



**Department of Law**

**An affront to the conscience of humanity:  
enforced disappearance in international human  
rights law**

**Nikolas Kyriakou**

Thesis submitted for assessment with a view to obtaining the degree of  
Doctor of Laws of the European University Institute

Florence, June 2012



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**Examining Board:**

Prof. Martin Scheinin, European University Institute (Supervisor)  
Prof. Francesco Francioni, European University Institute  
Prof. Manfred Nowak, (Universität Wien)  
Prof. Olivier de Frouville, (Clare Hall, Cambridge)

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## Summary

This PhD thesis takes issue with the practice of enforced disappearance as a multiple and complex human rights violation and covers various topics related to enforced disappearance. The point of departure is the historical development of the UN reaction to enforced disappearance and the creation of special mechanisms within that organization, which were drawn up in order to confront this practice. Linking the main theme with public international law, the thesis continues with the examination of the sources of law, both treaty and customary based, and juxtaposes the definitions of enforced disappearance that are found in international instruments with a view to ascertaining whether any discrepancies exist. In the subsequent chapters, the main methodological tool is the cross-jurisdictional comparative and interpretive assessment of the practice of three different human rights bodies, namely of the Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights. In this connection, the thesis identifies the areas of convergence and divergence in the work of these bodies. Further, the thesis also engages in the discussion of two significant topics that are directly related to the general theme, namely the right to truth and the phenomenon of extraordinary renditions. With regard to the right to truth, the main focus is on the interplay of this right with amnesty laws. At the same time the latter's compatibility with international law is examined. As for extraordinary renditions, the argument that is advanced is that this phenomenon is a new form of enforced disappearance and that it must be confronted as such. Overall, the thesis centres on the UN Convention for the Protection of All Persons from Enforced Disappearances and assess the evolution of human rights protection that this convention brings about.



## ACKNOWLEDGEMENTS

In late August 2008, I entered one of the main bookstores in central Florence and browsed its shelves. I stumbled upon a collection of poems by Constantine Cavafy and looked up his famous “Ithaca” poem. Little did I know then of the journey on which I was embarking on. The poet had not misled me: the road was “long, full of adventure, full of knowledge”.

The journey had actually started in 2006 without me realizing it. While working as a human rights lawyer in Cyprus, the case file of *Varnava v. Turkey* landed on my desk with instructions to carry out background research on specific issues. Those research tasks were the seed of curiosity from which grew thoughts of pursuing a Ph.D in that field. However, I became increasingly frustrated at not finding the answers I sought on the legal issues that loomed large: the bibliography on the subject was scarce and did not offer a systematic account, while the International Convention for the Protection of All Persons against Enforced Disappearance had just been signed. It soon became clear to me that I should write the book I was looking for.

So, I owe gratitude to Prof. Aristotle Constantinides for reviewing the original draft research proposal and for providing me with the initial insights to the academic world. I am greatly indebted to my supervisor, Prof. Martin Scheinin, for his encouragement, constant availability and thorough points of criticism on my research. I am also grateful to professors Francesco Francioni, Manfred Nowak and Olivier de Frouville for accepting to be on the examining board.

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The EUI has offered me not only an environment of intellectual rigour and broad intellectual horizons, but also good friends. Philippe, Tiago, Eunata, Georges, Teije and several other people that have spent a night or two (or more) at via Piagentina 31 have made the past four years in Florence unforgettable. Among my older cohorts, I must mention Nikos, Vasilis, Elias, Viki and Andreas with whom I have spent long working hours at the library and cheerful evenings in Sant’ Ambrogio, Berlin, New York, Maastricht and elsewhere. I surely hope that this list of places will become longer.

One of the places where this journey has taken me was Costa Rica. At the end of my second year of studies, I took a three-month internship at the Inter-American Court of Human Rights. I have earned an enormous amount of knowledge from that period and had the opportunity to meet a host of people from diverse backgrounds. I cherish the memory of that period. It would not have been the

same, had I not already taken Spanish classes with Edurne Iraizoz. Beyond her skilful guidance through Spanish texts, her profound love for life and the unreserved optimism make her one of the persons I admire most and I consider myself lucky to have crossed paths with her.

It is often the case that people behind the scenes are rarely praised for their contribution to the success of a work, so I wish to thank all the people of the EUI administration, the Law Department and the Library, who have responded to my queries unfailingly. Evangelia Koundouraki deserves special mention for her confidence-boosting words and support in the past year of study.

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“The Lestrygonians and the Cyclops and the angry Poseidon – do not fear them”. Words are not enough to describe my profound gratitude to my family, for supporting unfailingly every single endeavour I have taken up.

Looking back, I realize how long the journey has been.

Looking ahead, I see Ithaca.

Nikolas Kyriakou  
Florence – Nicosia, February 2012



*Στους γονείς μου,  
για την ελευθερία και την αγάπη.*



No one remembers them. Justice.

**G. Seferis *Argonauts***



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## INTRODUCTION

*“Praise the mutilated world  
and the grey feather a thrush lost,  
and the gentle light that strays and vanishes  
and returns”*

**Adam Zagajewski,  
“Try to praise the mutilated world”**

### ***Prolegomena***

In 1974, Savvas Hadjipanteli, along with another eight of his fellow-villagers of Yialousa, Cyprus, were forced aboard a bus by a group of Turkish soldiers and were driven to an unknown destination. For 33 years their whereabouts remained unknown. In 2007, Hadjipantelis' remains were located and exhumed from a mass grave in northern Cyprus. Bullet wounds were found to the skull, on the right arm and on the right thigh.<sup>1</sup> In 1975, on the other side of the globe, members of the notorious Chilean police '*Dirección de Inteligencia Nacional*' (DINA) detained Humberto Menanteau Aceituno and José Carrasco Vasquez. Their bodies were found only months later mutilated with signs of torture.<sup>2</sup> A year later, during a night that has come to be remembered as the '*Night of the Pencils*',<sup>3</sup> Horacio Angel Ungarno and many others of his schoolmates were arrested at their homes, on account of their participation in a campaign to demand school subsidies. Their actions were perceived as subversive action by the Argentine junta. Many of them still remain unaccounted for.<sup>4</sup>

The fate of the aforementioned individuals, as well as scores of others, was sealed by what has come to be known in human rights terminology as “enforced disappearance”. In the past two decades international human rights law has offered a handful of definitions of enforced disappearance. The most recent one is found in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED):<sup>5</sup>

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<sup>1</sup> *Varnava and others v. Turkey*, (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) 54 and 83 (European Court of Human Rights 2009).

<sup>2</sup> *Humberto Menanteau Aceituno and Mr. José Carrasco Vasquez v. Chile*, Communication No. 746/1997 (Human Rights Committee 1999).

<sup>3</sup> “Argentina recalls student abductions,” *BBC*, September 16, 2011, sec. Latin America & Caribbean, <http://www.bbc.co.uk/news/world-latin-america-14910859>.

<sup>4</sup> Argentina national commission on disappeared, *Nunca más: the report of the Argentine National Commission on the Disappeared*, 1st ed. (Farrar Straus Giroux, 1986), 318-319.

<sup>5</sup> International Convention for the Protection of All Persons from Enforced Disappearance (A/RES/61/177) (2007).

'For the purposes of this Convention, "enforced disappearance" is considered to be 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'.

The central notion in this thesis is the practice, or phenomenon, of enforced disappearance. Predominantly, the focus is on the development of legal responses to it by international organs and instruments. To this effect, the thesis takes stock of the vast material that has been generated by universal and regional organisations, courts, bodies and mechanisms, through diverse legal instruments, such as resolutions, reports, judgments, decisions etc. While the thesis is informed by the prolific developments taking place at multi-layered levels of human rights protection around the world, it places the International Convention for the Protection of All Persons from Enforced Disappearance at the epicentre of its analysis. Thus, one of the main research goals is to map how this new universal convention promotes protection against this particular practice.

The CPED marks the culmination of an arduous effort that began in the early 1980s by a host of actors (NGOs, concerned individuals and governments, officials of international organisations) to bring to the fore the issue of enforced disappearances.<sup>6</sup> It codifies in a legally binding instrument a definition of what constitutes enforced disappearance and issues a set of rules relating to matters that have languished for years in the realm of either customary or non-binding law or which had even been distributed among under various other human rights. Nowadays, since coming into force on 23 December 2010,<sup>7</sup> the CPED has become one of the core instruments of universal human rights instruments, complementing the protection of human rights around the world.<sup>8</sup>

Undertaking the research on this particular subject was not driven solely by a profound personal interest on the subject. A review of the literature for the purposes of drafting this thesis revealed at an early stage of my research that although this particular prohibition attracted academic interest, still there existed solely three monographs exclusively dedicated to it. '*Enforced disappearances in international human rights*'<sup>9</sup> is a 2006 publication, which does not include the CPED in its analysis, thus leaving considerable space for further research on the subject. '*The struggle against*

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<sup>6</sup> Amnesty International USA., "*Disappearances - a workbook*", (New York N.Y.: Amnesty International USA, 1981).

<sup>7</sup> "United Nations Treaty Collection", [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en).

<sup>8</sup> "Office of the United Nations High Commissioner for Human Rights (OHCHR) - International Law", <http://www2.ohchr.org/english/law/>.

<sup>9</sup> María Pérez Solla, *Enforced disappearances in international human rights* (Jefferson N.C.: McFarland & Co. Publishers, 2006).

*enforced disappearance and the 2007 United Nations convention*,<sup>10</sup> is a valuable contribution towards filling in the aforementioned gap. Despite the brief summaries of judgments and decisions of four international human rights bodies that this book offers, it does not provide for a comparative insight to their jurisprudence. As far as the CPED is concerned, this book does a particularly good job in rehearsing the preparatory steps to the CPED and setting out the content of its provisions, but remains mainly a handbook of the said convention, without elaborating into further detailed discussion of legal questions that merit attention. Finally, *'Enforced disappearance in international law'* was published in 2011 and aspires to cover international human rights, humanitarian and criminal law aspects of the phenomenon. Despite the lofty goals it sets, this book adopts a per body and not per theme analysis, therefore failing to provide insights and cross-regime analysis of the legal issues. The article-by-article analysis of the preparatory work and final text of the CPED subjects this work to the same criticism, as the previous book, i.e. that it similarly remains a handbook of the convention.

### ***Research methodology***

The research for this thesis was carried out mainly through desktop research, making use of the materials at various libraries and academic databases. In essence, the research aimed at analysing a wide breadth of documents and materials: UN resolutions; regional and universal human rights instruments; pronouncements of human rights courts, bodies and mechanisms; reports by international organisations and NGOs; and academic sources.

At the end of my second year of studies, I undertook a three-month mission to the Inter-American Court of Human Rights in Costa Rica, which proved to be a valuable experience in many respects. While at this Court, I benefited from working within an international body, whose case law holds a central role in my thesis. This afforded me the opportunity to understand the internal dynamics within bodies of this calibre and discuss with lawyers and judges the *modus operandi* of the Court and the legal underpinnings of the interpretative ethos of the Court's case law. Additionally, throughout the years of my research, I have placed particular attention on the development of the European Court of Human Rights' case law on enforced disappearances, with a particular focus on Cyprus. For this, I drew on my previous personal experience as a human rights lawyer. These experiences have added a practical gloss to the research, which although not directly reflected in the body of the thesis, have nevertheless broadened the horizon of my knowledge and understanding of these systems and which,

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<sup>10</sup> Tullio Scovazzi and Gabriella Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention* (Leiden ;;Boston: Martinus Nijhoff Publishers, 2007).

naturally, have shaped my perception for the role and effectiveness of international human rights adjudication.

An important methodological tool has been the use and comparative assessment of the jurisprudence of the European and Inter-American Court of Human Rights and the Human Rights Committee. The comparison between the three most prominent human rights bodies breaks with the traditional school of comparative human rights law school because the comparison here is undertaken at a “horizontal” level between these bodies, and not “vertically” between national jurisdictions and one single international human rights regime or even only between different national jurisdictions.

### **Overview of chapters**

In the first chapter, I embark on a historical recount of the evolution of enforced disappearance. The origins of disappearances are traced back to the Second World War era, when the Nazi regime had employed a systematic scheme of disappearances in order to crush local resistance in Europe. The practice remained in the shadow of other scourges of that period that period, especially the Holocaust, racial discrimination, as well as institutional and systematic violations of human dignity. A few decades later, enforced disappearance emerged again, this time in Latin America.

Two features of disappearances were particularly disconcerting in this respect: first, the institutionalised form that authoritarian regimes employed in performing them, mainly attested by planning and discharging “*Operación Condor*”. Second, the sheer number of disappearances reached unprecedented levels. It was the proliferation of this practice and the alarming statistics in countries such as Argentina and Chile that gave rise to multileveled universal reaction. The mobilisation within and by the United Nations (UN) mirrored one of the most important facets of this action, aimed at responding to the phenomenon. A principal outcome of this mobilisation was the creation in 1980 of the Working Group on Enforced and Involuntary Disappearances (WGEID).<sup>11</sup> In turn, the WGEID, paved the way for the subsequent creation of the special procedures (thematic and country-specific) within the UN.<sup>12</sup> It is the work and headways of this group that this chapter intends to grasp.

Chapter 2 is crafted to provide a coherent legal basis for the subsequent chapters by discussing the sources of law. In the first part of this chapter, I assess the customary law configuration of the prohibition of enforced disappearance. Often in the course of my research, I observed that commentators would either disregard the customary law dimension or consider it as a given that the prohibition was indeed proscribed by international customary law of human rights. This chapter puts the

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<sup>11</sup> “Working Group on Enforced or Involuntary Disappearances-index-”, <http://www2.ohchr.org/english/issues/disappear/index.htm>.

<sup>12</sup> “Special Procedures of the Human Rights Council”, <http://www2.ohchr.org/english/bodies/chr/special/index.htm>.

customary law *problématique* to the litmus test of three mainstream theories of custom formation. After concluding on this issue, the second part of the chapter sets the main backdrop of international instruments. A key feature of this part is the juxtaposition of the definitions found in the CPED, the Inter-American Convention on Forced Disappearance of Persons (IACFD), the UN Declaration on the Protection of all Persons from Enforced Disappearance (UNDPED) and Article 7(2) of the Statute of the International Criminal Court (ICC).

One of the oft-repeated quotes in academic writings and judicial decisions relating to enforced disappearance is that it constitutes a 'multiple and complex form of human rights violations'. Which human rights are involved through the perpetration of a disappearance? How have different international and regional jurisdictions dealt with these substantive rights and, in case differences arise, why is this so? Can a pattern of convergence or divergence in their respective interpretations be discerned? If the question is answered in the affirmative, what are the legal consequences? This is a set of questions to which chapter 3 aspires to proffer an answer to. An innovative element of the research is the inter-jurisdictional comparative approach to international case law on disappearances. Here, the underlying idea is to analyse the governing texts and actual practice of the Human Rights Committee and the European and American Courts of Human Rights on the practice of enforced disappearance.

Beyond the identification of which human rights are violated through the perpetration of enforced disappearance, a fundamental issue within the overall edifice of international human rights law is that of remedies. Remedies merit distinct consideration, which they are given in chapter 4, especially because the three bodies mentioned in the previous paragraph, have pursued different paths on this matter. Their practice offers a diverse and interesting background to examine which are the optimum ways to respond to enforced disappearance and why this is so. The monitoring mechanisms and enforcement rates of the remedies ordered by these judicial and quasi-judicial bodies are also relevant to this topic. At the heart of the examination lies the question of whether the remedies afforded are eventually appropriate and effective. Again, the method employed in order to discharge this task is by comparing the practice of the aforementioned bodies and contemplating ways to improve their impact. Although no actual practice based on the CPED exists, the remedial scope of this convention is also examined in an effort to locate its reparative reach, in anticipation of the actual impact it will have at the domestic level.

The CPED introduces in the constellation of human rights a new right: the right to the truth. Chapter 5 is exclusively dedicated to presenting the provenance and theorising the content of this new right. This right draws its origins from international humanitarian law, but has found its way into human

rights law through a progressive development from an admittedly narrow right of the family members of a disappeared person to know the truth about what has happened to that person, born by a broader circle of persons and even the society as a whole. The content of this right refers, *inter alia*, to all circumstances surrounding disappearance. The case law of the Inter-American Court of Human Rights played an instrumental role in the acknowledgment and shaping of this right and its analyses offer considerable insights to its normative scope both as a substantive right and as a remedy. The normative content of this right is criticised and the conclusions reached depart from those of the mainstream academic scholarship.

Hanna Arendt famously said in “*The Human Condition*” that: ‘Men are unable to forgive what they cannot punish and that they are unable to punish what has turned out to be unforgivable’.<sup>13</sup> The second part of this chapter takes amnesties in juxtaposition to the right to truth, on the hypothesis that the two notions stand in philosophical and legal antithesis. Amnesties are defined in this thesis as ‘a *de facto* or *de jure* measure of general application, which is aimed at shielding its beneficiaries from prosecution or exonerating them from the prospect of punishment or sanction’. Effectively, measures of this kind bar the access to investigatory and prosecutorial mechanisms whose operation would allow for the surfacing of truth. The main theme in this respect is whether amnesties for enforced disappearances are permissible and, if in the affirmative, under which conditions.

Enforced disappearance is not a phenomenon ascribed to legal archaeology. Reports by the WGEID and various NGOs, as well as the case law of the human rights bodies already mentioned in previous paragraphs, illustrate the “legal geography” of the phenomenon in the past three decades, as well as its changing contours. The democratisation of the Latin American countries contributed to the eradication of the phenomenon in that area. Although cases still reach the IACtHR even today, they mainly relate to events rooted in times of authoritarian regimes. Moving away from the Latin American paradigm, the phenomenon proliferated in Southeast Asia, northern Africa and Europe. Chapter 6 examines the hypothesis that “extraordinary rendition” constitutes a modern form of enforced disappearance. One of the practices employed by in the “war on terror”, especially under the Bush administration, was based on the detention and flying of individuals to “black sites”, essentially secret detention places, where they were more often than not subjected to “enhanced interrogation techniques”, a euphemism for torture. This last chapter examines these renditions through the lens of enforced disappearances and advances the argument that extraordinary rendition can be understood as a new form of enforced disappearance and that it must be confronted as such.

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<sup>13</sup> Hannah Arendt, *The human condition*, 2nd ed. (Chicago [u.a.]: Univ. of Chicago Press, 2009), 241.

The thesis is intended to include and advance multiple narratives and normative propositions. These multifaceted goals are intrinsically related to the historical and political context of enforced disappearance in the modern world. The first chapter is versed towards achieving this goal by focusing on the Latin American paradigm of disappearances. The evolution of the forms of enforced disappearance in Turkey, Russia or other geographical areas and later as CIA's extraordinary renditions takes place against a political background particular to each case. The second narrative underlying the main discussion is the development of the universal and regional human rights mechanisms. Starting from the 1503-procedure and reaching the latest and most elaborate judgments by the regional human rights courts, the discussion in chapters 3 and 4 portray the evolution of human rights law and the cross-fertilisation of jurisdictions. From a more normative point of view, the analysis undertaken seeks to be strongly rooted in an enlightened positivism,<sup>14</sup> without losing sight of the possible advancements *de lege ferenda* that could be made for the protection of individuals against enforced disappearance. In this respect, the thesis does not solely examine the particular features of a specific human rights violation, namely enforced disappearances, but makes excursions to broader themes of public international law, such as the ascertainment of customary law (chapter 2), remedies in international law (chapter 4), as well as amnesties and their permissibility under international law.

### ***Issues outside the scope of the thesis***

The main scope of the thesis is international human rights law and more specifically, the CPED and the jurisprudence of three human right bodies. By contrast, international humanitarian law and international criminal law lie outside the scope of my research. Despite this disclaimer, it should be noted that **chapter 5** makes, by necessity, brief excursions to these two areas. The main reasons for this are: first, that the normative roots of the right to truth are found in the rules laid down by the Additional Protocol I to the Geneva Conventions. Second, amnesties are inherently related to criminal law mechanisms, procedures and sanctions, which render it necessary to examine issues that partly fall within that domain. However, the central focus of analysis remains embedded in international human rights law.

A second disclaimer that ought to be made relates to the choice of the Human Rights Committee and the two regional human rights courts. The choice of these bodies was dictated by two reasons: first, starting from 1982 onwards, these three bodies have produced a prolific set of case-law out of which sprang the main legal challenges examined in this thesis. Secondly, as long-standing bodies of international profile they transcend, though in different terms, the national legal orders and

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<sup>14</sup> Bruno Simma, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View", *American Journal of International Law* 93, no. 2 (1999): 307.

shape law and its application within State boundaries. The Human Rights Chamber for Bosnia and Herzegovina is an interesting illustration of the hybrid courts, which were created in the aftermath of the dissolution of Yugoslavia.<sup>15</sup> Despite the fact that the Chamber issued several decisions regarding disappearances in that region, the choice was made not to include it within the scope of my research because of its narrow geographical relevance and its *ad hoc* nature.

The thesis reflects the law as it stood until February 2012.

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<sup>15</sup> "Human Rights Chamber", <http://www.hrc.ba/ENGLISH/DEFAULT.HTM>.



## CHAPTER 1

### **Enforced disappearances at the United Nations level**

- *“But if we exterminate them all, there’ll be fear for several generations.  
- What do you mean by all?  
- All... about twenty thousand people. And their relatives, too - they must be eradicated - and also those who remember their names.  
Not a trace of them will remain.  
That’s what Hitler attempted in his Night and Fog policy [...] Hitler lost the war. We will win.”*<sup>16</sup>

**Jacobo Timerman,  
*Prisoner without a name, cell without a number***

#### **1. Locating the principal forum**

The latest report by the UN Working Group on Enforced or Involuntary Disappearances states that the number of cases that remained under its active consideration stands at 42 759 in a total of 82 States.<sup>17</sup> Simultaneously, reports from other UN bodies and NGOs corroborate the fact that enforced disappearances remain rampant both as a matter of practice<sup>18</sup> and law.<sup>19</sup> The facts and figures provided by the various reports do not allow for any doubts that enforced disappearance still remains a disconcertingly contemporary human rights violation, which affects large numbers of individuals around the globe.<sup>20</sup>

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<sup>16</sup> Jacobo Timerman, *Prisoner without a name, cell without a number*, 1st ed. (Knopf; Distributed by Random House, 1981), 50.

<sup>17</sup> WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances A/HRC/19/58*, February 6, 2012, para. 8.

<sup>18</sup> Amnesty International et al., *Off the Record - U.S. Responsibility for Enforced Disappearances in the “War on Terror”*, June 7, 2007; Amnesty International, *Long Struggle for truth - Enforced Disappearances in Libya*, June 2010; Human Rights Watch, *“Who Will Tell Me What Happened to My Son?” - Russia’s Implementation of European Court of Human Rights Judgments on Chechnya*, September 2009; United Nations Office of the High Commissioner for Human Rights, *Conflict-related disappearances in Bardiya District*, December 2008.

<sup>19</sup> Human Rights Watch, “China: Don’t Legalize Secret Detention”, September 1, 2011, <http://www.hrw.org/news/2011/09/01/china-don-t-legalize-secret-detention> and “China: a year of illegal, politically motivated disappearances”, January 24, 2012, <http://www.hrw.org/news/2012/01/23/china-year-illegal-politically-motivated-disappearances>.

<sup>20</sup> For a recent illustration of the mobility and different contexts of the phenomenon of disappearances, see: “‘Hold Your Heart’ | Human Rights Watch”, October 27, 2001, <http://www.hrw.org/reports/2011/10/27/hold-your-heart>; “Mexico: Widespread Rights Abuses in ‘War on Drugs’ | Human Rights Watch”, November 9, 2011, <http://www.hrw.org/news/2011/11/09/mexico-widespread-rights-abuses-war-drugs>; “China: Enforced Disappearances a Growing Threat | Human Rights Watch”, November 9, 2011, <http://www.hrw.org/news/2011/11/09/china-enforced-disappearances-growing-threat>.

In the sections that follow, I undertake the task of describing the political and historical provenance of enforced disappearance in order to provide a contextualised illustration of the development of this phenomenon. In this chapter, the point of departure is World War II, when the first systematic practice of enforced disappearance, albeit not framed in these terms, took place under the Nazi regime. Following the presentation of the Nazi period, I will proceed to examine the reaction by the United Nations to the rise of enforced disappearance in Latin America during the turbulent decades of authoritarian rule in that region. The above-mentioned organisation is often praised for its work in standard setting, especially during the first decades of its existence. Indeed, it was within the context of the UN that three of the four currently existing international instruments relating to enforced disappearances were promulgated. The definitions of enforced disappearance found therein will be examined in chapter 2.

Nonetheless, standard-setting was not the only achievement of the organisation. After the first twenty years of its existence, the UN overturned the 'no power to take action' stance it had maintained by establishing two important mechanisms for the examination of human rights violations. UN Resolutions 1235 and 1503 paved the way for the active and more meaningful engagement of this organisation in the field of human rights. In turn, these two resolutions sowed the seeds for the creation of 'special procedures'.<sup>21</sup> In this connection, the creation of the Working Group on Enforced or Involuntary Disappearances in 1980 was, in my opinion, the unintended result of a process that was initiated by the aforementioned resolutions.

As prefigured by the three incidents of disappearances referred to in the introductory note, there were three countries whose situations first reached the UN during the late 1970s and early 1980s: Argentina, Chile and Cyprus. The disappearance cases in these countries sprang from different political settings and followed divergent itineraries thereafter. The body of work that was produced at the UN during the decades ranging from the 1960s until early 1990s is a firm foundation for and a significant contribution towards the subsequent promulgation of legal instruments, relating to enforced disappearance.<sup>22</sup>

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<sup>21</sup> Nigel Rodley, "The Evolution of United Nations Charter-based Machinery for the Protection of Human Rights" in *Human rights protection: methods and effectiveness*, ed. Frances Butler (Kluwer Law International, 2002), 187–192.

<sup>22</sup> In the course of my research I have compiled a catalogue of relevant documents, which remain on file with me.

## 2. Of nights and fogs: The 'Nacht und Nebel' decree

As already mentioned, the first instance of systematic practice of enforced disappearances is attributed to the Nazis.<sup>23</sup> Their notorious "*Nacht und Nebel*" (Night and Fog) decree was issued in 1941<sup>24</sup> and provided for the secret transportation of offenders, effectively political prisoners and members of movements of national resistance, to Germany where '(a) the prisoners [would] vanish without leaving a trace, (b) no information [would] be given as to their whereabouts or their fate'.<sup>25</sup> The practice was deployed with the purpose of spreading terror among the civilian population, deterring it from supporting or joining the resistance and of punishing resistance members. *Anderson* reminds that: 'The procedures took place secretly and family members were rarely notified of an individual's fate. It is thought that approximately 7000 persons were secretly arrested, transferred and likely executed under the Decree'.<sup>26</sup>

The decree and its repercussions were examined by the International Military Tribunal (IMT) during the Nuremberg trial and the proceedings subsequent to it. Under Article 6(b) of the IMT Charter the Tribunal had jurisdiction on, *inter alia*, war crimes.<sup>27</sup> Corresponding to Article 6(b), Count III of the

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<sup>23</sup> For a general perspective on the Nazi regime and legal issues in domestic and international law see: Nathan Stoltzfus, *Nazi crimes and the law* (Washington D.C.; Cambridge; New York: German Historical Institute; Cambridge University Press, 2008).

<sup>24</sup> Office of the United States Chief of Counsel For Prosecution of Axis Criminality, *Nazi conspiracy and aggression*. (Washington: United States government printing office, 1946), 873–4. The degree read as follows: 'Directives for the prosecution of offences committed within the occupied territories against the German State or the occupying power, of December 7th, 1941. Within the occupied territories, communistic elements and other circles hostile to Germany have increased their efforts against the German State and the occupying powers since the Russian campaign started. The amount and the danger of these machinations oblige us to take severe measures as a deterrent. First of all the following directives are to be applied: I. Within the occupied territories, the adequate punishment for offences committed against the German State or the occupying power, which endanger their security or a state of readiness is on principle the death penalty. II. The offences listed in paragraph I as a rule are to be dealt with in the occupied countries only if it is probable that sentence of death will be passed upon the offender, at least the principal offender, and if the trial and the execution can be completed in a very short time. Otherwise the offenders, at least the principal offenders, are to be taken to Germany. III. Prisoners taken to Germany are subjected to military procedure only if particular military interests require this. In case German or foreign authorities inquire about such prisoners, they are to be told that they were arrested, but that the proceedings do not allow any further information. [emphasis added]. IV. The Commanders in the occupied territories and the Court authorities within the framework of their jurisdiction are personally responsible for the observance of this decree. V. The Chief of the High Command of the Armed Forces determines in which occupied territories this decree is to be applied. He is authorized to explain and to issue executive orders and supplements. The Reich Minister of Justice will issue executive orders within his own jurisdiction'.

<sup>25</sup> Tullio Scovazzi and Gabriella Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention* (Martinus Nijhoff Publishers, 2007), 4.

<sup>26</sup> Kirsten Anderson, "How Effective Is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?", *Melbourne journal of international law*, 7 (2006), 245-277 (p. 249).

<sup>27</sup> "The Avalon Project: Charter of the International Military Tribunal", <http://avalon.law.yale.edu/imt/imtconst.asp#art6>. Article 6 provided: "The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (b) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in

indictment against Nazi officials charged Field-Marshal Wilhelm Keitel with the disappearance of persons under the 'murder and ill-treatment of civilian populations' section. Keitel was the official who had signed the 'Night and Fog' decree. The relevant part of the indictment read:

'In the concentration camps were many prisoners who were classified "Nacht und Nebel". These were entirely cut off from the world and were allowed neither to receive nor to send letters. They disappeared without trace and no announcement of their fate was ever made by the German authorities'.<sup>28</sup>

The International Military Tribunal did not accept Keitel's defence of following "superior orders" and found him guilty.

In the aftermath of the Nuremberg trial, the Allies issued Control Council Law No. 10 which sought to 'establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders other than those dealt with by the International Military Tribunal'.<sup>29</sup> The "Night and Fog" decree appeared once more in *USA. v. Alstoetter et al* (the justice cases). Franz Schlegelberger, Administrative Secretary of State of the Reich Ministry, was also found guilty because of his contribution to the destruction of judicial independence of the German legal system by imposing upon the Ministry of Justice and the courts the burden of the prosecution, trial, and disposal of the victims of the decree.<sup>30</sup>

This scheme of disappearances, as devised and executed by the Nazis, was directed indiscriminately against civilians in the occupied territories and, unsurprisingly, without any due process of law. It was applied on a massive scale against the population and its perpetrators did not inquire further into the details of each particular case; a characteristic inextricably linked to the dehumanising nature of the Nazi ideology. Contrasted to the definition of enforced disappearance in the CPED, "Night and Fog"-type disappearances bore identical elements to it. State agents deprived individuals of their liberty, leading them away to unknown destinations. This was later followed by a refusal to acknowledge the deprivation of liberty and/ or by concealment of their whereabouts. Although the actual words "enforced disappearance" or "missing person" were not used by the Nazi regime, nor were the crimes labelled as such by the Allies, it is nevertheless evident that the Nazi-sponsored policy, sanctioned by the "Night and Fog" decree, fitted squarely in the contemporary definition of enforced disappearance.

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occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

<sup>28</sup> "The Avalon Project: Indictment: Count Three", <http://avalon.law.yale.edu/imt/count3.asp>.

<sup>29</sup> John Watkins, *War crimes and war crime trials: from Leipzig to the ICC and beyond: cases, materials, and comments* (Carolina Academic Press, 2006), 191–192.

<sup>30</sup> "Nuremberg War Trials: The Ministries Cases (The Nazi Judges Cases)", <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm#U.S.A.%20v.%20ALSTOETTER%20ET%20AL%20%28The%20Justice%20Cases%29.>

### **3. *Eppur si muove: the role of the United Nations in promoting and protecting human rights***

World War II was succeeded by a period of universal human rights euphoria. In the aftermath of the war, the international community turned its attention to the promotion and respect of human rights. The Universal Declaration of Human Rights (UDHR),<sup>31</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>32</sup> and the International Covenant on Civil and Political Rights (ICCPR),<sup>33</sup> also known as the 'International Bill of Human Rights', heralded a new era for international law and stand, until today, as the cornerstone of human rights in the world.

The first post-war instance that "missing persons" were considered as an issue at the UN level was in 1949 on the occasion of the drafting of a legally binding instrument for the 'legal status of persons missing as a result of events of war or other disturbances of peace during the post-war years'.<sup>34</sup> The following year, the Convention on the declaration of death of missing persons was adopted.<sup>35</sup> Its scope was to provide 'for declarations of death of persons whose last residence was in Europe, Asia or Africa who have disappeared in the years 1939-1945, under circumstances affording reasonable ground to infer that they have died in consequence of events of war [...]'.<sup>36</sup> Further, it laid down a procedure for the application for declaration of death of a person and established an International Bureau for Declaration of Deaths. Nevertheless, this convention simply intended to provide certainty for the personal status of individuals and of their legal relationships by creating a set of legal arrangements that would be common for all states adhering to it. It was not inscribed in the standard-setting initiatives of the UN and did not aim at resolving any human rights-related issue.

#### ***A human rights agenda***

Until 1967, the UN's position with regard to human rights issues was limited to the handling of individual communications, pursuant to Resolution 75(V) of 1947 of the Economic and Social Council (ECOSOC).<sup>37</sup> During the early years of the organisation's life, ECOSOC had approved a statement by the Commission on Human Rights (CHR) that the latter 'had no power to take any action in regard to any complaints concerning human rights'.<sup>38</sup> Resolution 728F of 1959 slightly amended Resolution 75(V) and merely qualified a series of administrative aspects of its provisions by requesting that the UN

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<sup>31</sup> "The Universal Declaration of Human Rights", <http://www.un.org/en/documents/udhr/>.

<sup>32</sup> "International Covenant on Economic, Social and Cultural Rights", <http://www2.ohchr.org/english/law/cescr.htm>.

<sup>33</sup> "International Covenant on Civil and Political Rights", <http://www2.ohchr.org/english/law/ccpr.htm>.

<sup>34</sup> *General Assembly Resolution 369 (IV), Draft Convention on the declaration of death of missing persons*, 1949, para. 3.

<sup>35</sup> *Convention on the declaration of death of missing persons*, 1950.

<sup>36</sup> *Ibid.*, sec. 2.

<sup>37</sup> *ECOSOC Resolution 75(V)*, 1947.

<sup>38</sup> CHR, "Report of the Sub-committee on the handling of communications E/CN.4/14/Rev.2", February 6, 1947, para. 3.

Secretary General compile and distribute two sets of lists relating to 'principles involved in the promotion of universal respect for, and observance of, human rights' and to 'other communications concerning human rights'.<sup>39</sup> Despite the considerable controversy and debate caused by this self-inflicted denial of power, which generated 'the world's most elaborate waste-paper basket',<sup>40</sup> the situation remained unchanged for twenty years.<sup>41</sup>

It was the decolonisation wave of the 1960s, which substantially reformed UN membership, and by consequence, altered the stance of the organisation towards human rights. The political air had changed and so had States' agendas, thus bringing human rights to the forefront. The tone was also set by the adoption of the ICCPR and ICESCR. Despite these developments, the UN still could not articulate a practical and comprehensive response to the thousands of complaints of human rights violations. As a result, its mechanisms remained a paper-tiger: a euphemism that refers both to the amount of paperwork it produced and to the fruitlessness of its procedures. But the tide was changing;<sup>42</sup> political initiatives culminated in the adoption of Resolution 2144(XXI) by the General Assembly (GA), which invited ECOSOC and the CHR to 'give urgent consideration to ways and means of improving the capacity of the United Nations to put a stop to violations of human rights wherever they may occur'.<sup>43</sup>

This call did not remain unanswered neither by the CHR nor by the ECOSOC. The first passed Resolution 8 (XXIII) and the second approved Resolution 1235 (XLII). The latter Resolution authorised the CHR and the Sub-Commission on Prevention on Discrimination and Protection of Minorities (Sub-Commission) to

'examine information relevant to gross violations of human rights and fundamental freedoms, as exemplified by the policy of apartheid [...] and racial discrimination [...] contained in the communications listed by the Secretary General pursuant to Economic and Social Council resolution 728F' and '[m]ake a thorough study of situations which reveal a consistent pattern of violations of human rights, [...] and report, with recommendations thereon, to the Economic and Social Council'.<sup>44</sup>

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<sup>39</sup> ECOSOC Resolution 728F (XXVIII), 1959.

<sup>40</sup> John Humphrey, "The rights of petition in the United Nations," *Revue des Droits de l' Homme*, no. 4 (1971): 463, 470; Philip Alston, *The United Nations and human rights: a critical appraisal* (Clarendon Press; Oxford University Press, 1992), 141. For a more moderate assessment, see: Eckart Klein, "Some Thoughts on the Value of Individual Complaint Mechanisms on the Universal Plane", *Human Rights Law Journal* 29 (2008): 40-42.

<sup>41</sup> Miko Lempinen, *The United Nations Commission on Human Rights and the different treatment of governments: an inseparable part of promoting and encouraging respect for human rights?* (Åbo: Åbo Akademi University Press, 2005), 42.

<sup>42</sup> Alston, *The United Nations and human rights*, 143: 'The most significant development, however, was a decision by the Third World countries, strongly supported by the Eastern Europeans, that a general, non-treaty-based, communications-type procedure would be useful as an additional means by which to pursue the struggle against racist and colonialist policies'.

<sup>43</sup> *General Assembly Resolution 2144 (XXI). Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories*, 1966, para. 12.

<sup>44</sup> ECOSOC resolution 1235 (XLII), 1967, para. 2.

This brought the 'no power to take action' doctrine to an end and signalled the beginning of a new era for human rights at the UN.<sup>45</sup>

A public procedure was established accordingly with the aim of examining information on gross violations of human rights, which could be related with regard to their nature, seriousness and intensity to apartheid and racial discrimination. In this way the system of handling communications addressed to the UN found its *raison d'être*. As a consequence of the CHR power to make a thorough study, it could establish a mandate for a special rapporteur, an independent expert, a special representative or a working group with the task of investigating either specific human rights (thematic procedure) or the situation of human rights in a specific country (country-specific procedure).<sup>46</sup>

Despite the breakthrough that this signified, Resolution 1235 had inherent constraints and was far from constituting a purely individual petitioning system. The communications reaching the UN were solely used to establish whether gross violations were taking place in a certain state. Further, no form of redress was envisaged. Its final product could have been the initiation of a thorough study and, at best, an indirect public condemnation derived from the fact that a state was the object of such a procedure.

Although the general understanding of the 1235-procedure at the time was that its use would be confined to colonial and apartheid situations, the Sub-Commission brought to the CHR's attention the cases of Haiti and Greece. The case of Greece caused considerable concern to many UN member states; for western countries it was a matter of supporting a NATO ally and for the Soviet-led block, albeit a first-class opportunity to embarrass its opponents, a precedent that could be a source of problems for itself in the future.

Political expediency coupled with 'a genuine need felt particularly within the Sub-Commission'<sup>47</sup> and 'certain failings and inconsistencies [of the 1235-procedure]'<sup>48</sup> led to the adoption of Resolution 1503 (XLVIII) in 1970.<sup>49</sup> By this resolution, a parallel to Resolution's 1235 procedure was established for dealing with communications, which appeared to reveal a consistent pattern of gross and reliably

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<sup>45</sup> Howard Tolley, *The U.N. Commission on Human Rights* (Westview Press, 1987), 60.

<sup>46</sup> Miko Lempinen, *Challenges facing the system of special procedures of the United Nations Commission on Human Rights* (Turku/Abo: Institute for Human Rights Abo Akademi University, 2001), 6.

<sup>47</sup> Jeroen Gutter, *Thematic procedures of the United Nations Commission on Human Rights and International Law: in search of a sense of community* (Intersentia, 2006), 59. Gutter does not specify to what this 'need' referred to or which its source was.

<sup>48</sup> Antonio Cassese, *International law in a divided world* (Clarendon Press; Oxford University Press, 1986), 305; María Bartolomei, *Gross and massive violations of human rights in Argentina, 1976-1983: an analysis of the procedure under ECOSOC Resolution 1503* (Juristförlaget i Lund; Distribution Akademibokhandeln i Lund, 1994), 63. Cassese and Bartolomei do not elaborate further with regard to the nature of the 'failings and inconsistencies'.

<sup>49</sup> ECOSOC Resolution 1503 (XLVIII), 1970.

attested violations of human rights. Its three-stage procedure was characterised by the confidential nature of deliberations at the first two stages.<sup>50</sup>

According to UN Resolution 1503, a Working Group was mandated to consider communications with a view to bringing to the Sub-Commission's attention those communications that appeared to reveal a consistent pattern of gross and reliably attested violations of human rights. The second stage was the consideration by the Sub-Commission of these communications with a view to determining their referral to the CHR. And finally, the latter body had the power to require a thorough study in accordance with Resolution 1235, appoint an *ad hoc* committee with investigatory powers, or consider the matter closed.

It is true that the 1503-procedure was a cumbersome, time-consuming and slow system that often played into the hands of skilful diplomats who wished to keep their countries away from any scrutiny.<sup>51</sup> Not surprisingly it was the object of severe criticism by commentators.<sup>52</sup> The three-stage procedure offered States readily available opportunities to discontinue the examination of a country case. It should not be forgotten that the two decades of 1970s and 1980s were marked by the West - East antagonism, a situation that often led to the politicisation of the work of UN bodies. The 1503-procedure was no exception to this, but this is not to suggest that it was a wholesale failure, as the following country situations illustrate.

#### **4. Country situations: Cyprus, Chile and Argentina**

As already mentioned at the beginning of this chapter, there were three country situations, which brought the phenomenon of disappearances to the attention of the UN and eventually sparked action on disappearances. In this section, I intend to present the country situations of Cyprus, Chile and Argentina with regard to enforced disappearances.

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<sup>50</sup> For a thorough analysis of the 1503-procedure see: Maxime Tardu, "United Nations response to gross violations of human rights: the 1503 procedure", *Santa Clara Law Review* 20 (1980): 559 - 601.

<sup>51</sup> Iain Guest, *Behind the disappearances: Argentina's dirty war against human rights and the United Nations* (University of Pennsylvania Press, 1990), 117: "[...] as well as being breathtakingly complex, 1503 was exerting little if any pressure to governments. It was hardly surprising because 1503 had been created with two unrelated goals. The first was to reprimand governments, but in private. The second was to make use of the thousands of individual communications that were arriving at the UN. 1503 was not, in any sense, a petitions procedure [...]. Individual victims [...] were only important insofar as they helped show a pattern."

<sup>52</sup> Tolley, *The U.N. Commission on Human Rights*, 104; Marc Bossuyt, "The development of special procedures of the United Nations Commission on Human Rights", *Human Rights Law Journal* 6, no. 2-4 (1985): 184; Henry Steiner, *International human rights in context: law, politics, morals* (Oxford University Press, 1996), 361; Howard Tolley, "The Concealed Crack in the Citadel: the United Nations Commission on Human Rights' Response to Confidential Communications", *Human Rights Quarterly*, no. 6 (1984): 459; Nigel Rodley, "United Nations Non-Treaty Procedures for Dealing with Human Rights Violations" in *Guide to international human rights practice*, 4th ed. (Transnational Publishers, 2004), 84; Alston, *The United Nations and human rights*, 144.



## i. Cyprus

Dissatisfaction with the division of power in the newly established Republic and mistrust between the island's two ethnic communities resulted in the outburst of inter-communal fights in 1963. In July 1974, following a coup *d' état* backed by the Greek *junta* against the government of Cyprus, Turkey invaded Cyprus. As a result of the protracted conflict, a sizeable number, considering the total population, of Greek and Turkish Cypriots disappeared during the period of 1963 – 1974.

Alarmed by this aspect of the conflict, UN passed Resolution 3220 calling upon 'parties to armed conflicts, regardless of their character or location [...] to take such action [in order] to provide information about those who are missing in action'.<sup>53</sup> As a follow up to this resolution, the CHR passed Resolution 4(XXXI) calling for intensification of the efforts to ascertain the whereabouts of missing persons in Cyprus. The question of missing persons in Cyprus remained at an impasse until 1981. During that year, the two communities reached an agreement under the auspices of the United Nations by which the Committee on Missing Persons (CMP) was created.<sup>54</sup> Its mandate was to establish the fate of the missing persons. The two sides eventually submitted to it 502 cases of Turkish Cypriots and 1493 Greek Cypriots as missing. The function of the CMP followed largely the repeatedly failing course of the negotiations between the two communities for resolution of the Cyprus problem. For many years the work of the CMP remained at a standstill. In 1997, the leaders of the two communities agreed to provide each other all information at their disposal on the location of graves, but it took another seven years to disengage from political manipulation of the issue and resume the function of CMP.<sup>55</sup>

On the legal plane, Cyprus lodged in 1994 an interstate application in the European Court of Human Rights (ECtHR) against Turkey.<sup>56</sup> Amongst the complaints invoked was the issue of Greek Cypriot missing persons for whom the ECtHR found a violation of Articles 2, 3 and 5 ECHR. In 2009, the same Court handed down another judgment on disappeared persons in Cyprus brought against Turkey by a number of Greek Cypriot relatives of disappeared.<sup>57</sup> Again, violations of the same articles

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<sup>53</sup> "General Assembly Resolution 3220 (XXIX), Assistance and co-operation in accounting for persons who are missing or dead in armed conflicts", November 6, 1974, para. 2, <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/738/22/IMG/NR073822.pdf?OpenElement>.

<sup>54</sup> Committee on Missing Persons in Cyprus, "Home page", [http://www.cmp-cyprus.org/nqcontent.cfm?a\\_id=1](http://www.cmp-cyprus.org/nqcontent.cfm?a_id=1).

<sup>55</sup> Committee on Missing Persons in Cyprus, "UN Press Release", [http://www.cmp-cyprus.org/nqcontent.cfm?a\\_id=1353](http://www.cmp-cyprus.org/nqcontent.cfm?a_id=1353); Paul Sant Cassia, *Bodies of Evidence: Burial, Memory and the Recovery of Missing Persons in Cyprus* (Oxford: Berghahn, 2006), ch. 4.

<sup>56</sup> *Cyprus v. Turkey (Application no. 25781/94) [GC]* (European Court of Human Rights 2001).

<sup>57</sup> *Varnava and others v. Turkey (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90)* (European Court of Human Rights 2009).

of the ECHR were found. In the meantime, applications lodged against the Republic of Cyprus by Turkish Cypriot relatives of disappeared persons, were not successful.<sup>58</sup>

The discussion of the case of missing persons in Cyprus within the framework of the UN did not yield to any significant outcome. A tangible result was the creation of the CMP, under the auspices (and political pressure) of the organisation and its Secretary General. Despite its local significance, this neither impacted upon the development and function of UN procedures in the field of human rights at the institutional level nor did it furnish the relatives of missing persons with any information about the fate or whereabouts of their loved ones.

## ii. Chile

A *coup d' état* also marked this country's situation. In 1973, the military overthrew Salvador Allende and established a *junta*, which ruled Chile with the iron hand of Augusto Pinochet until 1990. Soon after his coming into power, the UN started receiving numerous communications with regards to the situation of human rights in Chile. The Sub-Commission was initially seized of the issue and made an urgent appeal to Chile to respect the UDHR and the international covenants on human rights. It also recommended the CHR to study the situation.<sup>59</sup> Further to this, the CHR authorised its president to send a telegram to the Chilean authorities. These calls were echoed in GA Resolution 3219 (XXIX)<sup>60</sup> and culminated in the CHR deciding to establish a Working Group on Chile.<sup>61</sup> A year after, Resolution 3448 (XXX) referred explicitly for the first time to the question of missing persons in Chile, calling for the clarification of the status of individuals who were not accounted for.<sup>62</sup> In relation to the two procedures discussed previously, premised on Resolutions 1235 and 1503, Chile reportedly was the object of a 1503 procedure in 1974, 1976 and 1977.<sup>63</sup> Since the two procedures were not mutually exclusive, Chile was also considered under the 1235 procedure that led to the adoption of Resolution 8 (XXXI),<sup>64</sup> setting up an *ad hoc* Working Group on the situation of human rights in Chile.<sup>65</sup>

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<sup>58</sup> *Saydam Hüsnü Baybora and others against Cyprus (Application no. 77116/01) [admissibility decision]* (European Court of Human Rights 2002); *Lütfi Celul Karabardak and others against Cyprus (Application no. 76575/01) [admissibility decision]* (European Court of Human Rights 2002).

<sup>59</sup> *Sub-Commission on prevention of discrimination and protection of minorities Resolution 8(XXVII)*, 1974.

<sup>60</sup> *General Assembly Resolution 3219 (XXIX)*, 1974.

<sup>61</sup> Commission on Human Rights, *Report on the thirtieth session, E/5464 - E/CN.4/1154*, March 4, 1974, 56.

<sup>62</sup> *Resolution 3448 (XXX), Protection of human rights in Chile, 3448 (XXX)*, 1975, para. 2 (c).

<sup>63</sup> Tolley, *The U.N. Commission on Human Rights*, 77.

<sup>64</sup> *Commission on Human Rights Resolution 8 (XXXI)*, 1975.

<sup>65</sup> Ton Zijldwijk, *Petitioning the United Nations: a study in human rights* (St. Martin's Press, 1982), 54; Ingrid Nifosi, *The UN special procedures in the field of human rights* (Intersentia; Gaunt, 2005), 38.

### ***The work of the ad hoc Working Group on Chile***

This amounted to a breakthrough in UN practice, as it stood at the time, because its primary focus of investigation hitherto had been on the themes of colonial situations and illegal occupation. It also constituted a stepping-stone for the opening of discussion on disappearances as a distinct item at UN level.<sup>66</sup> From 1975 to 1979, the *ad hoc* Working Group produced eight reports.<sup>67</sup> It was then replaced by a Special Rapporteur on the situation of human rights in Chile and two experts mandated to study the fate of missing persons in that country.<sup>68</sup>

A considerable amount of information on disappeared persons appeared in the aforesaid reports of the *ad hoc* Working Group. One of the main characteristics of these reports is that they included detailed information on individual cases of disappearances, which were corroborated with relevant factual proof, especially with regards to the involvement of State agents. Inclusion of this information in UN documents was important when considering the outright denial of the Chilean authorities to accept any responsibility for them. The importance lay not only in publicly condemning Chile within an international forum of the calibre of the UN, but especially in encapsulating an officially sanctioned truth of the assertions of the relatives of the disappeared, who had been marginalised within their own society and had to endure a state of denial.

The factual evidence and legal analysis from the standpoint of international law found in the reports are uneven. The Working Group described at length in describing the domestic state of siege and collated information on disappeared persons from various sources. It perceived the phenomenon of disappearances as 'extremely grave' from its very first report and pointed to the ineffectiveness of recourse to judicial safeguards such as *amparo*.<sup>69</sup> Further, it identified the methods employed for disappearances and categorises the subsequent inaction on the part of the Chilean authorities.<sup>70</sup> It also described the difficulties that advocates encountered in representing families of the disappeared, their

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<sup>66</sup> Regional developments should not be overlooked. For a survey on the action of the Inter-American human rights system: Robert Goldman, "History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights," *Human Rights Quarterly* 31, no. 4 (2009): 856.

<sup>67</sup> *Ad hoc Working Group on the situation of human rights in Chile, Progress report, A/10285* (United Nations, October 7, 1975); *Ad hoc Working Group on the situation of human rights in Chile, Report to Commission on Human Rights, E/CN.4/1188*, January 30, 1976; *Ad hoc Working Group on the situation of human rights in Chile, third report to General Assembly, A/31/253*, September 19, 1976; *Ad hoc Working Group on the situation of human rights in Chile, fourth report to the Commission on Human Rights, E/CN.4/ 1221*, February 10, 1977; *Ad hoc Working Group on the situation of human rights in Chile, fifth report to General Assembly, A/32/227*, 1977; *Ad hoc Working Group on the situation of human rights in Chile, sixth report to Commission on Human Rights, E/CN.4/ 1266*, March 1977; *Ad hoc Working Group on the situation of human rights in Chile, seventh report to General Assembly, July 27, 1978*; *Ad hoc Working Group on the situation of human rights in Chile, eighth report to Commission on Human Rights, E/CN.4/1310*, March 1979.

<sup>68</sup> *ECOSOC Decision, E/CN.4/1347*, 1979; *Commission on Human Rights Resolution 11 (XXXV)*, 1979.

<sup>69</sup> *Ad hoc Working Group on the situation of human rights in Chile, Progress report, A/10285*, para. 111 and 138.

<sup>70</sup> *Ad hoc Working Group on the situation of human rights in Chile, Report to Commission on Human Rights, E/CN.4/1188*, 80 and 82.

systematic harassment and isolation from their colleagues,<sup>71</sup> as well as the institutionalisation of torture of detainees in unofficial places of detention.<sup>72</sup> In subsequent reports the *ad hoc* Working Group established a set of common factual elements which confirmed that disappeared persons had been detained by security forces<sup>73</sup> and exposed the efforts by the Chilean secret services to wring declarations from families of disappeared persons that the latter had not disappeared.<sup>74</sup>

Following its visit to Chile in 1978, the *ad hoc* Working Group issued its penultimate report in which three interesting points merit attention: first, it recommended that the General Assembly adopt such dispositions in order to establish the international criminal responsibility for torturers who would otherwise evade individual responsibility by availing themselves of the protection of the amnesty law promulgated by Chile. Second, it proposed to Chile the establishment of an international commission of inquiry mandated to investigate the whereabouts and fate of the disappeared.<sup>75</sup> And third, the Working Group made explicit reference to the right of the families to know of the whereabouts and fate of their loved ones.<sup>76</sup> Despite the fact that the first two recommendations were not taken up by their respective addressees, it is submitted that they foreshadow the dispositions of the CPED on establishing the international criminal responsibility of perpetrators of disappearances, the setting up of a treaty body and this convention's provision on the right to truth. The final report included findings similar to those of previous reports and encapsulated the nature of the problem in the following lines:

'In short, the problem of the hundreds of missing persons has a uniform character: it is the consequence of a strategy of repression, fully planned and co-ordinated by a single authority and directed against those who might be suspected of engaging in any activity hostile to the regime'.<sup>77</sup>

### ***The Work of the Special Rapporteur on Chile***

*Felix Ermacora*, mandated by the CHR to study the question of the fate of missing and disappeared persons in Chile, submitted his report in 1979.<sup>78</sup> He recapitulated the main findings of the eight reports of the *ad hoc* Working Group and analysed the role of individuals, private organisations, the press, the

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<sup>71</sup> *Ad hoc Working Group on the situation of human rights in Chile, second report to Commission on Human Rights, E/CN.4/1188*, August 26, 1976, para. 289 and 292.

<sup>72</sup> *Ibid.*, 302 and 510.

<sup>73</sup> *Ad hoc Working Group on the situation of human rights in Chile, fourth report to the Commission on Human Rights, E/CN.4/1221*, para. 136.

<sup>74</sup> *Ad hoc Working Group on the situation of human rights in Chile, fifth report to General Assembly, A/32/227*, para. 131.

<sup>75</sup> *Ad hoc Working Group on the situation of human rights in Chile, seventh report to General Assembly*, para. 779, conclusions 9 and 15.

<sup>76</sup> *Ibid.*, para. 419.

<sup>77</sup> *Ad hoc Working Group on the situation of human rights in Chile, eighth report to Commission on Human Rights, E/CN.4/1310*, sec. VIII.

<sup>78</sup> *Felix Ermacora, Report of the Expert on the Question of the Fate of Missing and Disappeared Persons in Chile, Protection of human rights in Chile, A/34/583/Add.I* (United Nations, ECOSOC, November 21, 1979).

government and the judiciary in the disappearance of persons in Chile. The conclusion he reached was that there existed a *de facto* system of arrest and detention operating outside the control of the government and the courts.

Unlike the aforementioned eight reports, he further proceeded to expound on the legal ramifications that the situation of missing persons entailed and on Chile's responsibility under international law, against the backdrop of the two international covenants of human rights. To *Emracora's* understanding, the core violations of human rights related to disappearances were those pertaining to the right to life, the prohibition of torture, the prohibition of slavery and the right to liberty and security, these not being to the exclusion of other human rights.<sup>79</sup> He further asserted that:

'There can be no doubt that the phenomenon of missing persons in Chile described in this report amounts to a real situation of gross violations of human rights and it is not a question of a few, individual cases [...]. This "situation" is of a continuous nature'.<sup>80</sup>

The expert's report was significant because it provided for the first time a comprehensive legal analysis of the phenomenon of disappearances at a universal level and it did so with reference to international human rights that enunciated by the ICCPR a few years earlier. The report introduced an understanding of enforced disappearance as a multiple and continuous violation of human rights. Whereas the core violations of the right to life, liberty and security and the prohibition of torture are human rights that are considered usually implicated in an instance of enforced disappearance, it is doubtful, in my opinion, whether the prohibition of servitude and slavery could fit in the category of core violations.

There are at least three reasons in support of this contention: first, the context in which the expert had been called to examine the question of missing and disappeared persons does not provide any factual ground to base such a conclusion. On the contrary, from the very first report of the *ad hoc* Working Group it was observed that the arrests and detentions were predicated on political reasons.<sup>81</sup> Even up until 2001, *Manfred Nowak*, in his capacity as independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, was stating that: 'It is generally considered to be a multiple human rights

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<sup>79</sup> *Ibid.*, 87.

<sup>80</sup> *Ibid.*, para. 165 and 175.

<sup>81</sup> *Ad hoc Working Group on the situation of human rights in Chile, Progress report, A/10285*, para. 127: "Como se ha indicado antes, estas detenciones se hicieron fundamentalmente por motivos políticos; un régimen político constitucional fue derrocado por la fuerza y el nuevo régimen deseaba protegerse contra la resistencia de los partidarios del anterior. No puede, por lo tanto, establecerse una clara línea divisoria entre los detenidos sin haber sido acusados y los detenidos por delitos políticos. Todos los detenidos eran "sospechosos" políticos o considerados peligrosos, de hecho o en potencia desde el punto de vista político."

violation, but there is no agreement on which human rights, apart from the right to personal liberty, are actually violated by an act of enforced disappearance'.<sup>82</sup> A certain degree of antithesis lies here since *Ermacora* stated that: 'The right to liberty and security of person **may** [*emphasis added*] be involved inasmuch as persons who disappeared were often seen when they were detained by State authorities'.<sup>83</sup> With hindsight, it can be said that deprivation of liberty, whichever form it may take, is at the heart of enforced disappearance. The latter cannot be conceived without it as its fundamental constitutive element.

Second, the definition of slavery in ICCPR or the Slavery Convention<sup>84</sup> does not relate to the phenomenon of disappearance – at least in the latter's contemporary form. "Slavery" is defined in Article 7 of the Supplementary Slavery Convention as the 'status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. It is obvious that in the case of enforced disappearance the element relating to ownership is not present. To add to this, no evidence has been adduced to prove the conditions of slavery of disappeared individuals in Chile during that period.

Third, whatever the merit of the relation between disappearance and slavery or servitude in *Ermacora's* report, such a relation can no longer be sustained in the light of recent jurisprudence by the European Court of Human Rights. In *Siliadin v. France*, the Court found that although the applicant was deprived of her personal autonomy, it was not found that a genuine right of legal ownership over her was exercised, 'thus reducing her to the status of an "object"'.<sup>85</sup> In the later *Rantsev v. Cyprus and Russia* judgment, the same Court was confronted with a trafficking in human persons case. In this case, the Court took note of the ICTY judgment in *Prosecutor v. Kunarac, Vukovic and Kovac*, where the *ad hoc* Court found that:

'the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as 'chattel slavery' has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with 'chattel slavery', but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership,

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<sup>82</sup> Manfred Nowak, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, E/CN.4/2002/71*, January 8, 2002. It is interesting to note that Felix Ermacora and Manfred Nowak had already worked together for the Chilean reports.

<sup>83</sup> Ermacora, *Report of the Expert on the Question of the Fate of Missing and Disappeared Persons in Chile, Protection of human rights in Chile, A/34/583/Add.I*, 87.

<sup>84</sup> *Slavery Convention, 1926*, <http://www2.ohchr.org/english/law/slavery.htm>; *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956*, <http://www2.ohchr.org/english/law/slavetrade.htm>.

<sup>85</sup> *Siliadin v. France (Application no. 73316/01)* 122 (European Court of Human Rights 2005).

there is some destruction of the juridical personality; the destruction is greater in the case of 'chattel slavery' but the difference is one of degree'.<sup>86</sup>

Despite the submissions of third parties, which sought to prompt the ECtHR to change its legal assessment of slavery in *Siliadin*, the Court remained unconvinced.<sup>87</sup> The ECtHR's stance is relevant with regard to enforced disappearances to the extent that the latter are not perpetrated in order to subject individuals to slavery or servitude. The aforementioned ICTY judgment lends support to this argument by clarifying that 'the required *mens rea* consists of the intentional exercise of a power attaching to the right of ownership'.<sup>88</sup> Obviously, such is not the case with enforced disappearances. In *Cyprus v. Turkey* the applicant government had alleged that a violation of Article 4 ECHR, prohibiting slavery, had occurred with respect to missing persons. Both the ECHR Commission and Court refused to speculate on the fate and whereabouts of these persons.<sup>89</sup>

Chile's record with regard to disappearances improved in the years following the *coup d'état*. By 1978 no new disappearances were reported, although hundreds of cases remained unresolved. *Dinah Shelton* asserts that this is partly attributable to the mounting pressure of the international community and the fact-finding missions to Chile. Her point of reference is both the cessation of the practice as illustrated by the absence of new occurrences of cases of disappearances and also by the fact that disappearances were on the increase elsewhere in Latin America at the same time.<sup>90</sup> A more critical approach is adopted by *Richard Lillich* who, while commenting on the *ad hoc* Working Group's output, maintained that: 'the UN sanctioning process against states which violate the human rights of people resident therein is mostly investigative and ombudsmanlike'.<sup>91</sup>

But how is one to measure the impact of bodies of this type? Although no uniform calibration scale exists (or even a measuring scale of any kind), *Shelton's* position with factual corroboration seems more tenable. From a theoretical point of view, there were of course inherent limits to the scope of powers of the *ad hoc* Working Group that inevitably determined the expected outcome. The approach to the UN (in-) action towards the case of Chile depends on the standpoint one holds. Should the *ad hoc* Working Group be castigated for the perceived inadequate UN response to the practices of a totalitarian regime or should we see the *ad hoc* Working Group as a stage on which to mount pressure

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<sup>86</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* 117 (IT-96-23 & IT-96-23/1-A) (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 - Appeals Chamber 2002).

<sup>87</sup> *Rantsev v. Cyprus and Russia (Application no. 25965/04)* 282 (European Court of Human Rights 2010).

<sup>88</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, para. 122.

<sup>89</sup> *Cyprus v. Turkey (Application no. 25781/94) [GC]*, para. 138–141.

<sup>90</sup> Dinah Shelton, "Utilization of fact-finding missions to promote and protect human rights: the Chile case" *Human Rights Law Journal* 2, no. 1-2 (1981): 32.

<sup>91</sup> Richard Lillich, *International human rights: problems of law and policy* (Little Brown, 1979), 303.

at the UN? It is submitted that the Working Group was not devised to address the entire evil emanating from Chile. No more could have been expected other than a descriptive analysis of the situation and recommendations related to it. Furthermore, it should be remembered that the Group was obliged to discharge its duties within a highly politicised climate in situation in which the government concerned was uncooperative.

As a final note to this section, it should be mentioned that two of the elements underscored by *Ermacora* are nowadays reflected in international human rights instruments, namely, the gross violations of human rights attaining a level of systematic and widespread practice and the continuous nature of the violation. With regard to the first, the preamble of the IACFDP, Article 5 CPED and Article 7.1(i) of the ICC Statute provide that the systematic or widespread practice of enforced disappearance amounts to a crime against humanity. Related to the second element, Article III of the Inter-American Convention on Forced Disappearance of Persons and Article 8 CPED explicitly refer to the continuous nature of the violation. The particular features of the definitions of enforced disappearance in these instruments will be dealt with and analysed in chapter 2.

### iii. Argentina

The devastating numbers of *desaparecidos* in Argentina made the situation in Chile seem pale in comparison.<sup>92</sup> According to a report by CONADEP, the National Commission on Disappeared People set up in the aftermath of the Argentine *junta*'s fall, 12 000 persons were abducted during the seven-year military rule, out of whom 8 960 remained missing at the time the report was published.<sup>93</sup> Contrary to popular belief, disappearances did not surface in Argentina upon the *junta* assuming power on 24 March 1976.<sup>94</sup> In fact, disappearances also occurred in the immediately preceding period, while a democratic system was in place, albeit one highly flawed by antagonising factors within it. However, their proliferation as a systematic practice, together with the institutionalisation of torture and the creation of nearly 340 secret detention centres under the guise of a national security doctrine is exclusively attributed to the *junta*.

Argentina was also placed under the scrutiny of existing UN human rights mechanisms. Unlike Chile, the intensity, immediacy and degree of this scrutiny was very different. Soon after the

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<sup>92</sup> For a succinct description of the historical background see David Pion-Berlin, "To prosecute or to pardon?: human rights decisions in the Latin American Southern Cone", *Human rights quarterly* 16, no. 1 (1994): 107–115.

<sup>93</sup> Argentina National Commission on Disappeared, *Nunca más: the report of the Argentine National Commission on the Disappeared*, (Farrar Straus Giroux, 1986), xi and 447.

<sup>94</sup> "La dictadura militar en Argentina, 24 de marzo de 1976 - 10 de diciembre de 1983", <http://www.me.gov.ar/efeme/24demarzo/dictadura.html>.



establishment of the *junta* regime, communications containing allegations for human rights violations began to reach the UN. In 1977, the communications did not go further than the first stage of the 1503 procedure (that is, the Sub-Commission's working group). A year later, the communications reached the Sub-Commission, but did not make it to the next stage. In 1979, the case had still not reached the Commission, a fact that led the latter to seek a public response under the 1235 procedure. Finally, in 1980 Argentina was placed on the 1503 agenda and remained there until 1984.<sup>95</sup>

Argentina shifted from an initially intransigent position in 1976 to accepting cooperation with the UN under the said procedure in 1980. At the beginning its aim was 'to prevent any public debate that could lead to criticism of the Junta by name [and] to ensure that Argentina stayed off the United Nation's confidential blacklist of "gross violators", i.e. the 1503 procedure'.<sup>96</sup> As pressure was mounting and since the Chilean case served as an unsettling precedent, Argentina changed its position in 1980 by subjecting itself to the 1503 procedure in order to avoid the publicity that the 1235 procedure would entail. Until its fall, the *junta* responded to the procedure with the sole purpose of keeping itself within the boundaries of confidentiality and avoiding any reprimand or public condemnation.

As far as the Argentinean case is concerned, Resolution 1503 did not deliver any significant results during the period 1980 – 1984. *Cardenas* has argued that 'not only increases in international pressure lead to reduced violations and greater human rights commitments, but state responses matched international human rights demands closely'.<sup>97</sup> Her argument is valid in as much as Argentina's shift of policy and the decrease in the number of disappearances are attributed to calculations related to its international economic relations coupled with a concern for its international profile. This reinforces the argument that the 1503-mechanism was not by itself highly effective in the case of Argentina.

The reasons for this failure are manifold: the overly politicised nature of the case of Argentina;<sup>98</sup> the close economic ties between Argentina and the Soviet Union;<sup>99</sup> the inherent limits and weaknesses of the 1503 procedure;<sup>100</sup> the internal power games and personal agendas of UN officials.<sup>101</sup> All these factors influenced the debate on Argentina and assisted the *junta* in its political manipulations. Surprisingly enough, during the seven years of the *junta*'s existence, Argentina was denounced only

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<sup>95</sup> Tolley, *The U.N. Commission on Human Rights*, 128; Alston, *The United Nations and human rights*, 150.

<sup>96</sup> Gutter, *Thematic procedures of the United Nations Commission on Human Rights and International Law*, 82.

<sup>97</sup> Sonia Cardenas, *Conflict and compliance: state responses to international human rights pressure* (University of Pennsylvania Press, 2007), 64.

<sup>98</sup> Lempinen, *The United Nations Commission on Human Rights and the different treatment of governments*, 225.

<sup>99</sup> David Weisbrodt and María Bartolomei, "The Effectiveness of International Human Rights Pressures: the Case of Argentina, 1976-1983", *Minnesota Law Review* 75, no. 3 (1991): 1030.

<sup>100</sup> Alston, *The United Nations and human rights*, 150.

<sup>101</sup> Guest, *Behind the disappearances*, 323.

once in UN documents with regard to the phenomenon of disappearances: the Sub-Commission, within the 1235-procedure, had expressed its concern in Resolution 2(XXIX) for the situation of human rights in that country in 1976.<sup>102</sup>

### **Times they are a-changing**

Irrespective of how inadequate and inefficient the UN response appears to have been, there are two developments that mark this period and which are worth mentioning. The first is the adoption of UN General Assembly Resolution 33/173.<sup>103</sup> This resolution warrants attention for two main reasons: first, it is the first instance of the General Assembly moving away from the country-specific approach that had hitherto prevailed at the UN level and approaching the phenomenon of disappearances as a universal and distinct issue due to the reports from various parts of the world relating to it. Although this is an important expression of concern at the level of the General Assembly, it has been criticised that the failure to name Argentina as the principal perpetrator of disappearances was equal to a collective failure of concerned governments.<sup>104</sup> Further, the preamble of the resolution refers to enforced or involuntary disappearances ‘as a result of excesses on the part of law enforcement or security authorities’. Clearly, this wording is verging on a political correctness inconsistent with the magnitude and the gravity that the phenomenon of disappearances attained. It is also reminiscent of the language of ‘individual excesses’ employed by the *junta* itself in its attempt to self-pardon the atrocities it had committed.<sup>105</sup>

The second important point is the establishment of the UN Working Group on Enforced or Involuntary Disappearances. Although Argentina’s diplomatic tactics had succeeded in keeping it outside the scope of any meaningful criticism, they eventually contributed to carving out new space for human rights at the UN level. One of the most frequently voiced criticisms against any country-specific action was that it would be perceived as selective. Argentina had invoked the ‘selectivity defence’ on a number of occasions as part of its stratagem to avoid the glare of the international community. In order to sidestep this recurring block, action at the UN level shifted from ‘naming and shaming’ to a more general thematic approach.

Resolution 33/173, discussed above, called the CHR to ‘consider the question of disappeared persons with a view to making appropriate recommendations’ and States to ‘devote appropriate resources to searching for such persons and to undertake speedy and impartial investigations’. After

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<sup>102</sup> *Sub-Commission on prevention of discrimination and protection of minorities Resolution 2 (XXIX)*, 1976.

<sup>103</sup> *General Assembly Resolution 33/173, Disappeared persons*, 1978.

<sup>104</sup> Lempinen, *The United Nations Commission on Human Rights and the different treatment of governments*, 224.

<sup>105</sup> Argentina National Commission on Disappeared, *Nunca más*, 2.

tense and painstaking negotiations which sought to balance diverging interests and aims of various caucuses within the UN,<sup>106</sup> the ECOSOC adopted Resolution 1979/38, the CHR Resolution 20 (XXXVI) and the Sub-Commission Resolution 5B (XXXII). Broadly speaking, these four aforementioned instruments constitute the basis for the creation and operation of the WGEID.<sup>107</sup>

In a nutshell, Resolutions 1979/38 and 5B (XXXII) can be viewed as the preparatory steps to the creation of the WGEID. The first requested the CHR ‘to consider as a matter of priority the question of disappearances’ and the second proposed the creation of a group of experts whose task would be to act for the location of disappeared persons. Mindful of the aforementioned resolutions, the CHR adopted Resolution 20 (XXXVI) by virtue of which a working group was established, and mandated for one year to examine questions relevant to enforced or involuntary disappearances of persons. This latter resolution marked the birth of the first mechanism of what has come to be known as ‘special procedures’. Time proved that the establishment of the Working Group on Enforced or Involuntary Disappearances had far-reaching repercussions on the UN human rights machinery, serving as a prototype for the burgeoning of other special procedures that followed in time.

## **5. The Working Group on Enforced or Involuntary Disappearances**

In its 30-year long operation, the mandate of the Working Group has remained essentially twofold. Its primary task is to act as a medium of communication between families seeking to establish the fate or whereabouts of disappeared persons with governments. Secondly, in the aftermath of the promulgation of the UN Declaration on the Protection of All Persons from Enforced Disappearance, the Group has actively sought to monitor States’ compliance with it.

Notwithstanding the significant breakthrough marked by the establishment of WGEID, there was still an important issue to resolve: Resolution 20 (XXXVI) did not include any definition of enforced disappearance. At that stage it became apparent to all stakeholders that the discourse of human rights violations with regard to enforced disappearance was predicated on an understanding of the phenomenon, which was not to be found in any legal instrument existing at the time.

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<sup>106</sup> David Kramer and David Weisbsbrodt, “The 1980 U.N. Commission on Human Rights and the Disappeared”, *Human Rights Quarterly* 3, no. 18 (1981): 18 - 33.

<sup>107</sup> The accumulated frustration by the UN’s inability to respond to disappearances and the tension of the moments before the adoption of this resolution was captured by Guest, *Behind the disappearances*, 199: “There was a long moment of silence, almost as if the Commission was pausing to consider the fateful decision it was about to take. ‘Do I have a request for a vote?’ asked Sadi, to an almost audible intake of breath from the chamber. Sadi allowed no time for second thoughts, and he walloped his gavel against the wooden desk. For once, even Martínez had remained silent. The proposal had been accepted without a vote. Suddenly, the tension broke. Shestack and other Western delegates turned to each other in open relief. Upstairs in the gallery, relatives of the disappeared started weeping. Theo van Boven felt as though a cloud had lifted. The four year jinx had been broken.”

In its first report to the CHR, the Working Group provided a factual description of what the Group itself perceived to be the object of its mandate:

'The vast majority of the cases which confronted the Group involved persons who had been arrested, detained or abducted by personnel belonging to a body which was either established as or believed to be, an organ of Government; or controlled by Government; or operating with the overt or latent complicity of Government; and the Government concerned in these cases neither accepted responsibility for the arrest, detention or abduction, nor accounted for these actions'.<sup>108</sup>

This working definition was further elaborated in subsequent reports. In particular, in its 1988 report the Working Group crystallised the definition of enforced disappearance:

'A typical example of enforced or involuntary disappearance may be described in general terms as follows: a clearly identified person is detained against his will by officials of any branch or level of government or by organized groups or private individuals allegedly acting on behalf or with the support, permission or acquiescence of the Government. These forces then conceal the whereabouts of that person or refuse to disclose his fate or to acknowledge that the person was detained'.<sup>109</sup>

It is evident that as time advanced, the Working Group made a qualitative leap towards elaborating a more precise definition of enforced disappearance.<sup>110</sup> The definition bore no legal binding force, as it was merely the WGEID that had devised it, in order to discharge its mandate. However, it should be noted that this was an initial attempt to grasp the full extent of the phenomenon in a proper definition. And indeed the basic elements, as they developed through time, are there. If one deficiency were to be pointed out, that would be the narrow scope of the reference to detention against a person's will. A situation where a person may wilfully subject himself to detention is an unlikely possibility, in contrast to the all-encompassing phrase of 'deprivation of liberty' of which 'detention' is a sub-category.

