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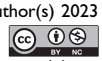
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How long does the past endure? 'Continuing violations' and the 'very distant past' before the UN Human Rights Committee

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Abstract

The concept of 'continuing violation' allows reviewing applications concerning effects of violations that started before a treaty came into a force with regard to a state that allegedly committed the violation. This article analyses how the UN Human Rights Committee has recently approached two communications concerning continuing violations that occurred in the 1930s and 1940s (K.K. and Others v Russia; F.A.J. and B.M.R.A. v Spain). It critiques the fact that the Committee has introduced an additional qualification to its case law on continuing violations, namely that it has no jurisdiction over the violations with continuing effect, when underlying violations happened in the 'very distant past'. The article argues that communications raising violations of the families of forcibly disappeared persons – at least these brought by their children – should not be ruled inadmissible because of time constraint since the disappearances. Lastly, the article reveals a tacit influence of the European Court of Human Rights on the Committee in the analysed case law.

Keywords

continuing violations, enforced disappearances, human rights committee, European Court of Human Rights, *ratione temporis*, distant past, historical memory, temporal scope of justice

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Email: g.baranowska@inp.pan.pl. The opinions expressed in this chapter are strictly personal and do not in any way reflect the position of the WGEID. The research for this article was funded by the Polish National Science Centre (grant agreements 2019/35/D/HS5/03700; 2016/21/B/HS5/02057). The author would like to thank Gabriella Citroni, Cathryn Costello, Roman Wieruszewski, Katarzyna Sękowska-Kozłowska, Łukasz Szoszkiewicz and Joanna Grygiel for their comments on earlier drafts.

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1. INTRODUCTION

Human rights treaties bind Parties after they ratify an instrument and it enters into force, so in principle only their conduct after that date is constrained by the treaty. If the human rights treaty has a complaint mechanism, the date of the mechanism's entry into force for a particular country creates the 'critical date': in principle, the mechanism would only examine complaints concerning State actions after that date. However, the concept of continuing violations has emerged across human rights regimes to deal with those violations whose effects persist after the critical date.[1]

Since the 1980s, the UN Human Rights Committee (HRC or Committee) has accepted communications concerning violations that occurred before the entry into force of its complaint mechanism, provided that the violations continued to have effects after that date.[2] So far, it has applied the continuing violations concept in at least 54 cases.[3] Out of them, 17 concern enforced disappearances,[4] which have been categorised as 'prototypical continuous violations', as two of their features typically persist over time: their unexplained nature, and the ongoing suffering of family members.[5]

In the vast majority of communications on continuing violations brought to the HRC, the initial violation commenced months or years before the critical date. Recently, the HRC ruled that two communications in which the initial violation had started over eighty years before the complaint was filed were inadmissible: enforced disappearances in 1936 in Spain (*F.A.J. and B.M.R.A. v Spain*),[6] and the secret executions of prisoners of war during the Katyń Massacre in 1940 (*K.K. and Others v Russia*).[7] This article will assess the HRC's two decisions and make three arguments. First, this article will critique the HRC's new temporal limitation that rejects as inadmissible complaints concerning continuing

1. *De Becker v Belgium* App No 214/56 (ECtHR, 9 June 1958); *Lovelave v Canada* Communication no 6/24 (HRC, 30 July 1981); *Blake v Guatemala* (Merits) (IACtHR, 24 January 1998).
2. For literature on the continuing violations in the case law of the HRC, see James Sweeney, 'The Elusive Right to Truth in Transitional Human Rights Jurisprudence' (2018) 67 International & Comparative Law Quarterly 353, 360; Frédéric Mégret 'The Notion of "Continuous Violations", Expropriated Armenian Properties, and the European Court of Human Rights' (2014) 14 International Criminal Law Review 320; P.R. Ghandi, *The Human Rights Committee and the Right of Individual Communication. Law and Practice* (Routledge 2019) 147; Grażyna Baranowska, *Rights of Families of Disappeared Persons. How International Bodies Address the Needs of Families of Disappeared Persons in Europe* (Intersentia 2021) 117; Rosalyn Higgins, 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 International and Comparative Law Quarterly 501, 504.
3. According to <https://juris.ohchr.org/> accessed 30 November 2022.
4. Enforced disappearances are 'the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law'. Article 2, International Convention for the Protection of All Persons from Enforced Disappearances (Adopted 20 December 2006, entered into force 23 December 2010) (ICPPED). Not all views concerning enforced disappearances are labelled as such in the UN database (<https://juris.ohchr.org/>). Within the 17 identified views and inadmissibility decision not all were labelled as 'enforced disappearances' in the database, namely: *Sarma v Sri Lanka* Communication no 950/2000 (HRC, 16 July 2003); *Sankara and others. v Burkina Faso* Communication no 1159/2003 (HRC, 28 March 2006); *Prutina v Bosnia and Hercegovina* Communication no 1917/2009, 1918/2009, 1925/2009, and 1953/2010 (HRC, 28 March 2013); *K.K. and Others v Russia*, Communication no 2912/2016 (Admissibility Decision) (HRC, 5 November 2019); *Yurich v Chile* Communication no 1978/2002 (HRC, 2 November 2005). The database search did not include *F.A.J. and B.M.R.A. v Spain* Communication no 3599/2019 (Admissibility Decision) (HRC, 18 October 2020), possibly because it was issued in Spanish.
5. Jeremy Sarkin, 'Enforced Disappearance as Continuing Crimes and Continuing Human Rights Violations' in Haeck and others (eds), *The Realization of Human Rights: When Theory Meets Practice* (Intersentia 2014) 410.
6. *F.A.J. and B.M.R.A. v Spain* (n 4).
7. *K.K. and Others v Russia* (n 4).

violations in the 'very distant past'. It will be argued that this criterion undermines legal certainty and contradicts the logic of the 'continuing violations' concept. Second, it will be posited that the communications raising violations regarding families of forcibly disappeared persons – at least these brought by their children – should not be ruled inadmissible because of time constraint since the disappearances. To acknowledge their continuing suffering, the HRC should assess present actions of the accused State towards the families. Third, an analysis of the decisions will reveal a 'tacit influence'[8] of the European Court of Human Rights (ECtHR) on the HRC. While the HRC has cited the ECtHR judgment *Janowiec and Others v Russia*[9] on one occasion in its reasoning in *K.K. and Others v Russia*,[10] the influence demonstrably goes much further. As the ECtHR has adopted a more restrictive approach towards the rights of families of disappeared persons,[11] its tacit influence on the HRC has led to the limitation of the families' rights. Such an influence of a regional human rights court is particularly striking, as we might expect better from the HRC, which derives its legitimacy from the notion of the universality of international human rights.[12]

The two analysed communications bear three similarities. First, both alleged violations commenced before the adoption of the International Covenant on Civil and Political Rights (ICCPR)[13] and at the moment of bringing it to the HRC, the applicants would have been aware that their family members had been eventually executed. Second, in both cases, the authorities neither conducted effective investigations into the persons' fates nor informed the families about the fate of their loved ones. Third, applications arising from an analogous factual situation[14] – enforced disappearances in the Spanish Civil War and the Katyń Massacre – were decided almost a decade earlier by the ECtHR.[15] The submissions to the HRC and ECtHR concerned the

