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## Transitional Albania

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# The unsolved issue of the missing persons in Albania

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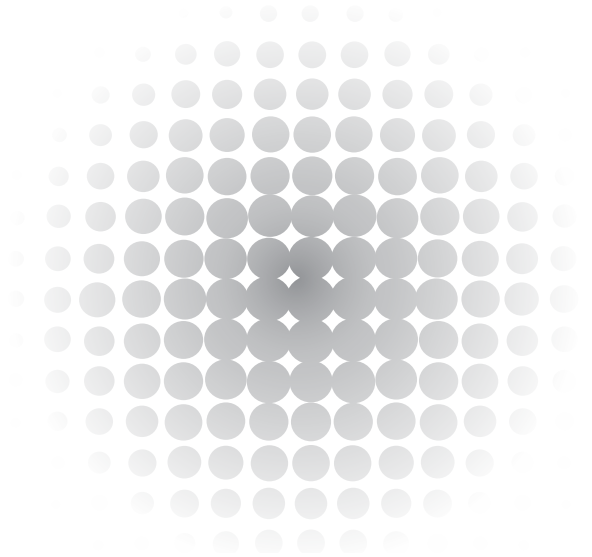
Studim i Institutit për Aktivizëm dhe Ndryshim Social



# **The unsolved issue of the missing persons in Albania**

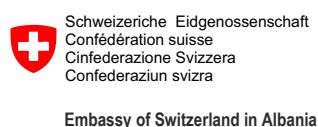
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A comparative study



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Views expressed in this publication are not attributed to the ICMP, EUD and the Government of the Switzerland



Unsolved issue of the missing persons during dictatorship in Albania

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# The unsolved issue of the missing persons in Albania<sup>1</sup>

## EXECUTIVE SUMMARY

This comparative study provides is an effort to identify shortcomings of the Albanian legislation and criminal justice in the challenge of identification of over 6000 missing persons during the communist regime. In a major struggle of duality and legal ambiguity of acknowledgement, the state tents to “throw” the ball from institution to institutions without being able to address the issue, aim for exhaustive solutions and start a process that can bring clarity for the missing truth.

The issue of the missing persons, apart of being considered as a crime against humanity, it is a clear violation of the right to life – a fundamental right, violated randomly during the period of dictatorship in Albania.

According to Article 7/1 of the Rome Statute, the *“enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or*

*whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”.*

This should be the legal definition of the law on the missing persons during the communist regime. And such Article should orient a process of institutional reform with regards to the existing structures, mechanisms and agencies that are legally obliged to address these major un-condemned crimes of the communist past in Albania.

The international law offers unified interpretation with regards to the national mechanisms in implementing and bringing justice to victim families, but it also takes into account the efforts to condemn the crimes against humanity openly and publicly. And in this study, cases of countries in Latin America and closer, Kosovo and Bosnia are brought as a comparison with regards to the role of state institutions responsible for the identification, and effective investigation and prosecution of the cases of the missing persons (accountability measures).

However, a more holistic approach renders visible all the different transitional justice principles that comprise (1) the

<sup>1</sup>This study is a product of the program “Right to truth -fact or fiction”, under the grant agreement SG-WB-APP.2020-008 between International Commission on the Missing Persons (ICMP) and the Institute for Activism and Social Change (IASC). © 2021.

right to justice, (2) right to reparations (pertaining compensation, restitution or rehabilitation of victims of human rights violations), (3) right to know, and the (4) guarantee of Non-Recurrence.

This study stresses the urgent need

to address the unsolved issue of the missing persons by drafting a special law that could incorporate the required holistic approach for this category of the victims of the past dictatorship in Albania.

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## 1. Extrajudicial killings as a legacy of communist regime:

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*The history of Communist regimes and parties, their policies, and their relations with their own national societies and with international community are of course not purely synonymous with criminal behaviours, let alone with terror and repression.*

*Some will say that most of these crimes were actions conducted in accordance with a system of law that was enforced by the regimes' official institutions, which were recognized internationally and whose heads of states continued to be welcomed with open arms. But was this the case of Nazism as well? The crimes we shall expose are to be judged not by the standards of communist regimes, but by the unwritten code of the natural law of humanity.*

Extracted from:

**“The Black Book of Communism: Crimes, Terror, Repression”**

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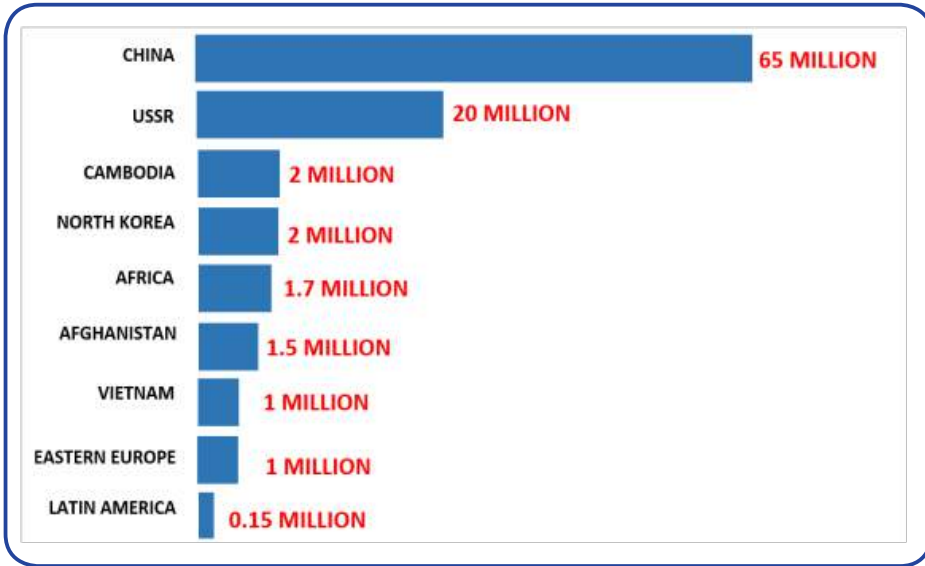
Since 1917, there have been 35 communist regimes across the world and many other attempts to

instill these regimes. All of them failed. Communism began in Russia in 1917 and spread throughout Eastern and Central Europe, China, Vietnam, Cambodia, parts of Africa, Afghanistan, North Korea, and Cuba. In all, it is estimated that communism killed around 100 million people, which is four times those killed by Adolf Hitler and more deaths than in World War I and II combined<sup>1</sup>. It is important to note that people died not as a result of wars but of killings from the system itself. The largest number of deaths stemmed from manmade famines that could have been avoided. As David Satter aptly explained in the Wall Street Journal, communism is “the greatest catastrophe in human history.”<sup>2</sup>

