

## Research Article

# TRUTH REVELATION INSTRUMENTS IN POST-COMMUNIST ALBANIA: TRANSITIONAL JUSTICE NON-FEASANCE IN INVESTIGATING COMMUNIST CRIMES AND THE FATE OF MISSING PERSONS

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## ABSTRACT

**Background:** During 45 years of dictatorship in Albania, many people were accused, convicted, imprisoned, exiled, or persecuted for “offences” of a political nature (under the communist law), thereby violating basic human rights. A series of legal measures have been enacted during the 30 years of democratic developments to deal with the bitter past and, especially, the crimes of the communist period.

**Methods:** This study contributes to making a normative evaluation of the status of the right to the truth in international law. The paper focuses on the most important state obligations for giving effect to this right, such as the prosecution of serious violations of fundamental rights and the issue of missing persons. The study uses a qualitative interpretation of the Albanian legislation model built to unveil the truth regarding the violations that occurred during the communist regime, including criminal prosecution and trials and the issue of missing persons. The study is conducted based on a methodology that analyses four variables in each of these policies, specifically: the policies contributing to revelation, the legal and empirical challenges encountered, the constitutional and legal basis of these measures, and the results achieved in practice.

**Results:** The measures set up along the democratic developments in Albania to investigate serious violations of fundamental rights committed by ex-communist officials did not contribute to achieving transitional justice goals.

**Conclusions:** *The crimes committed by ex-communist officials during the communist regime in Albania were never punished, and the truth about past atrocities while using the criminal law in Albania was never revealed. In Albania's recent years, regardless of the change of trajectory in dealing with the issue of 6000 missing persons' remains from the communist period, no tangible results are found, leaving the truth about their fate buried, turning it into a serious concern in the framework of guaranteeing human rights. Failure to account for the whereabouts and fate of the missing persons in Albania gives rise to a continuing situation in breach of the right to life.*

## 1 INTRODUCTION

One of the main challenges a democratic state in a transitional period faces is dealing with the past atrocities of the previous regime as measures that serve justice and truth, therefore giving an immense contribution to building a future of peace and social reconciliation. A question that naturally arises when handling past violations of human rights is: what is meant by truth, and what is the interconnection between truth and justice? Truth is a central concept in the struggle for justice and is oftentimes considered the foundation of justice. Aquinas placed the virtue of truthfulness among the virtues annexed to justice, duly arguing that "truth is a part of justice, being annexed thereto as a secondary virtue to its principal."<sup>1</sup> Almost in the same vein, consider this relation proposed by Teitel and Safjan. While Teitel considers the truth "as a virtue of justice," Safjan states that "justice requires and is based on truth,"<sup>2</sup> so the truth is needed for justice to be executed properly and injustice to be avoided.

Unveiling the truth about serious human rights violations committed by a repressive regime represents the minimum threshold to restore the dignity of the victims as the basis of fundamental rights. Justice must reach the truth, while the latter, as it happened during the communist regime, can be painful and might not produce justice in itself. Justice might instead solely serve to restore the dignity of the victims and alleviate their and their relatives' sufferings. Zalaquett asserts that although the truth cannot really in itself enforce justice, at least it contributes to "putting an end to many a continued injustice. Truth does not bring the dead back to life, but it brings them out from silence."<sup>3</sup> Reaching the truth with all the possible means contributes not only to the victims and their relatives but to society as a whole. Unveiling truth serves to make justice, bring an end to the anguishing, endless search of families in cases of enforced disappearance, and overall dismantle the false narrative of the past with heroes and so-called "enemies" of the people, thus, giving an immense contribution to peace and reconciliation.

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1 Thomas Aquinas, 'Summa Theologiae' in Shawn Bawulski and Stephen R Holmes, *Christian Theology: The Classics* (Routledge 2014) ch 8, doi:10.4324/9781315816449-14.

2 Ruti G Teitel, *Transitional Justice* (OUP 2000) 89; Marek Safjan, 'Transitional Justice: The Polish Example, the Case of Lustration' (2007) 1(2) *European Journal of Legal Studies* 12.

3 Jose Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations' (1992) 43(6) *UC Law Journal* 1433.

At the end of the Second World War, as in the other South-Eastern European countries, Albania's political power was taken over by the communist party that immediately installed a brutal dictatorship of violence and terror, physically eliminating and persecuting either without trials or with trials that manipulated their political opponents. The communist regime, through its criminal ideology based on demonic principles such as the "dictatorship of the proletariat" and "the class struggle," legitimised the "elimination" and "persecution" of people who were considered harmful to the construction of a new society and, as such, labelled them enemies of the regime and persecuted their close relatives. This criminal approach later became part of the communist law and, consequently, it was exercised as a state policy violating the dignity and basic human rights of thousands of people. Torture, enforced disappearances, and extra-judicial killings as severe forms of human rights violations used during the communist regime against hundreds of thousands of people were not only justifiable instruments adopted to obtain total power over the society, but also a part of a broader strategy of inducing fear on the population to strengthen the dictatorship. The dictatorship in Albania legitimised the perpetration of crimes by placing their commitment in a context that has rendered them understandable, acceptable, and even necessary and of benefit to large groups of the population. In Albania, as in other ex-communist countries, a large apparatus was involved in the conception and implementation of repressive measures and acts of violence.

Official statistics show that, in Albania, 5,577 men and 450 women were shot. 26,768 men and 7,367 women were imprisoned for political reasons, of which 1,292 women and men died or lost their mental capacity and 408 men and women died from torture. Also during this period, 20,000 families were interned for political reasons, of which 7,022 people of various ages died in the internment areas.<sup>4</sup> Due to the persistent freedom infringement during the communist era in Albania, too many people are still categorised as missing. It is assessed that more than 6,000 individuals are missing. As per official information, 5,501 individuals sentenced for political reasons were executed, and their families were never informed about their whereabouts or were not able to retrieve their remains. Official data also show that the graves of 987 other political prisoners who died in prisons during the communist period are unknown to their relatives.<sup>5</sup>

After the fall of the communist regime in 1991, the large scale and the long-term communist repression provided for a high social demand and expectation to execute justice and unveil the truth, to restore the dignity of hundreds of thousands of people desecrated during the communist regime. Justice and truth are also of primary importance when dealing with the issue of thousands of people who disappeared from the communist regime resulting from state repression, whose graves are still unknown though more than three decades have

4 'Databazën e te perndjekurve' (*BUNK'ART 2*, 2016) <<https://bunkart.al/2/database>> accessed 20 June 2023.

5 International Commission of Missing Persons, *Albania, Missing Persons from the Communist Era: A Needs Assessment* (ICMP 2021) 4 <<https://missingpersons.icrc.org/library/albania-missing-persons-communist-era-needs-assessment>> accessed 20 June 2023.

passed since the fall of this regime. The wound caused by such an experience is still open. Therefore, establishing the truth about the communist crimes and the missing persons during Albania's communist regime represents one of the pillars of transitional justice, and the goal of the truth-seeking policies is to shed light on repression and uncover the violations before the truth about them is buried.

While international law has made a valuable contribution to the vindication and evolution of the right to the truth, not only through shaping the instruments that contribute to the unveiling of the truth about serious human violations but also through fostering progress in the respective jurisdictions, the fundamental question remains: what is the solution that Albanian domestic legislation has given to this matter and how efficient is it? The purpose of this paper is to analyse the right to the truth about the communist past in Albania and the effectiveness of the instruments adopted in reaching for the truth. The research focuses especially on the obligation of the state to investigate criminal events, such as serious violations of fundamental rights or the issue of missing persons, and other legal and institutional measures carried out to restore justice and truth regarding these issues in Albania.

## 2 EVALUATING THE STATUS OF THE RIGHT TO THE TRUTH ABOUT SERIOUS HUMAN RIGHT VIOLATIONS IN INTERNATIONAL LAW

Enforced disappearances became an international problem in the second half of the last century because they were used as a strategy to spread terror during conflicts or periods of internal violence, especially as a means of political repression of opponents, causing several gross human rights violations. As a result, hundreds of thousands of people have vanished around the world. In response to this global problem, the Additional Protocol of the Geneva Convention recognised, for the first time in international law, the status of the enforced disappeared person.<sup>6</sup> This Convention laid the foundation for 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 recognised the right of the "parties to the conflict" and of the "international humanitarian organisations" to inform the relatives of the missing persons about the fate of their loved ones.<sup>7</sup> Accordingly, this moment represents the genesis of the right to the truth about human rights violations which emerged in the context of enforced disappearances.

