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WHEN GENEVA MEETS ROME IN NUREMBERG**

In this “keynote address”, I would like to report a very interesting story that I heard from an investigative journalist working on the mob activities in Europe and around the world. I will not mention the name of the journalist who is currently in a witness protection program. The report includes two people whose names will remain secret - you will understand why in a minute. We will therefore use their initials - which are identical, and their city of residence, which are Geneva and Rome, to identify and differentiate them. Our first protagonist will therefore be known as “E.D. Geneva” and the second as “E.D. Rome”.

Now let us introduce these two characters.

E.D. Geneva is the head of the World Organisation of Oppressive States (WOOS). You can, of course, very well imagine that this organization is anything but “official”, as its activities are rather underground. But the members of that organization are themselves quite “official”: they are mostly high-ranking officers in the security services of a number of states around the world. Some are even heads of state or heads of government. The states to which they belong may be allies or enemies. It does not really matter as WOOS’ aim is cooperation in the field of oppression and repression. They exchange best practices and information of all sorts. They may also cooperate in eliminating opponents around the world. A sort of Condor plan extended to the world if you like.

E.D. Rome also heads a very important global organization: the Criminals Organized Global Union (COGUN). This is not an “official” organization either. And the members are the most unofficial you can think of: they are all heads of criminal organizations from all over the world – dealing with all sorts of trafficking: drugs of course, human trafficking, arms trafficking, but also migrant smuggling, etc.

So now that you are familiar with the characters, here is the story. Both E.D. Rome and E.D. Geneva are heading to an International Congress on Crimes against Humanity in The Hague where they will feature as key speakers. On their way, they agree to hold a private

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informal bilateral working meeting in Nuremberg. They often go to the place where the Nazi Nuremberg Rally was held to meditate, and find inspiration for their own activities.

The get-together takes place in a meeting room of a fancy-but-not-too-fancy hotel not far from the Nuremberg Palace of Justice. The topic of the meeting is: «Good practices in enjoying impunity from enforced disappearances».

- I'm anxious, begins E.D. Rome with a frown. Something bad happened in Rome in 2002: the Rome Statute of the International Criminal Court came into force. It establishes an international tribunal to prosecute genocide, crimes against humanity and war crimes. And it even covers aggression, can you imagine? And guess what? Enforced disappearances are included in the list of “crimes against humanity”. And guess what else? The people who drafted the statute thought it would be smart to provide that enforced disappearances could be prosecuted when they are perpetrated not only by state or state-sponsored groups, but also by, quote: «political organization». This can be read in plain letters in article 7, paragraph 2-i of the Statute: «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...». I remember thinking COGUN members would go mad when they found out! We are being targeted!

- Oh, just don't mention it, replies E.D. Geneva, that's awful. But in Geneva things got even worse: as if a Declaration on enforced disappearances, adopted in 1992, and even a Working Group, dating back from 1981, were not enough, we also have since 2010, a Convention and a so-called “committee” of experts on our back! The WOOS did everything in its power to avoid this, but we didn't win this time. Fortunately, only those states that have ratified are bound. So, for those of us who maintain good practices, it's simply a matter of avoiding ratifying the treaty! This can sometimes be a tricky thing to do, as some states and even NGOs have put pressure on us, infringing our sacred sovereignty... Aren't we free after all?

- Yes, you are, interrupts E.D. Rome. And that's what makes you so useful to us, sometimes... Trafficking under the veil of sovereignty is the best place under the sun... And yes, I still envy you: your Geneva Convention is not as bad as our Statute: it only concerns your people, including those who are working undercover, without affecting the good old criminal organizations...

- Well, says E.D. Geneva with a grin, I would not be so sure, you see... It's true that the definition of enforced disappearances as provided in Article 2 includes a state-agency element – that is, enforced disappearances must be perpetrated either by a state agent or with the authorization, support or acquiescence of the state. But Article 3 of the Convention also provides that, I quote, «each State Party shall 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».

But E.D. Rome laughs at him and says:

- Ah! That's only the good old “abduction” thing; it doesn't add anything more to the existing crimes. If we get caught, we end up with just a few years behind bars, nothing serious - plus we escape the stigma associated to crimes against humanity!