Elaborating a working definition provided a shared understanding between stakeholders of what was actually perceived as enforced disappearance. Apart from this, the work of the WGEID dealt with a wide horizon of issues. The WGEID had encouraged the drafting of a binding international

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<sup>108</sup> WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/1435*, January 26, 1981, para. 3.

<sup>109</sup> WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/1988/19*, December 31, 1987, para. 17.

<sup>110</sup> In its 1996 report, the Working Group stated that three cumulative minimum elements should be contained in any definition of enforced disappearance in national laws. WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/1996/38*, January 15, 1996, para. 55; WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances A/HRC/7/2*, January 10, 2008, para. 26. A general comment to provide a construction of the definition of enforced disappearance that is most conducive to the protection of all persons from enforced disappearance is included in the latter report.

instrument on enforced disappearance<sup>111</sup> and actively participated in the elaboration of both the UN Declaration<sup>112</sup> and the CPED itself.<sup>113</sup> In addition, the group has highlighted the promulgation of amnesty laws and policies of impunity, in whichever form they materialised, as the two single most important factors contributing to disappearances.<sup>114</sup> Terrorism,<sup>115</sup> the “war on terror” and the methods employed therein have not escaped its attention, especially with regard to secret detentions<sup>116</sup> and extraordinary renditions.<sup>117</sup> Finally, the gender dimension of disappearances<sup>118</sup> and the interplay between transitional justice mechanisms with international law have equally attracted its attention.<sup>119</sup>

### ***The interface of old mechanisms and new procedures***

The creation of the WGEID and the proliferation of other ‘special procedures’, either thematic or country-oriented, begs the question of how their position can be conceptualised in relation to the mechanisms set up by Resolutions 1503 and 1235. Academic consensus is lacking on the issue as several writers have maintained different positions. *Menno Kamminga*<sup>120</sup> and *Philip Alston*<sup>121</sup> assert that Resolution 1235 is the basis for the establishment of the special procedures, whereas *Miko Lempinen* believes that the power for such establishment pre-existed the said resolution. In his opinion what was

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<sup>111</sup> WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/1988/19*, para. 302(c).

<sup>112</sup> WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/1989/18*, January 18, 1989, para. 311; WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/1990/13*, January 24, 1990, para. 31; WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/1993/25*, January 7, 1993, para. 520.

<sup>113</sup> WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/1997/34*, December 13, 1996, para. 31; WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/1998/43*, January 12, 1998, para. 20; WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/2001/68*, December 18, 2000, 24.

<sup>114</sup> WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/1990/13*, para. 22 – 23, 344.

<sup>115</sup> WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons A/HRC/10/9*, February 6, 2009, para. 450.

<sup>116</sup> WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/2005/65*, December 23, 2004, para. 368.

<sup>117</sup> WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons E/CN.4/2006/56*, December 27, 2005, para. 22. 'Extraordinary renditions' will be examined in chapter 5.

<sup>118</sup> WGEID, *Question of human rights of all persons subjected to any form of detention or imprisonment, in particular: question of missing or disappeared persons A/HRC/10/9*, para. 455.

<sup>119</sup> *Ibid.*, para. 456.

<sup>120</sup> Menno Kamminga, *Inter-state accountability for violations of human rights* (University of Pennsylvania Press, 1992), 108.

<sup>121</sup> Alston, *The United Nations and human rights*, 160.

lacking was the political will of States.<sup>122</sup> *Jeroen Gutter* is critical towards both views as he maintains that it is

'The entire institutional practice [of the UN] as a whole, building on, *inter alia*, ECOSOC Resolution 1235 and (widespread dissatisfaction with the manipulation of) Resolution 1503, from which the authority of the Commission to establish thematic procedures must be derived'.<sup>123</sup>

Based on the historical account that preceded this section, it can be validly maintained that the birth, function and subsequent development of the 'special procedures', and in particular that of WGEID, lies in between Resolutions 1235 and 1503. *Stricto sensu* Resolution 20 (XXXVI) is the founding document for WGEID, but the context from which it originates cannot be overlooked. Indeed, the repeated unsuccessful efforts to expose Argentina at the UN level through the 1503 mechanism, as well as the lack of concrete commitments and results on that State's part, led to the invention of a new procedure, that of the WGEID. As far as the characteristics of the latter are concerned, it should not escape attention that its methods of work and its mandate significantly differ from the ones found in Resolutions 1235 and 1503.

One of the most important advances introduced by the establishment of the WGEID is the emergence of the individual in the UN setting. The operation of the WGEID is not contingent upon establishing any pattern of gross violations of human rights. In both the 1503 and 1235 procedures the individual's role was exhausted at the moment of submission of a complaint. At best, such complaint could merely serve to corroborate the existence of a consistent pattern of violations that require the attention of the international community. By contrast, the WGEID has a principally humanitarian mandate of ascertaining the fate or whereabouts of a disappeared person and reporting this to its family. This also relates to the dynamics of the procedures under examination in the sense that the possible outcome of both the 1503 and 1235 procedures was, at best, the production of a thorough study or other comparable measures for a specific country.<sup>124</sup> The working methods of the WGEID allow for the examination of both the phenomenon at a level that exceeds a State-centred approach and permits the capture of a range of violations and not just those that are conducive to establishing a

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<sup>122</sup> Lempinen, *Challenges facing the system of special procedures of the United Nations Commission on Human Rights*, 9–10.

<sup>123</sup> Gutter, *Thematic procedures of the United Nations Commission on Human Rights and International Law*, 78.

<sup>124</sup> David Forsythe and Park Baekwan, "The Changing of the Guard: From the UN Human Rights Commission to the Council", *Human Rights Law Journal* 29 (2008): 12–13: "Whether one analyzes the 1235 procedure, the 1503 procedure, the use of special country-specific and thematic procedures, the use of special sessions, or the cumulative effects of all these and other measures, the facts are that none have been proven to be effective in the short-term structural protection of human rights in offending states. The 1503 procedure was especially weak."

pattern of violations within a certain jurisdiction. The diverse profile of the Group (wide scope of sources of information; annual reports; urgent action and country visits) attracts its public character from Resolution 1235.

As time advanced, the WGEID delimited the ambit of its activities and absorbed the flow of complaints that related to enforced disappearances. Indeed, 'the 1503 secretariat does not handle communications which refer to countries examined under public procedures by the Commission'.<sup>125</sup> The advent of a new UN body, that of the Human Rights Council (HRC), in replacement of the former CHR,<sup>126</sup> inspired discussions on the revision of the archaic procedure of Resolution 1503.<sup>127</sup> A new complaint procedure was introduced by HRC Resolution 5/1 with the aim of streamlining and rationalising the previous procedure.<sup>128</sup> The new procedure does not differ significantly from its predecessor and thus the remarks made above, as to the relationship between the 1503 procedure and the WGEID, are equally applicable.<sup>129</sup>

### **Assessment**

Seen in their respective domains of operation, all the procedures presented in the preceding sections cannot be deemed to bear the attributes of judicial or even quasi-judicial bodies. Especially the WGEID has avoided reaching any conclusion that could be perceived as judgmental towards States. At best, this group formulates observations on the general situation in a given State. Both the HRC complaint procedure and the WGEID are far from providing any comprehensive remedy. The humanitarian role of the WGEID is conclusive only in informing relatives of the disappeared as to the fate of the individual. While not underestimating its humanitarian mandate, it must be observed that there is no further remedial space for the WGEID.

Judging from the statistical data provided by the WGEID itself in its annual reports, a worsening trend of occurrences of enforced disappearances is discerned.<sup>130</sup> Not only has the overall number of pending cases been on the increase, along with that of the States under scrutiny, but also the number

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<sup>125</sup> Maria Francisca Ize-Charrin, "1503: A serious procedure" in *International human rights monitoring mechanisms: essays in honour of Jakob Th. Möller* (The Hague [u.a.]: Nijhoff, 2001), 297.

<sup>126</sup> *General Assembly Resolution A/RES/60/251, Human Rights Council, 2006.*

<sup>127</sup> "Human Rights Council Complaint Procedure", <http://www2.ohchr.org/english/bodies/chr/complaints.htm>.

<sup>128</sup> *Human Rights Council, Institution-building of the United Nations Human Rights Council, Resolution 5/1, 2007, pt. IV.*

<sup>129</sup> Andrew Clapham, "United Nations charter-based protection of human rights" in *International protection of human rights: a textbook*, ed. Catarina Krause and Martin Scheinin (Turku: Abo Akademi University. Institute for Human Rights, 2009), 101.

<sup>130</sup> According to the 2008 WGEID report the number of cases under active consideration that had not yet been clarified or discontinued stood at 42 393 and concerned 79 States. WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/10/9*, February 6, 2009, 2.

of clarified cases remains discouragingly low.<sup>131</sup> Clarification of a case within the WGEID framework may entail one of the following: locating the place of detention of a person; ensuring his/ her release; securing information surrounding a person's death; locating his/ her remains; moving the case under another more relevant procedure. Essentially, the WGEID acts as an intermediary between governments and families. Sanctions or remedies are lacking in this scheme and by consequence no enforcement mechanism is envisaged. The outer boundary of responsibility States might reach is that of a public embarrassment at the UN.

Notwithstanding States' concern about their public image and their need to maintain a positive human rights record, this situation is far from constituting an adequate response to enforced disappearance. A new development that seeks to address these problems and to fill the gap in protecting individuals from disappearance was the elaboration of a human rights convention specifically on the matter. The new UN Convention for the Protection of all Persons against Enforced Disappearance was adopted in 2007. Its features, innovations, deficiencies and gaps will be addressed in subsequent chapters.

## **6. The gradual development of UN mechanisms**

In the aftermath of the Nazi atrocities, the world seemed to be embarking on a new era in which human rights would play a prominent role and form the backdrop of international relations and domestic policies. Disillusionment did not take long to arrive, as the Cold War and its ensuing political expediencies falsified both the expectations and the promising declarations of an international bill of human rights. The UN conveyed a Janus-like message: on the one hand, it elaborated international instruments which sought to set standards of human rights protection at an unprecedented level, but on the other, it was unable to effectively respond to the plight of millions around the world. Resolutions 1235 and 1503 came after two decades of a self-imposed denial of action. Even at the most elaborate configuration and full deployment of their prescribed capacity, these two procedures cannot but be considered as having remained on the margins of a loose monitoring mechanism.<sup>132</sup>

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<sup>131</sup> Since 1980, 52 952 cases have been submitted to WGEID. 42 393 of them remain non-clarified or discontinued which places the rate of clarified cases at 19%.

<sup>132</sup> Tomuschat is even more critical of the 1503 procedure by considering that "the objective of that resolution was not to permit victims of human rights violations to submit their individual grievances, but rather to enable the competent UN bodies to ascertain whether there existed in a given country a "consistent pattern of gross and reliably attested violations of human rights". Accordingly, on a number of occasions country reporting derived from complaints received under Resolution 1503 (XLVII)'. See: Christian Tomuschat, "Origins and History of UN Special Procedures - An Overview from Their Inception to June 2007", *Human Rights Law Journal* 29 (2008): 28.



Their historical course had come full circle: the substitution of the former Commission on Human Rights with the Human Rights Council brought with it the streamlining and rationalisation of the existing mechanisms and procedures of the time. The current complaint procedure has not moved considerably further ahead and it is questionable whether the mechanism has added any value as such. This doubt is also preserved by the proliferation of human rights treaties, special procedures and treaty bodies of both international and regional nature.

Responding to enforced disappearance was the leitmotif for creating a new area in human rights protection: 'special procedures' can be deemed as the virtual progenies of enforced disappearance. Establishing the WGEID served not only to respond to the particular phenomenon of disappearances, but had a knock-on effect, which swiftly generated the creation of many other similar procedures.<sup>133</sup> This was not envisaged at the time of WGEID's creation. On the contrary, this group's mandate was solely for a year and several national delegations to the UN were indifferent or even hostile to its continuation.

Notwithstanding the vanguard position that the response to enforced disappearance enjoyed, it was not until 1992 that a UN Declaration and 2007 that an international convention specifically on this prohibition were adopted. In the meantime, other human rights issues ranked higher on the agenda of the international community and gained its attention. For many years, there was a general belief that enforced disappearance did not merit particular action as it could be understood and responded to through other safeguards, such as the prohibition of arbitrary arrest and detention, the humane treatment of prisoners and the prohibition of torture and extrajudicial killings.

Viewed from the standpoint of enforced disappearance, the story of UN responsiveness to this phenomenon can be narrated as a story of successive exhaustion of mediums. Stated otherwise, it is supported that the UN measures taken to react to this phenomenon had been employed to their outer limits both time- and result- wise. The initial inaction of the UN was succeeded by the introduction of the 1235 and 1503 Resolutions, which were, in turn, superseded by the establishment of WGEID. Adopting the CPED can be seen as the next stage of UN efforts to step up its action in this particular area. The binding definition of enforced disappearance and its customary law calibre will be considered in the following chapter.

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<sup>133</sup> Office of the United Nations High Commissioner for Human Rights, "Thematic mandates", <http://www2.ohchr.org/english/bodies/chr/special/themes.htm>.

## CHAPTER 2

### **Enforced disappearance and the sources of law**

*"Most of what we perversely persist in calling customary international law is not only not customary law; it does not even faintly resemble a customary law."<sup>134</sup>*

#### **1. Customary and treaty law definitions**

In this chapter, I intend to address two issues: first, I will examine whether the prohibition of enforced disappearance has attained the status of a customary law norm. Often, mainstream academic scholarship and human rights activists include this prohibition in the list of core human rights that fall within the realm of customary law.<sup>135</sup> However, its development into a norm of customary law is rarely, if ever, discussed.<sup>136</sup> As a result, it is often regarded as a self-evident truth that the prohibition of enforced disappearance is indeed customary. In the first part of this chapter, the customary law configuration of the prohibition of enforced disappearance will be examined under three methods. These are: the 'traditional method', having its foundations in general international law; the 'human rights method', proposed by human rights lawyers as a doctrinal construction inscribed in a broader and more modern understanding of custom; and the 'components method' which asserts that enforced disappearance detracts its customary law nature from separate human rights violations to which it can be 'de-constructed', namely the right to life, the prohibition of arbitrary arrest and the prohibition of torture.

In the second part, I will turn to the other main source of international law, i.e. treaties. In doing so, I will focus on those international instruments that deal either exclusively with the phenomenon of enforced disappearance or include provisions relevant to it. The Inter-American Convention on Forced Disappearance of Persons and the International Convention for the Protection of All Persons from Enforced Disappearance fall under the first category. Under the second category, Article 7 of the Rome Statute of the International Criminal Court is relevant for the purposes of this discussion. The understanding of enforced disappearances is complicated by differing definitions found in the

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<sup>134</sup> Robert Jennings, "The identification of International Law" in *International law: teaching and practice* (Stevens, 1982), 5.

<sup>135</sup> Amnesty International, "Denying the undeniable: enforced disappearances in Pakistan", 2008, 8, <http://www.amnesty.org/en/library/asset/ASA33/018/2008/en/0de43038-57dd-11dd-be62-3f7ba2157024/asa330182008eng.pdf>; American Law Institute, *Restatement of the Law, the Foreign Relations Law of the United States*, Rev. and enl. (American Law Institute Publishers, 1987), para. 702.

<sup>136</sup> Brian Lepard, *Customary international law: a new theory with practical applications* (Cambridge ; New York: Cambridge University Press, 2010), 331; Anthony D'Amato, "Human Rights as Norms of Customary International Law" in *Sources of international law*, ed. Martti Koskeniemi (Aldershot Hants England ; Burlington VT: Ashgate/Dartmouth, 2000), 305.

aforementioned instruments, as well as in the UN Declaration on the Protection of all Persons from Enforced Disappearance. The question to be answered here is two-pronged: first, to ascertain which are the elements found in each definition and second, whether there arise any challenges with regard to their juridical interpretation.

Finally, if a customary norm is indeed found, it will be compared to the treaty law one(s) in order to delimitate their respective normative scope in order to charter States' obligations. If this comparison yields to differences between customary and treaty law norms, then a possible ramification could be the identification of different cores of the right not to be subjected to enforced disappearance, as well as different applicable rules in the interpretation of the right.<sup>137</sup>

## **2. The prohibition of enforced disappearance in customary law**

The analysis of the customary law dimension of the prohibition cannot but be discharged through the methods that exist within the general system of international law. Contrary to adjacent fields of law, such as international humanitarian law,<sup>138</sup> there is no single reference work to ascertain whether the prohibition is indeed a customary norm. In more practical terms, at the time of writing, 90 States are signatories and only 30 are parties to the CPED.<sup>139</sup> Despite the fact that the CPED entered into force in December 2010, the pace of ratification remains slow and compared to other instruments in the field of human rights it does not enjoy the same degree of attention and number of ratifications.<sup>140,141</sup> In connection to this, the significance of ascertaining the customary law prohibition of disappearance is important as a norm to be invoked within international and domestic jurisdictions in the absence of binding treaty law.<sup>142</sup>

The US position, as codified in the *Restatement of the Law (Third)*, is rather revealing of the cursory manner in which the issue of the customary law dimension of enforced disappearance is dealt

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<sup>137</sup> Oscar Schachter, "Entangled treaty and custom", *International law at a time of perplexity essays in honour of Shabtai Rosenne* (1989): 720: 'The Court went on to indicate that the identical rules may have different legal consequences qua treaty rules and qua customary rules. They noted differences in respect to applicability in the event of a breach and they also referred to differences in 'the methods of interpretation and application'.

<sup>138</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law*, vol. I (Cambridge ;;New York: Cambridge University Press, 2005).

<sup>139</sup> "United Nations Treaty Collection, International Convention for the Protection of All Persons from Enforced Disappearance", [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en).

<sup>140</sup> The Convention against Torture entered into force less than 3 years after its adoption. "United Nations Treaty Collection, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en).

<sup>141</sup> Similarly, the Convention on the rights of persons with disabilities was signed one week earlier than CPED and entered into force on 3 May 2008. "United Nations Treaty Collection, Convention on the Rights of Persons with Disabilities", [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en).

<sup>142</sup> The present section seeks to ascertain the customary law status of the prohibition of enforced disappearance only and not of each separate provision of the CPED.

with in international human rights law. In paragraph 702, the *Restatement* reads: ‘A state violates international law if, as a matter of state policy, it practices, encourages, or condones [...] (c) the murder or causing the disappearance of individuals.’<sup>143</sup> In the explanatory notes that follow the catalogue of customary international law of human rights, disappearances do not appear even once. Another two evident difficulties are immediately noticeable: first, the *Restatement’s* validity is inherently confined to solely a US position on the matter and second, the customary law status of the listed human rights is contingent upon their violation as a matter of state policy. Hence, it excludes from its scope occurrences of disappearances falling below that high threshold.<sup>144</sup>

Furthermore, the *Restatement* has not escaped criticism for being overly broad<sup>145</sup> or narrow<sup>146</sup> or ideologically charged with western (or American) values in listing the specific human rights as included in customary law to the exclusion of others. At a more general level, the stark contrast between the lack of any reference by States to the customary nature of the prohibition while drafting the universally binding instrument on disappearances on the one hand, and of the conviction of international human rights lawyers that the disappearances are customarily prohibited, on the other, cannot be ignored.<sup>147</sup>

Article 38 of the Statute of the International Court of Justice (ICJ),<sup>148</sup> is commonly used as the starting point for any discussion on customary law.<sup>149</sup> This provision mandates the ICJ to apply ‘international custom, as evidence of a general practice accepted as law.’ The interpretation of this provision has not met with academic consensus.<sup>150</sup> Much ink has been spilled over the meaning of the provision and its interpretative analysis has, as in many other topics, not yielded shared conclusions.<sup>151</sup>

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<sup>143</sup> American Law Institute, *Restatement of the Law, the Foreign Relations Law of the United States*, vol. 2.

<sup>144</sup> Daniel Murphy, “The restatement (third)’s human rights provisions: nothing new, but very welcome,” *International lawyer* (1990): 921.

<sup>145</sup> Bruno Simma, “International Human Rights and general International Law: A comparative analysis” in *4 Collected courses of the Academy of European Law, 1993 = Recueil des cours de l’Académie de droit européen: the protection of human rights in Europe, Vol. IV, Book 2*. (The Hague: Martinus Nijhoff Publishers, 1995), 219.

<sup>146</sup> Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press, 1989), 99.

<sup>147</sup> Hurst Hannum, “The status of the Universal Declaration of Human Rights in national and international law”, *The Georgia journal of international and comparative law*. 25, no. 1-2 (1995): 383; Meron, *Human Rights and Humanitarian Norms as Customary Law*, 82.

<sup>148</sup> *International Court of Justice, Statute of the Court*, [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II).

<sup>149</sup> In this respect, the present thesis adopts the approach of the ICRC study, which its authors name as the “classic one”. See: Henckaerts and Doswald-Beck, *Customary international humanitarian law*, I: xxxviii.

<sup>150</sup> David Bederman, *Custom as a source of law* (Cambridge [U.K.] ;New York N.Y.: Cambridge University Press, 2010), 142.

<sup>151</sup> Among other works, see: Mark Villiger, *Customary international law and treaties: a study of their interactions and interrelations, with special consideration of the 1969 Vienna Convention on the Law of Treaties* (Dordrecht ;Boston ;Hingham MA: M. Nijhoff ;Distributors for the U.S. and Canada Kluwer Academic, 1985): ‘The main difficulty with which customary law is usually associated is probably that of ascertainment. The difficulty is caused as much by the heterogeneity and paucity of State practice as by the fact that the instances of practice are not always readily obtainable [...]’; Karol Wolfke, *Custom in present international law*, 2nd ed. (M. Nijhoff Publishers, 1993); Gerald Fitzmaurice, “Some problems regarding

It would be beyond the scope of the present thesis to assume the herculean task of rehearsing the arguments for and against each different strand of interpretation within international law. However, brief recapitulations of the basic elements of each one are provided in order to set the background of the current debates over the formation of customary law and examine the potential customary law nature of the prohibition of enforced disappearance within this setting.

## **2.1 Traditional school of thought**

Rosalyn Higgins aptly observed that: 'Article 38 could more correctly have been phrased to read: 'international custom *as evidenced* by a general practice accepted as law'.<sup>152</sup> Indeed, the traditional school of thought focuses primarily on State practice requiring a continuous, homogeneous and settled set of state acts whose content is informed by a belief of legal obligation in order to give rise to a rule of customary law.<sup>153</sup> Even with this clarification though, it is still not clear which criteria should be used for State acts to constitute State practice<sup>154</sup> or whether each and every act of a State which is thus understood to external observers should be taken into account.<sup>155</sup> Added to this, it is also unclear how much time is necessary or sufficient for the formation of a customary rule.

Neither does the ICJ jurisprudence render the issue less unproblematic. The classical dictum from the *Continental Shelf Cases* states that:

'Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive*

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the formal sources of international law," in *Sources of international law*, ed. Martti Koskeniemi (Aldershot Hants England ; Burlington VT: Ashgate/Dartmouth, 2000), 77; Curtis Bradley and Mitu Gulati, "Customary International Law and Withdrawal Rights in an Age of Treaties," *Duke journal of comparative & international law*. 21, no. 1 (2010): 4: 'Far from being well understood and accepted, the theory of CIL today is riddled with uncertainty. While commentators often recite that CIL is based on some combination of state practice and *opinio juris*, even a gentle probing of this definition reveals fundamental puzzles and debates. It is not clear, for example, what counts as state practice.'; Birgit Schlütter, *Developments in customary international law: theory and the practice of the International Court of Justice and the international ad hoc criminal tribunals for Rwanda and Yugoslavia* (Leiden ; Boston Mass.: Martinus Nijhoff Publishers, 2010), chap. 1.

<sup>152</sup> Rosalyn Higgins, *Problems and process: international law and how we use it*, Reprint. (Clarendon Press, 2007), 18–19; Degan proffers a similar criticism in: Vladimir Degan, *Sources of international law* (The Hague ; Boston ; Cambridge MA: M. Nijhoff Publishers, 1997), 143.

<sup>153</sup> Bruno Simma and Philip Alston, "The sources of human rights law: custom, *jus cogens*, and general principles," *Australian year book of international law* (1992): 89.

<sup>154</sup> "Report of the Committee on the Formation of Customary Law," *Proceedings of the American Branch of the International Law Association 1987-1988* (1988 1987): 112.

<sup>155</sup> James Anaya offers a persuasive critique to traditionalism: "For starters, even under traditional theory, the activities of the United Nations and other international institutions are capable of contributing to the development of customary international law regarding human rights. The statements and resolutions within international organizations about human rights may prompt patterns of state behavior, and in that way lead to customary international law" in: James Anaya, "Customary international law," *American Society of International Law Proceedings* 92: 43.

necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation'.<sup>156</sup>

The tone changed in *Nicaragua* where the Court placed weighted attention on *opinio juris* and on the probative value of UN General Assembly resolutions:

'The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions'.<sup>157</sup>

An extreme traditionalist position would take into consideration every single State activity and equate it to *usus*.<sup>158</sup> In this line of thinking the recurring instances of enforced disappearance perpetuated by States worldwide would leave no room for considering that a customary prohibition has developed over time. However, this is a highly artificial position as it is predicated on a strictly grammatical understanding of the term "State practice", which it actually distorts. No unassailable normative conclusion derives from this position and thus the issue merits a more nuanced approach. Oscar Schachter and others have also rejected this position: 'Hence, when violations of these strongly held basic rights of the person take place, they are to be regarded as violations, not as "State practice" that nullifies the legal force of the right'.<sup>159</sup> Were this absolutist traditional stance to be accepted, no human right norm would attain customary law status, as the breadth and intensity of every human right violation on the State's part would render this impossible. Consequently, the very notion of custom would essentially be devoid of any actual legal content and value.

### ***A balanced traditionalist approach***

This brings into play a mitigated traditional approach. One which requires the existence of the two elements (State practice and *opinio juris*),<sup>160</sup> but at the same time takes into consideration such

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<sup>156</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* 77 (International Court of Justice 1969).

<sup>157</sup> *Case concerning military and paramilitary activities in and against Nicaragua* 188 (International Court of Justice 1986).

<sup>158</sup> Michael Akehurst, "Custom as source of international law", *British Yearbook of International Law*, no. XLVII (75 1974): 10; Anthony D'Amato, *The concept of custom in international law* (Ithaca N.Y.: Cornell University Press, 1971), 87–98.

<sup>159</sup> Oscar Schachter, *Recueil des cours: collected courses of the Hague Academy of International Law*. (Nijhoff, 1985), 336; "Report of the Committee on the Formation of Customary Law", 114. The ICJ also in *Nicaragua* stated [pp. 97-98]: 'If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule'.

<sup>160</sup> On this particular point, Bederman states that 'the traditional formula for CIL enshrined in ICJ Statute Article 3877 is not a musty formalism or some artefact from the deep recesses of international law's intellectual history. Rather, the combined objective and subjective inquiries for CIL formation (State practice and *opinio juris*) remain the crucial algorithm for establishing whether a norm really rises to the level of international custom, and is thus deserving of recognition and

instances of State acts that are not in contravention to established international human rights law. Moreover, even if they are in breach of this law, it is considered that they are not carried out under a belief of abidance by a contrary or differentiated legal rule. In other words, State practice must demonstrate a State's conviction as to the legal connotation of its act at the time of its externalisation.<sup>161</sup> Concurrently, if other States do not acquiesce with the conduct that deviates from the established rule and seek to reverse the effect of this deviation or to compel the deviating State to conform to the international community's understanding of the specific rule, then this upholds the rule.<sup>162</sup> It is evident that this view allows reliance on the ethical underpinning of human rights, since human rights violations, as State acts, can be discarded.

Once the legal "purity" of State practice is understood as one that is supported by an affixed legal belief, the question arises: What constitutes State practice? Again, theory is not unanimous on the subject. For various commentators, State practice corresponds to concrete acts bearing a material element, as the following view by *van Hoof* illustrates: 'State-practice as the material element in the formation of custom is, it is worth emphasizing, material: it is composed of acts by States with regard to a particular person, ship, defined area [...]'.<sup>163</sup>

Others sustain that State practice is composed of another two components: the *interest and concern* of the reacting State in the act committed by the acting State and the *interaction* of the reacting and the acting State.<sup>164</sup> The latter view cannot accommodate diverging positions suggesting that national legislation and decisions by national courts may be regarded as such practice, as well as the more controversial issue of the normative importance of resolutions of the UN General Assembly.<sup>165</sup> *Ian Brownlie* epitomises the prevailing strand of academic scholarship on the matter by listing the following:

'[i]nternational and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and

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enforcement in: David Bederman, "Acquiescence, Objection and the Death of Customary International Law", *Duke journal of comparative & international law*. 21, no. 1 (2010): 44.

<sup>161</sup> Alvarez-Jimenez labels this as the "flexible deductive approach to the declaration of rules of customary international law. Conversely, he labels the extreme traditionalist approach as the 'strict inductive method'". Alberto Alvarez-Jimenez, "Methods for the identification of customary international law in the international court of justice's jurisprudence: 2000-2009", *International and Comparative Law Quarterly* 60, no. 3 (2011): 687.

<sup>162</sup> Arthur Weisburd, "The effect of treaties and other formal international acts on the customary law of human rights", *The Georgia journal of international and comparative law*. 25, no. 1-2 (1995): 103.

<sup>163</sup> Godefridus van Hoof, *Rethinking the sources of international law* (Kluwer Law, 1983), 108.

<sup>164</sup> Anthony D'Amato, "Human rights as part of customary international law: a plea for change of paradigms", *The Georgia journal of international and comparative law*. 25, no. 1-2 (1995): 74.

<sup>165</sup> Proponents of their normative significance include: Simma and Alston, "The sources of human rights law", 90; Schachter, *Recueil des cours*, 334; Meron, *Human Rights and Humanitarian Norms as Customary Law*, 107, 113; Theodor Meron and Hague Academy of International Law., *The humanization of international law* (Martinus Nijhoff, 2006), 368. Rejecting the position that GA Resolutions are an instrument of custom-making: Jennings, "The identification of International Law", 19. Higgins advocates a case-by-case consideration whether a particular resolution expresses a consensus on a customary rule (quoted from Meron, *The humanization of international law*, 388)

resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and much depends on the circumstances'.<sup>166</sup>

### **Assessment**

Bearing in mind the above-mentioned strands of the traditional approach, it is submitted that under the extreme traditionalist view, no rule of customary law prohibiting enforced disappearance can be established since State practice runs counter to any custom-creation rule. In the framework of this approach, the continuing perpetration of enforced disappearance from 1960 until today, as illustrated in chapter 1, impedes the formation of a customary rule.

However, mitigated traditionalism allows for consideration of the existence of such a rule. Recurring violations of human rights are not conclusive in themselves. What is legally important in this respect is the escalating response of the international community to enforced disappearance. As shown in the previous chapter, the reaction by States to the practice of enforced disappearance in Latin American countries took a dual form: first, at the bilateral level, many States denounced and protested the breaches of violations that amounted to the disappearance of persons, be them their own nationals or not. And second, at the multilateral level, the material produced at the UN level has significant probative value indicating that the international community as a whole regarded the prohibition of enforced disappearance as a rule of customary law. This material includes, *inter alia*, a long strand of UN Resolutions. The common denominator of their subject-matter ranged from expressing concern over the practice of disappearances, urging for the establishment of investigatory bodies and calling for the clarification of the fate of the disappeared to establishing *ad hoc* mechanisms, such as country-specific ones (as in the case of Chile) or thematic procedures (such as the WGEID).<sup>167</sup>

Furthermore, a repeated reference to the Universal Declaration of Human Rights (UDHR)<sup>168</sup> in the preamble of these resolutions cannot pass unnoticed. Interestingly, the rights invoked in the preambles are the ones concerning the right to life, liberty and security of person, freedom from torture, freedom from arbitrary arrest and detention and the right to a fair trial.<sup>169</sup> It can be argued that by linking enforced disappearance to UDHR provisions, the aggregate protection of the latter extends to enforced disappearance as a separate human rights violation. This extension includes also the legal nature of the UDHR provision, which allows for the ascertainment of a customary law rule. States' practice at the UN

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<sup>166</sup> Ian Brownlie, *Principles of public international law*, 6th ed. (Oxford [u.a.]: Oxford Univ. Press, 2003), 6.

<sup>167</sup> José E Alvarez, *International Organizations as Law-Makers* (Oxford [England]: Oxford University Press, 2005), 160.

<sup>168</sup> "The Universal Declaration of Human Rights", <http://www.un.org/en/documents/udhr/>.

<sup>169</sup> *General Assembly Resolution 31/124, Protection of human rights in Chile*, 1976; *General Assembly Resolution 33/173, Disappeared persons*, 1978.



level is informed by a belief that there are various violations of human rights implicated in the occurrence of enforced disappearance.

Two milestones to the progressive development of a customary law prohibition may be discerned through this process of promulgation of UN resolutions. As discussed in chapter 1, Resolution 33/173 was the first instance where the General Assembly moved away from the country-specific approach that prevailed until 1978 at the UN level and approached the phenomenon of disappearances as a universal and distinct issue due to the reports from various parts of the world relating to it. It mentioned the human rights referred to in the previous paragraph, citing both UDHR and ICCPR.

The apex of the quasi-legislative function of the UN was the Declaration on the Protection of all Persons from Enforced Disappearance in 1992. Again, reference is made therein to the UDHR and the ICCPR, only with the explicit inclusion this time of the right to recognition as a person before the law. UN Declarations bear a distinct normative value as they often spell out bodies of principles to be adhered to by States employing language and terminology, which is reminiscent of actual, hard-law, legal obligation.<sup>170</sup> They are also considered as a preparatory and intermediate step to drafting a legally binding instrument.

Added to the above, reference should also be made to the abundant jurisprudence of the Inter-American Court of Human Rights,<sup>171</sup> the European Court of Human Rights<sup>172</sup> and the Human Rights

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<sup>170</sup> Office of Legal affairs of the Secretary-General, "Memorandum to the General Assembly E/CN.4/L.610", April 2, 1962: "[...] However, in view of the greater solemnity and significance of 'declaration', it may be considered to import, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon states"; Andrew Clapham, *Human rights obligations of non-state actors* (Oxford ;New York :: Oxford University Press, 2006), 104–105: "Resolutions may also encapsulate or express the opinion of States with regard to the interpretation of existing international law. In human rights declarations, this could be by the fleshing out of international law obligations (either under treaty law or general international law) or by categorisation of certain acts as human rights violations of one type or another. [...] An example of the second type of resolution is the declaration on the Protection of all Persons from Enforced Disappearance adopted by consensus by the General Assembly"; Blaine Sloan, "General Assembly Resolutions revisited (forty years later)", *British Yearbook of International Law* (1987): 140; Christofer Joyner, "U.N. General Assembly resolutions and international law: rethinking the contemporary dynamics of norm-creation," *California Western International Law Journal*, no. 11 (1981): 457 and 464; Nancy Kontou, *The termination and revision of treaties in the light of new customary international law* (Oxford ;New York: Clarendon Press ;Oxford University Press, 1994), 7: "Although opinions differ on the subject, it is generally accepted that law-declaring resolutions, if not a source of law, at least constitute prima facie evidence of existing customary law, while resolutions purporting to create new rules may provide the basis for the generation of customary law by initiating or influencing State practice leading to its formation". But cf. Emmanuel Voyiakis, "Voting in the General Assembly as evidence of customary international law?," in *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, ed. Steve Allen and Alexandra Xanthaki (Oxford ;Portland Or.: Hart Pub., 2011): "[...] GA votes do not in themselves impact on customary international law and still enhance the representativeness and legitimacy of international custom by allowing that collateral statements by voting States do have such impact [...]."

<sup>171</sup> Indicatively: *Velásquez-Rodríguez v. Honduras (Merits)* (Inter-American Court of Human Rights 1988); *Godínez-Cruz v. Honduras (Merits)* (Inter-American Court of Human Rights 1989); *Neira-Alegría et al. v. Peru (Merits)* (Inter-American Court of Human Rights 1995).

<sup>172</sup> Indicatively: *Kurt v. Turkey*, (Application no. 24276/94) (European Court of Human Rights 1998); *Bazorkina v. Russia*, (Application no. 69481/01) (European Court of Human Rights 2006); *Varnava and others v. Turkey*, (Applications nos.

Committee<sup>173</sup> on cases of enforced disappearance. An overview of their respective case law reveals that a common set of human rights are violated by enforced disappearance.

Decisions and judgments by adjudicatory bodies serve also the purpose of custom ascertaining.<sup>174</sup> The IACtHR has almost invariably found violations of Article 4 ACHR (right to life), Article 5 ACHR (right to human treatment) and Article 7 ACHR (right to personal liberty).<sup>175</sup> With regard, to Article 5 ACHR, it must be noted that it protects, *inter alia*, the physical and moral integrity of the person and prohibits torture or cruel, inhuman, or degrading punishment or treatment. The ECtHR has, in most cases of enforced disappearances brought before it, found violations of Article 2 ECHR (right to life), Article 3 ECHR (prohibition of torture), Article 5 ECHR (right to liberty and security) and Article 13 ECHR (right to an effective remedy). Finally, the HRCttee's pronouncements on cases of enforced disappearances include Article 2(3) ICCPR (effective remedy), Article 6 ICCPR (right to life), Article 7 ICCPR (prohibition of torture) and Article 9 ICCPR (right to liberty and security). This treaty body has been reluctant to declare violations of the right to life.<sup>176</sup>

A common theme cutting across the distinct domains of the case-law of these bodies is the right to liberty and security of a person, as well as, the prohibition of torture and cruel, inhuman or degrading treatment, the latter referring both to the material victim and also to his/ her relatives. Interestingly, a point of convergence between the ECtHR and the HRCttee is their common approach on the matter of lack of effective remedies available to the victims. On this particular point, the CPED provides for a wide range of judicial and other protections. Its provisions elaborate on the content of effective remedy and structure a set of secondary rules for this right. For the purposes of this chapter it suffices to establish the basic *corpus* of enforced disappearance as discerned from the common juridical elements.<sup>177</sup>

National legislation is deemed as yet another source of state practice, which combined with other elements, may be conducive to custom-formation. In this respect, it should be noted that the WGEID conducted in 2006 a comparative study which found that 'outside of Latin America, very few

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16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) (European Court of Human Rights 2009).

<sup>173</sup> Indicatively: *Eduardo Bleier v. Uruguay*, Communication No. R.7/30 (Human Rights Committee 1982); *Edriss El Hassy, on behalf of his brother, Abu Bakar El Hassy, v. Libyan Arab Jamahiriya* (Human Rights Committee 2007).

<sup>174</sup> Alvarez, *International Organizations as Law-Makers*, 460: "Indeed, given the difficulty of finding the actual practice of states, as well as the inevitable selectivity of those state practices that are readily accessible, the opinions of international dispute settlers, increasingly available through the Internet, and, for members of the relevant IOs, in hard copy, may now be cited more often than this more traditional form of evidence of international law."

<sup>175</sup> Articles cited refer to the respective instruments of IACHR, ECHR and ICCPR.

<sup>176</sup> It seems that this reluctance is due to the HRCttee's respect to the wish of relatives of the disappeared not to have a pronouncement that would include a presumption of death for the disappeared person.

<sup>177</sup> See chapter 3 for an analysis of the case-law of these bodies and chapter 4 on remedies.

States have created a specific criminal offence of enforced disappearance'.<sup>178</sup> Furthermore, it appears that the prohibition of enforced disappearance in this specific region has found its way either into constitutional texts or national legislation of several States to a degree that is not matched in any other region of the world,<sup>179</sup> thus allowing one to speak of a regional custom developed in Latin America.<sup>180</sup>

Lastly, according to *Theodor Meron*'s view 'the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments' serves as an indicator for evincing customary human rights.<sup>181</sup> In the past 18 years, the prohibition of enforced disappearance has been cited in international instruments four times as an autonomous human right norm. Reference is, of course, made to the four different instruments mentioned previously in this chapter. Despite existing differences they can be deemed to share *prima facie* a common denominator of considering enforced disappearance as arrest, detention and abduction (but not all forms of deprivation of liberty) by agents of the State, followed by a refusal of acknowledgement of this act, thus impeding recourse to the applicable legal remedies and procedural guarantees (but not to the full protection of the law).

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<sup>178</sup> WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, January 25, 2007, para. 48.

<sup>179</sup> *República de Argentina, Constitución de 1994*, 1994, <http://pdba.georgetown.edu/Constitutions/Argentina/argentina.html>: Art. 43. [...] Cuando el derecho lesionado, restringido, alterado o amenazado fuera la libertad física, o en caso de agravamiento ilegítimo en la forma o condiciones de detención, o en el de desaparición forzada de personas, la acción de hábeas corpus podrá ser interpuesta por el afectado o por cualquiera en su favor y el juez resolverá de inmediato, aun durante la vigencia del estado de sitio. *República de Colombia, Constitución de 1991 con reformas hasta 2005*, <http://pdba.georgetown.edu/Constitutions/Colombia/colombia.html>: Artículo 12. Nadie será sometido a desaparición forzada, a torturas ni a tratos o penas crueles, inhumanos o degradantes. *República del Ecuador, Constituciones de 2008*, <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html>: Artículo 23. Sin perjuicio de los derechos establecidos en esta Constitución y en los instrumentos internacionales vigentes, el Estado reconocerá y garantizará a las personas los siguientes: 1. La inviolabilidad de la vida. No hay pena de muerte. 2. La integridad personal. Se prohíben las penas crueles, las torturas; todo procedimiento inhumano, degradante o que implique violencia física, psicológica, sexual o coacción moral, y la aplicación y utilización indebida de material genético humano. El Estado adoptará las medidas necesarias para prevenir, eliminar y sancionar, en especial, la violencia contra los niños, adolescentes, las mujeres y personas de la tercera edad. Las acciones y penas por genocidio, tortura, desaparición forzada de personas, secuestro y homicidio por razones políticas o de conciencia, serán imprescriptibles. Estos delitos no serán susceptibles de indulto o amnistía. En estos casos, la obediencia a órdenes superiores no eximirá de responsabilidad. ; *República de Paraguay, Constitución Política de 1992*, 1992, <http://pdba.georgetown.edu/Constitutions/Paraguay/para1992.html> Artículo 5. DE LA TORTURA Y DE OTROS DELITOS Nadie será sometido a torturas ni a penas o tratos crueles, inhumanos o degradantes. El genocidio y la tortura, así como la desaparición forzosa de personas, el secuestro y el homicidio por razones políticas son imprescriptibles. ; *Constitución de la República Bolivariana de Venezuela*, 1999, <http://pdba.georgetown.edu/Constitutions/Venezuela/ven1999.html>: Artículo 45. Se prohíbe a la autoridad pública, sea civil o militar, aun en estado de emergencia, excepción o restricción de garantías, practicar, permitir o tolerar la desaparición forzada de personas. El funcionario o funcionaria que reciba orden o instrucción para practicarla, tiene la obligación de no obedecerla y denunciarla a las autoridades competentes. Los autores o autoras intelectuales y materiales, cómplices y encubridores o encubridoras del delito de desaparición forzada de personas, así como la tentativa de comisión del mismo, serán sancionados de conformidad con la ley. Aim for human rights and Aim for human rights, "Relevant legal framework: International Coalition Against Enforced Disappearances", <http://www.icaed.org/the-convention/relevant-legal-framework/>.

<sup>180</sup> Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009), 33; Martti Koskeniemi, *From apology to utopia: the structure of international legal argument: reissue with a new epilogue* (Cambridge University Press, 2005), 445; *Asylum case (Colombia / Peru)* 14 (International Court of Justice 1950).

<sup>181</sup> Meron, *Human Rights and Humanitarian Norms as Customary Law*, 93–94.

The matter is not yet settled, though. The actual content of a universally binding customary law rule remains to be ascertained on the basis of the foregoing discussion. Relevant UN resolutions can also be adduced as a factor conducive to custom-ascertainment. The UDHR and ICCPR are almost invariably invoked in the preambles of UN resolutions, while distinct and explicit references are made to the right to liberty and security, the right to life, the right not be subjected to arbitrary arrest and detention and the prohibition of torture.

Based on the previous presentation of the various sources the following conclusions can be drawn on the customary law nature of the prohibition of enforced disappearance. First, the right to liberty and security of the person holds a central position in this regard as its transgression marks the factual starting point for the perpetration of a disappearance. This right, in conjunction with the inclusion in UN resolutions of freedom from arbitrary arrest and detention and the minimum common core in the definitions found in international normative instruments, suggests that not all deprivations of liberty that result in enforced disappearance are deemed to be legally significant. In other words, only an arbitrary arrest and detention leading to disappearance seems to form part of a customary law rule.<sup>182</sup> From a historical point of view this may well be explained by the fact that authoritarian regimes did not care much about observing formal legal prescriptions of their legal systems. Many times the protection of rights was suspended by declaring a 'state of emergency', paving the way for mass deprivations of liberty, which were arbitrary and did not commence with a formal act of apprehension. This would explain the narrower formulation of 'arbitrary arrest' and not the all-encompassing notion of 'deprivation of liberty, in whichever form', found in the CPED. However, this is an artificial position given the interpretation Article 9 ICCPR has received, which 'does not recognize any other forms of deprivation of liberty beyond'<sup>183</sup> arbitrary arrest and detention. Accordingly, the dichotomy between the two sets of notions bears no legal significance.

Second, the refusal to acknowledge the deprivation of liberty, or by concealment of the fate or whereabouts, of the disappeared person is directly linked with two other rights: the right to recognition as a person before the law and the right to a fair trial. Actual practice of disappearances by States reveals a pattern that disappeared persons are placed outside the protection of the law without affording them the guarantees of law. An immediate consequence is the inability to make use of any administrative or judicial procedures in order to challenge the deprivation of liberty and vindicate their release. Illustrative of the foregoing are the numerous *habeas corpus* writs (or *amparo*),<sup>184</sup> which had

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<sup>182</sup> By contrast, CPED definition provides that all forms of deprivation of liberty are elements of enforced disappearance.

<sup>183</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (N.P. Engel, 1993), 169.

<sup>184</sup> Allan-Randolph Brewer Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge: Cambridge University Press, 2009), 77, 163; Carlos Sánchez Mejorada, "The Writ of

been filed in various Latin American jurisdictions with no practical outcome, thus rendering ineffective and illusory any right prescribed by law.

Third, the prohibition of torture or cruel, inhuman and degrading treatment could also be well-founded within the customary law norm for disappearances, as the recurrent reference to it illustrates. However, this should be qualified and understood as a separate human rights violation, which may come into play in factual sequence to the deprivation of liberty of a person. Torture, while in detention, is not a necessary condition of the notion of enforced disappearance. It can, however, be considered through three different paths:

- (1) as an aggravating factor to an enforced disappearance, if a person is actually subjected to torture;
- (2) as a violation of a right ascribed to the relatives of a disappeared person for the anguish and distress they suffer, and
- (3) as a corollary of the detention conditions and/ or its prolonged duration.

Notwithstanding this, strictly speaking, torture must be considered separately from enforced disappearance and be deemed not to form part of its customary law prohibition.

Fourth, actual practice has proven that a person so deprived of his/her liberty is placed in a life-threatening situation, which more often than not leads to loss of life. The historical paradigms from Argentina, Chile and Cyprus, coupled with statistical information from WGEID reports, corroborate this assertion since a great majority of disappeared persons never resurface.<sup>185</sup>

Lastly, the customary rule does not appear to contain a requirement to prove a pattern of violations or systematic practice of enforced disappearance on the part of the State. This is inferred from the following considerations: the reaction of States to various instances of disappearances, and not only to the ones revealing a State policy or the existence of a systematic or widespread violation of

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Amparo. Mexican Procedure to Protect Human Rights”, *Annals of the American Academy of Political and Social Science* 243 (1946): 107: “The amparo procedure, typically Mexican, has a much broader scope and field of application than the Anglo-Saxon writ of habeas corpus, from which the idea of the procedure may have originated, since it protects men not only against illegal arrest but against violation of any human rights, and it is also a remedy to the encroachments of the Federal authorities on the jurisdiction of the states, or vice versa.”; Ariel Dulitzky, “The Inter-American human rights system fifty years later: time for changes”, *Quebec Journal of International Law* (Special Edition) (2011): 4.

<sup>185</sup> “Compilation of general comments and general recommendations adopted by human rights treaty bodies [HRI/GEN/1/Rev.9 (Vol. I)]”, May 27, 2008, 177. Paragraph 4 reads: “4. States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.”

human rights, together with the third paragraph to the preamble of the Declaration on the Protection of all Persons from Enforced Disappearance reveals that States were mindful of the distinction as it provides that 'in many countries, often in a persistent manner, enforced disappearances occur' and that 'the systematic practice of such acts is of the nature of a crime against humanity'. Different legal consequences are attributed to the systematic or widespread practice of disappearances. Accordingly, it can be concluded that sporadic, or even one instance, of enforced disappearance suffices to breach the customary law prohibition.

## **2.2 A modern interpretation of customary law**

A different strand of theory advocates the re-conceptualisation of the classical tenets of customary international law. The static perception of State practice and *opinio juris* is challenged by this strand, which revisits the interplay of these two notions. A basic characteristic of the modern theory is that it moves away from the rigid reliance on State practice and places larger emphasis on *opinio juris*. Two of the basic streams within modern custom are the 'sliding scale' approach and the 'instant custom' one.<sup>186</sup>

### ***Instant custom***

'Instant' custom is a term coined by *Bin Cheng* which at first sight appears to be standing on a conceptual paradox: if custom necessitates uniform practice through a sufficient passage of time, then its instantaneous creation has no solid foundation. The latter form of creation may take place by the approval of norms by consensus or adjacent forms of expression of consent. This theory further asserts that:

'Not only is it unnecessary that the usage should be prolonged, but there need also be no usage at all in the sense of repeated practice, provided that the *opinio juris* of the states concerned can be clearly established. Consequently, international customary law has in reality only one constitutive element, the *opinio juris*.'<sup>187</sup>

This approach fundamentally departs from the text of Article 38 of the ICJ Statute and remains deeply contested under general international law. Dispensing with State practice altogether and arguing

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<sup>186</sup> A third strand of this theory is the functional theory of customary law. See: Andrew Guzman and Timothy Meyer, "Customary international law in the 21st Century" in *Progress in international law*, ed. Russell Miller and Rebecca Bratspies (Leiden ;;Boston: Martinus Nijhoff Publishers, 2008).

<sup>187</sup> Bin Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", *Indian Journal of International Law* 5: 36.

solely on the premises of *opinio juris* suffers from legal myopia.<sup>188</sup> In essence, what is advanced here is a ‘doctrine of convenience’, which stands at the outer border of a *de lege ferenda* approach. The ‘sliding-scale’ construction is equally problematic.

### ***Sliding-scale formation***

*Frederic Kirgis* has suggested that the elements of custom can be viewed not as fixed and mutually exclusive, but rather as interchangeable along a sliding scale. Depending on the context, ‘consistent practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent’<sup>189</sup> and *vice versa*. In the case of human rights, an inherent criterion is inserted which assumes ‘that international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable’.<sup>190</sup> Under this theory, the customary law prohibition of enforced disappearance can be formed in the following way: the morally abominable character of the practice renders it one of the most serious violations of human rights. States have actively sought, and still do, to reverse its ramifications by outlawing any of its manifestations, by their adherence to international instruments and by condemning it in international *fora* and in their international relations. Taken to extremes, the ‘sliding scale’ allows for total disregard of State practice and exclusive reliance on *opinio juris*, thus coinciding with the precept of ‘instant’ custom. As with ‘instant custom’, this method is equally untenable because it reinterprets customary law in such a way so as to provide the right answers.<sup>191</sup>

It should be noted, though, that the modern approach to custom-formation has the benefit of interpreting Article 38 of the ICJ Statute in the light of the contemporary development of the law. Relying on a rigid textual interpretation of this provision, which is actually a remnant from ICJ’s predecessor court, can hardly be sustained in the conditions of our present day world. A potent argument derives from the fact that other participants to the international legal order have assumed law-making or law-enforcing powers. This fact underscores the changing nature of the law in this field through the identification of multiple sources of law-makers. In sum, Article 38 of the ICJ Statute should not be interpreted in a static and purely textual way. To the contrary, the multiplication of law-making actors

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<sup>188</sup> See also critique by: Jason Beckett, *The end of customary international law?: a purposive analysis of structural indeterminacy* (Saarbrücken: VDM Verlag Dr. Müller, 2008), 115.

<sup>189</sup> Frederic Kirgis, “Custom on a sliding scale,” *American Journal of International Law* 81 (1987): 149.

<sup>190</sup> *Ibid.*

<sup>191</sup> Anthea Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation”, *American Journal of International Law* 95, no. 4 (2001): 772.

and the constant deepening of international law suggest that State practice should not be interpreted in such a way as to run counter to the expanding nature of law.

### **2.3 A 'human rights method' of custom-formation?**

A more structured theory towards the formation of customary law in the field of human rights has been put forward as the 'human rights method'. This method takes State practice, usually in the form of transgressions of human rights, at face value by accepting that it can impede the formation of a customary rule. Hence, in order to circumvent the adverse effect of State practice it emphasises the normative importance of *opinio juris* over the former. Support for this doctrinal construction is deduced from the ICJ judgment in *Nicaragua*.<sup>192</sup> Human rights are labelled as 'higher law' norms that, in turn, justify deviation from the traditional framework of custom formation. The 'human rights method' is undeniably attractive not only for human rights lawyers, since it claims it can expand to include other norms beyond the realm of this particular field of law. Grounded on a dynamic and evolutive perception of customary law, it intends to re(de)fine one the classical *loci* of international law.

Yet, its normative strength may be undermined by a series of reasons. Firstly, it seeks to delimitate a separate domain of law by reversing the syllogism: the subject-matter affects the methodological approach without persuasive reasons being forwarded. From the standpoint of general international law it is unsustainable since it disregards its unity and its set of doctrines that should be common to all fields of its specialised branches.<sup>193</sup> A related criticism of this method comes under the heading of 'human-rightism'.<sup>194</sup> By asserting the sanctity or superior force of a branch of law (in this case human rights), the rules of general international law are bent so as to arrive at the desired result.<sup>195</sup> The 'higher law' nature afforded to human rights is similarly unfounded in international law and proposes a new hierarchical order, one disassociated from well-established notions such as '*jus cogens*'. Furthermore, its reliance solely on *Nicaragua* indicates a selectivity of sources and lack of coherent normative basis that leaves the method open to further criticism. Although 'human rights method' would facilitate the ascertaining of customary rules, it has not yet received broad consensus.<sup>196</sup>

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<sup>192</sup> Jan Wouters, "The impact on the process of the formation of customary international law" in *The impact of human rights law on general international law* (Oxford University Press, 2009), 111.

<sup>193</sup> Thomas Skouteris, *The notion of progress in international law discourse* (T.M.C. Asser Press, 2010), 145.

<sup>194</sup> Alain Pellet, "'Human Rightism' and International Law", *Italian yearbook of International law* (2000): 3; Brownlie, *Principles of public international law*, 529–530.

<sup>195</sup> Ian Brownlie, "The Rights of Peoples in Modern International Law" in *The Rights of peoples*, ed. James Crawford (Oxford [England] ;New York: Clarendon Press ;;Oxford University Press, 1988), 14–15.

<sup>196</sup> Frédéric Vanneste, *General international law before human rights courts : assessing the specialty claims of international human rights law* (Antwerp ;;Portland OR: Intersentia, 2010), 11–14.



## 2.4 Deconstructing disappearances

A different approach towards the customary nature of the prohibition is proposed in this subsection. This consists of a two-stage process: first, enforced disappearance is conceptually deconstructed into the various human rights violations that constitute its functional components. Then, their inclusion in the realm of customary law is argued on the basis of the UDHR and the normative force of the ICCPR.<sup>197</sup> In this way, the centre of attention shifts from the classic debate over the rules of formation of customary law towards the facts on the ground, whereby customary law of human rights is already implicit in the prohibition of enforced disappearance.

Disappearance is *per definitionem* an assault to the physical and moral integrity of the individual. As a consequence of the deprivation of liberty and the subsequent refusal to inquire into the whereabouts or fate of a disappeared person, the latter is placed outside the protection of the law. Through carving out an extra-legal space, perpetrators seek to annihilate a person's integrity and dignity. In such a situation no human rights may be exercised by a disappeared person, thus rendering disappearances an all-encompassing human rights violation. Nevertheless, one should distinguish between the constituent components of an enforced disappearance and its ramifications. The view advanced here is that through the concomitant violation of core human rights, the individual is stripped of his/her rights or finds him or herself in a situation where their exercise is hindered or denied.

In chartering this core set of rights, the following rights should be included: the prohibition of arbitrary arrest and detention, the right to life and the right to recognition as a person before the law. An enforced disappearance can be deconstructed to the effect of their concomitant transgression when these take place in the instance of the same person.

At the second stage of this process, the UDHR is taken as the legal point of reference. Although originally intended to serve only as a moral standard of aspirational character, the UDHR has progressed through the decades to a different status under international law. Nowadays, a considerable weight of academic scholarship accepts that the rights enshrined in UDHR have entered the ambit of customary international law.<sup>198</sup>

That said, it should be stressed that the scope of these rights under customary law remains to be ascertained. Articles 3, 6 and 9 UDHR cover nominally the three rights referred to in the previous

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<sup>197</sup> Meron suggests a similar approach while discussing Velasquez-Rodriguez: "This understanding of the judgment is supported by the universal condemnation of causing the disappearance of individuals and by the recognition that, severally, each of the rights violated embodies customary law, e.g., arbitrary deprivation of liberty through kidnapping (Article 7), violation of the inherent dignity and the integrity of the human being through torture or other cruel, inhuman, or degrading treatment, (Article 5), and flagrant violation of the right to life (Article 4)" in Meron, *Human Rights and Humanitarian Norms as Customary Law*, 130.

<sup>198</sup> Hannum, "The status of the Universal Declaration of Human Rights in national and international law", 323.

paragraph.<sup>199</sup> It is submitted that enforced disappearance derives its customary-law nature from the three respective articles endowed with the attribute of customary law. The ICCPR counterpart to the norms enshrined in the three aforementioned UDHR provisions are Articles 6, 9 and 16 ICCPR, the first and the last being non-derogable by virtue of Article 4(2) ICCPR.<sup>200</sup> In this connection, the HRCtee stated in General Comment No. 29:

'In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below. [...] (b) The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law'.<sup>201</sup>

Thus, the customary-law nature for the prohibition of enforced disappearance is reconfigured through the standing of other constitutive human rights that are violated through them.<sup>202</sup>

### **3. Enforced disappearance in *jus scriptum***

Definitions of enforced disappearance are found in various different instruments of international law. Interestingly, the passage of enforced disappearance to *jus scriptum* has taken place in the last 18 years. This period is further reduced if one considers that it was not included in a formally binding instrument until 1994. In the following section, the different definitions found in these instruments are presented and compared.

In 1992, the Declaration on the Protection of all Persons from Enforced Disappearance was promulgated by a resolution of the UN General Assembly. The Declaration is spelled out in mandatory language and declares that it is intended to serve as a body of principles. The WGEID employs it as the legal standard against which States' conduct is examined. Curiously, a definition of enforced disappearance does not appear in the operative part, but rather in a paragraph of the preamble. It reads:

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<sup>199</sup> Providing respectively for the right to life; to liberty and security; to recognition as a person before the law.

<sup>200</sup> *Lepard* argues that the non-derogable character of the ICCPR Articles listed in Article 4(2) ICCPR vests them with the attribute of customary law: Lepard, *Customary international law*, 335.

<sup>201</sup> "Compilation of general comments and general recommendations adopted by human rights treaty bodies HRI/GEN/1/Rev.9 (Vol. I)", May 27, 2008, 238, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/422/35/PDF/G0842235.pdf?OpenElement>.

<sup>202</sup> Antonio Cassese, *International Criminal Law*, 2nd ed. (Oxford: Oxford University Press, 2008), 113: "It may be noted that with respect to this crime the ICC Statute has not codified existing customary law but contributed to the crystallization of a nascent rule, evolved primarily out of treaty law (that is, the numerous treaties on human rights prohibiting various acts falling under this heading), as well as the case law of the Inter-American Commission and Court of Human Rights, in addition to a number of UN General Assembly Resolutions. These various strands have been instrumental in the gradual formation of a customary rule prohibiting enforced disappearance of persons" [emphasis added].

*'Deeply concerned* that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law'.

The Inter-American Convention on Forced Disappearance of Persons followed the Declaration and nowadays binds several Latin American countries. Currently, 14 states of the region are parties to it, while Brazil and Nicaragua, although both signatories thereof, are still to proceed to ratification.<sup>203</sup> The IACFD embodies for the first time in an international convention a legally binding definition of enforced disappearance. Article II of the said convention provides that:

'forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees'.

The next step was taken with the adoption of the Rome Statute of the International Criminal Court. Article 7(2) (i) lists enforced disappearance as a crime against humanity and defines it as follows:

"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>204</sup>

The Rome Statute is a turning point in the development of the notion of enforced disappearance mainly for two reasons. First, it introduces three elements ostensibly absent from previous definitions:

- (i) political organisations (therefore, non-state actors whose actions are not imputable to the state) as potential perpetrators;
- (ii) a subjective element of intentionality; and

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<sup>203</sup> "Inter-American convention on the forced disappearance of persons - Table of ratifications", <http://www.oas.org/juridico/english/sigs/a-60.html>.

<sup>204</sup> *Rome Statute of the International Criminal Court*, 1998, [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf).

(iii) a temporal element requiring a prolonged period of removal from the protection of the law.

Second, it is the most celebrated instrument of international criminal law, which extends the protection from enforced disappearance from human rights law to an adjacent field.

And finally, the 2007 International Convention for the Protection of All Persons from Enforced Disappearance includes a definition in Article 2:

"enforced disappearance" is considered to be 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'.

The CPED is the culmination of an arduous and painstaking procedure undertaken by families of the disappeared, NGOs, interested States and concerned international figures in a time span of nearly 30 years.<sup>205</sup> With minor verbal deviations from the definition found in the Declaration, it is nearly identical to the latter. Compared to its counterpart in the Inter-American Convention, one again arrives at the same conclusion, with the exception of the last part of the two articles. Whereas Article 2 CPED adopts an all-inclusive reference of placing disappeared persons 'outside the protection of the law', Article II IACFD opts for the narrower formulation of 'applicable legal remedies and procedural guarantees'.

#### **i. The fourth element**

Taken together, the three human rights instruments share a common core of the constitutive elements of enforced disappearance. These are:

- a) the deprivation of liberty of a person;
- b) the active involvement or authorisation, support or acquiescence of the State and;

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<sup>205</sup> *La Convention Pour La Protection De Toutes Les Personnes Contre Les Disparitions Forcées: Actes De La Journée D'études Du 11 Mai 2007 Organisée Par Le Centre De Recherche Sur Les Droits De L'homme Et Le Droit Humanitaire (C.R.D.H.) De L'Université Panthéon-Assas (Paris II) / Emmanuel Decaux Et Olivier De Frouville (éd.)* (Bruylant, 2009), 21 - 56; Tullio Scovazzi and Gabriella Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention* (Martinus Nijhoff Publishers, 2007), 94-100; F. Andreu-Guzman, "The Draft International Convention on the Protection of All Persons from Forced Disappearance," *Review - International Commission of Jurists*, no. 62/63 (2001): 73-106; W Tayler, "Background to the Elaboration of the Draft International Convention on the Protection of All Persons from Forced Disappearance," *Review - International Commission of Jurists*, no. 62/63 (2001): 63-72.

c) the refusal on the part of the State to acknowledge such deprivation or concealment of the fate of a disappeared person.

The existence or not of a fourth element remains fervently debated among States and human rights lawyers: one thread of legal argumentation supports the view that placing a person outside the protection of the law is merely a factual consequence of the three preceding elements and does not form part of the definition, either as a subjective or an objective element.<sup>206</sup> Contrary to this approach, others have maintained that this is indeed a fourth constitutive element of the definition of enforced disappearance.<sup>207</sup> The WGEID in its General Comment on the Declaration and *Nowak* in his report examining the international criminal and human rights framework for the protection of persons from enforced disappearance have referred solely to the three elements, without at the same time affixing a condition to them as exclusive upon the fourth.<sup>208</sup>

Under general international law, Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) are instructive as to the interpretation of Article 2 CPED and the clarification of this particular point. In the case at hand, Article 31 VCLT provides no clear solution;<sup>209</sup> the two competing interpretations afford an equally plausible avenue, which serves the object and purpose of CPED. The plausibility of the two interpretations is manifested by the stance maintained by the Chair of the 'Intersessional Open-ended Working Group' which was set up to elaborate a draft legally binding

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<sup>206</sup> Christopher Hall, in *Commentary on the Rome Statute of the International Criminal Court: observers' notes, article by article*, ed. Otto Triffterer, 2nd ed. (Oxford: Hart, 2008), 270; Kirsten Anderson, "How Effective Is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?", *Melbourne journal of international law* 7 (2006): 249.

<sup>207</sup> Susan McCrory, "The International Convention for the Protection of all Persons from Enforced Disappearance", *Human Rights Law Review* 7, no. 3 (January 2007): 550.

<sup>208</sup> WGEID, "Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance", <http://www2.ohchr.org/english/issues/disappear/docs/GeneralCommentsCompilationMay06.pdf>; Manfred Nowak, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, E/CN.4/2002/71*, January 8, 2002, para. 70.

<sup>209</sup> Article 31 VCLT provides: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

normative instrument for the protection of all persons from enforced disappearance.<sup>210</sup> Hence, by referring to the drafting history of CPED, the enterprise of interpretation proceeds to a supplementary rule of treaty interpretation, that of reliance on the *travaux préparatoires*. Article 32(a) justifies this leap since the attempt to comprehend the content of the rule through the means of Article 31 leaves the meaning ambiguous.<sup>211</sup>

In its 2005 report, the Chair of the Intersessional Working Group sought to accommodate the conflicting views of States as to whether removal from the protection of the law was a consequence or part of the definition of enforced disappearance, and so suggested that the definition remained unaltered in order to ‘make for “constructive ambiguity”’.<sup>212</sup> For the same reasons, in a later report that year the Chair labelled this element as a “third and a half” element.<sup>213</sup>

Further, in the French draft the phrase “*la soustrayant ainsi à la protection de la loi*” was replaced by “*la soustrayant à la protection de la loi*”, deleting the word “*ainsi*”.<sup>214</sup> This translates into “thereby”, thus signifying that a consequence was flowing from the preceding three elements. Its removal is indicative of the prevailing perception. The linguistic analysis is all the more relevant when considering that the Declaration on the protection of all persons from enforced disappearance and the IACFD retain this formulation. *Olivier de Frouville*, on the other hand, submits that: ‘Les deux formulations indiquent clairement le caractère subsidiaire de cet élément: il s’agit d’une simple conséquence, dont la mention est superfétatoire’.<sup>215</sup>

At the end of the negotiations several States made general statements, indicative of their positions on the issue. The United States, for example, stated the following with regard to the definition: ‘We have serious concerns about article 2, which we firmly believe needs a more focused definition that includes the element of intentionality. This is the core of the Convention and we believe it needs a great deal more work’.<sup>216</sup> Other countries voiced similar criticisms.<sup>217</sup> In antithesis to this, Argentina, joined by

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<sup>210</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2006/57)*, February 2, 2006, para. 93 and 96.

<sup>211</sup> Article 32 VCLT provides: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.”

<sup>212</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2005/66)*, March 10, 2005, para. 23.

<sup>213</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (5th Session)*, September 12, 2005, 2–3.

<sup>214</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2005/66)*, 23.

<sup>215</sup> *Olivier de Frouville*, “Les disparitions forcées” in *Droit International Penal* (Paris: Pedone, 2000), 381.

<sup>216</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2006/57)*, 48.

<sup>217</sup> *Ibid.*, para. 92.

other States, insisted that no additional constituent element could exist, as placing a person outside the protection of the law was an inherent characteristic of disappearances.<sup>218</sup> This is corroborated by the pre-existing practice of the WGEID, which did not require the demonstration, or even presumption, of the intention of alleged perpetrators.<sup>219</sup>

*Nigel Rodley* believes that if it is open to each State when legislating in its national law whether to codify the element of ‘outside the protection of the law’ as an objective question of factual situation of the detainee, or as a subjective one of the intent of the perpetrators, such an approach might be workable. However, he proposes the

‘text to be read as prohibiting the unacknowledged detention or refusal to clarify the fate or whereabouts of the person *in circumstances* which place the person outside the protection of the law. This would mean that the placing of the person outside the protection of the law would be an independent, objective element of the definition’.<sup>220</sup>

This is a reasonable interpretation, but not free from ambiguity. Reference to ‘*circumstances*’ that place a person outside the protection of the law allows leeway for arguing that there could be instances in which the said *circumstances* do not exist as flowing from the unacknowledged detention or refusal to clarify the fate of a person. In the alternative, if *circumstances* are to be understood as inescapable conditions, which are created in a deterministic manner by virtue of the aggregate result of the other elements, then we have come full circle in the argument that rejects the subjective nature of intentionality.

One way to approach the matter is to consider the added value of this part of the definition. What does it add to it? In the absence of this last part, enforced disappearance would be equated to secret detention,<sup>221</sup> which is addressed under Article 17 CPED. Consequently, it would be redundant to include the latter in the text of CPED and thus inclusion of this phrase must be understood as bearing a distinct meaning.

Given the disagreement by various States during the drafting process and the endowment of the definition with an intentional “constructive ambiguity”, it is to be expected that much will depend on the transposition of enforced disappearance within domestic legal orders. If several States would sanction enforced disappearance with an element of intent, this would create two streams of

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<sup>218</sup> *Ibid.*, para. 91.

<sup>219</sup> WGEID, “General Comment on the definition of enforced disappearance”, para. 5, <http://www2.ohchr.org/english/issues/disappear/index.htm>.

<sup>220</sup> Nigel Rodley, *The treatment of prisoners under international law*, 3rd ed. (Oxford University Press, 2009), 336–338.

<sup>221</sup> *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances*, January 26, 2010, para. 8 – 9, 28.

interpretation and possibly, thus, a source of tension. Such a possibility is not remote: the function of the WGEID will continue side-by-side with that one of the CPED's treaty body, the Committee. Instances of enforced disappearance might not be considered as such by States placing intentionality in the definition, whereas under the current practice of the WGEID (and possibly under the Committee) only the *actus reus* is legally relevant.

Another difficulty with intentionality is the very complex nature of enforced disappearance and the involvement of usually more than one perpetrator. Added to this complexity is that intentionality, depending on the factual settings, may not cover one or more of the other three elements. To be sure, the involvement of more than one person renders it difficult to establish their identity and their intentionality separately. Secondly, the sequence of persons involved in enforced disappearance does not allow for a fully-fledged intentionality to be established. This means that the captors could be different individuals or agencies to those keeping the disappeared person under detention, with yet others denying the acknowledgement of that person or concealing his/her fate, but without any of them knowing all the stages of enforced disappearance. Further, intentionality to render a person "disappeared" may develop well after a person's deprivation of liberty or even a lapse of time in detention. Generally, issues of proof would hinder every step towards the ascertainment of the legal nature of enforced disappearance. Seen from a reverse historical perspective, many of the disappearances that shocked the conscience of humanity would not have been considered as enforced disappearances proper, were this subjective element to be accepted.<sup>222</sup>

## ii. Intentionality in the ICC and the CPED

Compared to the definition found in the ICC, one may validly conclude that the definition of enforced disappearance in the CPED is substantially different.<sup>223</sup> Obviously, international criminal law is a distinct area from that of human rights, although it shares a common terrain.<sup>224</sup> Enforced disappearance is listed under the rubric of crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Both in Article 7

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<sup>222</sup> The Elements of Crime (ICC) provide that a perpetrator need only be involved in either the deprivation of liberty or the subsequent refusal to acknowledge it, while however their responsibility extends to the overall crime of enforced disappearance. This is a position that is problematic with regard to basic principles of criminal law.

<sup>223</sup> Antonio Cassese, *The Rome Statute of the International Criminal Court : a commentary* (Oxford University Press, 2002), 469–470; Philippe Currat, *Les crimes contre l'humanité dans le Statut de la Cour Pénale Internationale* (Bruxelles ;Geneve: Bruylant ;;Schulthess, 2006), 518–522; Steven Ratner, *Accountability for human rights atrocities in international law: beyond the Nuremberg legacy*, 2nd ed. (Oxford University Press, 2001), 123–124; Roy Lee, *States' responses to issues arising from the ICC statute : constitutional, sovereignty, judicial cooperation and criminal law* (Transnational Publishers, 2005), 206.

<sup>224</sup> Andrea Bianchi, "State Responsibility and Criminal Liability of Individuals" in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford: Oxford University Press, 2009), 16.



of the ICC Statute and the 'Elements of Crimes'<sup>225</sup> it is explicitly provided that the perpetrator must intend to remove a person from the protection of the law for a prolonged period of time. India had indicated in its general statement that this 'results in the creation of two different standards of proof for the same crime [...]'.<sup>226</sup> Indeed, a crime against humanity signifies a severe human rights abuse which by the means, intensity, duration and mode that it is carried out reaches an exceptional level. In the case of enforced disappearance a two-tier system seems to be emerging. The first is the broad net of international criminal law catching 'large' instances of enforced disappearances, while the second net is tighter, catching those that escape the first. In the end, however, the notions of enforced disappearance in the two legal regimes diverge.

Case law stemming from the HRCtee is illustrative of the implications this may have. In *Yurich v. Chile*,<sup>227</sup> the HRCtee was called to examine the case of the disappearance of the author's daughter. Although taking note of the definition of enforced disappearance found in the Rome Statute, it did not attach to it the legal consequences that are relevant to it, especially the continuing nature of the violation, which would render the State's *ratione temporis* objection inapplicable. A minority opinion of five of its members pointed to the discrepancy of the definitions in the Rome Statute and the then-draft CPED and disagreed with the non-acceptance of the legal consequences flowing from the continuing nature of violations such as in enforced disappearance.<sup>228</sup> Another case of enforced disappearance afforded the HRCtee the opportunity to deliver a more informed view on the matter. In *Grioua v. Algeria*,<sup>229</sup> the HRCtee took full note of all relevant instruments on enforced disappearances<sup>230</sup> and stated that:

'The Committee points out that *intentionally* removing a person from the protection of the law for a prolonged period of time *may* constitute a refusal to recognize that person before the law [...]. It is of the view that if a person is arrested by the authorities and there is subsequently no news of that person's fate, the *failure by the authorities to conduct an investigation effectively* places the disappeared person outside the protection of the law' (*Emphases added*).<sup>231</sup>

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<sup>225</sup> "Element\_of\_Crimes\_English.pdf", 12, [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf).

<sup>226</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2006/57)*, 49.

<sup>227</sup> *Norma Yurich v. Chile, Communication 1078/2002*, Selected Decisions of the Human Rights Committee under the Optional Protocol, vol. 9 (Human Rights Committee 2005).

<sup>228</sup> The dissenting members were Ms. Christine Chanet, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm and Mr. Hipólito Solari-Yrigoyen.

<sup>229</sup> *Messaouda Grioua v. Algeria, Communication No. 1327/2004*, Selected Decisions of the Human Rights Committee under the Optional Protocol, vol. 9 (Human Rights Committee 2007).