<sup>1</sup>Stéphane Courtois et al., *The Black Book of Communism: Crimes, Terror, and Repression* (Cambridge, MA: Harvard University Press, 1999).

<sup>2</sup> David Satter, “100 Years of Communism—and 100 Million Dead,” Wall Street Journal, November 6, 2017,

<https://www.wsj.com/articles/100-years-of-communism-and-100-million-dead-15100118100>



Data source: Stéphane Courtois et al., *The Black Book of Communism: Crimes, Terror, and Repression* (Cambridge, MA: Harvard University Press, 1999).

A great deal of attention—and rightly so—has been given to a number of contemporary human tragedies such as World War II, the Holocaust, and the Vietnam War to name a few, yet the magnitude of communism’s legacy in terms of human, economic, social, governance, and environmental destruction is not prominently communicated.<sup>3</sup> For example, few know that during 1932–1933 Stalin committed genocide in Ukraine—the Holodomor—that killed between 5–10 million people in this manmade famine.

<sup>3</sup> Paul Hollander, “Reflections on Communism Twenty Years after the Fall of the Berlin Wall,” *Development Policy Analysis, No. 11*, Cato Institute, November 2, 2009, <https://object.cato.org/sites/cato.org/files/pubs/pdf/dpa11.pdf>

In nearly all cases, the Communist regime, after installing it power, oriented a strong governing political Party that had a strong leader who embodied the cause and came to be idolized, often in a cult of personality. Shortly after succumbing to communist control, all countries experienced a sharp decline in living standards, often accompanied by famine and tragic loss of life. A supreme leader with concentrated power emerged and civil rights and freedoms were lost, all in the name of equality. Government posts were considered a way to gain personal benefits and enrichment, not as a service to the citizens. Communism, in the viewpoint of those who promoted it, was destined to reform human society



around the world<sup>1</sup> according to a model that emphasized equality as well as its permanent antagonism. Communist regimes built a refined state mechanism of violence and terror. Violence was considered the only means of gaining power, while terror was necessary to consolidate and perpetuate the power and cult of the individual communist leadership.

ideology and its derivatives to the rest of society is one of the major legacies of communism<sup>4</sup>.

From an historical perspective, Albania came out of the Second World War in a very poor and underdeveloped country. After securing the victory of the elections on December 2, 1945 and establishing the People's Republic of Albania, the regime began to



Denial of fundamental freedoms and rights, social and political to individuals of a category of society was argued by official propaganda as a small price to be paid to touch the unfeasible dream of a society without class, without property and without poverty. The persecution of any individual considered dangerous to the power of communist leadership and the indoctrination with Marxist

show its intentions even more clearly. Starting from January 1945, a series of trials were conducted across the country which were directed against

<sup>4</sup> AIDSHS, 2015 "Framework study On prison system, internment and forced labor during communist regime in Albania with a focus on establishing a museum of memory in the former internment camp in Tepelena" <https://www.undp.org/content/dam/albania/img/Publications/Framework%2520Study%2520for%2520web.pdf+%26cd=1&hl=en&ct=clnk&gl=al&client=firefox-b-d>

the Catholic clergy; social democrats, monarchists, landowners who opposed the application of the Agrarian Reform<sup>5</sup>. Soon, at the dock, will be placed even people who had been part of the National Liberation Movement but clearly expressed dissatisfaction with the policy being applied in Albania. The senior executives of the CPA, to support the consolidation of the totalitarian regime, also created the mechanisms by which the persecution, discovery and elimination of political opponents, whether they were real or imaginary, would be exercised. The People's Protection Directorate and then the State Security would receive a terrible fame in Albania starting in early 1946 to further elaborate promemoria on the political situation, the hostile work of the Catholic clergy and the "reaction" in general as well as the measures taken in this regard.

As in every political regime, the communism in Albania was installed and maintained by the principles entrusted in highest legislative framework. When referring to the Constitution of the People's Socialist Republic of Albania (Law Nr.5506, date 28.12.1976)<sup>6</sup>, one can find there principles of "equality", "inclusion" and "people's power" in all

<sup>5</sup> AIDSSH, F. 1, D. 1070 A, Rexho Plaku's investigative-judicial process,

<sup>6</sup> An accurate Albanian version of the communist constitution is accessible in: <http://licodu.cois.it/?p=383&lang=en>

sections. But what was flagrantly visible to all people was the designation of the Albania's political and social regime as the "dictatorship of proletariat"<sup>7</sup>. Article 4 of the Constitution stated that "The People's Socialist Republic of Albania unceasingly develops the revolution by adhering to the class struggle and aims at ensuring the final victory of the socialist regime over the capitalist regime, at achieving the complete construction of socialism and communism".

Based on strong ideology, by vesting the "power" of the "New Man", the communism in Albania achieved to keep a cruel repression that has repeatedly shown massive human rights violations in the name of these paradox principles of the dictatorship of proletariat.