- Well, E.D. Geneva adds still smiling, in Geneva, some people are saying that there is more to this... In fact, some of them refer to your Rome Statute of the ICC to argue that the law has changed and that now at least certain types of non-state actors ... such as “political organizations” for instance... should also be prosecuted...

- Frightening! says E.D. Rome. Such inappropriate use of freedom of thought! Tell me if you need a hand to stop these people from thinking too much!

- I will, answers E.D. Geneva. But unless they succeed – and we will see they don't – you will remain safe. While we, as oppressive states, are very unpleasantly disturbed by the progress made by this Convention. The definition of the crime in article 2, you may have seen, is pretty straightforward and does not leave room for many doubts – save the state-agency element we have just spoken about: 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, which place such a person outside the protection of the law»...

- Well, interrupts E.D. Rome, I have heard that the last element you have just quoted – this «placement of the person outside the protection of the law» has happily fallen victim to the negotiation process and has been left in a state of, let's say, “constructive ambiguity”. Isn't that right? Doesn't it leave you with some room to manoeuvre?

- Yes, and no, frowns E.D. Geneva. A little room in fact: as I mentioned, this Convention has an expert Committee – and the Committee has been loud and clear: states must give this element the status of a consequence of the deprivation of liberty. It may accept it as a “circumstance” of the crime, no more... Those states who do differently oppose repeated and stubborn criticism from this Committee.

- Expertise is a scourge, for sure, comments E.D. Rome, apparently very concerned by this fact.

- Yes, it is, agrees E.D. Geneva, also apparently very disturbed. «The first thing we do, let's kill all the lawyers», as Shakespeare famously wrote in Henry VI. But the fact is, at the end of the day, you and your COGUN people are safer under the ICC Statute!

- Am I? asks E.D. Rome, with a sudden smile.

- Yes, E.D. Geneva goes on with envy, it's true that the definition includes you as “political organizations”, but it is largely unenforceable if it is to prosecute people, especially people like you...

- Why is that? asks E.D. Rome, with great excitement.

- Because it includes what lawyers call a specific intention. You're Roman, you should know Latin? Don't you understand *dolus specialis*? Deprivation of liberty and refusal to acknowledge or give information must be done, and I quote: «with the intention of removing [the persons] from the protection of the law for a prolonged period of time»...

- Are you joking? asks E.D. Rome with greater excitement.

- No! says E.D. Geneva looking even more envious. It's almost too easy: you just make them disappear for a “short period of time” – and that's it.

- Well, says E.D. Rome, sometimes we need to keep them a bit longer, you see...

- It's easy! E.D. Geneva almost shouts, you just lie about the date of arrest... we do it all the time. Keep them captive a month, but make it appear as 48h on the legal documents...

- Oh! That's a splendid idea, cries out E.D. Rome.

- Anyway, adds E.D. Geneva, the prosecutor will have a hard time proving the intent of each of your agents who participated in the job... there must be a sort of «common criminal purpose»¹, you see...

- Good!, says E.D. Rome, with glee.

¹ Footnote 23 of the Elements of Crimes, Crime against humanity of enforced disappearance of persons: «Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose».

A silence follows and for a moment both the head of COGUN and the chief of WOOS seem lost in their thoughts. Then E.D. Rome suddenly raises his head and looks at his colleague:

- You're right in fact; we criminal organizations are quite safe! And I have just been thinking: this ICC definition... it only applies if it is committed as a crime against humanity, meaning within the scope of, quote: «a widespread or systematic attack directed against any civilian population».

- That's true, nods E.D. Geneva approvingly.

- And I have been thinking too, continues E.D. Rome, smiling: if I am right, you, states haven't implemented that many tools regarding universal jurisdiction, judicial cooperation, judicial assistance, extradition, and all of those things... as far as crimes against humanity are concerned? So, even if the other conditions were met, this would be another chance to get away with it, don't you think? It would suffice to reside in the right country at the right time, no?