<sup>230</sup> This time HRC referred to the Declaration on the Protection of All Persons from Enforced Disappearance, the Rome Statute of the International Criminal Court and the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>231</sup> *Messaouda Grioua v. Algeria, Communication No. 1327/2004*, vol. 9, para. 7.8 and 7.9.

It is submitted that this denotes a shift in the HRCttee's perception of enforced disappearance from a rather rudimentary, passing reference to solely the Rome Statute to a more circumspect view of law. Although the Committee does not undertake the task of disentangling the various definitions, it does make a choice by opting for the consequentiality approach. In other words, placing a person outside the protection of the law is seen as a mere ramification and intentionality, although duly noted, has no relevance.

To sum up, as the matter stands today, the diverging arguments seem to be standing on a delicate interpretative balance. Arguments favouring the existence of a separate fourth element of intention to place a person outside the protection of the law can be found in the drafting history of CPED, through the application of Article 32 VCLT. The change in the French text is also supportive of this interpretation coupled with specific declarations in States' general statements. On the other hand, previous practice of the WGEID, the inherent difficulties of proving intentionality of this type and countering declarations by States weigh against such an interpretation and towards human rights protection. In my opinion, the latter is more tenable.

A potential resolution of the matter could be reached by the aggregate result of the practice of the CPED treaty body and the WGEID. If the treaty body applies the WGEID's criteria, then intentionality will not be labelled as a fourth element and the balance will shift in favour of this interpretation: application of Article 32 VCLT supplementary means of interpretation will no longer be necessary since the subsequent practice<sup>232</sup> of the two UN bodies will fall under 31.3(b) VCLT<sup>233</sup> as subsequent practice in the application of a treaty.<sup>234</sup> Strong support for this approach comes from the ECtHR itself: in *Golder v. the United Kingdom*, the Court relied on Article 31 VCLT in order to ascertain the scope of Article 6 ECHR 'without needing to resort to "supplementary means of interpretation" as envisaged at Article 32 of the Vienna Convention'.<sup>235</sup> In a similar tone the International Law Commission

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<sup>232</sup> On the meaning of "subsequent practice", see: Ulf Linderfalk, *On The Interpretation of Treaties* ([New York]: Springer, 2007), 166 et seq.

<sup>233</sup> *Vienna Convention on the Law of Treaties*, 1969,

[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). Article 31.3(b) provides: "3. There shall be taken into account, together with the context: [...] (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

<sup>234</sup> Cf. Klabber's scepticism about the system of interpretation set by Articles 32 and 33 in Jan Klabbers, "Virtuous Interpretation" in *Treaty interpretation and the Vienna Convention on the Law of Treaties: 30 years on*, ed. Malgosia Fitzmaurice, Panos Merkouris, and Olufemi Elias (Leiden ; Boston Mass.: Martinus Nijhoff Publishers, 2010): "Add to this the circumstance that the rule(s) of articles 31 and 32 are rather open-ended themselves – embodying, as they do, a compromise between various approaches which itself goes back to a compromise concerning the various distinct activities that treaty interpretation signifies – and it will be obvious that not too much ought to be expected from articles 31 and 32 as such. While it goes too far to suggest that 'anything goes' under these provisions, still, 'quite a bit goes' would be a fairly accurate synopsis"; But cf.: "Nevertheless, the separation from the means codified in Article 32 implies that the supplementary means are first and foremost subsidiary", in: Olivier Corten, *The Vienna Conventions on the Law of Treaties: a commentary* (Oxford ; New York: Oxford University Press, 2011), 817.

<sup>235</sup> *Golder v. United Kingdom (Application no. 4451/70)* 36 (European Court of Human Rights 1975).

has stated that in the context of human rights treaties 'relevant subsequent practice might be broader than subsequent *State* practice and include the considered views of the treaty bodies adopted in the performance of the functions conferred on them by the States parties'.<sup>236</sup> *Villiger* also recalls the transformative power of Article 31.3(b) VCLT, which 'is of a dynamic nature in that it may alter the original ordinary meaning of a term by both contractual and customary means: (i) subsequent practice may modify a treaty provision contractually qua authoritative interpretation'.<sup>237</sup> However, as the matter stands today, both arguments have persuasive force.

### iii. A prolonged period of time?

The duration for which a person should remain outside the protection of the law for its detention to qualify as an enforced disappearance is another matter on which different solutions have been proposed. While the Rome Statute requires the placement of a person outside the protection of the law for a prolonged period of time, the CPED has no corresponding temporal requirement.

Research on the drafting history of the two instruments is not particularly enlightening. At early stages of the negotiations, the report of the 'Preparatory Committee on the Establishment of an International Criminal Court' did not include any reference to the temporal dimension of an enforced disappearance.<sup>238</sup> Two alternative options, which were considered, were the adoption of the definitions found either in the IACFD or in the UN Declaration.<sup>239</sup> However, this was changed, for reasons that are not reflected in the preparatory documents<sup>240</sup> and the 'Committee on the Whole' inserted the requirement for a prolonged period in its own report.<sup>241</sup> This version remained unaltered until the adoption of the Rome Statute. Neither the 'Elements of Crimes', a companion to the Statute, shed any light on this specific point, since it is merely a repetitive wording of the Statute itself.<sup>242</sup> On the other

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<sup>236</sup> International Law Association, "Final report on the impact of findings of the United Nations human rights treaty bodies", 2004, para. 22, [web.abo.fi/institut/imr/research/seminars/ILA/Report.pdf](http://www.abo.fi/institut/imr/research/seminars/ILA/Report.pdf).

<sup>237</sup> *Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties*, 432.

<sup>238</sup> "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [A/CONF.183/13(Vol. III)]", July 15, 1998, 21, [http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings\\_v3\\_e.pdf](http://untreaty.un.org/cod/icc/rome/proceedings/E/Rome%20Proceedings_v3_e.pdf). The definition considered at the time stood in the following words: "Enforced disappearance of persons" means when persons are arrested, detained or abducted against their will by or with the authorization, support or acquiescence of the 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, thereby placing them outside the protection of the law".

<sup>239</sup> *The Legislative History of the International Criminal Court*, vol. 2, International and comparative criminal law series (Ardsey, N.Y: Transnational Publishers, 2005), 50.

<sup>240</sup> Scovazzi and Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention*, 273.

<sup>241</sup> "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [A/CONF.183/13(Vol. III)]", 96.

<sup>242</sup> *Elements of Crimes*, [http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element\\_of\\_Crimes\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf). Paragraph 6 reads: "The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time."

hand, the same issue was initially debated at the drafting of the CPED. Views in favour and against the inclusion of a temporal element are recorded in the initial reports,<sup>243</sup> which subsequently do not appear at the last part of the negotiations, ostensibly subsumed by the discussions on intentionality.<sup>244</sup>

Enforced disappearance under Article 7 of the Rome Statute has not been the object of an investigation or indictment by the Prosecutor yet, and hence, no actual practice exists that would provide a concrete threshold. 'Prolonged' is inherently vague and cannot be interpreted, neither by reference to another temporal notion in the same instrument nor by any systematic method. Faced with this unclear formulation, guidance should be sought among other universal human rights instruments.<sup>245</sup> In particular, standards set by the ICCPR and their jurisprudential application by the HRCttee is particularly instructive. As discussed above, the right to liberty and security is a key component of enforced disappearance. *Argumentum a minori ad majus*, the interpretation given to Article 9 ICCPR, should be applicable. Arbitrariness of detention within this context relates also to the duration of detention.<sup>246</sup> The shortest period that the HRCttee has determined to violate Article 9(3) seems to have been the detention of the victim for three days before being brought before a judicial officer.<sup>247</sup>

As such, it can be concluded that the shortest time in detention presented in the preceding paragraph must, at least, serve as an indicator by which certain acts can be considered an enforced disappearance under international criminal law. If the same acts are examined through the spectrum of the CPED, then no such temporal element is necessary for the act to be categorised as enforced disappearance. Once the constitutive elements of enforced disappearance take place, its existence is not altered by its duration, be that several hours or several years.<sup>248</sup>

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<sup>243</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71)*, February 12, 2003, para. 36; *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59)*, February 23, 2004, 22; *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2005/66)*, 24.

<sup>244</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (5th Session)*; *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2006/57)*.

<sup>245</sup> Hall, 271: "[...] the reference period should not be longer than the short period of time under international law and standards which the State may deny a detained person access to families, counsel, independent medical attention or a judge". Hall points to a period ranging from 24 to 48 hours (fn. 592).

<sup>246</sup> "Compilation of general comments and general recommendations adopted by human rights treaty bodies [HRI/GEN/1/Rev.9 (Vol. I)]", 179. General comment No. 8: "2. Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought "promptly" before a judge or other officer authorized by law to exercise judicial power. More precise time limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days. Many States have given insufficient information about the actual practices in this respect.

<sup>247</sup> *Borisenko v. Hungary* 7.4 (Human Rights Committee 2002).

<sup>248</sup> Scovazzi and Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention*, 276.

#### iv. Potential perpetrators: non-State actors

A thorny issue upon which consent was clumsily reached at CPED negotiations was that of 'non-state actors' whose actions cannot be imputable to States.<sup>249</sup> For years the WGEID, although aware of the increasing dimensions of the problem of enforced disappearances perpetrated by groups that were not in any way related to the State, remains adamant in refusing to accept cases of this category.<sup>250</sup> Instead, the WGEID opts for solely a declaratory denunciation of this aspect of the phenomenon. The issue was hotly debated at every meeting of the Intersessional Working Group and the texts of what appear today as Article 2 and 3 CPED underwent extensive changes.<sup>251</sup>

One of the main reasons for not including non-State actors in the final text of Article 2 CPED was the refusal of a sizeable block of States, which refused to depart from the traditional principle of State responsibility in the area of human rights.<sup>252</sup> A different terminology is employed in the ICC definition, where a 'political organisation' is also included as potential perpetrator, alternatively to States. However, it is not clear what exactly is meant by 'political organisation'. Similarly to the issue of intentionality the 'Elements of Crimes' repeat the term without expanding upon it.<sup>253</sup> Be that as it may, it should be noted that since international criminal law is premised on individual criminal responsibility, there appears no hard-pressing reason for coining a clear definition of "political organisation".

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<sup>249</sup> Martin Scheinin, "Monitoring Human Rights Obligations and the Fight Against Terrorism: Whose Obligations? And Monitored How?" in *International human rights monitoring mechanisms: essays in honour of Jakob Th. Møller*, ed. Gudmundur Alfredsson et al. (Martinus Nijhoff Publishers, 2001), 416: "Despite the interesting openings just mentioned, the main rule is that the monitoring mechanisms under existing human rights treaties only operate in respect of States. In the exercise of the competencies of human rights treaty bodies, a finding of a human rights violation represents the end result of the application of the treaty in a concrete case or situation, and includes an attribution of State responsibility for a breach of its obligations. [...] Hence, even if we assuming that the notion of human rights violations could meaningfully be applied in respect of non-State actors, there are for the time being no mechanisms through which the actors in questions in question could be made accountable."

<sup>250</sup> WGEID, "General Comment on the definition of enforced disappearance," 1; WGEID, "Fact Sheet No. 6/Rev.3 - Enforced or Involuntary Disappearances" (Office of the United Nations High Commissioner for Human Rights, July 2009), 11.

<sup>251</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71)*, para. 35; *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59)*, para. 27; *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2005/66)*, para. 28; *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2006/57)*, para. 98.

<sup>252</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71)*, para. 35.

<sup>253</sup> The ICC grappled with this very question in *Situation in Kenya (ICC-01/09)* (International Criminal Court [Pre-trial Chamber] 2010). There was a split Chamber on the issue of "State-like" organisations and the analysis of the majority (par. 89 et seq.) and the dissenting Judge Kaul (par. 44 et seq.) are insightful. For a presentation of the main legal issues and commentary on the aforementioned judgment, see: Darryl Robinson, "Essence of Crimes against Humanity Raised by Challenges at ICC", *EJIL: Talk!*, September 27, 2011, <http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/>.

The inclusion of Article 3 CPED was a compromise solution that sought to address acts of non-State actors, while at the same time watering down state responsibility to an obligation to investigate such acts and to bring those responsible to justice.<sup>254</sup> In this way the ICC and CPED regimes are bridged,<sup>255</sup> although differences remain. Article 3 CPED mirrors both customary law and the current state of the mainstream interpretation given by various bodies to State obligation for disappearances perpetrated by non-State actors that are not in any way linked to the State. More than a quarter of century ago, the HRCttee was the first to tackle the issue in General Comment No. 6 in the following manner:

'States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life'.<sup>256</sup>

The IACtHR echoed this approach in its judgment in *Velásquez-Rodríguez*. Its reasoning was predicated on the lack of due diligence on the State's part to prevent or to respond to a violation of human rights perpetrated by private persons not associated to the state of Honduras.<sup>257</sup> More recently and within the realm of the ECHR, the ECtHR framed States' obligation in a similar fashion, by interpreting Article 2 ECHR to have a substantial aspect (requiring proof of loss of life attributable to a State beyond reasonable doubt) and procedural one (essentially, an obligation to conduct a meaningful investigation). Since *Timurtas v. Turkey*<sup>258</sup> and consolidated in *Cyprus v. Turkey*,<sup>259</sup> this Court has declared a violation of Article 2 ECHR (right to life) on the grounds of the failure of the respondent State to conduct an effective investigation.<sup>260</sup> Coming full circle, the HRCttee expounded on the issue of non-State actors in General Comment No. 31:

'However the positive obligations on States parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights insofar as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant

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<sup>254</sup> Article 3 CPED reads: "Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice."

<sup>255</sup> Rodley, *The treatment of prisoners under international law*, 335, fn. 21.

<sup>256</sup> "Compilation of general comments and general recommendations adopted by human rights treaty bodies HRI/GEN/1/Rev.9 (Vol. I)", 177.

<sup>257</sup> *Velásquez-Rodríguez v. Honduras (Merits)*, para. 172; Clapham, *Human rights obligations of non-state actors*, 424–426.

<sup>258</sup> *Timurtas v. Turkey (Application no. 23531/94)* (European Court of Human Rights 2000).

<sup>259</sup> *Cyprus v. Turkey (Application no. 25781/94) [GC]* (European Court of Human Rights 2001).

<sup>260</sup> Scovazzi and Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention*, 200.

rights as required by article 2 would give rise to violations by States parties of those rights, as a result of States parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities'.<sup>261</sup>

What emerges from this apposition of legal interpretations is that, on the one hand, a common domain has developed throughout the past 30 years regarding States' responsibility for the conduct of non-state entities. On the other hand, if the creation and articulation of international human rights law is understood as a discursive and progressive process, then the codification of the position of the aforementioned bodies in the text of Articles 2 and 3 CPED leaves a sense of dissatisfaction for failure to proceed to the next stage of human rights protection.

The doctrinal orthodoxy of international law in this field does not envisage the imposition of direct obligation(s) on non-state actors. It is at this exact point that the fundamental difference of ICC and CPED is located: while the latter remains within the traditional statist framework of responsibility, the ICC Statute, as an instrument intending to regulate the conduct and responsibility of individuals, includes a blurred reference to 'political organisation'. This could be a source of confusion in the overall edifice of international law.

Recourse to the drafting history of the ICC Statute does not illuminate research on the meaning of 'political organisation'. The term is not encountered elsewhere in the ICC Statute and the most analogous term is that of an 'identifiable group or collectivity' against whom persecution on the basis of a series of reasons is forbidden.<sup>262</sup> In the latter case, persecution by reason of the *identity* of the group delineates a separate sphere, from which a 'political organisation' must be distinguished. Exclusion of entities pursuing or having predominantly or exclusively economic goals or activities is equally logical. It can credibly be sustained that this term reflects reality: Fuerzas Armadas Revolucionarias de Colombia (FARC),<sup>263</sup> the Provisional IRA, the Irish National Liberation Army,<sup>264</sup> Tamil Tigers,<sup>265</sup> the Communist

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<sup>261</sup> "Compilation of general comments and general recommendations adopted by human rights treaty bodies HRI/GEN/1/Rev.9 (Vol. I)", 244–245.

<sup>262</sup> '(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 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.'

<sup>263</sup> "Hugo Chavez tells Colombian rebels to stop kidnapping | Reuters", January 13, 2008, <http://www.reuters.com/article/idUSN1336689820080113>; "Chávez urges Colombia's FARC rebels to free all civilian hostages | venezuelanalysis.com", , <http://venezuelanalysis.com/newsbrief/3352>.

<sup>264</sup> "Who were the 'Disappeared'?", *BBC*, June 28, 2011, sec. Northern Ireland, [http://news.bbc.co.uk/2/hi/uk\\_news/northern\\_ireland/7721560.stm](http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/7721560.stm); Equality and Law Reform The Department of Justice, "The Disappeared", , <http://www.iclvr.ie/en/ICLVR/Pages/The%20Disappeared>.

<sup>265</sup> "Traumatised Tamils live in fear of new crackdown in Sri Lanka | World news | The Observer", April 5, 2009, <http://www.guardian.co.uk/world/2009/apr/05/sri-lanka-forces-tamil-tigers>.

Party of Nepal – Maoist (CPN-M)<sup>266</sup> and Sendero Luminoso<sup>267</sup> are paradigmatic instances of political organisations that have perpetrated enforced disappearances in a variety of different political and regional settings in the past decades. It is activities of groups of this calibre that have seemingly led states to opt for the specific formulation of Article 7 ICC referring to ‘political organisation’. It is submitted here that an attempt to grasp the notion in abstract terms should include organisations that are entirely autonomous from governmental funding and control and that act in ways, which affect political outcomes.

Political organisations do not fit in the traditional categories of public international law. The discourse is usually performed in terms of ‘subjects’ and ‘objects’ of law. In this vein, *Brownlie* cites several categories of entities coming under the rubric of ‘special type of personality’ in which ‘political organisation’ is not found. Actually, it does not even make it to his controversial ‘candidatures of subjects’, which includes, *inter alia*, transnational corporations.<sup>268</sup> But the contours of the problem of categorising political organisations change, if ‘participants’ replace ‘subjects’ and ‘objects’.<sup>269</sup> Sidestepping the formalistic structure of ‘subjects’ and ‘objects’ allows international law to be responsive to the changing realities of the world, while at the same time sustaining a persuasive and coherent normative force.

The non-inclusion of political organisations in CPED preserves the State-centric configuration of international law, which entails that non-state actors are, at best, indirect addressees of human rights norms.<sup>270</sup> This unwittingly disregards the threat that these organisations pose in the private sphere for human rights globally,<sup>271</sup> while the threat is responded to solely by placing the burden of ‘positive

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<sup>266</sup> Madeleine Fullard and International Center for Transitional Justice, *Disappearances in Nepal*, June 2008, 3, [http://www.ictj.org/static/Publications/ICTJ\\_NPL\\_Disappearances\\_pb2008.pdf](http://www.ictj.org/static/Publications/ICTJ_NPL_Disappearances_pb2008.pdf); Human Rights Watch, *Waiting for Justice Unpunished Crimes from Nepal's Armed Conflict*, 2008, 11, <http://www.hrw.org/en/reports/2008/09/11/waiting-justice-0>.

<sup>267</sup> “Comisión de la Verdad y Reconciliación”, sec. Capítulo 3, <http://www.cverdad.org.pe/ingles/final/index.php>. [p. 27: “Tal y como ha sido reseñado a lo largo del Informe, la responsabilidad del mayor porcentaje de muertos y desaparecidos reportados a la CVR (cerca del 54%) ha sido atribuida al PCP-SL, mientras que los diversos agentes del Estado han sido señalados como responsables de cerca de un tercio de esos casos.”]

<sup>268</sup> Ian Brownlie, *Principles of public international law*, 7th ed. (Oxford ;New York: Oxford University Press, 2008), 62–67.

<sup>269</sup> Rosalyn Higgins, *Problems and process: international law and how we use it*, Reprint. (Clarendon Press, 2007), 50: “[i]t is more helpful, and closer to perceived reality, to return to the view of international law as a particular decision-making process. Within that process (which is a dynamic and not a static one) there are a variety of participants, making claims across state lines, with the object of maximizing various values”.

<sup>270</sup> See discussion in: August Reinich, “The changing international legal framework” in *Non-state actors and human rights* (Oxford [England] ;New York: Oxford University Press, 2005), 69–72. Interestingly, Martin Scheinin in the project “Towards a World Court of Human Rights” suggests the following: “the Court shall be guided by the principles of the international law of state responsibility which it shall apply also in respect of Entities subject to its jurisdiction, ‘as if the act or omission attributed to an Entity was attributable to a State’. This provision demonstrates how the rules of the international law of state responsibility will be applied for the purpose of making non-state actors accountable for conduct that results in the denial of the enjoyment of human rights by individuals or groups of individuals”. Available at: [http://www.udhr60.ch/report/hrCourt\\_scheinin0609.pdf](http://www.udhr60.ch/report/hrCourt_scheinin0609.pdf)

<sup>271</sup> Andrew Clapham, “The privatization of human rights”, *European Human Rights Law Review*, no. 1 (1995): 21; Philip Alston and Academy of European Law.;New York University., *Non-state actors and human rights* (Oxford [England] ;New



obligation' and 'effective investigation' on the State's shoulders. Nonetheless, this leaves unanswered questions of, and demands for, accountability of these organisations. This is inextricably linked to the broader issue of '[a]n ethically and legally cogent system of international normativity [which] should seek to regulate those actors who, in a political, economic and cultural sense, are autonomous and therefore act significantly at the international level'.<sup>272</sup> From a *lege ferenda* standpoint, a differently worded provision that would set non-state actors on the same footing as States with regard to their human rights responsibilities would be truly revolutionary for the universal human rights system. At the same time, it would also create a new set of challenges, relating to the extent and rights of such actors to participate in the international legal order, their legal capacity and the enforcement mechanisms to be used for them. Clearly, the spillover effect of such a turn would be significant and it is logical that it could not be effected solely through the insertion of a provision in a human rights instrument. To the contrary, this would necessitate a fundamental change in the sovereignty-based perception of international law.

To conclude, the 'political organisation' puzzle exemplifies one of the instances of the 'uneasy reconciliation of international human rights law [...] and international criminal law'.<sup>273</sup> The CPED opts for a 'second-best' solution, requiring States to take appropriate measures to prevent and investigate occurrences of disappearances.<sup>274</sup> In doing so, it turns a blind eye to an important facet of this phenomenon, which relates to the responsibility and ensuing unaccountability of non-State actors. Hence, the result on the ground is that the potential scope of human rights law is limited,<sup>275</sup> in spite of the fact that, as one commentator observed, the direct third-party effect is solely a practical and not conceptual issue.<sup>276</sup> The ICC Statute looks to grapple with accountability through the lens of individual responsibility within international criminal law. It cannot go unnoticed though that the material scope of the ICC Statute is significantly narrower than, and different to the human rights regime.<sup>277</sup>

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York: Oxford University Press, 2005), 19: "An international human rights regime which is not capable of effectively addressing situations in which powerful corporate actors are involved in major human rights violations, or of ensuring that private actors are held responsible, will not only lose credibility in the years to ahead but will render itself unnecessarily irrelevant in relation to important issues".

<sup>272</sup> Christopher Harding, "Statist assumptions, normative individualism and new forms of personality: evolving a philosophy of international law for the twenty first century", *Non-State Actors and International Law* 1, no. 2 (February 1, 2001): 123.

<sup>273</sup> Anderson, "How Effective Is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?" 274.

<sup>274</sup> A proposition for requiring necessary measures was rejected by States as it would be overly onerous for them. Thus, States enjoy a margin of appreciation with regard to this issue. Measures will have to be reviewed with regard to the exigencies of each situation.

<sup>275</sup> Steven R. Ratner, "The Schizophrenias of International Criminal Law", *Texas International Law Journal* 33 (1998): 254.

<sup>276</sup> Martin Scheinin, "Characteristics of human rights norms" in *International protection of human rights: a textbook*, ed. Catarina Krause and Martin Scheinin (Turku: Åbo Akademi University. Institute for Human Rights, 2009), 36.

<sup>277</sup> Taxil Bérangère, "À la confluence des droits: la convention internationale pour la protection de toutes les personnes contre les disparitions forcées" in *Annuaire français de droit international*. (Paris: CNRS, 2008), 136. Bérangère refers to a "hiatus" between the two definitions.

#### **4. Challenges posed by the diversity of definitions**

A number of academic observers maintains that some (or even all) human rights have attained customary law status. From early on, enforced disappearance has been included in the lists of rights that have borne this attribute. However, no convincing arguments or methodological approaches were advanced to this effect. For this reason, the assertion that the prohibition of enforced disappearance falls under customary law was scrutinised in the first part of this chapter.

Various methods for ascertaining the customary-law outlook of norms have been forwarded in academic literature. Ranging from the traditionalist to the 'human-rightist', the spectrum of methods and outcomes vary accordingly. Under the most contemporary methods of custom-ascertainment, the prohibition of enforced disappearance is achieved effortlessly: in the modern method, *opinio juris* trumps State practice and is sufficient to establish such a custom. Similarly, the human rights method vests human rights with a self-styled 'higher-value' that is unparalleled in international law, justifying departure from the classical requirements of sufficient existence of state practice and *opinio juris*. Despite the elegance of such theoretical constructions, they have not gone uncontested.

Solid ground is found in the mitigated traditional approach under which both relevant State practice and *opinio juris* verify the existence of a customary prohibition. Abundant evidence was created for both through the processes and mechanisms described in chapter 1. I subscribe to the path offered by this approach since it arrives at the same result without unnecessary epistemological concessions. Further, it preserves the unity of method within the overall structure of international law.

A last method was suggested through the deconstruction of disappearances to its constitutive human rights from which it, as an amalgam, derives its customary law nature. A serious detraction of this method is that it oversimplifies the complex, multiple and cumulative human rights violations that entailed in enforced disappearance.

Article 2 CPED is a codification of the customary law prohibition of enforced disappearance. The adoption of CPED was the culmination of an effort, initiated almost 30 years ago and which underwent various successive stages to reach its current form of an instrument crafted to be universally binding. Starting from the UN Declaration, universal but not legally binding, it was transformed into the Inter-American Convention, binding but on a regional basis only. In the ICC Statute it was configured into a crime against humanity, with a variety of conditions being attached to it, such as intentionality and perpetration within the framework of a widespread attack. And finally, there is CPED itself, which has received only 31 ratifications, thus putting in peril its universal acceptance, both in absolute numbers, and when compared to other individual human rights conventions. One of the chief reasons for this slow

and cumbersome ratification process is the adopted definition, which does not appear to receive general acceptance. Added to the disagreements appearing in the drafting history of CPED, is its difference from the definition included in the ICC.

Through the comparative analysis of the two, it transpires that they possess such divergent characteristics that it appears that the two instruments regulate two different things: the ICC Statute requires such a high degree of intentionality as to make it doubtful that it could ever be proven. Moreover, it endows the definition with an unspecified temporal element and introduces political organisations as potential perpetrators without attaching a legal ramification to it. On the other hand, the text of the CPED is free from the first two problematic terms, but much is vested in States' will and understanding on how they will transpose enforced disappearance in their respective legal orders. Lack of subsequent practice by a competent body, which could authoritatively set the 'interpretative tone', adds to the perplexities. Even under the optimum scenario of universal and plain transposition of the CPED definition in domestic legal orders, enforced disappearance will suffer from a 'split personality disorder', since some acts maybe qualified as enforced disappearances under CPED, but not necessarily so under ICC. Enforced disappearance has thus a different content under the two regimes.<sup>278</sup> Given the difficulty of proving intentionality, as pointed out previously, this will potentially keep many acts that would constitute enforced disappearance under the CPED beyond the reach of the ICC.

The reasons leading to the adoption of a new convention, its position in the constellation of human rights treaties, the delimitation of enforced disappearance with regard to secret detentions, torture, unlawful deprivation of liberty, *incommunicado* and/or arbitrary detention will be considered in the following chapter. This will be undertaken mainly through an analysis of the jurisprudence of the ECtHR, the IACtHR and the HRCttee.

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<sup>278</sup> The ICTY held the same line when examining torture allegations within its jurisdiction. It stated: "In attempting to define an offence under international humanitarian law, the Trial Chamber must be mindful of the specificity of this body of law [...]. The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. The Trial Chamber is of the view that notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law." in *Prosecutor v. Dragoljub Kunarac Radomir Kovac and Zoran Vukovic* 470–1 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 2001); Olivier de Frouville, "The Influence of the European Court of Human Rights Case Law on International Criminal Law of Torture and Inhuman or Degrading Treatment", *Journal of International Criminal Justice* 9, no. 3 (July 1, 2011): 643 et seq.



## CHAPTER 3

### **The prohibition of enforced disappearance in the constellation of international human rights**

*“One can have a very fair idea of international law without having read a single treaty; and one cannot have a very coherent idea of the essence of international law by reading treaties alone.”<sup>279</sup>*

#### **1. Introduction**

In the previous chapter, I undertook the task of comparing the various definitions of enforced disappearance found in international law instruments. The cornerstone of that analysis was the UN-sponsored International Convention for the Protection of all Persons against Enforced Disappearance. My intention in this chapter is to take issue with this convention in a two-prong approach: first, I will briefly trace back the steps that ultimately led to the adoption of the CPED and provide an outline of the main features of its adoption and the advances made thereby. This will allow me to address the question about the necessity of a new human rights instrument, especially bearing in mind that other universal and regional conventions include a list of rights that, in aggregate, appear to cover the human rights violations that comprise enforced disappearances. In this regard, I will delineate the relationship of enforced disappearance with other human rights.

Second, and most importantly, I will embark on a comparative analysis of the corpus of decisions and judgments handed down by three international human rights bodies specifically on enforced disappearances. This will serve to decode certain jurisprudentially created characteristics of disappearances, namely the *locus standi* of victims; the continuous nature of disappearances; and the interplay of the phenomenon with the *ratione temporis* rule. From a methodological point of view, this will be carried out by discussion of the interpretative approaches and the convergences and divergences of the case law of the ECtHR, the IACtHR and the HRCtee.

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<sup>279</sup> Clive Parry, *The sources and evidences of international law*. ([Manchester];[Dobbs Ferry N.Y.]: Manchester University Press;;Oceana Publications, 1965), 35.

## 2. Historical overview and the adoption of the CPED

Efforts made by individual States, NGOs, human rights activists and relatives of disappeared persons to prompt the international community to adopt a legally binding instrument on disappearances date back to at least 1981 and have been well documented elsewhere.<sup>280</sup> As with comparable human rights instruments, such as the Convention against Torture, a UN declaration predated the process of drafting a legally binding instrument, and is thus the first tangible result of this effort.<sup>281</sup> In 1992, the UN General Assembly adopted a declaration on enforced disappearance, which despite its legally non-binding nature, retains symbolic value and reflects the international community's position towards disappearances. As long as the rate of ratification of the CPED remains low, the UN Declaration will continue to serve as a baseline for examining State conduct, especially by the WGEID. The adoption of the IACFD in 1994 and the inclusion of enforced disappearance in the Rome Statute for the ICC four years later can only have underscored the lack of a universally binding instrument in the field of international human rights.

Mandated by the Commission on Human Rights, Professor *Manfred Nowak* tackled this very issue in a comprehensive report examining the contemporary international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances.<sup>282</sup> Drawing on a wide breadth of sources and practice, *Nowak* identified the following gaps in the edifice of international law:

- a) the existence of different definitions;<sup>283</sup>
- b) the varying notion of 'victim' under different jurisdictions;<sup>284</sup>
- c) the impunity gap due to the lack of the criminalisation of the perpetration of enforced disappearance;<sup>285</sup>

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<sup>280</sup> Louis Joinet, De la déclaration de 1992 à la Convention de 2006 (Chronologie de l'élaboration), in Emmanuel Decaux and Olivier de Frouville, eds., *La Convention Pour La Protection De Toutes Les Personnes Contre Les Disparitions Forcées: Actes De La Journée D'études Du 11 Mai 2007 Organisée Par Le Centre De Recherche Sur Les Droits De L'homme Et Le Droit Humanitaire (C.R.D.H.) De L'Université Panthéon-Assas (Paris II) / Emmanuel Decaux Et Olivier De Frouville (éd.)* (Bruylant, 2009), 29–35; Tullio Scovazzi and Gabriella Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention* (Martinus Nijhoff Publishers, 2007), 255.

<sup>281</sup> A declaration by the UN preceded the adoption of the Convention against Torture. See, General Assembly Resolution 3452 (XXX) of 9 December 1975. See also: Dinah Shelton, "Standard-Setting by the United Nations Commission on Human Rights - An Overview from its Inception in 1947 until the Creation of the Human Rights Council in 2006", *Human Rights Law Journal* 29 (2008): 21, 25.

<sup>282</sup> Manfred Nowak, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46*, January 8, 2002.

<sup>283</sup> *Ibid.*, para. 73.

<sup>284</sup> *Ibid.*, para. 75.

<sup>285</sup> *Ibid.*, para. 81.

- d) the lack of specific preventive measures;<sup>286</sup>
- e) the need to design appropriate reparations<sup>287</sup> and
- f) special protection to be afforded to children.<sup>288</sup>

At the end of this report, he considered that there was a clear need for a new, legally binding instrument and suggested three avenues:

- a) a separate human rights treaty,
- b) an optional protocol to the ICCPR or
- c) an optional protocol to the CAT.<sup>289</sup>

A similar report addressing the situation within the CoE framework was issued in 2005. This report addressed essentially the same issues, castigating at the same time the ECtHR for the low compensations awarded to relatives of the disappeared.<sup>290</sup> The Rapporteur, Mr. *Christos Pourgourides*, also mooted a CoE-wide instrument specifically on disappearances.<sup>291</sup>

The Commission on Human Rights established in 2001 an Intersessional open-ended working group charged with elaborating a draft normative instrument on enforced disappearances.<sup>292</sup> From 2003 until 2005, this group held five sessions and delivered a draft of the convention, which was eventually adopted by the Human Rights Council in 2006 and by the UN General Assembly in 2007.<sup>293</sup> Having received the necessary number of 20 ratifications, the CPED entered into force in December 2010.<sup>294</sup>

### **3. An overview of the Convention**

This Convention responds to a rights gap; first and foremost, a universally binding definition is coined, establishing an independent, autonomous and non-derogable human right not to be subjected to enforced disappearance. By devising a fully-fledged definition, it overcomes the pre-existing deficient and unsatisfactory legal situation, which attempted to capture the full complexity of enforced disappearance in a fragmented way. Indeed, other regional or universal instruments did not include a

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<sup>286</sup> *Ibid.*, para. 83.

<sup>287</sup> *Ibid.*, para. 84.

<sup>288</sup> *Ibid.*, para. 92.

<sup>289</sup> *Ibid.*, para. 97.

<sup>290</sup> Christos Pourgourides, *Enforced disappearances* (Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, September 19, 2005), para. 66.

<sup>291</sup> *Ibid.*, para. 69.

<sup>292</sup> ECOSOC, *Terms of reference for the negotiation of an international legal instrument against corruption*, Resolution 2001/46, 2001.

<sup>293</sup> "Resolutions: General Assembly (GA), 61st session: United Nations (UN)", January 12, 2007, <http://www.un.org/Depts/dhl/resguide/r61.htm>, A/RES/61/177.

<sup>294</sup> "United Nations Treaty Collection", *International Convention for the Protection of All Persons from Enforced Disappearance*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4&lang=en#1](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en#1).

specific prohibition against enforced disappearance. When disappearances resurfaced in Latin America and South-eastern Europe, international (quasi-) adjudicatory bodies addressed it as the conglomerate effect or aggregate result of a number of other human rights violations, such as the right to liberty, the right not to be tortured, the right to life etc.

Second, the Convention responds to a mechanism lacuna: the CPED Committee, the treaty-body that is set up to monitor the implementation of this Convention, is expected to provide a new universal forum for the resolution of complaints relating to disappearances. Beyond its task of monitoring the implementation of the obligations enshrined in the CPED, it is important to note that this body is endowed not only with the power to pursue a study on its own motion, but also with an unparalleled, in the special-procedures universe, 'urgent action' capacity.<sup>295</sup> Hitherto, mainly the WGEID, the Human Rights Committee, the CAT Committee and other special procedures have dealt with complaints of this kind in the UN framework. Having a single treaty body with primary competency to receive and handle complaints will undoubtedly contribute to managing the plurality of involved bodies and streamlining the ensuing multiplicity of results.

As I will demonstrate later in this chapter, there exist considerable convergences and divergences in the practice of the ECtHR, the IACtHR and the HRCttee with regard to which rights and to what extent are violated by this abhorrent practice. *Nowak* highlights in his aforementioned UN report that the sole point of convergence in international practice is that the right to liberty is violated.<sup>296</sup> Contrary to his conclusion, the results of my research show that together with the right to liberty, the right to life and the prohibition of torture and CIDT form the core of the rights found violated by the aforementioned international bodies.

The new definition breaks with the traditional understanding that perceives disappearance as solely an aggravated form of 'privation of liberty'.<sup>297</sup> Furthermore, *Scovazzi* and *Citroni* pinpoint the problems that arise by this fragmented approach while examining the ICCPR:

'[T]he Covenant does not establish specific obligations with regard to prevention, investigation, repression and international cooperation in cases of enforced disappearances. Nor does the Covenant stipulate any obligation to codify disappearances as an autonomous offence under domestic criminal law'.<sup>298</sup>

Similar considerations apply to the regional human rights instruments under examination.

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<sup>295</sup> Article 30 CPED.

<sup>296</sup> *Nowak, Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, para. 96.*

<sup>297</sup> *Decaux and Frouville, 41.*

<sup>298</sup> *Scovazzi and Citroni, The struggle against enforced disappearance and the 2007 United Nations convention, 259.*



Third, apart from framing disappearances as an autonomous human rights violation in a single definition, the CPED establishes further new rights and attaches specific obligations to them. Most notably, the prohibition of secret detention is proffered in absolute terms<sup>299</sup> and the right to know the truth is introduced as a positively recognised human right.<sup>300</sup> The latter is ascribed to all victims of enforced disappearance, which for the purposes of the CPED, comprise not only of the material victim, but also of any individual who has suffered harm as the direct result of such an action. This is a right that can potentially have far-reaching effects on individuals, local communities and even whole societies.<sup>301</sup>

Fourth, this convention also provides a list of obligations incumbent upon States on how to organise their internal apparatus and details which safeguard mechanisms they are obliged to set in place in order to combat the phenomenon of disappearances.<sup>302</sup> Criminal protection against the wrongful removal of children is also prescribed.<sup>303</sup> Several articles in the CPED are very much modelled on the CAT.<sup>304</sup> Seen from this angle, the CPED joins a series of other human right-specific conventions, which address in depth a single right (e.g. CAT) or a specific dimension of duty bearers (e.g. CRC).

Finally, despite the fact that impunity is central to the perpetration of an enforced disappearance, the CPED is resoundingly silent on the issue of amnesties. The lack of a normative framework for this issue is all the more noticeable, given the attention this theme has attracted in international law and academic literature.

### **3.1 Preliminary concerns: proliferation of human rights treaties and multiplication of procedures**

One of the original rejections of the necessity of yet another universal human rights instrument is that of the proliferation of treaties in the field of human rights, and the possible overlap of procedures and multiplication (or duplication) of legal norms and obligations addressed to States. The multifaceted problems that have arisen within the UN human rights system in decades past still persist and pose a

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<sup>299</sup> Article 17 CPED.

<sup>300</sup> Article 24(2) CPED.

<sup>301</sup> The right to truth is dealt with in chapter 5.

<sup>302</sup> See, Article 17(3) CPED: "Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party."

<sup>303</sup> Article 25(1) CPED.

<sup>304</sup> For example, Articles 1(2) CPED and 2(2) CAT, 6(2) CPED and 2(3) CAT, 7(1) CPED and 4(1) CAT, 9(1) CPED and 5(1) CAT.

serious challenge to the effectiveness of its overall edifice.<sup>305</sup> Adding a further treaty, endowed with a separate monitoring body, appears to be at odds with the challenges facing the current situation. During negotiations, certain States questioned the necessity and sustainability of drafting a new legally binding instrument.<sup>306</sup>

While concerns as to the addition of a tenth treaty body to an already overburdened UN human rights system (pending the problems already mentioned) should be considered seriously, the reasons to introduce a new treaty are just as compelling. A first argument relates to the specificity of the protected rights enshrined in the CPED and the corresponding need of monitoring the implementation of the obligations and observance of the procedural safeguards contained therein. In other words, having a treaty body, which will focus exclusively on this practice, will arguably harness specific expertise of its members and engender elaborate responses to it.

Moreover, there is a fundamental misconception in the “non-proliferation of treaty bodies” position. There is an implicit inversion of logic, underlying this view, which solicits the abstention from creation of further rights and mechanisms due to the pressure that the latter have come under already. Beyond these theoretical counter-arguments, there is also a practical response to this concern. Echoing the recommendation made by *Alston*, in his capacity as independent expert, that: ‘human rights treaties should provide for a simplified process to be followed in order to amend the relevant procedural provisions’,<sup>307</sup> the CPED includes two clauses that are responsive to the abovementioned concerns and allow for the correction of possible future setbacks. Firstly, pursuant to Article 28(2) CPED, the Committee shall:

‘consult other treaty bodies instituted by relevant international human rights instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations’.

This provision imposes an obligation upon the CPED Committee to engage in a consultation process with other treaty bodies with the evident rationale of delivering results that will be consonant with those of other mechanisms, especially the ones of the HRCttee. However, it should be expected

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<sup>305</sup> Philip Alston, *Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights* (United Nations, General Assembly, November 8, 1989); Philip Alston, *Effective functioning of bodies established pursuant to United Nations human rights instruments* (United Nations, Commission on Human Rights, March 27, 1997).

<sup>306</sup> *Report of the Intersessional Open-ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*. (UN, 2003), para. 23; *Report of the Intersessional Open-ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*. (UN, 2004), para. 144.

<sup>307</sup> Philip Alston, *Effective functioning of bodies established pursuant to United Nations human rights instruments - Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system, E/CN.4/1997/74* (United Nations, March 27, 1997), para. 101.

that the CPED Committee will also draw upon the experience and working methods of other bodies, and that its members will be mindful of the prevailing need for rationality and coherence in the UN system.

Secondly, Article 27 CPED functions as a “revision” clause, providing that a conference of the State Parties to the CPED shall ‘evaluate the functioning of the Committee and [...] decide [...] whether it is appropriate to transfer to another body - without excluding any possibility - the monitoring of this Convention [...]’. No other core human rights convention includes a similar provision. This article allows for the reassessment of the functioning of the CPED Committee no later than six years after its entry into force.<sup>308</sup> A short temporal horizon of this kind will allow for the assessment of the merits and demerits of maintaining a separate treaty body and will also streamline the issue within the on-going overall discussion as to the future of the UN human rights treaty bodies.

#### **4. Relationship with regard to other rights**

Enforced disappearance has received a plethora of characterisations for the devastating effects it inflicts on material victims, their relatives and on broader segments of a society: ‘an offence to human dignity’,<sup>309</sup> ‘a grave and abominable offence against the inherent dignity of the human being’,<sup>310</sup> ‘an affront to the conscience of the hemisphere’,<sup>311</sup> ‘a violation of violations’.<sup>312</sup> Indeed, by the way it is carried out, it constitutes an encroachment upon the most fundamental human rights, with chilling ramifications for victims and their societal environment.

The most basic rights protecting the life, liberty and security and physical and moral integrity of the person are typically violated by the perpetration of enforced disappearance. As a corollary of subjecting a person to this practice, virtually all human rights are imperilled or are similarly violated because of the absolute subjection of a person to the control and will of its perpetrators. For example, the right to humane treatment while in custody or the right to access to justice are also innately linked.

The UN Declaration enumerates the following as the rights most commonly violated in an enforced disappearance: the right to recognition as a person before the law, the right to liberty and

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<sup>308</sup> This means that the reassessment must take place by 2016.

<sup>309</sup> “Declaration on the Protection of all Persons from Enforced Disappearance”, <http://www2.ohchr.org/english/law/disappearance.htm>, Article 1: “Any act of enforced disappearance is an offence to human dignity.”

<sup>310</sup> Federico Andreu-Guzman, “The Draft International Convention on the Protection of All Persons from Forced Disappearance”, *Review - International Commission of Jurists*, no. 62/63 (2001): 74.

<sup>311</sup> *Resolution of the General Assembly of the Organisation of American States, AG/RES. 666 (XIII-O/83)*, 1983, para. 4, <http://scm.oas.org/pdfs/agres/ag03797E01.PDF>; *Resolution of the General Assembly of the Organisation of American States, AG/RES. 742 (XIV-O/84)*, 1984, para. 4, <http://scm.oas.org/pdfs/agres/ag03797E01.PDF>.

<sup>312</sup> Decaux and Frouville, 41.

security of the person, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, as well as the right to life. In the following paragraphs, I take issue with three of these rights, namely the right to liberty, the right not to be subjected to torture and the right to life. The intention here is to conceptually elucidate their respective domains and establish their correlation within the contextual background of enforced disappearance. While these three rights have been central to analyses of the case law of international bodies, the right to recognition as a person before the law has not received such widespread attention. For this reason, the discussion on this right is handled separately in section 5.2 of this chapter.

#### **4.1 Right to liberty**

Any form of deprivation of liberty is always the starting point for an enforced disappearance. The violation of the right to liberty lies at the heart of a sequence of events that make up a disappearance. Article 2 CPED is put in broader terms than those of Article 9 ICCPR<sup>313</sup> in this regard: the latter, prohibits arbitrary arrest and detention, whereas the CPED considers plain arrest and detention, abduction and any other form of deprivation of liberty as possible elements of a disappearance. The CPED wording goes beyond the instances prescribed by ICCPR encompassing even those instances of lawful arrest and detention that may be followed by a concealment of the fate or whereabouts of the disappeared person. Further categories of deprivation of liberty that have come to the fore through State practice such as secret, unacknowledged or *incommunicado* detention<sup>314</sup> and any unlawful deprivation of liberty must also be considered to fall foul of the definition of enforced disappearance.<sup>315</sup>

The use of the term “abduction” in the CPED definition should not be viewed as redundant, but must be read in the light of Article 3 of the same convention, which obliges States to ‘take appropriate measures to investigate acts defined in Article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice’. Thus, the aim of this provision is to address instances of criminal conduct by non-State actors, whose actions cannot be attributed or otherwise linked to a State.

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<sup>313</sup> Article 9.1 ICCPR reads: “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”

<sup>314</sup> Cf. Nigel Rodley, *The treatment of prisoners under international law*, 3rd ed. (Oxford ;New York N.Y.: Oxford University Press, 2009), 332–333; It should also be noted that in *Hammel v. Madagascar*, *Communication No. 155/1983* 19.4 (Human Rights Committee 1987) the HRCttee found a violation of Art. 9(4) due to the inability of the victim to challenge his arrest (and incommunicado detention).

<sup>315</sup> Rodley considers enforced disappearance as the most extreme form of detention. See: Nigel Rodley, “Integrity of the person” in *International human rights law*, ed. Daniel Moeckli, Sangeeta Shah, and Sandesh Sivakumaran (Oxford ;New York N.Y.: Oxford University Press, 2010), 220.

The right to security of the person, although usually found alongside to the right to liberty in various international human rights law instruments, has not been given an independent meaning. It has therefore remained in the shadow of the right to liberty and has only been connected to the latter in cases that relate to the deprivation of liberty of individuals. The ECtHR has made scarce attempts to infuse distinct meaning to this right. In *Bozano v. France*, the Court seemed to embark on an effort to separate the two rights, when it stated that:

'any measure depriving the individual of his liberty must be compatible with the purpose of Article 5 (art. 5), namely to protect the individual from arbitrariness [...]. What is at stake here is not only the "right to liberty" but also the "right to security of person"'.<sup>316</sup>

*Bozano* was recalled by the same Court in *Öcalan v. Turkey* with the addition that:

'An arrest made by the authorities of one State on the territory of another State, without the consent of the latter, affects the person concerned's [sic] individual rights to security under Article 5 § 1'.<sup>317</sup>

Subsequent case law did not offer much progress to the severability of the two rights and the clarification of the contours for the right to security.<sup>318</sup>

The Court does not elaborate on the possible implication of the right to security in events giving rise to cases of enforced disappearance. The rights to liberty and security are mentioned in the same breath in the list of violated rights.<sup>319</sup> Therefore, no independent meaning can be discerned for this right.

#### **4.2 The right not to be subjected to torture and cruel, inhuman and degrading treatment**

Enforced disappearance must be conceptually distinguished from torture from the outset: enforced disappearance is not tantamount to a violation of the prohibition of torture without further examination and qualification of the circumstances surrounding the disappearance.<sup>320</sup> From the moment of deprivation of liberty and extending until the eventual clarification of the whereabouts or fate of a disappeared person, torture or cruel, inhuman and degrading treatment may or may not be

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<sup>316</sup> *Bozano v. France* (Application no. 9990/82) 54 (European Court of Human Rights 1986).

<sup>317</sup> *Öcalan v. Turkey* (Application no. 46221/99) [GC] 85 (European Court of Human Rights 2005).

<sup>318</sup> For a review of the case-law, see: Rhonda Powell, "The Right to Security of Person in European Court of Human Rights Jurisprudence", *European Human Rights Law Review*, no. 6 (2007): 649-662.

<sup>319</sup> *Kurt* still stands as valid authority on this: *Kurt v. Turkey* (15/1997/799/1002) 129 (European Court of Human Rights 1998).

<sup>320</sup> Nowak, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46*, para. 100: "enforced disappearance is a much broader concept, which involves human rights violations that at present are not covered by the mandate and expertise of the Committee against Torture."

implicated.<sup>321</sup> A finding by a human rights body on whether a person has been subjected to either form of treatment is contingent upon various factors, including the actual treatment of the victim, the manner in which the deprivation of liberty took place and the overall impact upon the material victim and its family.

Torture constitutes one of the most solid peremptory norms of international law and is prohibited by various universal and regional treaties that cover the areas of human rights law, international criminal law and humanitarian law. The UN Convention against Torture has come to represent a central point of reference for the juridical community. Torture, as defined in Article 1 CAT, has four elements:<sup>322</sup> involvement of a public official; severe pain or suffering; intention; and specific purpose.<sup>323</sup> Juxtaposed to the definitions of enforced disappearance in the previous chapter, it becomes clear that there could be instances where one of these four elements would not be present. The most apparent difference is the wider protection offered by the CPED in including in the list of perpetrators not only State agents, but also persons or groups of persons acting with the authorisation, support or acquiescence of the State. An additional difference refers to the intention and specific purpose, which are not present as constitutive elements in the definition of enforced disappearance.

To add to the issues identified, one should bear in mind that enforced disappearances by their very nature usually do not permit the ascertainment of whether or not a person has actually been subjected to torture. Drawing upon the considerations of cases from the ECtHR and the HRCtee and the contours of enforced disappearances, it becomes clear that certain factors are conducive to reaching the threshold of torture. These are: the circumstances surrounding the deprivation of liberty (e.g. method of deprivation, use and degree of violence), the period and conditions of detention,<sup>324</sup> the

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<sup>321</sup> WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, "Question of the human rights of all persons subjected to any form of detention or imprisonment, in particular: Question of enforced or involuntary disappearances", January 21, 1983, para. 131: "the very fact of being detained as a disappeared person, isolated from one's family for a long period is certainly a violation of the right to humane conditions of detention and has been represented to the Group as torture".

<sup>322</sup> Article 1 reads: "For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

<sup>323</sup> Manfred Nowak, *The United Nations Convention against torture: a commentary* (Oxford ;;New York: Oxford University Press, 2008), 66–79; J. Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: a handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (Dordrecht ;;Boston ;;Norwell MA U.S.A.: M. Nijhoff, 1988), 117–123.

<sup>324</sup> For a recapitulation of the ECtHR's general principles on the conditions of detention, see: *Öcalan v. Turkey (Application no. 46221/99) [GC]*, para. 177 – 189.

purported intention of the perpetrators, as well as the adverse effects upon the victims' physical and mental integrity.

It can also very well be conceived that a person may be subjected to torture or CIDT during his detention.<sup>325</sup> In *Bámaca-Velásquez*, a case involving the alleged enforced disappearance and subjection to torture of the victim, the IACtHR held that:

'the alleged victim was submitted to grave acts of physical and mental violence during a prolonged period of time for the said purpose and, thus, intentionally placed in a situation of anguish and intense physical suffering, which can only be qualified as both physical and mental torture'.<sup>326</sup>

It should be noted that when faced with torture allegations, the ECtHR's threshold is to prove beyond reasonable doubt that torture has indeed taken place.<sup>327</sup> With regard to the IACtHR, *Pasqualluci* reminds that: 'The Court also holds that there is a presumption in favour of a victim's testimony regarding the conditions of imprisonment, when the victim has been held incommunicado'.<sup>328</sup> Thus, the IACtHR employs a laxer test on the issue of proof.

### **Cruel, inhuman or degrading treatment**

Distinguishing torture from other cruel, inhuman or degrading treatment is an exercise that depends largely on the context of each case. International instruments are not particularly instructive in this regard, therefore affording considerable margin to human rights bodies to put flesh to these terms. According to *Rodley* 'the purposive element is the sole or dominant element distinguishing torture from cruel or inhuman treatment'.<sup>329</sup> In a long strand of cases from the ECtHR, this Court has found a violation of Article 3 ECHR for the material victim of a disappearance where a person's arrest was conducted in a manner that brought it within the ambit of cruel, inhuman and degrading treatment. The Court's assessment of the facts in *Aliyeva* is illustrative:

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<sup>325</sup> *Kudła v. Poland* (Application no. 30210/96) [GC] 92 (European Court of Human Rights 2000): "The Court has considered treatment to be 'inhuman' because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical or mental suffering. It has deemed treatment to be 'degrading' because it was such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them. On the other hand, the Court has consistently stressed that the suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment."

<sup>326</sup> *Bámaca-Velásquez v. Guatemala*, Series C No. 70. Merits 158 (Inter-American Court of Human Rights 2000).

<sup>327</sup> *Çakıcı v. Turkey* (Application no. 23657/94) 92 (European Court of Human Rights 1999). See also *Ireland v. the United Kingdom* (Application no. 5310/71) [Plenary] 161 (European Court of Human Rights 1978): "The Court agrees with the Commission's approach regarding the evidence on which to base the decision whether there has been violation of Article 3 (art. 3). To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. In this context, the conduct of the Parties when evidence is being obtained has to be taken into account."

<sup>328</sup> Jo Pasqualucci, *The practice and procedure of the inter-american court of human rights* (Cambridge [u. a.]: Cambridge Univ. Press, 2003), 210.

<sup>329</sup> Rodley, *The treatment of prisoners under international law*, 123.

'The evidence submitted shows that he, a disabled person, was dragged outside by armed men at night in cold weather with only his underwear on. The Court considers that, in the circumstances of the present case, this treatment reached the threshold of "inhuman and degrading" since it not only made Abu Aliyev suffer from cold, but must have made him feel humiliated, defenceless and caused fear and anguish as to what might happen to him'.<sup>330</sup>

Another category of instances in which CIDT may be involved relates to the effects of a disappearance upon the relatives of the material victim,<sup>331</sup> who can be found to be victims of this violation in their own right. For example, within the European system such violation is contingent upon the responsiveness to the petitions of these persons by State authorities,<sup>332</sup> whereas in the Inter-American one, it is presumed that the degree of suffering is such as to justify the finding of this violation.<sup>333</sup> Similar to the IACtHR, the HRCttee has relied on the anguish and stress caused to the mother of the material victim by the continuing uncertainty concerning the fate and whereabouts of the latter and found that the mother is also 'a victim of the violations of the Covenant suffered by her daughter in particular, of article 7'.<sup>334</sup>

Especially with regard to the period of detention, the IACtHR considered prolonged isolation and deprivation of communication as constituting 'cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being'.<sup>335</sup> Similarly, the HRCttee has found that by being subjected to prolonged *incommunicado* detention in an unknown location, the complainant was the victim of torture and cruel and inhuman treatment.<sup>336</sup>

It flows from these considerations that many instances of enforced disappearance could result in torture or cruel, inhuman or degrading treatment. Even if enforced disappearance does not meet the "torture threshold" for the reasons explained above, it could fall under the prohibition of cruel, inhuman

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<sup>330</sup> *Aliyeva v. Russia* (Application no. 1901/05) 87 (European Court of Human Rights 2010).

<sup>331</sup> Nigel Rodley, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*, July 3, 2001, para. 14, [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/a10fc68f4899e0c1256ace004b6207/\\$FILE/N0144579.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/a10fc68f4899e0c1256ace004b6207/$FILE/N0144579.pdf): "While reaffirming that enforced disappearances are unlawful under international law and cause much anguish, whatever their duration, the Special Rapporteur believes that to make someone disappear is a form of prohibited torture or ill-treatment, clearly as regards the relatives of the disappeared person and arguably in respect of the disappeared person or him/herself. He further believes that prolonged incommunicado detention in a secret place may amount to torture as described in article 1 of the Convention against Torture". See also the case-law of HRC, ACtHR and ECtHR.

<sup>332</sup> *Kurt v. Turkey* (15/1997/799/1002), para. 133; *Akdeniz and others v. Turkey* (Application no. 23954/94) 101 (European Court of Human Rights 2001).

<sup>333</sup> *Ibsen-Cárdenas and Ibsen-Peña v. Bolivia*, Series C No. 217 137 (Inter-American Court of Human Rights 2010); *Chitay-Nech et al. v. Guatemala*, Series C No. 212 121 (Inter-American Court of Human Rights 2010).

<sup>334</sup> *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981 14 (Human Rights Committee 1983).

<sup>335</sup> *Godínez-Cruz v. Honduras*, Series C No. 5. Merits 156 (Inter-American Court of Human Rights 1989).

<sup>336</sup> *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994). 5.4 (Human Rights Committee 1994).



or degrading treatment.<sup>337</sup> However, in this case a problem of a different nature arises: Article 4 CAT requires States to criminalise torture, but not treatment that could be considered as cruel, inhuman or degrading.<sup>338</sup> This could potentially create a serious gap in the protection of individuals from enforced disappearance, if the matter were solely to be governed by CAT. By contrast, Article 4 CPED obliges States to take the necessary measures to ensure that enforced disappearance constitutes an offence under their criminal laws, thus leaving no leeway for other interpretations. I believe that together with the contextual argument, this gap is an additional reason for maintaining the conceptual distinctiveness of the two notions.

One should not forget that neither the CAT nor any other instrument in the field of human rights law was designed to address the specific features and complex nature of enforced disappearances. The discussion in this section attests to the opinion that the previous legal framework had shortcomings and that despite the similarities between enforced disappearance and torture, the two retain different characteristics in law and in fact. Consequently, they remain two conceptually distinct, yet potentially related, violations.

#### **4.3 Right to life**

Apart from the two aforementioned rights, the UN Declaration on the protection of all persons from enforced disappearance lists in its preamble the right to life as one of the rights to pay most regard. Past practice has proved that subjecting a person to enforced disappearance could lead to extrajudicial killing. Again, these two violations must be differentiated on a cause-and-effect basis, disappearances constituting the cause for the eventual loss of life. In many instances, as the case law of international bodies illustrates,<sup>339</sup> and reports from NGOs corroborate,<sup>340</sup> disappeared persons are deprived of their lives by their captors.

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<sup>337</sup> Nowak observes that: “[t]he case-law does not indicate whether the particular brutality of the treatment and severity of the victims’ suffering or the intention and purpose of the perpetrators were the distinguishing features between cruel and inhuman treatment on the one hand, and torture on the other”, in Nowak, *The United Nations Convention against torture*.

<sup>338</sup> Article 4(1) CAT reads: “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture”.

<sup>339</sup> *Luluyev and Others v. Russia* (Application no. 69480/01) (European Court of Human Rights 2006); *Shakhgiryeva and Others v. Russia* (Application no. 27251/03) (European Court of Human Rights 2009); *La Cantuta v. Peru*, Series C No. 162 (Inter-American Court of Human Rights 2006); *Bautista de Arellana v. Colombia*, Communication No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993 (1995). (Human Rights Committee 1995).

<sup>340</sup> “Who Will Tell Me What Happened to My Son?” *Russia’s Implementation of European Court of Human Rights Judgments on Chechnya* (Human Rights Watch, September 2009).

Depending on the surrounding factual circumstances, the subjection of a person to disappearance may be life-threatening *per se*.<sup>341</sup> The case law of the two regional human rights courts is illustrative of the profusion of instances in which a disappearance may be perpetrated. The conflict situations in southeast Turkey, Chechnya and north Cyprus are the source of numerous complaints about enforced disappearances upon which the ECtHR has been called to pronounce. In a similar fashion, the IACtHR has dealt with cases originating from countries that have experienced intense internal unrest due to non-international armed conflicts or the conduct of repressive dictatorships and authoritarian regimes threatening the lives of their own citizens.

Applicants to human rights bodies have invoked, usually with success, Articles 2 ECHR, 4 ACHR and 6 ICCPR, each of which protects the right to life in the domain of their respective jurisdictions. These bodies have attached positive obligations on these rights in order to protect the said right: from one point of view, the right to life has been interpreted as having a procedural aspect, which grounds a State obligation to thoroughly investigate instances of disappearances leading to death. From a different viewpoint, States are held responsible on the basis of the substantive aspect of the right due to their failure to protect the life of individuals or refrain from acts that lead to arbitrary loss of life.<sup>342</sup>

#### **4.4 Bridging rights: Dignity**

Notwithstanding the correlation of the aforementioned specific human rights, an overarching notion that has received scant attention in doctrinal writings on enforced disappearances is that of 'dignity'.<sup>343</sup> References to dignity are abundant in the human rights universe. Treaties and conventions, as well as decisions, judgments and 'soft-law' materials describe dignity as a fundamental philosophical premise of human rights.<sup>344</sup> All the major human rights instruments include at least one reference to the inherent

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<sup>341</sup> *Magomadov and Magomadov v. Russia* (Application no. 68004/01) 98 (European Court of Human Rights 2007).

<sup>342</sup> *General Comment No. 06: The right to life* (art. 6) (Human Rights Committee, April 30, 1982), para. 4, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/84ab9690ccd81fc7c12563ed0046fae3?Opendocument): "States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life."

<sup>343</sup> For a recent analysis of the tensions surrounding the issue, see: Viviana Monsalve and Javier Aguirre Román, "Tensions of Human Dignity: Conceptualization and Application to International Human Rights Law", *SUR - International Journal On Human Rights* 6, no. 11 (2009): 39-60.

<sup>344</sup> Doron Schultziner, in *Perspectives on Human Dignity: A Conversation*, ed. Jeff Malpas and Norelle Lickiss (Dordrecht: Springer, 2007), 12: "By intrinsic dignity, I mean that worth or value that people have simply because they are human, not by virtue of any social standing, ability to evoke administration, or any particular set of talents, skills or powers. Intrinsic value is the value that something has by virtue of being the kind of thing that it is. Intrinsic value is the value that human beings have by virtue of the fact that they are human beings. This value thus not conferred or created by human choices, individual or

dignity of the human person in their preambles, with the notable exception of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), which, however, requires respect for dignity for persons in detention.<sup>345</sup> At the same time, apart from being the *raison d'être of human rights*, dignity constitutes the ultimate value for each human being.<sup>346</sup>

In an influential article on dignity, *McCrudden* analyses the uses of this concept in universal and regional contexts and finds that there emerge:

'significant differences in the ways in which human dignity has been incorporated into positive law [...]. In many of the instruments, dignity is to be found in the preamble, whereas in others it is used to explicate particular rights. In some it is referred to as foundational in some sense; in others not. In some, human dignity is a right in itself (and in some systems, a particularly privileged right), whilst, in other jurisdictions, it is not a right but a general principle. [...] It is clear that the idea of dignity has become a central organizing principle in the idea of universal human rights, although with interesting differences between jurisdictions'.<sup>347</sup>

In more practical terms and relating to enforced disappearance, dignity finds its place in Article 10(1) ICCPR<sup>348</sup> and 5(2) ACHR,<sup>349</sup> which are worded in almost identical terms. Persons deprived of their liberty are entitled to treatment that will respect their inherent dignity. Whilst not underestimating the importance of the normative realm of these provisions, it is evident that they alone cannot embrace the full extent of disappearance, because they centre on a single stage of an enforced disappearance, namely the period of detention of a person. A vast set of rules and principles has been generated for the protection of individuals coming under the control and power of a detaining authority.<sup>350</sup>

Jurisprudence of international courts has taken up the issue of dignity, albeit in a rather declaratory and *in passim* fashion. In this connection, the Inter-American Court of Human Rights, from the first cases submitted to it, was adamant that the practice of disappearances in Honduras implied

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collective, but is prior to human attribution". See also the pronouncement of the ICTY in *Prosecutor v. Furundžija (IT-95-17/1) Lašva Valley* [trial judgment] 183 (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 2008): "The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law".

<sup>345</sup> Article 17.1 CMW: "Migrant workers and members of their families who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity."

<sup>346</sup> Catherine Dupre, "Unlocking Human Dignity: Towards a Theory for the 21st Century", *European Human Rights Law Review*, no. 2 (2009): 201–202; Frédéric Mégret and Florian Hoffmann, "Dignity: A Special Focus on Vulnerable Groups" (Swiss Initiative to Commemorate the 60th Anniversary of the UDHR), 1, [http://www.udhr60.ch/report/HumanDignity\\_Megret0609.pdf](http://www.udhr60.ch/report/HumanDignity_Megret0609.pdf).

<sup>347</sup> Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", *European Journal of International Law* 19, no. 4 (September 1, 2008): 675.

<sup>348</sup> Art. 10.1 ICCPR: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

<sup>349</sup> Art. 5.2 ACHR: "All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

<sup>350</sup> Nigel Rodley, *The treatment of prisoners under international law*, 3rd ed. (Oxford University Press, 2009).

'the crass abandonment of the values that emanate from human dignity and of the fundamental principles' on which the Inter-American system is premised.<sup>351</sup> The Human Rights Committee has not provided an equally vocal position. It has restrained itself to finding a violation of Article 10(1) ICCPR ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"), but with no further pronouncement on the encroachment upon dignity.<sup>352</sup> Neither has the ECtHR offered any view on the issue of dignity in its case law on disappearances. It transpires unquestionably from the above that the judicial use of dignity in instances of enforced disappearances instances has been marginal.

Having thus mapped the dignity landscape, one would expect that dignity would feature as a key element in the text of the CPED, as it does in all other human rights treaties.<sup>353</sup> Astoundingly, dignity plays only a peripheral role in the CPED, appearing only twice times in its text. Article 19(2) CPED provides as follows: 'The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.' Further down, in Article 24(5): 'The right to obtain reparation [...] covers material and moral damages and, where appropriate, other forms of reparation such as: [...] (c) Satisfaction, including restoration of dignity and reputation'.

Despite the scarce attention that dignity receives in the overall scheme of the CPED it cannot, of course, be taken to suggest that this concept does not underpin the rights protected therein. On the other hand, the lack of a general and even solely declaratory statement in the preamble seems to be at odds with statements of similar nature in other major human rights instruments. The contrast is even starker if one considers that the UN Declaration is adamant in its first article that: 'Any act of enforced disappearance is an offence to human dignity'.<sup>354</sup>

My proposition is that dignity should be understood as permeating every aspect of enforced disappearance and operating as a unifying material of the different dimensions of enforced disappearance. Instead of employing the traditional mode of the cumulative result of disappearance, the latter can be better understood as having different dimensions consisting of various human rights,

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<sup>351</sup> *Velásquez Rodríguez v. Honduras*, Series C No. 4. Merits 158 (Inter-American Court of Human Rights 1988); *Fairén Garbi and Solís Corrales v. Honduras*, Series C No. 6. Merits 151 (Inter-American Court of Human Rights 1989); *Godínez Cruz v. Honduras*, Series C No. 5. Merits 166 (Inter-American Court of Human Rights 1989).

<sup>352</sup> *S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000 (2003). 9.3 (Human Rights Committee 2003); *Messaouda Grioua*, Communication No. 1327/2004 7.2 (Human Rights Committee 2007); *Edriss El Hassy, on behalf of his brother, Abu Bakar El Hassy, v. Libyan Arab Jamahiriya*, Communication No. 1422/2005, 6.6 (Human Rights Committee 2007).

<sup>353</sup> McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", 669–670.

<sup>354</sup> UN Declaration, Article 1, first indent: "Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field."

depending on the particular circumstances.<sup>355</sup> Seen from this standpoint, enforced disappearance is released from the shortcomings of a fragmentary conceptual analysis. It also allows for all rights to be potentially engaged without setting a fixed rights terrain. Concurrently, it maintains at its core the right to liberty and it affords a cohesive frame of reference to the rights implicated.

## **5. Comparative analysis of case law on enforced disappearances**

In the previous sections, I relied sporadically on pronouncements by international courts and quasi-judicial bodies relating to enforced disappearance. The allusion to their significance in understanding the practice and theorising its legal nature will now defer to a more systematic and coherent approach. For the remainder of this chapter, and for the next two, the jurisprudence that has emerged and consolidated since the first decision on disappearance by an international body in 1982 will form a central tool of my analysis.

In the following sections, I will provide an overview of the jurisprudence of the HRCtee, the ECtHR and the IACtHR on enforced disappearances. My main objectives in undertaking such a task are to identify the interpretative approaches employed by each court and to discern the main legal challenges and waves within each respective body of case law. An analysis of this kind will clarify whether there are any problems of consistency across and within these bodies of jurisprudence and, if so, where these inconsistencies are attributable to and how they interplay with the legal framework set up by CPED.

### ***Fragmentation and cross-fertilisation***

At the theoretical backdrop of this discussion lies the broader theme of the fragmentation of international law.<sup>356</sup> The main question in this regard is whether the case law of international (quasi-) judicial bodies issues pronouncements that are plagued with inconsistencies or contradictions or whether they can be considered to fit within a unified framework of interpretation.<sup>357</sup> In this connection, the research conducted for the purposes of this thesis finds that cross-reference to the Views and

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<sup>355</sup> Juan Méndez and Jose Miguel Vivanco, "Disappearances and the Inter-American Court: reflections on a litigation experience", *Hamline Law Review* 13 (1990): 513. The authors refer to separate aspects of disappearances which clearly violate fundamental rights.

<sup>356</sup> Martti Koskenniemi, *Report of the Study Group of the International Law Commission - Fragmentation of International Law: Difficulties from the diversification and expansion of international law* (International Law Commission, April 13, 2006).

<sup>357</sup> Simma recognises the development of differing approaches to interpretation and application of law in various branches of international law. See: Bruno Simma, "Universality of International Law from the Perspective of a Practitioner," *European Journal of International Law* 20, no. 2 (April 1, 2009): 275.

judgments of other bodies on cases relating to enforced disappearance, as a form of cross-fertilisation between systems, has not yielded any significant results.

From a quantitative aspect, it is observed that the HRCttee has not cited relevant authorities from the two regional bodies.<sup>358</sup> However, the two regional courts have taken notice of the HRCttee's Views, as well as each other's,<sup>359</sup> but not in a coherent or conceptually framed way. One explanation of this could lie in the content of litigants' submissions in such cases. From a qualitative aspect, cross-reference has not been a factor conducive to resolving legal issues pending before one of these judicial bodies. Although convergences and divergences are identified, the two regional courts have kept to their distinct normative domains. Furthermore, as will be discussed in the next chapter the cross-reference exercise has not been particularly successful in finding remedies. Indeed, attempts by litigants to persuade the ECtHR to draw inspiration from its Inter-American counterpart have not convinced the European Court.

The IACtHR's propensity to cite decisions made by the other bodies may be explained by a need felt within that Court to establish its authority by searching for persuasive precedent in other jurisdictions.<sup>360</sup> By being cognisant of the other bodies work and in certain circumstances employing their methods, lawyers and judges of the IACtHR consider that Court to be on a par with its peer bodies. Another reason could be that the IACtHR is particularly sensitive to the phenomenon of disappearances, which plagued Latin America for decades. When cases started being submitted to the IACtHR, the HRCttee had already dealt with the same subject-matter and it was natural that reference would be made to its Views.

The ECtHR delivered its first judgment on disappearances in 1998, a decade after the IACtHR's first pronouncement and 16 years after the HRCttee's. Although this afforded the European Court with a readily available body of case law, it did not play a significant role in the outcome of proceedings relating to disappearances. To be sure, this Court has developed a different approach on substantial issues such as the standing of victims, remedies and the burden of proof.<sup>361</sup> In essence, the differences that are identified allow for the conclusion that distinct characteristics are borne by the

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<sup>358</sup> Monica Pinto, "Fragmentation or unification among international institutions: Human Rights Tribunals", *New York University journal of international law & politics* 31, no. 4 (1999): 840.

<sup>359</sup> Anne-Marie Slaughter, "A typology of transjudicial communication", *University of Richmond Law Review* 29 (1995 1994): 123.

<sup>360</sup> While working at the Court, I often observed that when lawyers were confronted with a legal issue that had not previously been dealt with by the Court, they would look into the practice of the ECtHR. Slaughter considers that citation of decisions strengthens the judgment to be delivered: *Ibid.*, 119; Cesare Romano, "Deciphering the Grammar of the International Jurisprudential Dialogue," *New York University Journal of International Law and Politics* 41, no. 4 (2009): 780.

<sup>361</sup> On the development and contradictions of evidentiary matters see Juliet Chevalier-Watts, "The Phenomena of Enforced Disappearances in Turkey and Chechnya: Strasbourg's Noble Cause?", *Human Rights Review* 11, no. 4 (December 1, 2010): 469-489.

underlying justice models to which each regional court subscribes. On the one hand, the European Court remains steadfastly centred on the delivery of individual justice, whereas on the other, the IACtHR has evolved a jurisprudence that aspires to bind wider circle of persons.

### ***Methodological considerations***

Although a vast literature exists on comparative human rights law at the level of national courts, there are few works that engage in a comparative exercise on the jurisprudence of international human rights courts and bodies.<sup>362</sup> Typically, these works compile a set of comments on specific judgments without engaging in a truly comparative and cross-sectional comparison, but rather set judgments side-by-side. On this particular point, *McCrudden* observes that:

[c]omparative constitutional law scholarship has also tended to ignore international human rights law, or to view the relationship between domestic constitutional rights and international human rights law almost entirely from the domestic constitutional law point of view [...]. The effect of this separation between zones of legal specialism is to impoverish the analysis in both areas with subsequent damaging effects on our understanding of the interactions and relationships between comparative and international law. This adversely affects the reception of such knowledge and its application in legal decision-making and policy-making in both constitutional law and international human rights'.<sup>363</sup>

Therefore, the focus in the following sections is not on the vertical operation of international jurisprudence, between international and national courts, but on the horizontal one, across international jurisdictions.<sup>364</sup> Having said this, it is evident that no comprehensive theory of interpretation is readily available to be applied in order to embark on such an endeavour. In the next two paragraphs, I explain how I intend to deal with this issue.

No previous research has performed a systematic and exhaustive review of the jurisprudence on enforced disappearance. It has been asserted elsewhere that comparative interpretative jurisprudence allows for conclusions to be drawn about the consistency within systems of law and that a variety of approaches has been developed through time while interpreting a particular human right.<sup>365</sup>

Before elaborating on the analysis itself, an explanation of the methodology employed is in order. Unlike transnational comparative law, the comparison of the jurisprudence of human rights at the level of international bodies is shielded from the 'cherry-picking' criticism commonly directed against the

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<sup>362</sup> For example: Magnus Killander, "Interpreting Regional Human Rights Treaties", *SUR - International Journal On Human Rights* 7, no. 13 (December 2010).

