role of forensics in the search for the disappeared along migrant routes has become more central (see Chapter 4). This draws inspiration from the use of DNA identification by the EAAF – The Argentine team of Forensic Anthropologists. In the 1980s, the team, together with its founder, the US American scientist Clyde Snow, pioneered the methods
for forensic identification of victims of state violence. The huge expertise they have accumulated since then has proved productive for dealing with enforced disappearances in Latin America and may extend to these other modes of disappearance related to migration. The methods and technical possibilities for identifying corpses have been improving in the last few decades under this strategy (Dziuban 2017: 12; Chapter 4). This scheme has offered a model for scientists and anthropologists working on behalf of justice and human rights, with the search for the disappeared at the core of the struggle.

However, the post-dictatorship Latin American context also shows obstacles and contradictions of such processes: in cases of state-driven exhumation, to what extent are states willing to investigate the crimes they could be indicted for? Keeping in mind this dilemma and the example of Argentina, today human rights practitioners, grassroots activism and the families of the disappeared migrants share modes of investigation and inquiry – as the case of the Colibri Centre for Human Rights in Arizona, US, shows (Reineke 2016) – that take into consideration the risks and complexities of the search – under harsh conditions of ‘hostile environments’ created by state policies and officials – and the difficulties of creating DNA databases to help with the storing, cross-referencing of data and hopefully identifying the disappeared or the dead.

The Disappeared in the (Post)colonial Present

We relate ‘enforced disappearances’ to the question of historical and political continuities, at the intersection of colonial and postcolonial politics and histories. In the context of the so-called ‘migration crisis’, the proliferation of ‘enforced disappearances’ directly addresses the inability of former colonizing societies to deal with centuries of colonial history: from the global mobility and the autonomy of migration that started with the collapse of empires to contemporary global economic inequality, and the ongoing displacements caused by regional conflicts and the long arm of the global War on Terror.

The category of the disappeared exposes the relationship between death, state policies and impunity. Perugini and Gordon recognise that, because of racist discourses and policies, migrants too often become ‘people who can be injured or killed with impunity. Indeed, they are portrayed as necro-figures’ (Perugini and Gordon 2018). Accordingly, we should read the category of the ‘disappeared’ within the framework of *necropolitics* as described by Achille
Mbembe. *Necropolitics* constrains colonial subjects within ‘lawless’ spaces, that could justify a large-scale fabrication of death. According to Mbembe, ‘the colony represents the site where sovereignty fundamentally consists of the exercise of a power outside the law’ (Mbembe 2003: 23). Not surprisingly, if we look back at the definition provided by the UN convention, we see that ‘disappearances’ similarly consist of placing an individual ‘outside the protection of the law’.

By juxtaposing the rationalities of *necropolitics* and the UN definition of ‘enforced disappearance’, we confirm that disappearances are a complex phenomenon that should be discussed across histories7: not necessarily as the outcome of ‘shoot to kill’ politics, but also as the product of a techno/military/legal apparatus that forces subjects ‘outside the protection of the law’. This informs a larger process of forced invisibility and historical erasure that has a clear colonial resonance – from slavery to the (post) colonial present. On the one hand, in the American context, this addresses questions around its genocidal and settler colonial nature, where non-white migrants (together with African Americans and Native Americans) are doomed to exclusion and made disposable. As proven by the recent case of the migrant Caravan, their very existence is perceived as a threat to the nation-state, and as the breach of the North/South divide, which more and more operates as a racial filter and boundary. On the other hand, in the context of EU border policies (from the Mediterranean area to the East of Europe up to the Scandinavian countries) we witness the *longue durée* of colonial history through discourses and policies of illegalization that foster invisibility among migrants, de-humanize, exclude and erase ‘otherness’ from the narrative of civilization. Therefore, disappearance, before death, brings to completion the de-identification process, around which colonial politics has built its relationship to the colonized other: not only are names, faces and families vanishing, but also the testimonies, tales and memories of colonization, transnational migration and global economic inequality.

For these reasons, the disappeared migrant stands here as a cross-figure and category around which seemingly distant and different struggles, testimonies and experiences gather. In so doing it poses a clear political question rather than simply a humanitarian one, and it can serve as a key to fostering new frameworks of global justice by agitating for investigation,

7 Specific to the context of occupied Algeria (1954-1962), ‘disappearances’ became infamously known as ‘Crevettes Bigeard’. This expression refers to the practice introduced by French General Marcel Bigeard which consisted of the executions of at least 4000 Algerian prisoners, whose bodies were then secretly disposed of in the Mediterranean Sea.
prosecution of crimes and, when it occurs, repatriations of the dead and compensation plans.

Conclusions

Overall, this chapter is an attempt to bring into conversation the various debates, disciplines and practices across histories and spaces that have revolved around the ‘disappeared’ as a cross-national category. It aims to show possible directions for further study, debate, analysis and action for justice. Specifically, the chapter indicates that it would be legally and politically useful to use the notion of ‘enforced disappearance’ to include border deaths along the migrant trail, as a way of making states and governments (and not only smugglers and traffickers) politically and legally accountable for disappearances. In so doing it offers a conceptual toolbox that can enable us to study the evolution of state violence across time and space, and the way counter-practices have reacted by pointing at state responsibility.

Moreover, by placing the disappeared at the intersection of seemingly distant historical settings and of different legal and political discourses, this chapter suggests an additional point of reflection: the disappeared should not be looked at as a ‘definitive’ or ‘ultimate’ category. On the contrary, it must be considered to be a ‘temporary’ category for subjects who are not nameless, absent, anonymous nor isolated. By existing in the memories and struggles of their families, the disappeared does not exist solely as a liminal legal category, but also as a political subject ‘striving’ against the deprivation of his/her identity, autonomy and subjectivity, and overall for justice.

References


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