- Yes, you're absolutely right, in fact, I missed that!, answers E.D. Geneva with some admiration. Although... I must tell you that another group of experts – curse these! – as well as, in fact, a group of states (idiotic, sure, but equally sovereign to me, so I won't say any more) are working on draft treaties precisely to fill that gap!

- Gosh! What bad news!, frowns E.D. Rome.

- Yes, terrible, says E.D. Geneva. But they're not there yet, I must say... And they are planning to adopt treaties, which is the most cumbersome and slow lawmaking technique... So I guess we still have some good days ahead of us!

- Oh, this is only cold comfort to me, says E.D. Rome...

- Don't be so pessimistic! says E.D. Geneva, tapping his friend's shoulder. If by chance one of these treaties is approved and then ratified by states, it will still apply to enforced disappearances as defined in the Rome Statute!

- Oh, yes, you're a genius, cries out E.D. Rome, slapping his forehead and laughing. Another silence ensues, broken after a minute by E.D. Geneva.

- And you know, I am thinking about our situation as oppressive states in Geneva: as far as crimes against humanity are concerned, the Convention on enforced disappearance is quite vague. It clearly leaves that to the ICC Statute. At least that seems to have been the idea of the drafters. It only mentions the issue twice. Article 5 is a kind of referencing clause stating that «the widespread or systematic practice of enforced disappearances constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided to under such applicable international law». And then article 34 empowers the Committee (curse the experts!) to refer a situation of enforced disappearances as crimes against humanity to the General Assembly...

- How admirable, says E.D. Rome, with a grin.

- Yes, continues E.D. Geneva. But what I'm thinking is that we, states, are basically off the hook when it comes to crimes against humanity...

- Are you really?, asks E.D. Rome, waiting impatiently to know more.

- Yes, indeed! It's true that, in contrast to the ICC Statute, the Geneva Convention establishes rather elaborate cooperation obligations, especially in its article 13, 14, 15 and 25... But for those states that have ratified the ICC Statute, these would only apply to enforced disappearances as an "autonomous crime", which isn't like a crime against humanity!

- But... how come?, asks E.D. Rome genuinely impressed.

- Because most of these states have set up specific provisions to implement the ICC statute, including enforced disappearances as a crime against humanity, separate from the provisions implementing the Convention. That's the magic of what international lawyers call, I think... yes... the "fragmentation of international law"!

- How beautiful!, cries out E.D. Rome.

- Yes, it is. The consequence is strange, although I must say, as the head of WOOS, I cannot but qualify it as positive.

- Why is that?, asks E.D. Rome.

- We, states, having ratified both the Geneva Convention and the Rome Statute, are better off committing enforced disappearances as part of a widespread attack against a civilian population than as an autonomous crime!

- That is indeed surprising, says E.D. Rome. But I guess you are exaggerating: if the crime is in the code as an autonomous crime, they will get your people for this crime!

- Right, replies E.D. Geneva instantly, but they won't catch them for a crime against humanity. Isn't it better?

- Frankly, I don't know, says E.D. Rome, not completely convinced, but this is troubling for sure...

And after a short silence, he continues:

- But I have another idea, and this one seems safe. Take armed conflicts, international or not...

- Yes, and then what?, asks E.D. Geneva, apparently lost.

- Well, have you ever heard of a war crime of enforced disappearance? Uh? Have you seen it mentioned in article 8 of the ICC Statute for instance? So?

- Well, no, says E.D. Geneva, but... it's well known that enforced disappearances are prohibited under customary international humanitarian law, which does apply to both international and non-international armed conflicts. This is even written down in the ICRC's excellent compilation... Rule 98 if you want to know.

- Ah ah, laughs E.D. Rome, but that's the magic of it. It is indeed prohibited, but there is no crime. No crime, no punishment. Do you want it in Latin? Here goes: *Nullum crimen sine lege*.

- Gosh! That's something!, exclaims E.D. Geneva with wide eyes. So you mean that if we commit enforced disappearances in connection with an armed conflict though...

-... though, continues E.D. Rome, not in the context of a widespread or systematic attack against a civilian population...