<sup>363</sup> Christopher McCrudden, "An integrated theory of comparative human rights law", 4, On file with author.

<sup>364</sup> De Schutter frames this as "global interjurisdictional conversation". See: Olivier De Schutter, *International human rights law cases, materials, commentary* (Cambridge: Cambridge University Press, 2010), 32.

<sup>365</sup> Theodore Orlin and Martin Scheinin, *The jurisprudence of human rights law: a comparative interpretive approach* (Turku/Abo; Syracuse NY: Institute for Human Rights Abo Akademi University, 2000), 1–27.

former. The potentially available jurisdictions are markedly fewer and the institutional weight of the bodies involved carries more authority than national courts. Such authority can, and has been, used to serve as 'persuasive authority', in a fashion akin to the one in national courts. It should not be forgotten that the comparison of the three selected bodies is characterised by the predominant autonomy for each treaty regime. As it will be later demonstrated, the two regional courts have referred to each other's jurisprudence, albeit with differing degrees of frequency and usage.<sup>366</sup> In spite of the autonomy enjoyed by the three bodies, their subject-matter, i.e. human rights, operates as a consolidating net that interweaves them in a common reference and operational framework. The establishment of English as the *lingua franca* of international case law is also a factor that facilitates comparison.

This comparison will first consider the normative texts of the respective treaties governing the three bodies. Subsequently, the following themes within their jurisprudence will be compared: the *locus standi* or victim capacity under the three regimes; and the exercise of temporal jurisdiction in relation to the continuous nature of enforced disappearance. Remedies will be treated separately in chapter 4. The catalogue of judgments and decisions that were taken into consideration for the purposes of this thesis comprise of 29 decisions by the HRCttee, 197 judgments by the ECtHR and 33 judgments by the IACtHR, covering a time span from 1982 until February 2012.

### **5.1 Overview of the evolution of case law in the three bodies**

None of the normative instruments under examination include a specific right not to be subjected to enforced disappearance. The founding fathers of the respective texts, unsurprisingly, had not envisaged the rise and proliferation of this scourge. All three instruments enunciate core civil and political rights that flourished after World War II. It is on the basis of these rights that the three bodies established under the ICCPR, the ECHR and the ACHR strove to address the practice of enforced disappearance. For ease of reference, a table showing the rights commonly found violated by each respective body is provided below.

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<sup>366</sup> Nathan Miller, "An International Jurisprudence? The operation of 'precedence' across international tribunals," *Leiden Journal of International Law* 15 (2002): 489.



HRCttee	ACHR	ECHR
Right to life (Art. 6)	Right to life (Art. 4)	Right to life (Art. 2)
Right to liberty and security (Art. 9)	Right to liberty and security (Art. 7)	Right to liberty and security (Art. 5)
Torture (Art. 7)	Torture (Art. 5.2)	Torture (Art. 3)
	Fair trial (Art. 8)	
Recognition as a person before the law (Art. 16)	Juridical personality (Art. 3)	
Right to effective remedy (Art. 2.3)	Judicial protection (Art. 25)	Right to effective remedy (Art. 13)
Rights of detained (Art. 10)	Humane treatment (Art. 5)	
First case decided in <b>1982</b>	First case decided in <b>1988</b>	First case decided in <b>1998</b>

*Table 1: The corresponding provisions in the three international human rights instruments.*

In the aftermath of the attention that enforced disappearance received at the UN level, the first case to be decided by the HRCttee, a quasi-judicial body, was that of *Bleier v. Uruguay* in 1982.<sup>367</sup> Some of the principles articulated in that decision by the HRCttee have been relied upon in subsequent cases by other courts: for example, those relating to the burden of proof and the probative value of evidence submitted allowing for inferences to be drawn from them. The HRCttee found violations of Articles 7 (right not be tortured), 9 (right to liberty), 10.1 (right to human treatment of detainees) and 'that there are serious reasons to believe that the ultimate violation of article 6 [right to life] has been perpetrated'.<sup>368</sup>

The geographical dispersion of the cases submitted before the HRCttee largely follows the proliferation of enforced disappearances around the globe: the bulk of the cases refer to the perpetration of disappearances in South America, Northern Africa and Asia. In its subsequent decisions the HRCttee maintained the core of these violations and, depending on the particular circumstances of each case, of others as well. A major progressive leap was made in *Kimouche v. Algeria*, where the HRCttee also declared Article 16 (the right to recognition everywhere as a person before the law) to be violated.<sup>369</sup> The same finding was repeated in subsequent cases.<sup>370</sup>

<sup>367</sup> *Eduardo Bleier v. Uruguay*, Communication No. R.7/30 (Human Rights Committee 1982).

<sup>368</sup> *Ibid.*, par. 14

<sup>369</sup> *Messaouda Kimouche and Mokhtar Kimouche v Algeria*, 1328/2004, Communications No. 1328/2004 (Human Rights Committee 2007).

In 1988, the IACtHR delivered its first ever judgment, the celebrated *Velásquez-Rodríguez v. Honduras*.<sup>371</sup> This judgment related to the disappearance of *Manfredo Velásquez* in Honduras during the reign of the military regime in that country.<sup>372</sup> The Court castigated the prevalent practice of disappearances in Honduras in this, and subsequent judgments it handed down.<sup>373</sup> Identically to the HRCttee, the IACtHR found violations of Article 4 (right to life), Article 5 (humane treatment/ torture) and 7 (liberty and security). As more cases were lodged with the Court, its jurisprudence steadily became more elaborate and brought within its realm the violation of Article 3 (juridical personality).<sup>374</sup>

The jurisprudence of the IACtHR on disappearances proved to be extremely prolific: of the almost 140 judgments it has handed down so far, 33 relate to enforced disappearance, representing nearly a quarter of its total judgments. This Court has also paved the way for many interpretative breakthroughs, such as the establishment of the right to truth, the extensive and innovative remedies it has afforded, the standing of victims, the reversal of the burden of proof and the legal characteristics of the prohibition of enforced disappearance.<sup>375</sup> On the antipodes of these theoretical advancements, looms the implementation deficit of the judgments on measures of reparation, which undermines its legitimacy as a human rights court (and actor) in the region.<sup>376</sup>

Across the Atlantic, the ECtHR was first seized with cases of enforced disappearances only in 1998, the year when it handed down its first judgment on *Kurt v. Turkey*. Time proved that the ECtHR, despite being seized chronologically last with cases of enforced disappearance, would, of all three bodies, deliver the most judgments on enforced disappearance. This counter-intuitive fact is attributable mainly to three regional conflicts in Europe, namely the Turkish invasion of Cyprus in 1974, the military operations in southeast Turkey against the Kurdish insurgency during the 1990s and the armed conflict in Chechnya from 1996 to 2003.

Coupled with the impact of the right of individual application, as enshrined within the realm of the ECHR, these conflicts were the source of a high number of cases. Two waves of case law can be discerned within this case law: the first, from 1998 to 2006, consisting mainly of cases against Turkey, and the second, from 2006 until today, with the catalogue including almost exclusively judgments

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<sup>370</sup> See the next section for a discussion of this particular right.

<sup>371</sup> *Velásquez-Rodríguez v. Honduras*, Series C No. 4. Merits (Inter-American Court of Human Rights 1988).

<sup>372</sup> For an overview of the legal issues in the first set of disappearance cases, see: Scott Davidson, *The Inter-American human rights system* (Aldershot Hants England ; Brookfield Vt.: Dartmouth, 1997), 206–212, 266.

<sup>373</sup> *Godínez-Cruz v. Honduras*, Series C No. 5 (Merits) 156–167 (Inter-American Court of Human Rights 1989); *Faireñ-Garbi and Solís-Corrales v. Honduras*, Series C No. 6 (Merits) 157 (Inter-American Court of Human Rights 1989).

<sup>374</sup> *Anzualdo-Castro v. Peru*, Series C No. 202 90 (Inter-American Court of Human Rights 2009).

<sup>375</sup> The IACtHR has classified the prohibition as *jus cogens* and has developed the notion of continuous nature.

<sup>376</sup> David Baluarte and Christian De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Foundations, November 2010), [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/from-judgment-to-justice20101122/from-judgment-to-justice-20101122.pdf](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/from-judgment-to-justice20101122/from-judgment-to-justice-20101122.pdf).

against Russia. In addition to this, two specific cases are salient: *Varnava v. Turkey*<sup>377</sup> for the Grand Chamber's position on the continuous nature of the violation and *Khaled El-Masri v. the Former Yugoslav Republic of Macedonia*<sup>378</sup> for bringing the phenomenon of CIA-sponsored extraordinary renditions within the terrain of the Court.<sup>379</sup>

Notwithstanding some initial inconsistencies in its early judgments, the Strasbourg Court has nowadays established a consolidated *jurisprudence constante* on enforced disappearances. As illustrated by Table 1 above, this Court usually finds violations of Article 2 (right to life) and Article 5 (right to liberty) and depending on the factual background of each case of Article 3 (torture). The Court has meticulously elaborated on the distinction between the procedural and substantive limbs of Articles 2, 3 and 5 ECHR and it has developed a judicial 'test' on the issues of *ratione temporis* and of drawing inferences from the probative material submitted by the parties. However, the ECtHR has come under severe criticism for its restrained pronouncements on remedies, mainly due to the low amounts it awards and for not ordering further reparations, particularly the lack of explicit orders for the carrying out of effective investigations. A significant difference with its two counterparts is that it has not found a violation of the juridical personality of an individual, which can only be taken to constitute an implied precondition for the enjoyment of rights enshrined therein.

## **5.2. The right to recognition as a person before the law**

Turning to this specific right, it must firstly be said that Articles 16 ICCPR<sup>380</sup> and 3 ACHR<sup>381</sup> explicitly prescribe the right to recognition as a person before the law. The wordings of both articles attract their origins from the corresponding UDHR provision in Article 6.<sup>382</sup> The scope of the right is *prima facie* vague and uncertain. It can be read as standing on merely declaratory ground. The autonomous meaning of this right can be established in the formation and protection of the judicial personality of the individual that serves as a 'prerequisite to all other rights of the individual'.<sup>383</sup> This, in turn, stems from the dignity of the individual and explains its capacity to be holder of rights and duties. Moreover, these

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<sup>377</sup> *Varnava and others v. Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [Third Section] (European Court of Human Rights 2008).

<sup>378</sup> *Khaled El-Masri against the former Yugoslav Republic of Macedonia* (Application no. 39630/09) [Communicated case] (European Court of Human Rights 2010). The Chamber to which the case was allocated has relinquished jurisdiction in favour of the Grand Chamber.

<sup>379</sup> For an analysis of the relationship between enforced disappearance and extraordinary rendition, see chapter 6.

<sup>380</sup> Article 16 ICCPR reads: "Everyone shall have the right to recognition everywhere as a person before the law."

<sup>381</sup> Article 3 ACHR provides: "Every person has the right to recognition as a person before the law."

<sup>382</sup> Article 6 UDHR reads: "Everyone has the right to recognition everywhere as a person before the law."

<sup>383</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (Kehl [Germany] ; Arlington Va. U.S.A.: N.P. Engel, 1993), 282.

are rights which in their respective jurisdictional domains are categorised as non-derogable, pursuant to Article 4(2) ICCPR<sup>384</sup> and 27(2) ACHR.<sup>385</sup>

The UN Declaration includes the same right in the list of rights that are considered as being violated by enforced disappearance.<sup>386</sup> The prohibition of enforced disappearance, together with that of slavery, are the sole rules that can actually breathe concrete meaning to this right. The total subjection of a person to the power and will of another, combined with the inability of the victim to effectively exercise human rights of fundamental importance brings to the fore the violation of the right to be recognised as a person before the law.

In fact, this right can be linked to the part of the definition of enforced disappearance in CPED, which refers to the placing of a person outside the protection of the law. As a consequence of the deprivation of liberty and the subsequent denial to provide information or account for the fate or whereabouts of a disappeared person, the latter is *de facto* unable to assert its rights. This is yet an additional reason why the last part of the CPED definition cannot be taken to constitute a fourth element of the definition, but solely a mere factual consequence.<sup>387</sup> Since the recognition of a person before the law is a non-derogable right, the intention of the perpetrators to divest the disappeared person from its legal entitlements is legally inconsequential for human rights, because the scope of protection of this specific right is valid irrespective of the intention of perpetrators. The factual ramification may well be the barring of the person from claiming its rights, but the legally relevant rule is the right of recognition of a person before the law.

The HRCttee was first to consider the violation of the said right.<sup>388</sup> In *Kimouche v. Algeria*, the Committee attached two conditions to the finding of a violation of this kind: first, the victim must last be seen in the hands of State authorities and, second, at the same time, ‘the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3),

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<sup>384</sup> Article 4(2) ICCPR reads as follows: “No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”

<sup>385</sup> Article 27(2) ACHR provides: “The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.”

<sup>386</sup> Art 1(2) of the UN Declaration.

<sup>387</sup> See the analysis in chapter 1.

<sup>388</sup> *Mallinder* supports that the right was first articulated by the Inter-American Commission in the case of *Alicia Consuelo Herrera et al v. Argentina*, 1992 (Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311). However, the Inter-American Commission did not examine this case under Article 3 ACHR (right to juridical personality), but only under Articles 8 and 25 ACHR. Further, the issue was actually the lack of judicial protection for the victims and not the failure by the State to abide by Article 3.

have been systematically impeded'.<sup>389</sup> The Committee found a violation of Article 16 ICCPR in this, as well as in other cases, concluding that:

'disappeared persons are in practice deprived of their capacity to exercise entitlements under law [...] and of access to any possible remedy as a direct consequence of the actions of the State, which must be interpreted as a refusal to recognize such victims as persons before the law'.<sup>390</sup>

The IACtHR followed suite from the HRCttee, despite the failure of initial attempts by the IAComHR to convince this Court to find a violation of Article 3 ACHR.<sup>391</sup> A turning point to the Inter-American Court's case law occurred in *Anzualdo-Castro v. Peru*, where the Court reconsidered its position and declared a violation of the said Article. In doing so, it stated:

'[...] despite the fact that the disappeared person can no longer exercise and enjoy other rights, and eventually all the rights to which he or she is entitled, his or her disappearance is not only one of the most serious forms of placing the person outside the protection of the law but it also entails to deny that person's existence and to place him or her in a kind of limbo or uncertain legal situation before the society, the State and even the international community'.<sup>392</sup>

Similar reasoning applied to subsequent cases where the same violation was found.<sup>393</sup>

Although these two bodies have consistently found violation of this right, the juxtaposition of their positions exemplifies a point of interpretative divergence. On the one hand, the HRCttee places two conditions for finding a violation of this right. The more important is the systematic impediment to seeking an effective remedy. In this way the focus is shifted from the impact that the violation bears on the material victim, to the chronologically subsequent stage of seeking remedies. On the other hand, the IACtHR approach does not set any condition, but places the individual at the centre of its analysis by focusing on the consequence of enforced disappearance.

In assessing the value of the right to be recognised as a person before the law, it can be affirmed that its practical importance has remained marginal in international case law, given that it is only in recent years that it has been applied explicitly and that its application has not gained consensus, the exception being the lack of any practice on the part of the ECtHR. The normative realm of this right best serves as a moral underpinning of human existence and, in practical terms, does not notably expand the scope of actual human rights protection.

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<sup>389</sup> *Messaouda Kimouche v. Algeria*, Communications No. 1328/2004 7.8 (Human Rights Committee 2007).

<sup>390</sup> *Messaouda Grioua*, Communication No. 1327/2004, para. 7.8; *Zohra Madoui v. Algeria*, Communication No. 1495/2006 7.7 (Human Rights Committee 2008).

<sup>391</sup> *Bámaca-Velasquez v. Guatemala*, Series C No. 70. Merits 178–181 (Inter-American Court of Human Rights 2000).

<sup>392</sup> *Anzualdo-Castro v. Peru*, Series C No. 202, para. 90.

<sup>393</sup> *Radilla-Pacheco v. Mexico*, Series C No. 209 157 (Inter-American Court of Human Rights 2009); *Chitay-Nech et al. v. Guatemala*, Series C No. 212, para. 98–102.

### 5.3 Expanding and deepening the scope of protection: positive obligations and due diligence

Two key concepts that have contributed to the juridical treatment of enforced disappearances are those of “positive obligations” and “due diligence”. The two concepts cover a substantially common ground within the framework of human rights law, mainly because “positive obligations” have been employed within the European regional human rights system to prescribe those State obligations which the Inter-American system categorises as “due diligence”. Both concepts are well embedded in the State-centric system of international law in that they expand the scope of application of human rights norms that were originally worded in prohibitive terms, essentially requiring the abstention of States from specific conduct. Concurrently, they are the basis for indirectly engaging State responsibility for the acts of non-state actors, thus creating a further dimension of human rights protection.<sup>394</sup> Moreover, they are interrelated with the remedial capacity of human rights protection systems. In this connection, *Leach* recalls that ‘the imposition by the Court of positive obligations on state parties is inextricably linked with the question of the effectiveness of the redress provided by the Strasbourg system’.<sup>395</sup> The three bodies examined in this thesis have elaborated on the issue of State responsibility due to a failure to act in a three-pronged manner. This includes the exercise of due diligence to prevent and to respond to violations;<sup>396</sup> the reading of implied positive obligations in safeguarding *status negativus* rights<sup>397</sup> and; the development of the duty to protect and fulfil human rights.<sup>398</sup>

The principle of due diligence flourished originally within the ambit of the security of aliens and security of foreign states.<sup>399</sup> Environmental law subsequently proved a fertile ground for its further development and is nowadays considered by the ICJ as ‘part of the corpus of international law relating to the environment’.<sup>400</sup> The principle later penetrated the human rights law regime as well and is

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<sup>394</sup> Dimitris Xenos, *The positive obligations of the state under the European Convention of Human Rights* (London ;;New York: Routledge, 2011), 139.

<sup>395</sup> Philip Leach, “Positive Obligations from Strasbourg – Where do the Boundaries Lie?”, *Interights Bulletin* 15, no. 3 (2006): 126.

<sup>396</sup> Generally on due diligence, see: Timo Koivurova, “Due diligence” (Max Planck Encyclopedia of Public International Law).

<sup>397</sup> For a discussion of the “implied” nature of positive obligations, see: Pieter Van Dijk, “‘Positive obligations’ implied in the European Convention of Human Rights: Are the States still the ‘Masters’ of the Convention?” in *The role of the nation-state in the 21st century: human rights, international organisations, and foreign policy: essays in honour of Peter Baehr*, ed. Monique Castermans-Holleman, Godefridus van Hoof, and Jacqueline Smith (The Hague ;;Boston: Kluwer Law International, 1998).

<sup>398</sup> Susan Marks and Fiorentina Azizi, “Responsibility for Violations of Human Rights Obligations,” in *The law of international responsibility*, ed. James Crawford (New York: Oxford University Press, 2010), 731.

<sup>399</sup> Riccardo Pisillo-Mazzeschi, “The due diligence rule and the Nature of the International Responsibility of States”, *German Yearbook of International Law* 35 (1992): 22.

<sup>400</sup> Timo Koivurova, “What is the principle of due diligence?” in *Nordic cosmopolitanism: essays in international law for Martti Koskenniemi*, ed. Jarna Petman and Jan Klabbers (Leiden ;;Boston: Martinus Nijhoff Publishers, 2003), 341 and 344–5.

nowadays an important conceptual tool for the furtherance of their protection.<sup>401</sup> From the standpoint of general international law, the Articles on Responsibility of States for Internationally Wrongful Acts envisage the possibility of an omission on the State's part that may produce such an act. It is worth noting that in the commentary to the Articles on State Responsibility, it is stated that '[c]ases in which the international responsibility of a State has been invoked on the basis of an omission are at least as numerous as those based on positive acts, and no difference in principle exists between the two'.<sup>402</sup> Furthermore, the standard for breach of an obligation may involve the want of due diligence.<sup>403</sup>

The IACtHR was the first to develop the "due diligence" standard for enforced disappearance cases in *Velásquez-Rodríguez*. There, the Court based its judicial reasoning on the general obligation to respect the ACHR's rights, found in Article 1 ACHR.<sup>404</sup> An implied duty of States Parties flowing from this article is to organise the governmental apparatus in such a way as to ensure enjoyment of human rights. Within this duty rests the obligation to

'prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation'.<sup>405</sup>

The duty to investigate enforced disappearance is a continuous one and should be orientated towards identifying and punishing the perpetrators, and, at the bare minimum, providing information to the relatives as to the fate and remains of the disappeared person.<sup>406</sup> This latter requirement should be read as encapsulating the core objective of any effective investigation, which, at the same time evidences this Court's victim-oriented approach. This core meaning can be construed as intending to restore the dignity of the victims by providing them with information, which will allow them to mourn and perform their religious duties. The three bodies examined in this thesis have elaborated on State responsibility due to an omission to act in a three-pronged manner. This includes the exercise of due diligence to prevent and to respond to violations; the reading of implied positive obligations in safeguarding *status negativus* rights and; the development of the duty to protect and fulfill human

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<sup>401</sup> Especially so in the field of the protection of women's rights. See, Carin Benninger-Budel, *Due diligence and its application to protect women from violence* (Leiden ;;Boston: Martinus Nijhoff Publishers, 2008).

<sup>402</sup> International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 2001, 35.

<sup>403</sup> *Ibid.*, 34.

<sup>404</sup> For an analysis of "due diligence" in the case-law of IACtHR, see: Magdalena García Elorrio, "Algunas consideraciones en torno a la naturaleza y alcance de la noción de diligencia debida en la jurisprudencia de la Corte Interamericana de Derechos Humanos," *Revista Electrónica Cordobesa de Derecho Internacional Público (RECORDIP)* 1, no. 1 (2011), <http://www.revistas.unc.edu.ar/index.php/recordip/article/view/286>.

<sup>405</sup> *Velásquez Rodríguez v. Honduras, Series C No. 4. Merits*, para. 166.

<sup>406</sup> *Ibid.*, para. 181.

rights.<sup>407</sup>

The IACtHR has consistently adhered to the “due diligence” examination of enforced disappearances cases brought before it. However, it is worth noting that it has broadened the theoretical foundation of the obligation to conduct an effective investigation. From its judgment in *Goiburú* onwards, the IACtHR has framed its reasoning in the terms of the right to “access to justice”.<sup>408</sup> Access to justice is not worded as a stand-alone right in the ACHR.<sup>409</sup> Nevertheless, this has not impeded the Court from construing it through a combined reading of Articles 1(1), 8 and 25 ACHR. The basic premise of this framing is that State obligations do not solely encompass a duty to respect human rights, but also a duty to guarantee them by means of (*ex ante*) diligent prevention and (*ex post*) investigation.<sup>410</sup> Further, such a right implies the effective determination of the facts,<sup>411</sup> which must be understood as a factor enabling claimants to substantiate their access to courts. In the IACtHR’s assessment this right has been configured into a peremptory norm of international law.<sup>412</sup> These investigations must be undertaken *ex officio*,<sup>413</sup> conducted in a serious, impartial<sup>414</sup> and expeditious manner, affording the competent authority the necessary logistical support and full access to detention centres.<sup>415</sup>

The counterpart notion of “due diligence” in the European context is the one of “positive obligations”. Although initially the idea flourished in the domain of the right to private and family life,<sup>416</sup> it soon burgeoned in other rights, most notably and relevant to enforced disappearances, to Articles 2, 3, 5 and 13 ECHR. The theoretical basis of positive obligations within the ECHR system stands on three pillars: to secure rights; to ensure their practical and effective enjoyment and; to provide for effective remedy of arguable breaches.<sup>417</sup>

The interpretative method of this Court illustrates this tripartite scheme. The first two obligations emanate from the procedural limb of Articles 2, 3, and 5 ECHR. In disappearance cases, the ECtHR

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<sup>407</sup> Marks and Azizi, “Responsibility for Violations of Human Rights Obligations”, 731.

<sup>408</sup> *Goiburú et al. v. Paraguay*, Series C No. 153. *Merits, Reparations and Costs*. 105 et seq (Inter-American Court of Human Rights 2006).

<sup>409</sup> Francesco Francioni, *Access to justice as a human right* (New York: Oxford University Press, 2007), 32.

<sup>410</sup> *Anzualdo-Castro v. Peru*, Series C No. 202, para. 102.

<sup>411</sup> *Ibid.*, para. 124.

<sup>412</sup> *Goiburú et al. v. Paraguay*, Series C No. 153. *Merits, Reparations and Costs.*, para. 131; *Chitay-Nech et al. v. Guatemala*, Series C No. 212, para. 193.

<sup>413</sup> *Goiburú et al. v. Paraguay*, Series C No. 153. *Merits, Reparations and Costs.*, para. 118.

<sup>414</sup> *Chitay-Nech et al. v. Guatemala*, Series C No. 212, para. 196.

<sup>415</sup> *Anzualdo-Castro v. Peru*, Series C No. 202, para. 135.

<sup>416</sup> See, *Marckx v. Belgium* (Application no. 6833/74) (European Court of Human Rights 1979).

<sup>417</sup> Keir Starmer, *European human rights law: the Human Rights Act 1998 and the European Convention on Human Rights* (London: Legal Action Group, 1999), 194.



has read these articles in the light of article 1 ECHR,<sup>418</sup> in order to expand their scope of protection from essentially *status negativus* rights to rights requiring specific action. Accordingly, ever since its judgment in *Kurt v. Turkey*, the Court has attached the obligation of conducting an effective investigation to each of these Articles. This obligation should be interpreted within the duty to respond to these breaches. The Court ranks Articles 2 and 3 ECHR as among the most fundamental provisions of the convention<sup>419</sup> and considers that especially in disappearance cases, 'the obligation on the authorities to account for the treatment of a detained individual is particularly stringent'.<sup>420</sup> For the Court, the procedural obligation under Article 2 ECHR 'operates independently of the substantive obligation'.<sup>421</sup>

The third obligation is premised on Article 13 ECHR. For this article to come into play it is sufficient that the relatives of the disappeared present an arguable claim. It must be underscored that this constitutes a separate basis for requiring an effective investigation, which works in parallel to the procedural obligation of the other Articles.<sup>422</sup> As the Court itself has observed:

'the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure [...]. Seen in these terms, the requirements of Article 13 are broader than a Contracting State's obligation under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible'.<sup>423</sup>

The HRCtee has similarly subscribed to the same doctrine. The Views it has issued do not lend themselves to useful insights, but General Comment No. 31 expressly posits the notion within the realm of the ICCPR. The positive obligations therein are mainly aimed at addressing the issue of ensuring human rights against actions not attributable to the State. What can engage the responsibility of the State, however, is the failure 'to exercise due diligence to prevent, punish, investigate or redress the

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<sup>418</sup> *McCann and Others v. the United Kingdom (Application no. 18984/91) [GC]* 161 (European Court of Human Rights 1995); *Kaya v. Turkey (158/1996/777/978)* 105 (European Court of Human Rights 1998); *Timurtaş v. Turkey (Application no. 23531/94)* 89 (European Court of Human Rights 2000).

<sup>419</sup> *Bazorkina v. Russia (Application no. 69481/01)* 102 (European Court of Human Rights 2006).

<sup>420</sup> *Ibid.*, 104.

<sup>421</sup> *Varnava and Others v. Turkey (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC]* 147 (European Court of Human Rights 2009). Also in *Ilaşcu*, the Court stressed the importance of positive obligations with regard to Articles 2 and 3, by stating in par. 334: "When faced with a partial or total failure to act, the Court's task is to determine to what extent a minimum effort was nevertheless possible and whether it should have been made. Determining that question is especially necessary in cases concerning an alleged infringement of absolute rights such as those guaranteed by Articles 2 and 3 of the Convention".

<sup>422</sup> *Xenos, The positive obligations of the state under the European Convention of Human Rights*, 198: "Due to its indispensable role, the state's investigating mechanism is examined separately by the Court, either as the procedural aspect of a human right or under Article 13".

<sup>423</sup> *Kurt v. Turkey (15/1997/799/1002)*, para. 140.

harm caused by such acts by private persons or entities'.<sup>424</sup> Again, as within the case law of the ECtHR and the IACtHR, positive obligations are interrelated with the need to provide effective remedies in the event of breach under Article 2(3) ICCPR.

In assessing the evolution of “positive obligations” or “due diligence” within the respective domain of each jurisdiction, it is interesting to note that the three bodies adopted similar approaches. While not expressly stating as much, the development of positive obligations within their work is embedded in the overall framework of international law. The fulfilment of the obligations that States have undertaken by subscribing to each treaty regime depends on their abidance to the duty to respond to breaches of the rights enshrined therein. The most pertinent response to this effect is the conduct of effective investigations, which are both a secondary obligation (arising out of the primary right) and a remedial measure.<sup>425</sup>

Two strands of interpretative convergence can be identified here: first, the parallel application of the “effective remedy” clauses provided in Articles 13 ECHR, 25 ACHR and 2(3) ICCPR. Second, the similar framing of procedural obligations rooted in the general obligation to respect and ensure human rights found in Articles 1 ECHR, 1 ACHR and 2(1) ICCPR.<sup>426</sup> It should also be noted that all three bodies have used the notion of “effectiveness” (ECtHR and HRCttee) and “*effet utile*” (IACtHR) as a dynamic tool of treaty interpretation. Overall, “positive obligations” have expanded the scope of application of human rights beyond the sphere of mere prohibition. The positive obligations are thus configured as a juridical tool that enables a dynamic and evolutive interpretation of the rights enshrined in human rights treaties.

Despite the positive assessment in the previous paragraphs it must be noted that the use of these two concepts is not always clear and as *Silvia Borelli* notes ‘the term [of positive obligations] apparently bears differing meanings for different writers, depending on the context and the obligation under discussion’.<sup>427</sup> In order to conceptually disentangle these two concepts it is proposed that “positive obligations” is used to include both the *ex ante* and *ex post* obligations that States may bear with respect to the realisation of human rights. A further categorisation of these obligations should include the dichotomy between procedural and substantive aspects of these obligations. On the other

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<sup>424</sup> Human Rights Committee, “General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, May 26, 2004, para. 8.

<sup>425</sup> For effective investigations as remedies, see chapter 4.

<sup>426</sup> Fernando Basch, “The Doctrine of the Inter-American Court of Human Rights Regarding States’ Duty to Punish Human Rights Violations and Its Dangers,” *American University international law review*. 23, no. 1 (2007): 223–224. The ECtHR, while examining *Varnava v. Turkey* [GC], stated in par. 147: “It notes that the Inter-American Court, and to some extent the Human Rights Committee, apply the same approach to the procedural aspect of disappearances [...], examining allegations of denial of justice or judicial protection even where the disappearance occurred before recognition of its jurisdiction”.

<sup>427</sup> Silvia Borelli, “Positive Obligations of States and the Protection of Human Rights”, *Interights Bulletin* 15, no. 3 (2006): 101.

hand, due diligence could be better understood as a measure or degree of effective and meaningful discharge of the positive obligations. In other words, due diligence should be assessed by the measure of what should be logically and reasonably expected in the framework of the particularities of each case. In essence, positive obligations should respond to the question of what are States' obligations, while due diligence should assess whether or not States have acted in a practical, effective and meaningful way in order to safeguard the enjoyment of a right. Failure to reach the adequate threshold of qualitative discharge should again be understood as leading to a breach of the positive obligation.

## **6. The 'victim' requirement**

Having sketched this broad-brush outline of the case law of the selected bodies, I will now turn to a theme-specific discussion cutting across the work of these three bodies. These themes are: the *locus standi* of applicants before these bodies; their temporal jurisdiction and the interrelated theme of the continuous nature of disappearances. The CPED lies at the backdrop of all three themes and consequently will form part of the discussion.

The notion of "victim" and its capacities differ significantly within each respective system. To start with, Article 34 ECHR affords the right of individual application to 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation'. In a similar fashion, the optional protocol to the ICCPR states in Article 2 that 'individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration'. Paradoxically, the right to directly seize the Court is both curtailed and broadened within the same phrase in the Inter-American system. There, Article 44 ACHR entitles any person or group of persons, or any legally recognised nongovernmental entity to lodge petitions with the AComHR containing denunciations or complaints of violation of the ACHR. Hence, the right to petition the competent body is amplified in terms of right-holders (virtually anyone with legal capacity), but concurrently refined through the two-track system of the Commission's initial filtering. Once the AComHR submits a case to the IACtHR, the alleged victim becomes an autonomous actor in the proceedings, entitled to submit briefs containing pleadings, motions and evidence.<sup>428</sup>

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<sup>428</sup> IACtHR, "Rules of procedure", 2009, [http://www.corteidh.or.cr/reglamento\\_eng.cfm](http://www.corteidh.or.cr/reglamento_eng.cfm) Article 25.

## **Human Rights Committee**

The case law of the HRCtee is fairly unproblematic in this respect. The communications examined under that treaty regime for the purposes of this thesis have all related to close relatives (usually parents and spouses) that have not given rise to *ratione personae* objections. In fact, victimhood in cases of enforced disappearance for the close relatives refers to the anguish and distress that it produces<sup>429</sup> and is of an indirect nature, as attested by the following excerpt from one of the HRCtee's most recent Views:

'As to the author's claim also to be a victim of violations of the Covenant, the Committee recalls its jurisprudence according to which the close family of victims of enforced disappearance may also be victims of a violation of the prohibition of ill-treatment under article 7. This is because of the unique nature of the anxiety, anguish and uncertainty for those to the direct victim. That is the inexorable consequence of an enforced disappearance. Without wishing to spell out all the circumstances of indirect victimisation, the Committee considers that the failure of a State party responsibly to discharge its obligations to investigate and clarify the circumstances of the harm suffered by the direct victim will be usually be a factor. Additional factors may be necessary.'<sup>430</sup>

## **Inter-American Court of Human Rights**

The IACtHR has developed a similar, but more nuanced, approach founding the relatives' capacity as victims on a broad reading of Article 8 ACHR (right to fair trial) in combination with the UN Declaration, which explicitly refers to the suffering of the family of a disappeared person.<sup>431</sup> In further developing its position in the later *Bámaca* case, the IACtHR took notice of its European counterpart's approach on the same matter. The San Jose Court quoted extensively the criteria enumerated by ECtHR in *Timurtas*,<sup>432</sup> but refrained from stating explicitly that it adopted them or how it otherwise transposed them. Instead, it premised its findings on the continued obstruction of the applicant's efforts to ascertain the facts, the concealment of the corpse of *Bámaca Velásquez* and the obstacles created by various public authorities to the attempted exhumation procedures and also the official refusal to provide relevant information.<sup>433</sup>

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<sup>429</sup> *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981 para. 14: "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7."; Nowak, *U.N. Covenant on Civil and Political Rights*, 661.

<sup>430</sup> *Abubakar Amirov v Russian Federation*, Communication No. 1447/2006 (Human Rights Committee 2009), 11.7.

<sup>431</sup> *Blake v. Guatemala*, Series C No. 36. Merits 96–97 (Inter-American Court of Human Rights 1988).

<sup>432</sup> *Bámaca-Velásquez v. Guatemala*, Series C No. 70. Merits, para. 162 et seq.

<sup>433</sup> *Bámaca-Velásquez v. Guatemala*, Series C No. 70. Merits, para. 165.

The current state of the law is reflected in the three most recent judgments of the IACtHR on enforced disappearances where the IACtHR accepts a rebuttable presumption for parents, children, spouses and permanent domestic partners to be considered as direct next of kin, so long as particular circumstances of each case permit it.<sup>434</sup> Where such relationship is not established, the IACtHR is prepared to accept particularly close links that may exist, the degree of involvement in the search for justice or the degree suffering caused to the alleged victims.<sup>435</sup>

### ***European Court of Human Rights***

Contrary to IACtHR's flexible stance on this issue, the ECtHR has developed a more stringent position. In the first case of enforced disappearance that it considered, *Kurt v. Turkey*, it did subscribe to the general trend of the two other bodies by finding a violation of Article 3 ECHR with respect to the mother of the disappeared person.<sup>436</sup> In the judgments that followed, the Court steadfastly stated that *Kurt* did not establish any general principle that a family member of a "disappeared person" is automatically a victim of treatment contrary to Article 3 and went further to set out the criteria it would take into consideration in order to examine whether a family member could be deemed as a victim. These are: the proximity of the family tie (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.<sup>437</sup> Finally, the Court stressed that:

'the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.'<sup>438</sup>

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<sup>434</sup> *Chitay-Nech et al. v. Guatemala*, Series C No. 212, para. 220.

<sup>435</sup> *Ibsen-Cárdenas and Ibsen-Peña v. Bolivia*, Series C No. 217, para. 137; *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 235 (Inter-American Court of Human Rights 2010): "Respecto de aquellas personas sobre quienes el Tribunal no presumirá un daño a la integridad personal por no ser familiares directos, la Corte evaluará, por ejemplo, si existe un vínculo particularmente estrecho entre éstos y las víctimas del caso que le permita establecer una afectación a su integridad personal y, por ende, una violación del Artículo 5 de la Convención. El Tribunal también podrá evaluar si las presuntas víctimas se han involucrado en la búsqueda de justicia en el caso concreto, o si han padecido un sufrimiento propio como producto de los hechos del caso o a causa de las posteriores actuaciones u omisiones de las autoridades estatales frente a los hechos".

<sup>436</sup> *Kurt v. Turkey (15/1997/799/1002)*, para. 134.

<sup>437</sup> *Akdeniz and others v. Turkey (Application no. 23954/94)*, para. 101.

<sup>438</sup> *Çakıcı v. Turkey (Application no. 23657/94)*, para. 98.

The overview of the ECtHR's case law illustrates that the most potent criterion in cases of enforced disappearances is a person's involvement in the search for the disappeared person rather than the degree or proximity of relationship to it. The Court requires applicants to demonstrate a considerable degree of diligence and persistence in searching for the material victim and has employed this as the touchstone of its examination. On this basis it has refused to consider as "victims" parents, siblings and children of very young age that failed to prove their active engagement in searches.<sup>439</sup> In one instance, the ECtHR accepted that the common-law wife of the disappeared person could be considered as a victim, despite the respondent Government's objections to the contrary.<sup>440</sup> Therefore, the Court does not assess victimhood on the sole basis of the nominal relationship to the disappeared person.

### **Assessment**

While the HRCttee's jurisprudence does not yield ground to analyse its stance on the question of who can be considered a "victim", the judgments of the two regional courts have diverged. On the one hand, the approach underpinning the IACtHR's judgments is a two-stage analysis: first, on the basis of a categorisation, i.e. if it falls under the categories of parents, siblings, children, spouses and domestic partners. Second, if a person does not come under any of the aforementioned categories, then the Court will take into consideration the proximity of the ties, the degree of involvement in the search and the degree of suffering. On the other hand, the ECtHR is primarily examining the degree of involvement in the search by the alleged victim and the modus of reaction by the authorities. Thus, the ECtHR appears to adopt a "functional" approach as to who may be considered to be a victim, looking into the concrete circumstances of each instance of disappearance. This is to be contrasted to the automatic attribution of victim status that relatives enjoy under the ACHR regime.

Having their conventional boundaries in mind, it can be said that the IACtHR provides a more victim-friendly forum than the ECtHR. The threshold to be considered as "victim" is lower in the former Court, while it is not exclusive to others who do not fall into this category. Employing a "functional" criterion as a second tier for victimhood operates as an inclusive criterion. The same cannot be said for the ECtHR. Within its realm, the use of the "functional" criterion is operates in an exclusionary way by a reversal of the analysis. The European Court moves from the actual perpetration of enforced disappearance to attach weight to the reactions of the State authorities, if the latter are petitioned by the

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<sup>439</sup> *Musikhanova and Others v. Russia* (Application no. 27243/03) 81 (European Court of Human Rights 2008); *Dzhambekova and Others v. Russia* (Application nos. 27238/03 and 35078/04) 307 (European Court of Human Rights 2009).

<sup>440</sup> *Amanat Ilyasova and Others v. Russia* (Application no. 1895/04) 144 (European Court of Human Rights 2009).

relatives. Although the relatives should be expected to demonstrate a minimum degree of diligence, this undercurrent shift of attention is not consonant to a fair assessment of the actual issue in question, which is the perpetration of an enforced disappearance, and is in disharmony with States' obligation to undertake an investigation *ex officio* as soon as authorities are informed of such a violation. Disappearances, as other equally repugnant forms of human rights violations, have an immediate and tangible impact, which should not be primarily contingent upon States' follow-up reactions. After all, the governing treaties of the two Courts refer to the harm or disadvantage that victims suffer by the original act constituting a violation. In this respect, the founding act of the violation is the perpetration of enforced disappearance.<sup>441</sup>

This critique also finds support in the relevant provision of the CPED. Article 24(1) provides that: 'For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance'. Hence, the CPED espouses a more outward and inclusive approach that goes beyond the case law of the IACtHR, since it does not require the existence of any specific link to the material victim and stands solely on the proof of harm as a direct result. The normative space that this Article covers is vast and can afford far-reaching protection to a wider circle of persons. Human rights defenders and lawyers are also considered to fall under this category.<sup>442</sup> The question, however, could be further perplexed if the disappeared person is a prominent one within a given society or context.

The IACtHR has alluded to this potential issue in its *Chitay v. Guatemala* judgment, where the material victim was the political leader of a Mayan indigenous group.<sup>443</sup> During the proceedings, the IAComHR requested that the community, in which the leader resided and was a member of its council, should also be included in the list of victims. However, due to a procedural barrier, namely the extemporaneous nature of the request, this was not allowed. A reading of the relevant part of the judgments, points towards a likelihood that the IACtHR would in future consider positively the inclusion of the community in any similar future case.<sup>444</sup>

The notion of "victim" as prescribed in CPED and interpreted in IACtHR is consonant with the broader framework of international law. The Declaration of Basic Principles of Justice for Victims and Abuse of Power defined victims as:

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<sup>441</sup> *Radilla-Pacheco v. Mexico, Series C No. 209*, para. 161: "Specifically, in cases that involve the forced disappearance of persons, it is possible to understand that the violation of the right to psychic and moral integrity of the next of kin of the victim is a direct consequence, precisely, of that phenomenon, which causes them a severe suffering due to the fact itself, which is increased, among other factors, by the constant negative of the state authorities to provide information regarding the whereabouts of the victim or to start an effective investigation in order to clarify what occurred."

<sup>442</sup> Scovazzi and Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention*, 346.

<sup>443</sup> *Chitay-Nech et al. v. Guatemala, Series C No. 212*.

<sup>444</sup> *Ibid.*, para. 110–111.

'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.'<sup>445</sup>

The same definition is *verbatim* reproduced in the basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law for acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law ("Van Boven/Bassiouni principles").<sup>446</sup> These principles add that the term also 'includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist in distress or to prevent victimization'.<sup>447</sup>

As noted above, the jurisprudence of the two regional courts has cemented in a coherent body of judgments that is characterised largely by internal consistency. With special regard to the issue of victimhood, the ECtHR has maintained the "functional" approach in numerous judgments. Despite the repetitive nature of its judgments on this particular issue, it is submitted that converging to the leading view, as codified in the CPED, is a valid reason for a reconsideration of its reasoning.<sup>448</sup> The codified position of international law in Van Boven's principles, despite their availability in the form of a legally non-binding UN resolution, is corroborated by the (admittedly laconic) formulation of Article 24 CPED and the overall orientation of IACtHR's jurisprudence. A turn in the case law of the ECtHR could come about by a reconsideration of its judicial reasoning, namely by conceding to a *iuris tantum* acceptance of victimhood for family members<sup>449</sup> and maintaining a contextual criterion, which would allow it to

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<sup>445</sup> UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Resolution 40/34, 1985, para. 1.

<sup>446</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147, 2006.

<sup>447</sup> *Ibid.*, Principle 8.

<sup>448</sup> *Loizidou v. Turkey (Application no. 15318/89) [Merits and Just Satisfaction]* 43 (European Court of Human Rights 1996): "In the Court's view, the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention's special character as a human rights treaty, it must also take into account any relevant rules of international law [...]". *Al-Adsani v. the United Kingdom (Application no. 35763/97)* 55 (European Court of Human Rights 2001): "The Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention's special character as a human rights treaty, and it must also take the relevant rules of international law into account [...]. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part [...]."

<sup>449</sup> Pourgourides, *Enforced disappearances*, para. 49: "Another lacuna of the existing legal framework is the incomplete recognition of family members of the disappeared as victims, whose intense suffering we were confronted with during the hearing in Limassol. The case law of different human rights bodies is still not unanimous in recognising family members as victims of torture or inhuman or degrading treatment (Article 3 ECHR), or a violation of the right to respect for private and family life (Article 8 ECHR) and CoE Resolution 1463 para. 10.2: family members of the disappeared persons should be recognised as independent victims of the enforced disappearance and be granted a 'right to the truth', that is, a right to be informed of the fate of their disappeared relatives."



include further individuals as victims and exclude those whose consideration is not justified or warranted because of the particularities of a given case.

## **7. The continuous nature of enforced disappearance and the 'ratione temporis' rule**

An important characteristic of enforced disappearance is its continuous nature. This is a characteristic that has evolved in the jurisprudence and has also found support from other sources. Since the verdict on *Velásquez-Rodríguez v. Honduras*<sup>450</sup> until its most recent judgment on *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*,<sup>451</sup> the IACtHR has referred to the continuous character of enforced disappearance. Akin, but distinguishable, to this settled case law, the ECtHR has offered sporadic references on the same issue. The HRCtee has not explicitly taken it up, but its decisions lend themselves to useful insights.

The concept of “continuity” is reflected in the work of the International Law Commission, which has identified breaches of international obligations having a continuing character.<sup>452</sup> In one of the early UN reports that were considered in chapter 1, enforced disappearance was deemed to constitute a continuous situation of violations of human rights and an acute humanitarian problem to the relatives of the disappeared.<sup>453</sup> The continuous nature is also embedded in the texts of the IACFD,<sup>454</sup> the UN Declaration<sup>455</sup> and the CPED. The latter, in particular, introduces it in an indirect way, within the “statutory limitations” provision. According to Article 8.1(b) CPED the term of limitation for criminal proceedings ‘commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature’.

The continuing nature of the disappearances bears a manifold importance. Firstly, it is closely linked to the temporal jurisdiction of international (quasi-) adjudicatory bodies. This issue has presented itself in pressing terms in cases examined by the three international bodies of the present analysis. Secondly, it relates to the principle of non-retroactivity in criminal law. And thirdly, as already mentioned in the previous paragraph, it is important for ascertaining the applicability of statutory limitations. As a

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<sup>450</sup> *Velásquez Rodríguez v. Honduras*, Series C No. 4. Merits, para. 155.

<sup>451</sup> *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219, para. 17.

<sup>452</sup> International Law Commission, *Draft Articles on the responsibility of states for internationally wrongful acts*, General Assembly Resolution 56/83, 2001, Article 14(2); James Crawford and United Nations., *The International Law Commission's articles on state responsibility: introduction, text, and commentaries* (Cambridge U.K. ;New York: Cambridge University Press, 2002), 136; James Crawford, *The law of international responsibility* (New York: Oxford University Press, 2010), 386.

<sup>453</sup> Felix Ermacora, quoted in: Nowak, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46*, para. 14.

<sup>454</sup> *Inter-American Convention on Forced Disappearance of Persons*, 1994, Article III.

<sup>455</sup> *Declaration on the Protection of all Persons from Enforced Disappearance*, General Assembly Resolution 47/133, 1992, Article 17.

concept it can, and at times has been, used to pierce the veil of time and allow for the consideration of all actions comprising an enforced disappearance.

Despite the clear-cut formulation of Article 28 VCLT,<sup>456</sup> continuing situations have given rise to practical problems for the non-retroactive applicability of treaties, human rights treaties being naturally one of the many instances.<sup>457</sup> *Prima facie* it is difficult to reconcile this interpretative strand with the predating WGEID comment on Article 17 of the UN Declaration, which states:

'Even if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented'.<sup>458</sup>

In the paragraphs that follow, I examine the development of the case law of the three bodies on this issue.

### ***Human Rights Committee***

The decisions by the HRCttee on the issue of the continuous character of enforced disappearances demonstrate that this body has consolidated the following interpretative principles. First, enforced disappearance is recognised as a violation that is, *per se*, continuing in time.<sup>459</sup> Second, where the acts constituting the violation have taken place before the entry into force of the ICCPR, then the HRCttee will consider the submission of an application as inadmissible *ratione temporis*.<sup>460</sup> Hence, the HRCttee does not accept that the continuous effects of a disappearance can circumvent the time barrier as set by the applicable international law, mainly Art. 28 VCLT. Third, in *Jegatheeswara v. Sri Lanka*, the HRCttee was faced with a complaint for a disappearance that occurred in 1990. The ICCPR had entered into force for Sri Lanka in 1980, but the Optional Protocol only came in to effect in 1997. Sri Lanka had accepted the HRCttee's competence to deal with communications for events that took place subsequent to the coming into force of the Optional Protocol. In this case, the HRCttee rejected the *ratione temporis* objection by that State, stating that 'the alleged violations of the Covenant, if confirmed

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<sup>456</sup> This article reads: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

<sup>457</sup> Dinah Shelton, *Regional protection of human rights* (New York: Oxford University Press, 2008), 634.

<sup>458</sup> Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime*, <http://www2.ohchr.org/english/issues/disappear/docs/GC-EDCC.pdf> The WGEID has previously issued a General Comment on the UN Declaration, which included a section on Article 17.

<sup>459</sup> *Norma Yurich v. Chile, Communication 1078/2002*, 6.4 (Human Rights Committee 2005).

<sup>460</sup> *S. E. v. Argentina, Communication No. 275/1988* 5.4 (Human Rights Committee 1990): "The Committee finds it necessary to remind the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies where applicable, for victims or their dependants." See also: *Eduardo Bleier v. Uruguay, Communication No. R.7/30*, 13.3.

on the merits, may have occurred or continued after the entry into force of the Optional Protocol'.<sup>461</sup> The position maintained in this case by the HRCtee was later reversed, although the factual backdrop was the same.

*Cifuentes v. Chile* and *Yurich v. Chile* are two communications illustrating the reversal of the HRCtee's assessment of the *ratione temporis* rule. Confronted again with the occurrence of a disappearance in between the dates of entry into force of the ICCPR and its Optional Protocol, the HRCtee considered that it was barred from examining these communications due to the temporal declaration of Chile. *Yurich v. Chile* is a particularly flawed because the HRCtee had considered that 'the author makes no reference to any action of the State party after [...] the date on which the Optional Protocol entered into force for the State party that would constitute a confirmation of the enforced disappearance'.<sup>462</sup>

In this respect, it is submitted that the practice of the HRCtee is both contradictory and erroneous. In *Jegatheeswara v. Sri Lanka*, the Committee had correctly observed that 'the alleged violations of the Covenant, if confirmed on the merits, may have occurred or continued after the entry into force of the Optional Protocol'.<sup>463</sup> However, it later departed from this position by subjecting its temporal jurisdiction to the declaration submitted by the respondent State. The two aforementioned Chilean communications produced the dissenting views of certain members of the Committee, who correctly pointed to the continuous nature of enforced disappearance as a valid base for piercing the veil of time.<sup>464</sup>

In my opinion, when faced with such cases, the HRCtee should have joined the examination of the admissibility question to the merits. The main reason for maintaining this stance is that the violation of ICCPR articles is the founding base endowing a concrete legal consequence to the continuous nature of the disappearances, namely the standing responsibility of the State for the said breach. *Nowak* also observes that the 'ratification of the OP merely implies recognition of one of several possibilities for ascertaining violations of the Covenant by an international organ' and that 'the date of

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<sup>461</sup> *S. Jegatheeswara Sarma v. Sri Lanka, Communication No. 950/2000, (Human Rights Committee 2003) 6.2.*

<sup>462</sup> *Norma Yurich v. Chile, Communication No. 1078/2002 6.4 (Human Rights Committee 2005).*

<sup>463</sup> *S. Jegatheeswara Sarma v. Sri Lanka, Communication No. 950/2000, (Human Rights Committee 2003) 6.2.*

<sup>464</sup> In *Norma Yurich v. Chile, Communication No. 1078/2002* the dissenting members (Christine Chanet, Rajsoomer Lallah, Michael O' Flaherty, Elisabeth Palm, and Hipolito Solari-Yrigoyen) stated: "Disappearance, as the Committee itself indicates in paragraph 6.4 of its decision, constitutes a continuing violation. The continuing nature of this violation precludes the application of the exception *ratione temporis* and of the reservation of Chile, insofar as the latter cannot exclude the competence of the Committee with regard to ongoing violations". Also, in *María Cifuentes Elgueta v. Chile, Communication No.1536/2006 (Human Rights Committee 2009)*: "The continuity of this negative impact is irrespective of at what point in time the acts constituting the disappearance itself occurred. Inevitably the State Party's obligations continue in relation to those rights" (dissenting members: Christine Chanet, Rajsoomer Lallah and Zonke Majodina).

entry into force of the OP is relevant only for the submission of the communication but not for violations it alleges'.<sup>465</sup> Confronted with the same matter, the IACtHR took a different approach.<sup>466</sup>

The HRCttee's position is therefore clear in the way it examines the continuous nature of enforced disappearance. In complaints where the acts have taken place before the entry into force of the ICCPR, this continuous nature does not bear any legal significance and the effects of disappearance do not give rise to a corresponding obligation incumbent upon the State. The situation remains the same where the said acts are subsequent to the entry into force of the ICCPR, but prior to that of the Optional Protocol. For the reasons explained above, this legal assessment should be considered as incorrect.

As a last note, it should, however, be said that in those cases declared inadmissible *ratione temporis*, the material victims were also found dead.<sup>467</sup> Although not stated explicitly, this seems to have weighed heavily upon the HRCttee's rejection of the communications on disappearances. The death of a disappeared person is construed in the case law of the HRCttee as an instantaneous act, lying at the end of a chain of events that include enforced disappearance. In this sense, death brings enforced disappearance to an end and deprives it from having continuous effects.<sup>468</sup> In *Vargas Vargas and Acuña Inostroza*, the Committee declared the complaints inadmissible *ratione temporis* because 'the acts giving rise to the claims related to the deaths of the authors occurred prior to the international entry into force of the Covenant'.<sup>469</sup> These cases, however, must be differentiated from the other Views examined in this section on two points. First, their factual background is different from *Jegatheeswara v. Sri Lanka* since the latter concerned events that took place after the entry into force of the ICCPR but before that of the Optional Protocol. Secondly, in both cases the death of the material victims was ascertained, thus not rendering these cases as cases of enforced disappearance. It must be noted that in *Acuña Inostroza* the applicant invoked Articles 2, 5, 14(1), 15, 16 and 26 ICCPR on the grounds that the victims and their families were deprived of the right to justice, including the right to a fair trial and to adequate compensation.

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<sup>465</sup> See Nowak, who provides further authorities: Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (N.P. Engel, 1993), 679.

<sup>466</sup> *Heliodoro-Portugal v. Panama, Series C No. 186* (Inter-American Court of Human Rights 2008).

<sup>467</sup> *Eduardo Bleier v. Uruguay, Communication No. R.7/30* (Human Rights Committee 1982); *María Otilia Vargas Vargas, Communication N. 718/1996* (Human Rights Committee 1999); *Humberto Menanteau Aceituno and Mr. José Carrasco Vasquez v. Chile, Communication No. 746/1997* (Human Rights Committee 1999).

<sup>468</sup> Cf. the approach of the Inter-American Court of Human Rights in *Heliodoro-Portugal v. Panama*, where despite the same factual background, that Court came to a finding of a violation of the prohibition of enforced disappearances.

<sup>469</sup> *Carlos Maximiliano Acuña Inostroza v. Chile, Communication N. 717/1996* (Human Rights Committee 1999) 6.4 and *Vargas Vargas* 6.6.

## ***Inter-American Court of Human Rights***

The IACtHR has explicitly described enforced disappearance as a continuous violation since the very first judgment it handed down.<sup>470</sup> Convergences and divergences with the case law of the HRCttee can be discerned, however. In *Blake v. Guatemala*, this Court made a distinction between acts and effects of an enforced disappearance. The act of deprivation of liberty and subsequent death of the victim *per se*, were considered to fall outside its temporal jurisdiction because they took place before the entry into force of the ACHR for Guatemala. Thus, in this respect the San Jose court aligned with the HRCttee.

However, the remains of the victim were discovered subsequent to the entry into force of the ACHR, which led the IACtHR to consider that the question before it was one of enforced disappearance, producing effects extending through time:

'forced disappearance implies the violation of various human rights recognized in international human rights treaties, including the American Convention, and that the effects of such infringements - even though some may have been completed, as in the instant case - may be prolonged continuously or permanently until such time as the victim's fate or whereabouts are established.'<sup>471</sup>

The relatives of the material victim, whose rights were violated, could be the only ones to endure the effects of the disappearance.<sup>472</sup>

Two important criteria stem from this judgment: firstly, that as long as the fate of the material victim is not known, enforced disappearance continues to generate interrupted effects, which can bring disappearance within the temporal jurisdiction of the IACtHR. Secondly, and perhaps most importantly, a distinction is drawn between acts and effects thereof. This distinction allowed the Court to remain within the mainstream of international law by excluding from its examination the founding violations (i.e. deprivation of liberty and death). At the same time, it indirectly addressed the ramifications of enforced disappearance by bringing their consequences within the realm of its competence.

The limits of the *ratione temporis* jurisdiction of the Court were drawn in *Serrano Cruz* where the Court accepted the relevant objection raised by El Salvador.<sup>473</sup> In that case, the State had accepted the Court's jurisdiction by placing a specific temporal limitation to it. This limitation was deemed as

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<sup>470</sup> *Velásquez-Rodríguez v. Honduras, Series C No. 4. Merits*, para. 155; *Heliodoro-Portugal v. Panama, Series C No. 186 34* (Inter-American Court of Human Rights 2008); *Tiu-Tojin v. Guatemala, Series C No. 190 52* (Inter-American Court of Human Rights 2008).

<sup>471</sup> *Blake v. Guatemala, Series C No. 36. Merits*, para. 39.

<sup>472</sup> The rights violated refer to: judicial guarantees set forth in Article 8(1) of the American Convention on Human Rights, in relation to Article 1(1) of the same; the right to humane treatment enshrined in Article 5 of the American Convention on Human Rights; the obligation to investigate the acts denounced and punish those responsible for the disappearance and death.

<sup>473</sup> Claudia Martin, "Catching Up with the Past: Recent Decisions of the Inter-American Court of Human Rights Addressing Gross Human Rights Violations Perpetrated During the 1970 1980s", *Human Rights Law Review* 7, no. 4 (2007): 783.

substantial reason to curtail the Court's jurisdiction and confine its examination to Articles 8 and 25 ACHR. The facts relating to these articles occurred after the entry into force and referred, according to the Court, to domestic judicial proceedings that constituted independent facts, amenable to the judicial scrutiny of the IACtHR.

One case that I believe has been dealt with in a problematic way is that of *Heliodoro Portugal v. Panama*.<sup>474</sup> Heliodoro Portugal disappeared in 1970, while the ACHR entered into force for Panama in 1978 and the same State accepted the Court's jurisdiction in 1990. The victim's remains were identified in 2000, but scientific examination proved that his death had certainly taken place at least 10 years before 1990. The Court set 9 May 1990, i.e. the date Panama accepted the Court's compulsory jurisdiction, as the critical date for examining its *ratione temporis* jurisdiction and for this reason refrained from examining his extrajudicial execution, as falling outside its temporal jurisdiction. On the other hand, it decided that it was competent to rule on the alleged deprivation of liberty since this was related to his alleged forced disappearance, which continued after 1990 and until his remains were identified in 2000.

Just as with the HRCtee in the previously mentioned communications, the IACtHR was called to delimit its temporal jurisdiction with regard to the substantive protection by the ACHR and the act of recognition of its jurisdiction, which is more procedural in nature. Unlike the HRCtee, the IACtHR considered that its jurisdiction could only be considered to initiate from the date of acceptance of its compulsory jurisdiction (i.e. 1990) and not from the date of entry into force of the ACHR (i.e. 1978). The ACHR allows in Article 62(2) for the recognition of the Court's jurisdiction by a declaration, which may designate a "specified period" for this jurisdiction.<sup>475</sup> In the absence of any such declaration, a correct reading of the ACHR should have placed the time limit at 1978. The Court's decision on this issue is also inconsistent with the judgment in *Serrano Cruz*, in which case the IACtHR accepted the specific temporal limitation on the Court's jurisdiction that El Salvador had placed.

This judgment created a conceptual paradox that led inevitably to a misapplication of the law.<sup>476</sup> The paradox lies in the fact that the Court examined the extrajudicial execution of the victim and ascertained, beyond doubt that Heliodoro Portugal's death occurred at some point in time after his arrest in 1970 and certainly before 1980. The Court then went on to examine his forced disappearance and considered that it had competence to rule on the alleged deprivation of liberty, since this was

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<sup>474</sup> *Heliodoro-Portugal v. Panama, Series C No. 186.*

<sup>475</sup> It reads: "2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court."

<sup>476</sup> Francisco Rivera Juaristi, "La competencia *ratione temporis* de la Corte Inteamericana en casos de desapariciones forzadas: una critica del caso Heliodoro Portugal vs. Panama", *Revista CEJIL*, no. 5 (December 2009): 20.

related to the alleged forced disappearance, which continued after 1990, and until his remains were identified.<sup>477</sup> In essence, what the IACtHR tasked itself to examine was the deprivation of liberty of the victim's remains.

The Court's poor reasoning manifests the misconceptions and problems that may arise when dealing with enforced disappearance in a fragmented manner and not as an autonomous and unitary violation. Its nature as a multiple violation that affects a series of other rights decisively determines not only the *ratione temporis* jurisdiction of adjudicatory bodies, but also other issues such as the burden of proof, the identification of victims, the determination of the kind of violation and the remedies warranted for it.

### ***European Court of Human Rights***

From the numerous judgments on enforced disappearances issued by the ECtHR, cases emanating from the conflict in Cyprus are conspicuously pertinent to the theme discussed in this section. The Court's judgments and decisions that are most relevant here are: the Grand Chamber judgment on *Cyprus v. Turkey* (fourth interstate application); the admissibility decisions in the cases of *Karabardak v. Cyprus* and *Baybora v. Cyprus*, and the Chamber and Grand Chamber judgments in the case of *Varnava and others v. Turkey*. The main scrutiny will be on the latter judgment and on the Court's approach to the issue of the six-month rule with a view to examining how this rule relates to the legal character of enforced disappearances as a human rights violation of a continuous nature.<sup>478</sup>

### ***The fourth interstate application of Cyprus v. Turkey***

In the fourth interstate application of *Cyprus v. Turkey*, the Court found a continuous violation of the procedural obligation embedded in Article 2 ECHR to conduct a meaningful and effective investigation for the ascertainment of the fate or whereabouts of the Greek Cypriot missing persons.<sup>479</sup> Further, it found a continuous violation of Article 5 ECHR on account of the failure to conduct an investigation of the same attributes for those cases of Greek Cypriots credibly alleged to have been detained at the time of their disappearance. It is worth noting that the ECtHR did not find that any of the Greek Cypriot missing persons had actually been detained by Turkish Cypriot authorities, due to the lack of sufficient

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<sup>477</sup> *Heliodoro-Portugal v. Panama*, Series C No. 186, para. 37.

<sup>478</sup> On continuous situations within the ECtHR system, see: Antoine Buyse, "A lifetime in time - Non-retroactivity and continuing violations under the ECHR", *Nordic Journal of International Law*, no. 75 (2006): 63-88.

<sup>479</sup> *Cyprus v. Turkey* (Application no. 25781/94) 123-136 (European Court of Human Rights [GC] 2001).

evidence in this respect.<sup>480</sup> Regarding the six-month rule, as prescribed by Article 35(1) ECHR,<sup>481</sup> the Court limited itself to declaring that it would disregard any situations ending six months before the date on which the application was introduced, namely 22 November 1994.<sup>482</sup>

### ***Missing persons from the other side: the cases of Karabardak and Baybora***

A year after the fourth interstate application of *Cyprus v. Turkey* was handed down, the ECtHR examined the cases of two Turkish Cypriot missing persons. The applications of *Karabardak*<sup>483</sup> and *Baybora*<sup>484</sup> against Cyprus related to the disappearance of two Turkish Cypriot individuals during the inter-communal strife of 1964. The applicants alleged that there existed continuous violations of Articles 2, 3 and 5 ECHR. The Court, in its admissibility decisions, examined whether the applicants had conformed to the six-month rule. In rejecting their applications, it stated that:

'The Court notes that nothing was done by the applicants to bring the alleged disappearance of the first applicant to the attention of the authorities of the respondent State in the first twenty five years following the alleged disappearance. In 1989 they lodged an application with the CMP. The applicants state that the CMP is not an effective remedy since it has failed to carry out any credible investigation into the alleged disappearance. However, they waited another twelve years before lodging their application with the Court. [...] For the Court, even assuming that the applicants had no effective remedies as alleged, they must be considered to have been aware of this long before 30 October 2001, the date on which they introduced their application'.<sup>485</sup>

In these two decisions, the Court refrained from setting a fixed point in time from which the six-month deadline would start, but rather limited itself to a Delphic reference that this point was well before 2001. This approach was rather vague and did not work to the benefit of the rule of law (especially with regard to its predictability), leaving relatives of other disappeared persons in a state of limbo as to which temporal point was pertinent to their cases. The issue was partially clarified in subsequent judgments by this Court.

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<sup>480</sup> *Ibid.*, para. 142–151.

<sup>481</sup> Article 35 ECHR provides: "1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken".

<sup>482</sup> *Cyprus v. Turkey* (Application no. 25781/94), para. 143.

<sup>483</sup> *Karabardak and others v. Cyprus* (Application no. 76575/01) [admissibility decision] (European Court of Human Rights 2002).

<sup>484</sup> *Baybora and others v. Cyprus* (Application no. 77116/01) [admissibility decision] (European Court of Human Rights 2002).

<sup>485</sup> The text of the decision is identical in both decisions.



### ***A new admissibility criterion?***

The applications in the case of *Varnava and others v. Turkey* were lodged with the ECtHR in 1990. They referred to the cases of nine Greek Cypriot disappeared persons (eight soldiers and a civilian), all of whom disappeared during the Turkish invasion of 1974. Admissibility decisions were issued in 1998 and the Third Chamber's judgment on merits was handed down ten years later.<sup>486</sup> Following a request for referral by Turkey, the case reached the Grand Chamber, which decided on the case in 2009.<sup>487</sup> In this latter judgment, the Court found the following continuous violations:

- a) Article 2 ECHR, on account of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of the nine men who disappeared in life-threatening circumstances;
- b) Article 3 ECHR, in respect of the applicants;
- c) Article 5 ECHR, by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the fate of two out of the nine disappeared persons, since it was ascertained from the ICRC catalogues that these two had in fact been detained.

Paragraphs 160 to 171 are one of the most intriguing sections of this judgment. In these paragraphs, the ECtHR analyses the application of the six-month rule for applying to the Court when the subject-matter relates to disappearances. The idiosyncratic feature that cases of enforced disappearances present is that they constitute continuing violations – a feature which entails concrete legal consequences.

The Court set out to present the general principles in the application of temporal restrictions on the procedural obligations of Article 2 ECHR by stating that:

'[...] Not all continuing situations are the same; the nature of the situation may be such that the passage of time affects what is at stake' and that 'it is indispensable that the applicants, who are the relatives of missing persons, do not delay unduly in bringing a complaint about the ineffectiveness or lack of such investigation before the Court. [...] Accordingly, where disappearances are concerned, applicants cannot wait indefinitely before coming to Strasbourg. They must make proof of a certain amount of diligence and initiative and introduce their complaints without undue delay'.<sup>488</sup>

With regard to the undue delay in disappearance cases, the ECtHR accepted that the state of uncertainty and lack of knowledge on the part of relatives of the victims rendered necessary a

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<sup>486</sup> *Varnava and others v. Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [Third Section], para. 21.

<sup>487</sup> *Varnava and others v. Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC] (European Court of Human Rights 2009).

<sup>488</sup> *Ibid.*, para. 161.

differentiated treatment of such cases, in relation to instances of unlawful or violent death. In the latter instance, the Court considered that:

'generally a precise point in time at which death is known to have occurred and some basic facts are in the public domain. The lack of progress or ineffectiveness of an investigation will generally be more readily apparent. Accordingly the requirements of expedition may require an applicant to bring such a case before Strasbourg within a matter of months [...]'.<sup>489</sup>

In instances of enforced disappearances, the Strasbourg Court accepted that 'allowances must be made for the uncertainty and confusion which frequently mark the aftermath of a disappearance'.<sup>490</sup> In addition, international law on enforced disappearances does not place an overly rigorous burden of due diligence on the relatives'.<sup>491</sup>

However, and still according to the Court, in the case of excessive or unjustified delays by applicants from the point in time when they realise, or should realise, that no investigation has commenced or that it has been rendered inactive or ineffective without any realistic prospect of success in the future, then the applications can be declared inadmissible *ratione temporis*. If there are any initiatives in the cases of missing persons, the relatives can justifiably await developments that would resolve crucial factual or legal matters. Conversely, and depending on the circumstances of each case, there comes a moment when relatives must realise that there is and there will be no prospect of an effective investigation.<sup>492</sup> The Court actually set a fixed point in time, stating that if ten or more years have passed from the disappearance, then the relatives must demonstrate convincingly that there was a continuous and tangible progress that would justify the delay in submitting an application to Strasbourg.<sup>493</sup>

Applying the aforementioned principles to the nine cases at hand, the ECtHR examined at which point in time enforced disappearance applications would be admissible or not. While accepting that the extraordinary circumstances of the international conflict in Cyprus justified waiting for the results of UN and Cypriot initiatives for a settlement, the Court declared that by the end of 1990 it should have been obvious that the problematic, non-binding and confidential nature of CMP procedures did not offer any realistic hope for progress in finding the remains or for ascertaining the fate of missing persons in

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<sup>489</sup> Ibid., para. 162.

<sup>490</sup> *Varnava and others v. Turkey (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC]*.

<sup>491</sup> Ibid., para. 165.

<sup>492</sup> Ibid.

<sup>493</sup> Ibid., para. 166.

the near future.<sup>494</sup> Finally, the Court accepted that the applications before it were admissible *ratione temporis* and proceeded to find continuing violations of Articles 2, 3 and 5 ECHR.<sup>495</sup>

### ***The interplay between the six-month rule and the continuous nature of the violation***

The common point of analysis in the cases presented in the previous paragraphs is the question regarding the point in time at which the six months prescribed by Article 35 ECHR commence. In the judgment on the interstate application of Cyprus against Turkey and in the decision on the Turkish Cypriot missing persons cases, which were handed down in 2001 and 2002 respectively, the Court did not definitely determine the point from which the six months would start to be calculated. In the Grand Chamber's *Varnava* judgment, the Court determined that this point in time was at the end of 1990.

The first paradox in the Court's approach lies in with the different treatment of the judgments it handed down in relation to the deadline for submitting an application. One would expect that the finding of the *Varnava* judgment<sup>496</sup> would be obvious to the same Court already at the time of handing down its judgment on the interstate application, that is, 11 years after the end of 1990. Notwithstanding this, the Court inserted in an implicit, but nonetheless clear and retroactive manner, a new factor, which was not previously present in its jurisprudence. In doing so, it interpreted the admissibility requirement on similar applications in a way that was new. In the interstate application, the ECtHR fixed 22 May 1994 as the point of time before which it would not consider any enforced disappearance case. A year later, in the Turkish Cypriot cases, it stated that the relevant point in time had passed well before 2001. In *Varnava*, the time limit was again moved to the end of 1990.

The judgments in *Cyprus v. Turkey* and *Varnava* arise out of the same factual background, while the cases of Turkish Cypriots can be differentiated since the relevant facts occurred 10 years before the invasion of 1974. For the first set of cases, the contradiction is obvious: the judgment on the interstate application should, for the purposes of admissibility and merits, be considered as covering the specific case of the nine instances of disappearances in *Varnava*.<sup>497</sup> And this is because the judgment in *Cyprus v. Turkey* relates to the totality of the Greek Cypriot disappeared persons and should

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<sup>494</sup> *Ibid.*, para. 170.

<sup>495</sup> The applicants in *Varnava* submitted their application on 25 January 1990. The violation of Article 5 considered only two of the disappeared persons because they were the only ones to appear in ICRC's lists as detained by the Turkish forces.

<sup>496</sup> That by the end of 1990 it should have been obvious to the relatives of the disappeared that CMP did not offer any realistic prospects of investigation.

<sup>497</sup> The counterargument to this would be that each case is adjudicated on its own merits. However, the general legal framework set by the *Cyprus v. Turkey* judgment would still remain a valid reference.

therefore, for the sake of consistency and coherence, be considered as covering the specific nine cases of *Varnava and others*.

As far as the Turkish Cypriot cases are concerned, a legal principle on the basis of which the cases were decided as inadmissible *ratione temporis* is, ironically, missing. The Court merely stated in its decisions on admissibility for the Turkish Cypriot cases that:

‘nothing was done by the applicants to bring the alleged disappearance of the first applicant to the attention of the authorities of the respondent State in the first twenty five years following the alleged disappearance’

and that:

‘even assuming that the applicants had no effective remedies as alleged, they must be considered to have been aware of this long before 30 October 2001, the date on which they introduced their application’.<sup>498</sup>

Furthermore, the statement by the Court that the relatives should have shown convincingly that there was continuous and concrete progress throughout the previous ten years that could justify the delay in applying to the Strasbourg Court, has no support under international human rights law, nor can it be justified in any other way by the text of the judgment itself. On the contrary, the CPED requires those states applying a statute of limitations on enforced disappearances that it be of long duration and commensurate to the gravity of the offence.<sup>499</sup> The *ratio* of this provision is to fight impunity. *Mutatis mutandis*, it can be reasonably claimed that setting a 10-year time limit, as ECtHR has done, is contrary to this *ratio*.

The background to the aforementioned criticisms is the conflict between the continuous nature of the enforced disappearances,<sup>500</sup> on the one hand, and the procedural obligation of the six-month rule, on the other.<sup>501</sup> In cases such as *Varnava*, the Court is confronted with a continuous violation, as already adjudicated by other courts and bodies, as well as by itself,<sup>502</sup> on the one hand, and the obligation to submit an application from the moment that Article 35(1) ECHR provides, on the other. The

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<sup>498</sup> See: *Baybora and others v. Cyprus* (Application no. 77116/01) [admissibility decision]; *Karabardak and others v. Cyprus* (Application no. 76575/01) [admissibility decision].

<sup>499</sup> Art. 8.1(a) CPED.

<sup>500</sup> Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime*.

<sup>501</sup> *Varnava and others v. Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC], Judge Ziemele's separate opinion, at paras 8-11.