Murders, as the most serious form against life and security, were recorded in very serious forms. The Criminal Code of Enver Hoxha's regime enumerated 34 crimes punishable by death, including 12 political crimes, such as "escape from the state" (Art. 47), sabotage of the "socialist economy and the organization and administration of the state" ( Art. 53) or "agitation and fascist, anti-democratic, clerical, belligerent and anti-socialist agitation and propaganda" (Art. 55). In 1952,

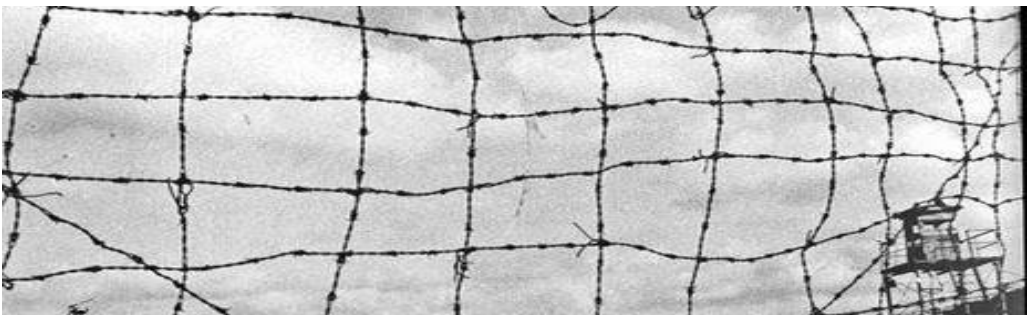
<sup>7</sup> Article 2, 1976 Constitution of the People's Socialist Republic of Albania (Law Nr.5506, date 28.12.1976).

at the time of the “Anglo-American espionage” mania, the death penalty was introduced for all “conspirators against the state.”

Non exhaustive studies show that every three days an Albanian was executed with or without trial for political motives. Every week a political prisoner died in prison from torture. Every two days, three people were interned for political reasons. The sentences were given not only for “activities” against the state or the party, but also for “displaying various ideo-political influences” or for a “bourgeois-revisionist” lifestyle. The Criminal Code provided for the death penalty even in cases where no hostile activity had been undertaken or when the latter had not brought any consequences. The death penalty was also provided for in the articles of the constitution for agitation and propaganda, escape, sabotage in art, culture, etc. During the first years of the dictatorship, discrimination against citizens belonging to the rich strata of Albanian society or families with

an intellectual and political past was widespread.

The communist regime maintained an extensive system of prisons and labour camps, including six institutions for political prisoners, nine for non-political prisoners, and fourteen where political prisoners served their sentences together with regular criminals. Inmates provided the state’s vital mining industry with an inexpensive source of labour. In 1985 there were an estimated 32,000 prisoners in the country. Conditions in the prisons and labour camps were horrific. There are numerous reports that political prisoners died in prisons or labor camps as a result of torture or other causes such as suicide. Even in these cases the bodies were not returned to the family, because in the communist regime the body of the convict remained at the disposal of the state throughout the duration of the sentence even if he died. But, nevertheless, the real purpose was to prevent the turning of the graves of political prisoners into symbolic places for rallies or protests against the Party.



The crime of agitation and propaganda ranked first among other political crimes in later years. The rise and fall of political crimes, especially for agitation and propaganda, seems to depend more on the manner of investigation, proceedings and trials than on real events. In some reports of the General Prosecutor's Office on the legality of the implementation of measures of arrest or detention for political crimes, it is found that problems are raised for violations of procedures and lack of reliance on evidence to prove violations. In a special report of the General Prosecutor, in 12.9.1959, regarding "the mistakes encountered during investigations"<sup>8</sup>, it is stated that the investigation is being performed in filthy premises where fear prevails. The sentences of persons holding party or state positions, during the communist regime, had a chain extension including many other pauses, due to the construction of party and state structures, which in many cases consisted of family, husband and wife, relatives and friends.

In 1990, following serious and widespread public unrest, steps were taken to liberalize the penal code. In May 1990, a politically and ideologically oriented penal code facilitated systematic

violations of human rights and ensured the communist party control over all aspects of Albania's political, economic, and cultural life. Article 53 of the 1982 code, for example, broadly defined sabotage as "activity or inactivity to weaken or undermine the operations of the state and the Albanian Party of Labour, the socialist economy, and the organization and administration of the state and society" —a crime punishable by at least ten years' imprisonment or by death.

The crime of "fascist, anti-democratic, religious, warmongering, and antisocialist agitation and propaganda," as defined by Article 55, carried a penalty of three to ten years' imprisonment or, in wartime, not less than ten years' imprisonment or death. Article 47 stipulated a penalty of not less than ten years or death for "flight from the state" or for "refusal to return to the fatherland." The penal code listed a total of thirty-four offenses punishable by death, of which twelve were political and eleven were military. Although individuals accused of criminal behaviour theoretically had the right to present a defence, they could not avail themselves of the services of a professional attorney; the private practice of law in Albania had been banned in 1967.

<sup>8</sup> *Arkivi Qendror i Shtetit, Fondi Prokuroria e Përgjithshme (492), d.26, v.1959, fl.1*

The number of offenses punishable by death was reduced from thirty-four to eleven, women were exempted from the death penalty, the maximum prison sentence for “anti-socialist agitation and propaganda” was reduced from twenty-five to ten years, the maximum prison sentence for attempts to leave the country illegally also was reduced from twenty-five to ten years, the legal status of lawyers was restored, and the official ban on religious activity was abolished

imprisonment were recognized as years of work for retirement effect; one year in prison equated to two years in prison; prison time was known as hard work. Compensation was settled with securities and only in small amounts in cash. Housing, employment, qualification and education issues for former political persecutors were a priority.

Article 9 of the law provided for the

*The last death sentence for ordinary criminals was handed down in Tirana on March 15, 1995. A few months later, a moratorium was introduced, which led to the final abolition of the death penalty in 1999. In May 1990, all internees were released and this form of punishment no longer remained in force.*

In March 1991, the first pluralist elections held in Albania after World War II were won by the Labor Party. In June 1991, amnesty was granted to all political prisoners.

On September 30, 1991, the People’s Assembly acquitted all former political persecutors of the communist regime, including those who had been executed, imprisoned, or exiled. the same law provided for reparation (compensation) according to the types of punishment.