The right to the truth emerged for the first time, even though not explicitly as a right in the case law of the Inter-American Court of Human Rights (IACtHR), in the area of enforced

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6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977) [1986] UN Treaty Series 1125/17523, art 33.

7 *ibid*, art 32.

disappearances. In the case *Velásquez Rodríguez v Honduras*, the Court argued that “enforced disappearances cause a multiple and continuing violation of many rights under the ACHR, like the right to personal liberty, the right to life, and the right to integrity of the person, including freedom from torture, and inhuman or degrading treatment.”<sup>8</sup> IACtHR considered the right to the truth as stemming from the state's responsibility to respect the dignity of the person rooted in the above-mentioned human rights. This court declared that the failure of a state to investigate acts of disappearance constitutes a violation of the right to life as guaranteed in the ACtHR.<sup>9</sup> In its case law, this court argued that when it was not possible to prosecute or punish the responsible persons, the state still had the obligation to investigate and inform family members about the fate of those missing.<sup>10</sup> The court confirmed that the right to the truth, apart from cases of forced disappearances, also extends to any type of serious violation of human rights.<sup>11</sup> The case law of IACtHR is considered to lay the foundation for recognising and codifying the right to the truth in international law.

The interpretations of the IACtHR regarding the right to the truth have been further reclaimed in the case law of the European Court of Human Rights (ECtHR), which, in turn, has contributed to developing the conceptual framework of the right to the truth, recognizing it beyond cases of disappearance or conflict-related violations. The ECtHR has considered the right to the truth not as an autonomous right under the ECHR, but as a procedural right derived from other rights. This standing is articulated by Naqvi, who outlines that the court has “inferred the right to the truth as part of the right to be free from torture or ill-treatment, the right to effective remedy, the right to effective investigation and the right to be informed of the results.”<sup>12</sup> A similar standing to that of IACtHR has also been endorsed by the ECtHR, which declared that “a state’s failure...at clarifying the whereabouts and fate of missing persons constitutes a continuing violation to the right to life,” according to Article 2 of the ECHR.<sup>13</sup> Natasha Stamenkovikj reasserts that in their case laws, both the IACtHR and the ECtHR recognise that family members must be provided access to the truth about the fate of their missing relatives to avoid ongoing suffering as a result of being deprived of information.<sup>14</sup>

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8 *Velasquez Rodriguez v Honduras (Merits)* Ser C no 4 (IACtHR, 29 July 1988) paras 155, 181 <<https://www.legal-tools.org/doc/18607f/>> accessed 12 September 2023.

9 *ibid*, para 185.

10 Y Gloria Park, ‘Truth as Justice: Legal and Extralegal Development of the Right to Truth’ (2010) 31(4) *Harvard International Review* 24.

11 *Barrios Altos v Peru* Ser C no 75 (IACtHR, 14 March 2001) para 48 <<https://www.legal-tools.org/doc/fl439e/>> accessed 12 September 2023.

12 Yasmin Naqvi, ‘The Right to Truth in International Law: Fact or Fiction?’ (2006) 88(862) *International Review of the Red Cross* 257.

13 *ibid*.

14 Natasha Stamenkovikj, ‘The Truth in Times of Transitional Justice: The Council of Europe and the Former Yugoslavia’ (DPhil thesis, University of Tilburg 2019) 34.

In the late 90s, this issue of enforced disappearances received greater attention. In 1992, the Declaration of the UN General Assembly provided the definition of an "enforced disappearance" offence for the first time 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.<sup>15</sup> Although 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."

Legal protection against enforced disappearances in international law was seen to acquire the recognition of a specific human right "not to be subjected to enforced disappearance."<sup>16</sup> The Disappearance Convention is the most important instrument acknowledging the above right as an autonomous and non-derogable right.<sup>17</sup> The Convention's main aim is the prevention of the enforced disappearances phenomenon through enacting a new framework in international criminal law related to the above widespread practice, considering it as a crime against humanity. One of the most important provisions of the Convention is the definition given to "enforced disappearance," as deprivation of liberty by agents of the state, followed by the refusal to acknowledge the concealment of the fate and whereabouts of the disappeared person. Meanwhile, a separate article deals with the cases of enforced disappearances that can only be ascribed to non-state actors. The Convention requires that member states implement the necessary steps to ensure that an enforced disappearance is regarded as an offence in terms of their criminal law.

Enforced disappearance of persons is considered a continuing offence so long as the perpetrators persist in concealing the fate and the whereabouts of persons who have disappeared, and these facts remain unclarified.<sup>18</sup> The UN stipulates that the breach of an international obligation "has a continuing character and it extends over the entire period during which the act remains not in conformity with the international obligation."<sup>19</sup> Therefore, states must bear responsibility for all violations arising from enforced disappearances and not only for the violations that occurred after the entry into force of the Convention. According to the Convention, most cases should be brought before national courts. The Disappearance Convention criminalises any failure on the part of the authorities to investigate acts of disappearance.<sup>20</sup> Considering the binding force of this

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15 General Assembly Resolution 47/133 of 18 December 1992 'Declaration on the Protection of All Persons from Enforced Disappearance' <<https://digitallibrary.un.org/record/158456?ln=en>> accessed 12 September 2023.

16 General Assembly Resolution 61/177 of 20 December 2006 'International Convention for the Protection of All Persons from Enforced Disappearance' <<https://digitallibrary.un.org/record/589467?ln=en>> accessed 12 September 2023.

17 *ibid*, art 17 para 2/f.

18 *ibid*, art (8) paras 1/b, g.

19 General Assembly Resolution 56/83 of 28 January 2002 'Responsibility of States for Internationally Wrongful Acts' art 14 (2) <<https://digitallibrary.un.org/record/454412?ln=en>> accessed 12 September 2023.

20 General Assembly Resolution 61/177 (n 16) art 6.

human rights instrument, the Convention establishes a mechanism to ensure the Party's compliance with its obligations.

As Scovazzi and Citroni state in their contribution, the crime of the enforced disappearance “affects several people who suffer harm 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.”<sup>21</sup> The Convention considers the relatives of enforced disappeared persons as victims and provides them with two main rights: firstly, the right to “reparation considered as a state obligation to cover material and moral damages,” and, secondly, the right of the primary victim’s relatives to know the truth regarding the circumstances of the enforced disappearance and the location of the disappeared person’s remains.<sup>22</sup> The Convention obligates states’ Parties to take all appropriate measures to search for, locate, and release disappeared persons and, in the event of death, to locate, respect, and return their remains as the duty derived from the right to the truth.<sup>23</sup>

In this Convention, for the first time in international law, the right to the truth was expressly articulated. According to the Convention, the scope of the “right to know” is related not only to international armed conflicts and interstate duties, but it extends even to the contexts of internal violence.<sup>24</sup> In the framework of these developments, the placement of the right to the truth about enforced disappearances has led some authors to consider it an autonomous right in international law.<sup>25</sup> Regardless of these attitudes and the fact that this right is becoming more firmly entrenched in international human rights law, it should be emphasised that this right is more a principle of International Law of great importance, especially in cases of human rights violations. The ratification of the Disappearance Convention by member states holds them responsible for investigating and unveiling the truth in cases of enforced disappearances and serious violations of human rights, to compensate the victims and their relatives, as well as to inform them about the progress of the investigations and the fate of the missing persons. As also affirmed in the case of *Velasquez Rodriguez v. Honduras*, “only by determining the truth regarding a victim's fate is the ongoing violation finally stopped and the state's duty to investigate satisfied.”<sup>26</sup> In the case of *Jularic vs. Croatia*, the court declared that the state’s failure to establish the truth simultaneously represents a breach of the right to life, as guaranteed in the ECHR.<sup>27</sup>

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21 Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* (Martinus Nijhoff Pub 2007) 98, 258.

22 General Assembly Resolution 61/177 (n 16) art 18 (1) para g, art 24 (2).

23 *ibid*, art 24 (3).

24 *ibid*, art 1 para (2).

