

**Expert consultation on standards and public policies for an effective
investigation of enforced disappearances**



Human Rights
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ANALYSIS OF CONTEXT IN THE INVESTIGATION OF ENFORCED DISAPPEARANCES

Mr. Chair-Rapporteur, ladies and gentlemen,

Thank you very much for the invitation. Last year the International Bar Association's Human Rights Institute and FLACSO México, published an online manual on contextual analysis, with the aim of clarifying what the concept means and how it can be useful for the documentation and investigation of human rights violations.¹

We found that there is confusion around the concept and thus, an ill-informed temptation for opening Units on Contextual Analysis in different countries in the Americas. The confusion arises in part because context is a word that we all use on a daily basis, mainly referring to a background, but it is also used by different disciplines within the social sciences. Moreover, when it comes to human rights violations, including enforced disappearances, its use by regional human rights systems is different to that of international criminal tribunals.

Let me start then by addressing the definition and its main elements, I will then move into how it is used by international courts and to enumerate some of the main challenges of using the methodology at a country level. I will conclude by referring to some tools that can be employed in cases of enforced disappearances.

1) Definition and elements of the contextual analysis

Definition

Context is indeed a background that can cover history, politics, economy, geography, relationships and discourses, amongst others. There is a context to every crime, including that of a close social environment but external to the victim (i.e. families, peer groups, schools) and a more general context in which those social interactions take place: peace or war, dictatorship or democracy. With this in mind, many questions can be asked about the context of a human rights violation, which does not mean, however, that the investigation of every crime or human rights violation requires contextual analysis.

Contextual analysis refers to an activity one carries out, it is the joint analysis of factors that are relevant to a case, it is a methodology for criminal investigations that was primarily developed by international criminal tribunals.²

Contextual analysis is useful and needed when talking of the existence of a systematic or widespread phenomenon, when the victim belongs to a vulnerable/marginalized or particularly targeted group.³ It is relevant when "crime-based reconstruction is not sufficient to establish the methods of participation and degrees of criminal responsibility of the intellectual authors of so called system crimes" (meaning crimes committed by complex networks).⁴ More often than not the intellectual authors of system crimes are far removed from the crime scene.⁵

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As Seils and Wierda point out, “The investigation of system crimes requires an approach closer to that of an engineer. **The task is not simply to describe the carrying-out of the criminal act, but to elucidate the operation of the elements of the machinery.**”⁶

Elements

Contextual analysis requires a preliminary **hypothesis of investigation**. In crime analysis, a hypothesis is an presumption on a crime, which is supported by the initial available evidence.⁷ For instance, that state authorities participated in the commission of the crime.⁸ Hypothesis allow to make strategic decisions on how to direct and frame the investigation, including whether it is necessary to include a contextual analysis and which contextual elements would be relevant to analyse.⁹ The initial hypothesis will be gradually enriched or adapted at later steps of the investigation. In this sense, it is essential to remark that contextual analysis is a ‘living’ methodology that can be useful at all stages of the investigation.

The key element of contextual analysis is patterns. **Patterns** are activities, methods, logistics, communications, basically the modus operandi. The existence of patterns implies some degree of planning of centralized control, and mainly a connection between crimes or violations. The connection is the central element because it tells us that the violations, in this case disappearances, are not isolated or exceptions.¹⁰

At this point it is important to keep in mind that when we look at patterns we go beyond the particular circumstances of each of the crimes/ violations, to identify the typology of the violation. This means that contextual analysis contributes to collective truth much more than to individual truth.¹¹

Use of contextual analysis by international tribunals

International organs, in particular international tribunals, and the Inter-American Court of Human Rights have developed the notion of “context”.

In the case of the ICC, contextual circumstances **are an element** of each of the core crimes under its jurisdiction: genocide, crimes against humanity, war crimes and crimes of aggression.

This means that the ICC, as other international criminal tribunals, always has to consider what it calls contextual circumstances. These are key, for example in the case of crimes against humanity, to characterize the systematic or widespread nature of the violation.

While both international human rights and criminal courts describe the socio-historic and economic context of the territory where the violations were committed,

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international criminal courts assess individual criminal responsibility and thus need to meet the threshold of reasonable doubt.