Law changes over the years: years of

establishment of a Commission with the participation of MPs, members of the government, representatives of judicial bodies and members of associations of former political persecuted to assess the political crimes of the State. This commission also had the task of monitoring the implementation of the law in question.

Over the years, public institutions and relatives of the missing have found about 100 bodies, in some cases

unidentifiable. One of the first discoveries of the remains of those shot was in 1993, near Tirana, where 22 people were found shot for the bomb incident at the Soviet embassy. In 2010, a mass grave was discovered near Dajti Mountain. As a result of exhumations by the Albanian Institute of Forensic Medicine, 13 bodies were found as well as remains, which have not yet been identified.<sup>9</sup> The exhumation was not respecting any of the elements of the Minnesota Protocol<sup>10</sup>.

Ironically, since 1991 time when Communist regime failed on the territory of the Republic of Albania there is no recorded data to confirm any investigated or prosecuted case of enforced disappearance. The crimes of the past on Albania, although over 30 years of the demise of the dictatorship, remain still un-condemned. Albania is yet to deal adequately with the gross human rights violations committed between 1944 and 1991, when thousands of victims suffered from imprisonment, torture, internal exile, executions and enforced disappearances.

## 1. Extrajudicial killings as crime against humanity:

The legal ramifications of crimes committed by a specific country were first confronted in 1945 at the Nuremberg Tribunal, which was organized by the Allies to consider the atrocities committed by the Nazis. The nature of these crimes was defined by Article 6 of the Charter of the International Military tribunal, which identified three major offences: crimes against peace, war crimes and crimes against humanity. And examination of all these crimes committed by the communist regime reveals crimes that fit into each of these three categories.

International Humanitarian Law also provides for obligations to search for the missing. For example, Protocol Additional to the Geneva Conventions of 1977 “requires each party...to search for persons who have been reported missing

<sup>9</sup> *Osteological proofs of torture and cruelty: forensic findings form a secret cemetery in Tirana, Albania*

*Admir Sinamati, MD\*, Anila Tahiri, MD\*\*, Besim Ymaj, MD\*\*\*, Zija Ismaili\*\*\*, Gentian Vjshka, MD\*\*\*\*, Bardhyl Çipi, M- TORTURE Volume 21, Number 3, 2011, <https://irct.org/publications/torture-journal/115>*

<sup>10</sup> *Minnesota Protocol, The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>*

by the adverse party.” The Rome Statute of the International Criminal Tribunal (Rome Statute) provides for the crime of enforced disappearance as a crime against humanity. Its Article 7/1 gives the definitions of the crimes against humanity meaning “any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in para-graph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or

any crime within the jurisdiction of the Court;

- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health

According to this Article of the Rome Statute, the “enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time<sup>11</sup>.

Certainly, the violent and repressive acts of the communist regime in Albania often met the reference criteria the relevant literature, international law documents set to qualify them, in accordance to the relevant circumstances and the context, mainly as crimes against humanity (e.g., massive killings, torture and persecutions, deportations/ forced displacements). Living conditions in prisons and in concentration and labour camps were reportedly inhumane, and detainees were often subjected to torture and other forms of cruel, inhuman or

<sup>11</sup> *Rome Statute of the International Criminal Tribunal, Article 7/2, point (i)*. <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

degrading treatment. It has been argued that these facilities not only served the purpose of providing free industrial labour for the regime, but also allowed for the “physical elimination” of its political opponents. In today’s Albanian society there is no doubt whether the communist regime had committed crimes of torture, persecution, and of inhuman treatment.

Regarding the missing person these abuses frequently include violations of the right to security and liberty, as well as dignity of the person; the right to life; the right not to be subjected to torture or degrading treatment or punishment; the right to a family life and the right to recognition as a person before the law.

The official data on missing persons and on those who were judicially or extrajudicially imprisoned or executed under the dictatorship are reportedly incomplete, with different non-governmental organizations offering different figures. It is estimated however, that more than 6,000 persons went missing, yet with no specific information on how many of them were forcibly disappeared<sup>12</sup>. The data

<sup>12</sup><http://www.sociale.gov.al/al/newsroom/deklarata-per-shtyp/zgjidhja-e-ceshtjes-se-personave-te-zhdukur-gjate-regjimit-komunist-ne-shqiperi>

from the Institute for the Studies of Communist Crimes and Consequences, victims can be classified into the following categories: people who were executed by the regime, with or without a trial; people who were imprisoned; and people who were internally displaced to concentration or labour camps. It is estimated that approximately 650 women and 5,600 men were executed, 22,000 persons were imprisoned, and 40,000 persons were internally displaced to camps. However, as internal displacement affected entire families, the total number of victims rises to more than 100,000 persons.

Information collected from human stories, archives from the Authority for the Opening of the Sigurimi Files, show that some of the victims died during pre-trial detention; others lost their lives while serving imprisonment sentences or in concentration or labour camps; others were executed in accordance with death sentences passed by courts; while others perished while attempting to escape the regime, by leaving the country (lowest reported number of the killings against individuals trying to escape from the country in 1989 was 88). While there are varying degrees of certainty as to the final fate of these victims, most are presumed dead, yet the location of their burial sites has never been disclosed to their families<sup>13</sup>.