8. Antoine Buyse, 'Tacit Citing: The Scarcity of Judicial Dialogue Between the Global and the Regional Human Rights Mechanisms in Freedom of Expression Cases' in Tarlach McGonagle and Yvonne Donders (eds), *The United Nations Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press 2015) 462.
9. *Janowiec and others v Russia* App no 55508/7 and 29520/09 (ECtHR, 16 April 2012) (Chamber judgment); *Janowiec and others v Russia* App no 55508/7 and 29520/09 (ECtHR, 21 October 2013) (Grand Chamber judgment).
10. *K.K. and Others v Russia* (n 4), para 6.5.
11. Baranowska (n 2) 80–100 (ECtHR) and 127–130 (HRC).
12. Yuval Shany, 'Can Strasbourg be Replicated at a Global Level? A View from Geneva' in Helmut Aust and Esra Demir-Gürsel (eds), *The European Court of Human Rights* (Elgar 2021).
13. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).
14. The two communications to the HRC were not identical to the ECtHR applications, and the issue of the 'no other forum' principle was consequently not assessed by the HRC. For more on this principle and how it has been applied, see Başak Çalı and Alexander Galand, 'Towards a Common Institutional Trajectory? Individual Complaints Before UN Treaty Bodies During their 'Booming' Years' (2020) 8 *The International Journal of Human Rights* 1103, 1107.
15. The applications with regard to Spain were ruled inadmissible (See for example *Antonio Gutierrez Dorado and Carmen Dorado Ortiz v Spain*, App no 30141/09, Admissibility (ECtHR, 27 March 2012)), while two applications relating to the Katyń massacre were decided in a Chamber and Grand Chamber judgment (n 9). For an analysis of the temporal element in the ECtHR judgments, see Corina Heri, 'Enforced Disappearances and the European Court of Human Rights' *Ratione Temporis* Jurisdiction: A Discussion of Temporal Elements in Janowiec and Others v Russia' (2014) 12 Journal of International Criminal Justice 751. For a broader analysis on continuing violations in the ECtHR case law, see Loukis Loucaides 'The Concept of "Continuing" Violations of Human Rights' in Loukis Loucaides (ed) *The European Convention on Human Rights* (Brill 2007) 17 (highlighting the differences between instantaneous and continuing violations); Andy Pachtenbeke, Y.W.J. Haeck, 'From De Becker to Varnava: The State of Continuing Situations in the Strasbourg Case Law' (2010) 1 *European Human Rights Law Review*; Mégret (n 2) 317–331 (on expropriation); Antoine Buyse, 'A Lifeline in Time – Non-Retroactivity and Continuing Violations under the ECHR' (2006) 75 *Nordic Journal of International Law*.

lack of investigations into the enforced disappearances as well as the effects State authorities' actions and inactions had on the remaining family members.

The article will begin with an analysis of how the HRC approaches the concept of 'continuing violation' (section 2), with special attention to enforced disappearances as continuing violations, as both analysed cases commenced as such.[16] The subsequent section presents the facts of the two HRC Decisions, first *K.K. and Others v Russia* (Section 3.1) and then *F.A.J. and B.M.R.A. v Spain* (Section 3.2). The next three sections analyse various aspects of the decisions, starting with who is considered disappeared and how long they are considered disappeared for (Section 4). It will be shown that whereas the HRC's finding that the men in *K.K. and Others v Russia* were dead and not disappeared was a key factor in concluding that there was no violation with regard to their relatives, this aspect was entirely omitted in *F.A.J. and B.M.R.A. v Spain*. Next, it will be demonstrated how the HRC approached the treatment of families of the disappeared in these two decisions (Section 5). At this point, the article will explain the ECtHR approach and show its tacit influence on the HRC. Section 6 will scrutinise how the HRC set time limits to the concept of 'continuing violation', juxtaposing it with the cut-off dates used by the ECtHR. The article will conclude with an assessment of the future communications concerning continuing violations that arose from events that happened in the 'very distant past' (Section 7). The HRC members in the concurring opinion to *F.A.J. and B.M.R.A. v Spain* pointed to the HRC's State reporting procedure as a venue to address the situation. Therefore, this article will conclude by expressing concern regarding the relevance and meaning of such a solution.

2. THE HRC AND ENFORCED DISAPPEARANCES AS CONTINUING VIOLATIONS

2.1. Continuing Violations and Their Affirmation

The HRC has been accused of excessive caution regarding its temporal jurisdiction.[17] Currently, it only accepts individual complaints concerning events that occurred after the entry into force of the Optional Protocol to the ICCPR on the individual complaints procedure with regard to a particular country.[18] Manfred Nowak and Marc Bossuyt argue that the critical moment should not be the entry into force of the Optional Protocol, but the entry into force of the ICCPR, as this is the point in time when the State commits to respect and ensure the rights recognised therein.[19]

At the same time, the HRC follows other international courts with a crucial exception from such an application of the *ratione temporis* rule by applying the concept of continuing violations.[20]

16. The execution of the prisoners of war was conducted in secrecy and the families were denied any information about their fate and whereabouts – as such this met all the elements of an enforced disappearances.
17. For a description of the HRC as being less 'bold' than other international courts, see Higgins (n 2) 507.
18. Optional Protocol to the International Covenant on Civil and Political Rights (Adopted 16 December 1966, entered into force 23 March 1976).
19. Manfred Nowak, *UN Covenant on Civil and Political Right: CCPR Commentary. 2nd Edition* (N.P. Engel, Kehl am Rein 2008) 854; Marc J. Bossuyt, 'Le Réglement Intérieur du Comité des Droits de l'Homme' (1978) 14 *Rev.Belge de Droit Int*. 104, 136. The same criticism is made with regard to the Committee Against Torture, who apply *ratione temporis* in the same way. See Manfred Nowak and others (eds.), *The United Convention Against Torture and its Optional Protocol: A Commentary* (2nd ed. Oxford University Press 2019) 600.
20. *Lovelave v Canada* (n 1). Continuing violations have been listed by Antoine Buyse as one of three general exceptions to non-retroactivity, see Buyse (n 14) 70.

However, while accepting the concept, the HRC has elaborated neither on its meaning nor scope. Scholars have critiqued the HRC's approach to continuing violations, in particular for introducing the 'affirmation' element[21] and the refusal to countenance non-retroactivity.[22] The HRC introduced the affirmation element in a critical decision from 1994, when it stated that a continuing violation is 'an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations by the State party'.[23] The UN Committee Against Torture has also more recently started to apply the construct of affirming a continuing violation,[24] but it has not been used outside of the UN treaty body system.[25]

Whether the State has 'affirmed' the violation needs to be assessed on a case-by-case basis, and it remains unclear how the HRC applies the affirmation principle.[26] As will be shown below, those questions only gain in importance due to the specific characteristics of enforced disappearances.