25 Eduardo Ferrer Mac-Gregor, ‘The Right to The Truth as an Autonomous Right Under the Inter-American Human Rights System’ (2016) 9(1) *Mexican Law Review* 136, doi:10.1016/j.mexlaw.2016.09.007.

26 *Velasquez Rodriguez v Honduras* (n 8) para 181.

27 *Jularic v Croatia* App no 20106/06 (ECtHR, 20 January 2011) para 51 <<https://hudoc.echr.coe.int/eng?i=001-102904>> accessed 10 September 2023.

The hierarchy achieved by the right "not to be subjected to enforced disappearance" in international law was recognised by IACtHR standings, confirming that the above-mentioned right should be viewed as *jus cogens* norm.<sup>28</sup> The acquisition of such a status in International Law has also been endorsed by many researchers who consider it to have attained *jus cogens* status. One of these scholars is Jeremy Sarkin, who thoroughly surveys the meaning, context, development, and status of enforced disappearances as *jus cogens* in International Law, obligating member states to take active measures to avoid and investigate instances of it.<sup>29</sup>

Albania ratified the Convention several weeks after receiving approval from the General Assembly of UN by the Law no. 9802/2007.<sup>30</sup> The international law in Albanian legal order is of a higher position than the domestic law. Article 122 of the Albanian Constitution foresees that international law applies directly, except when it is not self-executable, and its application requires the promulgation of a law.<sup>31</sup> The domestic legal approach related to protection from enforced disappearance requires the promulgation of a law that criminalises the enforced disappearance offence. In addition, dealing with the issue of disappearances that happened during the communist regime in Albania as an open legal and social challenge requires additional legal and institutional measures that will be analysed in the following parts of the study.

### 3 CONTOURING THE SCOPE OF THE RIGHT TO THE TRUTH ABOUT SERIOUS RIGHTS VIOLATIONS IN INTERNATIONAL SOFT LAW

The right to the truth emerged in international law in the context of enforced disappearances, but this right is of great importance in all serious violations of human rights. As discussed above, the birth of the right to the truth in the framework of all serious human rights violations is dedicated to the contribution of human rights courts, especially IACtHR and, later, ECtHR. An immense contribution is given by several UN policy documents which have extended the scope of the right to truth beyond that recognised by the Protocol of the Geneva Convention. According to the *Impunity Principles of 1997* and the revised ed. of 2005 as non-binding guiding instruments, the right to know the truth about past atrocities is considered "an inalienable and an imprescriptible right of the

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28 *Goiburú et al v Paraguay (Merits, Reparations, and Costs)* Series C no 153 (IACtHR, 22 September 2006) <<https://www.legal-tools.org/doc/e1a617/>> accessed 20 February 2024.

29 Jeremy Sarkin, 'Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law' (2012) 81(4) *Nordic Journal of International Law* 564, doi:10.1163/15718107-08104006.

30 Law of the Republic of Albania no 9802 of 13 September 2007 'For the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance' [2007] *Official Journal of the Republic of Albania* 125/3551.

31 Constitution of the Republic of Albania no 8417 of 21 October 1998 <<http://qbz.gov.al/eli/ligj/1998/10/21/8417>> accessed 20 June 2023.



victims, their families, and relatives, and it is not conditioned by any legal proceedings."<sup>32</sup> The *Impunity Principles* consider the right to truth as a collective right, retrieving information from history to prevent violations from occurring again in the future. The principles declare that society has the right to know the truth about serious human rights violations, while the state has the responsibility to preserve the memory and further people's knowledge of its historical oppression as part of its heritage.

Another important international law source, *Basic Principles on the Right to a Legal Remedy and Reparation*, adopted in 2005, considers the right to the truth an element of satisfaction in the framework of the general right of remedies and reparations for victims of gross violations of international human rights law. Satisfaction stands among others for "verification of the facts and full and public disclosure of the truth..."<sup>33</sup> The right to the truth, according to *Basic Principles*, focuses on the causes leading to victimisation and on the causes and conditions of the gross violations of international human rights law. This right belongs to the victims, their representatives, and the public, so that factual truth about gross violations of human rights might be publicly disclosed. These standings of the UN soft law became part of the IACtHR standings in the case of *Bamaca Velasquez v Guatemala*, underlining that: "in addition to being an individual right, the right to the truth also belongs to society as a whole."<sup>34</sup> Later, they were used by ECtHR, stating that "where allegations of serious human rights violations are involved in the investigation, the right to the truth does not belong solely to the victim of the crime and his or her family but also to the other victims of similar violations and the general public."<sup>35</sup>

Contouring State obligations in cases of enforced disappearances and serious violations of fundamental rights in international law have contributed to the design of truth-seeking measures and policies to deal with the bitter past. State-driven truth-seeking measures, although closely related to the pillar of truth, do not emerge exclusively from the right to truth, but rather are considered instruments for guaranteeing human rights in a transitional context. From the point of view of the right to the truth, the Convention recognises the

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32 Louis Joinet, 'Question on the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Pursuant to Sub-Commission Decision 1996/119, Annex II' (2 October 1997) <<https://digitallibrary.un.org/record/245520?ln=en>> accessed 12 September 2023; Diane Orentlicher, 'Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity' (8 February 2005) Principle 3, 17 <<https://digitallibrary.un.org/record/541829?ln=en>> accessed 12 September 2023.

33 General Assembly Resolution 60/147 of 21 March 2006 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' para 22 <<https://digitallibrary.un.org/record/563157?ln=en>> accessed 12 September 2023.

34 *Bámaca-Velasquez v Guatemala (Merits)* Ser C no 70 (IACtHR, 25 November 2000) paras 197, 495 <<https://www.legal-tools.org/doc/e1f6bb/>> accessed 12 September 2023.

35 *Nashiri v Poland* App no 28761/11 (ECtHR, 24 July 2014) <<https://hudoc.echr.coe.int/eng?i=001-146044>> accessed 12 September 2023.

state's obligation to investigate cases of enforced disappearances, focusing only on clarifying the fate of the disappeared persons, extending this obligation until the above-mentioned objective is fulfilled. Thus, the right to the truth emerges from the state's obligation to respect the dignity of human beings, which institutes a duty to investigate and undertake all necessary means to effectively inform the families about the fate and whereabouts of their missing relatives. The duty to investigate, among others, aims to recover truth for the relatives of victims and to alleviate their suffering.

This duty to investigate applies not only to cases of enforced disappearances but to all other serious violations of human rights. In *Velasquez Rodriguez v. Honduras*, IACtHR indirectly implied that the state's obligation to investigate extends beyond cases of enforced disappearances to all serious human rights violations.<sup>36</sup> Of the same opinion, scholars including Naqvi and Stamenkovikj argue that the duty to investigate applies to all violations of human rights.<sup>37</sup> The duty to investigate does not arise solely as an explicit standard for guaranteeing the right to the truth per se, but it also emerges as a standard for safeguarding other fundamental rights, such as the right to life and the right not to be subjected to torture or degrading treatment. The duty to investigate works to give effect to the criminal accountability of perpetrators and the right to aid the victims. The establishment of the truth related to past atrocities and the guilt of the perpetrators should result in criminal investigations and trials. Thus, the right to know who perpetrated the serious violations might be considered in the context of the right to justice, focusing on the tool of criminal prosecution and punishment of past atrocities, besides other tools of a non-judicial character.

Secondly, as the UN emphasises that the right to know the truth about human rights violations serves to end impunity and promote human rights, considering that the judiciary system has a priority mandate to investigate, while the restorative mechanisms of transitional justice are limited to pursuing a complementary mandate alongside the judicial instances.<sup>38</sup> Thus, the right to the truth should be pursued through both judicial and nonjudicial mechanisms. The eradication of impunity about human rights abuse is in the best interest of society as a whole. To satisfy this social need, it is necessary to understand the whole truth about the events and define the corresponding individual responsibilities. To this end, both measures exceed the sphere of the individual interest of the victims.

Thirdly, the state must preserve the memory of the unfortunate past as a form of historical justice and a way to unveil the truth that eases the pain of the victims and contributes to raising awareness among the new generation. As the UN's *Impunity Principles* emphasise people's knowledge of its historical oppression as part of its heritage, so it is also the "state's

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36 *Velasquez Rodriguez v Honduras* (n 8) para 181.