<sup>13</sup> *Preliminary observations of the Working Group on Enforced or Involuntary Disappearances at the conclusion of its visit to Albania (5-12 December 2016)*, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21016&LangID=E>



The remains of those who were executed by the regime were mostly buried in mass unmarked graves located near detention centres, prisons and concentration or labour camps throughout the country. The 13 former political detention centres that operated between 1944 and 1991 were Kukes, Peshkopi, Burrel, Tirana, Elbasan, Berat, Tepelene, Gjirokaster, Vlore, Kavaje, Durres, Shkoder and Korçe. In addition, it is estimated that the number of labour camps amounted to more than 20, with some research identifying up to 56 camps.<sup>14</sup> The number of burial sites also remains inaccurate and is estimated by some sources to be between 22 and 29, including mass graves.<sup>14</sup>

The International Convention for the Protection of All Persons from Enforced Disappearances is ratified by the Republic of Albania by the law No. 9802, dated 13.09.2007. In accordance with this law, the Republic of Albania declares that pursuant to article 31, paragraph 1 of the Convention, it recognizes the competence of the Committee on Enforced Disappearances to receive and consider communications from or on behalf of individuals subject to its jurisdiction, claiming to be victims of a violation by Albania of provisions of this Convention. Pursuant to article 32, the Republic of Albania declares that it recognizes the competence of the Committee to receive and consider communications, in which a State Party claims that another State Party is

not fulfilling its obligations under the Convention.

In Albania, the international law enjoys a privileged position in relation to domestic one and it is in this sense that the Convention prevails over domestic law. The Constitution determines the obligation of the Albanian state to implement the international law. According to Article 122 of the Constitution, any international agreement ratified by the Parliament becomes part of the domestic law after its publication in the Official Journal. Article 122 of the Constitution provides that the international law applies directly, except when it is not self-executable and its application requires the promulgation of a law. International agreements ratified by the Parliament have priority over national laws that do not comply with it. Likewise, the norms issued by the international organizations prevail in case of conflict, over the domestic laws when the agreement is ratified by the Republic of Albania.

Albania is a party to the International Convention on the Protection of All Persons from Enforced Disappearances (ICED), having ratified the Convention in 2007 and has recognized the competence of the Committee on Enforced Disappearances to receive and consider communications from or on behalf of individuals under its jurisdiction, claiming

<sup>14</sup>*Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Albania. A/HRC/36/39/Add.1, para 11.*

*Based on general rules and principles on implementation of legal norms, it can be concluded that the subjects (individuals) may apply and require the application of only those articles of the Convention, the implementation of which is guaranteed by the current legislation and for which there is no need to establish internal mechanisms. Taking into account the obligations deriving from this Convention, in cases where a specific article of the Convention requires the adoption of internal legal provisions or establishment of internal mechanisms for its implementation, we underline the provision of “enforced disappearance” as a criminal offense.*

to be victims of a violation by Albania of provisions of this Convention. Likewise, Albania recognizes the competence of the Committee to receive and consider communications in which a State party claims that another State party is not fulfilling its obligations under the Convention.

Albania has codified enforced disappearance as a distinct criminal offence, under articles 74<sup>15</sup> and 109(c) consistent with the definition given in the Declaration on the Protection of All Persons from Enforced Disappearance, and punishable by appropriate penalties which take into account its extreme

<sup>15</sup> Art 74 CC states that “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, ideological, racial, ethnical and religious motives, shall be punishable to not less than fifteen years of or life imprisonment”. <https://euralius.eu/index.php/en/library/albanian-legislation/send/10-criminal-code/11-criminal-code-en>.

seriousness<sup>16</sup>. The Criminal Code covers the various modes of criminal liability, including liability in relation to any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance. It expressly provides for the application of command or superior individual criminal responsibility for such crime. Perpetrating enforced disappearance against children and women aggravates criminal responsibility.<sup>17</sup> The Criminal Code also provides for appropriate mitigating or aggravating circumstances. In 2013, the Code was amended to include enforced disappearance in the definition of crimes against humanity, to which no statute of limitations applies<sup>18</sup>.

What measures are taken to condemn this unlawful deprivation of the Right to Life? Assuming that the will

<sup>16</sup> Article 109/c of the Criminal Code (supplemented by Law No. 144, dated 2 May 2013, art. 25)

<sup>17</sup> Article 109/c of the Criminal Code

<sup>18</sup> Articles 67 and 74 of the Criminal Code.

to condemn communist crimes is inevitable, necessary and healthy for a society, investigations into human rights abuses may take various forms in different contexts, from official, well-resourced state-sponsored exhumations to unofficial searches and exhumations by family members.

**The case of Argentina:** was the first country in Latin America that started to perform exhumations as part of the process of searching for disappeared persons, at the request of the National Commission on the Disappeared and the Grandmothers of the Plaza de Mayo. Right from the start, the organizations of relatives have played an important role in the search processes. Although not always consensual, exhumations have formed part of a broader strategy in the struggle of organizations of relatives of disappeared persons. As in other countries, such as Venezuela, the overriding motive is the search for justice and truth and not merely emotional elements, although these elements are present among organizations of relatives. In the specific case of HIJOS the approach is based on a political struggle, and when exhumations have been performed, the human and emotional nature of these processes was revealed. In the case of Argentina, despite differences in cases, and/or laws in the region where exhumations took

*There are many various examples from all over the world that provide some practices in dealing with the issues of extrajudicial killings and/or enforced disappearances, that combine a multi-layered legislative approach towards recognition of the crimes, the involvement of the families, conducive measures to the development of judicial proceedings, and if convenient, forcibly annulling the Amnesty Laws that served to conceal impunity (the case of Chile).*

place, the role of the families was quite important in deciding how the remains are to be returned; what will be the next step with regards to justice, etc. The studies show that there were some justice institutions that become involved in the processes, in some cases resulting in symbolic acts of recognition (the reading of records).

In **Argentina** a great deal of psychological support has been provided for relatives of disappeared persons and survivors of torture, and a large amount of theoretical work has been done, but exhumation processes have not been identified as fields where this work is relevant.

The case of Argentina has showed that there is always a need for a combined psychological, judicial and social reconciliation approach.

**The case of Uruguay** for thousands of Detained–Disappeared coup d'état in 1973 was very similar to the other countries of Latin America, such as Argentina. Few exhumations have

been carried out, but they have had a huge social impact, the first one being described as an authentic collective process involving the Uruguayan people. Due to the absence of experience and background in exhumation processes, there has been a lack of coordination. The possible location of disappeared persons in different countries, such as Argentina and Chile, has made it difficult to find them. The case of Uruguay is also analyzed due to existence of the law that prohibited any further legal actions (State Punitive Claim Expiration Law- Law on impunity). It was not until 2006 that some cases were taken to the Uruguayan and Chilean courts. This case shows similarities with the Albanian Amnesty law of the '90s that in fact has oriented the legal processed towards administrative/executive acts rather that court cases.