2.2. Applying the Standards to Enforced Disappearances

The Inter-American Court of Human Rights (IACtHR) applied the concept of continuing violations to deal with enforced disappearances in 1998,[27] followed by the ECtHR in 2001[28] and the HRC in 2003.[29] The continued nature of enforced disappearances was reaffirmed in the 2010 International Convention for the Protection of all Persons from Enforced Disappearance.[30] One of the first decisions by the UN Committee on Enforced Disappearances, created by this Convention, was to announce that it would consider enforced disappearances that had occurred before the critical date in reviewing State reports.[31] The UN Working Group on Enforced and Involuntary Disappearances adopted a particularly broad approach on continuing violations, by stating that States should be held responsible for all violations resulting from an enforced disappearance, not only those that occurred after the critical date.[32]

21. Sweeney (n 2) 360–366; Mégret (n 2) 320; Ghandi (n 2) 147; Baranowska (n 2) 117–120.
22. Ghandi (n 2) 152–157; Higgins (n 2) 504–507.
23. See *Konye v Hungary* Communication no 520/1992 (Admissibility Decision) (HRC, 7 April 1994), para 6.4. For examples of communications concerning enforced disappearances decided admissible even though the disappearance occurred before the state accepted the individual complaint procedure, see *Bleier v Uruguay* Communication no 30/1978 (HRC, 29 March 1982); *Sarma v Sri Lanka* (n 4). For a broader perspective on the HRC and the past, see Antoon de Baets 'The United Nations Human Rights Committee's View of the Past', in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Towards the Governance of History* (Cambridge University Press 2017) 29, which shows the importance of enforced disappearances decisions in shaping the HRC approaches towards the past.
24. For example *N.Z. v Kazakhstan* Communication no 495/2021 (CAT, 28 November 2014), see also Nowak and others (n 19) 600.
25. Some argue it is comparable to the ECtHR enquiry into procedural acts or omissions after the crucial date, which is part of the genuine connection test. See Sweeney (n 2) 385.
26. Ghandi (n 2) 145.
27. *Blake v Guatemala* (n 1).
28. *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001).
29. *Sarma v Sri Lanka* (n 4). See also Human Rights Chamber for Bosnia and Hercegovina *Unković v Federation of Bosnia and Hercegovina* Case no CH/99/2150 (Revision) (HRCBiH, 10 May 2002).
30. ICPPED, Article 8.1 (b).
31. Statement by the CED on the *ratione temporis* element in the review of reports submitted by States Parties under the ICPPED. The CED has also the possibility to review individual communications, however none of them related to *ratione temporis* competences.
32. WGEID, 'General Comment of Enforced Disappearances as a Continuous Crime', A/HRC/16/48, para 39 (see 3 and 4).

The doctrine of continuing violations requires States to investigate the fate of forcibly disappeared persons before a particular treaty came into force.[33] Importantly for the analysed decisions, the presumption of death[34] does not end such a continuing violation, as authorities are still required to establish the circumstances of the disappearance, then search for and return the remains of the forcibly disappeared person.[35] Debate continues regarding when exactly the crime of enforced disappearance comes to an end. For example, Marthe Lot Vermeulen argues that this occurs when the disappeared person's body is revealed and the relatives are informed.[36] In contrast, Jeremy Sarkin argues that the violation continues until the whole truth about what happened comes to light.[37]

The HRC issued its first views on enforced disappearances in the case *Bleier v Uruguay* in 1982. It concerned disappearances that had occurred only half a year before the complaint mechanisms entered into force for Uruguay. The HRC declared the communication 'admissible in so far as it related to events which have allegedly continued or taken place' after the entry into force of the Optional Protocol. However, this was a relatively straightforward case, as the HRC found that there was sufficient evidence to indicate that the person continued to be detained after the critical date.[38] In subsequent views on enforced disappearances that had happened significantly earlier (for example, seven years before the critical date), the HRC did not rely on the continuing deprivation of liberty but rather on the fact that the State authorities did not deny the detention.[39]

In enforced disappearances cases, the HRC usually does not explicitly mention the necessity of showing measures a State takes after the critical date, which would constitute an affirmation of the enforced disappearance.[40] It remains an exception that the HRC held that authors of communications should indicate the measures taken by the State after the critical date that would have constituted a continuation of the enforced disappearance.[41] In fact, it is difficult to show how, in an enforced disappearances case, the violation can be 'affirmed' by the State, as denying the deprivation of liberty and fate of the persons lies at the heart of enforced disappearances. Therefore, would continuing the denial of a disappearance constitute an 'affirmation'? Or, alternatively, would acknowledging that the persons were forcibly disappeared, with no efforts by the State to establish their fate, constitute an 'affirmation'?

Enforced disappearances generally entail continuing violations when one considers the rights of the disappeared persons' family members. As is well-established, persons close to a forcibly

33. Sarkin (n 5). For relevant ECtHR case law, see: *Mahmut Kaya v Turkey* App no 22535/93 (ECtHR, 28 March 2000); *Luluyev and others v Russia* App no 69480/01 (ECtHR, 9 November 2006).
34. Consequently, the legal status of disappeared persons should not be regulated through declaration of deaths. See Gabriella Citroni, 'The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death' (2014) 12 Journal of International Criminal Justice 787; Grażyna Baranowska, 'The Right of the Families of Missing Persons: Going Beyond International Humanitarian law' (2022) 55 Israel Law Review 25, 41.
35. Committee on Enforced Disappearances, 'Guiding Principles for the Search for Disappeared Persons', CED/C/7, Principle 7 (3).
36. Marthe Lot Vermeulen, *Enforced Disappearances: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearances* (Intersentia 2012) 199.
37. Sarkin (n 5) 397.
38. *Bleier v Uruguay* (n 22), paras 13.4, 14, 7(b).
39. *Sarma v Sri Lanka* (n 4), paras 6.2, 9.2.
40. Baranowska (n 2) 117; see, for example, *S.E. v Argentina* Communication no 275/1988 (HRC, 26 March 1990); *Cifuentes Elgueta v Chile* Communication no 1536/2006 (HRC, 28 July 2009).
41. *Yurich v Chile* (n 4), 6.3–6.4); *Cifuentes Elgueta v Chile* (n 39), para 8.5.

disappeared person are also considered victims of human rights violations.[42] This holds true also for disappearances that occurred before the critical date. In the 2005 *Yurich v Chile* decision, the HRC ruled that the claims concerning the disappearance themselves were inadmissible *ratione temporis,* but did not rule out the possibility of a violation of the ICCPR with respect to their family members.[43] This was expanded during the following decade to communications regarding persons who disappeared during the war in Bosnia and Herzegovina before the State had accepted the individual procedure. In a number of views, the HRC found violations of several rights guaranteed in the ICCPR, both with regard to the disappeared persons and their families.[44]

Consequently, in certain circumstances, the HRC finds admissible communications arising from enforced disappearances that occurred before a country accepted the Optional Protocol. The HRC can rule a communication inadmissible *ratione temporis* with regard to the disappearance and find a violation with regard to their families. It is not entirely clear whether and how the HRC applies the 'affirmation' of continuing violation to such communications. Furthermore, all the earlier views and decisions concerned enforced disappearances that occurred a couple of months or years before the critical date.

3. THE FACTS

3.1. *K.K. And Others v Russia*: The Katyń Massacre

Ruled inadmissible by the HRC in November 2019, *K.K. and Others v Russia* was brought by descendants (children and one grandchild) of persons killed during the Katyń Massacre. The term refers to the secret execution by Soviet forces of circa 21,000 Polish prisoners of war in the spring of 1940. The families did not know of this fact,[45] and learned about the executions in 1943, when Nazi German forces discovered one of the mass graves in which some of the bodies were buried. The Soviet authorities denied responsibility and claimed the mass graves were the result of a Nazi crime until 1990, when the State officially acknowledged and condemned the killings and the subsequent cover-up. At this time, the Soviet government also initiated investigative proceedings into the killings, which were suspended in September 2004, decision officially announced at a press conference in March 2005.[46]