- We get away with it! cries out E.D. Geneva.

- Yes, we do!, laughs E.D. Rome... And we can work together on this. I like armed conflicts. They generally benefit our corporation a lot.

- Yes, they do!, answers E.D. Geneva. Let's drink to our benefits.

- Yes, cheers, says E.D. Rome.

And so they went on all night, sipping glasses of French Champagne, courtesy of the World War Weapons Providers (WWWEAP), an organization that happens to be affiliated to both WOOS and COGUN.

According to the investigative journalist I spoke to, this is a very accurate transcript of what was said that day in that hotel in Nuremberg between E.D. Rome and E.D. Geneva.

My point is that it is always interesting to hear what the perpetrators have to say. They may be right on some points, they may be wrong on others. They may be either too pessimistic on their chances of getting caught, or too optimistic on their chances of getting

away with crime. Nevertheless, this is a worthwhile perspective for those who, like all of us today, are working in the opposite direction and striving as hard as possible towards full accountability for the perpetrators of such a heinous crime as enforced disappearance.

So what conclusions can we draw from what we've just heard? It seems that our two protagonists have identified contradictions, uncertainties and even loopholes in the normative framework against enforced disappearances. And they have shown that, to a certain extent, these issues can be exploited to their advantage.

What can we do to prevent this from happening?

We could hear that most of the problems result from the fact that we have two definitions in international law that are not completely aligned.

We need to bring them into line, so that we come up with a definition that will be actionable and usable in order to fight impunity in all contexts.

A *first issue* we have heard, comes from the *dolus specialis* which has been added in the Rome definition: on the one hand, the withdrawal of the protection of the law, which is normally a consequence of the deprivation of liberty, is defined as a special intent of the perpetrator; on the other hand, the *dolus specialis* adds a new temporal element to the crime by saying that the intention should be to withdraw the person from the protection of the law for a prolonged period of time. We have seen that our protagonists like this very much, because not only does it add an extra burden of proof for the prosecutor, but it may also allow, in some cases, to cheat the crime, by falsifying the dates of arrest and covering up an enforced disappearance with lawful detention instead.

The big issue is that the "Rome definition" has greater influence than the "Geneva definition": 123 states are parties to the ICC Statute, and only 63 to the Convention; and a good number of states have already implemented the Rome Statute in their national legislations, including by transposing the Statute's crimes and their definitions into their criminal codes. Add to this the fact that a number of statutes and treaties have taken the Rome Statute as a model. This is the case for a number of recent draft treaties. Our characters have alluded to these draft conventions: the International Law Commission's draft articles on crimes against humanity; and the more recent so-called MLA Initiative, standing for Mutual Legal Assistance Draft Convention. Both texts are copying and pasting the Rome definition, and despite the insistence of NGOs and some states, the drafters have so far refused to align the definition with the Convention.

A first solution to this problem would be to amend the Rome Statute – but we know how complicated the procedure can be under article 121 of the Statute. Therefore, a safer way would be for the Chambers to provide an interpretation of the existing provisions that would be in line with the definition as provided in the Convention. Plus, the national courts should be encouraged to do the same.

A push in the right direction came from the African Extraordinary Chambers, in charge of trying Hissène Habré in Senegal: in its judgement dated 30th of May 2016, the *Chambre d'Assises* compared the two definitions of Rome and Geneva, concluded that there were differences between them, and decided to go with the "Geneva" Convention definition, which, in its opinion, seemed to better reflect the state of international customary law².

This was followed by another good move – one that would certainly have created great distress with our protagonists had they taken notice of it. In its decision pursuant to Article 15 of the Rome Statute on Burundi from 25 October 2017, Pre-Trial Chamber III of the

² *Chambres africaine extraordinaire d'assises, Ministère public c. Hissène Habré, jugement, 30 mai 2016, § 1471.*

ICC clearly facilitated the work of the prosecutor by stating that the intention to remove the victim from the protection of the law could be inferred from the «manner in which the person is deprived of his or her liberty». It considered for instance that such an intention could be deduced from the «lack of a court order for the detention; abduction in cars without a licence plate and with tinted windows; detention in secret, unofficial prisons; non-registration of names of the detainees in official records; or capture in desolate areas». – examples which were all taken from the human rights case law.