**Paraguay:** The practice of forced disappearance was systematic in Paraguay, particularly between 1959 and 1962 after the coup d'état by General Stroessner. It continued after these dates but in a more selective manner. The processes have been implemented in the context of the Truth and Justice Commission. Accompaniment has been provided that has not been limited to the excavation but has been continued, starting with the initial work of searching for information up to legal proceedings or the presentation of demands by relatives to

the parliament. Such process took years to be finalized; and the results included also the creation of a National Genetic Data Bank to facilitate identification. The process also demanded the adaptation of Paraguayan legislation to international requirements and the creation of a permanent mixed human rights secretariat with the participation of the state and civil society in order to extend the frame of action of the Truth and Justice Commission.

### **The failing legal cases in Venezuela:**

The presidential decree of 28 February 1989, which suspended constitutional guarantees to facilitate the repression of protests as a result of economic measures taken by the government, led to a period of almost one month of actions by the army and the police, resulting in numbers of dead and wounded that have still not been quantified, especially in the city's poor neighborhoods. Official estimates were 276 dead, but when the grave of La Peste was found with 68 unidentified bodies that were not on the official list, this estimate was discredited. In 1999, 437 lawsuits were filed in the courts for death or injury (Carrillo, 2007).

A long legal battle was required for the exhumations and it took 18 months to issue the order to open the common grave. After 17 years of criminal proceedings and a favourable sentence

by the Inter-American Court of Human Rights, investigations are still in the preliminary phase and no case has been heard in the national courts so far. A large number of bodies are still unidentified (as in El Salvador). The families promoted and implemented most of the process (locating other families, making ante mortem records, clearing the area, participating in the excavation, and protecting and watching over the remains).

In **Venezuela** the search for justice has been the main driving force for the families, rather than grief or emotional issues (unlike Guatemala or Peru but similar to Argentina or Brazil).

Since the exhumation, the Committee of the Relatives of the Victims of the Events that Occurred in February and March 1989 (COFAVIC) was set up as a human rights organisation which works on all kinds of issues in the country as well as providing training for the armed forces and the police, human rights education and other activities (like Honduras and Panama).

The state tried to avoid exhumations by appealing to “sanitation” reasons (as in Panama) not supported by international reports. Successive governments were responsible for obstructing efforts and relatives were threatened by state officials. After the exhumation, the Legal Medicine Institute manipulated

the remains, destroying expert evidence and burying the remains a few hours later. The relatives were only given identical certificates confirming death by firearm, with no further information nor burial activities (as in Panama and Columbia) (Carrillo, 2007).

This is the worst case scenario where the state is both judge and party, and thus the impunity prevails.

The case of **Kosovo**: the status of the missing persons in Kosovo is regulated by the Law No.04/L-023 “On Missing persons”<sup>19</sup>. The law aims to protect the rights and interests of missing persons and their family members, in particular the right of family members to know about the fate of missing persons, who were reported missing during the period 1 January 1998 – 31 December 2000, as a consequence of the war in Kosovo during 1998-1999. It creates an inter-ministerial committee as an institutional mechanism that reviews and informs the families on the outcomes of the search requests; leads, supervises, coordinates and harmonizes the activities of local and international institutions with regards to missing persons issues; and enlightens the fate of the missing persons as a result of the war conflict, regardless ethnicity, military or civil status.

<sup>19</sup> *Text of the Law can be found in the following:* [https://ihl-databases.icrc.org/ihl-nat/a24d1cf3344e99934125673e00508142/5877830e98fef580c12579dc004abfac/\\$FILE/Law%20on%20Missing%20Persons.pdf](https://ihl-databases.icrc.org/ihl-nat/a24d1cf3344e99934125673e00508142/5877830e98fef580c12579dc004abfac/$FILE/Law%20on%20Missing%20Persons.pdf)



**Albania:** A number of ad hoc and fragmented efforts to search for the disappeared have been launched in Albania, yet none of them as part of a comprehensive truth-seeking State policy. These initiatives include the establishment of a short-lived inter-ministerial taskforce<sup>20</sup> to search, locate and identify remains of persons executed during the communist regime, which did not provide the so needed answers sought by the relatives of those who remain missing. In most cases, the search for remains and the excavation of suspected burial sites that have taken place in Albania have been undertaken by families of the disappeared, with their own financial resources, and without any expert or forensic support from State institutions.

The 2015 agreement between the Albanian Government and the International of the Missing Persons (ICMP), aimed at supporting the search for the people believed to have gone missing during the communist regime. The project involved support as regards

data management systems, sample collections, as well as DNA testing and matching. A thorough examination of all identified burial sites was made possible with the support of ICMP and actually a dedicated website is functional.

Despite impressive results to address the issue (the MoU that the Albanian Government signed with the ICMP; some state-run initiatives related to dedicated places of historical memories), very little progress has been done in the finalization of the lists and records of the missing persons, the search of the execution places and potential grave locations still remain not open source to public. The “secrecy” is justified by the complicated procedures of the law on information about the files of the former State’ Security”; yet, there are families extremely frustrated by that.

As of today, the different mechanisms, institutions did not make the process clear: the cooperation and exchange were lacking, the issue was politicized and those who continue to suffer were the families.

Despite domestic regulatory framework, the lack of implementation still prevails. There is still no involvement

<sup>20</sup> Decision No. 133 of 24 February 2010 on the Creation of a Task Force that will seek to find and identify the people executed by the communist regime

of the prosecutor's in the process of exhumations. According to Article 200 of the Criminal Procedural Code, the request for post mortem examination of the corpses is a legal responsibility of the proceeding authority with the presence of a forensic doctor. With the purpose of carrying out the examination of a dead body, the judge or prosecutor may order for its exhumation, by informing a member of the dead person's family to participate, except for when the participation may harm the purpose of the examination.