42. ICPPED, para 24.1. See also Tamar Feldman, 'Indirect Victims, Direct Injury: Recognizing Relatives as Victims Under the European Human Rights System' (2009) 1 European Human Rights Law Review; Ruth Rubio-Marín, Clara Sandoval, and Catalina Diaz, 'Repairing Family Members: Gross Human Rights Violations and Communities of Harm', in Ruth Rubio-Marín (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge University Press 2009).
43. *Yurich v Chile* (n 4), para 8.5.
44. *Prutina v Bosnia and Hercegovin* (n 4); *Rizvanović v Bosnia and Hercegovina* Communication no 1997/2010, Views (HRC, 21 March 2014); *Durić v Bosnia and Hercegovina* Communication no 1956/2010 (HRC, 16 July 2014); *Selimović v Bosnia and Hercegovina* Communication no 2003/2010 (HRC, 17 July 2014); *Ičić and Ičić v Bosnia and Hercegovina* (HRC, 30 March 2015); *Mandić v Bosnia and Hercegovina* Communication no 2064/2011 (HRC, 5 November 2015). For an analysis of ECtHR and HRC case law on disappearance in Bosnia and Hercegovina, see Manfred Nowak, 'Enforced Disappearances in Bosnia and Hercegovina. Recent Developments in International Jurisprudence' in Fazıl Sağlam and others (eds), *Prof. Dr. Rona Aybay'a Armağan (2 Cilt Takım)*, (Legal Yayınevi 2014).
45. As such, the massacres fulfil all the elements of an enforced disappearance.
46. For a more detailed course of events, see *Janowiec and Others v Russia* (Grand Chamber judgment) (n 9), para 14–72; *K.K. and Others v Russia* (n 4), para 2.1–2.16.

Following this decision, a number of family members started proceedings in Russia aimed at rehabilitating their relatives and challenging the decision to discontinue the investigation. After exhausting domestic remedies, some families filed applications to the ECtHR. In 2012, the Chamber found that the treatment of the applicants born before the men were killed amounted to inhuman and degrading treatment under Article 3 of the European Convention on Human Rights (ECHR), but stated that it lacked temporal competence to investigate the claim regarding the effective investigation into the massacre under Article 2 ECHR (right to life).[47] The case was subsequently referred to the ECtHR Grand Chamber, which, in 2013, took the same stance as the Chamber towards the obligation to investigate; the Grand Chamber took a different approach towards the treatment of the families by State authorities, finding that there was no Article 3 ECHR violation.[48]

The authors of *K.K. and Others v Russia* – represented by the same counsel as in *Janowiec and Others v Russia*[49] – claimed the same set of violations in their complaint to the HRC, namely that the investigations into the disappearances of their relatives were ineffective (Article 2(3) in connection with Article 6 of the ICCPR) and that the treatment of the families amounted to inhuman treatment (Article 7 of the ICCPR).[50] The HRC found that by 1992 – when the Optional Protocol entered into force for the Russian Federation – the State authorities were not under an obligation to investigate the killings of 1940.[51] Next, after reiterating that Russian authorities changed the status of the relatives from 'dead' to 'disappeared', the HRC concluded that it could not consider them to be 'disappeared', as by the time of the proceedings, their death was beyond doubt and the killings were an established historical fact.[52] The HRC concluded that uncertainty about the fate of the relatives was unlikely and that 'information on the file' did not reveal that the treatment of the authors was aimed at causing them pain and suffering. Despite not disclosing what that information might be, the HRC found that they had not been treated in a manifestly disrespectful or degrading manner. Therefore, the HRC deemed the claim under Article 7 ICCPR inadmissible for a lack of substantiation.[53]

Just as in *F.A.J. and B.M.R.A. v Spain* (see below), the dissenting opinion to the decision concerned the violation of Article 7 ICCPR with regard to the authors. As the dissenting HRC members

47. *Janowiec and Others v Russia* (Chamber judgment) (n 9), paras 155–167 (Article 3 violation), para 128–142 (Article 2 violation).
48. *Janowiec and Others v Russia* (Grand Chamber judgment) (n 9), paras 182–189 (Article 3 violation), para 152–161 (Article 2 violation). For a close comparison of the Chamber and Grand Chamber judgment see Susana Sanz-Caballero, 'How could it go so wrong? *Reformatio in Peius* before the Grand Chamber of the ECtHR in the case Janowiec and Others v Russia (or Polish Collective Memory Deceived in Strasbourg)' (2013) 33 Polish Yearbook of International Law 259, 266.
49. Ireneusz Kamiński. For his comments on the litigation and judgment at the ECtHR, see Ireneusz Kamiński 'Comments on Janowiec and others v Russia: The Katyń Massacre Before the European Court of Human Rights: A Personal Account' (2013) 33 Polish Yearbook of International Law 205.
50. They also noted 'that the facts submitted can be interpreted as a violation of articles 14, 17 and 19' (*K.K. and Others v Russia* (n 4), para 3.3). The claims under Articles 17 and 19 were ruled inadmissible as they were not raised in domestic proceedings, while the HRC found that the rights under Article 14 were fully respected (para 6.8). The HRC did not engage in its assessment of those violations beyond this.
51. *K.K. and Others v Russia* (n 4), para 6.5.
52. For a different approach, see *Radilla-Pacheco v Mexico* (Preliminary Objections, Merits, Reparations and Costs) (IACtHR, 23 November 2009), concerning the continuous effects of an enforced disappearance that occurred in Mexico in 1974. See, in particular, paras 44–50, for the analysis of the presumption of deaths in such circumstances.
53. *K.K. and Others v Russia* (n 4), paras 6.6–6.7.

reasoned, the majority decision on the inadmissibility of the claim under Article 7 ICCPR was based on two reasons. First, there was no uncertainty about the death of the men due to the lapse of time. Second, there was a lack of intent from the Russian authorities to cause the authors pain and suffering. The dissenting HRC members disagreed with that finding, stating that the uncertainty and pain of the families did not end with the certainty of death, as acknowledged in the HRC's earlier views. Moreover, the dissenting HRC members listed a number of actions by Russian authorities that exacerbated the suffering of the authors.[54]

What follows from *K.K. and Others v Russia* is that two elements had to be met in order for it to conclude that the authors were victims of inhuman or degrading treatment. First, there had to be uncertainty as to the disappeared persons' death, which would have led to their categorisation as 'disappeared'. Second, their treatment by State authorities had to be 'manifestly disrespectful'. These would have been new requirements in the HRC's approach, as the HRC had found violations of the ICCPR with regard to families of disappeared persons even when there was no uncertainty as to the death of those persons. Moreover, in contrast to the ECtHR,[55] the HRC does not analyse how State authorities treat family members of disappeared persons, so this point should be irrelevant. In fact, when reviewing a similar communication from Spain several months later, the HRC did not comment on either one of these two factors.

3.2. F.A.J. and B.M.R.A. v Spain: Enforced Disappearances During the Spanish Civil War

The applicants in *F.A.J. and B.M.R.A. v Spain* were a daughter and granddaughter of a couple that were forcibly disappeared after their arrest in Mallorca in 1936.[56] The enforced disappearance was never investigated, and, since 2006, the authors of the communication have pursued numerous legal actions in Spain and Argentina, including in order to conduct exhumations and receive the remains, which remained unsuccessful.[57] The enforced disappearance of the couple occurred as part of a widespread practice at the time. While there is no complete list of forcibly disappeared persons during the Spanish Civil War, the number of persons disappeared between 1936 and 1951 is estimated at 114,266.[58]