<sup>502</sup> For a succinct review of ECtHR's jurisprudence on this issue, see: Andy Van Pachtenbeke, "From De Becker to Varnava: the State of Continuing Situations in the Strasbourg Case Law", *European Human Rights Law Review*, no. 1 (2010): 47-58.

judgment is thus erroneous on this point as it does not take into account the plethora of jurisprudential precedents and insists on setting a fictitious time limit at the end of 1990.<sup>503</sup>

This fictitious nature is proven by the course of events subsequent to 1990: in 1997, the leaders of the two communities on the island adopted a common statement in which they agreed to exchange information regarding known burial sites and to return the remains of Greek Cypriot and Turkish Cypriot missing persons.<sup>504</sup> In 2001, the ECtHR's judgment was handed down and the CMP resumed its long-delayed work in 2004, producing concrete results over the last few years.<sup>505</sup> Although the Court scrutinises the CMP's operations, it omits at the same time to examine Turkey's responsibility for the lack of any effective investigation. Judge *Ziemele*'s separate opinion is relevant to this point, as she stated: 'In other words, the issue is not whether there is an event suspending the running of time (see, *a contrario*, § 171); it is whether there is an event which makes the six months begin to run'.<sup>506</sup>

In its reasoning, the ECtHR stated:

'With the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and the prospects that any effective investigation can be undertaken will increasingly diminish; and the Court's own examination and judgment may be deprived of meaningfulness and effectiveness'.<sup>507</sup>

The perception of a *lato sensu* procedural economy, together with the aforementioned reasoning, may constitute a pragmatic approach to the issue of balancing the six-month rule and the continuous nature of the violation. However, these are far from convincing when they appear as self-serving values or objectives that can supersede fundamental rights, such as the right to life, the prohibition of torture, and the right to liberty and security of the individual.

The Court's understandable preoccupation regarding the effect of time on the process and the result of an enforced disappearance case must be examined separately in each case, thus affording the relatives of the disappeared the opportunity to access a judicial body (possibly for the first time, as per applicants in *Varnava*) and allowing the Court to examine within the concrete circumstances of the case whether or not witnesses can be traced and whether they can provide reliable and sufficient testimony.

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<sup>503</sup> *Varnava and others v. Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC], para. 158.

<sup>504</sup> "Press and Information Office - Documents - Agreements on the Cyprus Problem", <http://www.cyprus.gov.cy/moi/pio/pio.nsf/All/4632228BBD701DA4C2256D6D00314114?OpenDocument>.

<sup>505</sup> The last progress report by the CMP mentions that until today 663 individuals have been exhumed from different burial sites and 235 identifications have taken place (184 Greek Cypriots and 51 Turkish Cypriots), "CMP > Progress Report", , [http://www.cmp-cyprus.org/nqcontent.cfm?a\\_id=1307](http://www.cmp-cyprus.org/nqcontent.cfm?a_id=1307).

<sup>506</sup> *Varnava and others v. Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC] dissenting opinion of Judge Ziemele at par. 11.

<sup>507</sup> *Ibid.*, para. 161.

By opting for the other way, the Court is essentially depriving the victims' relatives of access to justice by setting up a raft of hypothetical problems.

The Inter-American Court of Human Rights has highlighted the same point in a recent case on disappearances. The San Jose Court found that in this case the passage of time without the conduct of an investigation had exceeded what could be considered as reasonable and that the lack of an investigation constituted a flagrant denial of justice and of the right to have access to it.<sup>508</sup> It is highly doubtful whether concerns of a procedural nature can take priority over the need to allow the possibility of a judicial scrutiny of serious violations of human rights, such as enforced disappearances.

### ***Unintended consequences and a new test***

One of the most serious repercussions of the *Varnava* judgment is the light-handed exoneration of the respondent State from the obligation to respond to the applicants' allegations. The Court has silently shifted the burden of proof, requiring future applicants in similar cases to adduce evidence that would be sufficient to extend the 1990 time limit to another one which would be more favourable for the specificities of their application. However, the parties to this type of international litigation are not in the same position with that of the State: a disequilibrium is created by the State's difficulty in accessing key information given the length of time elapsed between the events in 1974 and the ECtHR's examination of the application.<sup>509</sup> Another worrying ramification is the unintended condoning of the phenomenon of impunity. From now on, States have a reduced incentive to cooperate, and the possibility of judicially forcing them to provide evidence or to conduct an investigation has been curtailed. Time is thus now on the States' side.

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<sup>508</sup> *Chitay-Nech et al. v. Guatemala*, Series C No. 212, 197. The judgment is available only in Spanish: "Este Tribunal considera que en el presente caso el tiempo transcurrido sobrepasa excesivamente un plazo que pueda considerarse razonable para que el Estado iniciara las correspondientes diligencias investigativas, máxime que a ese tiempo habrá que sumar el que tome la realización de la investigación que apenas se encuentra en su fase inicial, y el trámite del proceso penal con sus distintas etapas, hasta la sentencia firme. Esta falta de investigación durante tan largo período configura una flagrante denegación de justicia y una violación al derecho de acceso a la justicia de las presuntas víctimas".

<sup>509</sup> Scovazzi and Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention*, 107: "Lastly, in the Quinteros case, the Committee reiterated the importance of reversal of the burden of proof as to the valuation of evidence in cases of enforced disappearances. To find a violation of rights recognised in the Covenant, the Committee relied on the information presented by the author of the communication 'in the absence of any convincing defence or evidence by the government.' This standard is indispensable in cases of enforced disappearances and complies with basic needs of justice. If the victims and the relatives were subject to the usual burden of proof, they would be placed in the condition of being denied justice".

The immediate consequence of the *Varnava* judgment was declaring 51 similar applications as inadmissible *ratione temporis*. Two of the judgments had been submitted in 1999<sup>510</sup> and the rest in the period 2004-2006.<sup>511</sup> In all of these cases the ECtHR took into consideration the precedent established by *Varnava* and rejected them because they had been submitted after 1990. Only in the case of *Karefyllides* an effort was made to challenge the precedent set in *Varnava* by invoking new facts that would justify the delay in submitting an application. More specifically, the applicants referred to the joint statement of 31 July 1997 by the leaders of the two communities, claiming that it had renewed their hopes for the effectiveness of the CMP's investigations. They also forwarded the argument that only by the issuance of the judgment in the interstate judgment had it been obvious that the CMP could not be regarded as an effective remedy. In any case, a veil of absolute confidentiality covered the function of CMP, which meant that they were unable to have any information about their cases. None of these arguments convinced the ECtHR, which insisted on the temporal limit it had instituted in *Varnava* and rejected the application.

It is thus already apparent that the ECtHR has fixed the end of 1990 as an immovable temporal threshold in cases of enforced disappearances arising from the Cyprus conflict. More broadly the Court has refined its admissibility criteria, adding the "*Varnava* test".<sup>512</sup> The only categories of applications that therefore have any realistic prospect of success in the future are:

- a) those that were submitted before the end of 1990, and
- b) where the remains of a missing person are found and identified, there is the possibility of submitting an application alleging the lack of effective investigation by the responsible State for the time period starting from the identification of the remains.

Applications falling under category (b) have already been lodged with the Court and are currently at the admissibility stage. These cases concern 28 Greek Cypriot and 17 Turkish Cypriot applications for missing persons, the remains of whom were identified during the period from 2007 until

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<sup>510</sup> *Christos Karefyllides and others v. Turkey* (application nos. 45503/99) [admissibility decision] (European Court of Human Rights 2009); *Zacharias Hatzigeorgiou and others v. Turkey* (Application nos. 56446/00), admissibility decision (European Court of Human Rights 2010).

<sup>511</sup> 49 applications against Turkey, (Application nos. 43422/04, 4568/05, 4577/05, 4613/05, 4617/05, 4630/05, 4636/05, 4638/05, 4687/05, 4711/05, 4821/05, 4829/05, 4834/05, 4844/05, 4847/05, 4888/05, 4891/05, 4896/05, 4901/05, 4920/05, 4927/05, 4931/05, 4936/05, 4947/05, 4983/05, 5030/05, 5039/05, 5044/05, 5077/05, 6631/05, 26541/05, 26557/05, 26562/05, 26566/05, 26569/05, 26610/05, 26612/05, 26634/05, 26666/05, 26670/05, 38948/05, 45653/06, 11457/07, 30881/08, 37368/08, 46369/08, 54060/08, 521/09 and 43094/09), admissibility decision (European Court of Human Rights 2009).

<sup>512</sup> *Abuyeva and Others v. Russia* (Application no. 27065/05) 179: (European Court of Human Rights 2010) the Court refers to "the test as formulated in *Varnava* and *Others*". See also: *Palić v. Bosnia and Herzegovina* (Application no. 4704/04) 48–52 (European Court of Human Rights 2011).

today.<sup>513</sup> The Court considered that in both sets of cases the lack of an investigation for the period commencing from the discovery of the remains of the missing persons (and not by the acts of disappearance themselves) and the treatment of relatives raised issues that fall under the scope of Articles 2 and 3 ECHR and for these reasons the Court decided to communicate them to the States involved. The outcome of these cases should be awaited with interest.

## **8. Voices of dissent: Judicial dialogue in the back pages**

A dialogue between the three international bodies is also burgeoning by means of the separate or dissenting opinions of several of their members. This indirect dialogue addresses the continuous nature of enforced disappearance and its interplay with the *ratione temporis* criterion. The value of these opinions lies primarily in that they elucidate the reasoning in the main texts of the judgments or decisions and in that they register divergent readings of the law.

In *Blake v. Guatemala*, Judge *Trindade* expressed his disagreement with the conclusions of the IACtHR on the acceptance of the *ratione temporis* objection, because it unduly fragmented the concept of enforced disappearance and led 'to the almost decharacterization of the crime' and introduced an artificial division in its understanding.<sup>514</sup>

Five members of the HRCttee expressed their dissenting views to the findings of their colleagues in *Yurich v. Chile*. In their view 'the continuing nature of [enforced disappearance] precludes the application of the exception *ratione temporis*'. Furthermore, that the declaration of the communication as inadmissible discharged 'the State of its responsibility for the sole reason that the State does not deny the criminal acts, as demonstrated by the fact that it has taken no action to "confirm" the enforced disappearance'.<sup>515</sup>

In *Varnava v. Turkey*, apart from Judge *Ziemele's* opinion cited above, Judges *Spielmann*, *Power*, *Villiger* and *Eronen* expressed their separate opinions, which allow us to conclude that the rejection by 16 votes to 1 of Turkey's *ratione temporis* objection was not based on a common understanding of the law. The first two judges underscored the continuous violation that enforced

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<sup>513</sup> *Despoina Charalambous and others v. Turkey and 28 other applications against Turkey*, (Application nos. 46744/07) [admissibility decision] (European Court of Human Rights 2010); *Semral Emin and Others, Nazli Gürtekin and Others, Fatma Aybenk Abdullah and Others, Meryem Arkut and Others, Ayşe Akay and Others, Omer Hussein and Others kai Ayşe Eray and Others against Cyprus, Greece and the United Kingdom*, (App. No. 59623/08, 3706/09, 16206/09, 25180/09, 32744/09, 36499/09 and 57250/09) [admissibility decision] (European Court of Human Rights 2010).

<sup>514</sup> *Blake v. Guatemala*, Series C No. 36. Merits (Inter-American Court of Human Rights 1998), Separate opinion of Judge Cançado-Trindade, paras. 12-13.

<sup>515</sup> *Norma Yurich v. Chile*, Communication No. 1078/2002. Dissenting opinion of Committee members Ms. Christine Chanet, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm and Mr. Hipólito Solari-Yrigoyen.



disappearance entails, while recognising that 'it is quite understandable the Court wants to uphold some legal certainty when it comes to the time frames within which complaints can be lodged'.<sup>516</sup> For Judge *Villiger*, the cut-off year was 1987, when the respondent State had accepted the right of individual application.<sup>517</sup> To a further extreme, Judge *Eronen* considered that the *ratione temporis* principle is not one that can be overridden and that the judgment of the Court was tantamount to attributing retroactive effect to the ECHR.<sup>518</sup>

The variety of views expressed by the members of these bodies vividly demonstrates from a different angle the plurality of interpretative flows existing within each body, even from the dissenting voices therein. These pluralistic options remain open with the passage of time, forming different currents of interpretation in these bodies. The latter, by way of its cross-referencing to the decisions and judgments of the others,<sup>519</sup> as well as to international instruments other than their foundational ones, seem to be cognisant of their role as actors within a unified system of international law. Despite being aware of their role, the oversight of the respective case law has not always operated as a leitmotiv towards the direction of further common standards.

The jurisprudential construction of the continuing nature of the violation holds a prominent position, under the category of the common elements of their case law. The effects, however, of this continuing nature are not agreed upon. For the IACtHR, the critical date beyond which State acts or omissions cannot be considered is the one of the acceptance of its compulsory jurisdiction.<sup>520</sup> For the ECtHR, it must not escape attention that it set 1990 as a temporal mark: the year Turkey accepted the jurisdiction of the ECtHR. Thus, the two regional courts implicitly follow the same line with regard to this issue. On the other hand, the HRCttee takes the entry into force of the ICCPR, and not of the OP, as its baseline.

Both interpretative approaches intend to adhere, through a positivistic reading, to Article 28 VCLT on the non-retroactivity of treaties, resulting in setting a barrier at some point in time. What escapes attention, though, is the second half of Article 28 VCLT, which refers to 'any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party'. Enforced disappearance considered as a continuous situation falls squarely within this, because it only ceases upon the clarification of the fate or whereabouts of the disappeared person. Even if all other constitutive

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<sup>516</sup> *Varnava and others v. Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC], 68.

<sup>517</sup> *Ibid.*, 74.

<sup>518</sup> *Ibid.*, 82.

<sup>519</sup> For example, *Varnava and others v. Turkey*, 93-98 (citing case law from IACtHR) and 99-107 (citing Views by the HRCttee). Also, *Bámaca-Velásquez v. Guatemala*. Merits 162-164 (citing case law from ECtHR and Views by the HRCttee).

<sup>520</sup> *Heliodoro-Portugal v. Panama*, Series C No. 186, para. 27.

elements of an enforced disappearance take place before the entry into force of a human rights treaty, the non-clarification is the factor prolonging its continuous nature and bringing it within the normative realm of that treaty. The view I advance here is a dynamic and unconditional interpretation of the law, which aspires to remain faithful to VCLT, but at the same time inculcates a concrete legal content to the continuous nature of enforced disappearance. To have it otherwise, would entail divesting the continuous nature from any legal significance. Beyond the inter-institutional coherence, the preceding analysis of the respective jurisprudences case law proves that these bodies suffer from internal inconsistencies as well.

There is also a correlated issue in the CPED that calls for attention with respect to the continuous nature of disappearances. This is the competence of the CPED Committee, which has competence solely in respect of enforced disappearances that commenced after the entry into force of the convention.<sup>521</sup> The wording of the CPED is unambiguous and provides the Committee with a “clean slate”. Any case of enforced disappearance must have started after the entry into force of the CPED. Essentially, this entails that the act of deprivation of liberty must be subsequent to the CPED’s entry into force. During the drafting process, three countries expressed their intent to make an interpretative declaration aimed at extending the rights to the truth, justice, reparation and those relating to children to enforced disappearances that commenced before the entry into force but which were yet not clarified.<sup>522</sup> Despite ratifying the CPED, Argentina and Chile have not made such a declaration, while Italy is yet to ratify it.

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<sup>521</sup> Article 35(1) provides: “The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention”.

<sup>522</sup> Scovazzi and Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention*, 396.

## 9. Challenges posed by the diversity of definitions

The analysis in the present chapter has demonstrated that there exist convergences and divergences in the case law of the three respective bodies. At the level of substantial rights, *Nowak's* claim that international jurisprudence shares only the right to liberty as the sole common feature must be refined. This core must now be widened to include the right to life and the right to an effective remedy. The prohibition of torture or CIDT could conditionally be part of this core. On the one hand, the right to life has been analysed in its substantive and procedural aspects in order to cover a broad set of factual situations. Most importantly, this has allowed the amplification of its scope of protection through the inclusion of effective investigations as a necessary requirement. On the other hand, the right to a remedy has come into play in varying degrees.<sup>523</sup>

It is further observed that bipolar convergences take place. The HRCtee and the IACtHR share a longer list of substantive rights, which are implicated in the examination of complaints relating to enforced disappearance. These two bodies have also taken into consideration the right to be recognised as a person before the law and the treatment of detainees. In contrast to these two bodies, the ECtHR has maintained a more inflexible position on the issue of the standing of victims and the analysis of potential violations.

Overall, the three bodies under consideration have contributed to the emergence, not free from ambiguities, of at least two special features of enforced disappearances that were later codified in international instruments. The first refers to the continuous nature of the prohibition and the second to defining victims in their respective jurisdictions. As other studies have concluded, despite the increasing number of decisions by international bodies, 'the law remains, at its core, relatively coherent'.<sup>524</sup> This is equally applicable to the sub-theme of enforced disappearances. The main notion that serves to unify the different bodies of case law is that of "positive obligations".

These observations can be framed within the emerging *jus commune* of international human rights. Beyond the content and origins of similar provisions across texts,<sup>525</sup> there is a second level, which forms part of this common human rights space, that of the interpretation these provisions receive by international courts. Clarifying which human rights are violated by enforced disappearance, defines the type and extent of remedies to be afforded. Remedies afforded in such cases are analysed in the following chapter.

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<sup>523</sup> In the next chapter, I undertake an analysis of the remedies afforded by all three bodies.

<sup>524</sup> Jonathan Charney, "Is international law threatened by multiple international tribunals?" *Recueil des cours - Académie de Droit International de La Haye* (1999): 352.

<sup>525</sup> De Schutter, *International human rights law cases, materials, commentary*, 31.



## CHAPTER 4

### Remedies for enforced disappearances: appropriate and effective?

*“Well, we got money,  
but I still don’t know where my brother is”*<sup>526</sup>

#### **1. Making sense of the different remedial models**

The universal appeal for human rights does not only relate to the demand for their protection, but also to the vindication of allegations in case they are violated. Remedies in international human rights law make up much of the work of international organs and, inevitably, academic literature. The pronouncements by international organs mark the culmination of a process that may have unfolded over the course of many years, reaching back to the initial act, which is the source of the allegation of human rights violations. In this sense, remedies are primarily orientated at restoring the affected right and addressing the adverse consequences that emanate from the violation. A fundamental factor towards achieving this is the element of time.

Remedies are assigned a dual role: retroactive, in that they address the founding source of a violation and restore the individual to its *status quo ante* and forward-looking, in wiping out to the extent possible the consequences suffered, ensuring that similar violations do not take place in the future. Beyond the element of time, cases of gross and systematic human rights violations are also delicate exercises in weighing the competing interests of the individual and of broader justice and political stability is also required.

In the absence of a unified and comprehensive universal system of remedies, the three systems under consideration have trodden different paths in the course of their evolution, although *grosso modo* they can be considered to be the progeny of Article 8 UDHR.<sup>527</sup> It is these different paths that I intend to examine in this chapter. The set of questions to be explored here relates to identifying which remedies have been opted for in these systems, whether they have been appropriate and effective and if there are further steps to be taken in order to expand the list of affordable remedies and amplify their scope.

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<sup>526</sup> Zenaida Velasquez, sister of Manfredo Velasquez-Rodriquez. Quoted in: Dinah Shelton, “Conference - Reparations in the Inter-American system: a comparative approach”, *The American University law review*. 56, no. 6 (2007): 1396.

<sup>527</sup> Article 8 UDHR provides: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law”.

## 2. The overarching framework of international law

The right to a remedy straddles general public international law and human rights law. At the same time it is characterised by an additional duality: one side requires a right of access to a competent body capable of addressing the complaint effectively; the other addresses the right to receive substantial remedy. This latter dimension of redress will be the object of my analysis. Remedies in international human rights law are founded partly in the regime of broader public international law. In this respect, the Articles on the Responsibility of States for internationally wrongful acts ('Articles on State Responsibility')<sup>528</sup> embody a range of rules that are relevant to this analysis<sup>529</sup> in that they prescribe a State to be under obligation to make full reparation for the injury by an internationally wrongful act<sup>530</sup> and that such a reparation encompasses restitution, compensation and satisfaction.<sup>531</sup> The Articles on State Responsibility are the springboard for the further development of remedies as they are not exclusive to special rules of international law.<sup>532</sup> First, they allow for the conceptualisation of human rights as a set of obligations, which, if breached, give rise to a duty to remedy. Second, arrangements in regional, universal and right-specific treaties create a web of relevant remedies within the broader mosaic of international law.<sup>533</sup>

Within the normative domain of international human rights law, the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>534</sup> and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*<sup>535</sup> ('Van Boven/Bassiouni Principles') provide a regime-specific conceptual framework of remedies.

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<sup>528</sup> International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 2001. The UN General Assembly took note of these Articles and commended them to the attention of Governments without prejudice to the question of their future adoption by its Resolution A/Res/56/83, January 28, 2002.

<sup>529</sup> Similarly: Murray Hunt, "State obligations following from a judgment of the European Court of Human Rights" in *European Court of Human Rights: remedies and execution of judgments*, ed. Theodora Christou and Juan Pablo Raymond (London: British Institute of International and Comparative Law, 2005), 25–29.

<sup>530</sup> Art 31(1) reads: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

<sup>531</sup> Art. 34 reads: "Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter."

<sup>532</sup> Art. 55 provides that: "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."

<sup>533</sup> See Julio Rojas Baez, "La Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Reparaciones y los Criterios del Proyecto de Artículos sobre Responsabilidad del Estado por Hechos Internacionalmente", *American University international law review*. 23, no. 1 (2007): 91.

<sup>534</sup> UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Resolution 40/34, 1985.

<sup>535</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147,

A central notion of the Van Boven/Bassiouni Principles is that of “victim”. This is due to the underlying choice made by its drafters in formulating the principles on the basis of a victim-oriented approach. Principles 19 to 23 set the taxonomy of remedies for this particular field of law. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition are the five different categories that by themselves or in combination, subject to the particularities warranted by individual circumstances, are intended to provide full and effective reparation.

The inclusion of ‘rehabilitation’ and ‘guarantees of non-repetition’ is a noticeable addition to the Articles on State Responsibility’. They evidence a move beyond a static (and statist) approach to remedies. Whereas the Articles on State Responsibility are designed to provide a set of rules for the protection of state interests and sovereignty, the Van Boven/Bassiouni Principles are underpinned by the idea of restorative justice with an enhanced concern for deterrence, mainly served through the guarantees of non-repetition.<sup>536</sup> Principle 18 evinces the espousing of “restorative justice” by explicitly requiring the ‘taking into account of individual circumstances’ and setting ‘appropriateness’ and ‘proportionality’ as guiding principles in devising remedies for human rights violations.

An oft-cited part of the PCIJ judgment in *Chorzów Factory* reads as follows:

‘The essential principle contained in the actual notion of an illegal act [...] is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation due for an act contrary to international law’.<sup>537</sup>

Read together with the Articles 34 to 37 on State Responsibility, this passage is suggestive of a hierarchy of remedies, at least by positing restitution at the top of it. Although this may be true for the Articles on State Responsibility, the same conclusion cannot be sustained for the Van Boven/Bassiouni Principles (and the field of human rights, for that matter),<sup>538</sup> especially because decisions by various international human rights bodies do not support a similar conclusion. To be sure, compensation seems

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2006; See also M. Cherif Bassiouni, “International Recognition of Victims’ Rights”, *Human Rights Law Review* 6, no. 2 (2006): 203-280.

<sup>536</sup> Dinah Shelton, “Righting Wrongs: Reparations in the Articles on State Responsibility”, *American Journal of International Law* 96, no. 4 (2002): 838: “[...] Two conceptual premises appear to underlie the reparations articles: (1) the importance of upholding the rule of law in the interest of the international community as a whole, and (2) remedial justice as the goal of reparations for those injured by the breach of an obligation”.

<sup>537</sup> *The factory at Chorzów (Claim for Indemnity), Merits. [Germany v. Poland], Series (A) 17. 47* (Permanent Court of International Justice 1928).

<sup>538</sup> Marten Zwanenburg, “The Van Boven/ Bassiouni Principles: an appraisal”, *Netherlands quarterly of human rights* 24, no. 4 (2006): 666; Cf. Antoine Buyse, “Lost and regained?: restitution as a remedy for human rights violations in the context of international law,” *Heidelberg journal of international law* (2008): 132.

to hold a prominent, if not preferable, position in their practice.<sup>539</sup>

Although useful as conceptual compasses in the field of international law, both the Articles on State Responsibility and the Van Boven/Bassiouni Principles lack formal legally binding force. At best, they consist of a recapitulation of existing norms or codification and progressive development of international law.<sup>540</sup> A more tangible and legally binding authority is dispersed in the various international instruments on human rights. For the purposes of the present thesis, the textual provisions on remedies and the mechanisms of enforcement within the ICCPR, the ECHR and the ACHR are of particular importance.

### **3. The remedial scope of the three bodies**

The three treaty regimes consist of different types of pursuing human rights protection. Their differences are qualitatively considerable: different overarching political projects; diverging protection and competences in some aspects of their respective texts;<sup>541</sup> and diverse enforcement mechanisms. These three differences have contributed to a situation where the reach and effect of the HRCtee, the ECtHR and the IACtHR has taken different forms. Seen from this standpoint, human rights can be theorised not just as a uniform set of rules destined to deliver an inescapable result, but as a dialectic process of evaluation, substantially influenced by the contours of the basic instruments and the interpretation they have received in the course of time.

The starting point for exploring the remedial powers of the three organs under consideration are the respective articles in the governing instruments. This will allow tackling the questions about the inherent limitations posed by the texts and the categorisation of remedies according to the taxonomy of the Van Boven/Bassiouni Principles. Commencing from the domain of the European Court, Article 41 ECHR provides:

‘If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party’.

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<sup>539</sup> Dinah Shelton, *Remedies in international human rights law*, 2nd ed. (Oxford: Oxford University Press, 2006), 103: “Finally, the primary role of restitution in international law generally has not been mirrored in human rights law specifically because, like injury to aliens, many of the violations are irreparable. Where life has been lost or other personal injury done, the individual cannot be placed back in the situation that existed before the violation. For this reason, too, the declaratory judgment, which is used in the European human rights system, is not viewed as adequate in most circumstances to repair injury that has been done. Measures of satisfaction and guarantees of non-repetition are increasingly sought and awarded.”

<sup>540</sup> See preamble of “UN General Assembly, Resolution 56/83, Responsibility of States for internationally wrongful acts”, January 28, 2002.

<sup>541</sup> Jonathan Charney, “Is international law threatened by multiple international tribunals?”, *Recueil des cours - Académie de Droit International de La Haye* (1999): 352.



This narrow formulation, coupled with a dual conditionality, i.e. the availability of remedies in domestic law and the necessity for affording a remedy, has for decades resulted in the ECtHR providing exclusively monetary compensation to aggrieved victims. In terms of monetary compensation, the ECtHR has taken hesitant steps to enhance its pronouncements on remedies through specific orders in the operative part of its judgments and the gradual institutionalisation of the 'pilot-judgment' procedure. The monitoring of compliance with its judgments is a task discharged by the Committee of Ministers, which in turn has given rise to a separate category of problems. This will be considered at the end of this chapter. A major variable to be borne in mind while analysing the role of the ECtHR, and international (quasi-) judicial bodies in general for that matter, is its subsidiary nature. The latter allows considerable leeway to respondent States in choosing the process, means and measures for remedying the violation of human rights.

On the other side of the Atlantic, the IACtHR has since its inception enjoyed broader latitude of operation. Article 63(1) reads:

'If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party'.

The American Convention, hence, develops a three-pronged response to human rights violations: first, the focus is on the right itself, enjoyment of which has to be brought again within its proper boundaries. Second, it addresses the consequences flowing from the breach of a right in order to ensure to the extent possible the extinguishment of the adverse ramifications caused. And third, it specifically envisages monetary compensation as a form of reparation.

Despite an initially hesitant stance, the IACtHR has developed nowadays the most elaborate and advanced scheme of remedies in international human rights law.<sup>542</sup> Problems, however, persist within this jurisdiction as well, for a variety of reasons. An important factor while assessing this Court and its European counterpart is their institutional diversity. The San Jose Court has taken it upon itself to monitor compliance with its judgments, which ostensibly safeguards the overall process from the potential politicisation at the Committee of Ministers at the Council of Europe, but which nevertheless has its own shortcomings that I address at the end of this chapter.

The ICCPR and its (first) Optional Protocol do not have such a remedy clause, as the ECHR and the ACHR do. This has not impeded the HRCttee to read in the two instruments an inherent

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<sup>542</sup> Antonio Augusto Cancado Trindade, "The developing case law of the Inter-American Court of Human Rights", *Human Rights Law Review* 3, no. 1 (2003).

competence for itself to require States to provide remedies. Indeed, Article 2(3) ICCPR prescribes the obligation to afford effective remedy for the rights enshrined therein. Articles 9(5) and 14(6) ICCPR have also a remedy-specific provision, requiring States to provide compensation in the cases of unlawful arrest and miscarriage of justice. The HRCttee is mandated to deliver its Views on communications relating to claims for violations, but its findings and remedial measures, despite being authoritative interpretations of the ICCPR,<sup>543</sup> do not carry legally binding weight.<sup>544</sup> The Follow-up procedure to the issuance of its Views is no more than a paper tiger that generates an additional layer of UN-State communication. This process has proved to be incapable of exerting pressure on States or of inducing them to comply by affording the suggested remedies. Again, the assessment of the effectiveness of this system will be examined together with the other two bodies.

In the sections that follow, I have chosen to analyse the remedies that are afforded in respect of pecuniary and non-pecuniary damage. The analysis of the awards for these damages will allow me to compare the reasons leading to monetary awards and their thresholds. Within the IACtHR, I will also discuss the wide array of non-monetary remedies. Moreover, I proceed to a separate discussion on the issue of effective investigation. As will be illustrated in the relevant paragraphs, the requirement for

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<sup>543</sup> Henry Steiner, "Individual claims in a world of massive violations: What role for the Human Rights Committee?" in *The future of UN human rights treaty monitoring*, ed. Philip Alston and James Crawford (Cambridge; New York: Cambridge University Press, 2000), 30; Martin Scheinin, "The Human Rights Committee's pronouncements on the right to an effective remedy - An illustration of the legal nature of the Committee's work under the Optional Protocol" in *Towards implementing universal human rights*, ed. Nisuke Andō (Leiden; Boston: M. Nijhoff Publishers, 2004), 106.

<sup>544</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR commentary* (Kehl [Germany]; Arlington Va. U.S.A.: N.P. Engel, 1993), 710; Dominic McGoldrick, *The Human Rights Committee: its role in the development of the International Covenant on Civil and Political Rights* (Oxford; New York: Clarendon; Oxford University Press, 1991), 150–151; Sandy Gandhi, *The human rights committee and the right of individual communication: law and practice* (Aldershot Hants England; Brookfield Vt.: Ashgate Dartmouth, 1998), 329–330; Sarah Joseph, *The international covenant on civil and political rights: cases, materials, and commentary* (Oxford; New York: Oxford University Press, 2000), 14; Yogesh Tyagi, *The UN Human Rights Committee: practice and procedure* (Cambridge; New York: Cambridge University Press, 2011), 622. Scheinin contends that: "it would be wrong to categorize the Committee's views as mere 'recommendations.'" in: Martin Scheinin, *Leading cases of the Human Rights Committee*, ed. Raija Hanski (Turku: Institute for Human Rights Abo Akademi University, 2003), 22. Also, the HRCttee has itself stated that: "The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol." in: Human Rights Committee, "General Comment No. 33: The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights", November 5, 2008, para. 13. Steven Ratner, "Essays - New Democracies, Old Atrocities: An Inquiry in International Law", *The Georgetown law journal*, 87, no. 3 (1999): 725; Başak Çalı, "The Legitimacy of International Interpretive Authorities for Human Rights Treaties: An Indirect-Instrumentalist Defense" in *The Legitimacy of International Human Rights Systems*, ed. Andreas Follesdal, Geir Ulfstein, and Johan Schaffer, forthcoming. For the opposite view, see Michael Scharf, "Swapping Amnesty for Peace: Was There A Duty to Prosecute International Crimes in Haiti?", *Texas International Law Journal* 31, no. 1 (1996): 26 where he states that: "The Human Rights Committee is not a judicial body authorized to render authoritative interpretation of the Covenant but is rather an administrative body established to monitor compliance with the treaty"; Also, in Michael Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes", *Law and Contemporary Problems* 59, no. 4 (1996): 49 where the same author supports that: "The authoritative interpretation rationale is based on the notion that Parties to the Covenant, having undertaken the treaty obligations contained therein, are subsequently bound to accept, for the purposes of interpreting these obligations, the interpretations rendered by the Human Rights Committee. This rationale, however, is a bit of an overstretch. During the negotiations of the Covenant, the delegates specifically considered and rejected a proposal that would have required states to prosecute violators".

conducting an effective investigation has gained prominence, especially within the case law of the two regional courts. For this, it will be examined on its own merits.

### ***i. Remedies at the Human Rights Committee level***

The research conducted into decisions of the HRCttee shows that the remedies listed by this body when seized with an enforced disappearance follow a fixed pattern. States are solicited to proceed to an effective investigation into the whereabouts or fate of the disappeared person; to keep the relatives of the disappeared informed of this process; to bring those responsible to justice; to provide appropriate compensation; to release immediately the disappeared person, if still alive; to prosecute, try and punish as criminals those responsible for the disappearance. It must be observed from the outset that the HRCttee's Views remain at a general declaratory level without additional specifications on the way remedies should be carried out. Neither is there a criterion by which to assess the appropriateness of the level of the solicited monetary compensation.

In examining the earliest set of communications bringing forth allegations of enforced disappearance, the HRCttee preferred to request States to 'bring those responsible to justice'<sup>545</sup> or 'establish what has happened'.<sup>546</sup> The wording in this section of its Views was very weak and allowed for broad discretion as to how justice would be brought or factual truth established. Neither formulation necessarily warranted the effectuation of a criminal investigation or the engagement of an impartial investigative or judicial body.

The year 2006 was one of change for the HRCttee: starting from *Bousroual v. Algeria*,<sup>547</sup> this organ took a firmer stance by explicitly requesting the initiation of criminal prosecution, trial and punishment of perpetrators. Since then, the HRCttee has consistently invoked the duty of the respondent State to prosecute, try and punish.<sup>548</sup> This change could be explained by three distinct reasons, namely consistency with the content of General Comment No. 31; the publication of the basic Principles in 2006 and; a general trend towards criminalisation of international human rights law. In this connection, General Comment No. 31 reads in relation to investigation and prosecution:

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<sup>545</sup> *Eduardo Bleier v. Uruguay*, Communication No. R.7/30 (Human Rights Committee 1982); *Mojica v. Dominican Republic*, Communication No. 449/1991 (Human Rights Committee 1993).

<sup>546</sup> *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981 (Human Rights Committee 1983).

<sup>547</sup> *Bousroual v. Algeria*, Communication 1085/2002, (Human Rights Committee 2006).

<sup>548</sup> *Boucherf v. Algeria*, Communication No. 1196/2003 (Human Rights Committee 2006); *Messaouda Grioua v. Algeria*, Communication No. 1327/2004, Selected Decisions of the Human Rights Committee under the Optional Protocol, vol. 9 (Human Rights Committee 2007); *Messaouda Kimouche v. Algeria*, Communications No. 1328/2004 (Human Rights Committee 2007).

'As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6)'.<sup>549</sup>

Thus, serious human rights violations that are already criminally configured go hand-in-hand with an obligation to prosecute.

The Van Boven/Bassiouni Principles marked the culmination of a long process within the UN with respect to their content. Principle 3(b) provides that States have a duty to:

'[i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law'. Hence, the possibility to pursue criminal prosecution is logically associated to the conduct of investigations and is subjected to an undefined "appropriateness" litmus test'.

The extensive debate on criminalisation in the field of human rights law in recent years was prompted by at least two factors: first, sanctioning violations through criminal law at the domestic level appears as the most powerful tool with which to punish and deter violations. The rise of international criminal law and the operation of the ICC early in the previous decade added considerable impetus to this view. Secondly, together with the momentum of international criminal justice, came the international debate and campaign against impunity. Nowadays, the struggle against impunity occupies considerable space and energy in the public discourse of both international human rights law and domestic political affairs in countries confronted with such pressing choices.

We can see, then, that the HRCttee opts to blend of the available categories of remedies. Compensation falls under the homonym category. Whereas the conduct of an effective investigation, the bringing to justice and criminal prosecution of those responsible falls under the rubric of satisfaction, the requirement for immediate release of the disappeared person, if still alive, straddles restitution, satisfaction and cessation of the violation. This difference underscores a major difference between the Articles on State Responsibility and the Van Boven/Bassiouni Principles. In the former, cessation of the violation is an autonomous obligation, decoupled from any form of reparation.<sup>550</sup> In the later, cessation of the violation features as a form of satisfaction.<sup>551</sup> Further to this, release of a person could also be

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<sup>549</sup> Human Rights Committee, "General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant", May 26, 2004, para. 18.

<sup>550</sup> International Law Commission, "Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", 2001, 30; Dinah Shelton, "The United Nations Principles and Guidelines on reparations: context and contents," in *Out of the ashes: reparation for victims of gross and systematic human rights violations*, ed. Marc Bossuyt et al. (Antwerpen: Intersentia, 2005), 27.

<sup>551</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147 Basic Principle 22(a).

conceptualised as restitution in the *status quo ante* by restoring the right to liberty of a person, which lies at the heart of every instance of enforced disappearance. It is submitted that considering the release of a person as an obligation emanating from the duty to cease a continuing violation, such as an enforced disappearance, is consistent with its legal nature and ensures in a watertight manner that release is an automatic consequence and not merely one of a range of available remedial measures with which States enjoy a wide margin of how to comply with.<sup>552</sup>

Once the views of the HRCttee are furnished to a State, the case is delegated to the Follow-up procedure for monitoring the compliance with it. Although States undertake to abide by its Views, there is no mechanism of compliance or strict time limits for specific performance. Compliance is essentially a voluntary exercise. Assessed in this way, the HRCttee could be considered as a universal forum, which allows the airing of human rights complaints, especially against States that do not come under the scrutiny of other regional mechanisms. It affords also the opportunity for stocktaking of the human rights situation in the world, while allowing for more elaborate views to (re-) interpret human rights, keeping the text up-to-date with developments.<sup>553</sup>

## ***ii. Remedies at the European Court of Human Rights***

The ECtHR has come under considerable criticism for its limited remedial pronouncements. As already mentioned, a major source of constraint is Article 41 ECHR, which sets the limits of this Court's remedial competence.<sup>554</sup> Added to this, the ECtHR's own hesitant approach ever since the *Marckx*<sup>555</sup> case has yielded to a situation where it considers its declaratory judgments as a form of satisfaction and may order the provision of monetary compensation to the victim.

In few and exceptional cases, the Court has included in the operative parts of its judgments the requirement for specific performance. The judgments in *Ilaşcu*,<sup>556</sup> *Assanidze*<sup>557</sup> and *Brumărescu*<sup>558</sup> are showcases of this Court trying its hand in furthering its remedial capacity. In the former two cases, the

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<sup>552</sup> See also Eckart Klein, "Individual reparation claims under the International Covenant on Civil and Political Rights: the practice of the Human Rights Committee" in *State responsibility and the individual: reparation in instances of grave violations of human rights.*, ed. Albrecht Randelzhofer and Christian Tomuschat (The Hague: Martinus Nijhoff, 1999), 29: "Cessation of wrongful conduct and non-repetition of the breach of the obligation should be extinguished from reparation since they directly reflect or, more exactly, constitute part of the treaty obligations themselves: i.e. the obligation to respect and ensure the rights recognized by the treaty concerned."

<sup>553</sup> In a similar mode: Steiner, "Individual claims in a world of massive violations: What role for the Human Rights Committee?" 38; Tyagi, *The UN Human Rights Committee*, 630.

<sup>554</sup> Christian Tomuschat, "Reparation for victims of grave human rights violations", *Tulane Journal of International and Comparative Law*, no. 10 (2002): 161.

<sup>555</sup> *Marckx v. Belgium* (Application no. 6833/74) (European Court of Human Rights [Plenary] 1979).

<sup>556</sup> *Ilaşcu and Others v. Moldova and Russia* (Application no. 48787/99) (European Court of Human Rights [GC] 2004).

<sup>557</sup> *Assanidze v. Georgia* (Application no. 71503/01) (European Court of Human Rights [GC] 2004).

<sup>558</sup> *Brumărescu v. Romania* (Application no. 28342/95 - *Just satisfaction*) (European Court of Human Rights [GC] 2001).

Court ordered, *inter alia*, the expeditious release of the victim, whereas in the latter case it indicated its preference for the restitution of property over compensation. Despite the initial enthusiasm that these judgments provoked among commentators,<sup>559</sup> they did not signify a principled change of the Court's dealing with remedies. To the contrary, they remain salient exceptions of preference to the *restitutio in integrum* principle to an otherwise unwavering compensatory approach.

The research conducted for the purpose of this thesis encompassed nearly 200 judgments of the ECtHR on disappearances, covering a period of 14 years (1998-2012). The monetary compensations awarded to applicants do not seem to follow clear criteria as to the reason they are afforded and how they are calculated.<sup>560</sup> It is not possible to establish clear links between the type and gravity of violations to the final award. As it was presented earlier in this thesis, the violations most commonly found by the ECtHR pertain to Articles 2, 3, 5 and 13 ECHR, and depending on the circumstances, to a combination of some of these. In terms of monetary assessable damage, the relative weightings of each of these violations cannot be calculated conclusively from the Court's practice.

### **a) Pecuniary damage**

The Court's basis for assessing damages of pecuniary damage is the claim and calculations that the parties advance. If the applicants omit to advance such a claim, the Court does not enter into an examination of the issue.<sup>561</sup> In *Çakıcı*, the Court established that 'there must be a clear causal connection between the damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings' and went on to find a direct causal link between the violation of the right to life and the loss of income, resulting in an award of more £11 500. In the event that the applicants cannot furnish the Court with proof of salaries, it is possible to claim the minimum subsistence level in their country, which results in a minimum award of such damages.<sup>562</sup>

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<sup>559</sup> Loukis Loucaides, "Reparation for Violations of Human Rights under the European Convention and Restitutio in Integrum", *European Human Rights Law Review*, no. 2 (2008): 189; Valerio Colandrea, "On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in Light of the Assanidze, Broniowski and Sejdicovic Cases", *Human Rights Law Review* 7, no. 2 (January 2007): 410.

<sup>560</sup> Heidy Rombouts, Pietro Sardaro, and Stef Vandeginste, "The right to reparation for victims of gross and systematic violations of human rights" in *Out of the ashes: reparation for victims of gross and systematic human rights violations*, ed. Marc Bossuyt et al. (Antwerpen: Intersentia, 2005), 379: "The practice of the ECtHR, however, is striking for the scantiness of principles on the award of damages. The 'equitable basis' is in fact used by the Court as a shield for obscuring the reasons behind its decisions on damages."

<sup>561</sup> *Aliyeva v. Russia (Application no. 1901/05)* (European Court of Human Rights 2010).

<sup>562</sup> *Malika Dzhamayeva and Others v. Russia (Application no. 26980/06)* (European Court of Human Rights 2010).

Applicants have also attempted to persuade the Court to apply the Odgen tables for the calculation of pecuniary damage.<sup>563</sup> These principles include actuarial tables for use in personal injury and fatal accident cases containing factors known as multipliers, which are used to assess the capital values of future annual losses or expenses. The ECtHR has not been fully responsive to taking these tables as a baseline. At some instances it has awarded sums that follow the calculations based on these tables. In the majority of its judgments, however, it has awarded significantly lower amounts than those claimed on their basis.<sup>564</sup> Again, the Court eschewed the opportunity to provide clear reasons for its awards, which would bestow legal certainty and enhanced transparency upon the remedies it orders.

### **b) Non-pecuniary damage**

In the case of non-pecuniary damage the opaque criterion that the Court employs is “equity”, without further justification on the quantification of the damage.<sup>565</sup> This must be considered as a major drawback to the judicial reasoning of the Court and inconclusive under the necessity for legal certainty. A particular trend of a fixed baseline at the sum of €35 000 is observed for the years 2006-2009. In the first case arising from the conflict in Chechnya, the Court awarded this sum. The same was repeated in another emblematic case, where the award of €70 000 was made for the disappearance of two persons.<sup>566</sup>

With some exceptions,<sup>567</sup> the Strasbourg Court kept to this amount for each disappeared person until 2010, when the amount rose to €60 000 per disappeared person.<sup>568</sup> Notwithstanding the particular circumstances of each individual case, such as the number of dependent family members, personal capacity of the victim (e.g. disability) or factors that could be considered as aggravating, such as the duration of the disappearance, the Court has kept to this fixed monetary award.<sup>569</sup> In other

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<sup>563</sup> UK Government Actuary's Department, “Compensation for injury and death”, [http://www.gad.gov.uk/services/Other%20Services/Compensation\\_for\\_injury\\_and\\_death.html](http://www.gad.gov.uk/services/Other%20Services/Compensation_for_injury_and_death.html).

<sup>564</sup> *Khakiyeva, Temergeriyeva and Others v. Russia* (Application nos. 45081/06 and 7820/07) (European Court of Human Rights 2011).

<sup>565</sup> Ruth Rubio-Marín, *The gender of reparations: unsettling sexual hierarchies while redressing human rights violations* (New York: Cambridge University Press, 2009), 223: “[...] the court does not have quantification systems in place or clear and consistent criteria to award either material or moral damages. In the majority of cases, the court opts to award a lump sum of money based on equity but without explaining how it arrived at such a sum of money.”

<sup>566</sup> *Imakayeva v. Russia* (Application no. 7615/02) (European Court of Human Rights 2006).

<sup>567</sup> In the case of *Varnava and Others v. Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC] (European Court of Human Rights 2009) the Court awarded 12 000 euro.

<sup>568</sup> *Dubayev and Bersnukayeva v. Russia* (Applications nos. 30613/05 and 30615/05) (European Court of Human Rights 2010); *Iriskhanova and Iriskhanov v. Russia* (Application no. 35869/05) (European Court of Human Rights 2010); *Aliyeva v. Russia* (Application no. 1901/05).

<sup>569</sup> According to former Vice-President of the ECtHR, Christos Rozakis, the rise from EUR 35 000 to 60 000 was made in order to streamline the Court's awards of remedies and ensure that they are reflective of the gravity of each violation.

words, an opaque process of determination and a lack of responsiveness to the particularities of each individual case characterise the Court's case law on remedies.

Although it is difficult to put value on an applicant's suffering caused by the loss of a relative, or by the authorities' subsequent indifference and failure to provide any information about the fate of the disappeared, the Court's methodology of affixing a certain quantifiable value through this method pays service neither to the victims that seize it nor to the overall advancement of human rights.<sup>570</sup> In fact, the fixed amount of compensation is detrimental in a double sense: as a compensatory threshold it inescapably delimits the outer boundaries of victims' expectations. Furthermore, if the Court does not follow it consistently, it exacerbates the initial injustice of violation. Two points merit attention here: first, there is a need for setting clear criteria as to how the monetary compensation is calculated and second, and more importantly, it underscores the necessity of escaping from the exclusively pecuniary straight-jacket to awarding further non-monetary remedies.

In *Varnava*, the Court took issue with these points by stating in par. 224 that:

'In some situations, however, the impact of the violation may be regarded as being of a nature and degree as to have impinged so significantly on the moral well-being of the applicant as to require something further. Such elements do not lend themselves to a process of calculation or precise quantification. Nor is it the Court's role to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. Its non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage; they are not, nor should they be, intended to give financial comfort or sympathetic enrichment at the expense of the Contracting Party concerned'.

The Court rejected the idea of 'specific scales of damages that should be awarded in disappearance cases'<sup>571</sup> and awarded the sum of €12 000.<sup>572</sup> However, the Court's reasoning is not corroborated by its own practice, especially when the awards of the previous and subsequent to *Varnava* judgments are examined. In almost all other judgments handed down during the same

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Therefore, the rise was a consequence of the Court assessing enforced disappearance as particularly grave, thus meriting a rise in the pecuniary award it made (Interview with Christos Rozakis, 20 June 2011, on file with author).

<sup>570</sup> Shelton, "The United Nations Principles and Guidelines on reparations: context and contents", 375.

<sup>571</sup> *Varnava and Others v. Turkey (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC]*, para. 225.

<sup>572</sup> In the Chamber judgment the Court had not made any award because the Court did not "find it appropriate or constructive, or even just, to make additional specific awards or recommendations in regard to individual applicants" (para. 158), pending the execution of the fourth interstate application of Cyprus v Turkey.



period,<sup>573</sup> the Court awarded the sum of €35 000 to the applicants, making the award in *Varnava* a striking and inexplicable exception to its practice.

### **c) Effective investigation**

The requirement for the conduct of an effective remedy stands on two distinct foundations. On the one hand, it is seen as a duty incumbent upon States to conduct an effective investigation in the event a violation of a substantive right is found. The Court has read a procedural dimension into the protected rights obliging States to conduct an effective investigation.<sup>574</sup> An interpretation of this sort is facilitated by a conjoined reading of the substantive article with Article 1 ECHR, on the general duty to secure to everyone the rights and freedoms defined in the Convention.

*Kurt v. Turkey* is the Court's first judgment on disappearances and a leading authority on the requirement for an effective investigation. While examining the complaint under article 5 ECHR, it concluded that:

'Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since'.<sup>575</sup>

This finding was later reiterated in *Cyprus v. Turkey*.<sup>576</sup> The duty of investigation is thus impliedly read in the text of Article 5 ECHR and is considered as a continuing duty incumbent upon States.<sup>577</sup>

The Court has repeated on numerous occasions that States are charged with an obligation of means, not of result. By this it is meant that even investigations that do not yield concrete results, i.e. identification and punishment of those responsible, would be considered as effective so long as the checklist of their attributes is abided by. Without subscribing to a particular system or form of conducting an investigation, the Court considers the following as essential characteristics that an investigation of this type must bear:<sup>578</sup>

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<sup>573</sup> The Court awarded EUR 8 000 in *Yusupova and Others v. Russia* (Application no. 5428/05) (European Court of Human Rights 2009) and EUR 40 000 in *Rezvanov and Rezvanova v. Russia* (Application no. 12457/05) (European Court of Human Rights 2009). In 15 other cases adjudicated in the second half of 2009, the Court awarded EUR 35 000.

<sup>574</sup> Juliet Chevalier-Watts, "Effective investigations under article 2 of the European Convention on Human Rights: securing the right to life or an onerous burden on a State?" *European journal of international law* (2010): 705: "First, the duty to carry out an effective investigation is only an implied provision, and is not an unambiguous requirement of the Convention."

<sup>575</sup> *Kurt v. Turkey* (15/1997/799/1002) 124 (European Court of Human Rights 1998).

<sup>576</sup> *Cyprus v. Turkey* (Application no. 25781/94) 147 (European Court of Human Rights [GC] 2001).

<sup>577</sup> Alastair Mowbray, "Duties of Investigation under the European Convention on Human Rights", *International and Comparative Law Quarterly* 51, no. 2 (2002): 446–447.

<sup>578</sup> *Bazorkina v. Russia* (Application no. 69481/01) 117–119 (European Court of Human Rights 2006).

- 1) the authorities must act on their own motion once the matter has come to their attention;
- 2) the investigation must be able to lead to the identification and punishment of those responsible;
- 3) the persons responsible for and carrying out the investigation must be independent from those implicated in the events;
- 4) the investigation must be able to determine of whether the force used in such cases was or was not justified in the circumstances;
- 5) reasonable steps must be taken to secure the evidence concerning the incident;
- 6) any deficiency in the investigation, which undermines its ability to establish the cause of death or the person responsible, will risk falling below this standard;
- 7) the duty must be discharged with promptness and reasonable expedition.

On the other hand, paralleling the duties under Articles 2, 3 and 5 ECHR,<sup>579</sup> an effective investigation is premised upon Article 13 ECHR. Depending on the nature of the alleged violation this right requires the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the ECHR.<sup>580</sup> Again in *Kurt v. Turkey*, the Court examined the allegation of the applicant with regard to Article 13 ECHR. It found that:

‘where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure [...]’.<sup>581</sup>

In the Court’s analysis, the requirements of Article 13 ECHR are broader than a Contracting State’s obligation under Articles 2, 3, or 5 ECHR to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible.<sup>582</sup> It is important to note that seen from the standpoint of Article 13 ECHR, an effective investigation is essentially a remedial measure.<sup>583</sup>

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<sup>579</sup> Alastair Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford [u.a.]: Hart, 2004), 211–212.

<sup>580</sup> *Bazorkina v. Russia* (Application no. 69481/01), para. 160.

<sup>581</sup> *Kurt v. Turkey* (15/1997/799/1002), para. 140.

<sup>582</sup> *Bazorkina v. Russia* (Application no. 69481/01), para. 131; *Kurt v. Turkey* (15/1997/799/1002), para. 140; Kombe notes that: “The difference is however limited in the case in point. It derives principally from the fact that the investigation required by the former provision [i.e. Art. 13] must be accessible to the family of the deceased. To sum up, if there is a difference it is so tiny as not to be worth dwelling on. So the implications of the two kinds of provision must be regarded as virtually identical”, in Jean-François Akandji-Kombe, “Positive obligations under the European Convention on Human Rights - A guide to the implementation of the European Convention on Human Rights” (Council of Europe Pub., 2007), 61.

<sup>583</sup> Anja Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford ; New York: Oxford University Press, 2009), 128.

Nonetheless, the Court has consistently refused to include in the operative part of its judgments an explicit order for the conduct of an effective investigation.<sup>584</sup> Despite attempts to that effect by various applicants, especially in Chechnyan cases, the ECtHR has refrained from ordering specific performance to this effect. In a number of cases the applicants relied on the *Assanidze* judgment and the *Tahsin Acar* admissibility decision in order to persuade the Court to order such an investigation.<sup>585</sup> Their argument did not convince the Court, which considered that these two were clearly distinguishable on points of law and fact from the cases emanating from disappearances in Chechnya. Only “exceptional circumstances” could lead to a different conclusion, but the Court’s understanding of these still remains impervious.<sup>586</sup>

In one of its timid steps in expanding its remedial powers, the Court, sitting in Grand Chamber formation, stated in *Assanidze* that:

‘having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 5 § 1 and Article 6 § 1 of the Convention, [it] considers that the respondent State must secure the applicant’s release at the earliest possible date’.<sup>587</sup>

Earlier, in *Tahsin Acar* the Court considered that a unilateral declaration issued with the purpose of reaching a friendly settlement

‘should at the very least contain [...] an undertaking by the respondent Government to conduct, under the supervision of the Committee of Ministers in the context of the latter’s duties under Article 46 § 2 of the Convention, an investigation that is in full compliance with the requirements of the Convention as defined by the Court in previous similar cases’.<sup>588</sup>

Hence, the Court considered that it could not be compelled to order an effective investigation for two reasons. First, the *Assanidze* judgment related to the seizing the continuous violation of Articles 5 and 6 ECHR in a situation where by its very nature, the violation found did not leave any real choice as to the measures required to remedy it.<sup>589</sup> And second, the *Tahsin Acar* decision was confined in the examination of the unilateral declaration issued by Turkey, which could not be taken to apply in broader contexts.

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<sup>584</sup> Kirill Koroteev, “Legal Remedies for Human Rights Violations in the Armed Conflict in Chechnya: The Approach of the European Court of Human Rights in Context”, *Journal of International Humanitarian Legal Studies* 1, no. 2 (December 1, 2010): 289.

<sup>585</sup> *Kukayev v. Russia* (Application no. 29361/02) (European Court of Human Rights 2007); *Ayubov v. Russia* (Application no. 7654/02) (European Court of Human Rights 2009); *Bersunkayeva v. Russia* (Application no. 27233/03) (European Court of Human Rights 2008); *Albekov and Others v. Russia* (Application no. 68216/01) (European Court of Human Rights 2008); *Kaplanova v. Russia* (Application no. 7653/02) (European Court of Human Rights 2008); *Musayeva v. Russia* (Application no. 12703/02) (European Court of Human Rights 2008); *Ruslan Umarov v. Russia* (Application no. 12712/02) (European Court of Human Rights 2008); *Medova v. Russia* (Application no. 25385/04) (European Court of Human Rights 2009).

<sup>586</sup> *Medova v. Russia* (Application no. 25385/04), para. 143.

<sup>587</sup> *Assanidze v. Georgia* (Application no. 71503/01), para. 203.

<sup>588</sup> *Tahsin Acar v. Turkey* (Application no. 26307/95) 84 (European Court of Human Rights 2003).

<sup>589</sup> *Assanidze v. Georgia* (Application no. 71503/01), para. 202.

The Court leaves it to the respondent State and the Committee of Ministers to choose freely the means for and supervision of the process of compliance, respectively. This is in line with the subsidiary role of the ECtHR in the legal architecture of human rights protection. But in so doing, the Court misses the opportunity to use *Assanidze* as a stepping stone to extend its remedial competence. It rather prefers to remain within the strict confines of Article 41 ECHR and preserve a dogmatic postulation of the “integrity of the system” that is already under severe pressure. A direct and explicit order to the respondent State would have the additional advantage of providing clearer and concrete guidance to the Committee of Ministers for discharging its supervisory task.<sup>590</sup> It would, additionally, be consistent with the nature of the two bodies were the Court to retain a fully fledged judicial review and not cede the remedial function wholesale to the CoM.

Notwithstanding the optimism surrounding the handful of judgments ordering specific measures caused, it cannot be said that the ECtHR has embarked on a new era in its jurisprudence. It would be beyond this Court’s power to embark on a trend of ordering detailed remedies and particular steps to remedy every single violation found in its judgments.<sup>591</sup> But in between the two positions, i.e. specific orders or a *carte blanche* to States, the Court can take a different approach towards remedies in disappearance cases by subscribing to the general principle of international law requiring the cessation of continuous violations.<sup>592</sup>

As already discussed in the previous chapter, enforced disappearance is a continuous violation, whose perpetration can be ordered to cease by ordering the release of the disappeared individual. In those cases where the fate or whereabouts of the disappeared person are not known, the readily available option to the Court is the ordering of the release of the disappeared person and, if this is not possible for any reason, the conduct of an effective investigation. The question to be asked here is: what other measures can remedy a violation of this nature?<sup>593</sup> In other words, my preposition is that an effective investigation is a remedy *sine qua non* in disappearance cases, which is a means by which to address directly the refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of a disappeared person, and to bring the latter again within the protection of the law.

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<sup>590</sup> Philip Leach, “The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights”, *European Human Rights Law Review*, no. 6 (2008): 759. Leach supports that: “[...] making an order for an investigation to be undertaken is arguably the only step which could get near to ‘remedying’ the violation (as it could lead to the identification and punishment of those responsible for the crime and to the discovery of the whereabouts of the victim). This would also be in tune with the broader international legal framework relating to disappearances, which widely recognises the continuing nature of an enforced disappearance, arising in particular from the denial or failure of the state to disclose what has happened to the victim.”

<sup>591</sup> Colandrea, “On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures”, 411.

<sup>592</sup> Victor Madrigal-Borloz, “Damage and redress in the jurisprudence of the Inter-American Court”, *Human Rights Development Yearbook* (2001): 241.

<sup>593</sup> This is the wording the ECtHR used in *Assanidze* (par. 202): “However, by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it.”

### **iii. Remedies at the Inter-American Court of Human Rights**

Research on the remedies afforded by the IACtHR in cases of enforced disappearance proves that human rights adjudication can be delivered in various forms and serve different ends. The diverse nature and far-reaching potentiality of the remedial practice of the IACtHR stands in stark contrast to that of its European counterpart. The IACtHR has gradually developed a comprehensive system of remedies, which intends to grasp the full extent of human rights violations in that region. Unsurprisingly, this system is rightly considered as the most advanced at both the regional and universal levels. The examination of judgments conducted for this section of the thesis includes all 33 judgments of the IACtHR on disappearances, covering the years from 1988 to 2012.

As previously mentioned in this chapter, Article 63 ACHR offers a broad foundational basis to this Court in ordering remedies. Unrestrained by domestic law and underpinned by a philosophy of multi-level remedial goals, this Court has devised in the course of more than 20 years a spectrum of remedies that encompasses all five categories of human rights remedies, i.e. restitution, compensation, satisfaction, rehabilitation and guarantees of non-satisfaction. Its remedial jurisprudence can be viewed as a contemporary incarnation of the Van Boven/Bassiouni Principles. However, its remedial capacity and pronouncements were not built in a day.<sup>594</sup> In its initial judgments the Court confined itself to effectively ordering compensation for material and moral damage, coupled with a reticent requirement for investigation.<sup>595</sup>

#### **a) Pecuniary damage**

Starting from the remedies judgment in *Neira Alegria* the Court applied its own method by which to calculate for the pecuniary damage sustained by the victim. Essentially, the Court recognising that *restitutio in integrum* is not possible when violations of the right to life and physical integrity are found, it awards compensation by calculating the actual wage of the victim (or the minimum wage) for the rest of

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<sup>594</sup> Dinah Shelton, "The Jurisprudence of the Inter-American Court of Human Rights", *The American University journal of international law and policy* 10, no. 1 (1994): 362–370; Dinah Shelton, "Reparations in the Inter-American System" in *The Inter-American system of human rights*, ed. David Harris and Stephen Livingstone (Oxford; New York: Clarendon Press ; Oxford University Press, 1998), 169–170.

<sup>595</sup> *Velásquez-Rodríguez v. Honduras, Series C No. 4. Merits* 174 (Inter-American Court of Human Rights 1988): "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation". The jurisprudence of the same Court nowadays considers the obligation to investigation as a peremptory norm of international law.

his or her life, based on the life expectancy in his or hers country. From this amount, 25% is deducted and then the applicable current interest is applied.<sup>596</sup>

Pecuniary damage is divided to other sub-categories for its determination. A main category is that of loss of earnings or income, calculated using the aforementioned calculation method. The method of calculation was mentioned in the previous paragraph. The IACtHR employs a direct causal link between the damage and the pecuniary award it makes, depending on the specific circumstances and the characteristics of the material victim itself.

A second sub-category is “consequential damage”, which is orientated at redressing the expenses incurred by persons searching for the disappeared, as well as other expenses direct consequential to the disappearance. Medical expenses for the members of the family that undergo a period of anguish and anxiety due to the disappearance of their loved one, fall under this category.

Related to this sub-category is that of the general patrimonial damage that must be redressed. Although not often awarded, it is still a distinct sub-category and its purpose is to redress economic and other loss that a family suffers due to the disappearance. *Castillo-Páez* offers an illustration of this type of reparation: in this case the family of the disappeared had to endure the bankruptcy of the business of the victim’s father and the sale of the family home at less than its market value.<sup>597</sup> The main point of differentiation of this category of damages is that the causality between the violation and its consequences cannot be clearly established, but can nonetheless be related. In assessing the damage, the Court resorts to equity.

### **b) Non-pecuniary damage**

In contrast to its European counterpart, the IACtHR has awarded a broader array of remedies and larger sums to a wider circle of individuals for moral damages. To this Court’s perception, monetary awards and acts intended to restore the victims’ dignity can compensate moral damages and wipe out, to the extent possible, the adverse consequences of disappearance. For this reason, it has not confined itself to awarding a fixed amount of money, but it has also devised a complex set of additional remedies that complement the former.

Starting from the monetary awards, it is important to note that the Court bases its decision for award on the presumption that it is inevitable that both material victims and their next-of-kin suffer moral harm, which must be compensated. In fact, the Court’s approach is to create a two-tier system where

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<sup>596</sup> *Neira-Alegria et al. v. Peru, Series C No. 29. Reparations and Costs 38–49* (Inter-American Court of Human Rights 1996); *Castillo-Páez v. Peru, Series C No. 43. Reparations and Costs 75* (Inter-American Court of Human Rights 1998).

<sup>597</sup> *Castillo-Páez v. Peru, Series C No. 43. Reparations and Costs, para. 76.*

the disappeared person is afforded greater monetary compensation than the next-of-kin. The table below demonstrates the awards made under this heading from 2008 to 2011.

<b>Case</b>	<b>Material Victim</b>	<b>Next-of-kin</b>
<b>Gelman v. Uruguay</b> (2011)	100 000	80 000
<b>Ibsen-Cárdenas and Ibsen-Peña v. Bolivia</b> (2010)	80 000	50 000/ 40 000
<b>Chitay-Nech et al. v. Guatemala</b> (2010)	80 000	50 000/40 000
<b>Radilla-Pacheco v. Mexico</b> (2009)	80 000	40 000
<b>González et al. (“Cotton Field”) v. Mexico</b> (2009)	40 000/ 38 000/ 40 000	11 000 – 15 000
<b>Anzualdo-Castro v. Peru</b> (2009)	50 000	20 000
<b>Tiu-Tojín v. Guatemala</b> (2008)	80 000	52 000/ 50 000/ 60 000
<b>Heliodoro-Portugal v. Panama</b> (2008)	66 000	40 000

*Table 2. Monetary compensation awarded for material damage (in USD).*

The Court’s strength does not lie solely in ordering States to pay considerable amounts of money to larger numbers of persons. Far from a strict commodification of the value of the human person, the IACtHR has created a set of non-monetary remedies that extend to fields that were normally occupied by State sovereignty. Up until 2009, the Court’s approach to enforced disappearance cases contained sporadic references to such non-monetary remedies, thus rendering impossible any effort to systematise them.

A significant turn in the Court's jurisprudence on disappearances came with its judgment on *Trujillo-Oroza v. Bolivia*. The pattern of non-monetary awards that the Court decided in this judgment served as a blueprint for the disappearance judgments that ensued. More specifically, the Court found an obligation of the respondent State to typify enforced disappearance in its penal code;<sup>598</sup> it labelled the right to truth as a remedy in itself;<sup>599</sup> it ordered the publication of the judgment<sup>600</sup> and the provision of training to public law-enforcement personnel;<sup>601</sup> and the assignment of the victim's name to a public school.<sup>602</sup>

In the judgments on disappearances that followed, the Court not only resorted to these remedies again, but it also expanded the list by adding further requirements, including: the creation of webpages for the search<sup>603</sup> of disappeared persons;<sup>604</sup> systematic collection of genetic information into databases;<sup>605</sup> public acts of acknowledgment of responsibility<sup>606</sup> and commemoration<sup>607</sup> of the victim(s);<sup>608</sup> typification of enforced disappearance into penal codes<sup>609</sup> or undertaking legal reforms to bring domestic legislation in conformity to international human rights law;<sup>610</sup> erecting monuments,<sup>611</sup> placing plaques, naming streets<sup>612</sup> or establishing a national day in the memory of the victim(s);<sup>613</sup> medical rehabilitation programmes for the next-of-kin;<sup>614</sup> radio broadcasts of the judgment;<sup>615</sup> facilitation of access to public archives.<sup>616</sup>

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<sup>598</sup> *Trujillo-Oroza v. Bolivia*, Series C No. 92. *Reparations and Costs* 98 (Inter-American Court of Human Rights 2002).

<sup>599</sup> *Ibid.*, para. 114.

<sup>600</sup> *Ibid.*, para. 119.

<sup>601</sup> *Ibid.*, para. 121.

<sup>602</sup> *Ibid.*, para. 122.

<sup>603</sup> *Mapiripán Massacre v. Colombia*, Series C No. 134. *Merits, Reparations and Costs* 308 (Inter-American Court of Human Rights 2005).

<sup>604</sup> *Serrano-Cruz Sisters v. El Salvador*, Series C No. 120. *Merits, Reparations and Costs* 189 (Inter-American Court of Human Rights 2005).

<sup>605</sup> *Ibid.*, para. 192.

<sup>606</sup> *Mapiripán Massacre v. Colombia*, Series C No. 134. *Merits, Reparations and Costs*, para. 314; *Pueblo Bello Massacre v. Colombia*, Series C No. 140. *Merits, Reparations and Costs* 277 (Inter-American Court of Human Rights 2006).

<sup>607</sup> *Ticona-Estrada et al. v. Bolivia*, Series C No. 191. *Merits, Reparations and Costs* 165 (Inter-American Court of Human Rights 2008).

<sup>608</sup> *Serrano-Cruz Sisters v. El Salvador*, Series C No. 120. *Merits, Reparations and Costs*, para. 194.

<sup>609</sup> *Blanco-Romero et al. v. Venezuela*, Series C No. 138. *Merits, Reparations and Costs* 105 (Inter-American Court of Human Rights 2005).

<sup>610</sup> *Radilla-Pacheco v. Mexico*, Series C No. 209. *Preliminary Objections, Merits, Reparations, and Costs* 342–344 (Inter-American Court of Human Rights 2009).

<sup>611</sup> *Goiburú et al. v. Paraguay*, Series C No. 153. *Merits, Reparations and Costs* 177 (Inter-American Court of Human Rights 2006); *Anzualdo-Castro v. Peru*, Series C No. 202 471 (Inter-American Court of Human Rights 2009).

<sup>612</sup> *Heliodoro-Portugal v. Panama*, Series C No. 186 250 (Inter-American Court of Human Rights 2008).

<sup>613</sup> *Serrano-Cruz Sisters v. El Salvador*, Series C No. 120. *Merits, Reparations and Costs*, para. 196; *Anzualdo-Castro v. Peru*, Series C No. 202, 473.

<sup>614</sup> *La Cantuta v. Peru*, Series C No. 162 238 (Inter-American Court of Human Rights 2006).

<sup>615</sup> *Chitay-Nech et al. v. Guatemala*, Series C No. 212 245 (Inter-American Court of Human Rights 2010).

<sup>616</sup> *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 293 (Inter-American Court of Human Rights 2010); *Gelman v. Uruguay*, Series C No. 221 282 (Inter-American Court of Human Rights 2011).



The previous enumeration of remedies does not suggest that the Court orders all these measures in every case of enforced disappearance. To the contrary, it opts for a differentiated approach depending on the circumstances of each particular case to order each particular measure. However, the trend that should be underscored here is the gradual expansion of measures and their systematisation under different headings, which carries an intrinsic value in itself, as will be demonstrated in following paragraphs.

For the most part of its case law, the Court had not offered a specific taxonomy of the remedies it orders. The basic division was that of monetary remedies for pecuniary and moral damages with an addition of an order for investigation, which was framed in terms of a duty to investigate under the rubric of “other forms of reparation”<sup>617</sup> or as a measure of satisfaction.<sup>618</sup> The Court had done a particularly bad job in meshing the requirement of investigation with various headings of reparations.

Before examining the requirement for an investigation under the IACtHR regime, as it was previously done for the ECtHR, it is important to note that the Court has, quite recently, changed fundamentally the structure of the remedies it orders. This allowed for a clearer understanding of its practice and clarified the legal nature of each remedy. *Anzualdo v. Peru* marks a point of change in the way the Court expounds on the remedies it orders. In this judgment, the Court examined the duty of investigation as a separate issue under the section of reparations. This was followed by the heading on measures of reparation and concluded with monetary redress for the pecuniary and non-pecuniary damage suffered. In all six judgments on enforced disappearances that followed *Anzualdo*, the Court clearly sign-posted the remedies it ordered and added, where appropriate, separate sub-headings for guarantees of non-repetition and rehabilitation.

Under the Court’s new approach, apart from the classic compensatory awards for material and moral harm, measures of satisfaction entail the publication of the judgment,<sup>619</sup> the designation of a national day for the disappeared,<sup>620</sup> the performance of an act of public acknowledgement of responsibility,<sup>621</sup> the erection of monument,<sup>622</sup> and measures of similar contours.

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<sup>617</sup> *Bámaca-Velásquez v. Guatemala*, Series C No. 91. *Reparations and Costs* 68 and 73 (Inter-American Court of Human Rights 2002).

<sup>618</sup> *Mapiripán Massacre v. Colombia*, Series C No. 134. *Merits, Reparations and Costs*, para. 294; *Blanco-Romero et al v. Venezuela*, Series C No. 138. *Merits, Reparations and Costs.*, para. 94; *Goiburú et al. v. Paraguay*, Series C No. 153. *Merits, Reparations and Costs.*, para. 164; *Heliodoro-Portugal v. Panama*, Series C No. 186, 240.

<sup>619</sup> *Molina-Theissen v. Guatemala*, Series C No. 108. *Reparations and Costs* 86 (Inter-American Court of Human Rights 2004); *Serrano-Cruz Sisters v. El Salvador*, Series C No. 120. *Merits, Reparations and Costs.*, para. 195; *Mapiripán Massacre v. Colombia*, Series C No. 134. *Merits, Reparations and Costs* 318 (Inter-American Court of Human Rights 2005); *Tiu-Tojín v. Guatemala*, Series C No. 190. *Merits, Reparations and Costs* 106 (Inter-American Court of Human Rights 2008).

<sup>620</sup> *González et al. (“Cotton Field”) v. Mexico*, Series C No. 205 473 (Inter-American Court of Human Rights 2009).

<sup>621</sup> *19 Tradersmen v. Colombia*, Series C No. 109. *Merits, Reparations and Costs* 8 (operative part) (Inter-American Court of Human Rights 2004); *La Cantuta v. Peru*, Series C No. 162 233 (Inter-American Court of Human Rights 2006); *Radilla-*

The standardisation of protocols and investigative criteria, the establishment of programmes for the search of disappeared persons, the creation of webpages for the same purpose, the creation of databases containing information for the disappeared, the performance of training in human rights,<sup>623</sup> the adoption of measures for organising, systematising and accessing public documents and prompting the respondent State to ratify the IACFD are all measures that fall under the sub-heading of guarantees of non-repetition. Particular attention is also devoted to rehabilitation measures that address the direct medical and psychological needs of persons identified by the Court as having been adversely affected through the perpetration of an enforced disappearance.

Finally, the “life plan” (*proyecto de vida*) is a notion introduced in *Loayza Tamayo v. Peru*,<sup>624</sup> as a category of damages clearly distinguishable from loss of (future) earnings or income. It was subsequently considered only once<sup>625</sup> in the case of *Cantoral-Benavides v. Peru* where the Court awarded a fellowship for advanced or university studies, covering the costs and living expenses of the victim for a degree which would prepare the victim for the profession of his choice.<sup>626</sup> However, it has not been considered again in disappearance cases.

### **c) Duty to conduct an investigation**

The duty to investigate instances of enforced disappearances holds a prominent place in the jurisprudence of the IACtHR, straddling Articles 8(1) and 25(1) of the ACHR. In turn, these Articles have been construed by the Court to form part of the right of “access to justice”. In the following paragraphs, I discuss the development of the Court’s case law on this issue and highlight its shortcomings.

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*Pacheco v. Mexico*, Series C No. 209 353 (Inter-American Court of Human Rights 2009); *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 277 (Inter-American Court of Human Rights 2010).

<sup>622</sup> *Pueblo Bello Massacre v. Colombia*, Series C No. 140. *Merits, Reparations and Costs* 278 (Inter-American Court of Human Rights 2006); *Goiburú et al. v. Paraguay*, Series C No. 153. *Merits, Reparations and Costs.*, para. 177; *González et al. (“Cotton Field”) v. Mexico*, Series C No. 205, para. 471.

<sup>623</sup> The reparative measures in *González et al. (“Cotton Field”) v. Mexico*, Series C No. 205, para. 502 et seq. are a showcase of these.

<sup>624</sup> The Court described the concept of life plan in the reparations judgment: “The concept of a ‘life plan’ is akin to the concept of personal fulfilment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. An individual can hardly be described as truly free if he does not have options to pursue in life and to carry that life to its natural conclusion. Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.” *Loayza-Tamayo v. Peru*, Series C No. 42. *Reparations and Costs* 148 (Inter-American Court of Human Rights 1998).