To come to a recommendation, the lack of a comprehensive legislation securing the rights of both society and the families of forcibly disappeared persons to know the truth about what happened; the right of families to have the remains of their loved ones found, identified and returned to them; their right to reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition; and the right to memory, as well as the right to access to justice is still absent.

To the current developments and the information, there are no investigations, or prosecution cases requested by any governmental authority regarding the extrajudicial killings, nor a direct engagement of the General Prosecutor Office related to the opening of the archives of this institution. This reinforces the climate of impunity and lack of truth and justice for the victims.

Furthermore, the unwillingness to deal with the crime of the past, apparently makes the judicial authorities violating the international law and the International Convention on the Protection of All Persons from Enforced Disappearances (ICED), although recognized by Article 122 of the Albanian Constitution as directly applicable in the domestic judicial system.

The contested position that the "perpetrators had acted in accordance with the law then in force" is an argument that still obstructs right to truth and justice. To put this view in legal terms, this position appears to suggest that prosecution for acts that were not considered crimes when they were carried out would contradict the principle of non-retroactivity. The UN Working Group on Enforced Disappearances, in its published report on Albania, had recalled to fully respect the principles of the Declaration on enforced disappearances stating that "no circumstances whatsoever may be invoked to justify enforced disappearance". In the legal arguments provided as point of referrals to the Albanian prosecutorial authorities, the UN Working Groups has clearly stated that "enforced disappearance is a single consolidated act, not a combination of isolated, unconnected facts<sup>26</sup> and prototypical continuous crime"<sup>21</sup>. This means, *inter alia*, that the crime extends for the whole period of time when it is

<sup>21</sup> A/HRC/16/48, para. 39.

not complete, that is until the fate or whereabouts of the disappeared person are clearly established, irrespective of whether that person is alive or dead. Consequently, cases of enforced disappearance can, and should, be investigated and tried if the commission of the act had begun before, and continues after, it was criminalized in national law, notwithstanding the principle of non-retroactivity.

A clear interpretation of the concept of “ex officio” investigations support the argument: in accordance with the Declaration, States are under an obligation to investigate alleged enforced disappearances ex officio. The lack of any investigation from the Prosecutor’s Office is in clear violation of the Albania’s international obligations for effective investigations.

The analysis of similarities and differences between these processes

allow us to learn useful lessons to avoid past mistakes. If the main aim of the exhumation process is to make possible a rebuilding of the social fabric after violent events, key issues that must be carefully considered are ways to encourage and strengthen the involvement of victims, communities and society as a whole in the process, the role of cultural peculiarities in each community, the relationship between technical support and community organization, the role of Justice and the State and the political context.

These reasons echo not only associated arguments cited in the general literature, but create a solid ground to start litigating for a unified approach towards justice for the victims, restoring the rule of law and human rights, and consolidating an objective historical narrative about what happened to individuals and to the Albanian people/ families during the communist regime.

### 3. International requirements in the cases of crimes against humanity

The right to life in particular rests on the procedural guarantee that abuses will be officially investigated irrespective of whether such abuses are considered attributable to actions or omissions by the State.



According to the United Nations Human Rights Council (UNHRC) the international community should “endeavor to recognize the right of victims of gross violations of human rights, and their families, and society as a whole to know the truth to the fullest extent practicable.” The right to the truth is also asserted in the Convention. The obligations of the State under the right to the truth are procedural, with no absolute obligation of result. The European Court of Human Rights (ECtHR) ruled that a state’s failure to conduct an effective investigation to clarify the whereabouts and fate of missing persons constitutes a continuing violation of the State’s procedural obligation to protect the right to life under Article 2 of the Convention, as well as a violation of the rights of families of the missing under Article 3, the prohibition of torture.

An effective investigation, according to the ECtHR, must be official, transparent, independent and impartial, as well as capable of establishing the circumstances in a given case.

### **Management and due diligence rules in forensic investigations:**

The process of identifying human remains of missing persons begins with the recovery of those remains from their specific location. An exhumation

is the disinterment of a buried body from a designated burial site, cemetery or other place that may be unmarked. Exhumation serves several important purposes, including recovery of the remains for physical examination and analysis for their identification; release of remains to relatives so as to facilitate funeral arrangements and emotional healing; documentation of injuries and other evidence for legal proceedings and to uncover human rights abuses; the search for clues that may assist in the historical reconstruction of events and revelations to create awareness; and acknowledgement that is necessary for healing and to draw lessons for the future of the community.

The entire process of exhumation is intricate and delicate, requiring well-trained and highly skilled personnel with expertise in various disciplines of forensic science. Forensic pathologists are generally conversant with these disciplines and able to work with a team of technicians with specialized training in the various fields. These include forensic archaeology, which consists of applying standard archaeological techniques modified to suit forensic crime scene processing where human remains are thought to be present.

## 4. Rights of the victims in the domestic contexts

The victim of a criminal offence has the right: a) to require the prosecution of the perpetrator; b) to seek medical care, psychological assistance, counselling and other services provided by the authorities, organizations or institutions responsible for assisting the victims of criminal offences. c) to communicate in his or her own language and to be assisted by a translator and an interpreter of the language of signs or communication facilitator for people who are not able to speak and hear; ç) to choose a defence lawyer and when it is the case to receive free legal aid pursuant to the legislation into force; d) to seek at any time information about the status of the proceedings, and to be acquainted about the acts and evidence, without breaching the principle of investigatory secret; dh) to require to receive the evidence and submit other requests to the proceeding authority; e) to be informed about the arrest of the accused person and his release under the conditions stipulated in this Code; ë) to be informed for the non-initiation of the proceeding, the dismissal of the case, the initiation and the completion of the adjudication; f) to make an appeal in the court against the decision of the prosecutor for the non-initiation of the proceeding and the decision of the prosecutor or of

the judge of the preliminary hearing to dismiss the charge or the case; g) to ask a compensation for the damage and be accepted as a civil plaintiff in the criminal process; h) to be excluded, in the cases provided for by the law, from the payment of every expense for receiving the acts and judicial fee for the submission of the lawsuit connected with the status of the victim of the criminal offence; i) to be summoned in the preliminary hearing and in the first hearing; j) to be heard by the court even when none of the parties requires him to be summoned as a witness; k) exercise other rights provided for by the Criminal Procedural Code.