54. *K.K. and Others v Russia* (n 4), Joint Opinion of Committee Members Ilze Brands Kehris and Arif Bulkan (partly dissenting).
55. *Çakıcı v Turkey* App No 23657/94 (ECtHR, 8 July 1999): para 98. For an even more detailed engagement with the treatment of authority, see the approach of the HRC for Bosnia and Hercegovina, for example, the HRCBiH see *Unković v Federation of Bosnia and Herzegovin* (n 28).
56. *F.A.J. and B.M.R.A. v Spain* (n 4), para 2.4.
57. *F.A.J. and B.M.R.A. v Spain* (n 4), paras 2.13–2.24. After the HRC decision was adopted, the remains of one of the two disappeared were found, identified, and returned to the family; see 'Primeras Identificaciones de las Víctimas Exhumadas en Son Coletes', (March 12, 2021) <https://www.ultimahora.es/noticias/part-forana/2021/03/12/1245925/manacor-primeras-victimas-identificadas-son-coletes.html> accessed 30 November 2022.
58. This figure does not include the 30,960 children forcibly taken from Spanish Republican families. See Ursula Urdillo, 'Impunity for Enforced Disappearances in Contemporary Spain: The Spanish Search for Truth' (2011) 41 Interdisciplinary Journal of Human Right Law 43. On addressing enforced disappearances in Spain, see also: Samantha Salsench i Linares, 'Francoism Facing Justice: Enforced Disappearances before Spanish Courts' (2013) 11 Journal of International Criminal Justice 464; Alfons Aragoneses, 'Legal Silences and the Memory of Francoism in Spain', in Belavusau and Gliszczyńska-Grabias (n 22) 175.

The authors of *F.A.J. and B.M.R.A. v Spain* argued that the actions of the Spanish authorities after the ratification of the Optional Protocol constituted a continuing violation of Articles 6, 7, 9, and 19 read in conjunction with Article 2(3) of the ICCPR with regard to the disappeared couple, but also inhuman treatment with regard to the authors (Article 7, read in conjunction with Article 2(3), of the ICCPR).[59] Spain argued that the communication should be inadmissible, and simultaneously informed the HRC of several steps taken to address enforced disappearances resulting from the period of Civil War and Francoist Repression.[60]

The HRC ruled the communication inadmissible for two reasons concerning the *ratione temporis* consideration,[61] in which the HRC relied on and repeatedly cited *K.K. v Russia*.[62] The first ground for inadmissibility concerned the passage of time since the events: almost 85 years. The HRC stated that while enforced disappearances can have a continuing effect, the facts occurred 41 years before the entry into force of the ICCPR for Spain and 49 years before the entry into force of the Optional Protocol. Furthermore, the HRC reasoned that since the enforced disappearance commenced before the 'consolidation of modern international human rights law', the ratification of the ICCPR by Spain cannot be understood as implying an obligation to investigate enforced disappearances in the 'very distant past'.[63] Thus, the passage of time was crucial for the decision, and not the fact that the enforced disappearances occurred prior to the entry into force of the ICCPR and the Optional Protocol.

The second reason for which the communication was ruled inadmissible was because the authors had inadequately explained the delay in their submission. According to the HRC, the communication should have been submitted in 1985, when the Optional Protocol came into force for Spain, or in 2010, when the authors' appeal was ruled inadmissible by the Constitutional Tribunal, and not in January 2019. This reasoning follows the ECtHR in the analogous inadmissibility decision.[64]

In the three opinions attached to the views, the HRC members unambiguously supported the decision with regard to the inadmissibility of the procedural obligations to investigate the violations concerning the disappeared couple. However, two of the joint opinions disagreed with the findings regarding the inadmissibility of the claims of the authors, concerning their inhuman treatment.[65]

59. *F.A.J. and B.M.R.A. v Spain* (n 4), paras 3.5–3.7.
60. *F.A.J. and B.M.R.A. v Spain* (n 4), paras 4.1–4.5 and 4.10. They addressed some of the measures requested by the authors, paras 3.9–3.10.
61. Moreover, a third reason was the non-exhaustion of domestic remedies with regard to the claim itself. See: *F.A.J. and B.M.R.A. v Spain* (n 4), paras 7.7 and 7.8.
62. In those paragraphs, the HRC also cited two other views, which however did not in substance concern violation in the distant past. *Zinaida Yusupova v Russian Federation* Communication no 2036/2011 (HRC, 21 July 2015) was brought by a woman forcibly deported from Chechnya to Kazakhstan in 1944, who received a certificate in 2005 confirming her status of victim of political repression but was denied compensation. Thus, the complaint in fact concerned not the violations that occurred between 1944 and 1957, but the lack of compensation (which she was provided by law) while Russia was already party to the ICCPR. The second cited views concerned a man who was deprived of his liberty 30 days before the Optional Protocol entered into force with regard to Kazakhstan, but the allegations concerned violations that occurred after that date. See *Dmitry Tyan v Kazakhstan* Communication no 2125/2011 (HRC, 16 March 2017).
63. *F.A.J. and B.M.R.A. v Spain* (n 4), para 7.6.
64. *Antonio Gutierrez Dorado and Carmen Dorado Ortiz v Spain* (n 14), para 39.
65. *F.A.J. and B.M.R.A. v Spain* (n 4), Joint Opinion of Committee members Marcia v J. Kran and Hernán Quezada (Partially dissenting), 3–6; Joint Opinion of Committee members Arif Bulkan, Hélène Tigroudja, Yadh Ben Achour and Ahmed Amin Fathalla (partially dissenting), para 2–5.

4. WHO IS CONSIDERED 'DISAPPEARED' – AND FOR HOW LONG?

In *K.K. and Others v Russia*, the HRC found the claim of the continuing violation with regard to the families inadmissible, arguing that the men killed in the Katyń Massacre could not be considered 'disappeared'.[66] By the time the communication was submitted to the HRC, there was clearly no doubt about the death of the disappeared persons. At the same time, finding that a forcibly disappeared person died – without a full inquiry and explanation of the circumstances of the death – does not end the crime, as it is a continuing violation. However, such a reasoning in *K.K. and Others v Russia* would suggest that after the passage of a certain amount of time, finding out that the disappeared person is dead does end the enforced disappearance. As the factual situation does not substantially differ with regard to this point – the disappeared family members in both cases were clearly dead – the HRC appears to be backing out of this reasoning, by not recalling this point in *F.A.J. and B.M.R.A. v Spain*.

The deliberation on whether the persons should be considered dead, disappeared, or both did not appear in a void. First, in 2004 the Russian authorities discontinued the domestic investigation, stating there was no evidence that the authors' relatives had been executed.[67] From the reasoning, it follows that they cannot by regarded 'dead' but 'disappeared', since their fate and whereabouts remain unclear. Second, both in the HRC and ECtHR proceedings, the authors themselves argued that their relatives – presumed 'dead' – must be treated as 'disappeared' following this 2004 domestic decision.[68] Third, and perhaps most surprisingly, the ECtHR Grand Chamber in *Janowiec and Others v Russia* decided that what could initially have been a case of enforced disappearance must be considered a 'confirmed death' case.[69] The lack of explanation on why such a change of qualification had occurred – coupled with the fact that this has been applied by the ECtHR in only one other judgment[70] – renders a clarification of the ECtHR's approach difficult. Similarly, the HRC Decision does not include an explanation about its approach to the categorisation.