37 Naqvi (n 12) 249; Stamenkovikj (n 14) 42.

38 Human Rights Council Resolution 21/7 of 10 October 2012 'Right to the Truth' paras 1, 4 <<https://digitallibrary.un.org/record/736871?ln=en>> accessed 12 September 2023.

duty to ... preserve the collective memory from extinction.”<sup>39</sup> Also, *Basic Principles* considers preserving collective memory as serving for reparation and as an element of satisfaction for the harm suffered.<sup>40</sup> Thus, the state must carry out initiatives and policies protecting collective memory as a way of restoring the truth about the bitter past.

Lastly, as already outlined in the UN *Impunity Principles of 1997*, after the fall of a repressive regime, the new democratic state must give effect to the processes of discovering the truth, thereby establishing mechanisms and models of truth revelation, such as preservation of the archives and providing access to them.<sup>41</sup> *Basic Principles* considers, as a standard of reparation, the state's obligation to develop means of informing the general public on the causes leading to their victimisation and on the causes of the gross violations of international human rights law.<sup>42</sup> Revealing information contained in the files contributes to accountability and the historical clarification of the truth. For the states in transition from dictatorship or repression to democracy, disclosure of the files and archival revelations enables a break from the past and provides truth and respect for human rights.

In conclusion, the right to the truth about serious violations of human rights is not closely bound to the precise wording of particular treaties, but it was vindicated by case law, soft law, and doctrinal contributions. Even though it emerged in the context of enforced disappearances, a series of legal documents of international law made it clear that the right to the truth is of great importance in all serious violations. The truth, together with justice and reparations, are the main pillars that guarantee a complete and sustainable solution to dealing with past human rights violations.

The clear linkage between the right to truth and the preservation of human dignity makes it stand on the threshold of a legal principle and a claim. The right to the truth holds authorities accountable for implementing effective measures and offers the victims and society a tool to instigate truth-seeking processes. Unveiling the truth is an obligation and not an option for states where violations of human rights have occurred. In a transitional context, the right to the truth requires states to prosecute past atrocities and punish the perpetrators. In societies with a history of gross human rights violations, the elucidation of the truth from the perspective of the victim appears to surpass the criminal investigations in importance because it urges a broad official response to rights abuse through establishing mechanisms and models of truth revelation. The right to the truth constitutes a legal basis for the victims and their relatives to submit requests for information and benefit from reparations.

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39 Orentlicher (n 32) Addendum, principle 3.

40 General Assembly Resolution 60/147 (n 33) para 22 g.

41 Orentlicher (n 32) Addendum, principle 4.

42 General Assembly Resolution 60/147 (n 33) para 24.

## 4 THE POLITICS OF TRUTH REVELATION ABOUT SERIOUS HUMAN RIGHTS VIOLATIONS IN ALBANIA

Dealing with the serious violations of human rights and the manipulation of the truth is not only a political, moral, and historical goal, but it is, above all, a legal one. On the domestic level, the protection of human dignity and personhood and fundamental human rights contributes toward achieving justice, unveiling the truth, and dismantling the manipulations built over the decades under the communist regime. The new democratic state must respond to the individual and collective demand for justice and truth by investigating criminal practices, identifying their authors, and evaluating their consequences. While international law has posed normative pressures on domestic jurisdictions to uncover the truth about the past atrocities, the fundamental question remains: what is the solution that Albanian domestic legislation has given to this matter, and how efficient is it?

The following discussion aims to make a detailed analysis regarding how far justice and the truth, especially, has been unveiled through the criminal prosecution and trials of the perpetrators of the communist crimes and to identify what measures have been carried out during the years to track the buried truth, identifying and finding the remains of the missing persons.

### 4.1. Finding the Truth about Past Human Violations by Using Criminal Law

In a democratic state, judicial truth is the highest and most undisputed form of the truth. In the post-communist society, criminal law is the most useful tool to prosecute serious human rights violations. Criminal proceedings and trials of the perpetrators of previous crimes are usually the first, most prominent instruments of unveiling the truth because they intend to collect evidence, facts, and testimonies about past serious violations. This idea is also endorsed by Stevens, who states that through criminal proceedings and trials, "the truth of what happened is hopefully revealed and the victim's story told."<sup>43</sup> Trials might make an immense contribution to strengthening the rule-of-law by demonstrating that previous serious human rights violations are punished, state actors do not benefit from impunity, and the truth about the most serious atrocities is unveiled.

Scholars support the idea that criminal proceedings of the responsible perpetrators contribute to society through what Antkowiak<sup>44</sup> articulates as guaranteeing non-repetition of gross human rights violations and demonstrating that such acts are not tolerated, or, as Gamarra considers, "detering ongoing crimes while fostering the rule-of-law and social reconciliation."<sup>45</sup>

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43 David Stevens, 'Dealing with the Past' (2004) 55(3) *The Furrow* 151.

44 Thomas M Antkowiak, 'Truth as Right and Remedy in International Human Rights Experience' (2002) 23(4) *Michigan Journal of International Law* 977.

45 Yolanda Gamarra Chopo, 'Peace with Justice: The Role of Prosecution in Peacemaking and Reconciliation' (2007) 13 *Revista Electrónica de Estudios Internacionales* 17.

#### 4.1.1. Overcoming the Obstacles

Dealing with communist crimes in Albania, as in every jurisdiction, raises the dilemma of whether criminal acts committed by individuals during the communist regime should be prosecuted and punished under the standard criminal code. In this way, the truth about past atrocities may be unveiled through the criminal prosecution of the perpetrators. The main concern surrounds how to overcome the basic obstacles related to principles of criminal law, like "*nullum crimen sine lege*" and the "statutory limitations." To respond to these two challenges, it is necessary to analyse the typology of the crimes committed during the communist period, thereby discussing the way they should be qualified under international and domestic law. It is generally accepted that communist regimes have committed massive violations of human rights. Several international documents consider these atrocities as genocide and crimes against humanity.<sup>46</sup> Likewise, in domestic law, it is also accepted that the totalitarian communist regime of Enver Hoxha, who governed Albania after the Second World War until 1990, was characterised by a "massive violation of human rights, individual and collective murders and executions (with and without trial), deaths in concentration camps, deaths from starvation, torture, deportations, slave labour, physical and psychological terror, genocide due to political origins..."<sup>47</sup>

Several international law instruments ratified by Albania during the communist era, such as the International Convention on the Prevention and Punishment of the Crime of Genocide of 1948<sup>48</sup> and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,<sup>49</sup> constitute the legal foundation in international law, with the force of *jus cogens*, which renders genocide punishable. These binding instruments explicitly provide for individual criminal responsibility or require

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46 Parliamentary Assembly Resolution 1481 of 25 January 2006 'Need for International Condemnation of Crimes of Totalitarian Communist Regimes' para 2 <<https://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=17403&lang=en>> accessed 12 September 2023; European Parliament Resolution P6\_TA(2009)0213 of 2 April 2009 'On European Conscience and Totalitarianism' paras 4, 7 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009IP0213>> accessed 12 September 2023.

47 Law of the Republic of Albania no 7514 of 30 September 1991 'On the Innocence, Amnesty and Rehabilitation of Ex-Convicts and Politically Persecuted' [1991] Official Journal of the Republic of Albania 7, Preamble. See also, Resolution of the Parliament of Albania no 11/2006 of 30 October 2006 'On the Punishment of Crimes Committed by the Communist Regime in Albania' [2006] Official Journal of the Republic of Albania 117/4669, para 2; Resolution of the Parliament of Albania of 3 November 2016 'On the Condemnation of the Crimes of Communism Against the Clergy, as well as the special gratitude for the role and activity of the clergy in the defense of democratic values and basic human rights and freedoms' [2016] Official Journal of the Republic of Albania 217/22764.

48 General Assembly Resolution 260(III)A of 9 December 1948 'Convention on the Prevention and Punishment of the Crime of Genocide' art 2 <<https://digitallibrary.un.org/record/666848?ln=en>> accessed 12 September 2023.

49 General Assembly Resolution 2391(XXIII) of 26 November 1968 'Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity' <<https://digitallibrary.un.org/record/202665?ln=en>> accessed 12 September 2023.

states to consider an act a crime under domestic law, as does the Albanian Criminal Code and Albanian Genocide Law.