<sup>625</sup> Reparation for the life plan was also considered at but the Court did not accept the claim under this heading, stating that: “the Tribunal maintains that reparation for harm to the life project is not in order when the victim is deceased, since it is impossible to restore the individual’s reasonable expectations of realizing a life project. Consequently, the Court will abstain from giving any further consideration to this point.” *Cantoral-Benavides v. Peru*, Series C No. 88. *Reparations and Costs*. 589 (Inter-American Court of Human Rights 2001).

<sup>626</sup> *Ibid.*, para. 80.

Even from its very first pronouncement on *Velásquez-Rodríguez* the Court considered the investigation of enforced disappearances as a continuing duty incumbent upon States.<sup>627</sup> The Court's initial construction of the duty to investigate linked it primarily with Articles 1(1) and 2 ACHR. In essence, the understanding by the Court at the time was that the obligation to respect and ensure the rights enshrined in Article 1 ACHR, combined with the obligation to take legislative or other measures in order to give effect to the same rights, found in Article 2 ACHR, resulted in the creation of the secondary obligation for the conduct of an investigation. Especially Article 1 ACHR, according to the Court's opinion, calls for positive measures for the protection and effective realisation of human rights. This entails preventive measures, effective investigation into allegations of violations and reparation for the harm caused.<sup>628</sup> The continuing duty for conducting an investigation must be seen in the light of the violation itself: as a situation of a continuous character, which retains the fate or whereabouts of the individual unknown, must be responded to with a measure that is equally continuing, and which seeks to reverse the uncertainty about the individual's state.

A second observation, relates to the notion of "positive measures", which in the IACtHR's jurisprudence, has also developed under the name of "due diligence". As seen in the previous chapter, the notion corresponds to the doctrine of "positive obligations" in the ECtHR's case law. States within the jurisdiction of the Inter-American system are required not only to respect and abstain from interfering with human rights, but must also bear out their responsibility by taking the appropriate measures, of whichever character falls within the ambit of their power, to protect genuinely and effectively the human rights of individuals coming under their jurisdiction.

Investigation is one such measure, which is simultaneously backward and forward-looking: in the former sense it is orientated at establishing the facts, identifying the perpetrators and clarifying the status of the disappeared. In the latter, it is intended to serve as the leitmotiv of the criminal mechanisms in order for the perpetrators to be tried and sanctioned. Hence, it is intended to have a deterrent effect. It has also been configured as a remedy for victims: for the material victim, it is the

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<sup>627</sup> *Velásquez-Rodríguez v. Honduras, Series C No. 4. Merits*, para. 181; *Velásquez-Rodríguez v. Honduras, Series C No. 7. Reparations and Costs* 34 (Inter-American Court of Human Rights 1989): "The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains."

<sup>628</sup> *Velásquez-Rodríguez v. Honduras, Series C No. 4. Merits*, para. 166 The second obligation of the States Parties is to "ensure" the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation. *Heliodoro-Portugal v. Panama, Series C No. 186*, para. 142; *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil, Series C No. 219*, para. 138.

single most important tool for clarifying his/ her whereabouts. For its relatives, it is a means for knowing the truth about their loved one<sup>629</sup> and of seeing justice being done, while for society, it serves the purpose of settling accounts with the historical truth by entrenching it in an official process.

A more nuanced approach was adopted later in *Durand and Ugarte*. There, the Court founded the duty to investigate on the concomitant application of Articles 8(1) and 25(1) ACHR. The Court's reasoning shifted on two interlinked arguments: first, since Article 8 ACHR required an impartial and independent adjudicative body and second, since such a body was non-existent (thus rendering in-existent any effective recourse), then the duty to investigate was found not have been respected. From *Durand and Ugarte* onwards the Court remained faithful to this interpretation, with just one exception; that of *Blake v. Guatemala*, in which the Court considered that Article 8 ACHR had been indeed violated and that the relatives of the disappeared had a right to have his disappearance and death effectively investigated and those responsible prosecuted.<sup>630</sup> However, it rejected the allegation of violation for Article 25 ACHR based on the relatives' inaction with regard to seizing the authorities of the matter. On this particular issue, *Blake* is a an exception in the Court's interpretative trail, because in the remaining enforced disappearance cases the same Court has required an *ex officio* initiation of an investigation, while jointly examining Articles 8(1) and 25(1) ACHR.

For the Court, the conglomerate effect of the provisions relating to due process and remedies are the foundational pillars of the right of access to justice. The same Court has gone so far as to categorise this right as a peremptory norm of international law.<sup>631</sup> As a notion, it has been met with resistance in the two other bodies under consideration. However, for the IACtHR, the duty to investigate operates within the framework of this right of access to justice.<sup>632</sup> In fact, it was not until the Court handed down *Anzualdo* that the duty to investigate started to be examined as a separate item under the rubric of "access to justice".

The Court has also considered that the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*, owing to the particular gravity of enforced disappearance, the nature of the rights harmed and the prohibition of enforced disappearance.<sup>633</sup>

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<sup>629</sup> For the right to truth as a remedy, see chapter 5.

<sup>630</sup> *Blake v. Guatemala*, Series C No. 36. Merits 97 (Inter-American Court of Human Rights 1998).

<sup>631</sup> *Goiburú et al. v. Paraguay*, Series C No. 153. Merits, Reparations and Costs., para. 131; *La Cantuta v. Peru*, Series C No. 162, para. 160.

<sup>632</sup> Seibert-Fohr, *Prosecuting serious human rights violations*, 68: "The right to justice necessarily entails a right to an investigation. Investigation is an indispensable precondition for punishing those held responsible. The right to an investigation is derived from art. 1(1) as well as from arts 8 and 25 and is accordingly considered primarily as a measure of reparation."

<sup>633</sup> *Goiburú et al. v. Paraguay*, Series C No. 153. Merits, Reparations and Costs., para. 84; *Anzualdo-Castro v. Peru*, Series C No. 202, para. 59; *Radilla-Pacheco v. Mexico*, Series C No. 209. Preliminary Objections, Merits, Reparations, and Costs, para. 139.

Although the Court's reasoning is opaque, it can be inferred that the *jus cogens* status of the obligation to investigate draws not only upon the primary prohibition itself, but also upon the right of access to justice. The Court's assessment appears to be premised on the false perception that the *jus cogens* prohibition of enforced disappearance necessarily entails that effective investigation is also vested with the same powerful norm.

In my opinion, such a categorisation by the Court is unwarranted and may very well prove to be a dead letter,<sup>634</sup> thus weakening the normative force of the norm itself. Firstly, the mere baptism of an obligation as a *jus cogens* one does not automatically elevate it to a superior level, nor does it guarantee its respect and performance. It is obvious that the large-scale *de facto* or *de jure* impunity were particularly alarming for the Court. However, the attempt to address this reality cannot be premised on a pronouncement that is more pertinent to theoretical constructions and hierarchies of rules within international law.

Secondly, the labelling of this duty as *jus cogens* is all the more unfortunate, when one bears in mind that the Court has itself given a broad meaning to the obligation to investigate. The latter must be designed and conducted in order to bring perpetrators within the realm of criminal law, which already stretches extensively the ambit of the obligation.

Thirdly, while the IACtHR goes at length in order to ground its jurisprudence within international human rights law,<sup>635</sup> it has developed an exceptional taste for *jus cogens* obligations without seeking to harmonise it with the developments in other human rights bodies. In other words, the mere categorisation of a duty as *jus cogens* does not necessarily evoke compliance.

Similarly to the ECtHR, the IACtHR has developed a set of characteristics for this type of investigations. Hence, it must be conducted *ex officio*, with due diligence and it must be undertaken 'in a serious manner and not as a mere formality'.<sup>636</sup> It must also be genuine, impartial, prompt and effective, using all available legal means in its design to determine the truth. As within the European context, it is an obligation of means, not of result. However, the IACtHR considers that as a minimum the relatives must be told the fate of the victim and the whereabouts of his or her remains.<sup>637</sup> Concordant to the "access to justice" interpretation, the lack of an investigation has been held to constitute denial of justice, especially if aggravating circumstances surround the case.<sup>638</sup> Overall, its

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<sup>634</sup> Jo Pasqualucci, *The practice and procedure of the Inter-American Court of Human Rights*. (Cambridge: Cambridge University Press, 2003), 290: "Except for the duty to punish violators, States are, for the most part, complying with Court ordered reparations."

<sup>635</sup> *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219, para. 141.

<sup>636</sup> *Velásquez-Rodríguez v. Honduras*, Series C No. 4. Merits, para. 177.

<sup>637</sup> *Durand and Ugarte v. Peru*, Series C No. 68. Merits 143 (Inter-American Court of Human Rights 2000).

<sup>638</sup> *Chitay-Nech et al. v. Guatemala*, Series C No. 212, para. 197.

purpose must be to lead to the identification, capture, trial and eventual punishment of the perpetrators.<sup>639</sup>

#### **4. Remedies under the International Convention for the Protection of All Persons from Enforced Disappearance**

Of all core international human rights instruments, the CPED is the only to include a detailed categorisation of remedies that should be present in the event of breach of the obligations enshrined therein. The right to justice and to reparation appears in the preamble of the Convention, affording a moral underpinning to the whole instrument. It is immediately recognisable by the text of Article 24 (4) and (5) CPED that the drafters of this convention have been inspired by the Van Boven/Bassiouni Principles.<sup>640</sup> In addition, Article 19 of the UN Declaration on Disappearances<sup>641</sup> and the WGEID General Comment on the same Article offer substantial conceptual ground for the right to obtain reparation.<sup>642</sup>

The first limb of Article 24(4) CPED establishes that victims of enforced disappearance have the right to obtain reparation. The second limb requires that the same persons are ensured the right to prompt, fair and adequate compensation. In the next paragraph, the CPED qualifies the content of reparation:

'The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition.'

Article 24(4) CPED sets in explicit terms the right to reparation for victims of enforced disappearance. Contrary to other universal human rights instruments, it is not needed to infer this right from other provisions. Interestingly, the CPED recognises on equal footing the right to compensation. This can be taken to constitute a specific requirement that must be present at all instances. States must therefore ensure that their own legal systems afford victims reparation and prompt, fair and adequate compensation. This is a requirement that places remedies within the realm of the domestic sphere and

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<sup>639</sup> *Heliodoro-Portugal v. Panama, Series C No. 186*, para. 144.

<sup>640</sup> "Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance - E/CN.4/2004/59", February 23, 2004, para. 137. Reference was made to the current efforts to draft basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and international humanitarian law.

<sup>641</sup> "The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation". <http://www.unhcr.ch/huridocda/huridoca.nsf/%28Symbol%29/A.RES.47.133.En?OpenDocument>

<sup>642</sup> <http://www2.ohchr.org/english/issues/disappear/docs/GeneralCommentsCompilationMay06.pdf>

stands in contrast to the IACtHR's standpoint that (for itself) remedies are governed in all their aspects by international law.<sup>643</sup>

A second observation that must be made is that the remedial scope of the CPED is two-fold: there is a right to obtain reparation and compensation. The first includes the four forms of reparative measures listed by Article 24(5), but the CPED offers no further guidance as to when and under which circumstances each one would be preferable. This can be considered to provide States, as well as the CPED treaty-body, with considerable margin to list (or not) various other forms and condition their application upon various factors.

In this way the CPED shifts the strictly compensatory paradigm of the ECtHR. The latter can no longer offer an appropriate remedial model to be followed, but merely one component of an overarching scheme of remedies. There is a need of an additional component for remedying the adverse effects of disappearances and the various different forms of reparative measures that must be in place address this need. In essence, the enumeration of the list of remedies must be read and understood in the light of the nature of enforced disappearance as a multiple and complex violation of human rights. Due to the gravity of the repercussions of enforced disappearance on all aspects of a victim's life and the empirically proven spill-over effect on members of his or her family and wider society, monetary compensation is bound to redress these violations only partially.<sup>644</sup> In other words, broader and diverse remedies are the mirror image of the wide array of rights violated through the perpetration of an enforced disappearance. In this connection, it will be important for any adjudicatory body to first identify the violations that have taken place and then couple them with the appropriate reparative form.

An additional right to a remedy is found in Article 20(2) CPED, which establishes the right to a prompt and effective judicial remedy as a means of obtaining without delay the information that relates to the authority ordering the detention, the whereabouts and status of the disappeared person and surrounding information.<sup>645</sup> This is a different genre of remedy, compared to those listed under Article 24 CPED. It is one that seeks to clarify the basic and necessary facts with regard to the disappeared person itself in order to identify the responsible authority and clarify the fate or whereabouts of the same person.

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<sup>643</sup> *Neira-Alegría et al. v. Peru, Series C No. 29. Reparations and Costs*, para. 37.

<sup>644</sup> Judith Schonsteiner, "Dissuasive Measures and the 'Society as a Whole': A Working Theory of Reparations in the Inter-American Court of Human Rights," *American University international law review*. 23, no. 1 (2007): 162–164.

<sup>645</sup> The minimum information under Article 18 is reproduced here: "(a) The authority that ordered the deprivation of liberty; (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty; (c) The authority responsible for supervising the deprivation of liberty; (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer; (e) The date, time and place of release; (f) Elements relating to the state of health of the person deprived of liberty; (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.

### **a) The duty to investigate under the UN Convention**

The duty to investigate is a salient element in the text of the CPED. The provisions of the latter largely reflect the advances made by the three international bodies, whose practice has been analysed in the previous sections. The conduct of an investigation is configured both as a State obligation and as a right of individuals to have access and participation to available domestic mechanisms. The CPED expressly requires that 'where there are reasonable grounds for believing that a person has been subjected to enforced disappearance' States shall *ex officio* undertake an official investigation.<sup>646</sup> Such a duty can be also implicitly inferred from another three CPED Articles. First, from the requirement to hold criminally responsible a superior that has failed to submit an instance of enforced disappearance to the competent authorities, thus hindering any possibility of investigation.<sup>647</sup> Second, from the obligation to exercise jurisdiction over suspected perpetrators of enforced disappearance, once the latter find themselves within the territory of the former.<sup>648</sup> In this case, the State must 'carry out a preliminary inquiry or investigations to establish the facts' in order to decide whether it will exercise jurisdiction or not. And third, States are under an obligation to investigate acts of enforced disappearance that are perpetrated by non-state actors.<sup>649</sup>

A specific facet of the duty to investigate is the obligation to 'take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains'.<sup>650</sup> When read in a systematic way together with the aforementioned provisions of the CPED, it seems that the focus of an investigation extends beyond the disappeared person. Investigations must also have the goal of bringing perpetrators to justice, establishing the facts surrounding the disappearance and providing the whole truth in all its aspects. The obligation is one of continuous character because it is not extinguished until the clarification of the fate of the disappeared person. Overall, the duty to conduct an investigation has multiple foundations in the text of the convention and there can be no doubt that it is a primary duty for the States Parties thereto.

The reverse side of this duty is the right of individuals to have access to the progress and results of an investigation. Effectively, this is a sub-right included within the normative boundaries of the right to truth.<sup>651</sup> The right to be informed of the progress and results, as well as to benefit from

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<sup>646</sup> See Art. 12(2) CPED.

<sup>647</sup> See Art. 6(1)(b)(iii) CPED.

<sup>648</sup> See Art. 10 (1) and (2) CPED.

<sup>649</sup> See Art. 3 CPED.

<sup>650</sup> See Art. 24(3) CPED.

<sup>651</sup> Art. 24(2) CPED.



meaningful participation to the investigation corresponds to the same requirement imposed by the IACtHR upon States in its case law.

A secondary set of obligations that complement the primary duty to conduct an investigation relates to the protection of the persons engaged in it ‘from any ill-treatment, intimidation or sanction’,<sup>652</sup> as well as placing emphasis on the importance of investigation while providing human rights training to law-enforcement personnel.<sup>653</sup>

## **5. Implementation and (in)effectiveness of remedies**

The central question of this chapter is whether the remedies that have been afforded by the universal and regional bodies are appropriate and effective.<sup>654</sup> The argument that is made in the following part is that the violation of enforced disappearance requires a tailor-made remedy, which, depending on the particular circumstances of each case, must address the manifold adverse consequences that the disappeared person and other victims suffer.

The ECtHR, the IACtHR and the HRCtee have all demarcated their remedial reach within the framework of their own institutional barriers. Beyond ordering scarce or complex remedial measures, the fundamental issue is whether such orders are actually abided by and whether these remedies engender change and rectification. The first section of this part will address the implementation stage that follows the handing down of judgments and decisions and discuss whether the remedies are indeed effective in reversing, to the extent possible, the harm done through this violation. Within this process, the ideas of punitive damages, the transposition or cross-fertilisation of remedial models and the enhanced participatory role of victims will come under scrutiny. Drawing on the critical assessment of the implementation, the second section will offer suggestions for the three international bodies under consideration.

All three bodies under examination grapple with the challenge of implementation in different ways. Partial or lack of implementation undermines the legitimacy of all three as actors at the international plane.<sup>655</sup> The institutional settings of each separate body demonstrate diverse ways that can be followed and underscore the need for a strong political backing to their pronouncements, as well as a need for a balanced internal institutional setting.

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<sup>652</sup> Art. 18(2) CPED.

<sup>653</sup> Art. 23(1)(b) CPED.

<sup>654</sup> Manfred Nowak, “The Right to Reparation of Victims of Gross Human Rights Violations”, *Human Rights Development Yearbook* (2001): 280.

<sup>655</sup> Dinah Shelton, “The Boundaries of Human Rights Jurisdiction in Europe”, *Duke journal of comparative & international law*. 13 (2002): 143.

### *i. Challenges facing the Human Rights Committee*

Once the HRCtee delivers its views on a communication, the monitoring of the State's response passes over to the next stage. This is a task assigned to a Committee member who acts as a Special Rapporteur for Follow-Up on Views.<sup>656</sup> The lack of an enforcement mechanism or an enhanced monitoring procedure adds up to the challenges posed by the legally non-binding nature of the HRCtee's Views.

In essence, this Special Rapporteur is performing "book-keeping" tasks, which entails also a periodic engagement with the States Parties concerned. *Tyagi* aptly observes that:

'neither the HRCtee nor its Special Rapporteur for Follow-Up on Views is confident about the measures that may be taken following the State party's non-compliance with Committee's Views. The best course of action is perseverance, implying an interrupted engagement with the State party'.<sup>657</sup>

Hence, the limits of implementation are already watered down and relegated to a sphere of political discourse, which is often foreign to legal process. Unlike the other two systems under examination, the HRCtee does not enjoy the support or oversight of a political body, thus leaving it as the sole interlocutor of States.

Expectedly, the weakness of the system is confirmed by the low implementation rates of HRCtee's views. A recent survey, reports that only 67 out of 546 communications where the HRCtee found a violation, received a 'satisfactory' report, amounting to 12% of its total output.<sup>658</sup> Data from the OHCHR indicates also that a number of cases are still considered on-going, despite being more than thirty years old.<sup>659</sup>

An illustration of the long overdue responses by States,<sup>660</sup> exemplifying that these shortcomings have not left enforced disappearance cases unaffected, is the case of *Elcida Arévalo Perez et al. v. Colombia*, which was decided in 1984, but which still remains subject to an "on-going dialogue"

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<sup>656</sup> Markus Schmidt, "Follow-up Mechanisms Before UN Human Rights Treaty Bodies and the UN Mechanisms Beyond" in *The UN human rights treaty system in the 21st century*, ed. Anne Bayefsky (The Hague ; Boston: Kluwer Law International, 2000), 25–34; *Ibid.*, 233 et seq.

<sup>657</sup> *Tyagi*, *The UN Human Rights Committee*, 623.

<sup>658</sup> David Baluarte and Christian De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions* (Open Society Foundations, November 2010), 27, [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/from-judgment-to-justice20101122](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/from-judgment-to-justice20101122).

<sup>659</sup> *Ibid.*, 120.

<sup>660</sup> Steiner, "Individual claims in a world of massive violations: What role for the Human Rights Committee?", 30: "The problem stems less from uncertainty over the formal effect of the views than from unyielding attitudes of the recalcitrant states, the gross and systematic violators."

between the HRCttee and Colombia.<sup>661</sup> Several other cases have reached the same stalemate, obliging the HRCttee to maintain the monitoring of implementation.<sup>662</sup>

The problem of implementation is, thus, not particular to the idiosyncratic nature of enforced disappearance, but relates predominantly with the institutional inefficiencies and weaknesses afflicting the system. Additional factors contributing to this are the substantial backlog of cases; the low output by the HRCttee;<sup>663</sup> the inherently limited potential of the 'Follow-up procedure' and the lack of economic support and resources for the discharging of the mandate. Ideas for amending the UN treaty body system abound, ranging from radical uprooting<sup>664</sup> to substantial reconceptualisation of the international system of human rights protection through a consolidation of treaty bodies coupled<sup>665</sup> (or not) with the establishment of a World Court of Human Rights<sup>666</sup> and to more moderate proposals for the reform of treaty-bodies.<sup>667</sup> Inescapably, the solution(s) to an effective implementation of the HRCttee's views on enforced disappearance cases lie therein.

## **ii. Success will tear us apart: European Court of Human Rights**

As early as 1992, *Tomuschat* observed that 'however numerous and bold the decisions of the Strasbourg bodies may be, it has recently emerged that especially their implementation lacks

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<sup>661</sup> *Annual Report of the Human Rights Committee, A/64/40 (Vol. II)* (New York, October 1, 2009), 629–630.

<sup>662</sup> *Bautista de Arellana v. Colombia*, Communication No. 563/1993, *Annual Report of the Human Rights Committee, A/63/40 (Vol. II)* (New York, October 1, 2008), 522; *Celis Laureano v. Peru*, Communication No 540/1993, Human Rights Committee, *Follow-up Progress Report of the Human Rights Committee on Individual Communications, CCPR/C/95/4*, February 17, 2009, 7; *Arhuaco v. Colombia*, Communication No. 612/1995, *Follow-up Progress Report of the Human Rights Committee on Individual Communications, CCPR/C/98/3*, May 21, 2010; *Boucherf v. Algeria*, Communication No. 1196/2003, *Annual Report of the Human Rights Committee, A/64/40 (Vol. II)*, 623; *Ali Medjnoune v. Algeria*, Communication No. 1297/2004, *Ibid.*, 625; *Yasoda Sharma v. Nepal*, Communication No. 1469/2006, *Ibid.*, 636; *Abubakar Amirov v. Russia*, Communication No. 1447/2006, *Annual Report of the Human Rights Committee, A/65/40 (Vol. I)*, October 11, 2010, 152.

<sup>663</sup> Steiner, "Individual claims in a world of massive violations: What role for the Human Rights Committee?" 33.

<sup>664</sup> Anne Bayefsky, "Making the Human Rights Treaties Work" in *Human rights: an agenda for the next century*, ed. Louis Henkin (Washington D.C.: American Society of International Law, 1994), 229–295.

<sup>665</sup> Thomas Buergenthal, "A Court and Two Consolidated Treaty Bodies" in *The UN human rights treaty system in the 21st century*, ed. Anne Bayefsky (The Hague ;; Boston: Kluwer Law International, 2000), 299–302.

<sup>666</sup> Manfred Nowak, "The Need for a World Court of Human Rights", *Human Rights Law Review* 7, no. 1 (January 2007): 251-259; Julia Kozma, Martin Scheinin, and Manfred Nowak, *A World Court of Human Rights - consolidated statute and commentary* (Wien: NWV Neuer Wissenschaftlicher Verlag, 2010); Stefan Trechsel, *A world court for human rights?* (Chicago: Northwestern University School of Law, 2004); Manfred Nowak, "Eight reasons why we need a world court of human rights," *International human rights monitoring mechanisms : essays in honour of Jakob Th. Moller* (2009).

<sup>667</sup> Steiner, "Individual claims in a world of massive violations: What role for the Human Rights Committee?" 42–44 Steiner advocates for a reconsideration of the character of the views under the Protocol and moving from a mandatory to a discretionary jurisdiction. "Enhancing the human rights treaty body system - The treaty bodies' response to the Secretary-General's Agenda for Further Change", <http://www2.ohchr.org/english/bodies/treaty/reform.htm>; Michael O'Flaherty, "Reform of the UN human rights treaty body system: Locating the Dublin statement," *Human Rights Law Review* 10, no. 2 (2010): 319-335; Nadia Bernaz, "Reforming the UN Human Rights Protection Procedures: A Legal Perspective on the Establishment of the Universal Periodic Review Mechanism" in *New institutions for human rights protection*, ed. Kevin Boyle (Oxford ;; New York: Oxford University Press, 2009), 87; Philip Alston, "Beyond 'them' and 'us': putting treaty body reform into perspective" in *The future of UN human rights treaty monitoring* (Cambridge ;; New York: Cambridge University Press, 2000), 501.

sufficiently effective safeguards'.<sup>668</sup> For years the European Court had garnered respect for the high standard of protection of human rights it afforded, also due to the degree of compliance to its pronouncements by States Parties. The broadening of its membership brought a corollary influx of applications, widening the subject matters in question, many of which proved to be highly complex. Importantly for enforced disappearance, conflicts in Russia (Chechnya),<sup>669</sup> southeast Turkey and Cyprus have introduced a new category of sources for human rights violations to the Court's work, leading to the 'Latin-Americanization of the European system'.<sup>670</sup> The increase of its caseload is nowadays as important as the problem of implementation of its judgments, straining the system's overall capacity.

A recent report by the Rapporteur for the Parliamentary Assembly's Committee on Legal Affairs and Human Rights warned that 'the problem of non-implementation of Strasbourg judgments is far graver and more widespread than previous reports have disclosed'.<sup>671</sup> Indeed, the latest CoM's Annual Report documents 7328 pending judgments in 2008, 8667 in 2009 and 9922 in 2010.<sup>672</sup> For the same years, the CoM closed by way of a final resolution 400, 239 and 455 cases respectively.<sup>673</sup> These figures prove beyond doubt that, unless serious efforts to reverse the trends are undertaken, the current model of supervision will soon become unmanageable both in the sheer numbers of output and in the quality of supervision, which will eventually impact human rights protection in this region.<sup>674</sup>

The monitoring of implementation falls within the competences of the Committee of Ministers,<sup>675</sup> pursuant to Article 46(2) ECHR.<sup>676</sup> The CoM is a purely political body comprised of the representatives

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<sup>668</sup> Christian Tomuschat, "Quo Vadis, Argentoratum? The Success Story of the European Convention on Human Rights - And a Few Dark Stains", *Human Rights Law Journal* 13, no. 11-12 (December 30, 1992): 401.

<sup>669</sup> Emma Gilligan, *Terror in Chechnya Russia and the tragedy of civilians in war* (Princeton N.J.; Oxford: Princeton University Press, 2010); Joseph Barrett, "Chechnya's Last Hope? Enforced Disappearances and the European Court of Human Rights", *Harvard human rights journal*. 22, no. 1 (2009): 133-144; *Last Seen . . . Continuous "Disappearances" in Chechnya* (Human Rights Watch, April 15, 2002), <http://www.hrw.org/en/reports/2002/04/15/last-seen-0>; *Swept Under - Torture, Forced Disappearances, And Extrajudicial Killings During Sweep Operations In Chechnya* (Human Rights Watch, February 2002), <http://www.hrw.org/en/reports/2002/02/02/swept-under-0>; *Worse Than a War "Disappearances in Chechnya" - a Crime Against Humanity* (Human Rights Watch, March 21, 2005), <http://www.hrw.org/en/reports/2005/03/21/worse-war>; Matthew Evangelista, *The Chechen wars: will Russia go the way of the Soviet Union?* (Washington D.C.: Brookings Institution Press, 2002); Tracey German, *Russia's Chechen war* (London ;;New York: Routledge, 2003).

<sup>670</sup> Christina Cerna, "The Inter-American system for the protection of human rights", *Florida Journal of International Law*, no. 16 (2004): 202.

<sup>671</sup> Christos Pourgourides, *Implementation of judgments of the European Court of Human Rights (progress report)* (Parliamentary Assembly, Committee on Legal Affairs and human Rights, August 31, 2009), para. 5.

<sup>672</sup> *Supervision of the execution of judgments of the European Court of Human Rights- 4th annual report* (Council of Europe, Committee of Ministers, April 2011), 32.

<sup>673</sup> *Ibid.*, 34.

<sup>674</sup> Added to these, the budgetary issue constitutes yet another problem, to the degree that the Rapporteur stated that: "The present situation is simply untenable, not to say suicidal". See: Marie-Louise Bemelmans-Videc, *Guaranteeing the authority and effectiveness of the European Convention on Human Rights*, November 4, 2011, para. 20.

<sup>675</sup> Philip Leach, "Analysis - The effectiveness of the Committee of Ministers in supervising the enforcement of judgments of the European Court of Human Rights" *Public law* (2006): 443; Costas Paraskeva, *The relationship between the domestic*

of States Parties to the Council of Europe. Already here, one of the crucial challenges facing the system is apparent: although on the one hand the supervision by a political organ sets the conditions for a collective system of monitoring and can potentially induce compliance, it is, nevertheless, a body amenable to the exigencies of political and diplomatic balances. A problem linked to this challenge is the ECtHR's refusal to include in the operative parts of its judgments clear orders that would render the monitoring task easier and more appropriate for the CoM. The ECtHR remains firm on the position that it is for the State to choose, subject to supervision by the CoM, the general and/or individual measures that will bring the violation to an end.<sup>677</sup>

The response of the European system of human rights protection took the form of a three-level reaction: i) introduction of the pilot-judgment procedure,<sup>678</sup> ii) elaboration and entry into force of Protocol no. 14<sup>679</sup> and iii) elaboration of new working methods within the framework of the Interlaken process.<sup>680</sup> All these efforts are directly or indirectly geared towards improving the implementation of judgments. More specifically, the pilot-judgment procedure has been employed by the Court in a way as to direct respondent States to specific measures and/ or time frames, thus defining a clear field for States to act and for the CoM to supervise.<sup>681</sup> Protocol No. 14 endowed the latter with a power of referral to the ECtHR in case the supervision of the execution of a final judgment is hindered by a problem of

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*implementation of the European Convention on Human Rights and the ongoing reforms of the European Court of Human Rights: (with a case study on Cyprus and Turkey)* (Antwerp: Intersentia, 2010), 81.

<sup>676</sup> Article 46(2) ECHR reads: "The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

<sup>677</sup> *Scozzari and Giunta v. Italy* (Applications nos. 39221/98 and 41963/98) 249 (European Court of Human Rights [GC] 2000).

<sup>678</sup> "Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem", May 12, 2004, <https://wcd.coe.int/wcd/ViewDoc.jsp?id=743257&Lang=fr>. The CoM invited the Court to: "I. as far as possible, to identify, in its judgments finding a violation of the Convention, what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments; II. to specially notify any judgment containing indications of the existence of a systemic problem and of the source of this problem not only to the state concerned and to the Committee of Ministers, but also to the Parliamentary Assembly, to the Secretary General of the Council of Europe and to the Council of Europe Commissioner for Human Rights, and to highlight such judgments in an appropriate manner in the database of the Court."

<sup>679</sup> "Council of Europe - ETS No. 194 - Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention", <http://conventions.coe.int/Treaty/EN/Treaties/html/194.htm>; Lucius Cafilisch, "The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond", *Human Rights Law Review* 6, no. 2 (2006): 403-415; Alastair Mowbray, "Beyond Protocol 14," *Human Rights Law Review* 6, no. 3 (2006): 578-584.

<sup>680</sup> "High Level Conference on the Future of the European Court of Human Rights Interlaken Declaration", February 19, 2010, [http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final\\_en.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Par.0133.File.tmp/final_en.pdf); "Interlaken Process- Follow-up of the High Level Conference on the Future of the European Court of Human Rights", [http://www.coe.int/t/dghl/monitoring/execution/Themes/Interlaken/index\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/Themes/Interlaken/index_en.asp).

<sup>681</sup> But see also the critique it has received: Stuart Wallace, "Much ado about nothing? The pilot judgment procedure at the European Court of Human Rights", *European Human Rights Law Review*, no. 1 (2011): 71-81; Philip Leach, "Can the European Court's pilot judgment procedure help resolve systemic human rights violations? Burdov and the failure to implement domestic court decisions in Russia", *Human Rights Law Review* 10, no. 2 (2010): 346-359.

interpretation of the judgment or when it considers that a High Contracting Party refuses to abide by a final judgment in a case to which the latter is a party.<sup>682</sup>

And lastly, the Interlaken Action Plan called on the CoM to 'review its working methods and its rules to ensure that they are better adapted to present-day realities and more effective for dealing with the variety of questions that arise'.<sup>683</sup> Responding to this call, the CoM has recently adopted a twin-track supervision procedure providing for an enhanced and standard supervision procedure.<sup>684</sup> One of the indicators for the classification of a judgment under the enhanced category is that it must disclose major structural and/ or complex problems as identified by the Court and/or the CoM.<sup>685</sup>

Serious problems persist with regard to the implementation of enforced disappearance judgments, which keep cases dating as far back as 1999 on the CoM's docket.<sup>686</sup> The Committee on Legal Affairs and Human Rights has identified Turkey and Russia among the first three States for which cases are pending before the CoM and before the ECtHR.<sup>687</sup> The same document offers an analysis of violations of ECHR articles, showing that the violations found against Russia for the years 2008 - 2010 relate to the actions of security forces in the Chechen Republic and mainly refer to the right to liberty and security; the right to life; the prohibition of CIDT and the lack of effective investigation into the latter two.<sup>688</sup>

Among the most serious non-implementation issues is the lack of an effective investigation into violations of Articles 2 and 3 ECHR.<sup>689</sup> Again, the Russian and Turkish sets of cases exemplify the sort of intractable situation upon which these cases have stumbled.<sup>690</sup> For the Turkish cases, the problems

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<sup>682</sup> Articles 46(3) and (4) ECHR, respectively.

<sup>683</sup> "High Level Conference on the Future of the European Court of Human Rights Interlaken Declaration", Art. 11(b).

<sup>684</sup> "Committee of Ministers - Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan – Outstanding issues concerning the practical modalities of implementation of the new twin track supervision system - Document prepared by the Department for the Execution of Judgments of the European Court of Human Rights (DG-HL) with a view to its examination at their 1100th meeting (December 2010) (DH)", [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Inf/DH\(2010\)45&Language=lanEnglish&Ver=final&Site=CM&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=CM/Inf/DH(2010)45&Language=lanEnglish&Ver=final&Site=CM&BackColorIntranet=EDB021&BackColorLogged=F5D383).

<sup>685</sup> *Ibid.*, 10.

<sup>686</sup> "Committee of Ministers - Interim Resolution - Execution of the judgments of the European Court of Human Rights - Actions of the security forces in Turkey - Progress achieved and outstanding issues (Adopted by the Committee of Ministers on 18 September 2008, at the 1035th meeting of the Ministers' Deputies)", <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1344121> Appendix II, which includes *Cakici v. Turkey* (decided on 8 July 1999).

<sup>687</sup> *States with major structural/systemic problems before the European Court of Human Rights: statistics* (Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, April 15, 2011), 4–7.

<sup>688</sup> *Ibid.*, 11–12.

<sup>689</sup> Pourgourides, *Implementation of judgments of the European Court of Human Rights (progress report)*, para. 52–54.

<sup>690</sup> Ed Bates, "Supervising the execution of judgments delivered by the European Court of Human Rights: the challenges facing the Committee of Ministers," in *European Court of Human Rights: remedies and execution of judgments*, ed. Theodora Christou and Juan Pablo Raymond (London: British Institute of International and Comparative Law, 2005), 84 et seq.

relate to administrative obstacles within the judiciary that for years bar such investigations.<sup>691</sup> The same impasse was also reached in the Russian cases, where the respondent State has invoked 'a number of objective reasons, including those related to the conduct of investigation in war-time conditions' to justify the impossibility 'to ensure fulfillment of all conventional requirements and find those responsible for the mentioned crimes'.<sup>692</sup>

The judgments in *Cyprus v. Turkey* and *Varnava v. Turkey* are showcases of the misplacement of the implementation process. In the former judgment, the Grand Chamber had stated that:

'although the CMP's procedures are undoubtedly useful for the humanitarian purpose for which they were established, they are not of themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention, especially in view of the narrow scope of that body's investigations'.<sup>693</sup>

This finding was again confirmed in *Varnava*.<sup>694</sup> Despite this clear position by the Court, the monitoring of the two judgments has revolved primarily around the role of the CMP. In the last meeting that took issue with the monitoring of *Varnava*, the CoM requested the Turkish authorities to provide information on the measures envisaged in the prolongation of the CMP's work with a view to the effective investigations required by this judgment.<sup>695</sup>

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<sup>691</sup> "Committee of Ministers - Interim Resolution - Actions of the security forces in Turkey - Progress achieved and outstanding problems - General measures to ensure compliance with the judgments of the European Court of Human Rights in the cases against Turkey concerning actions of members of the security forces (listed in Appendix III) (Follow-up to Interim Resolutions DH(99)434 and DH(2002)98) (Adopted by the Committee of Ministers on 7 June 2005 at the 928th meeting of the Ministers' Deputies)", para. 19–22, [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=ResDH\(2005\)43&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=ResDH(2005)43&Language=lanEnglish&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864); See also the list of problems listed in: "Pending cases: state of execution", [http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=bati&StateCode=&SectionCode=](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=bati&StateCode=&SectionCode=). '(1) la durée excessive de l'enquête menée à l'encontre des agents d'Etat impliqués, (2) le défaut d'indépendance des autorités ayant mené l'enquête, (3) l'impossibilité pour les requérants d'avoir accès au dossier de l'enquête, (4) l'impossibilité pour les requérants d'interroger les témoins et les agents accusés, (5) l'impunité résultant de l'application des règles de prescription, (6) des décisions de sursis au jugement ou de sursis à l'exécution des peines rendues à l'encontre des agents accusés, (8) le défaut de suspension des agents d'Etat de leurs fonctions malgré l'existence de poursuites à leur encontre pour mauvais traitement, (9) l'insuffisance des rapports médicaux préparés par les experts, (10) la clémence des peines d'emprisonnement infligées aux agents de police impliqués, (11) la relaxe conditionnelle qui a été appliquée aux agents condamnés pour mauvais traitements.

<sup>692</sup> "Committee of Ministers - Communication from the Russian authorities in the Khashiyev group of cases against the Russian Federation - Information concerning measures taken by the authorities of the Russian Federation in the course of execution of the European Court's judgments regarding issues of violation of human rights during the crisis settlement in the Chechen Republic - Document distributed at the request of the Russian Federation", 2, [https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=DH-DD\(2011\)130&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/wcd/ViewDoc.jsp?Ref=DH-DD(2011)130&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383).

<sup>693</sup> *Cyprus v. Turkey* (Application no. 25781/94), para. 135.

<sup>694</sup> *Varnava and Others v. Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC], para. 192–194.

<sup>695</sup> "Pending cases: state of execution. *Varnava v. Turkey* and *Cyprus v. Turkey*", [http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=Varnava&StateCode=TUR&SectionCode=](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=Varnava&StateCode=TUR&SectionCode=).

Moreover, while supervising the execution of the judgment in *Cyprus v. Turkey*, the CoM reiterated 'its repeated invitation to the Turkish authorities to provide information on the additional measures required to ensure the carrying out of effective investigations, as required by the judgment of the European Court'.<sup>696</sup> This discussion is doubly flawed: first, the subject matter is the operation of an organ that was found by the Court as incompetent and incapable due its terms of reference to hold effective investigations. Second, the CMP is a tripartite organ, where decisions are taken by unanimity, which does not permit parties thereto to 'ensure the carrying out of effective investigations', as the CoM has requested of Turkey.

### **a) Ideas for the future**

The three main reactions of the European system are a sign that the actors therein are conscious of the need for efficient reform to enable the system to manage the current surge of cases. At the same time, it must be underscored that by themselves, these reactions are not sufficient to tackle the problem, and for that matter no other single set of solutions. A further series of proposals is offered in the following paragraphs in an effort to complement the existing measures. The proposals refer to (i) the reorientation of the operative parts of the ECtHR in order to sign-post clearly the remedial measures it considers necessary, (ii) the rewording of Article 41 ECHR, (iii) the development of the institutional ability to study "thematic or country situations" and (iv) a broad institutional change with the aim of bringing about an 'executive' organ to balance the dynamics of the CoM, the Parliamentary Assembly and the Court or further strengthening the competencies of the current Commissioner.

The suggestion for the reorientation of the operative parts of the ECtHR draws on the timid steps the Court took in judgments such as *Assanidze*, where it addressed a specific order to the respondent States. In enforced disappearance cases, a specific order from the ECtHR to conduct an effective investigation would carry added legal authority and would serve the purpose of underscoring that such encroachments entail, at a minimum, an automatic repercussion. The overall approach of the ECtHR, that of leaving it to the States to choose the means to end a violation, could accommodate such a shift, since specific orders and freedom to choose remedial means are not mutually exclusive, but could work in complementarity to each other. In addition, extrapolation of empirical research conducted

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<sup>696</sup> "Committee of Ministers - Case Cyprus against Turkey, judgment of 10/05/01 - Grand Chamber - Introduction - Memorandum prepared by the Secretariat of the Department for the execution of judgments of the ECHR (DG-HL) - Version updated for the 1035th meeting", <https://wcd.coe.int/wcd/ViewDoc.jsp?id=1338261&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.



on the Inter-American system, suggests that clarity on judicial decisions has an important influence on compliance.<sup>697</sup>

Further to this, the ECtHR could also, following its Inter-American counterpart, move into the field of symbolic reparations, mainly public apologies and ceremonies, as well as publication of judgments in the domestic press. By their very nature, these types of reparations do not add, if at all, significant monetary cost to the States, but can actually serve manifold purposes. To name but a few, the Court would thus reach a broader audience;<sup>698</sup> the victims would receive an officially sanctioned acknowledgment of their suffering; and awareness for the Court's role would be raised.

The second proposal for a rewording of Article 41 ECHR is orientated towards the same goal: that of liberating the Court from the asphyxiating terms of the current text. It should be pointed out that Article 41 ECHR stands in the same form as it did in 1950, despite the numerous amending Protocols that ensued. Even if it were to be accepted that at the time such an arrangement was dictated by the then Contracting Parties' policy objectives, this position can no longer be sustained, especially given the progress that the international law on remedies has made in the past 60 years. Allowing the Court to draw on a large spectrum of remedies that are currently envisaged in other jurisdictions or soft-law instruments would be a significant breakthrough, capable of reshaping the entire edifice of human rights protection in the region.

Developing the institutional capacity of the European human rights system to study "thematic or country situations" where the ECtHR's findings point to such situations may well serve as both a proactive measure and as a retroactive one.<sup>699</sup> In the former form, it may operate as a tool which to raise awareness of a particular situation, which would engage the combined action from all CoE actors. In the latter, it may be conceived as a measure responsive to similar situations, which would provide an additional forum within the CoE space and contribute to justice and the re-establishment of human rights.

Finally, the broad institutional change mentioned earlier could come about through the introduction of a new "executive" body to which the supervisory oversight would be passed on. The purpose of such a change would be to remove the monitoring process from the often politicised climate of the CoM and assign it to a body that will act as a "guardian of the system". Coupled with this, a

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<sup>697</sup> Jeffrey Staton and Alexia Romero, "Clarity and compliance in the Inter-American Human Rights System", February 12, 2011, 19, <http://www.saopaulo2011.ipso.org/sites/default/files/papers/paper-883.pdf>.

<sup>698</sup> Laurence Helfer, "Toward a Theory of Effective Supranational Adjudication", *Yale Law Journal* 107, no. 2 (1997): 308–312.

<sup>699</sup> See the same, yet underdeveloped idea in: Tomuschat, "Quo Vadis, Argentoratum? The Success Story of the European Convention on Human Rights - And a Few Dark Stains", 406.

reform could envisage a meaningful type of “infringement proceedings”,<sup>700</sup> characterised by the same rationale that undercuts the EU system.<sup>701</sup> This new body would have the objective credentials to guarantee the equal treatment of situations. At the same time, the CoM could retain the ultimate leverage of expulsion of a persistently defiant State. A change of this diameter would be conducive to a more balanced allocation of institutional powers. Alternatively, similar tasks could be assigned to the existing Commissioner for Human Rights, with the appropriate changes of institutional modalities.

The aforementioned proposals range from a change in the interpretive ethos of the Court to deep reconfigurations of the overall system. Unavoidably, such changes necessitate different requirements in order to be effected. A change in the jurisprudence need not pass through a formal and cumbersome negotiation among the 47 States of the CoE, but this does not detract from the difficulty of such an achievement. The changes that have been brought into operation hitherto are characterised by micromanagement of the caseload at both ends of the system. But what is essential for the overall system is to respond also to the “macro” questions that touch upon the core issue: that of its viability as a whole.

### ***iii) A voice crying in the wilderness? The Inter-American Court of Human Rights***

The IACtHR has not escaped the implementation crisis that looms over the previously examined bodies. Similarly to them it has come under considerable stress over its authority to monitor the implementation of its judgments. Disheartening implementation rates undermine its legitimacy and its actual role as an actor for the protection and advancement human rights in the region.<sup>702</sup> Due to the lack of a provision specifically on monitoring of implementation, the Court, from its very first judgment, has taken this task upon itself. Furthermore, the IACtHR is bound by its governing convention to submit a report to the General Assembly, specifying the cases in which a state has not complied with its judgments and to make pertinent recommendations.<sup>703</sup>

The Court’s competence to monitor compliance with its own judgments was solidified in *Baena Ricardo v. Panama*, following Panama’s contention that this was the competence of the General

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<sup>700</sup> The idea was contemplated at the negotiations process of the 14<sup>th</sup> Protocol, but it was eventually abandoned.

<sup>701</sup> See the procedure set up by Article 258 of the Treaty on the Functioning of the European Union (TFEU).

<sup>702</sup> Lisa Laplante, “Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention”, *Netherlands quarterly of human rights* 22 (2004): 348: “The true test of the effectiveness of the Court’s use of reparations, however, is its actual impact on the behaviour of States, not only in terms of paying off judgments ordered by the Court but also in erecting human rights protections within their own system, including adequate and effective internal remedies.”

<sup>703</sup> Article 65 ACHR.

Assembly.<sup>704</sup> The Court, drawing on the preparatory work of the IACHR, international materials and various interpretative techniques, rejected Panama's position and reaffirmed that this function fell within the realm of its competences.<sup>705</sup> This already constitutes an important difference with the European system, where the political body of the CoM is the prime driving force in monitoring implementation. At the same time, this lack of political debate and collective system of implementation is similar to the *modus operandi* of the HRCttee. Yet, a significant difference with this latter body is that the IACtHR benefits from the legal authority its judgments carry.

Despite the aforementioned differences, the IACtHR, as with the other two bodies, suffers from a low implementation rate of its judgments. At the end of 2010, the Court was monitoring compliance with 111<sup>706</sup> out of a total of 127 merits judgments it had handed down since coming into operation. Other studies show an anaemic 9% of total compliance for 2009,<sup>707</sup> 2% less than for the year 2007. A closer look reveals that while States normally abide by monetary orders and symbolic measures,<sup>708</sup> the same does not occur for other forms of reparation, most importantly the conduct of effective investigations.<sup>709</sup>

Factors conducive to non-compliance relate to the lack of political will on the part of States, the role and power of armed forces in various countries, the lack of infrastructure and institutional capacity, a pervasive and deep-rooted disregard for human rights in parts of the establishment<sup>710</sup> and segments of society and the often long and demanding list of remedial measures, which are far-reaching and, by their nature, require considerable time and resources.<sup>711</sup> This last factor points to an important, yet overlooked condition: the IACtHR's remedial scope has been expanding in a way that places considerable tension on the resources, capacities and infrastructures of often recently re-established democracies, facing severe challenges on the political and economic leverage that they may command. In other words, although a wide range of multi-purpose remedies may generate human rights complacency, it nevertheless suffers the peril of remaining no more than an hortatory pronouncement destined to remain solely on paper.

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<sup>704</sup> *Baena-Ricardo et al. v. Panama*, Series C No. 61. Competence 58 et seq. (Inter-American Court of Human Rights 2003).

<sup>705</sup> Laurence Burgogue-Larsen, *The Inter-American Court of Human Rights: case-law and commentary* (Oxford: Oxford University Press, 2010), 178–179.

<sup>706</sup> *Annual Report of the Inter-American Court of Human Rights - 2010* (Inter-American Court of Human Rights, ), [http://www.corteidh.or.cr/docs/informes/2010\\_eng.pdf](http://www.corteidh.or.cr/docs/informes/2010_eng.pdf).

<sup>707</sup> Baluarte and De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, 65.

<sup>708</sup> James Cavallaro and Stephanie Erin Brewer, "Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American court," *American Journal of International Law* 102, no. 4 (2008): 786.

<sup>709</sup> Another study of the period 2001-2009 shows a 10% compliance with this specific order. Fernando Basch, "The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance With its Decisions", *SUR - International Journal On Human Rights*, no. 12 (2010): 16.

<sup>710</sup> Sergio García Ramírez, "El amplio horizonte de las reparaciones en la jurisprudencia interamericana de derechos humanos" in *El control del poder - Homenaje a Diego Valadés*, ed. Peter Häberle and Domingo García Belaunde, 2011, 95.

<sup>711</sup> Cavallaro and Brewer, "Reevaluating regional human rights litigation in the twenty-first century", 788.

Beyond the statistics highlighting the problems of the current situation, the implementation of judgments on enforced disappearances is also grimly ineffective. Emblematic cases of this Court have remained a dead letter with regard to the actual effect of their reparations limb. Although only the payment of compensation was eventually made in *Velásquez-Rodríguez v. Honduras*, the Court concluded the monitoring of the judgment, without ascertaining that an investigation into the enforced disappearance actually took place.<sup>712</sup> In other cases, the Court is still monitoring the implementation, through periodic reviews of States' actions. However, progress is still hindered, if not prevented, by the State's 'blatant and persistent inaction',<sup>713</sup> timid steps towards investigation,<sup>714</sup> inconclusive information on the State's part<sup>715</sup> and no actual effect of arrest warrants.<sup>716</sup> A notable exception to this situation, which serves to underscore the seriousness of the situation, is Peru's compliance with the investigation order eleven years after the reparations decision and nineteen after the victim's disappearance.<sup>717</sup>

### **a) Future perspectives of the IACtHR**

The IACtHR has employed a considerable amount of efforts in streamlining its procedures in order to induce compliance. A series of amendments to its Statute and a firmer resolution in requesting States to produce concrete and specified information, action plans and justifications for their delays within prescribed time-limits illustrate the most common features of this Court's attempts to exert pressure on States.

From the standpoint of an overarching political project and support, the Inter-American system of human rights protection stands in between the HRCttee and ECtHR. Although the OAS is endowed with steering bodies supposedly able to coin and maintain political support for the Court, such as the Permanent Council and the General Assembly, it has proven incapable of doing so.<sup>718</sup> Seen in a broader horizon, this may be well explained by the difference between the overall political projects that underpin the European and Inter-American systems. However, this is a discussion that verges on the political field, and for this reason stands outside the scope of this thesis.

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<sup>712</sup> Baluarte and De Vos, *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, 66.

<sup>713</sup> *Serrano-Cruz Sisters v. El Salvador* 12 and 18 (Order of the Inter-American Court of Human Rights 2010).

<sup>714</sup> *Bámaca Velásquez v. Guatemala* 31–32 (Resolución de la Corte Interamericana de Derechos Humanos 2010).

<sup>715</sup> *Gómez-Palomino v. Peru* 9 (Resolución del Presidente de la Corte Interamericana de Derechos Humanos 2010).

<sup>716</sup> *Blake v. Guatemala* 8 (Order of the Inter-American Court of Human Rights 2009).

<sup>717</sup> *Castillo-Páez v. Peru* 10 (Order of the Inter-American Court of Human Rights 2009).

<sup>718</sup> Jo Pasqualucci, "Victim reparations in the Inter-American human rights system: a critical assessment of current practice and procedure", *Michigan journal of international law* 18, no. 1 (1996): 56–57.

Setting up a special body within the OAS, in the form of a working group or committee, tasked with monitoring compliance is an idea that would not depend on politically charged reforms.<sup>719</sup> To the contrary, it could be a starting point for the aforementioned deepening of the political integration in the region. The added value of this would be to place the lack of political will under the scrutiny of a truly collective system of monitoring and to join the Court in its efforts towards achieving compliance.

Turning to the Court itself, *Thomas Antkowiak* has argued for a ‘participatory model’ in deciding remedies, in which victims’ direct participation and negotiation with the State would provide tailor-made remedies.<sup>720</sup> The agreed remedies would come under the Court’s scrutiny to ensure that they are adequate and that the victims would not find themselves in a disadvantaged position. Overall, this model is attractive from at least two perspectives: the democratic outlook of the system would be strengthened and its legitimacy would be enhanced.

Notwithstanding these theoretical advantages, this proposal does not take into consideration that at the IACoMHR level, the victims may already participate and offer their views on the remedial scheme of their preference. Adding an intermediate layer of direct victim-State negotiation of remedies is likely to prove time-consuming and not as effective as expected. Furthermore, the ‘participatory model’ stands on the hypothesis that the actors involved would always strive for efficient and fair outcomes, which fails to grasp the realities of litigation. In essence, the model is misleading so long as it builds upon the aspirations of victims and does not take into account States’ interests. A plain reading of the Court’s orders on compliance proves that States capacity and willingness to respond to their obligations should be the real concern. For even if such a model were to be in place, it would not provide an answer on how to address this issue.

### ***b) Punitive compensation***

The idea of punitive compensation in the event of non-compliance with the operative parts of international bodies has not found wide support by commentators.<sup>721</sup> Furthermore, at a normative level, such a proposition has no foundation in international human rights law and could hardly be introduced by

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<sup>719</sup> See Cavallaro and Brewer, “Reevaluating regional human rights litigation in the twenty-first century”, 783–784, referring to the idea of Judge Trindade.

<sup>720</sup> Thomas Antkowiak, “Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond”, *The Columbia journal of transnational law*. 46, no. 2 (2008): 351-419.

<sup>721</sup> Stephan Wittich, “Punitive damages” in *The law of international responsibility*, ed. James Crawford, Alain Pellet, and Simon Olleson (New York: Oxford University Press, 2010), 674. On the other hand, Laplante considers that punitive damages are not absolutely impossible to imagine in the case of the IACtHR. See, Laplante, “Bringing Effective Remedies Home”, 379 et seq; Shelton believes that the issue is fundamentally one of utility: Dinah Shelton, *Remedies in international human rights law* (Oxford ;New York: Oxford University Press, 1999), 290.

a court on its own initiative. Especially for the ECtHR and the HRCttee, for reasons previously explained, such an option would go beyond the scope of their competences, as prescribed by their constitutional texts. In practice, similar claims have already been advanced by litigants in the two regional courts, albeit unsuccessfully.

Beyond these reasons, there is nothing to suggest that the idea of awarding punitive damages would not be met with resistance by States, especially in view of the unwarranted benefit it would afford to only a fraction of victims. To be sure, such a measure would widen the gap between the handful of victims who eventually reach an international court (and still fewer that get a positive decision) and those who remain unable to do so. What underpins this approach is an extreme monetary paradigm that is foreign to the idea of proportionality of remedies and the goal of engendering wider human rights protection.

## **6. A world of different options**

The analysis in this chapter focused on two distinct fields: first, identifying the type of remedies afforded to individuals seizing international (quasi-) judicial bodies. And second, examining whether their implementation has been efficient in practice. On the basis of the answers discerned for these questions, a set of proposals was advanced for each body.

The first concluding observation is that the remedial schemes of these bodies have been heavily influenced by their respective constitutional texts. Naturally, this has resulted in a situation whereby the remedies ordered have taken different forms in the different jurisdictions. Of all three bodies, the HRCttee offers an anaemic list of remedial measures, mainly in terms of the specification of what States should do in order to conform to their obligations under the ICCPR. Seen from the perspective of their actual impact, remedies for enforced disappearances within this framework have little impact, if any. The list of cases still under the Follow-up procedure proves that this forum has not brought about considerable change. At best, and as far as enforced disappearances are concerned, the HRCttee serves as a stocktaking forum and as an indicator of the status of respect for international human rights law.

Conversely, the two regional courts are endowed with the capacity to have effective control over States on the issue of remedies. The ECtHR has followed a mainly compensatory model of doing justice to human rights encroachments. Although this has solidified the status of compensation as a remedial means of international human rights adjudication, it has had the unintended result of portraying compensation as a preferable means of remedy. The narrow boundaries of Article 41 ECHR

do not allow the Court to consider the social and political dynamics in which its judgments operate.<sup>722</sup> It is submitted that the impact of the Court's judgments would expand if it could order further and more direct remedial measures.

The IACtHR has developed a wide array of remedies, giving practical effect to measures that had remained in the sphere of non-binding instruments. Notwithstanding the fact that it also affords monetary compensation, usually at a higher level than its European counterpart, this Court has devised meticulous reparative schemes for enforced disappearances cases. These schemes exemplify the Court's efforts to move beyond the paradigm of individual justice to address the broader causes underlying violations and to reach wider segments of the population.<sup>723</sup>

Both courts are undergoing a period of crisis in terms of implementation of their judgments that undermines their effectiveness and legitimacy. In the previous chapter, I grappled with the consequences of fragmentation within the body of enforced disappearance case law. Nonetheless, the more pressing challenge emerging from this chapter is the implementation deficit from which these bodies suffer. In this line of analysis, it is the effectiveness of remedies that underpins the legitimacy of the human rights system rather than the diverging interpretations received by several aspects of enforced disappearances.

It is of particular concern that one of the most common measures by which states fail to abide is that of effective investigations.<sup>724</sup> Although the IACtHR has cloaked them with the status of *jus cogens*, this position is far from persuasive.<sup>725</sup> The requirement for the conduct of an effective investigation has firmer roots in the procedural aspect of several rights. Seen through the lens of "positive obligations" or "due diligence", the requirement maintains sufficient normative force to require abidance by States in default. Beyond this issue, the aforementioned implementation deficit has ramifications at various levels. Justice remains an elusive ideal for victims at the individual level, while the phenomenon of impunity is condoned. In effect, the capability of effective investigations to shed light on the particular circumstances of an enforced disappearance and to pave the way for the prosecutions and discover the fate or whereabouts of the disappeared is irreparably compromised. Thus, direct orders for an effective investigation should form part of international human rights decisions. Without

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<sup>722</sup> James Cavallaro and Stephanie Erin Brewer, "Reevaluating regional human rights litigation in the twenty-first century: The case of the Inter-American court," *American Journal of International Law* 102, no. 4 (2008): 777.

<sup>723</sup> Naomi Roht-Arriaza, "Reparations decisions and dilemmas", *Hastings international and comparative law review*. 27, no. 2 (2004): 182.

<sup>724</sup> Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law", *California Law Review* 78, no. 2 (1990): 481.

<sup>725</sup> Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", *Yale Law Journal* 100, no. 8 (1991): 2600: "[...] the comprehensive treaties should be interpreted in a manner that avoids imposing impossible obligations or duties whose discharge would prove harmful. A functional analysis of the general rule requiring prosecution of torture, extra-legal killings, and disappearances provides a principled basis for such an interpretation."

such orders, truth would remain elusive. In this connection, the next chapter discusses the right to the truth, its provenance, legal nature and content, and its conceptual and normative antithesis to amnesties.



## CHAPTER 5

### In search of justice: the right to truth and amnesties for enforced disappearance

“I’m for truth, no matter who tells it.  
I’m for justice, no matter who it’s for or against”<sup>726</sup>

#### **1. “We would like to be met with more than just words”:<sup>727</sup> Truth as a right and as a moral value**

In ancient Greek ‘alitheia’ translates to ‘truth’ and in its literal meaning, it signifies that which cannot be forgotten. ‘Truth’ survives the test of time and for this, it is passed on to the next generations. ‘Amnestia’, on the other hand, is the exact opposite: its etymology means to cast to oblivion, to wipe out from memory by conscious decision. These two notions are not only philosophically antithetical, but are also in tension within the framework of international human rights law. This chapter of the thesis is divided into two parts. The first part analyses the evolution of the right to truth in international law and seeks to charter its content and explore its relations to other rights.<sup>728</sup> It challenges the two main theoretical positions that argue for and against its existence and scope, on different grounds. It also offers an alternative option to understanding the content of this right. The second part takes issue with amnesties and their position in international human rights law. Special focus is placed on their permissibility and range of application with regard to enforced disappearance.

One of the most pervasive consequences of enforced disappearance is the agonising effect it has on a disappeared person and its family. The lack of knowledge or information of what has happened to him or her, where he or she is and the danger about his or her life, have a chilling effect on the material victim and on his or her social environment. State practice evidences that the outright refusal to provide information or the provision of misleading material has as its primary goal to conceal the truth about his or her fate or whereabouts and maximise the terrorizing effect of enforced disappearance.

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<sup>726</sup> Malcolm X, *The autobiography of Malcolm X*, 1st ed. (New York: Ballantine Books, 1992), 373.

<sup>727</sup> Ana Lucrecia Molina-Theissen, sister of the disappeared victim, quoted in: *Molina-Theissen v. Guatemala (Monitoring Compliance with Judgment)* 7 (Order of the Inter-American Court of Human Rights 2009).

<sup>728</sup> On the most recent summary of these issues, see: “Observance of the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims A/66/335” (United Nations, General Assembly, September 2, 2011).

Article 24(2) CPED enshrines, for the first time in an international human rights law instrument, the right to the truth. It provides that:

'Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.'

Beyond its powerful moral force, the express recognition of this right begs a series of questions: What is the normative core and content of this right? Is it a right inferred by other rights or is it an autonomous, self-standing entitlement? How is it related and distinguished from other human rights? Are we dealing with a justiciable right? Or are we confronted with a strong, yet merely moral, claim that is devoid of legal substance? This part intends to tackle these questions by employing normative judicial and academic parameters.

The normative parameter includes the development of the right to truth within the domain of legally binding and non-binding instruments. In this regard, the provenance of the right is traced back to specific rules of international humanitarian law that have been transposed to international human rights law. The leitmotiv for the emergence of the right to the truth has been the work of the United Nations, which mainly consists of reports and resolutions on this subject, culminating in the inclusion of the right in the body of the CPED.

The judicial parameter relates to the judgments of the IACtHR and the Views of the HRCtee. Both bodies have contributed to the development of the notion of the right to truth. As will be shown later, the case law of the IACtHR has contributed to considerable confusion surrounding this right. Nonetheless, weighted material comes from its jurisprudence, offering insightful interpretations on the contours of the right.

The academic parameter straddles the first two parameters, since the analyses and arguments by commentators rely heavily on the content of the aforementioned materials. The prevailing analytical strand supports that the right to the truth has evolved from an emerging principle to an established right, which has a concrete and distinguishable content. On the other hand, the minority view sustains that no such right exists, chiefly because the IACtHR, nor any other body for that matter, has explicitly recognised it yet.

My analysis in this chapter will seek to demonstrate that both views are flawed on different counts: the first one because, despite the insertion of the right to the truth in the text of the CPED, this right can, at best, be seen as a form of reparation, and in any case lacks the characteristics of a human rights norm. The second view, although reaching a correct outcome, in my opinion, it is not shielded from criticism because of its almost exclusive reliance on the pronouncements of the IACtHR, which are

contradictory when analysed in their entirety. Further, the argument made by those authors supporting the minority strand does not take into account recent judgments that depart from the original position taken by that Court.

## **2. The origins of the right to truth in international humanitarian law**

Additional Protocol I (AP-I) to the Geneva Conventions includes a section on missing and dead persons.<sup>729</sup> Article 32 AP-I sets the right of families to know the fate of their relatives as a general guiding principle for the actions of State Parties. The next two articles set two interrelated obligations to be discharged on the basis of this principle. First, Article 33 AP-I provides that States Parties must search for the persons who have been reported missing. Second, Article 34 AP-I requires respect for the remains of the dead and sets a two-fold obligation:

- a) to protect, maintain and facilitate access to gravesites, and
- b) to facilitate the return of the remains of the deceased.

Both sets of obligations must be discharged with a view to fulfilling the said right.

The ICRC study on the customary law nature of international humanitarian law norms supports that 'the right of families to know the fate of their relatives pre-existed the adoption of Additional Protocol I'<sup>730</sup> and that 'state practice establishes this rule as a norm of customary international law'.<sup>731</sup> It must be noted that the right of the family to know the fate of the missing person has a clearly defined scope of application. The obligations arise in the context of international and non-international armed conflicts and require *ex post facto* action by the States. Hence, the obligation arises once a person is reported missing. In this connection, States are under an obligation of means, which is to proceed to take all feasible measures to clarify the whereabouts or fate of a missing person.

The narrower interpretation of this requirement could be that States are under an obligation to provide information relating only to the whereabouts of a disappeared person if that person is alive. In such an instance, this information triggers the obligation for the protection of detainees under the relevant IHL rules.<sup>732</sup> In the event that the person is found or reported to be dead, then the second obligation described above is triggered and States must discharge their duties under Article 34 AP-I,

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<sup>729</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1977, <http://www.icrc.org/ihl.nsf/full/470?opendocument>.

<sup>730</sup> Jean-Marie Henckaerts and International Committee of the Red Cross, *Customary international humanitarian law*. (Cambridge: Cambridge University Press, 2007), 425.

<sup>731</sup> *Ibid.*, 421.

<sup>732</sup> Mainly through the third Geneva Convention [Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949].

which are to record gravesites and return the remains. Yet, it is not clear what the obligation to ‘transmit all relevant information’ encompasses.<sup>733</sup> It can be validly supported that this provision sets a minimum threshold of providing concrete and definitive information on missing persons. In other words, States could not be obliged to conduct an investigation, which would be capable of revealing the full extent of factual and surrounding circumstances in each different instance. Considering the practical difficulties arising in cases of armed conflicts and occupation that such an obligation would entail, it appears logical to set the minimum threshold at this height.

The initial transposition of the right from the context of international humanitarian law to the one of international human rights law occurred through the practice of the HRCttee and the IAComHR. The first body, while examining a communication pertaining to an enforced disappearance, linked the right of the mother of the disappeared person to know the truth with the protection afforded by Article 7 ICCPR.<sup>734</sup> The HRCttee found that this right had been violated due to the anguish and stress caused to her.<sup>735</sup> Hence, the Committee linked the lack of knowledge with the prohibition of torture or other CIDT,<sup>736</sup> though without drawing a clear line between the two latter notions, i.e. torture and CIDT.

Two years later, the IAComHR made a sweeping statement in its 1985 Annual Report, in the context of the interplay between the lack of effective investigations and amnesties in the region. It stated:

‘Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly’.<sup>737</sup>

The aforementioned two sources laid the ground for the ensuing extensive analyses and work by the United Nations and the IACtHR. In particular, they brought to the fore the individual and collective dimensions of the right. The individual aspect is related to the material victim and its relatives with the purpose of informing them on the surrounding circumstances of an enforced disappearance. The collective element assigns that right to the society and seems to introduce the idea of a collective right to search, discover and disseminate the “historical truth”. Obviously, the difference lies not only to

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<sup>733</sup> Art. 33 AP-I.

<sup>734</sup> “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

<sup>735</sup> *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981 14 (Human Rights Committee 1983).

<sup>736</sup> Par. 14: “The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.”

<sup>737</sup> Inter-American Commission on Human Rights, Annual Report 1985-1986, <http://www.cidh.org/annualrep/85.86eng/chap.5.htm>.

the right-bearers (individuals or society as a whole), but also to the type of truth to which each may have a claim.

### **3. The evolution of the right to truth**

The right to truth features in various forms in the jurisprudence of the IACtHR. At times it is analysed as the underpinning rationale of effective investigations. In some cases, the same Court has considered, similarly to the HRCttee, that the refusal to disclose information or posing impediments to its search, amounts to cruel, inhuman or degrading treatment, which is prohibited by Article 5 ACHR. A major analytical strand by the IACtHR categorises the right within the right to justice, which in turn, is the conglomerate result of the combined interpretation of Articles 8 and 25 ACHR. Equally important is the configuration of the right to the truth as a form of reparation. Another approach to the right has been through Article 13 ACHR, which provides for the freedom of thought and expression.

The IACtHR has used the aforementioned approaches either as single interpretative tools or in combination to each other. What transpires from these categorisations of the right to truth is that the Court's practice has been unable to remain either faithful to or consistent with a single systematic and integral understanding of the right to truth. Inescapably, one of the ramifications of the Court's oscillations is the considerable confusion among practitioners and academics as to the nature of the right to the truth.

#### ***An overview of the IACtHR's case law on the right to truth***

Since its celebrated *Velásquez-Rodríguez* judgment, the Court delinked the issue of punishment of perpetrators from the State's obligation 'to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains'.<sup>738</sup> Although express reference to the right to truth was only made nine years later, in *Castillo-Páez v. Peru*, it can nowadays be considered that the seed was sowed from the Court's very first merits judgment. Actually, the Court's statement is a reflection of Article 32 AP-I because, as per the humanitarian law norm itself, it requires the State to provide information either on the fate of the person or the location of the remains.

In *Castillo-Páez*, the IAComHR advanced the argument based on Article 17 ACHR<sup>739</sup> that the lack of interest in investigating the events surrounding the disappearance violated the right to the truth.

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<sup>738</sup> *Velásquez-Rodríguez v. Honduras, Series C No. 4. Merits* 181 (Inter-American Court of Human Rights 1988).

<sup>739</sup> Referring to the right to family.

This argument met with a reluctant Court, which confined itself to a laconic statement that this right was 'a concept that is being developed in doctrine and case law'.<sup>740</sup> Later, in *Bámaca-Velásquez v. Guatemala*, the Court expanded its analysis by linking the right to the truth to the suffering to which the applicant was subjected. For the Court, it clearly 'constitute[d] cruel, inhuman or degrading treatment, violating Article 5(1) and 5(2) of the Convention'.<sup>741</sup> However, the Court also went on to state that 'the right to the truth is subsumed in the right of the victim or his next-of-kin to obtain clarification of the facts'.<sup>742</sup> Three observations are called for in this respect: first, the Court recognised for the first time that the right to truth existed. Second, it refrained from providing any insights to it by assigning it within the right to obtain clarification of the facts. And third, this latter reference expanded the narrow interpretation of the norm in Article 32 AP-I. Clarification of the facts should be understood to feature as a broader obligation, encompassing not only information on the fate or whereabouts, but also information on the preceding events surrounding the enforced disappearance.

An interesting turn occurred in the reparations judgment on the same case. There, the Court made a statement that was later reiterated on other occasions that:

'The right that every person has to the truth has been developed in international human rights law and, [that it] is a means of reparation, and therefore an expectation regarding which the State must satisfy the next-of-kin of the victims and society as a whole'.<sup>743</sup>

The judgment in *Bámaca* is thus the foundational stone of the Court's stance towards the right to truth as a form of reparation born by both the next of kin and the society as a whole.

The case of *19 Tradesmen v. Colombia* is worth mentioning since the Court there linked more tightly the right to truth to the right to justice. More specifically, the Court stated:

'The right to access to justice is not exhausted by the processing of domestic proceedings, but it also ensures the right of the victim or his next-of-kin to learn the truth about what happened [...]'.<sup>744</sup>

Two sets of cases that showcase the inconsistencies of the IACtHR's approach are, on the one hand, *Blanco-Romero et al. v. Venezuela* and *Pueblo Bello Massacre v. Colombia* and, on the other, *Gomes Lund et al v. Brazil* and *Gelman v. Uruguay*. The crux of the inconsistency between these two set of cases lies in the contradictory position of the Court towards the normative foundation of the right. In the first two cases the Court rejected the argument that the right to know the truth was a separate

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<sup>740</sup> *Castillo-Páez v. Peru*, Series C No. 34. Merits 86 (Inter-American Court of Human Rights 1997).

<sup>741</sup> *Bámaca-Velásquez v. Guatemala*, Series C No. 70. Merits 165 (Inter-American Court of Human Rights 2000).

<sup>742</sup> *Ibid.*, para. 201.

<sup>743</sup> *Bámaca-Velásquez v. Guatemala*, Series C No. 91. Reparations and Costs 76 (Inter-American Court of Human Rights 2002).

<sup>744</sup> *19 Tradesmen v. Colombia*, Series C No. 109. Merits, Reparations and Costs 188 (Inter-American Court of Human Rights 2004).

right enshrined in Articles 8, 13, 25 and 1(1) ACHR. In a bold statement in *Pueblo Bello* the Court referred to ‘the so-called right to the truth’, which it understood as ‘part of the right of access to justice, as a reasonable expectation that the State must satisfy to the victims of human rights violations and to their next-of-kin, and as a form of reparation’.<sup>745</sup> It went on to reject the proposition that the right to truth is an autonomous one. Overturning this finding, a sea change to the Court’s case law occurred in two later cases, where it departed from this position.<sup>746</sup> More specifically, in *Gomes Lund and Gelman*, the Court conceded to finding a violation of Article 13 ACHR, in combination with Articles 1(1), 8 and 25 ACHR.

A separate issue that has arisen in the course of the Court’s judgments is the interplay of the right to the truth with the “historical truth” and the role of truth commissions and other mechanisms of transitional justice. In *Anzualdo*, the Court welcomed the establishment of such mechanisms that intend ‘to build and safeguard historical memory, to clarify the events and to determine institutional, social and political responsibilities in certain periods of time of a society’.<sup>747</sup> However, in the Court’s view, neither the establishment of the “historical truth” nor transitional mechanisms *per se* may be a substitute for the right to truth or the formal procedures, respectively.<sup>748</sup> These discussions take place in the broader context of the relationship of the right to truth and amnesties,<sup>749</sup> and will be dealt with in the second part of this chapter.

### ***An assessment and critique of the IACtHR’s jurisprudence***

The above brief presentation of the Court’s jurisprudence reveals the different itineraries that the Court has followed in order to reach the right to truth. As its case law currently stands, the right to the truth is configured in the following ways:

- a) as emanating from the positive obligation of States to conduct an effective investigation;
- b) as a reparation,

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<sup>745</sup> *Pueblo Bello Massacre v. Colombia*, Series C No. 140. Merits, Reparations and Costs 219 (Inter-American Court of Human Rights 2006).

<sup>746</sup> *Blanco-Romero et al v. Venezuela*, Series C No. 138. Merits, Reparations and Costs. 62 (Inter-American Court of Human Rights 2005): “The Court does not consider the right to know the truth to be a separate right enshrined in Articles 8, 13, 25 and 1(1) of the Convention, as alleged by the representatives, and, accordingly, it cannot find acceptable the State’s acknowledgement of responsibility on this point. The right to know the truth is included in the right of the victim or of the victim’s next of kin to have the relevant State authorities find out the truth of the facts that constitute the violations and establish the relevant liability through appropriate investigation and prosecution.”

<sup>747</sup> *Anzualdo-Castro v. Peru*, Series C No. 202 119 (Inter-American Court of Human Rights 2009).

<sup>748</sup> *Radilla-Pacheco v. Mexico*, Series C No. 209 179 (Inter-American Court of Human Rights 2009): “In this regard, the Court considers it appropriate to reiterate, as it has done in other cases, that the ‘historical truth’ documented in the reports and recommendations of bodies such as the National Commission, does not complete or substitute the State’s obligation to also establish the truth through judicial proceedings.”

<sup>749</sup> *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219 151–158 (Inter-American Court of Human Rights 2010).