The ECtHR in *Janowiec and Others v Russia* and the HRC in *K.K. and Others v Russia* decided that the forcibly disappeared persons must be considered dead. While neither one clearly indicated how it came to such a decision, the passage of time appears to be the main reason. In fact, by the time the communications were brought to the ECtHR and HRC, the families were not uncertain whether their loved ones were alive. However, uncertainty as to the death of the disappeared person is not a prerequisite for finding a violation of the ICCPR or the ECHR. Certainty of death does not mean that the continued crime of enforced disappearance comes to an end. For example, the HRC requires States to clarify the fate of the disappeared and the circumstances in which the enforced disappearance occurred,[71] establish the circumstances of their death, and place the information on their death certificate.[72] Similarly, the ECtHR requires States to undertake

66. *K.K. and Others v Russia* (n 4), paras 6.6–6.7.
67. ibid, para 2.15. See also *Janowiec and Others v Russia* (Chamber judgment) (n 9), para 146; *Janowiec and Others v Russia* (Grand Chamber judgment) (n 9), para 174.
68. *K.K. and Others v Russia* (n 4), para. 3.2; *Janowiec and Others v Russia* (Chamber judgment) (n 9), para 120–121.
69. *Janowiec and Others v Russia* (Grand Chamber judgment) (n 9), para 185.
70. The other judgment was substantially different from *Janowiec and Others v Russia*, as it concerned a person a person abducted in Croatia in 1991, whose remain were found about three months after his abduction. See *Jelić v Croatia* App no 57856/11 (ECtHR June 12, 2014), para 112.
71. *Sharma v Nepal* Communication no 1469/2006 (HRC, 28 October 2008), para 7.6; *Bashasha v Libya* Communication no 1776/2008 (HRC, 20 October 2010), par 7.3.
72. *Sankara and others v Burkina Faso* (n 4), paras 6.2–6.3.

several steps after a disappeared person's body has been discovered, even when the presumed death happened prior to the State's ratification of the ECtHR.[73] As the HRC did not repeat this reasoning in *F.A.J. and B.M.R.A. v Spain* – in which the factual situation regarding the death of the disappeared persons is quite similar – the *rationale* in *K.K. and Others v Russia* appears to be an exception. However, the matter was a key part of the *rationale* in the latter decision, showing the influence of the ECtHR judgment in *Janowiec and Others v Russia*.

5. TREATMENT OF FAMILIES OF DISAPPEARED PERSONS

The HRC has been consistent in stating that relatives of disappeared persons can be victims of an Article 7 ICCPR violation also when the enforced disappearance occurred before the State accepted the individual complaint procedure.[74] Both in *F.A.J. and B.M.R.A. v Spain* and *K.K. and Others v Russia*, the authors argued that they had endured inhuman or degrading treatment as family members of disappeared persons. This was also the most contentious part of the two decisions: all the three dissenting opinions (one to *K.K. and Others v Russia* and two to *F.A.J. and B.M.R.A. v Spain*) concern this aspect of the decision. The one concurring opinion to *F.A.J. and B.M.R.A. v Spain* explicitly refers to the possibility of claims arising with regard to individual rights of living family members of disappeared persons.[75] Before commenting on the HRC reasoning in the two decisions, this article will criticise the relevant aspect in the ECtHR *Janowiec and Others v Russia* Chamber judgment to show its influence on the HRC Decisions.

The ECtHR approach to the matter differs from that of the HRC. Whether family members of forcibly disappeared persons are victims of inhuman or degrading treatment depends on the presence of special factors that distinguish suffering from emotional distress experienced by all relatives of a victim to a serious human rights violation. The special factors established by the ECtHR include involvement in attempts to obtain information about the disappeared persons and the way authorities responded to those inquires.[76] Based on those special factors, the ECtHR adopted an approach whereby it does not find that children born after the disappearance of their father are to be considered victims of inhuman or degrading

73. *Varnava and others v Turkey* App no 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90 (ECtHR September 18, 2009), paras 145, 148, and 190; *Tashukhadzhiyev v Russia*, App no 33251/04 (ECtHR October 25, 2011), para. 76.

74. *Yurich v Chile* (n 4) para 6.5; *Sankara and others v Burkina Faso* (n 4), paras 6.2–6.3; *Durić v Bosnia and Herzegovina* (n 43), para 9.8. This has also been accepted and developed by various other international courts. See, in particular: the case law of the Human Rights Chamber for Bosnia and Hercegovina, which clearly recognised that failure of State authorities to take action or provide families with information on the disappeared persons is a human rights violation, even if the disappearances occurred before the critical date (*Unković v Federation of Bosnia and Herzegovin* (n 28) paras 86–90; *Selimović and others v Republika Srpska* Case no CH/01/8365 and others (HRCBiH, 7 March 2003), paras 168–169.

75. *F.A.J. and B.M.R.A. v Spain* (n 4), Joint opinion of Committee members Yuval Shany, Jose Santos-Pais, Gentian Zyberi, David Moore, and Vasilka Sancin (concurring), para 4.

76. See the so-called Çakıcı criteria in *Çakıcı v Turkey* (n 54) at paragraph 98, which include the proximity of the family tie (in that context, a certain weight will be attached to the parent-child bond), the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person, and the way in which the authorities responded to those enquiries. For more on the Çakıcı criteria, see Baranowska (n 2) 82.

treatment.[77] In the rare occasions when the ECtHR commented on the reasons, it stated that this was caused by the fact that small children do not participate in the search for information about their disappeared fathers.[78] This approach was subsequently applied in the Chamber judgment of *Janowiec and Others v Russia* to exclude claims of applicants born after the enforced disappearance of the prisoners of war by Soviet authorities.[79] As reasoned above, since the application concerned only acts undertaken after the ECHR had entered into force for Russia, this factor should not have been taken into consideration, as by this time all of the applicants were adults and could participate in the search for information.[80]

The HRC does not adopt such special factors, although *K.K. and Others v Russia* shows the impact the ECtHR Chamber judgment in *Janowiec and Others v Russia* had on the decisions. First, in contrast to the ECtHR proceedings, all authors of the communication to the HRC were born before the enforced disappearance occurred.[81] Second, the ECtHR's special factors and analysis from *Janowiec and Others v Russia* were explicitly invoked by Russia when arguing that the claims were unsubstantiated.[82] Third, while the HRC did not comment on the special factors, it did base its reasoning that the applicants were not victims of inhuman or degrading treatment on the fact that their loved ones cannot be considered 'disappeared' – just as the ECtHR Grand Chamber found in *Janowiec and Others v Russia*.[83] While the HRC did not elaborate on its approach, the ECtHR highlighted in the Grand Chamber judgment that by 1998 there was no uncertainty as to the fate of the disappeared persons.[84] The uncertainty factor is also present in the reasoning of the HRC in the decisions. In this way, the HRC appears to have been 'learning from regional systems without too openly acknowledging it' – a phenomenon that has been described by Antoine Buyse as 'tacit learning'.[85]

Last but not least, in one of the first views concerning enforced disappearances, the HRC found that the mother of a disappeared person was treated in an inhuman manner because she was denied the truth about the fate of her daughter.[86] As shown by James Sweeney, the HRC has developed the

77. Baranowska (n 2) 84–86. By contrast, the Inter-American Court of Human rights has repeatedly acknowledged the difficult situation of children growing up in families affected by enforced disappearances. See, for example: *Contreras et al v El Salvador* (Merits, Reparations and Costs) (IACtHR, 31 August 2011), para 122; Alexander Murray, 'Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts' (2013) 2 International Human Rights Law Review.
78. *Taymuskhanovy v Russia* App No 11528/07 (ECtHR, 16 December, 2010), para 122.
79. *Janowiec and Others v Russia* (Chamber judgment) (n 9), paras 150–154.
80. Grażyna Baranowska, 'Families of Disappeared Persons in the Jurisprudence of the European Court of Human Rights' (2018) 5 European Human Rights Law Review 505, 510.
81. *K.K. and Others v Russia* (n 4), para 1.
82. ibid, para 4.10. The argumentation by Russia at the HRC mirrors that in the *Janowiec and others v Russia* (n 9) proceedings, as the authorities in this paragraph also argue that 'five of the authors were born after the arrest of their relatives', which was true for the ECtHR proceedings but not for the application to the HRC.
83. In *F.A.J. and B.M.R.A. v Spain* (n 4) one of the authors was born in 1950, that is 14 years after the disappearance. The authors were not found to be victims of inhuman or degrading treatment but the fact of being born after the disappearance did not play a role. Thus, the HRC does not appear to take this fact into consideration.
84. *Janowiec and Others v Russia* (Chamber judgment) (n 9), para 186.
85. Buyse, (n 2) 462.
86. *Quinteros v Uruguay* Communication no 107/1981 (HRC, 21 July 1983), para 14.