Also, the Nuremberg Charter and the case law of the Nuremberg Trial represent an important basis for prosecuting and punishing communist atrocities.<sup>50</sup> The Nuremberg case law demonstrated that the punishment of any person who committed acts against human rights that constitute criminal offences according to international criminal law might be allowed, independent of domestic law not considering them as criminal offences at the time of their commitment. Everyone involved in acts of violence against human rights that constitute criminal offences under international law should be held responsible and cannot claim to be free from the charges based on the argument that they were acting under orders. In the same vein, the Parliamentary Assembly of the Council of Europe (PACE) urged domestic jurisdictions toward prosecuting communist crimes, arguing that the “statute of limitations for some crimes can be extended since it is only a procedural, not a substantive matter.”<sup>51</sup>

ECtHR, in its case law, considers that it “...is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticised for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.”<sup>52</sup> Also, in other cases, the Court adopted the same approach, confirming that “even if the acts committed by the applicant could have been regarded as lawful under the law at the material time, they were nevertheless found to constitute crimes against humanity under international law at the time when they were committed.”<sup>53</sup>

The instruments of international criminal law and the principles they embody impose the obligation to prosecute and punish serious violations of human rights on the states, regardless of the internal juridical regime. No one can claim that the actions committed, which constitute war crimes, crimes against humanity, and genocide according to international criminal law, were legal in the framework of domestic law. Thus, international criminal law constitutes the foundation upon which criminal acts committed by

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50 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal (signed London, 8 August 1945) art 6 <<https://www.refworld.org/legal/agreements/un/1945/en/56517>> accessed 20 September 2023.

51 Parliamentary Assembly Resolution 1096 of 28 June 1996 ‘Measures to Dismantle the Heritage of Former Communist Totalitarian Systems’ para 7 <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16507>> accessed 12 September 2023.

52 *Streletz, Kessler and Krenz v Germany* App nos 34044/96, 35532/97, 44801/98 (ECtHR, 2001) para 81 <<https://hudoc.echr.coe.int/eng?i=001-59353>> accessed 20 September 2023.

53 *Kolk and Kislyiy v Estonia* App nos 23052/04, 24018/04 (ECtHR, 17 January 2006) <<https://hudoc.echr.coe.int/eng?i=001-72404>> accessed 20 September 2023. See also, James A Sweeney, ‘The Elusive Right to Truth in Transitional Human Rights Jurisprudence’ (2017) 68(2) *International and Comparative Law Quarterly* 353, doi:10.1017/S0020589317000586. 55.

ex-communist officials during the dictatorship period might be prosecuted and punished under domestic criminal law. International criminal law represents the most important tool for establishing justice, eradicating the culture of impunity, and clarifying that every perpetrator will be brought to justice, sooner or later. The criminal prosecution and trials serve to the unveiling of the truth, shedding light on the bitter past and leaving strong traces in the history of a country.

#### 4.1.2. Legal Foundations of Pursuing and Punishing Past Communist Crimes in Albania

The change of Albania's political system in 1992 brought forth a new era. The large scale and the long-term communist repression provided for a high social demand and expectation that the new constitutional and legal architecture would be guided by the highest values of humanity, including protection of human rights, rule of law, human dignity, justice, peace, and truth.<sup>54</sup>

The first traces of legal measures attempting to handle the communist crimes in Albania were embedded in Law No. 7514, dated 30.09.1991, "On the innocence, amnesty and rehabilitation of ex-convicts and politically persecuted." This law indirectly recognised the criminal activities of the communist regime in Albania, apologized to the Albanian people, recognised the human rights violations that occurred during the communist regime, and, thereby, provided amnesty for the persons convicted on political charges and restoration for the victims or their families. This law sanctioned the creation of a commission with the participation of members of the Parliament and Government, judiciary officials, and members of the Association of Former Political Prisoners. This commission was foreseen to examine and register state political crimes that happened during the communist regime. Such an act did not produce any effect, therefore remaining a formal statement on paper. The initial approach adopted by Albania in dealing with communist crimes was an important step compared to other former communist countries, but concrete measures failed to follow.

The criminal prosecution of former high-communist officials, was initially focused only on crimes of an economic nature due to the lack of a legal domestic provision for punishing communist crimes. In 1994, before the adoption of the New Criminal Code, 24 former high-communist officials were punished for crimes of an economic nature. In January 1995, Albania adopted Law No. 7895, dated 27.01.1995, called "Criminal Code of the Republic of Albania," which created the legal basis to prosecute and punish communist crimes, qualifying them as crimes against humanity. According to this law, "Murder, enforced disappearance, extermination, enslaving, internment and expulsion and any other kind of human torture or violence committed according to a concrete premeditated plan or systematically, against a group of the civil population for political,

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54 Law of the Republic of Albania no 7692 of 31 March 1993 'On an Amendment to Law no 7491 of 29 April 1991 "On the Main Constitutional Provisions"' [1993] Official Journal of the Republic of Albania 3, Preamble; Constitution of the Republic of Albania (n 31) Preamble, arts 21, 25.

ideological, racial, ethnical and religious motives, shall be punishable to not less than fifteen years of prison or life imprisonment.”<sup>55</sup>

The second attempt at the prosecution of the communist crimes in Albania began in 1995 with the approval of Law No. 8001, dated 22.09.1995, "On genocide and crimes against humanity committed in Albania during the communist regime for political, ideological and religious reasons." This law explicitly sanctioned "the obligation of the prosecutor's office to follow the criminal investigations and proceedings against crimes committed during the communist regime for political, ideological, and religious reasons."<sup>56</sup> A few weeks after the law came into force, 24 high-ranking communist officials were arrested and accused of committing crimes against humanity almost without an investigative process. The defendants were largely the same ex-officials who, a few years prior, had been sued for the economic charges. The trial took place without the presence of the media and was not open to the public. The court banned the opportunity for the victims' claims to be heard, violating their right to participate in the process of seeking the truth and making justice. The Court of First Instance found some of these officials guilty, but the sentence was reduced in the Court of Appeal; in the end, in 1997, the Supreme Court acquitted the defendants, declaring that they could not be held liable for actions that were not illegal at the time they were committed. Even though the prosecution raised such a serious charge, in no case was it able to prove the guilt of the officials arrested for these crimes. As scholars Aliaj<sup>57</sup> and Asllani<sup>58</sup> argue, this decision of the Supreme Court was not in conformity with international law instruments and standards that explicitly provide for individual criminal responsibility in cases of crimes against humanity. Failure to properly apply international and domestic law in punishing the communist crimes relates to the fact that four years after the fall of the regime, human resources in the judiciary system remained almost the same, while the judges newly introduced into this system lacked adequate professional skills.

Albanian and international scholars support the idea that the rush to arrest former high communist officials could not be justified except by the political interests of the ruling party, to target and remove the old caste from politics and to gain votes from the people. Asllani endorses this idea by stating that the "Genocide law was a political tool of the ruling

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55 Law of the Republic of Albania no 7895 of 27 January 1995 'Criminal Code of the Republic of Albania' art 74 <<https://qbz.gov.al/eli/ligj/1995/01/27/7895/49876337-8143-4c8e-bba8-a8620022f231;q=ligj>> accessed 12 June 2023.

56 Law of the Republic of Albania no 8001 of 22 September 1995 'On Genocide and Crimes against Humanity Committed in Albania During the Communist Regime for Political, Ideological and Religious Reasons' art 3 <<https://qbz.gov.al/eli/ligj/1995/09/22/8001/47d8f329-ba05-4ad4-8fad-7f6d4f62827c;q=ligj>> accessed 12 June 2023.

57 Arbora Aliaj, 'Transitional Criminal Justice in Albania: The use of trials and criminal proceedings as a Transitional Justice Instruments' in OSCE and Konrad-Adenauer-Stiftung, *Transitional Justice in Albania: A Compilation of Papers by Young Albanian Researches* (OSCE 2020) 197.