- c) as being premised on the conglomerate effect of Articles 1(1), 8 and 25 ACHR, and following the latest turn in the jurisprudence on Article 13;
- d) as included in the right to access to justice; and,
- e) as a violation of the prohibition against cruel, degrading and inhumane treatment.

### ***Truth as a positive obligation***

Conceptualising the right to the truth as emanating from the positive obligation to conduct an effective investigation presents three distinct challenges. First, the Court does not adequately analyse how a right to the truth is derived from the State's duty to conduct an investigation. In a way, the Court seems to be reinventing the self-evident: the object and aim of each meaningful investigation is to ascertain the facts and circumstances, as well as to identify the perpetrators of an enforced disappearance. These can, of course, be captured in pursuit of the truth, but, for the creation of a new right out of it, the Court still needs to adduce convincing arguments to establish the legal links between this purpose and the birth of a new right.

Second, the Court appears to be mindful of the conceptual difficulty when it states that:

'the right to the truth is subsumed in the right of the victim or his next-of-kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention'.<sup>750</sup>

In my opinion, the Court comes full circle through this reasoning. The State obligation to investigate the violation arises already through the concomitant application of Articles 8 and 25 ACHR, which in turn make up the right to justice. Either through this interpretation, or through the ECtHR's dynamic interpretation of reading procedural obligations in substantive rights, the obligation is already sufficiently premised to have effect. Hence, an additional layer of rights is redundant.<sup>751</sup>

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<sup>750</sup> *Bámaca-Velásquez v. Guatemala*, Series C No. 70. Merits, para. 201.

<sup>751</sup> Judge Medina in two of her separate opinions questions the Court's reasoning. See: *19 Tradesmen v. Colombia*, Series C No. 109. Merits, Reparations and Costs, para. 7 and 8 of her partially dissenting opinion: "The missing step that connects Article 8 to the facts of the case is to determine the legal source of the next of kin's right to know the truth of what has happened, and to require the State to prosecute those allegedly responsible. I consider that the legal grounds for requiring a trial that seeks to establish the responsibility of the participants in the violation of specific rights, to which those affected by the violation have access, should be found, not in a provision that embodies the right to a remedy or in one of a procedural nature, but in the substantive right that has been violated, in light of the general obligation to guarantee rights, contained in Article 1(1) of the American Convention, which can only be examined in connection with a substantive right, particularly in view of the way in which that obligation has been interpreted by both this Court and other international supervisory bodies". See also: *Mapiripán Massacre v. Colombia*, Series C No. 134. Merits, Reparations and Costs, par. 6 of her concurring opinion (Inter-American Court of Human Rights 2005): "The other method, the one chosen by the Court in many cases (though in this judgment the Court omitted establishing the relation between the determination of the substantive right violation and the emergence of the right to have that violation investigated pursuant to Article 8), consists in verifying if the



Third, by its very nature, the right to the truth arises after the perpetration of an enforced disappearance. As such, it does not fit squarely in the conceptualisation of positive obligations as a set of obligations designed and applied in order to prevent human rights violations. Rather it can better be categorised under the rubric of ‘due diligence’ obligations, as proposed in chapter 3. It must also be pointed out here that the Court frames the right to truth as an obligation of result and not of means. Therefore, the standard of performance when discharging the duty to investigate in a way that is capable of leading to tangible results cannot be elevated to a right. This stands in contrast to the well-established case law, not only of this Court, but also of the two other bodies that were examined in previous chapters.

### ***Truth as a remedy***

Truth as a form of reparation refers to ‘the possibility of the victim’s next-of-kin knowing what happened to the victim and, if that be the case, the whereabouts of the victim’s mortal remains’.<sup>752</sup> Receiving the remains ‘allows the victims to be honoured, since the mortal remains of a person merit being treated with respect by their relatives, and so that the latter can bury them appropriately’.<sup>753</sup> Thus, truth features as a means for closure for the relatives. At the same time, the Court considers that ‘knowing the truth makes it easier for [a] society to look for other ways to prevent such kinds of violations in the future’.<sup>754</sup> It is useful to establish a link here with the jurisprudence of the European Court of Human Rights, which, in a different factual context, read the right to bury one’s relative as forming part of Article 8 ECHR.<sup>755</sup>

It becomes evident that both the individual and collective dimension of the right to truth is reflected in the reparative stage. In its individual dimension, the reparative character can be categorised under the general categories of satisfaction and rehabilitation. To be sure, the *Van Boven/Bassiouni* Principles, which were examined in the previous chapter, include under the measures of satisfaction the ‘[v]erification of the facts and full and public disclosure of the truth’<sup>756</sup> and ‘[t]he search for the whereabouts of the disappeared, [...] and for the bodies of those killed, and assistance in the recovery,

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rules of due process contained in Article 8 have been violated upon complying with the obligation. I do not disagree with this method, as long as it be accepted that the right to know the truth about the circumstances undergone by the victim whose right to life or personal integrity has been violated, originates in the violation of a substantive right that must be ‘determined’ by an independent and impartial court, within reasonable time. In my opinion, this makes it possible to apply Article 8, subparagraph one, wherein the general requirements with which all proceedings, whether criminal, civil or of any other nature, must comply are established”.

<sup>752</sup> *Bámaca-Velásquez v. Guatemala*, Series C No. 70. Merits, para. 76.

<sup>753</sup> *Trujillo-Oroza v. Bolivia*, Series C No. 92. Reparations and Costs 115 (Inter-American Court of Human Rights 2002).

<sup>754</sup> *Blanco-Romero et al v. Venezuela*, Series C No. 138 95 (Inter-American Court of Human Rights 2005).

<sup>755</sup> *Girard v. France (Application no. 22590/04)* 101 (European Court of Human Rights 2011).

<sup>756</sup> Principle 22(b).

identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims[...].<sup>757</sup> Although the measures of rehabilitation require the provision of medical and psychological services, it should be observed that discovering and disclosing the truth has an intrinsic rehabilitative value in and of itself. The collective aspect of truth is entwined with the guarantees of non-repetition. The Court has explicitly recognised this, as the excerpt from *Blanco-Romero* in the previous paragraph shows.

### ***Truth as emanating from a combined reading of Articles 8, 13 and 25 ACHR***

The turn that the case law of this Court took with regard to Article 13 ACHR can be explained by two reasons. Primarily, between the Court's judgments in *Blanco-Romero* and *Pueblo Bello*, on the one hand, and *Gomes Lund* and *Gelman*, on the other, intervened the judgment in *Claude Reyes v. Chile*. Although this case was totally disassociated with enforced disappearances, it marked a significant development in the interpretation of Article 13 ACHR.<sup>758</sup> The IACtHR extended the scope of application of this article so as 'to protect the right of the individual to receive such information and the positive obligation of the State to provide it' and, further, that:

'[t]he delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State'.<sup>759</sup>

Additionally to this reason, a resolution of the Assembly General (AG) of the OAS and the *Van Boven/Bassiouni* Principles partly foreshadowed the judgment in *Reyes*. The resolution referred to the right to truth and invoked in its preamble Articles 8, 13 and 25 ACHR.<sup>760</sup> This was an initial sign on the part of the AG towards including Article 13 ACHR as a legal basis for the right to truth. The Principles, on the other hand, refer to the means that States should develop in order to enable victims:

'to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations'.<sup>761</sup>

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<sup>757</sup> Principle 22(c).

<sup>758</sup> For an analysis of the case see Laurence Burgorgue-Larsen, *The Inter-American Court of Human Rights: case-law and commentary* (Oxford ;New York: Oxford University Press, 2011), 529.

<sup>759</sup> *Claude-Reyes et al. v. Chile, Series C No. 151 77* (Inter-American Court of Human Rights 2006).

<sup>760</sup> Organisation of American States, *AG/Res 2175 (XXXVI-O06) - Right to the truth*, 2006.

<sup>761</sup> Principle 24.

The latter part of this phrase is particularly relevant to the specific ACHR provision.

### ***Truth and the prohibition of torture or CDIT***

In regard to the interplay of the right to truth with the prohibition of cruel, degrading or inhuman treatment, all three human rights mechanisms that are analysed in this thesis, have maintained the same stance. In all three bodies, the lack of knowledge for the fate of the disappeared person, no matter where this is attributed, leads to a finding of a violation of the relevant right, which prohibits such treatment. However, nuances can be observed in their respective work. On the one end, the IACtHR and the HRCtee have a more advanced body of work. Although they have not explicitly recognised a right to the truth, they have referred to the right to know the truth or the fate of the disappeared person. In *Lund*, the IACtHR considered that the deprivation of access to truth constitutes a form of cruel and inhuman treatment.<sup>762</sup> Similarly, in *Quinteros* the HRCtee considered that the mother of the disappeared person had endured stress and anguish and for that reason had the right to know what had happened to her daughter.<sup>763</sup>

On the other end, the ECtHR has not acknowledged any concept that may even stand at the periphery of the right to truth, but rather has chosen to focus on the root-causes and results of the non-disclosure of truth.<sup>764</sup> The judgment in *Varnava* is exemplary of the ECtHR's approach: there, the Court bases its assessment of CIDT on the suffering and anguish relatives undergo, on the one hand, and on the 'flagrant, continuous and callous disregard' by the State of its obligation to conduct an effective investigation.<sup>765</sup> It cannot escape attention that the word "truth" appears only twice in an *amicus curiae* and that the Court does not respond to the argument made in it with respect to the right to truth.

#### **4. The right to the truth at the UN level and the CPED**

The body of work that has been generated at the UN level regarding the right to truth is characterised by two chief features: first, that it is mainly elaborated within the sphere of soft-law instruments (i.e.

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<sup>762</sup> *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil, Series C No. 219*, para. 240.

<sup>763</sup> *María del Carmen Almeida de Quinteros et al. v. Uruguay, Communication No. 107/1981*, para. 14. It should be noted, though, that this finding was not repeated in subsequent Views relating to enforced disappearance cases.

<sup>764</sup> *Aziyevy v. Russia (Application no. 77626/2001)* 102 (European Court of Human Rights 2008): "The Court observes that the question whether a member of the family of a 'disappeared person' is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation."

<sup>765</sup> *Varnava and Others v. Turkey (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) [GC] 200* (European Court of Human Rights 2009).

resolutions, annual and *ad hoc* reports) and second, that the analyses and interpretation of the relevant developments are deeply coloured by the wishful thinking of their authors. In the paragraphs that follow, I will attempt to reconstruct the main elements of the work done at the UN and offer critical remarks to it.

The right to truth has, since 1995 when the first statement was made, been categorised as a non-derogable right,<sup>766</sup> ascribed to the category of *jus cogens*,<sup>767</sup> which is strongly connected to the right to family and the right to remedy. Similarly bold statements about the autonomous,<sup>768</sup> inalienable,<sup>769</sup> imprescriptible,<sup>770</sup> absolute<sup>771</sup> and non-derogable nature of the right have been made ever since in various reports and resolutions. The individual and collective dimension of the right is also affirmed. Within the sphere of enforced disappearance, the right of families to be informed of the progress of investigations and to know the whereabouts, fate or the burial site of the disappeared person form the core of the right. With this at its core, societies (or people) have the right to the truth. Effectively, this equates to knowing the causes that led to and the conditions that surrounded the perpetration of gross violations of human rights during a certain period. The right to the truth is thus reconfigured as a collective expression of the individual's right to know.<sup>772</sup>

According to the same sources, the aim of this right is set to address multiple issues. To begin with, a primary goal is to preserve the collective memory from revisionist and negationist versions of historical events. In essence, this aim fits squarely within the framework of the guarantees of non-repetition. Conversely, societies are expected to recognise the right of victims to know the truth. This imperative obliges societies to act as facilitating actors towards the full and effective investigation of individual cases. Furthermore, gross human rights violations affect the public order in such a profound way that all members of society are enabled to take action. Simultaneously, this can also be read as a

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<sup>766</sup> *Eighth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency: corrigendum* (UN, June 26, 1995), para. 39 [Annex]; Leandro Despouy, *Report of the Special Rapporteur on the independence of judges and lawyers* (UN Commission on human rights, January 23, 2006), para. 16 and 24; WGEID, "General Comment on the Right to the Truth in Relation to Enforced Disappearances", para. 2, [http://www.ohchr.org/Documents/Issues/Disappearances/GC-right\\_to\\_the\\_truth.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf).

<sup>767</sup> Despouy, *Report of the Special Rapporteur on the independence of judges and lawyers*, para. 16 and 23.

<sup>768</sup> *Follow-up report of the Office of the United Nations High Commissioner for Human Rights on the study on the right to the truth* (Human Rights Council, June 7, 2007), para. 16; WGEID, "General Comment on the Right to the Truth in Relation to Enforced Disappearances."

<sup>769</sup> *Question of the impunity of perpetrators of violations of human rights (civil and political rights): final report prepared by Mr. L. Joinet, pursuant to Subcommission resolution 1995/35*, June 20, 1996 Principle 1; *Revised version of the principles on impunity* (United Nations, Commission on Human Rights, February 8, 2005) Principle 2; Despouy, *Report of the Special Rapporteur on the independence of judges and lawyers*, para. 22; *Study by the Office of the UN High Commissioner for Human Rights on the right to the truth* (United Nations, Commission on Human Rights, February 8, 2006), para. 4.

<sup>770</sup> *Question of the impunity of perpetrators of violations of human rights (civil and political rights): final report prepared by Mr. L. Joinet, pursuant to Subcommission resolution 1995/35* Principle 3; *Revised version of the principles on impunity* Principle 4; Despouy, *Report of the Special Rapporteur on the independence of judges and lawyers*, para. 22.

<sup>771</sup> WGEID, "General Comment on the Right to the Truth in Relation to Enforced Disappearances."

<sup>772</sup> *Question of the impunity of perpetrators of human rights violations (civil and political) - Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119* (United Nations, Commission on Human Rights, October 2, 1997), para. 17.

form of public acknowledgement of the violation that individual members have had to endure. Overall, the right to truth is tightly connected with the issues of impunity and amnesty; pursuit of truth is conducive to the eradication of impunity and overturn of amnesties.

As to the right-holders and the mechanisms to be used for the realisation of this right, the UN has set the minimum threshold to any person having a legitimate interest to vindicate it before either judicial or non-judicial bodies. This particular feature is explained by the rise and proliferation in the past two decades of transitional justice mechanisms. Essentially, truth and reconciliation commissions have been set up in many countries exiting turbulent political periods in order to deal with past violations of human rights. Acknowledging the increasing use of such mechanisms, the UN has brought them within the purview of its work.<sup>773</sup> This latter observation illustrates the way in which the right to truth has had a spill-over effect on other human rights violations. Although initially conceived as pertaining solely to enforced disappearances, nowadays the right to truth is considered to have extended its relevance and application to torture, extrajudicial executions and other situations of gross violations of human rights.

I believe that it is clearly evident from the foregoing presentation that the kernel of these soft-law instruments is the powerful moral imperative they assert. Indeed, the moral underpinning of the argument that a right to truth exists, addresses principally the rightful claim of victims to know important information relating to the perpetration of enforced disappearance. This strong moral claim drills down the fundamental core of human rights, which is nothing less than dignity. Following the path paved by the UN, it can be argued that the right to the truth features as a fundamental facet of dignity. Individuals are entitled to be treated humanely and not as objects. A specific contour of this claim is the right to know what has happened to a person subjected to enforced disappearance. Yet, no matter how alluring and persuasive on moral grounds such a claim may be, it must not escape attention that the total sum of the UN work on the right to truth does not offer convincing and conclusive proof that this right has the same features as other human rights: that is, a clearly distinguishable norm covered by the right, justiciability, precise definition of right-holders and specific mechanisms for its protection.

These deficiencies led *Nowak*, while examining the legal framework for the protection of persons from disappearances, to state that the right to the truth is a fairly vague concept in international law.<sup>774</sup> To this scholar, this vagueness constituted a gap that needed to be bridged by precise definition of the concept and its endowment it with concrete legal consequences. Interestingly, *Nowak* adopted a

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<sup>773</sup> The Human Rights Council has recently adopted the mandate for a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. *Resolution 18/7 adopted by the Human Rights Council*, 2011.

<sup>774</sup> Manfred Nowak, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46*, January 8, 2002, para. 78.

two-pronged approach to the right to truth: first, through the right to the protection of the family and second, through remedies.<sup>775</sup>

The lack of unanimity, which was also identified in *Nowak's* report, surfaced during the discussions of all sessions of the Intersessional Open-ended Working Group that was tasked to elaborate a draft convention on enforced disappearances. The *travaux préparatoires* of the CPED record the disagreements between the participating States. The main division was marked between those States (mainly Latin American countries) supporting the inclusion of the right to truth as an essential requirement<sup>776</sup> and others that expressed reservations or contentions to this.<sup>777</sup> The very existence of such a right was doubted and rather the obligation to provide all possible information under the law was considered as a meaningful provision.<sup>778</sup> The formulation of the last preambular paragraph of the CPED reflects the compromise solution that was eventually reached. It reads: 'Affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end'. However, the co-existence of the two antithetical views is not found in the main text of the CPED. There, Article 24(2) CPED does not reflect the freedom to seek, receive and impart information.

The right to truth features as the first key reservation of the United States to the CPED. They contended that the right to truth could only be read under the light of the freedom of information, as enshrined in Article 19 ICCPR.<sup>779</sup> Although the most recent General Comment on this article does not directly relate to this issue, it lends some support to this argument. The opinion of the HRCtee on the right of access to information is that:

'Article 19, paragraph 2 embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production'.<sup>780</sup>

Hence, it can be supported that Article 19 ICCPR could shed light to the interpretation of the right to truth, especially with regard to the petitions that relatives file with the purpose of clarifying the whereabouts of the disappeared person.

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<sup>775</sup> *Ibid.*, para. 80.

<sup>776</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2005/66)*, March 10, 2005, para. 104.

<sup>777</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59)*, February 23, 2004, para. 78; *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (5th Session)*, September 12, 2005, 3.

<sup>778</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2005/66)*, para. 14.

<sup>779</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2006/57)*, February 2, 2006, 48.

<sup>780</sup> Human Rights Committee, *General Comment No. 34*, July 21, 2011, para. 18.

The issue is not merely a theoretical exercise: if the right to truth is read within the context of Article 19 ICCPR, then its alleged non-derogable and absolute character can no longer be sustained because of two separate, but interlinked reasons. First, Article 19 ICCPR does not feature on the list of ICCPR articles that are not subject to derogation.<sup>781</sup> Although the freedom of opinion may not be subject to derogations,<sup>782</sup> the right of access to information is not on an equal footing in this matter. And secondly, restrictions to the scope of protection of Article 19 are allowed in principle, albeit under strict conditions. Notwithstanding the benefit that the right to the truth could receive from the interpretation of Article 19 ICCPR, sight should not be lost of the fact that the freedom of access to information is but one aspect of the right to truth. In concluding this section, I argue that a systematic interpretation of the right to truth actually gives prominence to its remedial character. In light of this approach, the argument favouring an interpretation that is consistent to Article 19 ICCPR can have only minimal effect.

### **5. The right to the truth in academic writings**

As mentioned at the beginning of this chapter, there are two main theoretical views on the right to truth. Scholars representing a Latin American approach maintain a dynamic stance by asserting the emergence of a relevant norm in international law. For them, the right to truth, albeit initially not found in any binding international law instrument, has been formed by authoritative interpretations of binding norms.<sup>783</sup> *Juan Méndez*, the most prominent exponent of this view, has repeatedly supported in his writings that this is an emerging norm (or principle), whose content requires positive action on the part of the State. The minority view is voiced by *Lawrence Burgogrué*, who rejects the existence of such a right, primarily relying on the lack of its express recognition by the IACtHR. However, this lack of recognition is not by itself a sufficiently convincing reason. In this section, I intend to discuss the two strands and seek to set my view on more solid ground.

The prevailing view considers that the right to truth arises out of the wider duty of States to respect and ensure human rights.<sup>784</sup> The authoritative interpretations of binding norms and the non-binding instruments that have been generated, mainly within the context of the UN and the Latin American regional mechanisms, are presented as suggestive of 'the emergence of something

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<sup>781</sup> According to Article 4(2) ICCPR Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 are not subject to derogation.

<sup>782</sup> Human Rights Committee, *General Comment No. 34*, para. 5.

<sup>783</sup> Juan Méndez, "The human right to truth" in *Telling the truths: truth telling and peace building in post-conflict societies*, ed. Tristan Borer and RIREC Project on Post-Accord Peace Building. (Notre Dame Ind.: University of Notre Dame Press, 2006), 116.

<sup>784</sup> Juan Méndez and Francisco Bariffi, "Right to truth - International protection", *Max Planck encyclopedia of public international law* (New York, NY :: Oxford University Press, 2008), para. 10; Jo Pasqualucci, "The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity, and the Inter-American Human Rights System," *Boston University International Law Journal* 12 (1994): 330.

approaching a customary right'.<sup>785</sup> With regard to its content, this is defined not simply as access to public records,<sup>786</sup> but as requiring positive State action in order to address five separate questions on who, why, how, where and when.<sup>787</sup> Commentators subscribing to this view have attempted to colour this right as forming part of a broader right to justice and as being grounded in the right to remedy and of access to information.<sup>788</sup> One commentator has labelled the recognition of the existence of this right as a victory of the Inter-American system of human rights.<sup>789</sup> *Dermot Groome*, who offers the most credible account in favour of the right to truth, supports that the right to truth 'derives its legal basis as an enforceable right primarily from two underlying categories of protections found in international conventions'.<sup>790</sup> These are, first, the prohibition of inhuman treatment with respect to family members for the failure to disclose the fate of a disappeared person and second, the violation of the right of access to justice for the family, in case of a failure to investigate and prosecute crimes committed against a person in custody.

Despite the moral foundation of the right to truth, the authors who support the existence of the right to truth fail to provide concrete evidence of its categorisation as a human right. The lack of theoretical substantiation is reflected in their vague formulations that the right to truth is 'indirectly and automatically respected by the conducting of investigations and prosecutions'<sup>791</sup> or that the continuous engagement of the UN in truth-telling in post-conflict situations serves as a proof of an emerging rule.<sup>792</sup> In addition, *Groome's* description of the legal basis of this right does not adduce any new and clearly distinguishable basis or characteristic for this right. To the contrary, it relies exclusively on existing obligations arising out of other specific human rights to support his position. For this reason, it merely constitutes a superfluous addition of a further "right".

In my view, the ascertainment of the existence of a right to truth, or even of an emerging norm, is less clear and remains unconvincing for a series of reasons. Firstly, because the consistent reference to non-binding material as a major source of legitimacy for such a claim cannot stand in par with other human rights, e.g. the prohibition of torture, the right to life etc. In fact, this type of argumentation tends

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<sup>785</sup> Yasmin Naqvi, "The right to the truth in international law : fact or fiction?" *International review of the Red Cross* (2006): 267.

<sup>786</sup> Méndez and Bariffi, "Right to truth - International protection", 3.

<sup>787</sup> Juan Méndez, "An emerging 'right to truth': Latin-American contributions" in *Legal institutions and collective memories*, ed. Susanne Karstedt (Oxford ;;Portland Or.: Hart Pub., 2009), 55.

<sup>788</sup> Thomas Antkowiak, "Truth as right and remedy in international human rights experience", *Michigan journal of international law*. 23, no. 4 (2002): 994.

<sup>789</sup> Francisco Álvaro, "*Efecto reflejo*": *la práctica judicial en relación con el derecho a la verdad en la jurisprudencia de la corte interamericana de derechos humanos* (Pontificia Universidad Javeriana, 2007), 148.

<sup>790</sup> Dermot Groome, "The Right to Truth in the Fight Against Impunity", *Berkeley journal of international law* 29, no. 1 (2011): 103.

<sup>791</sup> Álvaro, "*Efecto reflejo*", 142.

<sup>792</sup> Méndez, "The human right to truth", 119.



to become circular and self-invoking. Second, the requirement for the clarification of fundamental questions on who was the perpetrator, why, when and how did a violation took place already fall under the requirement for and scope of an effective investigation. Defining these questions as the content of the right to truth is tantamount to mere renaming of an existing obligation, which adds no value. Even the timid acknowledgment that prosecutions<sup>793</sup> or transitional justice mechanisms can serve as conclusive evidence for the existence of a new right ignores that both these categories have their own dynamics and concrete meaning within their respective systems, wherein they are self-sustained. The same, however, cannot be said for the sort of argumentation that is attempted from the proponents of the right to truth.

From a dissenting angle, *Lawrence Burgorgue* has observed that the IACtHR has not explicitly recognised the right to truth and that it does not constitute a separate right.<sup>794</sup> Her analysis relies exclusively on the pronouncements of the Court and devotes much of her attention to the interplay of Article 1(1), 8 and 25 ACHR, which relate to the obligation for conducting an effective investigation. *Burgorgue* considers that the Court had ‘rejected once and for all the link the Inter-American Commission wished to establish between the right to the truth and the right to information’ (Article 13 ACHR).<sup>795</sup> While I share *Burgorgue*’s conclusion on the non-existence of the right, I disagree with the uncritical way that she accepts the IACtHR’s case law on this particular issue. The turn that the case law took in *Gomes Lund* and *Gelman* with regard to Article 13 ACHR is not the only rebuff to her sweeping ‘once and for all’ statement. What is crucially unsubstantiated in her position is a fully articulated argument about the ontology of the said right. Mere reliance on the Court’s pronouncements is surely not the only criterion to that effect.

### ***The right to truth in the CPED***

Beyond the three parameters that have been analysed in this chapter, it is important to examine the right to truth within the boundaries of the CPED. This right appears under Article 24 CPED, whose seven subparagraphs address three main issues: victim capacity; reparative measures and; freedom to form and participate in organisations and associations that have enforced disappearance and their ramifications as their centre of activity. Article 24(2) CPED includes, for the first time in an international human rights instrument, the right to truth. Its content is specified in States’ obligation to take

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<sup>793</sup> Juan Méndez, “The right to truth” in *Reining in impunity for international crimes and serious violations of fundamental human rights: proceedings of the Siracusa conference, 17-21 September 1998*, ed. Christopher Joyner, International Association of Penal Law., and M. Cherif Bassiouni (Toulouse: Association internationale de droit pénal ;Eres, 1998), 276.

<sup>794</sup> *Burgorgue-Larsen, The Inter-American Court of Human Rights*, 700.

<sup>795</sup> *Ibid.*, 704.

appropriate measures in order to provide information regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. The CPED does not add anything new to the content of the right to truth. The three elements comprising its content are already covered by the positive obligations of States. Read in this way, Article 24(2) CPED is, at best, a codification of already existing obligations that are founded mainly in the right to life and the prohibition of CIDT.

With regard to the right holders, the CPED creates a category of victims that could potentially have far-reaching ramifications. Beyond the material victim, 'any individual who has suffered harm as the direct result of an enforced disappearance'<sup>796</sup> may be considered as a victim, too. The consequences of this formulation remain to be seen in the practice of the CPED Committee. It will be interesting to see whether this Committee will broaden the circle of persons who could be considered as victims beyond the threshold of the IACtHR, which as I have demonstrated in previous chapters, has maintained the more advanced position on this issue.

A systematic and contextual interpretation of Article 24 CPED proves that the right to truth is primarily embedded in the remedial scheme, which is set up by the CPED. The right to truth is found in the same article where the general obligation to provide reparation is also found, together with the enumeration of the different forms of reparations under this convention.<sup>797</sup> This determinatively colors the right to truth as having a distinctively remedial character.

## **6. Final remarks on the right to truth**

In the foregoing pages I have attempted to provide an analysis of the right to truth through different aspects and submit critical observations with regard to its existence and normative scope. As the case law of the Inter-American Court of Human Rights best illustrates, the right to truth does not exist as such. Although the majority of commentators advocate in favour of its existence and despite its entrenchment in the body of the CPED, it is my view that the right to truth is not an actual a right, akin to other human rights.

My main objections against its inclusion in the taxonomy of human rights revolve around the following themes: lack of distinct content, vague normative scope and enforceability. The content and normative scope which other scholars have attempted to assign to the right, have already been

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<sup>796</sup> Art. 24(1) CPED.

<sup>797</sup> These are: compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. Conspicuously, these coincide with the *Van Boven/Bassiouni* principles.

elaborated by international bodies, especially through the positive obligations incumbent upon States with regard to the right to life and the prohibition of CIDT. What the majority of the theory argues is the birth of a new right out of the existing ones, but without a persuasive account of the new and uncovered area or norm that needs to be covered or protected. Without a cogent framework, the support of this right leads to a rights-inflation phenomenon. In my opinion, truth can, at best, be considered as a meta-value, which is both diffused within the system of human rights law and as a moral imperative worth pursuing. As such, truth features as the opposing point of measures that seek to conceal or hinder it. One set of such measures is amnesties. Their analysis and compatibility with human rights law and the prohibition of enforced disappearance is examined in the second part of this chapter.

## **7. Amnesties for human rights violations**

Following the fall of authoritarian or totalitarian regimes and the wave of democratisation that has swept the globe in the past three decades, the fight against impunity has been on the rise predominantly due to the concerted campaigns by human rights NGOs. It is presumably their position that often leads to the commonly held position that amnesties are prohibited by international law.<sup>798</sup> Synchronously, the debate exceeds the boundaries of the strictly legal discourse and provides new ground for interdisciplinary analyses to the issue. The debate on the permissibility of amnesties under international law, and especially human rights law, is more often than not held against the backdrop of the “truth vs. justice” conundrum.<sup>799</sup>

This dilemma encapsulates the challenges facing States in the course of transitions towards restoring democratic governance.<sup>800</sup> Contemporary history is replete with civil wars coming to an end, dictators ceding power to civil governments and international conflicts creating new states of affairs.<sup>801</sup> On many such occasions, amnesties have played a role and it is reasonable to expect that they will

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<sup>798</sup> Louise Mallinder, “Exploring the Practice of States in Introducing Amnesties” (presented at the Building a future on peace and justice, Nuremberg, 2007), 1; Ronald Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?”, *Virginia Journal of International Law* 43 (2002): 175; John Dugard, “Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?”, *Leiden Journal of International Law* 12, no. 4 (December 1, 1999): 1002.

<sup>799</sup> Indicatively, Mark Kersten, “The Fallacy of Sequencing Peace and Justice”, *Opinio Juris*, September 29, 2011, [http://opiniojuris.org/2011/09/29/the-fallacy-of-sequencing-peace-and-justice/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29](http://opiniojuris.org/2011/09/29/the-fallacy-of-sequencing-peace-and-justice/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29).

<sup>800</sup> Mallinder, “Exploring the Practice of States in Introducing Amnesties”, 22: “Whether a state includes or excludes international crimes from an amnesty often seems to be influenced by political concerns, rather than legal absolutes.”

<sup>801</sup> By way of recent examples, see: Human Rights Watch, *Adding Insult to Injury - Continued impunity for wartime abuses in Nepal*, December 1, 2011, <http://www.hrw.org/reports/2011/12/01/adding-insult-injury-0>; Justice and Reconciliation Project, “To Pardon or to Punish? Current Perceptions and Opinions on Uganda’s Amnesty in Acholi-land | Justice and Reconciliation Project”, December 15, 2011, <http://justiceandreconciliation.com/2011/12/to-pardon-or-to-punish-current-perceptions-and-opinions-on-uganda%E2%80%99s-amnesty-in-acholi-land/>.

continue to play a significant part in shaping the future of newly established States or governments.<sup>802</sup> Beyond this dilemma, legal issues revolving around amnesties are often dovetailed with adjacent areas of law, such as military jurisdiction for human rights violations; permissive or mandatory universal jurisdiction; prescription of or statute of limitations for human rights violations and; the bringing into effect of transitional justice mechanisms, particularly in the form of truth and reconciliation commissions.<sup>803</sup>

“Impunity” and “accountability” are key concepts when discussing amnesties. Often these three concepts are conflated and the lines delineating their distinct terrains are blurred. One reason contributing to the vagueness surrounding them is the fact that international law has not elaborated a specific vocabulary to elucidate them, but has only dealt with them in an indirect, if not incidental, way.

An analysis and understanding of these concepts is premised on the underlying vision of justice that one adopts. In this connection, there are two competing strands in theory, espousing different visions of justice that are broadly defined as “retributive”<sup>804</sup> and “restorative”.<sup>805</sup> McEvoy succinctly describes these competing visions against the background of amnesties in the following words:

‘In an environment where politically constructed notions of ‘pragmatism’ and related offshoots such as reconciliation are often viewed as slippery bywords for impunity, ‘human rights as retribution’ provides an understandably comforting terra firma for many lawyers’.<sup>806</sup>

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<sup>802</sup> Louise Mallinder, “Can Amnesties and International Justice be Reconciled?”, *International Journal of Transitional Justice* 1, no. 2 (2007): 209– 210: “since the end of World War Two, it appears that over 420 amnesty processes have been introduced during this period [...] This shows that amnesties have continued to be a political reality despite international efforts to combat impunity” .

<sup>803</sup> From a burgeoning literature on this subject, see Kai Ambos, Judith Large, and Marieke Wierda, eds., *Building a Future on Peace and Justice - Studies on Transitional Justice, Peace and Development - The Nuremberg Declaration on Peace and Justice* (Springer, 2009); Priscilla Hayner, *Unspeakable truths*, 2nd ed. (Routledge, 2011), especially pages 19–75; Ruti Teitel, *Transitional Justice* (Oxford University Press, 2000).

<sup>804</sup> Carlos Nino, “The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina”, *Yale Law Journal* 100, no. 8 (1991): 2620; Geoffrey Robertson, *Crimes against humanity: the struggle for global justice* (New York: New Press, 2000), 264: “Prosecution is the only real means of retribution, and certainly the only process which offers any hope of deterring such crimes in the future”; Diane Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime”, *Yale Law Journal* 100, no. 8 (1991): 2542; M. Cherif Bassiouni, “Combating impunity for international crimes”, *University of Colorado Law Review* 71 (2000): 410; Peer Stolle and Tobias Singelstein, “On the Aims and Actual Consequences of International Prosecution of Human Rights Crimes” in *International Prosecution of Human Rights Crimes*, ed. Wolfgang Kaleck et al. (Springer, 2007), 237 et seq.; Graham Blewitt, “The Importance of a Retributive Approach to Justice” in *The Legacy of Nuremberg: civilising influence or institutionalised vengeance*, ed. David Blumenthal and Timothy McCormack (Martinus Nijhoff Publishers, 2008), 39 et seq.

<sup>805</sup> Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law”, 191; Charles Villa-Vicencio, “Why perpetrators should not always be prosecuted: where the international criminal court and truth commissions meet”, *Emory Law Journal* 49 (2000): 214; Charles Villa-Vicencio, “Restorative justice” in *Pieces of the puzzle - Keywords on Reconciliation and Transitional Justice*, ed. Charles Villa-Vicencio and Erik Doxdrader (Institute for Justice and Reconciliation, 2004), 33.

<sup>806</sup> Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice”, *Journal of Law and Society* 34, no. 4 (December 1, 2007): 420–1.

For the purposes of this thesis “amnesty” is understood as a *de facto* or *de jure* measure of general application, which is aimed at shielding its beneficiaries from prosecution or exonerating them from the prospect of punishment or sanction.<sup>807</sup> The latter situation should be differentiated from “pardon”, which effectively relates to the lifting or annulment of a *previously* imposed punishment. Flowing from this, “impunity” is understood as a situation where no effective and commensurate punishment or sanction is imposed or eventually served by the persons found guilty or considered to be responsible for human rights violations.<sup>808</sup> “Accountability” should be seen as a notion broad enough to include public answerability of a person for his/her conduct in all possible forms, be they legally prescribed or customarily followed, irrespective of the formal and established (or not) procedure by which it is delivered.<sup>809</sup>

Depending on the particular features of an amnesty, a general typology includes the following characteristics:

- 1) *ratione personae*: amnesties designed to be applied in respect of defined classes of persons;
- 2) *ratione materiae*: amnesties designed to be applied in respect of defined categories of illegal conduct;
- 3) temporal force: amnesties designed to apply for a predetermined period of time and;
- 4) conditionality: amnesties designed to include or not conditions for an individual to invoke and benefit from them.

Expectedly, an amnesty may fall concurrently under different categories of the aforementioned typology. Taken together with the diverse factual setting in each different State, it is understood that

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<sup>807</sup> Cf. the definitions suggested by other authors: Andreas O’Shea, *Amnesty for crime in international law and practice* (The Hague ;,New York: Kluwer Law International, 2004), 1–2: “immunity in law from either criminal or civil legal consequences, or from both, for wrongs committed in the past in a political context” and Ben Chigara, *Amnesty in international law : the legality under international law of national amnesty laws* (Harlow: Longman, 2002), 1–2, who defines amnesties thus: “laws [that] purport to extinguish legal liability of agents of a prior regime alleged to have violated basic human rights of individuals”. Also, Faustin Ntoubandi, *Amnesty for Crimes against Humanity under International Law* (Martinus Nijhoff, 2007), 9: “It is an act of sovereign power designed to apply the principle of tabula rasa to past offences, usually committed against the State, in order to end proceedings already initiated or that are to be initiated, or verdicts that have already been pronounced”.

<sup>808</sup> Cf. Christopher Joyner, “Redressing impunity for human rights violations : the Universal Declaration and the search for accountability,” *Denver journal of international law and policy*. 26(4) Summer 1998 : 591-624 (1998): 595–6: “Impunity, then, means exemption or freedom from punishment and connotes the lack of effective remedies for victims of crimes. Within this context of human rights law, impunity implies the lack of or failure to apply remedies for victims of human rights violations”; Gwen Young, “Amnesty and accountability,” *U.C. Davis law review*. 35, no. 2 (2002), 433: “Related to, but distinct from amnesty, is impunity. Impunity is the idea that an individual is immune from prosecution.”

<sup>809</sup> Louise Mallinder, “Rethinking amnesties: Atrocity, accountability and impunity in post-conflict societies”, *Twenty-First Century Society* 6, no. 1 (2011), 19: “However, the interdisciplinary literature on accountability reviewed in this paper points towards the acceptance of a pluralistic approach to accountability that focuses on evaluating whether individual accountability mechanisms deliver the core elements of answerability and enforcement, rather than prescribing a ‘one-size-fits all’ approach to dealing with past crimes in transitional societies”; M. Cherif Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability”, *Law and Contemporary Problems* 59, no. 4 (1996), 18–19: “Accountability measures fall into three categories: truth, justice and redress. [...] Accountability measures that achieve justice range from the prosecution of all potential violators to the establishment of the truth.”

every situation is bound to bear its own distinct characteristics.<sup>810</sup> The purpose of this part of the thesis is not to provide a full account of these situations,<sup>811</sup> but focus on the interplay between amnesties and enforced disappearance. Actual State practice evidences that amnesties have been at times afforded for serious human rights violations including enforced disappearance, and at others not.<sup>812</sup> For example, Algeria enacted an amnesty, which included enforced disappearance under its material scope,<sup>813</sup> whereas Guatemala had chosen to exclude it from the scope of its own amnesty measures.<sup>814</sup> And furthermore, amnesties have been afforded in various other settings for other serious human rights violations, international crimes, even crimes against humanity.<sup>815</sup> Indeed, practice is so diverse that each State situation is a hybrid problem in itself, which is in turn suggestive of a different applicable law in each case.<sup>816</sup> Inevitably, this adds up to the prevailing vagueness in the field, which is mainly due to the uneven development of the law on amnesties in the judicial practice, on the one hand, and State practice and binding international instruments, on the other.

### ***Amnesties: the current academic debate***

Before examining the practice of judicial organs and human rights bodies with regard to amnesties, it would be useful to present the state of the current academic debate on the same subject. Rehearsing the main arguments will allow me to locate the principal differences and examine if, and under which conditions, amnesties may be permissible or relevant for enforced disappearances.

Observers rejecting amnesties employ as their main argument against their legality the requirement to prosecute found either in positive or customary law.<sup>817</sup> Under certain treaties, prosecution is an explicit requirement that cannot be evaded or rendered meaningless through the

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<sup>810</sup> Cf. Mark Freeman, *Necessary evils* (Cambridge ;;New York: Cambridge University Press, 2009), 13. However, *Freeman* believes that it is nonsensical to compare the different amnesties.

<sup>811</sup> For an excellent analysis, see Louise Mallinder, *Amnesty, human rights and political transitions: bridging the peace and justice divide* (Oxford ;;Portland Or.: Hart, 2008).

<sup>812</sup> For a comprehensive catalogue of truth commissions, their mandates and subsequent developments (prosecutions etc.), see "Truth Commission Digital Collection | United States Institute of Peace", <http://www.usip.org/publications/truth-commission-digital-collection>.

<sup>813</sup> "UNHCR | Refworld | Algeria: The Charter for Peace and National Reconciliation and the evolution of the violence in Algeria", <http://www.unhcr.org/refworld/docid/46fb72f6a.html>.

<sup>814</sup> See the sources cited in: Charles Trumbull, "Giving Amnesties a Second Chance", *Berkeley journal of international law* 25, no. 2 (2007): 297.

<sup>815</sup> It is often missed that South Africa is a prominent case of this category.

<sup>816</sup> Louise Mallinder, "Amnesties" in *Routledge Handbook of International Criminal Law*, ed. William Schabas and Nadia Bernaz (Routledge, 2011), 430.

<sup>817</sup> The most oft-cited article in this respect is by Orentlicher, "Settling Accounts", 2540; John Dugard, "Is the truth and reconciliation process compatible with international law? An unanswered question", *South African Journal on Human Rights* 13 (1997): 262–4; Naomi Roht-Arriaza, ed., *Impunity and human rights in international law and practice* (Oxford University Press, 1995).

enactment of amnesties.<sup>818</sup> Alternatively, the claim is that the state of customary law has reached a level of development that a norm requiring prosecution has crystallised.<sup>819</sup>

Supplementary to this, observers invoke other bases in support of their view: the right of victims to remedy, the explicit investigation requirement in some treaties and judicial practice, the prohibition of statutory limitations for crimes against humanity and the non-derogability of certain human rights are, in their opinion, sufficient enough to present a water-tight claim for dismissing amnesties.<sup>820</sup> According to Orakhelashvili 'if a substantive prohibition is part of *jus cogens* and consequential duties are integral to it, then these consequential duties are also peremptory'.<sup>821</sup> A moderate view accepts that it would not be feasible to pursue prosecutions against all alleged perpetrators of human rights violations. Rather, selective<sup>822</sup> and gradual<sup>823</sup> prosecutions could be said to both fulfil the requirements of international law and to accommodate the exigencies of political reality.<sup>824</sup>

On the other side of the spectrum, academics sustain that carving out individualised and conditional amnesties,<sup>825</sup> coupled with transitional justice mechanisms, which can deliver broad and effective remedies and address the root-causes that led to the initial human rights violations, must be an available option.<sup>826</sup> Typically, proponents of this view question the customary law basis of the duty to prosecute.<sup>827</sup> Their main counterargument derives from reality itself: the enactment of numerous

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<sup>818</sup> Typically, this refers to the Genocide Convention and the Convention against Torture. See, Lisa Laplante, "Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes", *Virginia Journal of International Law* 49, no. 4 (2009): 941.

<sup>819</sup> See the references in Trumbull, "Giving Amnesties a Second Chance", 285.

<sup>820</sup> See also, Slye, "The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law" 182: "There are three major international law arguments made against amnesties. First, it is argued that amnesties violate well-established principles of international law that obligate a state to prosecute individuals responsible for certain gross violations of human rights. [...] Second, it is argued that amnesties violate a victim's fundamental rights guaranteed under international law. [...] Third, it is argued that amnesties undercut efforts to establish a stable democracy that honors human rights and the rule of law."

<sup>821</sup> Alexander Orakhelashvili, *Peremptory norms in international law* (Oxford ; New York: Oxford University Press, 2006), 319.

<sup>822</sup> Orentlicher, "Settling Accounts", 2599.

<sup>823</sup> Gerard Quinn, "Will the rule of law end? Challenging grants of amnesty for the human rights violations of a prior regime? Chile's new model", *Fordham Law Review* 62 (February 1994): 907.

<sup>824</sup> However, selectivity has been criticised as discredited because of its discriminatory nature. See, Juan Méndez, "Accountability for Past Abuses", *Human Rights Quarterly* 19, no. 2 (1997): 274.

<sup>825</sup> Louise Mallinder, "The Role of Amnesties in Conflict Transformation", March 11, 2009, 14, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1375048](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375048); Dugard, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?", 1012.

<sup>826</sup> Robert Weiner, "Trying to make ends meet: reconciling the law and practice of human rights amnesties", *St. Mary's Law Journal* 26 (95 1994): 871; Mallinder, "Rethinking amnesties", 8; Stephan Landsman, "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions", *Law and Contemporary Problems* 59, no. 4 (1996): 89; William Burke-White, "Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation", *Harvard international law journal*. 42, no. 2 (2001): 468.

<sup>827</sup> Although not squarely falling under this category, Dugard offers a persuasive account on the matter. See, Dugard, "Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?", 1003–4; Helmut Gropengiesser, "Amnesties and the Rome Statute of the International Criminal Court", *International Criminal Law Review* 5, no. 2 (June 1, 2005): 278; Dwight

amnesties around the world suggests that States have not accepted ceding their prerogative to issue them<sup>828</sup> and thus no customary rule can be discerned,<sup>829</sup> but have only assumed such obligation in clearly defined and selected situations.<sup>830</sup> To be sure, in various negotiations of multilateral treaties where amnesties were at issue, States did not agree on their prohibition, because no consensus was achieved on their legal categorisation under international law.<sup>831</sup>

The supporters of the permissibility of amnesties under international law have suggested several criteria against which amnesties should be checked in order to be legally accepted and realistically functional. Conditional amnesties should be democratically endorsed;<sup>832</sup> they should leave serious crimes outside their scope;<sup>833</sup> they should also secure public accountability and should be matched with real and effective reparative measures.<sup>834</sup> Essentially, issuing amnesties should not be a stringent checklist-exercise or a conceptual straightjacket into which all country situations ought to fit.<sup>835</sup> On the contrary, a framework or minimum criteria and available options should be in the amnesty-toolkit of States to use depending on the surrounding circumstances.

One of the most preferred tools in this regard is truth and reconciliation commission, establishment of which has been on the rise for several decades. Reflecting the general approach to amnesties of setting a general operational framework, the creation and operation of these commissions conforms to no pre-fixed rules. Rather, the name lends itself as a shell-notion to be used according to diverse needs and aims. Truth commissions are said to offer considerable advantages to prosecutions.<sup>836</sup> First, they can reach broader layers of society and not deal only with specific

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Newman, "The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem", *American University international law review*. 20, no. 2 (2004): 314.

<sup>828</sup> Elizabeth King, "Amnesties in a Time of Transition", *The George Washington international law review*. 41, no. 3 (2009): 605; Michael Scharf, "Swapping Amnesty for Peace: Was There A Duty to Prosecute International Crimes in Haiti?", *Texas International Law Journal* 31, no. 1 (1996): 40.

<sup>829</sup> Mallinder, "Can Amnesties and International Justice be Reconciled?" 214.

<sup>830</sup> Williams attempts to restate the question by saying that: "It is also possible that the rule emerging is not a rule requiring prosecution, or prohibiting amnesty, but rather a rule that precludes impunity". See, Sarah Williams, "Amnesties in International Law: The Experience of the Special Court for Sierra Leone", *Human Rights Law Review* 5, no. 2 (2005): 292.

<sup>831</sup> Freeman, *Necessary evils*, 55–56.

<sup>832</sup> Mallinder, "Can Amnesties and International Justice be Reconciled?", 226.

<sup>833</sup> King, "Amnesties in a Time of Transition", 582.

<sup>834</sup> *Ibid.*, 615.

<sup>835</sup> Ratner maintains though that: "The very state practice that casts doubt on the duty of prosecution does suggest that states are increasingly accepting two other forms of accountability: (1) that states should not completely bury the crimes of the past and should reveal the truth about the role of organizations - and at times, individuals - in the crimes; and (2) that at least some of those who committed such crimes should face some form of sanction", in Steven Ratner, "New Democracies, Old Atrocities: An Inquiry in International Law", *The Georgetown law journal*. 87, no. 3 (1999): 730.

<sup>836</sup> Neil Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights" *Law and Contemporary Problems* 59, no. 4 (1996): 141. Orentlicher admits that: "If societies that have descended into the abyss of inhumanity bear a special burden of reckoning with their past, the work of highly respected truth commissions can facilitate a broader and more complex understanding of the machinery of mass atrocity than the circumscribed verdict of a criminal proceeding can do". See, Diane Orentlicher, "'Settling Accounts' Revisited: Reconciling



individuals. Second, if properly endowed, they can devise remedial measures to address the underlying causes of human rights violations to the benefit of not solely the victims, but society at large. Third, they can offer an officially sanctioned truth and uncover the “historical truth” as a form of acknowledgment to the victims’ suffering and as a barrier to revisionism and repetition of violations. Nevertheless, the use of transitional justice mechanisms has not gone unquestioned.<sup>837</sup>

### ***International practice and jurisprudence on amnesties***

So what does the practice of international bodies have to say about amnesties? The human rights treaties that have been central to the analysis presented in this thesis are silent on the issue as are the rest of the core universal human rights treaties. Scholars have attempted to discern interpretative principles from their texts, especially through explicit prosecution or investigation provisions, the “right to remedy” provisions, the general obligation to ensure the effective realisation of the protection afforded and the *aut dedere aut judicare* requirement found in certain treaties and conventions. Also, their respective treaty bodies have attempted to fill this vacuum through their practice. In the following paragraphs, I embark on a brief recapitulation of their pronouncements, views and statements.

#### **Human Rights Committee**

General Comment No. 20 moves beyond prevention language to require penal provisions to suppress torture or CIDT. The HRCtee considers that a combined reading of Articles 7 and 2(3) ICCPR provides the basis for complaints about ill-treatment to be investigated, for those found guilty to be held responsible, and for the alleged victims to have effective remedies at their disposal. More importantly, this treaty body, noting the grant of amnesties in certain States, has stated that:

‘Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible’.<sup>838</sup>

The HRCtee has affirmed this stance in *Hugo Rodríguez v. Uruguay*, where it stated that:

‘[A]mnesties for gross violations of human rights [...] are incompatible with the obligations of the State party under the Covenant. [...] The adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the

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Global Norms with Local Agency”, *International Journal of Transitional Justice* 1, no. 1 (2007): 16. For a less academic and more empirical view, see Desmond Tutu, *No future without forgiveness* (Doubleday, 1999).

<sup>837</sup> Robertson, *Crimes against humanity*, 288; Bassiouni, “Searching for Peace and Achieving Justice”, 20.

<sup>838</sup> *General Comment No. 20* (Human Rights Committee, 1992), para. 15; The ECtHR quoted the HRCtee on this point in *Ely Ould Dah v. France* (*Application no. 13113/03*) [*admissibility decision*] (European Court of Human Rights 2009).

State party from discharging its responsibility to provide effective remedies to the victims of those abuses. [...] In adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations'.<sup>839</sup>

Observers have attempted to decipher the meaning of the phrase “amnesties are generally incompatible”, as employed in the General Comment cited above.<sup>840</sup> This phrasing was also adopted in the Princeton Principles, due to the inability of academics to reach consensus on whether or not the ban on amnesties under international law was absolute.<sup>841</sup> In a subsequent case, the HRCtee was clearer in stating that Peru was under an obligation to provide the victim and the author with an effective remedy. It also urged for a proper investigation into the disappearance and for the bringing to justice of ‘those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary’.<sup>842</sup>

Of equal importance is General Comment No. 31, where the Committee expresses its concern about the problem of impunity with specific reference to torture, summary and arbitrary killing and enforced disappearance. For the Committee, ‘failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant’. It further concluded that:

‘where public officials or State agents have committed violations of the Covenant rights [...] the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties [...] and prior legal immunities and indemnities’.<sup>843</sup>

In a similar fashion, the CAT Committee has stated in its General Comment No. 2 that it:

‘considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability’.<sup>844</sup>

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<sup>839</sup> “Rodríguez v. Uruguay, Communication No. 322/1988, 12.4 (Human Rights Committee 1994).

<sup>840</sup> King, “Amnesties in a Time of Transition”, 609; Trumbull, “Giving Amnesties a Second Chance”, 299: “First, the use of the word ‘generally’ leaves open the possibility that some amnesties, even amnesties that are extended to jus cogens crimes, may be legitimate”; Michael Scharf, “The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes”, *Law and Contemporary Problems* 59, no. 4 (1996), 50: “By stating that amnesties “are generally incompatible,” the Committee implied that some amnesties—for example, those that are accompanied by investigations to document abuses and identify perpetrators, purging the perpetrators from positions of authority, and providing victim compensation—would be acceptable.”

<sup>841</sup> “The Princeton Principles on Universal Jurisdiction”, <http://www1.umn.edu/humanrts/instree/princeton.html>. Principle 7 on amnesties provides: “1. Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in Principle 2(1). 2. The exercise of universal jurisdiction with respect to serious crimes under international law as specified in Principle 2(1) shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state”.

<sup>842</sup> *Celis Laureano v. Peru*, Communication No. 540/1993 10 (Human Rights Committee 1996).

<sup>843</sup> Human Rights Committee, “General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, May 26, 2004, para. 18.

<sup>844</sup> *General Comment no.2 - Implementation of Article 2 by States parties* (United Nations, January 24, 2008), para. 5.

Similar findings were reiterated in recent annual reports by the same body<sup>845</sup> and were echoed in a recent report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.<sup>846</sup>

### Inter-American human rights system

The Inter-American human rights system has dealt more extensively with this issue, due to the pervasive use of amnesty measures in States within its jurisdiction. One of the first instances of amnesty measures was made in the mid-1980's by the IAComHR while addressing the issue of the investigation of human rights violations under previous governments. In one of its Annual Reports the Commission considered that:

'Only the appropriate democratic institutions—usually the legislature—with the participation of all the representative sectors, are the only ones called upon to determine whether or not to decree an amnesty of the scope thereof, while amnesties decreed previously by those responsible for the violations has no juridical validity'.<sup>847</sup>

These pronouncements were later vested with binding authority through the case law of the IACtHR, particularly in the cases of *Barrios Altos v. Peru*, *Almonacid-Arellano et al v. Chile*, *La Cantuta v. Peru*, *Lund v. Brazil* and *Gelman v. Uruguay*. In *Barrios Altos*, the Court was confronted with a set of amnesty laws that was a self-serving one and exonerated members of the army, the police force and civilians from responsibility for violations of human rights or participation in such violations from 1980 to 1995. With reference to the typology presented earlier, this amnesty fell under the first three categories, while the element of conditionality was not present. Despite the acknowledgment of responsibility on the part of the State of Peru, the Court went on to analyse the incompatibility of amnesty laws with the ACHR and it was adamant in stating that:

'[A]ll amnesty provisions, provisions on prescription and the establishment of measures

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<sup>845</sup> *Report of the Committee against Torture*, A/64/44 (United Nations, 2009), para. 84: "The Committee recommends that, in keeping with its earlier recommendations, the State party abrogate the Amnesty Decree-Law. The Committee draws the State party's attention to paragraph 5 of its general comment No. 2 on the implementation of article 2 of the Convention by States parties, wherein it considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability"; *Report of the Committee against Torture* (United Nations, ), para. 58: "The State party should ensure that acts of torture, which also include enforced disappearances, are not offences subject to amnesty"; *Report of the Committee against Torture* (United Nations, ), 365: "The Committee has itself expressed concern at the impunity of State officials since the Charter was adopted, as it provides for amnesty from prosecution for State officials and prohibits any prosecution for acts committed by those State officials in the context of the national tragedy."

<sup>846</sup> *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (United Nations, February 5, 2010), para. 175: "In my experience, the prevalence of impunity is the most common obstacle to the realisation of the right to a remedy and adequate reparation of torture victims. I am particularly concerned about laws and other measures that limit the legal responsibility of State officials for torture and other forms of ill-treatment of detainees, such as regulations on indemnities for police officers or the granting of amnesties."

<sup>847</sup> *Annual Report of the Inter-American Commission on Human Rights*, September 26, 1986, chap. V.

designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law'.<sup>848</sup>

The Court considered that the amnesty laws in question violated Articles 1(1), 2, 8 and 25 ACHR in that they impaired individuals from having access to justice and perpetuated impunity within Peru due to the lack of an investigation and prevention from obtaining reparation.<sup>849</sup> Notwithstanding the fact that the Court did state that the amnesty laws prevented the 'capture, prosecution and conviction of those responsible', it transpires from a reading of the relevant section on the incompatibility of amnesty laws with the ACHR that the Court's reasoning is based on various premises. First, it is important for the Court that the violations under consideration are of a *jus cogens* nature. It seems that the Court takes an interesting interpretative step towards considering that the *jus cogens* character of a specific right covers not only the substantive normative core of the right, but also the judicial guarantees that make its protection effective and meaningful.<sup>850</sup> Second, it is interesting to note the entwining of different aims by the Court: conduct of investigation, access to justice, recovery of the truth and reparations are all aims equally endorsed by the Court, but which it considers to be obstructed through the adoption of amnesty laws. And third, the Court seems to centre on investigations as the first means of protection, which is hindered by amnesties. The practical relation of the two, amnesty and lack of investigation, sets the conduct of an investigation at a prime position. This latter point is connected to the argument made in chapter 4, with regard to the crucial essence of investigations in cases of enforced disappearances.

In *Almonacid-Arellano*, the Court was again confronted with a self-amnesty, which fell foul of the same three categories of the typology.<sup>851</sup> The issue in this case referred to the extrajudicial execution of a Chilean citizen and the promulgation of an amnesty by the Chilean regime in order to absolve its supporters of responsibility for human rights violations. The Court declared that the execution was a crime against humanity, considering that the background and specific factual details amounted to a systematic and generalised pattern of attack against the civilian population. After

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<sup>848</sup> *Barrios Altos v. Peru (merits)* 41 (Inter-American Court of Human Rights 2001).

<sup>849</sup> *Ibid.*, paras. 43 and 44.

<sup>850</sup> Bassiouni concurs with this view. See: Bassiouni, "Searching for Peace and Achieving Justice", 11; However, Scharf is unconvinced that "the associated duty to prosecute has simultaneously" attained an equivalent status". See, Michael Scharf, "From the eXile Files: An Essay on Trading Justice for Peace", *Washington and Lee law review*. 63, no. 1 (2006): 365–6.

<sup>851</sup> *Almonacid-Arellano et al v. Chile* 82(10). (Inter-American Court of Human Rights 2006) The text of amnesty law 2.191 read: "Amnesty shall be granted to all individuals who performed illegal acts, whether as perpetrators, accomplices or accessories after the fact, during the state of siege in force from September 11, 1973 to March 10, 1978, provided they are not currently subject to legal proceedings or have been already sentenced."

examining the development of the notion of crime against humanity, the Court recalled its own assessment in *Barrios Altos* on the incompatibility of amnesties and found that:

'States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty'.<sup>852</sup>

Evidently, the analysis of the case by the Court on the basis of its finding that the extrajudicial execution was a crime against humanity, distinguished it from *Barrios Altos*. The Court therefore established an additional category of violations for which amnesties are not permissible. Actually, the incompatibility of amnesties for crimes against humanity flows as a logical consequence because of the extreme seriousness and gravity of the latter. If violations of *jus cogens* rights cannot be amnestied, then, clearly, amnesties can have no legal effect or validity on crimes against humanity. The Court's analysis is also consonant with the mainstream academic position, which rejects amnesties for crimes against humanity, war crimes and serious violations of human rights, such as torture.<sup>853</sup>

The Court's judgment in *La Cantuta* was handed down a few months after *Almonacid-Arellano* and related to the enforced disappearance and extrajudicial execution of a group of persons. The acts complained of were found to constitute crimes against humanity.<sup>854</sup> With regard to the issue of the amnesty that barred the investigation at the domestic level, the Court linked the violations of the substantive rights found in Articles 4, 5, 7, 8(1), 25 and 1(1) ACHR with Article 2 ACHR.<sup>855</sup> For the Court, the latter article requires States to 'repeal rules and practices of any nature involving violations to the guarantees provided for in the Convention or disregarding the rights enshrined therein or hamper[ing] the exercise of such rights'.<sup>856</sup> Amnesty laws, as such, fall under this subcategory of rules, depriving the substantive articles of their *effet utile*.

In *Gomes Lund v. Brazil*, the IACtHR confirmed its previous case law and covered a further category of human rights violations that cannot be susceptible to amnesty or similar measures. In this case, the Court dealt with an amnesty that was afforded indiscriminately to all persons involved in human rights violations committed from 1961 to 1979 in Brazil. No conditionality clause was applicable in the text of the amnesty law. After examining the practice of universal and regional human rights

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<sup>852</sup> *Ibid.*, para. 114.

<sup>853</sup> Laplante, "Outlawing Amnesty" 918; Bassiouni, "Searching for Peace and Achieving Justice", 11; Clara Edelenbos, "Human rights violations: a duty to prosecute?", *Leiden journal of international law* 7, no. 2 (1994): 15.

<sup>854</sup> *La Cantuta v. Peru*, Series C No. 162 115–6 (Inter-American Court of Human Rights 2006).

<sup>855</sup> Article 2 ACHR provides: 'Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.'

<sup>856</sup> *La Cantuta v. Peru*, Series C No. 162, para. 172.

bodies, as well as case law stemming from supreme courts of the Latin American sub-continent, the Court concluded that the common denominator of the justifications followed by those bodies was that amnesty laws 'impact the international obligation of the State to investigate and punish said violations'.<sup>857</sup>

The judgment confirmed the previous rulings, which dealt with amnesties and found, again, violations of Articles 1(1), 2, 8, 25 ACHR. In a bold step, the Court declared that the amnesty law lacked legal effect,<sup>858</sup> thereby directly penetrating the domestic legal sphere with its judgment. Another interesting feature of this judgment is that the Court was not preoccupied with the character of the amnesty law as a self-amnesty law or whether the latter constituted a means to facilitate transition and promote reconciliation. For the Court, what mattered more than the process or the adopting authority was the end-result of the law, which was to 'leave unpunished serious violations in international law committed by the military regime'.<sup>859</sup> *Gomes Lund* is a leading authority on the non-applicability of amnesty laws to serious violations of human rights, especially so because the case related to the commission of enforced disappearances, a fact that renders the judgment all the more pertinent for the purposes of this thesis.

When *Gelman v. Uruguay* was handed down in 2011, the case law of the IACtHR was already consolidated in outlawing amnesties. *Gelman* related again to an enforced disappearance and the Court had no difficulty in applying the same reasoning and reaching the same conclusion as in *Lund*. Despite the sweeping statement by the Court that all amnesty provisions are inadmissible, it should be noted that in all cases the Court was confronted with blanket self-amnesties, which extinguished all responsibility of perpetrators.<sup>860</sup> At the same time, the human rights violations with which it was confronted were particularly grave, ranging from serious violations to crimes against humanity. On the one hand, the jurisprudence of the Court settles within that region the question of the non-applicability of amnesty laws to enforced disappearances and it offers a strong authority to be extrapolated to other jurisdictions. On the other hand, it is open to question whether the Court would maintain the same position were it to deal with human rights violations that fell below the high threshold of serious human rights violations or crimes against humanity. The answer to this may well lie in the Court's remark that what shapes its judicial opinion is not the external characteristics of an amnesty, but its *ratio legis* which

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<sup>857</sup> *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil* 170 (Inter-American Court of Human Rights 2010).

<sup>858</sup> *Ibid.*, para. 174.

<sup>859</sup> *Ibid.*, para. 175.

<sup>860</sup> Mallinder, "Can Amnesties and International Justice be Reconciled?", 228; Slye, "The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law", 179–80.

is 'to leave unpunished serious violations committed in international law'.<sup>861</sup>

The Court's judgments reject the "truth v. justice" dilemma as a false one. This stance should be read in the light of two different parameters: first, the IACtHR itself in *Gomes Lund* explicitly stated so.<sup>862</sup> The Court there opted for a purely legal response to the problems that arise out of complex settings of transitional periods. While it took a principled stance towards these problems, it nevertheless remains open to question if such pronouncements could engender the sort of change that the Court espoused, namely the total and uncompromised prevalence of justice.<sup>863</sup>

The essential and more vexing question posed here is what happens after the overturn of an amnesty law. Should all perpetrators be prosecuted? Can newly established or restored democracies confront the *ancien régime*, usually maintaining its power and network within the military, for old atrocities? And what about new democracies lacking the necessary fiscal means, basic infrastructure, a judiciary with integrity and a human rights culture that, concurrently, must address pressing social demands and consolidate their political existence? Would selective prosecutions be an acceptable solution in this respect? These questions do not lend themselves to easy answers and it is doubtful whether they could be answered outside the contextual specificities of a particular situation.

The second parameter relates to the interplay of purely legal measures, usually in the form of prosecutions, with the setting up of transitional justice mechanisms, such as truth and reconciliation commissions. In one occasion, the Court stated that the "historical truth" documented in the reports and recommendations of bodies such as the National Commission, does not complete or substitute the State's obligation to also establish the truth through judicial proceedings. And also that:

'the obligation to investigate the facts, prosecute, and, if that is the case, punish those responsible of a crime that constitutes a violation of human rights is a commitment that results from the American Convention, and that the criminal responsibility shall be determined by the competent judicial authorities, strictly following the rules of the due process established in Article 8 of the American Convention'.<sup>864</sup>

In other words, the Court welcomed and made use of the findings and reports of such bodies, but maintained that the legal obligations to investigate and punish stand independently of the operation of these mechanisms. This should be contrasted to a stream within scholarship which supports that truth commissions are often better placed and equipped to address underlying causes of human rights violations and to offer a comprehensive and holistic type of remedies that seek not only to repair

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<sup>861</sup> *Gelman v. Uruguay* 229. (Inter-American Court of Human Rights 2011). The Court had already repeated this in *Almonacid-Arellano* (par.120) and *Lund* (par. 175).

<sup>862</sup> *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, para. 151.

<sup>863</sup> It is recalled that the IACtHR in *Gomes Lund* stripped the amnesty law of legal effect.

<sup>864</sup> *Radilla-Pacheco v. Mexico, Series C No. 209. Preliminary Objections, Merits, Reparations, and Costs* 178 and 179 (Inter-American Court of Human Rights 2009).

individual harm, but to reach broader segments of society.<sup>865</sup> The underlying problem in this connection is that the mismatch between transitional justice mechanisms and human rights is due to former not being a normative discipline.<sup>866</sup> This allows proponents of transitional justice to maintain the necessary degree of flexibility in setting the aims and standards of each specific truth and reconciliation commission. Conversely, the human rights standards, at least within the Inter-American system, are suggestive of the imperative for prosecutions. For the Court, transitional justice mechanisms have an important, yet complementary, role to play, but surely do not proffer the full answer to serious human rights violations.

### **8. Amnesty and prosecution for enforced disappearances**

Soft-law instruments relating to enforced disappearance contain clear and vocal provisions opposing amnesties for this human rights violation. Conversely, human rights treaties are silent on the issue, which renders this contrast even more conspicuous.<sup>867</sup> Under the first category, the UN Declaration on the Protection of all Persons from Enforced Disappearance provides in Article 18 that:

‘Persons who have or are alleged to have committed offences referred to in Article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction’.

The UN Declaration is the sole instrument aligned to the jurisprudential shaping of the prohibition of amnesties and the only one to take a stance, for that matter. However, it should be noted that the WGEID has played down the vocal tone of the UN Declaration in its General Comment on this specific article. In this connection, the Working Group stated that:

‘[s]tates should refrain from making or enacting amnesty laws that would exempt the perpetrators of enforced disappearance from criminal proceedings and sanctions, and also prevent the proper application and implementation of other provisions of the Declaration’.<sup>868</sup>

It is evident that the WGEID is using language more cautiously crafted so as not to correspond or invoke a concrete legal obligation, but which only appears to encourage or advice States not to promulgate amnesty laws that would bar criminal prosecution and punishment. Interestingly, the

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<sup>865</sup> Antje du Bois-Pedain, “Post-conflict accountability and the demands of justice: Can conditional amnesties take the place of criminal prosecutions?”, June 2011, 4, <http://www.law.cam.ac.uk/ssrn/>. This author points to an additional issue: “[p]roblems of evidence and resources mean that trials can realistically only deal with relatively small numbers of perpetrators, who may not always be the ones most responsible for the worst types of wrongdoing.”

<sup>866</sup> Goldstone makes a related point in: Richard Goldstone, “Past Human Rights Violations - The MacDermott Lecture” *The Northern Ireland legal quarterly*. 51 (2000), 166: “The truth commission route has really emerged as a political necessity more than the ideal solution.”

<sup>867</sup> Anja Seibert-Fohr, “Amnesties” (Max Planck Encyclopedia of Public International Law), para. 15.

<sup>868</sup> WGEID, “Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance”, 11, par. 1, <http://www2.ohchr.org/english/issues/disappear/docs/GeneralCommentsCompilationMay06.pdf>.



General Comment does not make any reference to an international legal obligation or the development of international law to a certain standard, as it does in other General Comments. An explanation for the Group's self-confinement could be that it might have been hesitant to map out a State obligation in an area that remained unchartered by international law, which would risk opposition and possible non-compliance by States.

Although the IACFD lacks an amnesty provision, it nevertheless includes two provisions that are suggestive of a ban or at least a restriction on amnesties. First, pursuant to Article III, States undertake to adopt legislative measures in order to impose an appropriate punishment for enforced disappearance commensurate with its extreme gravity. Second, and admittedly distinct to the issue of amnesty, Article VII provides that: 'Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations'. What can be inferred from a joined reading of these two provisions is that amnesty can be construed as an extraordinary measure, which does not conform to the proportionality test that the IACFD introduces with regard to punishment. Amnesty by definition breaks with any proportionality requirement since it is a total absolution from punishment or the prospect thereof.

The attempt to infer a prohibition or restriction on amnesty by drawing an analogy from the notion of "statute of limitations" is made in order to illustrate two points. The first is that an amnesty cannot be cloaked as a "statute of limitations" in order to provide it with a gloss of legality. And the second is that considering that even a legal notion accepted in various jurisdictions worldwide, such as the statute of limitations, has been outcast from the normative scope of IACFD, then, *a fortiori*, amnesty cannot be permitted under the same treaty regime.

The full-blown dimensions of the amnesty *problématique* and their potential repercussions are found in the preparatory works of the CPED and the eventual non-inclusion of any provision on amnesty. *Freeman* reports that 'the suggestion by a few states to incorporate an explicit amnesty prohibition or discouragement nearly caused the treaty negotiations to break down'.<sup>869</sup> Indeed, at the outset of the multilateral negotiations, some States were suggesting that, rather than prohibiting amnesty for those responsible for enforced disappearances, a clause should be inserted that would take into consideration the extreme seriousness of acts leading to enforced disappearances. In a way, this would follow the IACFD paradigm. Other States were not opposed to amnesty and several others 'considered that before amnesty was granted, a number of conditions must be fulfilled: an inquiry leading to the establishment of the truth; adequate compensation for the victims; and penalties imposed

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<sup>869</sup> Freeman, *Necessary evils*, 38.

on the perpetrators'.<sup>870</sup>

However, it became apparent at the second preparatory meeting that amnesties were a stumbling block to the progress of negotiations.<sup>871</sup> The proposal to remove all references to pardons and amnesties and focus on remedies and the right to obtain information about the fate of disappeared persons was eventually accepted.<sup>872</sup> This development in the negotiations was a missed opportunity for the inclusion for the first time of an amnesty provision in a universal human rights instrument. What is also important to discern from this uneventful wind-up is the *opinio juris* of States. Despite the numerous academic exercises to confirm the existence of a customary rule supporting the prohibition of amnesties in international law,<sup>873</sup> the preparatory works for the CPED signal convincingly that the issue is not ripe yet and that more sustained efforts are actually needed to reach that stage of development of international law.

Similarly to the IACFD, the CPED includes two provisions that may offer ground to argue for an indirect prohibition of amnesty. Reminiscent of its counterpart, Article III IACFD, Article 7(1) CPED provides that: 'Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness'. Article 11(1) CPED is the *aut dedere aut judicare* provision of the CPED. It reads:

'The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.'

Everything that has been said in the analysis of IACFD with regard to the requirement for proportional punishment in view of the nature of enforced disappearance is equally applicable here. What needs to be pointed out, though, is that States are under an obligation to exercise their jurisdiction and 'submit the case for the purpose of prosecution'. This latter part of Article 11(1) CPED could be construed as preventing States from enacting laws or taking other measures that would render the obligation to submit a case to the competent authorities devoid of any real and effective application.

To sum up this section of the discussion, the first interim conclusion is that the prohibition of amnesties is a norm created by the judicial law-making exercise of mainly the IACtHR. As in the case of

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<sup>870</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71)*, February 12, 2003, para. 52.

<sup>871</sup> Tullio Scovazzi and Gabriella Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention* (Martinus Nijhoff Publishers, 2007), 328–9.

<sup>872</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59)*, para. 79.

<sup>873</sup> See the bibliography in the section entitled: "Amnesties: the current academic debate".

remedies, the Court offers in this area another innovative and progressive step for the protection of human rights. However, the difference with its proactive stance in the former is that its judgments have started to engender a tangible change in the case law of national courts in Latin America.<sup>874</sup> The same cannot be said definitely for remedies, as the discussion in the previous chapter showed.

An impressive characteristic of the amnesty case law of the IACtHR is that the Court goes so far as to declare that the national amnesty laws lack legal effect. The Court transcends the barrier of national jurisdiction and sovereignty by effectively overturning such laws.<sup>875</sup> It is also equally remarkable that the Uruguayan electorate upheld in two referenda the amnesty law that was in question in *Gelman*. This begs a question of legitimacy: can international courts defy or ignore the democratic will of people and impose a choice that runs counter to their freely expressed opinion? A recent trend in academic debate responds in the negative. *Mallinder*,<sup>876</sup> *Freeman*<sup>877</sup> and other observers<sup>878</sup> maintain that one of the conditions, which in their opinions would render an amnesty acceptable and legitimate, is, *inter alia*, democratic approval.

Although the views they express move within a school of thought that perceives democracy as a fundamental element in the international legal order, their views fail to consider four interrelated issues. First, that democratic approval by whatever means (approval by a legislative body, referendum or other) runs the risk of relegating democratic legitimacy to mere majoritarianism.

Secondly, it is well settled in my view that human rights cannot depend on democratic endorsement or rejection of their actual scope of protection. In other words, even if the democratically taken decision refers only to upholding an amnesty and not to the substantive scope of human rights, the end-result remains that human rights are rendered toothless by stripping them of their judicial guarantees.

Thirdly, it is historically proven in many cases that amnesties favour directly or indirectly the majority over the minority, the latter usually being a national, ethnic, political, religious one. For the same reasons that minority rights cannot be subjected to the will of the majority, amnesties, as a measure empowering the majority, cannot be accepted solely on their democratic credentials.

Fourth, as *Ratner* pointedly observes, this argument is unfounded in the relevant international law because 'those treaties [i.e. the Genocide, Torture and Disappearances conventions] do not

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<sup>874</sup> In this regard, see the overview of national case law that the IACtHR offers in *Gelman v. Uruguay*, para. 215 *et seq.*

<sup>875</sup> Christina Binder, "The prohibition of amnesties by the Inter-American Court of Human Rights", *German Law Journal* 12, no. 5 (2011): 1204 and 1214.

<sup>876</sup> Mallinder, "Can Amnesties and International Justice be Reconciled?" 210.