right to truth precisely to underpin findings on the inhuman treatment of the next of kin.[87] This also includes the right to know the circumstances of the disappeared person's death.[88] Thus, the information about their fate should be at the centre of the analysis, which was not the case in either *F.A.J. and B.M.R.A. v Spain* or *K.K. and Others v Russia*. In the two communications, the authors not only invoked that the States did not investigate the crimes, but they also claimed that not providing them information about their disappeared family members resulted from the active involvement of State authorities. In the Spanish communication, the authors specifically raised the 'obstruction' into the investigation and search,[89] while in the communication against Russia the authors raised that the investigation ended in 'secrecy and denial'.[90] The HRC refrained from commenting on that aspect.

6. CUT-OFF DATE: WHAT IS THE 'VERY DISTANT PAST'?

The case of *F.A.J. and B.M.R.A. v Spain* has added an additional qualification to the HRC case law on continuing violations, namely that it has no jurisdiction over violations with continuing effect when the underlying violations happened 'in the very distant past', 'even before the consolidation of modern international human rights law'.[91] Such a reasoning begs the question of how long ago 'a very distant past' is, and when the HRC sees modern international human rights law as consolidated. Following from the two decisions, the HRC appears to consider that events that took place in the 1930s and the 1940s are in 'very distant past' – but what about the 1950s? Would the HRC consider admissible communications arising from enforced disappearances that occurred during the 1950s in the Soviet Union or in the 1960s in Cyprus? While the consolidation of international human rights law supports the 'very distant past' reasoning, we should ask: when did this consolidation occur? For example, is it with the emergence of modern international human rights in normative expression (the adoption of the Universal Declaration of Human Rights in 1948)? Or is it with the emergence of international human rights law (the two UN Covenants in 1966)? Besides different dates that refer to human rights treaties and core documents, one could mention other dates connected to the establishment of organisations or human rights courts. There is a plethora of dates that could be proposed. As the HRC's reasoning implies, establishing a date is of crucial relevance for potential authors of communications concerning human rights violations that were allegedly committed decades ago, because only the violations that did not happen in the 'very distant past' and occurred after the 'consolidation of the modern international human rights law' can give rise to a continuing obligation for the HRC to investigate. Thus, the approach of the HRC does not give legal certainty.

87. Sweeney (n 2) 362. The second dimension in which the right to truth has been applied by the HRC is implicit: in relation to the right to remedy. On the right to truth and the HRC, see also Melanie Klinker and Howard Davis, *The Right to the Truth in International Law: Victims' Rights in Human Rights and International Criminal Law* (Routledge 2020) 122. For an analysis of the place of the concept of the right to truth in the ECtHR case law, see Alice M. Panepinto, 'The Right to the Truth in International Law: The Significance of Strasbourg's Contribution' (2017) 37 Legal Studies 739.
88. *Sankara and others v Burkina Faso* (n 4), para 12.2. The right to truth was also raised by dissenting HRC members to inadmissibility decisions concerning enforced disappearances that occurred before the critical date: *Cifuentes Elgueta v Chile*, Individual opinion of Committee Members Helen Keller and Fabián Salvioli (dissenting), paras 22–24.
89. *F.A.J. and B.M.R.A. v Spain* (n 4), paras 1.1, 5.5.
90. *K.K. and Others v Russia* (n 4), para 5.1.
91. *F.A.J. and B.M.R.A. v Spain* (n 4), para 7.6.

While the HRC's reasoning did not go much into detail, its approach mirrors the reasoning in *Janowiec and Others v Russia*, where the ECtHR held that the case was inadmissible.[92] According to the ECtHR case law, the procedural obligation to conduct an effective investigation can also arise with regard to deaths that occurred before the State in question was bound by the ECHR. Generally, such cases must meet principles of genuine connection between the death and the obligations. The ECtHR found that the temporal factor is the first and most important indicator of the 'genuine' character of the connection.[93] This period should not exceed ten years.[94] Moreover, the ECtHR introduced an exception – the Convention value clause – when it needed to 'ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner'.[95] In *Janowiec and Others v Russia*, the Grand Chamber declared that this clause could not be applied to violations that occurred before the adoption of the ECHR in 1950, 'for it was only then that the Convention began its existence as an international human rights treaty'.[96] Thus, the ECtHR set a clear cut-off date connected with the Court itself, although it is worth noting that this action was also criticised at the time, including a harsh dissenting opinion to the Grand Chamber judgment.[97]

Even though enforced disappearances are a continuing violation, international human rights bodies seek a cut-off date when confronted with submissions concerning continuing violations that commenced many decades ago. In the interests of legal certainty, when applying such a solution, the mechanisms concerned should clearly establish a date and justify why they found it reasonable to do so. Neither of those steps was taken by the HRC. This reduces certainty for States and authors of potential communications and contradicts the logic of the 'continuing violations' concept.

Furthermore, families of disappeared persons are recognised to be victims of human rights violations.[98] The suffering of families stems from the lack of information about the disappeared persons' fates, which leads to a sense of loss 'resulting from not knowing whether a loved one is dead or alive, absent or present'.[99] The disappeared person becomes 'psychologically present, but physically absent'.[100] The hope that the disappeared persons may return is often maintained

92. Which again is an example of what Antoine Buyse calls 'tacit citing'. See Buyse, (n 2) 462.
93. The so-called genuine connection clause. While the ECtHR cited both the HRC and IACtHR when developing the test, the approach developed by the ECtHR differed from the two significantly. See Yaroslav Kozheurov, 'The Case of Janowiec and Others v Russia: Relinquishment of Jurisdiction in Favour of the Court of History' (2013) 33 Polish Yearbook of International Law 227; Gabriella Citroni, 'Janowiec and Others v Russia: A Long History of Justice Delayed Turned into a Permanent Case of Justice Denied' (2013) 33 Polish Yearbook of International Law 279, 290.
94. *Janowiec and Others v Russia* (Chamber judgment) (n 9), para 143. In establishing this 10-year period, the ECtHR cited a judgment concerning disappeared persons in Cyprus, in which it found that the acceptable period was 26 years, by setting 1990 as the last date for application concerning disappearances from 1964 and 1974. See *Varnava v Turkey* (n 72), para 166.
95. *Šilih v Slovenia* App no 71463/01 (ECtHR, 9 April 2009), para 163.
96. *Janowiec and Others v Russia* (Grand Chamber judgment) (n 9), para 151.
97. *Janowiec and Others v Russia* (Grand Chamber judgment) (n 9), joint dissenting opinion of Judges Ziemele, De Gaetano, Lafranque and Keller; see also William A. Schabas 'Do the "Underlying Values" of the European Convention on Human Rights begin in 1950?' (2013) 33 Polish Yearbook of International Law 247.
98. ICPPED, para 24.1.
99. Pauline Boss, 'Ambiguous Loss Research, Theory, and Practice: Reflections after 9/11' (2004) 66 Journal of Marriage and Family 551, 554.
100. Simon Robins, *Families of the Missing: A Test for Contemporary Approaches to Transitional Justice* (Routledge 2014) 45.

for a very long time, and so disappearances profoundly affect families over decades and generations.[101] Therefore, disappearances committed in the 'very distant past' also influence families. The applications in the two analysed decisions were submitted by very close relatives of the disappearances – mostly their children – who undoubtedly continue to be affected by the crimes, including by current actions of the respondent States. Hence, the violations raised by the families regarding themselves did not occur in the 'distant past'. The present-day suffering is caused by current actions of the respective State and the fact that the fate of their loved ones continues to be concealed.