58 Dorina Ndreka Asllani, 'Dilemmas in Using International Law for Pursuing the Communist Crimes: The Albanian Case' in Patrycja Grzebyk (ed), *The Communist Crimes: Individual and State Responsibility* (Instytut Wymiaru Sprawiedliwości 2022) 38.



party because their implementation resulted in the banning of high members of the opposite party from participating in the forthcoming elections.”<sup>59</sup> Austin and Ellison also state in their paper that the “Genocide Law in Albania did not serve its legal purpose. This law was abused and misapplied by the ruling Party and then quickly dismantled and rendered meaningless in 1997 with the coming to power of ex-communist political forces.”<sup>60</sup> The above-mentioned law did not constitute a new legal basis for the prosecution of communist crimes because this basis had already been created several months before with the entry into force of the Criminal Code. Rather, it represented a political strategy of the ruling party to hit their opponents. The purpose of this law was not the prosecution of communist crimes, but the exclusion from the electoral process that would take place a few months later of the political opponents involved in criminal proceedings. Criminal law, as a form of enacting justice and revealing the truth about communist crimes in Albania, proved to be a substitute for political justice.

In recent years, several initiatives have been carried out to bring justice and unveil the truth about the challenging past as soon as possible, but these approaches serve more historical justice and truth than individual ones. Through the creation of public mechanisms, such as the Institute for the Study of Crimes and Consequences of Communism and the Authority of Former State Security Files, institutional action was meant to serve the cause of justice and truth by giving the opportunity for access to secret files to the victims and society, analysing crimes committed, identifying perpetrators, and, if possible, referring them for criminal prosecution.<sup>61</sup> These institutions played an important role in enabling the victims and society, especially the young generation, to learn the truth about the criminal communist past, but have made vague attempts in referring perpetrators of communist crimes to the prosecution office. Such an apathetic attempt to identify and sue those responsible for communist crimes was made in 2019 when the Institute referred one criminal report against a former prison high-ranking official, who had emigrated in the '90s, to the prosecution office. Even though 4 years have passed since then, nothing is publicly known about the progress of the criminal investigations of this case.

#### 4.1.3. Evaluating the Politics

The criminal investigations and trials of the perpetrators of the communist crimes would be the most important tools with a significant impact on restoring justice and truth and, especially, raising Albanian society's awareness of the scale of the communist atrocities.

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59 *ibid* 37.

60 Robert C Austin and Jonathan Ellison, 'Post-Communist Transitional Justice in Albania' (2008) 22(2) *East European Politics and Societies* 386.

61 Law of the Republic of Albania no 10242 of 25 February 2010 'On the Institute of Studies on the Crimes and Consequences of Communism in Albania' [2010] *Official Journal of the Republic of Albania* 30/1013; Law of the Republic of Albania no 45/2015 of 30 April 2015 'On the Right to Information about the Documents of the Former State Security in the People's Socialist Republic of Albania' [2015] *Official Journal of the Republic of Albania* 88/4671.

Criminal justice would serve to unveil the truth, making an immense contribution to the victims' reparation, helping social reconciliation, and preventing similar scenarios from happening in the future. The scale of human violations that happened during a long repressive communist regime in Albania laid out high expectations regarding the measures to be included in the transitional legal framework. The real steps undertaken to prosecute and punish communist crimes were far from the expectations.

Albanian society has failed to punish the perpetrators of the past communist atrocities. When crimes of the past are not properly prosecuted, doubtlessly truth becomes a victim on its own. The failure of Albanian's society to prosecute and punish communist crimes was also confirmed in 2006 by the Parliament. The Albanian Parliament made a "*mea culpa*," admitting that the fall of the communist regime in Albania was not followed by an investigation of the crimes committed by that regime, especially since the perpetrators of these crimes were never seriously confronted with justice, and no public apology was sought to the victims of the communist genocide.<sup>62</sup>

Nowadays, many victims and perpetrators are no longer alive, making it difficult or impossible to initiate criminal proceedings. Even though the crimes committed by ex-communist officials were not prosecuted and punished, this process still should not be considered impossible to achieve. The prosecution system in Albania should play a more proactive role in pursuing communist crimes through its discretion. Victims of communist violence and the state-mandated institutions created to provide evidence of the communist crimes have the right, and, at the same time, the duty to refer every identified case to the criminal prosecution office. The justice system at the domestic and international level can make a valuable contribution in this direction.

In Albania, since the criminal trials did not produce the desired effect, the social demand to analyse, study, and provide evidence of communist crimes, as well as their consequences, with any appropriate means, is imperative. The Parliament estimated that the awareness of the Albanian public opinion, especially of the young generation, about the inhumane crimes committed by the communist regime was quite poor.<sup>63</sup> Therefore, the Parliament invited studies of a historical character to enable an objective verification of the history of Albania during the communist dictatorship, as well as called for the drafting of a national strategy for eliminating the consequences of half a century of totalitarianism in Albania. The evaluation of the communist period and the communist crimes should not be left only to the judgment of researchers and historians, but it needs timely intervention from the state through other policies, like public access to the files of the former state secret service, and the study of communist crimes to raise historical awareness of the bitter past. Such initiatives might serve justice and, above all, the truth. Thus, Albanian society faces the challenge swiftly seeking historical justice for the truth about the past to be transmitted across generations through collective memory and memory practices.

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62 Law of the Republic of Albania no 7514 (n 47) art 4.

63 Resolution of the Parliament of Albania no 11/2006 (n 47) art 5.

## 4.2. The Politics of Truth about the Missing Persons from the Communist Era

During the communist era in Albania, resulting from the persistent freedom infringement, more than 6,000 persons were categorised as missing. The people's disappearance under the communist regime was part of a state demonic strategy of terror, fear, and violence, punishing the political opponents or so-called "enemies of the people" even after their death and not allowing the "victims" to have a grave or informing the family members of their fates. Most of the disappearances in Albania occurred under circumstances such as a) the execution based on a court decision with capital punishment according to the law of the time, b) being killed at the state border, c) dying in prisons as a result of torture, d) dying in internment camps or medical or rehabilitation institutions as a result of slave treatment, etc., e) shootings without trial, or f) arrests and detention of the persons by secret police, then dying as a result of torture, etc. All these forms of state repression that led to the disappearance of the persons happened randomly during the period of dictatorship in Albania.

In a transitional context with a history of gross human rights violations, socio-political needs urge one to consider in which way the issue of missing persons can best be addressed. Tracing the missing people is crucial to maintaining and restoring basic human rights, supporting their families is also an act of respect for the dead. Above all, tracing the missing persons from the Communist Era stems from the Disappearance Convention. This is because the prohibition of enforced disappearance and the corresponding state obligation to investigate establish the fate and whereabouts of the disappeared, punish the responsible perpetrators, and attain the status of *jus cogens* in international law. This state obligation enjoys a higher rank in the international law hierarchy than other obligations arising from serious human rights violations. Inaction or refusal of the state to carry out an investigation and provide information to the relatives of the missing people about the remains of their loved ones causes great suffering and constitutes a breach of the right to life and, simultaneously, an infringement of the right to know the truth. The State is obligated to investigate every situation involving a violation of the rights protected by the international human rights instruments. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction.<sup>64</sup>

Discovering the buried truth, identifying and finding the remains of the missing persons, and bringing the perpetrators before justice is a difficult and lengthy process. The success of it depends primarily on the institutional and political will to address this issue. The investigations into human rights abuses related to the issue of persons who went missing from the communist era should not be left up to solely the unofficial searches and exhumations by family members but should also be part of a well-resourced, state-

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64 *Velasquez Rodriguez v Honduras* (n 8) para 176.

sponsored broader strategy and policy. The domestic legal system should be capable of dealing with cases of disappearances, thereby producing concrete results. The undertaking of legal and institutional measures in this way should not be considered a result, but as a means to achieve the final goal: discovering the truth that was buried many decades ago, giving the victims due respect, and providing the families with the required support.

#### 4.2.1. Overcoming the Obstacles

Enforced disappearances that happened during the period of dictatorship in Albania constitute a continuing violation of many rights under several documents of international law. The investigation of these cases represents an important obligation stemming from the Disappearance Convention. Undoubtedly, the criminal investigation of missing persons is the primary method to discover the circumstances of the disappearance, identify the responsible perpetrators, and search, find, and identify the victims. The results of the investigations might condition the legal qualification of the offence. Nevertheless, cases of disappearances resulting from a widespread or systematic attack against a civilian population during the communist regime might be qualified as crimes against humanity. This is also asserted by the Rome Statute of the International Criminal Tribunal.<sup>65</sup> Therefore, as previously discussed, international and domestic law makes it possible to prosecute and punish crimes against humanity, regardless of obstacles such as "*nullum crimen sine lege*" and "statutory limitations."