Nevertheless, commenting on the temporal element, the Chamber noted that: «[a] period of several months or years certainly fulfils» the requirement of removal «for a prolonged period of time»³. Whereas the Working Group or the Committee have often been confronted in recent years – particularly in the context of the fight against terrorism – with disappearances lasting only from a few days to a few weeks – the so-called “short-term disappearances”.

A *second issue* with the definition concerns the inclusion of non-state actors as potential perpetrators of enforced disappearances. The ICC Statute clearly includes the so-called “political organizations” as perpetrators. But the Convention takes a more ambiguous stand: article 2 includes a state agency element in the definition of enforced disappearances, whereas article 3 defines state obligations to prevent and punish «acts as defined in article 2», committed by non-state actors, acting without the authorization, support or acquiescence of the state. The WGEID and the CED have both and are still, in fact, carefully considering the issue. Of particular note is the bold move made by the Working Group in the now famous paragraph 94 of its 2019 annual report, where it stated that: «In light of its humanitarian mandate and the fact that the victims of these acts do not have any remedy to address their plight, the Working Group has decided to document cases concerning enforced or involuntary disappearances allegedly perpetrated by non-state actors that exercise effective control and/or government-like functions over a territory»⁴.

A *third issue* identified during the conversation between E.D. Geneva and E.D. Rome deals with the consequence of the double definition of enforced disappearances on the course of justice – and in particular national procedures and procedures of judicial cooperation and judicial assistance between states. It may seem a paradox, but in these fields, the ICC Statute does not offer much help. It is up to States to decide whether they wish to extend the jurisdiction of their courts to the crimes provided for in the ICC’s Statute – but some states pretend that the Statute contains no obligation to do so. And it is because they have identified this particular loophole that some experts, and more recently some states, have proposed new treaties – the ILC’s articles on crimes against humanity and the MLA.

In the meantime, we may find ourselves in this strange situation where perpetrators of enforced disappearances as a crime against humanity are better off than perpetrators of enforced disappearances as an autonomous crime. At least this is the case in France, for example, where universal jurisdiction for crimes against humanity is submitted to more conditions than for enforced disappearance as an autonomous crime.

³ Pre-Trial Chamber III, Situation in the Republic of Burundi, Public Redacted version of «Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Burundi», ICC-01/17-X-9-US-Exp, 25 October 2017, Date Public Redacted Version: 9 November 2017, § 120.

⁴ Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/42/40, 30 July 2019, § 94.

This is just another argument in favour of a unification of the crime. If we want our jurisdiction and cooperation tools to work properly, we need a single definition for a single crime: enforced disappearance, regardless of the circumstances or the context.

Finally, our two characters have identified a loophole in international criminal law: although enforced disappearances are prohibited under international humanitarian law, there is no war crime of enforced disappearances – meaning that an enforced disappearance committed in connection with an armed conflict, but not in the context of a widespread or systematic attack against a civilian population, may not be punished as such. Although we have to admit that this may fall under other war crimes such as torture or unlawful confinement. It would therefore seem appropriate to propose the recognition of a new war crime, applicable to both international and non-international armed conflicts. Again, the possibility of amending the ICC Statute could be considered. But a declaration from an ICC judge that such a crime does exist under customary international law may be a more appropriate and convenient way to proceed.

In conclusion, I think there was no better place than this courtroom in Nuremberg to launch a call for a renewed effort and energy in the fight against impunity for perpetrators of enforced disappearances. Reaching an agreement on a unified definition of enforced disappearance will certainly be a step forward.

Beyond that, all states need to ratify the Convention and cooperate so as to provide assistance to all victims, and give effect to the victims' rights to truth, reparation and justice.

I would propose to name this “The Nuremberg call”, which could be adopted by this conference today or tomorrow. With, as an epigraph, the words of the International Military Tribunal of Nuremberg: «Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced»⁵.

⁵ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, Nuremberg, Germany, 1947, vol. I, p. 223.