Consequently, communications raising violations with regard to families of forcibly disappeared persons – at least these brought by their children – should not be ruled inadmissible because of the length of time that has elapsed since the disappearances. In such cases, the HRC should assess the actions of the State towards the families that occurred after the critical date. For example, in the domestic proceedings in Russia, the Court stated that a bullet hole in the skulls of the prisoners of war proved only the use of firearms but not that the persons were shot by State authorities.[102] This statement concerned persons that were under a *de facto* and *de iure* control of State authorities, who refused to investigate those deaths. Such circumstances can be said to cause family members unnecessary pain and can be considered inhuman and degrading treatment. This statement by the State was not made in the 'very distant past': it was a statement made during proceedings after the critical date. By ruling the entire communication inadmissible, the HRC did not recognise that the State's actions caused additional suffering to the families.

7. CONCLUSION AND FUTURE OUTLOOK

In the light of the above analysis of the two HRC decisions, communications concerning human rights violations that occurred in the 'very distant past' are highly unlikely to be found admissible by the HRC. However, it remains unclear what the HRC considers to be the 'very distant past'. While it appears to be possible for the HRC to find a violation of the prohibition of inhuman and degrading treatment with regard to family members of forcibly disappeared persons in such circumstances – as also highlighted by concurring Committee members –[103] the two decisions show that the admissibility of a communication in such circumstances is highly unlikely. In *K.K. and Others v Russia* this was justified by the fact that the men were categorised as 'dead' and not 'disappeared', along with the fact that their families were allegedly not treated in a 'manifestly disrespectful' manner. Those two conditions were not taken into consideration in *F.A.J. and B.M.R.A. v Spain*.[104]

101. ICRC and CMP, *Needs of Families of Missing Persons in Cyprus*, April 2019. See also Nasia Hadjigeorgiou, 'Truth and Closure in Cyprus: An Assessment of the Committee on Missing Persons' (2022) 55 Israel Law Review 3.
102. *K.K. and Others v Russia* (n 4), para 5.2.
103. *F.A.J. and B.M.R.A. v Spain* (n 4), Joint Opinion of Committee Members Yuval Shany, Jose Santos-Pais, Gentian Zyberi, David Moore, and Vasilka Sancin (concurring), para 4.
104. The HRC did however add the argument that domestic remedies were not exhausted, which was strongly criticised by the dissenting members of the HRC, *F.A.J. and B.M.R.A. v. Spain* (n 4) Joint opinion of Committee members Marcia V. J. Kran and Hernán Quezada (Partially Dissenting), paras 3 and 4. The other partially dissenting opinion argued that the applicants had in fact exhausted domestic remedies. See F.*A.J. and B.M.R.A. v. Spain* (n 4), Joint Opinion of Committee Members Marcia V. J. Kran and Hernán Quezada (Partially Dissenting).

While the HRC found the cases inadmissible, in one of the opinions to *F.A.J. and B.M.R.A. v Spain*, five HRC members stated that the HRC will monitor the process of addressing Spain's difficult past, historical memory, establishing of truth, and identifying and commemorating the victims of the Civil War and Franco's dictatorship in the context of the country's periodic review. In the opinion of the HRC members, the domestic process is the remedy for the 'authors' plight and their entitlement to obtain some sense of closure'.[105] In fact, UN treaty bodies, including the HRC, have raised the enforced disappearances that occurred in the 'very distant past' when reviewing country reports numerous times, including with regard to Spain,[106] as did various UN special procedures.[107] By addressing those issues in the reporting procedures, the HRC set expectations for victims, which were then not met when the victims tried to reach the HRC via the complaint mechanism. While approaching this issue within the reporting process might push States to adopt new measures or strengthen policies, it has a different meaning than views in an individual communication, which permits the HRC to analyse whether an ICCPR violation happened with regard to a specific person.

Last but not least, an Amnesty Law in Spain made it impossible to obtain justice domestically for the authors of *F.A.J. and B.M.R.A. v Spain*.[108] Treaty bodies, including the HRC, have repeatedly criticised within the State reporting procedure that the Amnesty Law remains in force, recommending Spain to either repeal or amend it.[109] The HRC specifically mentioned that the Amnesty Law hinders the investigation of past enforced disappearances.[110] Spain has not followed the recommendation to date, so the Amnesty Law remains in force. If Spain had followed the recommendation, the authors of *F.A.J. and B.M.R.A. v Spain* could possibly have obtained closure through domestic procedures. Therefore, responding that domestic process in Spain is the right remedy for the applicants, which will be monitored by the HRC in Spain's periodic review –[111] in which relevant HRC recommendations have previously been ignored – appears at least contradictory.

105. *F.A.J. and B.M.R.A. v Spain* (n 4), Joint Opinion of Committee Members Yuval Shany, Jose Santos-Pais, Gentian Zyberi, David Moore, and Vasilka Sancin (Concurring), para 4.
106. For relevant comments on Spain see for example *Concluding Observations on the Sixth Periodic Report of Spain*, CCPR/C/ESP/CO/6 (HRC), para 21; *Concluding Observations on the Report Submitted by Spain under Article 29, Paragraph 1 of the Convetion*, CED/C/ESP/CO1 (CED), paras 32–33. For other crimes that occurred in 'the very distant past', see comments on 'comfort women', that is, women and girls forced into sexual slavery by the Japanese Army before and during World War II, in *Concluding Observations on the Report Submitted by Japan under Article 29, Paragraph 1 of the Convention*, CED/C/JPN/CO/1 (CED), para 31. The UN Committee on Enforced Disappearances even adopted a statement on the *ratione temporis* element in the context of examination of State reports in which it recalled the right of close relatives to the truth and the fact that enforced disappearances are a continuous crime, and stated that wherever previous events are relevant for understanding the current situation of a State Party, they should be included in concluding observations. See: Statement by the CED on the *Ratione Temporis* Element in the Review of Reports Submitted by States Parties under the ICPPED.
107. See Report of the Working Group on Enforced or Involuntary Disappearances, Mission to Spain A/HRC/27/49/Add.1.
108. *F.A.J. and B.M.R.A. v Spain* (n 4), paras 2.15–2.17, 2.19, 3.3.
109. HRC, 'Concluding Observations on the Fifth Periodic Report of Spain', CCPR/C/ESP/CO/5, para 9; CAT, 'Consideration of Reports Submitted by States Parties under article 19 of the Convention, CAT/C/ESP/CO/5 para 21 and CAT/C/ESP/CO/6, para 15 (highlighting that enforced disappearances constitute torture).
110. *Concluding Observations on the Sixth Periodic Report of Spain*, para 21.
111. *F.A.J. and B.M.R.A. v Spain* (n 4), Joint Opinion of Committee Members Yuval Shany, Jose Santos-Pais, Gentian Zyberi, David Moore, and Vasilka Sancin (concurring), para 4.

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