The use of context analysis by a human rights court is very different because they do not have investigative units and they do not assess individual criminal responsibility. The Inter-American Court of Human Rights understands context widely as the historical, political, material, temporal and spatial circumstances of a case. A well-known example is the Cotton Field Case (González and al. v. Mexico), where the Court used contextual analysis to describe the context of violence against women in Ciudad Juárez,¹² and ask questions like the following: “Can patterns be identified in the characteristics of women who were disappeared and / or killed? What are the cultural guidelines that allow us to understand this development?”¹³

This is how the court uses contextual analysis but as part of its decisions, the Court has stated that the application of a contextual analysis to the national investigations of complex cases, including cases of widespread and systematic violations of human rights, is a due diligence obligation of states. The Rochela Massacre v. Colombia Case is a good example of this.¹⁴

2) Challenges of the use of context at a country level

Both the Working Group, in the case of Mexico, and the Committee on Enforced Disappearances, in the case of Colombia, have recommended the government to start looking at patterns, and chain of command.¹⁵

Despite the advantages of contextual analysis, as previously presented, it is important to consider the following challenges to its implementation at a country level:

- At the national level and in the framework of a criminal investigation, the standard of proof needs to be met while ensuring due process, mainly the presumption of innocence;
- The state, different to the ICC, needs to find those directly responsible for the violations and not only those most responsible;
- At a national level both individual and collective truth (and justice) are important. Relying solely on a contextual analysis entails a risk of overlooking material perpetrators by focusing on intellectual criminals;
- Narrow hypothesis of investigation can be used against victims via the argument that certain cases do not fit within their scope.

Moreover, the creation of Units on Contextual Analysis require sufficient resources and an interdisciplinary team.¹⁶ Furthermore, the communication between the Unit on Context and other units is essential to diminish the risk overlooking interconnected human rights violations like torture

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3) Tools that can be useful for enforced disappearances

Beyond traditional sources of information such as testimonies, confessions, reports from international and local human rights organizations and press, the application of context analysis to the criminal investigation of enforced disappearances and/or the search of disappeared persons requires “the application of investigative techniques from other disciplines that facilitate the elaboration of an analysis to guide the gathering of evidence”.¹⁷

(1) First, the use of mapping techniques or graphic visualizations:

Static and dynamic cartography, including geographic data and satellite images, can facilitate the search for disappeared and the investigation of responsible persons.¹⁸ In Mexico, the 2015 Protocol for the Search of Disappeared and Investigation of the Crime of Enforced Disappearances contemplates the creation of maps to link localities and states to criminal organizations or responsible authorities.¹⁹

One example is Congram’s work on geographical patterns of mass graves of victims of enforced disappeared during the Spanish Civil War. He built his work on the hypothesis that in armed conflicts behaviour is restricted, thus, the places where victims are buried are determined by context. He analysed various characteristics of already discovered mass graves, such as “the number of victims, the distances between places of the detention and execution/pits, the use and extension of the land, the type of roads, population density”. Finally, based on the distance from the nearest road, distance from the nearest populated place and type of road he created maps that can be used as predictive models.²⁰

(2) Second, the use of indirect documentation:

A research by organizations EQUITAS and Human Rights Data Analysis Group is an example of the usefulness of analysing indirect documentation in the investigation of enforced disappearances. The research team analysed and compared various records of a cemetery in RioNegro, Colombia. They found that most of unidentified remains were buried in 2003. Comparing this information with the reports of disappeared in the region, and the fact that the Colombian military had frequent activities in the region in that year, the research concluded that the persons whose relatives had disappeared in 2003 had higher probabilities than other families of identifying the remains of their loved ones in that particular cemetery.²¹

(3) Third, statistical analysis might also provide insight into context:

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The Human Rights Data Analysis Group, the Human Rights Program of the Ibero-American University and the organization Data Cívica, generated a statistical prediction model to determine the probability that counties (municipios) in Mexico contain clandestine graves. For this purpose, the research team merged information from the discovery of mass graves as reported by media, and geographic, sociodemographic and violence indicators in each of these municipalities into a database. Based on these indicators, the study identifies a number of municipalities where the probability that mass graves are found are higher.²²

Thank you very much for your attention, I welcome any question or comment.