Thus, as determined by the Disappearance Convention and argued by IACtHR, even in the case that the individual responsible for crimes of this type cannot be legally punished under certain circumstances, the state is obliged to use the means at its disposal to inform the victims' relatives about their fate and whether they were killed, as well as the location of their remains.<sup>66</sup> Therefore, the state has the obligation to organise the internal legal and institutional system to respond to this obligation. From this point of view, when dealing with the issue of missing people from the communist era, the main problem to resolve is how to reach the burial places, overcoming two difficult obstacles: time and silence. The combination of these factors makes finding the remains of the missing persons very difficult. In the Albanian context, there has been a lack of information for several decades about the missing people. Such a long period creates a large challenge in collecting information and identifying the victims. Therefore, the use of traditional methods, such as the publication of the identity of the missing persons, undertaking campaigns to collect information from the public, etc., are ineffective.

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65 Rome Statute of the International Criminal Court (adopted 17 July 1998) art 7 <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en)> accessed 12 June 2023.

66 *Velasquez Rodriguez v Honduras* (n 8) para 181.

The other obstacle to overcome is breaking the silence. The question arises on how to strike a balance between the right to collect valuable information about the remains of missing persons and the necessity to retrieve such information from persons who know about their fates. The concern is how to make the executioner, collaborator, or their relatives speak up and tell the truth. To achieve this goal, it will be necessary to use incentive-based approaches to have them offer information instead of allowing them to remain silent. This approach, which is currently also used in criminal law, can be a valid tool, although ethically questionable, because it can present itself as rewarding the author for the crime committed. Thus, the administrative proceedings approach may be more appropriate to be adopted. In this view, the administrative proceedings can also serve as a necessary preliminary tool for initiating the criminal investigation.

#### 4.2.2. Constitutional and Legal Basis of the Missing Persons from the Communist Era

The obligation to search for and discover the remains of persons considered missing during the communist dictatorship stems from values and principles that constitute important cornerstones in Albanian constitutional architecture. From a broad legal interpretative point of view, guaranteeing the principle of justice and peace and basic human rights, like the right to life, as well as the prohibition of torture, cruel, inhuman, or degrading punishment or treatment gives rise to the state's obligation to deal with the issue of missing persons from the communist era.<sup>67</sup> Also, the constitution imposes the obligation to apply binding international law on the Albanian state. According to the Constitution, any international agreement that has been ratified constitutes part of the internal juridical system and it is implemented directly, except for cases when it is not self-executing, and its implementation requires the issuance of a law.<sup>68</sup>

After the fall of the communist regime in Albania, the issue of missing persons resulting from state repression was not considered a priority. During the period from 1991 to 2013, there was no political and institutional will to address the issue through legal and administrative measures. The remains of the disappeared during this period were found only through the efforts and interest of the relatives of the missing people who engaged with their private moral or material resources in carrying out the complicated process of gathering information about the remains and their exhumation. Cooperation between the families of the missing persons and the state institutions, like the State Police, the Institute of Forensic Medicine, and the Prosecution Office could be traced only in the final stage of this process, that of exhumation after the discovery of the remains. The involvement of such state structures was mandatory due to the provisions of the Criminal Procedural Code, which sanctioned that where unidentified remains are found, a criminal investigative

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67 Constitution of the Republic of Albania (n 31) Preamble.

68 *ibid*, arts 5, 122.

procedure must be initiated to identify the circumstances of the disappearance, the identity of the victims, the responsible perpetrators, etc.<sup>69</sup>

The first legal step in tracing the remains of the missing persons was the ratification by Albania of the UN International Convention, "On the Protection of All Persons from Enforced Disappearances," in 2007.<sup>70</sup> According to the Albanian Constitution, international law is of a higher ranking position than domestic one, providing the obligation of the Albanian state to implement international law. The Convention imposes important obligations on the Albanian state to clarify the issue of the persons who went missing during the communism period, and this responsibility lasts until the fate and whereabouts of the victims are verified. The second step was taken in 2013, fulfilling the obligation stemming from the Disappearance Convention by criminalising the offence of enforced disappearances under the Albanian Criminal Code by the Law No. 144/2013.<sup>71</sup> It was only in 2015 that a state unit was established to deal with the issue of the remains of the missing persons by the Institute of Politically Persecuted Persons. The main purpose of setting up this mechanism was to create an initial database of missing persons. Another legal progress was achieved in 2018 with the ratification by Albania of the cooperation agreement between the Council of Ministers of the Republic of Albania and the International Commission on Missing Persons (ICMP).<sup>72</sup> According to this act, ICMP undertakes assisting the Albanian government in drawing up the list of missing persons and their family members, thereby providing technical assistance and regularly informing the families of missing persons about the recovery and identification of the remains.<sup>73</sup>

Important progress was made in 2020 in clarifying, by law, the meaning of the term "missing person from the time of communism."<sup>74</sup> The law has given the same definition to the persons that are considered missing under communism as to those considered enforced disappeared, according to the Disappearance Convention. The clarification by the law of the notion of missing persons during communism enables an accurate identification of the victims included in this category by the public institutions in charge

69 Law of the Republic of Albania no 7905 of 21 March 1995 'Criminal Procedure Code of the Republic of Albania' art 200, para 2 <<https://qbz.gov.al/eli/ligj/1995/03/21/7905/def27cc2-ec71-458f-aec6-fa2a1f0b56c8;q=ligj>> accessed 22 June 2023.

70 General Assembly Resolution 61/177 (n 16); Law of the Republic of Albania no 9802 (n 30).

71 Law of the Republic of Albania no 144/2013 of 2 May 2013 'For some additions and changes in the law no 7895, dated 27.1.1995 "Criminal Code of the Republic of Albania", amended' [2013] Official Journal of the Republic of Albania 83/ 3526, art 2.

72 Law of the Republic of Albania no 83/2018 of 15 November 2018 'For the ratification of the cooperation agreement between the Council of Ministers of the Republic of Albania and the International Commission on Missing Persons (ICMP)' [2018] Official Journal of the Republic of Albania 172/12074.

73 *ibid*, art 2.

74 Law of the Republic of Albania no 114/2020 of 29 July 2020 'For some changes and additions to the law no 45, dated 30.4.2015 "On the right to information about the former state insurance documents of the People's Socialist Republic of Albania"' [2020] Official Journal of the Republic of Albania 154/9734, art 2, para 4.

and serves as a basis for identifying, searching, and finding the remains of the missing people. This also enables their relatives to make requests for information or reparations to the state competent authorities. Thus, it is useful that the state authorities establish a comprehensive database of missing persons, which might provide reliable information regarding cases of missing persons and allow their families to register missing relatives and exercise their social and economic rights.

The Institute of the Politically Persecuted Persons was not the right mechanism to deal with the issue of missing persons. Considering this, the Albanian government mandated the Files Authority with the administrative investigation of the remains of the missing persons from the communist period in 2022. This state entity, together with the Ministry of the Interior Affairs, cooperated with ICMP.<sup>75</sup> The Files Authority has only recently established a unit to deal with the process of identification and recovery of the remains of missing persons, in addition to launching an online platform for collecting information about them.

Regardless of the legal steps taken during the 30 years of democratic development in Albania, it must be said that on the concrete level, very little has been achieved. The latest exhumation to find and identify the whereabouts of the missing persons from the communist era dates back to 2010 in places called "Mali me Gropa," Dajti Mountain, Tirana. In 2010, the Institute of the Politically Persecuted Persons, after finding 11 plastic bags with human remains thought to have been shot during the communist regime, referred the case to the Tirana Prosecution Office. The latter has registered criminal proceedings no. 2502/2010 and started investigations for the offence provided for by article 79/dh of the Criminal Code, "Murder in other qualifying circumstances," thus sending the identified human remains to the Albanian Institute for Legal Medicine (ILM) for further examination. ILM confirmed the remains of 13 persons, while DNA identification has not yet been carried out due to the lack of technological infrastructure and the difficulties encountered in this type of procedure. Meanwhile, as it randomly happens, the investigation has been suspended until the examinations are completed. In 2018, the Prosecution Office of Fier registered an investigation for the same criminal offence based on the suspects for a mass grave from the communist period in the village of Panahor, Mallakastër, Fier. No results are yet available from the proceedings of such an investigation, furthermore, exhumation has not begun.