The proceeding authority shall immediately notify the victim on the rights referred to in paragraph 1 of this Article and record the notification about it. The victim who does not have legal capacity to act shall exercise rights through his/her legal representative or the legal guardian, unless this is not in the interest of the victim.

By including the Victim's rights, we aim to raise the concerns of the actual impunity.

The complicated and difficult process of exhumation requires also for support dedicated to the family relatives (be it medical, moral or material/financial support). Such support has not been addressed so far by any mechanism or legislation. The missing persons'

families should demand from relevant institutions the fulfilment of this obligation and concurrently should file complaints regarding those institutions not meeting this obligation. In order for this right to be implemented the families should be entitled to request court enforcement and, as a part of the court's decision, a determination of the responsibility of the relevant organ or institution. Compared to the missing right of complaint by the former political persecuted, the tradition of excluding courts from this important process remains a concern.

Another concern remains with after-identification processes. The current practices of the last two decades have shown individual initiatives of exhumations, where family relatives paid out-of-pocket money to accomplish such process. By personal means, the family relatives have found the burial places of executed or missing relatives. And these were the only initiatives that have successfully been addressed. While there is no clear information about human remaining, kept as "unidentified" in the forensic institute of Albania.

Also no clear information what will happen with the identified remaining: will they be considered veterans, heroes or martyrs? May the law on the veterans apply for their closed relatives? What other rights may be applying to the relatives?

## 5. Shortcomings and recommendations:

*As of today, the victims of the communist regime in Albania -well defined and identifiable through international standards, but not regulated in domestic legislation- receive unstructured and extremely low and incomplete [due to state budget restrictions] reparations which basically are calculated based on a different legal reference, i.e. unjust punishment, instead of crimes against humanity.*

Based on interpretation of the international human rights standards and international humanitarian law, the communist crimes stand unpunished and [even] unrecognized, as data and human stories show for no investigations for more than 6,000 missing people, killed without or prior trial/court decision during the period starting from 30 November 1944 until October 1<sup>st</sup> 1991.

In the absence of effective and official investigations, disappearances concurrently represent grave abuses of the rights of surviving relatives and others, including violations of due process, the prohibition of torture, and

violation of the right to a family life and the right to recognition as a person before the law.

Law “On the compensation of former political convicted of the communist regime”, and several bylaws for its implementation provide the compensation of former political for the following categories: convicted with prison; capital punishment by court decision; extrajudicial killings; insulation at investigating offices; hospitalization to a medical institution; exile. Pursuant to this law is adopted the decision of the Council of Ministers (DCM) “For the determination of the administrative review procedures related the claims, and financial compensation for the families of the victims unjustly executed without trial, for political reasons, from 30.11.1944 until 1.10.1991”.

The role of multi-agency approach, although introduced as the only good example, turned to reduce the intended impact by more overlapping of mandates, no clear roles and responsibilities and no target objectives. It is the moment to request dissolving outdated mechanism that are not functional, lack capacities and mandate for this issue.

The issue of missing persons due to crimes of the communist dictatorship

remains an open call for Justice, accountability and right to truth. It is becoming urgent to ensure that the process of identifying mass grave locations and burial places should come to an end (where transparencies, reliability, the right to know and access to information are fully guaranteed). As a continuous process, the exhumation of body remaining and identification of the victims should be a process with a local ownership and possibilities for the families to know what happened. Additionally, and even more importantly, some relatives of missing persons are reaching the end of their lives and risk dying without ever knowing the truth about the fate or whereabouts of their loved ones.

Albania has made enforced disappearances an autonomous crime in the Criminal Code under articles 74 and 109(c), consistent with the definition given in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance (the Declaration), and punishable by appropriate penalties which take into account its extreme seriousness.

Reading those data and the relevant pieces of domestic regulatory framework, the main question raised here is why 30 years after communist regime fall we do

not have either sufficient or sufficiently consolidated will of Government of Albania to condemn these crimes and the extreme communist ideology? Why there is no investigation regarding all allegations coming from families of the missing?

Effective remedy that includes a thorough and impartial ex officio investigation with a view to identifying those allegedly responsible for the disappearance and imposing the appropriate penalties should be guaranteed to all families of victims of enforced disappearance.

**of Missing Persons, as part of the requirements of the UN Expert Group that recall for a comprehensive approach and a national strategy on transitional Justice to deal with the crimes and gross violations of human rights committed in Albania under communism, yet remaining to be investigated and punished.**

There is an immediate need to address the process by drafting a law on the victims of communist dictatorship, with intention to provide a comprehensive approach by addressing the victims' right to truth, justice, reparation and remembrance:

*The crimes of the past on Albania, although over 30 years of the demise of the dictatorship, remain still un-condemned. Albania is yet to deal adequately with the gross human rights violations committed between 1944 and 1991, when thousands of victims suffered from imprisonment, torture, internal exile, executions and enforced disappearances.*

If such institutional apathy continues, then the society will find no “blame” against the regime, ignoring tragic consequences of the communism, and moreover, accepting “unintended” consequences.

**There is an immediate need for the adoption of the Rulebook on Marking the Sites of Burial and Exhumation**

- By establishing a new multi-professional “one-stop-shop” mechanism, able to deal in timely framework (with set deadlines), with the final case management system, administrative/judicial power to provide acknowledgment of the enforced disappearances (certificates) and with powers to participate as interested party, together with families throughout state-financed exhumations processes.

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