¹ IBAHRI and FLACSO, *Violaciones, derechos humanos y contexto: herramientas propuestas para documentar e investigar, Manual de Análisis de Contexto para Casos de Violaciones a los Derechos Humanos*, 2017,

<http://www.flacso.edu.mx/sites/default/files/violaciones-ddhh-y-contexto-herramientas-propuestas-para-documentar-investigar.pdf>

² Ibid, p.5-6

³ Ibid, p.41

⁴ David Martínez Osorio, *Manual de análisis contextual para la investigación penal en la Dirección Nacional de Análisis y Contextos (DINAC) de la Fiscalía General de la Nación*, 2014, ICTJ, p.20-21, <https://www.ictj.org/sites/default/files/ICTJ-Manual-DINAC-2014.pdf>

⁵ Ibid, p.18

⁶ Office of the High Commissioner for Human Rights, *Rule of law tools for post-conflict states, Prosecution initiatives*, 2006, p.12, <https://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>

⁷ Spencer Chainey, “Hypothesis Testing Crime Analysis”, JDiBrief Series, UCL Jill Dando Institute of Security and Crime Science, 2014, <http://www.ucl.ac.uk/jdibrief/analysis/hypothesis-testing-crime-analysis>

⁸ Office of the High Commissioner for Human Rights, *Rule of law tools for post-conflict states, Prosecution initiatives*, 2006, p.6 and 13, <https://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>

⁹ IBAHRI and FLACSO, *Violaciones, derechos humanos y contexto: herramientas propuestas para documentar e investigar, Manual de Análisis de Contexto para Casos de Violaciones a los Derechos Humanos*, 2017, p.36-37,

<http://www.flacso.edu.mx/sites/default/files/violaciones-ddhh-y-contexto-herramientas-propuestas-para-documentar-investigar.pdf>

¹⁰ Juan Pablo Hinestrosa Velez, “Contexto y patrones de macrocriminalidad en Colombia: Una forma de buscar el derecho a la justicia”, 2018, https://dplfblog.com/2018/03/22/contexto-y-patrones-de-macrocriminalidad-en-colombia-una-forma-de-buscar-el-derecho-a-la-justicia/#_ftnref17

¹¹ Colombian Supreme Court of Justice, Penal Chamber, Judgment N° 45547, 16 December 2015, quoted by Juan Pablo Hinestrosa Velez, *ibid*

¹² Inter-American Court of Human Rights, Case of González et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment of 16 November 2009, Serie C, No.205, paras 113-164, http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.pdf

¹³ Ibid

¹⁴ Inter-American Court of Human Rights, Case of the Rochela Massacre v. Colombia, Merits, Reparations and Costs, Judgment of 11 May 2007, Serie C, No. 163, paras 76, 158 and 194,

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http://www.corteidh.or.cr/docs/casos/articulos/seriec_163_ing.pdf

¹⁵ CED, Concluding observations on the report submitted by Colombia, CED/C/COL/CO/1, 27 October 2016, http://www.un.org/en/ga/search/view_doc.asp?symbol=CED/C/COL/CO/1, para 20.e); WGED, Report on visit to Mexico, A/HRC/19/58/Add.2, 20 December 2011, para 97, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/19/58/Add.2

¹⁶ I(dh)eas, “El análisis de contexto en la investigación de delitos y violaciones graves a los derechos humanos”, March 2017, p.6, <http://www.idheas.org.mx/files/Relatoria.pdf>

¹⁷ David Martínez Osorio, *Manual de análisis contextual para la investigación penal en la Dirección Nacional de Análisis y Contextos (DINAC) de la Fiscalía General de la Nación*, 2014, ICTJ, p. 21, <https://www.ictj.org/sites/default/files/ICTJ-Manual-DINAC-2014.pdf>

¹⁸ Tamar Hayrikyan, “Community Discussion Summary: Documenting the Disappeared”, HURIDOCS, <https://www.huridocs.org/2017/08/community-discussion-documenting-the-disappeared/>

¹⁹ Office of the Prosecutor, *Protocolo Homologado para la Búsqueda de Personas Desaparecidas y la Investigación del Delito de Desaparición Forzada*, June 2015, p.45 http://www.pgr.gob.mx/que-es-la-pgr/PGR_Normateca_Sustantiva/Protocolo%20Desaparici%C3%B3n%20Forzada.pdf

²⁰ Derek Congram y Giovanna M Vidoli, “Arqueología forense: contexto, métodos e interpretación”, 2016, p.93-94, https://www.researchgate.net/publication/313790410_Arqueologia_forense_contexto_metodos_e_interpretacion_uncorrected_proof

²¹ EQUITAS, *Propuestas metodológicas para la Documentación y la Búsqueda de Personas Desaparecidas en Colombia*, 2010, p.31-43, https://hrdag.org/content/colombia/equitas_rionegro_es.pdf

²² Human Rights Data Analysis Group (HRDAG), *Data Cívica y el Programa de Derechos Humanos de la Universidad Iberoamericana (PDH Ibero)*, *Predecir la existencia de fosas en municipios mexicanos, Una primera aproximación estadística*, p.2, http://datacivica.org/assets/pdf/Fosas_web.pdf