Therefore, it must be said that the process of searching for and discovering the missing persons has almost stalled. No criminal proceedings related to missing persons have been carried forward or have reached the expected success. From this situation naturally arises a strong scepticism as to who will be held criminally responsible for crimes against humanity in these cases, to restore justice and truth.

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75 Law of the Republic of Albania no 72/2022 of 20 October 2022 'For some changes and additions to the Law no 45/2015 "On the right to information about the documents of the former State Security of the Socialist People's Republic of Albania", amended' [2022] Official Journal of the Republic of Albania 154/18649, art 10.

### 4.2.3. Evaluation of the Policy

More than three decades after the fall of the communist regime in Albania, criminal investigations as the most effective tool to deal with the issue of missing persons did not produce any effect, thus they did not serve the cause of justice and truth. There was a lack of institutional will on behalf of the Prosecutor's Office to investigate previous communist crimes. This becomes obvious in the standing articulated by the high representatives of the General Prosecution Office who have argued that the actions carried out by former communist officials under the communist law cannot be qualified as crimes in the present time because the former communist officials acted according to the law applicable at the time.<sup>76</sup> The prosecutor's office also states that they have been handling very old, mostly prescribed crimes, which pose many difficulties in collecting and documenting the evidence related to this issue. As Bllaca and Pilika emphasise, they argue that the perpetrators had acted by the law and then, in force, obstructed the enforcement of the right to the truth and justice.<sup>77</sup>

The lack of institutional will is expressed not only from the point of view of these scholars, but it is also from the point of view of the formal legal aspect. For about 30 years, the Prosecutor's Office has not been organised in such a way that a specific structure by this entity might handle the investigations of communist crimes. On the other hand, there is also a lack of will on behalf of the Parliament of Albania, which monitors the activity of the Prosecution Office. During these three decades, this issue has been mentioned in only a few formal positions of mainly right-wing political forces in the Albanian parliament. In no case has the Parliament of Albania exerted enough pressure and demand for accountability towards the Prosecutor's Office. The Albanian Parliament has not considered utmost priority in providing the Prosecutor's Office with adequate human resources and the needed financial support to intensify investigations on crimes of communism. Intensification of investigations might produce concrete results, helping to clarify and restore justice for the crimes of communism and restoring basic human rights and respect for the victims. The EU progress report of 2020, and those from the 4 years following, also reached the same conclusion, stating that "the Prosecutor's offices failed to conduct any 'ex officio' investigation on missing persons, the resolution of cases has remained low partly due to the lack of capacities and resources and political will is needed to establish an efficient cooperation mechanism among relevant institutions and to enhance public awareness."<sup>78</sup>

76 Gjergj Erebara, Albanian Prosecutor Declines to Probe Communist-Era Disappearances (*Balkan Transitional Justice*, 22 October 2021) <<https://balkaninsight.com/2021/10/22/albanian-prosecutor-declines-to-probe-communist-era-disappearances/>> accessed 25 September 2023.

77 Erinda Bllaca and Anita Pilika, *The Unsolved Issue of the Missing Persons in Albania: A Comparative Study* (Institutit për Aktivizëm dhe Ndryshim Social 2021) 21.

78 Commission Staff Working Document, Albania 2021 Report: Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2021 Communication on EU Enlargement Policy, SWD/2021/289 final, 28 <<https://eur-lex.europa.eu/legal-content/CS/TXT/?uri=CELEX:52021SC0289>> accessed 26 September 2023.



Throughout such a long period, no legal policy has been adopted to deal with the issue of missing persons from the communist period, leaving the relatives of the victims without protection and, thus, not serving the cause of justice and truth. Regardless of some limited measures taken in 2015, it was only in 2022 that the Albanian legislation mandated the Files Authority to administratively investigate this heavy burden of the past. By the end of 2023, the authority had just started the first administrative investigations in search of the graves of the missing people in Kolonje.<sup>79</sup> According to the head of the Files Authority, about 107 possible burial sites of missing persons had been identified through the end of 2023, but no concrete exhumation process had yet begun.<sup>80</sup> In addition to the above-mentioned measures, political will and endorsement are required to provide the File Authority with the necessary financial and human resources to effectively coordinate activities related to the investigation and identification of missing persons from the communist era. The cooperation between the above-mentioned authorities and the ex-communist officials or other persons who might give valuable information on the remains of the missing persons has not yet been properly addressed by the law.

Despite these measures taken, there are no tangible results for the remains of 6,000 missing persons, leaving the truth about their fate buried and converting the issue into a serious concern in the framework of guaranteeing human rights. The failure to investigate and punish communist crimes as serious violations of human rights can lead to international responsibility of the State because of the lack of due diligence to respond to them as required by the international law-binding instruments. The issue of missing persons from the communist dictatorship in Albania remains an open process that calls for justice, accountability, and truth.

Therefore, it is a priority for Albania to adopt legislation that includes provisions protecting the rights of the families of missing persons from the communist era. The Prosecutor's Office ought to guarantee an adequate number of prosecutors entitled to follow the investigations of secret gravesites and of locations where crimes were committed in collaboration with the other institutions in charge of dealing with this issue. Sufficient resources should be allocated to ILM for the examination and identification of missing persons. Incentive-based approaches should be adopted and further utilised by the institutions in charge to gather relevant information from the people involved. The Files authority should be endorsed with the necessary financial and human resources to handle and coordinate effectively activities related to the investigation and identification of all missing persons from the communist era.

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79 'Vrasjet në kufi, AIDSSH nis hetimin e parë administrativ për të zhdukurit në Kolonjë' (*Authority of Information on Secret State Documents of Albania*, 2023) <<https://autoritetidosjeve.gov.al/blog/vrasjet-ne-kufi-aidssh-nis-hetimin-e-pare-administrativ-per-te-zhdukurit-ne-kolonje>> accessed 24 December 2023.

80 Najada Pendavinji and Erald Kapri, 'Institutional Obfuscation Frustrates Search for Communist-Era Victims in Albania' (*Balkan Transitional Justice*, 19 September 2023) <<https://balkaninsight.com/2023/09/19/institutional-obfuscation-frustrates-search-for-communist-era-victims-in-albania>> accessed 25 September 2023.

## 5 CONCLUSIONS

The right to the truth about serious violations of human rights is not closely bound to the precise wording of particular treaties, but it was vindicated by case law, soft law, and doctrinal contributions. The clear linkage between the right to the truth and the preservation of human dignity makes it stand on the threshold of a legal principle and a claim. Knowing the truth “to the fullest extent possible” is extremely important to help communities understand the causes of past atrocities. Unveiling the truth is an obligation, not an option, for states where violations of human rights have been committed. In a transitional context, the right to the truth offers the victims and society a tool to instigate truth-seeking processes and demands from authorities to implement effective measures to guarantee it. If implemented properly, these processes can play a determinant role in establishing the basis upon which justice can be executed.

Albania has experienced a painful past under a criminal communist regime that caused serious violations of basic human rights, a toll of many victims, a significant part of whom are still missing. The transition from a totalitarian (communist) system to a democratic one for Albania was a difficult and complex process due to the lack of resources and, often, the will of the new political elite to carry out institutional reforms in a sustainable manner. During these 33 years of democratic developments in Albania, crimes committed by the communist regime were never investigated, the perpetrators of these crimes never seriously confronted justice, and no public apology was sought for the victims of the communist genocide. The instruments of criminal law in Albania did not produce any “legal truth” about the communist crimes.

The communist system's ideology of violence and terror extended the demonic policy of punishment for the so-called "enemies of the people" even after the death of the person, not allowing the possibility for the “victim” to receive a grave or for the family members to know about the location of their relative's grave. For about three decades in Albania, there was no legal policy dealing with the issue of missing persons during the communist period. The process of finding their remains has been taken over by the family members themselves. It was only in 2022 that the Albanian legislation assigned responsibility to the Files Authority to administratively investigate this heavy burden of the past. Safeguarding the rights of families of the missing persons is fundamental to upholding human rights and the rule of law in post-communist Albania. Until now, there have been no tangible results about the remains of 6,000 missing persons, leaving the truth about their fate buried and turning it into a serious concern in the framework of guaranteeing human rights. The issue of missing persons from the communist dictatorship in Albania still remains an open process that calls for justice, accountability, and truth.

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