<sup>877</sup> Freeman, *Necessary evils*, 13.

<sup>878</sup> Landsman, "Alternative Responses to Serious Human Rights Abuses", 89; Douglass Cassel, "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities", *Law and Contemporary Problems* 59, no. 4 (1996): 219; Gropengiesser, "Amnesties and the Rome Statute of the International Criminal Court", 278.

recognize the possible effects on democratization as legitimate reasons not to prosecute'.<sup>879</sup>

A credible critique of the Court's case law on amnesties comes from *Carvalho Veçoso and do Amaral*, who argue that:

'The problem with the Inter-American System's hegemonic position regarding domestic amnesties is that the Court completely disregards the political constraints and compromises that are related to processes of transition from authoritarian rule. While affirming the absolutism of the "Inter-American view on amnesty", the Court puts itself comfortably away from the political struggles'.<sup>880</sup>

Their argument hinges on the political legitimacy and viability of adjudicating on amnesties outside their political context. In essence, the authors call for a "reality-check" on the part of the Court for such pronouncements that appear to be handed down for *in vitro* situations or with lack of calculation of their political ramifications.

A final remark should be made on the antithetical positions of amnesty and truth. In presenting the evolution of the right to truth in the first part of this chapter, I referred to three different parameters. The mainstream of commentators and the case law of the IACtHR point to the direction that the right to truth is a self-standing norm of *jus cogens* character owed to individuals and societies alike. In a more subdued tone, the CPED proclaims the right to truth, but without endowing it with the aforementioned attributes. Whatever the normative position and content of this right, it is evident that amnesties impair the claim to the truth.<sup>881</sup> How can the two be reconciled in the conditions of present reality? *Mallinder* expresses her scepticism that by 'solely providing for the right to truth is not adequate to fulfil a State's obligation', especially because addressing all different facets of this right 'could prove problematic where there are mass graves and limited resources available'.<sup>882</sup>

I believe that an understanding of the right to truth as essentially a claim to the conduct of an effective investigation, on the one hand, and the prohibition of amnesties for serious human rights violations, such as torture and enforced disappearance, on the other, is capable of easing the tensions between truth and amnesty. The added value of such a hermeneutic approach is that it ties in well with the conclusion in the previous chapter that effective investigation must be a *conditio sine qua non*, which can be characterised both as a remedy and as a positive obligation. By reconfiguring the right to

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<sup>879</sup> Steven Ratner, "Essays - New Democracies, Old Atrocities: An Inquiry in International Law", *The Georgetown law journal*, 87, no. 3 (1999): 739.

<sup>880</sup> Fabia Fernandes Carvalho Veçoso and Alberto do Amaral Júnior, "The Inter-American system as a new Grossraum? Assessing the case law of the Inter-American Court of Human Rights", in *European Society of International Law Conference Paper Series*, vol. 1, 1, 2011, 20.

<sup>881</sup> Similarly, Brian Tittmore, "Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes Under International Law", *Southwestern Journal of Law and Trade in the Americas* 12, no. 2 (2006): 440.

<sup>882</sup> Mallinder, "Can Amnesties and International Justice be Reconciled?", 215–6.

truth in its proper dimensions, a dual purpose can be served: first, the claim to the truth is better pursued through effective investigations.<sup>883</sup> And second, by prohibiting amnesties for serious human rights violations, the way is paved for the conduct of such investigations. This point is consonant with the position that:

'Reconciliation between the international demand for prosecution of international crimes and the national appeal for a political compromise involving amnesty can best be achieved by drawing a distinction between permissible and impermissible amnesties, and by limiting international recognition to the former'.<sup>884</sup>

Enforced disappearance must definitely be seen as falling within the ambit of the aforementioned impermissible amnesties.

### **9. The interplay between amnesties and effective remedy**

In chapters 3 and 4 I examined the notion of “effective remedy” from two different standpoints: in the former, the relationship between the prohibition of enforced disappearance and the autonomous right to effective remedies, provided in major human rights treaties, was examined. In the latter, based on the fact that these treaties are silent on the issue of what kind of remedies are appropriate or effective, I provided an overview of the practice of human rights bodies and suggested that the obligation to conduct an effective investigation must be a central reparative measure for enforced disappearances around which all other measures should revolve.

It should be clarified that the obligation to investigate is not tantamount to an obligation to prosecute. The argument in the previous section is that meaningful and effective investigations can be reconciled with the concurrent promulgation of amnesties. In connection to this, it is commonly neglected that the right to an effective remedy does not necessarily entail an entitlement of the victim to demand the criminal prosecution and punishment of the individual perpetrators. Despite the vocal stance that the IACtHR maintains in its jurisprudence, this is by no means a universally accepted rule. What international human rights law and jurisprudence recognises is that States are free to choose the means to remedy human rights violations. Providing for a systematic scheme of criminal prosecutions does not fall by definition in the remedial measures that a State must adopt. Within this framework, transitional justice mechanisms, such as truth and reconciliation commissions may prove to be

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<sup>883</sup> Roman Boed, “The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations”, *Cornell International Law Journal* 33 (2000), 317: “Developments in the treaty bodies suggest that the States parties’ duty to ensure fundamental rights has flowered into a minimum obligation to investigate the violation and leave open possible prosecution of alleged perpetrators.”

<sup>884</sup> Dugard, “Dealing With Crimes of a Past Regime. Is Amnesty Still an Option?”, 1009.

adequate responses, if they are successful in providing effective remedies to victims. In other words, the procedural aspect of how a remedy is delivered may not be of such importance, but the substantive aspect of what a remedy consists of is certainly essential. Thus, there is no reason to preclude *in abstracto* the co-existence of amnesties, truth commissions and effective remedies. The essential criterion must be that amnesties cannot be designed in such a way that they render remedies for victims inadequate in form and content. Employing this criterion to the specificities of enforced disappearance, an amnesty that would impede or obstruct the conduct of effective investigations must be considered as not fulfilling this criterion and, therefore, be impermissible.

A final point before reaching to the conclusions section of this chapter is that a distinction must be made between the domestic effect of an amnesty and the lack of international recognition and effect of an amnesty. In the former instance a domestic amnesty can bar prosecution and subsequent re-criminalisation or reopening of cases of enforced disappearance. The issue in this instance lies primarily within the domain of the domestic legal order since the role of international bodies in pursuing prosecutions is a subsidiary one. However, universal jurisdiction may prove a useful tool and an important parameter in assessing the international effect of an amnesty.

The importance of universal jurisdiction cannot be overstated. Its significance was stressed in *Nowak's* report, where he emphasised that universal jurisdiction would constitute the most effective measure of deterring the practice of enforced disappearance where the cases were clearly defined.<sup>885</sup> The nature of the universal jurisdiction found in Article 9(2) CPED is, however, contested. For her part, *Anderson* considers that its nature is mandatory, thereby criminalising enforced disappearance under international law, and leading to State exercise of jurisdiction over relevant offenders.<sup>886</sup> *Scovazzi* and *Citroni* take a more conservative approach. In their view 'no provision in the 2007 Convention addresses the question of the so-called universal jurisdiction intended in its most radical meaning', but only that Article 9(2) CPED 'allows for a sort of universal jurisdiction at least in cases where the alleged perpetrator is in the territory of a State Party'.<sup>887</sup>

The nature of the prescribed jurisdiction is directly linked to the issue of which legal steps may be taken with regard to perpetrators. Should Article 9(2) CPED be considered as establishing universal

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<sup>885</sup> Manfred Nowak, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46, E/CN.4/2002/71*, January 8, 2002, para. 96.

<sup>886</sup> Kirsten Anderson, "How Effective Is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?", *Melbourne journal of international law* 7 (2006): 276.

<sup>887</sup> Scovazzi and Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention*, 301.

jurisdiction, then no safe heavens would be available to them. Relying on *travaux préparatoires* for guidance, one finds the following provision in Article 6 (1)(b) of the draft CPED that reads:

‘(b) When the alleged perpetrator or the other alleged participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention are in the territory of the State Party, irrespective of the nationality of the alleged perpetrator or the other alleged participants, or of the nationality of the disappeared person, or of the place or territory where the offence took place unless the State extradites them or transfers them to an international criminal tribunal’.<sup>888</sup>

This wording leaves no ambiguity as to the establishment of universal jurisdiction. The WGEID had stated that this provision was ‘drafted in a much clearer manner than in comparable treaties, including the Convention against Torture’.<sup>889</sup> However, this provision was not maintained in the final version of the draft CPED, and this fact may be evidence against universal jurisdiction.

Article 9 CPED is drafted in almost identical language to Article 5 CAT.<sup>890</sup> Guidance can be found in CAT’s interpretation as to the nature of this jurisdiction. In his highly commendable commentary of the CAT, *Nowak* observes that it ‘is the first human rights treaty incorporating the principle of universal jurisdiction as an international obligation of all States parties without any precondition other than the presence of the alleged torturer’ and that ‘States parties have a legal obligation to take the necessary legislative, executive and judicial measures to establish universal jurisdiction over the offence of torture’.<sup>891</sup>

Although the explicit language of the draft CPED was not followed, one may discern from the comparative approach between the two provisions of the CAT and the CPED that universal jurisdiction is established. To conclude, it is argued that the hermeneutic proposition put forward by *Scovazzi* and *Citroni* is untenable, both because it remains unelaborated in their writings and because the adoption *mutatis mutandis* of CAT’s interpretation of the identical provision suggests this. Thus, the universal jurisdiction provided in the CPED can prove a potent tool at the international law level against individual perpetrators of enforced disappearance, and especially as an alternative avenue for sidestepping the effect of amnesties at the domestic level.

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<sup>888</sup> Louis Joinet, *Report of the sessional working group on the administration of justice* (Commission on Human Rights, August 19, 1998).

<sup>889</sup> *Report of the Working Group on Enforced or Involuntary Disappearances*, December 18, 2000.

<sup>890</sup> Article 5(2) CAT reads: “Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.”

<sup>891</sup> Manfred Nowak, *The United Nations Convention against torture : a commentary* (Oxford ;New York: Oxford University Press, 2008), 316–17.

## 10. "You don't need a weatherman to know which way the wind blows"

*Dugard* observed in 1999 that: 'Although international law does not - yet - prohibit the granting of amnesty for international crimes it is clearly moving in this direction'.<sup>892</sup> I believe that his assessment is still valid today, despite the ensuing developments, especially at the level of international practice by human rights bodies tasked to monitor human rights compliance.

The jurisprudence originating from the Inter-American system has offered distinct normative bases upon which to consider the impermissibility of amnesties for human rights violations. The *jus cogens* character of a right or prohibition, reaching the high threshold of crimes against humanity and the seriousness of the violation are three different bases upon which the IACtHR has analysed the cases that have come before it. The robust stance taken by this Court should be contrasted with the lean development of positive law. States have not succeeded in shaping the applicable law into binding international instruments, with much confusion still surrounding the issue. Neither does State practice lend itself to drawing clear-cut conclusions.

What can safely be said is that blanket amnesties and amnesties against international crimes such as genocide, torture, enforced disappearance and crimes against humanity cannot be subjected to amnesties.<sup>893</sup> Notwithstanding the failure of negotiating States to craft a provision outlawing amnesties in the CPED, their prohibition is founded upon other bases. Both international practice and academic scholarship are following the same direction. Bearing in mind the differences that prevail on other subjects, such as the permissibility of individualised and conditional amnesties, such convergence is not to be undervalued.

Impunity, however, is still vexingly present in our world. A recent phenomenon has revamped the mode and conduct of enforced disappearance and its perpetrators have, but for exceptional

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<sup>892</sup> *Ibid.*, 1004.

<sup>893</sup> For a slightly more reserved opinion, see Leila Nadya Sadat, "The effect of amnesties before domestic and international tribunals: Morality, law and politics" in *Atrocities and international accountability*, ed. Edel Hughes, William Schabas, and Ramesh Thakur (United Nations University Press, 2007), 237: "Although there is some contention on this point, it is currently the practice of the United Nations to reject amnesty for crimes against humanity and genocide (and presumably serious violations of international humanitarian law, as well)". Philip Alston, *Report on mission to the Central African Republic - Special Rapporteur on extrajudicial, summary or arbitrary executions*, May 27, 2009, para. 66–67: "On 29 September 2008, the National Assembly of the Central African Republic passed a General Amnesty Law, which came into effect upon its promulgation on 13 October 2008. This law provides for amnesty from prosecution for Government officials and rebels for all acts committed after 15 March 2003, except for acts amounting to war crimes, crimes against humanity, or other crimes over which the International Criminal Court has jurisdiction. The Special Rapporteur attaches particular importance to those indispensable exclusions from the amnesty. Moreover, it is important that its application be limited to acts committed in the context of the armed conflict and that are consistent with international humanitarian law (although they would normally constitute crimes under domestic law) and that it not be interpreted to cover private acts or abuses committed in the law enforcement context. In addition, it must be ensured that the existence of the amnesty, together with ongoing investigations by the International Criminal Court in the Central African Republic, do not lead to Government inaction on prosecuting the most serious abuses committed by its soldiers."



occasions, remained unknown and, consequently, unpunished. “Extraordinary renditions” entered the human rights vernacular, piggybacking on another neologism, that of the “war on terror”. The argument I advance in the next chapter is that the seizure and transfer of individuals around the world, outside any legal procedures and safeguards, and their detention and interrogation in secret detention facilities, is the most contemporary form of enforced disappearance. Consequently, extraordinary renditions should be assessed and treated as a form of enforced disappearance.

## CHAPTER 6

### Caught in the spider's web: Extraordinary renditions as a form of enforced disappearance

*"The past isn't dead. It isn't even past."*

*Requiem for a Nun, William Faulkner, 1951*

#### 1. Creating a legal black hole

Extraordinary renditions are one of the most debated practices ushered into our world after 9/11. In the aftermath of the terrorist attack at the World Trade Centre, the "war on terror" was declared and brought with it a new vocabulary. Beyond the neologism of the "war on terror" itself, "extraordinary renditions", "enhanced interrogation techniques", "alternative set of procedures", "waterboarding", Bagram, Abu Ghraib and Guantanamo built up the lexicon of State practice and policies in media articles and human rights briefs.<sup>894</sup>

During the past decade, the CIA played a leading role in orchestrating and operating a programme whose main aims were to locate, detain, transfer and interrogate by all possible means persons suspected of terrorist activities. While operating this system, the US sought and secured the cooperation of other countries or of their intelligence services.<sup>895</sup> The said programme was designed to evade all legal constraints, both in terms of national and international law, that could hamper the achievement of these aims and effectively wiped out all human rights guarantees that constitute the

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<sup>894</sup> Denise Bentele, Kamil Majchrzak, and Georgios Sotiriadis, "Pending investigation and court cases" in *CIA - "extraordinary rendition" flights, torture and accountability - a European approach*, ed. European Center for Constitutional and Human Rights and Wolfgang Kaleck, 2nd ed. (Berlin: ECCHR, 2009), 32: "The model had been created. In the aftermath of 9/11, the complete transition would be made: intelligence-gathering, not trial, would become the purpose for transfer; the legal process requirement would be dropped; countries with a record of torture or secret CIA prisons hidden from the world, would become the sites of detention; and rendition to justice would become extraordinary rendition". Also, Human Rights Watch, *Getting Away with Torture - The Bush Administration and Mistreatment of Detainees*, July 12, 2011.

<sup>895</sup> On the UK's complicity see: "UK's secret policy on torture revealed," *the Guardian*, August 4, 2011, sec. Politics, <http://www.guardian.co.uk/politics/2011/aug/04/uk-allowed-interrogate-tortured-prisoners>. For an updated account of the involvement of other European States, see: Amnesty International, *Open secret: Mounting evidence of Europe's complicity in rendition and secret detention*, November 15, 2010, <http://www.amnesty.org/en/news-and-updates/report/european-governments-must-provide-justice-victims-cia-programmes-2010-11-15>; Human Rights Watch, "US/UK: Documents Reveal Libya Rendition Details", <http://www.hrw.org/news/2011/09/08/usuk-documents-reveal-libya-rendition-details>. Also: Human Rights Watch, "Canada: Intelligence Service Accused of Libya Interrogations | Human Rights Watch", September 28, 2011, <http://www.hrw.org/news/2011/09/28/canada-intelligence-service-accused-libya-interrogations>.

human rights *acquis* of humanity. Unsurprisingly, the masterminds and perpetrators of extraordinary renditions have benefited from an atmosphere of impunity.<sup>896</sup>

The ramifications of the programme on human rights were manifold: first, the human rights of individuals were impacted the most directly. The protection afforded to these individuals by international and regional human rights instruments were blatantly disregarded and remained a dead letter. Second, in many instances extraordinary renditions were carried out with the cooperation and support of intelligence services of many States,<sup>897</sup> therefore giving a transnational character to this practice and vitiating the human rights ethos of European states. Third, and related to the previous point, the cooperation of intelligence services often without parliamentary or judicial oversight created an “extra-legal” space for these agencies, where the end justified the means.<sup>898</sup> In this connection, the justification of the “war on terror” was premised on an illusory “security and freedom” rhetoric, which in reality undermined the core nucleus of many absolute prohibitions provided by international human rights law.

Extraordinary renditions, at a minimum, are an encroachment upon three basic human rights: the right to liberty and security; the prohibition of torture and CIDT (including the principle of *non-refoulement*); and the prohibition of enforced disappearance.<sup>899</sup> Together with the substantial protection that these rights afford, the procedural guarantees that accompany them are similarly violated. The evasion of formal legal routes, e.g. extradition procedures, and the bending of guarantees are aimed at a result that has been discussed often in the course of this thesis: placing the individual outside the protection of the law. It follows that the complete disregard of human rights also included the remedies to which victims of extraordinary renditions are entitled.

The present chapter seeks to discuss the relation between extraordinary renditions and enforced disappearances and examine when and under which conditions the former can be understood

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<sup>896</sup> For an overview of the situation, see: Bentele, Majchrzak, and Sotiriadis, “Pending investigation and court cases”, 59.

<sup>897</sup> Adam Svendsen, *Intelligence cooperation and the war on terror: Anglo-American security relations after 9/11* (London ;;New York: Routledge, 2010).

<sup>898</sup> Ian Leigh, “Rendering an account? Accountability oversight and international intelligence cooperation” in *Extraordinary renditions and the protection of human rights*, ed. Ludwig Boltzmann Institut für Menschenrechte and Manfred Nowak (Wien [Austria]: NWV Neuer Wissenschaftlicher Verlag, 2010), 101–2: “As evidence mounts of abuses by the intelligence services and the military perpetrated since 9/11 it has become clear that a significant feature that has largely evaded control or scrutiny is the collaboration between the agencies of different countries.”

<sup>899</sup> Lorna McGregor and Lucy Moxham, “Spinning a ‘Global Spider’s Web’: claims of national security and ongoing impunity for ‘extraordinary rendition’”, in *Extraordinary renditions and the protection of human rights*, ed. Ludwig Boltzmann Institut für Menschenrechte. and Manfred Nowak (Wien [Austria]: NWV Neuer Wissenschaftlicher Verlag, 2010), 35: “Documented cases of ‘extraordinary rendition’ underscore the range of fundamental human rights violations involved, including infringements of the right to liberty and security of the person, the absolute prohibition of torture and other ill-treatment, the absolute principle of *non-refoulement*, and the absolute prohibition of enforced disappearance. From an international law perspective, therefore, ‘extraordinary rendition’ constitutes a multiple and serious human rights violations and gives rise both to a duty to conduct an independent investigation capable of identifying, prosecuting and punishing those responsible and to the right to a remedy and reparation for victims.”

and treated as the latter. In this connection, the aim is also to illustrate the relevance to this practice of the CPED and several of its provisions. Part of this discussion will make insights to the CAT, on account of the factual and legal affinity of enforced disappearance and torture within the framework of extraordinary rendition.

## **2. What is the relationship between 'extraordinary renditions' and enforced disappearances?**

Extraordinary renditions are included in the long list of practices used in the "war on terror" and their legality is highly contentious. It is an idiomatic term that does not meet with general agreement as to the act(s) it describes. An important reason behind this failure to agree is that the term is not coined as a rigid legal definition. Nevertheless, it has been employed to describe a programme run by the CIA in discharging its counterterrorism tactics. Its components are: the abduction or unlawful seizure, transfer, secret detention and possible torture of an individual outside any legal process or oversight.

Similar methods applied by the US in the past, with increasing frequency from 1970 onwards, came under the cloak of "irregular renditions" and sought to bring criminal fugitives to justice.<sup>900</sup> However, these should be differentiated mainly on the basis of their purpose and object: in the case of irregular renditions, the US sought to bring criminals to face justice in a court of law, a condition that is rarely the case in instances of extraordinary renditions. The overall legal framework is also markedly distinct as the "war on terror" hinges on aspects of international humanitarian and human rights law that are otherwise not applicable in the case of irregular renditions.

Extraordinary renditions have been a recurring theme in the public domain<sup>901</sup> and academic literature in the past decade. It has been a hotly debated matter in global politics, human rights

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<sup>900</sup> "PDD-39 U.S. Policy on Counterterrorism", June 21, 1995, 813, <http://www.fas.org/irp/offdocs/pdd39.htm>.

<sup>901</sup> "Rendition | World news | The Guardian", <http://www.guardian.co.uk/world/rendition>; "Former US chief prosecutor condemns 'law-free zone' of Guantánamo | World news | The Observer", October 30, 2011, <http://www.guardian.co.uk/world/2011/oct/30/guantanamo-morris-davis>; "Poland admits role in CIA rendition programme | World news | guardian.co.uk", February 22, 2010, <http://www.guardian.co.uk/world/2010/feb/22/poland-cia-rendition-flights>; "Human Rights Comment: Ten years of 'global war on terror' undermined human rights – also in Europe", September 1, 2011, [http://commissioner.cws.coe.int/tiki-view\\_blog\\_post.php?postId=172](http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=172); Mark Danner, "After September 11: Our State of Exception," *The New York Review of Books*, October 13, 2011, <http://www.nybooks.com/articles/archives/2011/oct/13/after-september-11-our-state-exception/>; Peter Finn and Julie Tate, "N.Y. billing dispute reveals details of secret CIA rendition flights", September 1, 2011, [http://www.washingtonpost.com/world/national-security/ny-billing-dispute-reveals-details-of-secret-cia-rendition-flights/2011/08/30/gIQAbggXsJ\\_story.html](http://www.washingtonpost.com/world/national-security/ny-billing-dispute-reveals-details-of-secret-cia-rendition-flights/2011/08/30/gIQAbggXsJ_story.html); "US court documents reveal inner workings of CIA renditions | Clare Algar | Comment is free | The Guardian", August 31, 2011, <http://www.guardian.co.uk/commentisfree/2011/aug/31/documents-reveal-renditions-programme-business>; "Extraordinary rendition: a backstory | World news | The Guardian", August 31, 2011, <http://www.guardian.co.uk/world/2011/aug/31/extraordinary-rendition-backstory>; "UK's secret policy on torture revealed | Politics | The Guardian", August 4, 2011, <http://www.guardian.co.uk/politics/2011/aug/04/uk-allowed-interrogate-tortured-prisoners>; "The CIA rendition flight network | World news | guardian.co.uk", August 31, 2011,

reports<sup>902</sup> and US politics and, furthermore, has attracted UN attention through a recent joint study of several 'special procedures',<sup>903</sup> as well through the annual reports of the WGEID and the CAT Committee.<sup>904</sup> The volume of material generated has been substantial.

The press and NGOs have maintained a prominent role in unveiling factual elements of this programme.<sup>905</sup> Numerous reports have activated several mechanisms within international organisations, including the Council of Europe and the European Union. These bodies have engaged their organs or set up *ad hoc* committees to look into the matter.<sup>906</sup> A considerable number of reports, opinions, memoranda and recommendations have been produced which have reconstructed, albeit mainly with circumstantial evidence, the operation of the CIA programme.<sup>907</sup>

In this regard, the CoE produced one of the most comprehensive analyses. *Dick Marty*, a member of the CoE Parliamentary Assembly, was mandated to conduct a parliamentary investigation into this programme. His two reports compiled a considerable amount of information from former detainees, flight schedule information by national authorities and Eurocontrol, replies from governments

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<http://www.guardian.co.uk/world/interactive/2011/aug/31/rendition>; "The Washington Post: National, World & D.C. Area News and Headlines - The Washington Post", September 1, 2011, <http://www.washingtonpost.com/>.

<sup>902</sup> Reed Brody, "Prisoners Who Disappear | Human Rights Watch", October 12, 2004, <http://www.hrw.org/node/68830>; "U.S.: Detained al-Qaeda Suspects 'Disappeared' | Human Rights Watch", October 12, 2004, <http://www.hrw.org/node/68831>; "The United States' 'Disappeared': The CIA's Long-Term 'Ghost Detainees' | Human Rights Watch", October 12, 2004, <http://www.hrw.org/reports/2004/10/12/united-states-disappeared-cias-long-term-ghost-detainees?tr=y&aid=9459787>; "Secret Intelligence Documents Discovered in Libya | Human Rights Watch", September 9, 2011, <http://www.hrw.org/news/2011/09/08/secret-intelligence-documents-discovered-libya?tr=y&aid=9459639>.

<sup>903</sup> United Nations Human Rights Council, *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental* ([Geneva]: United Nations, February 19, 2010).

<sup>904</sup> Extraordinary renditions feature in the Annual Reports of these bodies since 2005.

<sup>905</sup> One of the journalists involved in their investigation has received a Pulitzer price on a series of her reports on CIA's program. See, Dana Priest, "CIA Holds Terror Suspects in Secret Prisons", *The Washington Post*, November 2, 2005, sec. Nation, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

<sup>906</sup> Monica Hakimi, "The Council of Europe Addresses CIA Rendition and Detention Program", *American Journal of International Law* 101, no. 2 (2007): 442; Venice Commission, *Opinion on the International legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners*, March 17, 2006, [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp).

<sup>907</sup> *European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, 2007, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2007-0032&language=EN&ring=A6-2007-0020>; *European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, adopted midway through the work of the Temporary Committee*, 2006, <http://eur-lex.europa.eu/Notice.do?val=458750:cs&lang=en&list=458750:cs,&pos=1&page=1&nbl=1&pgs=10&hwords=>; Dick Marty, *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states* (Council of Europe, Committee on Legal Affairs and Human Rights, June 12, 2006), <http://assembly.coe.int/main.asp?link=/documents/workingdocs/doc06/edoc10957.htm>; Dick Marty, *Alleged secret detentions in Council of Europe member states - Information Memorandum II* (Committee on Legal Affairs and Human Rights, January 22, 2006), [http://assembly.coe.int/main.asp?link=/committeedocs/2006/20060124\\_jdoc032006\\_e.htm](http://assembly.coe.int/main.asp?link=/committeedocs/2006/20060124_jdoc032006_e.htm); Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, June 11, 2007, <http://www.assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11302.pdf>; Venice Commission, *Opinion on the international legal obligations of Council of Europe member States in respect of secret detention facilities and inter-state transport of prisoners*.

and interviews with former and acting officials on both sides of the Atlantic.<sup>908</sup> The conclusions of these reports were that ‘the United States ha[d] progressively woven a clandestine “spider-web” of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture<sup>909</sup> and that there was a ‘high degree of probability that such secret detention centers [...] ha[d] existed in these two countries [i.e. Poland and Romania]’.<sup>910</sup> In addition, that individuals detained in those places were subjected to torture, inhuman and degrading treatment and that, overall, there was a varying degree of involvement of other CoE Member States.

Notwithstanding the findings of these two reports, it was acknowledged by Marty that there was a lack of hard evidence as to the details of abduction and methods of interrogation. The identification of officials of European States with knowledge of the programme (and its ensuing human rights violations such as enforced disappearance, *incommunicado* detention and torture) and who collaborated with CIA was also not forthcoming. It is clear, however, that without official acknowledgment and *bona fide* cooperation from across the Atlantic, much will remain unknown.

As suggested above, “extraordinary rendition” is a generic term. Affixing the adjective “extraordinary” appears to provide a legal gloss to this form of rendition, in the form of a permissible exception. However, a closer examination of its components points to the opposite direction. Several working definitions have been proposed for “extraordinary rendition”. *Santos Vara* proposes that it should be

‘understood as the forcible abduction abroad of a suspected terrorist from the territory of one State, carried out with or without the consent of the territorial State, and the transfer of the detainee to a third country where there is a reasonable risk of being tortured or subjected to cruel, inhuman or degrading treatment. Consequently, the main feature of renditions is the risk of suffering torture or other cruel, inhuman or degrading abuses, regardless of whether the victims are eventually subjected to them’.<sup>911</sup>

Others have suggested that it

‘is the transfer of an individual, with the involvement of the United States or its agents to a foreign state in circumstances that may make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment’.<sup>912</sup>

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<sup>908</sup> Both reports can be found in: Council of Europe, *CIA above the law?: secret detentions and unlawful inter-state transfers of detainees in Europe*. (Strasbourg: Council of Europe Pub., 2008).

<sup>909</sup> *Ibid*, 13.

<sup>910</sup> *Ibid*, 123.

<sup>911</sup> Juan Vara Santos, “Extraordinary Renditions: The interstate transfer of terrorist suspects without human rights limits”, in *Terrorisme et droit international*, ed. Michael Glennon and Serge Sur (Leiden: Boston ;Martinus Nijhoff Publishers, 2008), 556.

<sup>912</sup> Association of the Bar of the City of New York.;New York University., *Torture by proxy: international and domestic law applicable to “extraordinary renditions”* (New York NY: ABCNY & CHRJ NYU School of Law, 2004), 4.

Button understands extraordinary rendition in a rather rudimentary fashion, since he refers to it as the

'transfer of terror suspects by U.S. security forces to third states known to engage in torture, where they are surrendered to local security forces. The purported purpose [...] is to enable the United States to subject terrorism suspects to the more "effective" modes of interrogation of receiving states.'<sup>913</sup>

These three attempts to construct a definition do, indeed, incorporate crucial elements of extraordinary renditions.<sup>914</sup> However, taken in isolation, they do not provide a full account of the phenomenon. The first definition proposed by Santos Vara provides a detailed description of every stage and every actor involved in extraordinary renditions. The elements are:

- (i) forcible abduction,
- (ii) transfer of a detainee,
- (iii) arbitrary detention and
- (iv) risk of torture.

The actors are:

- (i) the captor State,

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<sup>913</sup> Jillian Button, "Spirited Away (Into a Legal Black Hole?): the Challenge of Invoking State Responsibility for Extraordinary Rendition", *Florida journal of international law*, 19, no. 3 (2007): 533.

<sup>914</sup> There is a surplus of definitions of extraordinary renditions by academics and institutions. See: *European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, para. 36: "[t]he programme of extraordinary rendition is an extra-judicial practice which contravenes established international human rights standards and whereby an individual suspected of involvement in terrorism is illegally abducted, arrested and/or transferred into the custody of US officials and/or transported to another country for interrogation which, in the majority of cases, involves incommunicado detention and torture"; Olivier Duthéillet de Lamothe, "Extraordinary renditions: a European perspective (Cardozo School of Law, 'Bauer Lecture')", September 25, 2006, para. 1, <http://www.venice.coe.int/docs/2006/CDL%282006%29077-e.asp>: "Extraordinary rendition may be defined as the transfer of an individual suspected of involvement in terrorism, captured and in the custody of American officials, who is sent to another country often for interrogation sometimes facing torture there. As the term suggests this 'extraordinary' practice appears to be one form of what is an acknowledged practice—the covert rendition by US officials of individuals suspected of involvement in terrorism to justice, i.e. for trial or criminal investigation either to the United States or to foreign states. What is 'extraordinary' about this more recent form of rendition is the role of torture and cruel, inhuman or degrading treatment reportedly involved in such transfers."; Philippe Sands, "The International Rule of Law: Extraordinary Rendition, Complicity and its Consequences", *European Human Rights Law Review*, no. 4 (2006): 2: "It has come to be understood as referring to the practice of forcibly transporting a person – usually alleged to be involved in terrorist activity – from one country to another country without relying on the normal legal processes (extradition, deportation etc) and for the purposes of subjecting them to interrogation and other forms of treatment that include torture or cruel and degrading treatment"; Geoff Gilbert, *Responding to international crime* (Leiden ;;Boston: Martinus Nijhoff, 2006), 329: "extraordinary rendition occurs when a State wishing to prosecute some individual transfers that individual to a third State for the purpose of indefinite detention or even so as to subject them to torture or ill-treatment during questioning."; Isabelle Mouliez, "Extraordinary renditions and the Convention against Torture" in *Extraordinary renditions and the protection of human rights*, ed. Ludwig Boltzmann Institut für Menschenrechte and Manfred Nowak (Wien [Austria]: NWV Neuer Wissenschaftlicher Verlag, 2010), 145: "This expression refers to the extrajudicial practice in which individuals suspected of being involved in terrorist activities are illegally arrested or abducted by State authorities and transferred into the custody of United States agents and/ or transferred to another country to be detained and 'forcefully' interrogated in order to obtain intelligence of use in the fight against terrorism, these detainees being later transferred into US custody."

- (ii) the State in whose territory the abduction takes place and
- (iii) the State to which the detainee is transferred and where torture may be perpetrated.

The Achilles' heel of this definition is its excessive emphasis on the risk of suffering torture.

It is obvious that torture could be a main link in the chain of events comprising extraordinary renditions and related human rights violations. However, torture lies at the end of this chain and near-exclusive focus on it does not provide for a holistic assessment: one must not lose sight of the other occurring illegalities. Further, the definition fails to take into account a broader array of potential victims, including the detainee's relatives who are not informed about his or her fate.

The second definition is also flawed for similar reasons. It does not take into account the initial step of extraordinary rendition, that of the deprivation of liberty of an individual. Rather its starting point is the transfer of a person. Furthermore, it adopts the "more likely than not" threshold of the risk of being subjected to torture, which is an exclusively US interpretation of the law.<sup>915</sup> This interpretation departs significantly from the standards set by the CAT and the ICCPR, as well as the interpretation given to them by treaty bodies.<sup>916</sup> Article 3(1) CAT requires 'substantial grounds for believing that he would be in danger of being subjected to torture', which sets a less stringent threshold than the one forwarded by the definition under consideration. In the same vein, General Comment No. 31 requires the existence of 'substantial grounds for believing that there is a real risk of irreparable harm'.<sup>917</sup>

The third definition by *Button* equally takes no notice of the deprivation-of-liberty element and limits the scope of perpetrators to US and foreign security forces rather than employing the more inclusive term of agents. Again, torture features as the predominant human rights violation.

I am of the opinion that the first of the definitions examined accurately describes the practice, on the condition that torture is understood as a separate, subsequent factual event and as a human rights violation interlinked to previous actions. Torture is not the sole corollary of extraordinary

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<sup>915</sup> John Yoo, "Transferring Terrorists", *Notre Dame Law Review* 79 (2004): 1228: "First, the United States expressed the understanding that the phrase 'substantial grounds for believing that he would be in danger of being subjected to torture' in Article 3 means that 'it is more likely than not that he would be tortured'. As a condition of the United States' consent to the treaty, this understanding substantively limits the obligation under Article 3 of the treaty to the stated interpretation"; Also, see John Bellinger, Legal Adviser to the Secretary of State at the time, who is quoted in the second Dick Marty report Council of Europe, *CIA above the law?*, 104: "Similarly the Senate of the United States and our courts for more than ten years have taken a position that the words 'substantive grounds' means 'more likely than not'. If we transfer a person from one point outside the United States to another point outside the United States then, as a policy matter, if we think there are substantial grounds to believe that the individual will be tortured or mistreated, we follow the same rules."

<sup>916</sup> Committee against Torture, *Summary record of the first part of the 424th meeting : United States of America*, February 9, 2001, 17, <http://www.unhcr.ch/tbs/doc.nsf/0/d0a2c63bdfec877c12569f800392171?Opendocument>: "However, according to the United States interpretation of that article, the person claiming that he should not be expelled must demonstrate that it was 'more likely than not that he would be tortured'" and para. 158 of the report: "That was not the Committee's interpretation of the phrase 'substantial grounds for believing that he would be in danger of being subjected to torture' in article 3. It held that something less than probability could, in certain circumstances, constitute a real risk."

<sup>917</sup> Human Rights Committee, "General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant", May 26, 2004, para. 12.



renditions. Deprivation of life may also follow, with or without torture taking place. Consequently, a distinction should be made between the *rationale* behind extraordinary renditions and the constitutive *elements* and subsequent possible *outcomes*.

This rationale is twofold:

- (i) detain a potentially dangerous suspect and avert his participation in a terrorist activity, and
- (ii) extract intelligence information from him/ her.

The constitutive elements are:

- (i) any form of deprivation of liberty,
- (ii) arbitrary and *incommunicado* detention,
- (iii) lack of access to any form of judicial process or review and,

depending on the particular circumstances, the possible outcomes are:

- (iv) torture, or
- (v) deprivation of life or
- (vi) a combination of the two.

Based on these, extraordinary rendition has two senses: a narrow one, comprised only of the first three elements, and a broader one including all of the above.

Academics have taken up the issue whether extraordinary renditions can be equated or paralleled to enforced disappearances. Some support the idea that 'there may be a link between renditions and enforced disappearances',<sup>918</sup> or that the definition of enforced disappearance as prescribed in CPED 'is consistent with the elements of extraordinary rendition',<sup>919</sup> or that 'the enforced disappearance of the victim is an important element in the practice of extraordinary renditions which is characterized by secrecy in the capture procedures, the establishment of secret detention centres and the long-lasting failure by the states involved to tell the truth'.<sup>920</sup> Importantly, *Paust* has argued that: 'the secret detention and processing of various detainees engaged in by the executive branch after 9/11 and over the last five years fits within the definition of forced disappearance of persons which is absolutely

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<sup>918</sup> EU Network of Independent Experts on Fundamental Rights, *The human rights responsibilities of the EU Member States in the context of the CIA activities in Europe (extraordinary renditions)*, May 25, 2006, 4, [http://crldho.cpd.r.ucl.ac.be/en/eu\\_experts\\_network/report\\_details.php?year=2006](http://crldho.cpd.r.ucl.ac.be/en/eu_experts_network/report_details.php?year=2006).

<sup>919</sup> Amy Bergquist and David Weissbrodt, "Extraordinary Rendition: A Human Rights Analysis", *Harvard human rights journal*. 19 (2006): 160.

<sup>920</sup> Tullio Scovazzi and Gabriella Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention* (Martinus Nijhoff Publishers, 2007), 56.

proscribed by international law in all circumstances'.<sup>921</sup> In a less absolute manner, *Santos Vara* has maintained that these violations of international law 'could even lead to enforced disappearance when the final fate of the victims is unknown'.<sup>922</sup>

In my opinion, extraordinary renditions share the following identical constitutive elements with enforced disappearances. They are:

- (i) the deprivation of liberty;
- (ii) the engagement, in whatever form, of State agents; and
- (iii) the refusal to acknowledge this deprivation.

The aforementioned have as a factual consequence the placing of the victims of both practices outside the protection of the law. However, there is a part of what constitutes extraordinary rendition that still remains uncovered by enforced disappearance. This is the intent on the part of perpetrators to apply 'enhanced interrogation techniques' in order to extract intelligence information. Torture, while disappeared, is the second main component of extraordinary renditions.

Broadly speaking, there are two main categories of persons subjected to extraordinary renditions. The first includes those Guantanamo detainees whose names were, eventually, released.<sup>923</sup> Although some of them may have been captured legally, for example on the field of battle, their subsequent unacknowledged detention and transfer places them in the realm of enforced disappearance, while their possible subjection to torture is in the sphere of extraordinary renditions. However, the aforementioned acknowledgment of their detention, as in the case of the "High Value Detainees",<sup>924</sup> puts the violation of the prohibition of enforced disappearance to an end and brings to the fore other human rights violations, such as the violation of the right to liberty and security, the right not to be subjected to torture or cruel, inhuman or degrading treatment, the right to be treated with humanity and with respect for one's inherent dignity, and the right of access to a court. Similar considerations apply for the limited cases that have reached US courts.<sup>925</sup>

The second category relates to those individuals who have been victims of extraordinary renditions and still remain unaccounted for. These individuals continue to be victims of enforced

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<sup>921</sup> Jordan Paust, *Above the law: Unlawful, executive authorizations regarding detainee treatment, secret renditions, domestic spying, and claims to unchecked executive power* (Salt Lake City UT :: Utah Law Review Society, 2007), 258.

<sup>922</sup> *Santos Vara*, "Extraordinary Renditions: The interstate transfer of terrorist suspects without human rights limits", 556.

<sup>923</sup> Andy Worthington, *The Guantánamo files: the stories of the 774 detainees in America's illegal prison* (London ;; Ann Arbor MI: Pluto Press, 2007).

<sup>924</sup> International Committee of the Red Cross, *ICRC report on the treatment of fourteen "high value detainees" in CIA custody* (Washington, D.C. :: International Committee of the Red Cross, 2007).

<sup>925</sup> "U.S. Court of Appeals for the Ninth Circuit: *Gherebi v. Bush and Rumsfeld*", *International legal materials*. 43, no. 2 (2004): 381.

disappearance. From the moment one of the constitutive elements ceases to exist, either as a result of their release or through the acknowledgment of their detention being made, then enforced disappearance comes to an end. In summary, it is submitted that extraordinary rendition *stricto sensu* is equated to enforced disappearance and in its broader sense equals the aggregate result of enforced disappearance and torture.

It is true that current scholarship is orientated towards searching for answers to violations perpetrated through extraordinary renditions in the mainstream international instruments such as the ICCPR, CAT, ECHR, the Refugee Convention and the Geneva Conventions.<sup>926</sup> This is understandable since solutions must be identified within the existing and applicable legal instruments. In this regard, scholars have reserved a prominent role for the CAT in their search for legal answers to the problems posed by enforced disappearances of this type.<sup>927</sup> Torture figures here as a proxy notion between enforced disappearance and extraordinary rendition. In the following section, I discuss those provisions of the CPED that are most pertinent to extraordinary renditions.

### **3. The international convention for the protection of all persons against enforced disappearance: the added value**

One of the significant advancements of the CPED lies not only in coining a new and legally binding definition, but also in that it sets up a comprehensive legal framework to deal with all aspects of enforced disappearance, including those of the nature of the violation; the individual criminal responsibility; the victims' rights and the right to truth. In this section, I will examine the relevant provisions of the CPED and discuss how they may interrelate with extraordinary renditions.

This discussion will employ the CAT as the main comparator for two reasons. First, it has been one of the fundamental instruments relied upon in scholarship in analysing extraordinary renditions. Second, the CPED is modelled upon it. In this part, I will also scrutinise some of the US arguments that extraordinary rendition is not an unlawful practice.

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<sup>926</sup> Beth Henderson, "From Justice To Torture: The Dramatic Evolution of U.S.-Sponsored Renditions", *Temple international and comparative law journal*. 20, no. 1 (2006): 189-189-218; John Parry, "The shape of modern torture: Extraordinary rendition and ghost detainees", *Melbourne Journal of International Law*, no. 6 (2005); Naureen Shah, "Knocking on the Torturer's Door: Confronting International Complicity in the U.S. Rendition Program", *Columbia human rights law review* 38, no. 3 (2007); Matteo Winkler, "When "Extraordinary" Means Illegal: International Law and European Reaction to the United States Rendition Program", *Loyola of Los Angeles international & comparative law review*. 30, no. 1 (2008): 33-33-76.

<sup>927</sup> Jordan Paust, *Beyond the law: the Bush Administration's unlawful responses in the "War" on Terror* (Cambridge [UK]; New York: Cambridge University Press, 2007).

### 3.1. Non-derogable nature

Article 1 CPED provides:

- '1. No one shall be subject to enforced disappearance.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.'

This is a pivotal article in the CPED. It establishes unequivocally the non-derogable nature of the prohibition. The *jus cogens* nature of the prohibition is confirmed both in theory<sup>928</sup> and through the IACtHR's jurisprudence<sup>929</sup> and cannot be treated as only a matter of academic interest or as merely serving the taxonomy of the international human rights law: it has paramount importance in rejecting the US argument that paves the way for the practice of extraordinary renditions. The US position supports that international human rights law is not applicable to extraordinary rendition. *Satterthwaite* has summarised the US position along the following lines:

'The legal vacuum is constructed as follows: because the transfers occur as part of an armed conflict, we must look to humanitarian law for any relevant rules concerning transfers. Al Qaeda members, however, are unprivileged combatants, and thus unprotected by rules found in the Geneva Conventions concerning the transfer of prisoners of war or other protected persons. Finally, the argument concludes, the rules of human rights law do not apply either, because humanitarian law operates as *lex specialis* to oust such rules from application. For this reason, suspected terrorists may be informally transferred from place to place without those transfers being unlawful, because no law applies.'<sup>930</sup>

The CPED elbows aside this argument and specifies explicitly: neither war nor any other exceptional circumstance can justify enforced disappearances and, to the degree that they are identical, extraordinary renditions. Certainly, this language is reminiscent of the CAT stipulation in its Article 2(2).<sup>931</sup> The added value of the CPED over the CAT is that it extends to the period chronologically preceding torture, as well as other violations concurrent to the latter elements such as the arbitrary and *incommunicado* detention and the lack of any judicial recourse for the victim(s).

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<sup>928</sup> Paust, *Above the law*, 256.

<sup>929</sup> *Goiburú et al. v. Paraguay, Series C No. 153. Merits, Reparations and Costs*. 84 (Inter-American Court of Human Rights 2006): "The prohibition to carry out enforced disappearance and the corresponding obligation to investigate and punish those found to be responsible have acquired the character of *jus cogens*."

<sup>930</sup> Margaret Satterthwaite, "Rendered Meaningless: Extraordinary Rendition and the Rule of Law", *The George Washington Law Review*. 75, no. 5 (2007): 1400.

<sup>931</sup> Article 2(2) CAT reads: "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."

### 3.2. Non-refoulement

*John Yoo*, former official at the US Department of Justice, has described the US stance on the applicability of the CAT in relation to extraordinary renditions.<sup>932</sup> The argument he advanced is based on the reservations made by the US to Article 3 CAT, which refers to the *non-refoulement* obligation.<sup>933</sup> 'First, the United States expressed the understanding that the phrase 'substantial grounds for believing that he would be in danger of being subjected to torture' in Article 3 means that 'it is more likely than not that he would be tortured'. As a condition of the United States' consent to the treaty, 'this understanding substantively limits the obligations under Article 3 of the treaty to the stated interpretation'.<sup>934</sup>

The counterpart provision in CPED appears to broaden the "non-refoulement" protection and to deal more effectively with the aforementioned line of argument. Indeed, Article 16 CPED is drafted in the same language as Article 3 CAT, with the additional term of "surrender" of persons being added to the other instances of expulsion, return and extradition.<sup>935</sup> The meaning of the word "surrender" is to be interpreted in good faith and in accordance with its ordinary meaning in light of the treaty's object and purpose.<sup>936</sup> The ordinary meaning of the word "surrender" is defined as 'the giving up of something into the possession or power of another who has or is held to have a claim to it; *esp.* of combatants, a town'.<sup>937</sup> In essence, the CPED prohibits any form of physical handing over of an individual, which may subsequently lead to torture. Even if the US position were to be accepted, the prohibition of enforced disappearance would still remain a human rights violation, irrespective of where it takes place. The only requirement that would be needed would be the involvement of US state agents in an enforced disappearance to trigger the application of the CPED. Thus, the US argument is rejected. It is also a reason why enforced disappearance cannot be perceived and understood solely as torture. However, as *Padmanabhan* reminds, the US is unlikely to sign to the CPED especially because of the additional

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<sup>932</sup> For a full account of the "torture memos", see: Karen Greenberg, *The torture papers : the road to Abu Ghraib* (New York: Cambridge University Press, 2005).

<sup>933</sup> Article 3 CAT provides: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

<sup>934</sup> Yoo, "Transferring Terrorists", 1228. In the same line of argument, John Bellinger: "The obligation under Article 3 of the Convention against Torture requires a country not to return, expel, or refouler an individual. For more than a decade, the position of the US Government, and our courts, has been that all of those terms refer to returns from, or transfers out from the United States", in Council of Europe, *CIA above the law?*, 103.

<sup>935</sup> Article 16(1) reads: "No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance."

<sup>936</sup> Article 31 of the 'Vienna Convention on the Law of Treaties', UNTS, [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>937</sup> John Simpson, *The Oxford English Dictionary* (Oxford: Clarendon Press, 1989), 304.

obligation that Article 16 places on States that choose to be bound by this convention<sup>938</sup> (i.e. the *non-refoulement* requirement).

Article 16 CPED offers broader protection than the CAT from yet another standpoint. It requires consideration of 'serious violations of international humanitarian law' in addition to examining whether there is a 'consistent pattern of gross, flagrant or mass violations of human rights', an expression also found in Article 3 CAT. This is very important in view of the fact that, as previously mentioned, the US position attempts to create a legal vacuum by excluding the application of humanitarian law. Article 16(1) CPED is sufficiently precise to prevent the exclusion of the relevant legal framework.

### **3.3. Jurisdiction**

The issue of jurisdiction is a highly contentious matter. A further US argument concerning the non-applicability of human rights treaties (and particularly, the CAT) is that of extraterritoriality. More specifically:

'the Convention [i.e. CAT] is generally inapplicable to transfers effected in the context of the current armed conflict because it has no extraterritorial effect (except in the case of extradition) and, hence, cannot apply to al Qaeda and Taliban prisoners detained *outside* of US territory at Guantanamo Bay or in Afghanistan'.<sup>939</sup>

It is submitted that the definition of enforced disappearances in the CPED combined with Article 9 of the same convention will endow human rights proponents with a counter argument to this US stance. Article 9 CPED requires States parties to take the necessary measures to establish their competence to exercise jurisdiction over the offence of enforced disappearance in the following three cases: first, when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; second, when the alleged offender is one of its nationals and; third, when the disappeared person is one of its nationals and the State Party considers it appropriate.

Extraordinary renditions are planned and executed pursuant to the CIA programme. Its agents, or persons acting under its authority, participate in whole or in part in the performance of the programme. It has also been found that the CIA has provided logistical and material support, for example, by creating "front companies" which owned or leased airplanes used to transfer individuals.<sup>940</sup> The US implication in perpetrating enforced disappearance is clear in that its acts fall foul of all three

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<sup>938</sup> Vijay Padmanabhan, "To Transfer or Not to Transfer: Identifying and Protecting Human Rights Interests in Non-Refoulement", *Fordham Law Review* 80, no. 1 (October 25, 2011): 116.

<sup>939</sup> Yoo, "Transferring Terrorists", 1229.

<sup>940</sup> "How US firms profited from torture flights | World news | The Guardian", August 31, 2011, <http://www.guardian.co.uk/world/2011/aug/31/us-firms-torture-flights-rendition>; Peter Finn and Julie Tate, "N.Y. billing dispute reveals details of secret CIA rendition flights."

substantive elements of enforced disappearance, i.e. deprivation of liberty; authorisation, support or acquiescence of the State; and refusal to acknowledge the disappearance or concealment of the victim's fate.

Article 9(1)(b) CPED is also essential since it requires a State to establish jurisdiction where an alleged offender is one of its nationals. In such a case, extraterritoriality would have no bearing on the legal discourse since jurisdiction over US perpetrators would be established *ratione personae*. This possible interpretation of the CPED goes far to counter the US position, which has hidden behind a legal sophistry up to now. Evading responsibility for extraordinary renditions is premised on the argument that torture is carried out by agents of another State, and not by those of the US. In this manner, the US sustained the argument that the identical provision found in the CAT was not applicable since the alleged offender was not a US official, and therefore jurisdiction could not be established. By contrast, the CPED pierces this veil of "legality" and succeeds in founding jurisdiction over perpetrators of US nationality.

Another aspect in which the CPED is complementary to the CAT, thereby cementing the protection of the individual, is that of the scope of persons covered. Whereas the CAT refers in its Article 1(1) to 'public officials or other persons acting in an official capacity', the CPED broadens the category of persons by mentioning in its Article 2, 'persons or groups of persons acting with the authorization, support or acquiescence of the State'. In this regard, the CPED broadens the number of persons who may find themselves within its realm, encompassing not only those who act under colour of law, but also individuals who act with the authorisation, support or acquiescence of the State. These three modes of State involvement are very broad and appear to encompass all possible conduct, active or passive, and with different levels of knowledge on the State's part. In short, outsourcing parts of the practice of extraordinary rendition does not exonerate the State from observing its human rights obligations. In the particular circumstances of the US-led programme, this brings to an end the debate as to the lack of any US involvement from the point in time when a person deprived of his liberty is handed over to a foreign authority. Enlarging the category of those persons who are connected to the offence of enforced disappearance leads to a connection being established with the responsible States and to creating additional occasions on which jurisdiction may be exercised.

### 3.4. Secret detention

Article 17 CPED is exceptionally detailed in its prohibition of holding of an individual in secret detention and requires States to abide by a series of positive obligations.<sup>941</sup> It is the first time that the prohibition of secret detention is promulgated in such unequivocal terms in a binding international human rights instrument.

The ICCPR includes a provision that is similar to this. Article 10(1) ICCPR requires that: 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. The Covenant does not provide *prima facie* for a prohibition of secret detention. Instead, it relates mainly to the humane conditions of detention and obliges States to 'provide detainees with a minimum of services to satisfy their basic needs (food, clothing, medical care, sanitary facilities, communication, light, opportunity to move about, privacy etc.)'.<sup>942</sup>

A passing reference to secret detention is found in General Comment No. 21:

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<sup>941</sup> Article 17 reads:

1. No one shall be held in secret detention.
2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:
  - (a) Establish the conditions under which orders of deprivation of liberty may be given;
  - (b) Indicate those authorities authorized to order the deprivation of liberty;
  - (c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
  - (d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;
  - (e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;
  - (f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.
3. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:
  - (a) The identity of the person deprived of liberty;
  - (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
  - (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
  - (d) The authority responsible for supervising the deprivation of liberty;
  - (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
  - (f) Elements relating to the state of health of the person deprived of liberty;
  - (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
  - (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

<sup>942</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights : CCPR commentary* (Kehl [Germany] ; Arlington Va. U.S.A.: N.P. Engel, 1993), 188–89.



'To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places *officially recognized as places of detention* (emphasis added) and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against *incommunicado* detention.'<sup>943</sup>

*Incommunicado* and secret detention must be conceptually disentangled. *Incommunicado* detention refers to the situation when an individual is held without any communication with the outside world and finds himself in a situation where not even his closest relatives know of his place of detention. By contrast, detention in a secret location goes beyond *incommunicado* detention because the location of detention is neither formally designated as an official detention facility nor it is known to the relatives of the detainee. In both instances it is possible that even the detainee himself does not know where he or she is being detained.

The case of *El-Megreisi v Libya* is illustrative of the above.<sup>944</sup> In this case the HRCtee found that the author was 'detained *incommunicado* for more than three years [...] when he was allowed a visit by his wife, and that after that date he has again been detained *incommunicado* and in a secret location'.<sup>945</sup> The distinction made between the two is apparent in this case.

Prohibiting secret detention and setting up a detailed scheme of a State's obligations with regard to persons deprived of their liberty is extremely relevant to the position of those States involved in maintaining or making use of secret detentions around the globe. Article 17 CPED offers a clear legal response to the use of so-called "black sites" or other similar premises that have been created for the detention of individuals. The CPED provides, in a legally binding manner, the requisite level of protection that had previously only been attained through an expansive interpretation of the ICCPR. It is here that a further instance of the CPED's added value to human rights protection is demonstrated.

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<sup>943</sup> "Compilation of general comments and general recommendations adopted by human rights treaty bodies HRI/GEN/1/Rev.9 (Vol. I)", May 27, 2008, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/422/35/PDF/G0842235.pdf?OpenElement>.

<sup>944</sup> *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, (Human Rights Committee 1994).

<sup>945</sup> *Mapiripán Massacre v. Colombia*, Series C No. 134. Merits, Reparations and Costs 146 (Inter-American Court of Human Rights 2005); *Ituango Massacres v. Colombia*, Series C No. 148 262 (Inter-American Court of Human Rights 2006).

### **3.5. Monitoring body**

The monitoring body set up by Article 26 CPED is an autonomous committee of ten independent experts, who serve in their personal capacity.<sup>946</sup> Special provision is made to bring the Committee within the map of the UN treaty regime: special provision is made to secure that the Committee shall consult particularly the HRCttee in order to ensure consistency of their respective work.<sup>947</sup>

One of the most innovative elements of the CPED is Article 34,<sup>948</sup> which enables the CPED monitoring Committee to bring enforced disappearances to the urgent attention of the UN General Assembly upon well-founded indications that the practice is widespread or systematic. This possibility is unparalleled in the area of human rights law. In addition to the traditional competences of other treaty bodies the Committee can also expose cases thereby exerting public pressure upon States practicing disappearances on this scale, while at the same time avoiding the lengthy procedures of either exhausting domestic remedies or seeking the protection of an international court or tribunal. Especially with regard to the International Criminal Court, this has the additional benefit of dealing effectively with its complementary function. In relation to situations created by extraordinary renditions of the kind professed by the US, this would increase the options available to the international community when confronted with these human rights violations. The CPED Committee is institutionally endowed with such attributes and could draw significantly on past experience of other treaty bodies so as to avoid the institutional impasse observed in the past. In this way, it could be a useful tool in confronting extraordinary renditions at the UN level.

### **4. Dead ends in the pursuit of justice?**

This chapter has dealt with two central issues: first, presenting the main features of the practice that has come to be known as extraordinary rendition and second, examining how this practice relates to enforced disappearance and how the CPED provides a response to it. Enforced disappearance is a complex phenomenon and includes multiple violations of human rights. These may vary depending on the circumstances surrounding disappearances. Notwithstanding this, enforced disappearance cannot be reduced to the aggregate result of these violations; in the CPED, the prohibition of enforced disappearance has been framed as an autonomous human right.

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<sup>946</sup> "Committee on Enforced Disappearances", <http://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx>.

<sup>947</sup> Article 28(2) CPED.

<sup>948</sup> Article 34 reads: "If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practiced on a widespread or systematic basis in the territory under the jurisdiction of a State Party, it may, after seeking from the State Party concerned all relevant information on the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations."

A former director of the CIA's Counterterrorist Centre stated, revealingly: 'All I want to say is that there was "before" 9/11 and "after" 9/11. After 9/11 the gloves came off'.<sup>949</sup> Extraordinary renditions are a practice that fits squarely within this acknowledgment, which metaphorically admits that there are few, if any, moral or legal barriers in the "war on terror". Pursuant to the preceding analysis, extraordinary renditions can be analysed and confronted as a new form of enforced disappearance, if they have the following substantive elements in common: deprivation of liberty, State involvement and refusal to acknowledge the deprivation. The findings of the various committees and reports discussed in previous sections prove that a considerable and increasing number of individuals have been subjected to this egregious practice.

In the aftermath of the election of Barack Obama to the office of US President, there was optimism that the practice of extraordinary renditions would come to an end and that Guantanamo would close down. A positive step towards achieving these goals was made with three executive orders by President Obama that were issued soon after his coming to office.<sup>950</sup> Together with scepticism as to the adequacy of these executive orders,<sup>951</sup> it must be noted that extraordinary renditions are still conducted by the current administration, though with lower intensity.<sup>952</sup> The alarming news, however, comes from two different sources: first, the US Congress Bill S. 1867 provides for detention without trial until the end of the hostilities, military custody of detainees and a national security waiver that gives a free hand to the Executive to extend detention indefinitely without judicial or parliamentary oversight.<sup>953</sup> Second, the policy has shifted from enforced disappearance to targeted killings, giving rise to possible new human rights violations.<sup>954</sup>

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<sup>949</sup> "Andrew Rawnsley: The greatest moral failure of Tony Blair's premiership | The Observer", February 8, 2009, The Guardian edition, <http://www.guardian.co.uk/commentisfree/2009/feb/08/tony-blair-human-rights-torture>.

<sup>950</sup> "Executive Order 13491 -- Ensuring Lawful Interrogations | Executive Order 13492—Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities | Executive Order 13493—Review of Detention Policy Options - The White House", January 27, 2009, [http://www.whitehouse.gov/the\\_press\\_office/EnsuringLawfulInterrogations/](http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/).

<sup>951</sup> Mathias Vermeulen, "Don't ask, don't tell: renditions under the Obama administration" in *Extraordinary renditions and the protection of human rights*, ed. Ludwig Boltzmann Institut für Menschenrechte and Manfred Nowak (Wien [Austria]: NWV Neuer Wissenschaftlicher Verlag, 2010).

<sup>952</sup> United States Department of Justice, "Accused Al Shabaab leader charged with providing material support to Al Shabaab and Al Qaeda in the Arabian peninsula", July 5, 2011, [http://searchjustice.usdoj.gov/search?q=warsame&btnG=Search&q=inurl%3A%2Fusao%2Fny&sort=date%3AD%3AL%3Ad1&output=xml\\_no\\_dtd&ie=iso-8859-1&oe=UTF-8&client=default\\_frontend&proxystylesheet=default\\_frontend&site=default\\_collection](http://searchjustice.usdoj.gov/search?q=warsame&btnG=Search&q=inurl%3A%2Fusao%2Fny&sort=date%3AD%3AL%3Ad1&output=xml_no_dtd&ie=iso-8859-1&oe=UTF-8&client=default_frontend&proxystylesheet=default_frontend&site=default_collection).

<sup>953</sup> *To authorize appropriations for fiscal year 2012 for military activities of the Department of Defense, for military construction, and for defense activities of the Department of Energy, to prescribe military personnel strengths for such fiscal year, and for other purposes.*, 2011, sec. 1031 et seq., [http://r20.rs6.net/tn.jsp?lr=95acjidab&et=1108902216286&s=63319&e=0011yVERaY\\_fbKQm7WSKVbZ2B0ZIW83Tb4tTKoYXtduY9XjMZq-91FkCMI-V4c1OicFQRt2gIWS6xu67T3V1dhlut7i\\_LPTcowxAi3lnRHlY3IKBRF1WHDTUs3dRaS6sd8HQ-31N6LOdykF11JAir4ZUxiuXw4rS-aMjiGdx\\_Xz9WSEb2EMCY4wSs6861x9xm](http://r20.rs6.net/tn.jsp?lr=95acjidab&et=1108902216286&s=63319&e=0011yVERaY_fbKQm7WSKVbZ2B0ZIW83Tb4tTKoYXtduY9XjMZq-91FkCMI-V4c1OicFQRt2gIWS6xu67T3V1dhlut7i_LPTcowxAi3lnRHlY3IKBRF1WHDTUs3dRaS6sd8HQ-31N6LOdykF11JAir4ZUxiuXw4rS-aMjiGdx_Xz9WSEb2EMCY4wSs6861x9xm).

<sup>954</sup> Greg Miller and Julie Tate, "CIA shifts focus to killing targets," *The Washington Post*, September 3, 2011, sec. World, <http://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing->

This chapter has highlighted the legal consequences of enforced disappearances. *De lege lata*, State responsibility is a first category of available solutions, which may be invoked to the extent that enforced disappearance amounts to torture. The snapshot given of the case law of international bodies demonstrates that this may not always be the case because of the lack of well-established criteria in this regard. The current applicable legal framework comprises of the ICCPR, the CAT and, depending on the legal route a victim may choose, regional human rights instruments. The European and African human rights systems have already been seized with cases of this sort.<sup>955</sup>

Individual responsibility is a second category of available solutions. Again, the prerequisite that an enforced disappearance reaches the “torture threshold” is necessary to trigger the relevant CAT provision, which allows prosecution through universal jurisdiction. This has not remained a mere option on paper: an attempt, albeit unsuccessful, to indict six former US officials for providing legal advice which essentially allowed torture practices was made in Spain.<sup>956</sup> A second investigation, again in Spain, on torture allegations in Guantanamo is still underway at the time of writing.<sup>957</sup> Even the well-documented case of the disappearance of Abu Omar in Italy initially fell to a successfully invoked defence of State secrecy.<sup>958</sup> In Germany, an action by an individual that sought to oblige the German Government to request the extradition of the alleged perpetrators of an extraordinary rendition was rejected recently.<sup>959</sup>

An interesting option that has not been explored in this chapter is that of the filing of a civil action.<sup>960</sup> *Filártiga v. Peña-Irala*<sup>961</sup> is a prominent example, but one must be mindful of the inherent

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targets/2011/08/30/gIQA7MZGvJ\_story.html; Dana Priest and William M. Arkin, “‘Top Secret America’: A look at the military’s Joint Special Operations Command”, *The Washington Post*, September 3, 2011, sec. World, [http://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ\\_story.html?hpid=z1](http://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ_story.html?hpid=z1).

<sup>955</sup> *Khaled El-Masri against the former Yugoslav Republic of Macedonia* (European Court of Human Rights 2009); “African commission asked to take case challenging CIA rendition program”, 28 February 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/28/AR2011022803848.html?hpid=moreheadlines>.

<sup>956</sup> “Spain rejects US ‘torture’ probe”, *BBC*, April 16, 2009, sec. Europe, <http://news.bbc.co.uk/2/hi/europe/8002262.stm>.

<sup>957</sup> “Spanish court opens investigation of Guantánamo Bay detention centre torture allegations | World news | guardian.co.uk”, <http://www.guardian.co.uk/world/2009/apr/29/spain-court-guantanamo-detainees-torture>.

<sup>958</sup> Tullio Scovazzi, “Diritti individuali e giustizia internazionale = Individual rights and international justice = Droits individuels et justice internationale” in *Liber Fausto Pocar*, ed. Fausto Pocar (Milano: Giuffrè, 2009), 885; “Italy: Constitutional Court recognizes wide discretion by the Government on state secrets « The Lift – Legal Issues in the Fight against Terrorism”, *The LIFT*, April 30, 2009, <http://legalift.wordpress.com/2009/04/30/italy-constitutional-court-recognizes-wide-discretion-by-the-government-on-state-secrets/>; Amnesty International, “Italy: The Abu Omar case Introduction”, November 4, 2009, <http://www.amnesty.org/en/library/asset/EUR30/012/2009/en/8580778b-6737-40dc-a3ce-0903398a0178/eur300122009en.pdf>; Francesco Messineo, “‘Extraordinary renditions’ and state obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy”, *Journal of International Criminal Justice* 7, no. 5 (2009): 1023-1023-1044.

<sup>959</sup> Peter Wilkitzki, “German Government Not Obligated to Seek Extradition of CIA Agents for ‘Extraordinary Rendition’”, *Journal of International Criminal Justice* 9, no. 5 (November 1, 2011): 1117-1127.

<sup>960</sup> Peter Weiss, “The future of universal jurisdiction” in *International prosecution of human rights crimes*, ed. Republikanischer Anwälten- und Anwalteverein.; Center for Constitutional Rights (New York, N.Y.) and Wolfgang Kaleck (Berlin ;New York: Springer, 2007), 25: “The Alien Tort Claims Act, which the Center for Constitutional Rights resuscitated

challenges of lodging such a case, especially in identifying perpetrators of extraordinary renditions. From a more general standpoint, access to justice by individuals in domestic *fora* presents an attractive prospect for two main reasons. Where such domestic recourse is successful, then a remedy to human rights violations is anticipated, coupled with a thorough and effective investigation.<sup>962</sup> If unsuccessful, then exhaustion of domestic remedies may open the way for applications to competent international courts. Considering the involvement of CoE Member States in the extraordinary renditions saga, one can expect to see an interesting period of litigation brought before the ECtHR in the not-too-distant future.<sup>963</sup>

*De lege ferenda*, the CPED offers a wide array of legal solutions. It brings within the ambit of the protection of human rights law all instances of extraordinary renditions, regardless of whether they could be considered as torture or not. It is also more encompassing in that it may be used against all individuals who act with the authorization, support or acquiescence of the State. This places a bar on outsourcing extraordinary renditions to private individuals or other entities. It also fills in certain gaps of the current international protection of human rights, especially with regard to CAT.

More importantly, as seen in the previous chapter, the CPED introduces a new right, which in the framework of the debate for extraordinary renditions attains special significance: the right to truth. The bearers of the right are the material victims and those who have suffered harm from their disappearance. However, the moral foundation of the right relates to every one of us: our societies are owed the truth of what has happened.

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from its 200-year slumber in 1978, has become one of the most successful instruments for exposing torture, disappearance and other grave human rights violations committed outside the United States, through civil suits brought in American courts. There are many advantages for victims or their survivors to proceeding in this way: (1) they can initiate the litigation instead of having to persuade a public prosecutor to do so; (2) once commenced, they can control the litigation through lawyers of their choice; (3) they can introduce all the admissible evidence at their disposal, including that which public prosecutors might be reluctant to use for political reasons; and (4) last, but not least, they can receive compensation for the injury done to them or their murdered relatives.”

<sup>961</sup> U.S. Court of Appeals (2nd Circuit), *Filártiga v. Peña-Irala*, 630 F.2d 876, 30 June 1980.

<sup>962</sup> It is also interesting to note that in the UK a parliamentary committee was set up. “All Party Parliamentary Group on Extraordinary Rendition”, <http://www.extraordinaryrendition.org/>. Another body has also been set up by the UK to look into renditions: “Terms of Reference and Protocol published | The Detainee Inquiry”, <http://www.detaineeinquiry.org.uk/2011/07/news-release-terms-of-reference-and-protocol-published/>.

<sup>963</sup> On 8 October 2010, the ECtHR communicated a statement of facts for the case of Khaled El-Masri against the former Yugoslav Republic of Macedonia, which relates to the applicant’s alleged handing over to a “special CIA rendition team”. This statement is available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=875676&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. The Grand Chamber of the Court will be holding a hearing in this case on 16 May 2012.



## CONCLUSIONS

*“It happened, therefore it can happen again:  
this is the core of what we have to say.”*

**Primo Levi**  
**“The drowned and the saved”**

This thesis has discussed various central themes of international law and, where necessary, drawn upon several branches of its theory and jurisprudence beyond those pertaining to human rights.

The analysis in the first two chapters attempted to grasp how the notion of enforced disappearance has developed from a technical aggregation of other human rights violation into an autonomous, self-standing right. Notwithstanding the regional initiatives, it was shown that the role of the UN as a universal forum for the protection against enforced disappearance was instrumental. The creation of the first thematic special procedure on enforced or involuntary disappearances continues today to be a central point for the channelling of human rights complaints originating from countries that often do not come under a human rights mechanism. The added value of the creation of the WGEID lies especially in how it paved the way for the proliferation of thematic procedures that constitute one of the prime areas of human rights protection within the UN system. With regard to the definition of enforced disappearance, the analysis attempted to offer a solid grounding of the argument that it is prohibited under customary law, by drawing on a variety of sources and employing the mainstream theories.

Chapters 3 and 4 benefit from a quantitative and qualitative analysis of the case law of the European and Inter-American Courts of Human Rights, as well as the Views of the Human Rights Committee. Underlying these two chapters is the comparative analysis of the common themes of their bodies of their jurisprudence. Rights, remedies and judicial interpretations were compared in order to identify the areas of convergence and divergence within the work of the respective human rights bodies. The presentation of these three topics was made against the background of the discussion on the fragmentation of international law, together with the jurisdiction-specific problems that come along with the particular characteristics of each system.

The last two chapters dealt with two diverse phenomena that are closely linked with enforced disappearance. Chapter 5 explored the right to truth and its interplay with the permissibility of amnesty laws. One of the arguments made in the first part of this chapter was that the right to truth, despite its moral underpinning, is devoid of any substantial and distinct human rights content. At best, the claim to

this right can be better understood as included in the positive obligation of States to conduct effective and meaningful investigations that can have no other purpose than bringing truth to light. Concurrently, it was found that truth bears an inherently remedial charge that links it with the chapter on remedies.

Chapter 6 advanced the argument that the perpetration of enforced disappearance has nowadays been transformed into a new phenomenon, namely extraordinary rendition. While the latter is not found in human rights treaties, the acts constituting renditions can often involve enforced disappearance. The analysis in the thesis attempted to differentiate the various legal situations that are created out of extraordinary renditions and asserted that the deprivation of liberty and the concealment of the fate or refusal to acknowledge such act by State officials bring extraordinary renditions within the ambit of enforced disappearance. At the same time, sight should not be lost of the fact that more often than not extraordinary renditions have been mainly associated with torture. One reason for this may well be the fact that the detainees have been subjected to it for the purposes of extracting information from them. The conceptual meshing of renditions and torture is owed largely to the debate in the media, which failed to draw the necessary distinctions between the human rights implicated. One major side-effect was that the enforced disappearance remained at the background of this debate. Chapter 6 suggested possible ways of dealing with this issue.

Despite the fact that the thesis is an attempt to analyse the various aspects of enforced disappearances in a holistic manner, three areas have been intentionally left out of the scope of this research. The gender dimension of enforced disappearance and the issue of the enforced disappearance of children have not been dealt with in the previous chapters. With regard to the first, an analysis that would set as its goal to identify the gender contours of disappearances would certainly have necessitated a context-specific reference. However, the particular socio-political situations of different countries fall outside the scope of this research. Similarly, the enforced disappearance of children, although specifically mentioned in Article 25 CPED, did not form part of the research objectives because it mainly relates to the connection of national criminal systems with the CPED. This connection did not present itself as an autonomous research question.

Lastly, an interesting topic that has been *in passim* referred to is the interplay of transitional justice mechanisms with themes linked to enforced disappearance, namely remedies and amnesties. Transitional justice has been an area of interdisciplinary studies, a large part of which questions the methods, goals and priorities for achieving successful transitions to democracy, the rule of law and the restoration of human rights. These mechanisms have formed part of the toolkit of Latin American States for their return to democratic rule, with varied outcomes. Although transitional justice does not form part



of core legal studies, it cannot be disregarded either in the scholarly research or in political reality. All three aforementioned areas could form part of a future research agenda.



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## ABBREVIATIONS

ACHR – American Convention on Human Rights  
AG – Assembly General of the OAS  
AP-I - Additional Protocol I to the Geneva Conventions  
CAT - UN Convention against Torture  
CHR - Commission on Human Rights  
CIA – Central Intelligence Agency  
CIDT – Cruel, inhuman or degrading treatment  
CoE – Council of Europe  
CoM - Committee of Ministers of the Council of Europe  
CMP - Committee on Missing Persons  
CMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families  
CPED - International Convention for the Protection of All Persons from Enforced Disappearance  
DINA - Dirección de Inteligencia Nacional'  
ECHR - European Convention on Human Rights and Fundamental Freedoms  
ECOSOC - Economic and Social Council  
ECtHR - European Court of Human Rights  
GA - General Assembly  
HRC – Human Rights Council  
HRCttee - Human Rights Committee  
IACFD - Inter-American Convention on Forced Disappearance of Persons  
IACtHR – Inter-American Court of Human Rights  
IAComHR – Inter-American Commission on Human Rights  
ICC - International Criminal Court  
ICCPR - International Covenant on Civil and Political Rights  
ICESCR - International Covenant on Economic, Social and Cultural Rights  
ICJ - International Court of Justice  
ICRC – International Committee of the Red Cross  
ICTY - International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991  
IHL – International Humanitarian Law  
IMT - International Military Tribunal  
OAS – Organisation of American States  
UDHR - Universal Declaration of Human Rights  
UNDPED - UN Declaration on the Protection of all Persons from Enforced Disappearance  
UN - United Nations  
VCLT - Vienna Convention on the Law of Treaties  
WGEID - Working Group on Enforced and Involuntary Disappearances