Redress for Victims of Enforced Disappearances: A Comparative Perspective

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Abstract

Enforced disappearance is a multiple and complex human rights violation and a serious international crime. This phenomenon has pervasive implications on individuals and society as a whole, leaving behind a legacy of violence, fear, impunity and overall distrust in the institution of law. The purpose of this thesis is to investigate the human tragedy of enforced disappearance from a range of perspectives in order to address the variety of complications arising from this phenomenon. One such challenge is the provision of redress to victims, a problematic task for international human rights courts. This study will offer a comparative analysis of the remedial jurisprudence of the most prominent regional courts entrusted with the protection of human rights in two different regions affected by the prevalence of enforced disappearance. The originality and core contribution of this thesis lies in the dialogue it establishes between different disciplines in order to gauge the distinct human dimensions affected by this violation, which in turn merit their own appropriate redress. The practice of enforced disappearance strikes at the very identity and dignity of a person, their family and their social infrastructure, and therefore requires a comprehensive and holistic response.

La disparition forcée constitue une violation complexe de droits de l'homme et un crime international sérieux. Ce phénomène, synonyme de violence et souvent d'impunité, a des répercussions envahissantes dans la société. Il génère également une attitude de peur et de méfiance à l'égard des institutions, tant aux points de vues individuel que collectif. Cette thèse propose d'étudier la tragédie humaine de la disparition forcée à partir d'une variété de perspectives, afin d'aborder le spectre des conséquences qui en découlent. Octroyer une réparation appropriée aux victimes est une tâche difficile et problématique vu la difficulté de quantifier les dommages causés. Cette étude offrira une analyse comparative de la jurisprudence de la Cour Européenne et de la Cour Interaméricaine des Droits de l'Homme, deux cours chargées de la protection des droits humains dans deux différentes régions touchées par le fléau des disparitions forcées. L'originalité et le pivot de cette thèse résident dans le dialogue qu'elle établit entre les différentes disciplines. L'objectif est d'évaluer les multiples dimensions humaines affectées par cette violation et qui méritent une réparation appropriée et efficace. La pratique des disparitions forcées frappe et détruit l'identité et la dignité d'une personne, de même que ses cadres familial et social. Pour cette raison, des réponses globales et holistiques sont nécessaires et impératives.

Prolegomena

Santiago Gómez Palomino was a twenty-nine-year-old student and member of an evangelist church who lived in Lima, Peru. On 9 July 1992 he was at home with his partner when a group of armed persons knocked down the door and stomped in. They were members of the *Grupo Colina*, a death squad set up in secret during the presidency of Alberto Fujimori. Apparently they were searching for the former owner of the house. Santiago was insulted, beaten and taken away, while his partner was threatened in case she reported the events that had just taken place. Santiago was taken to a beach close to Lima and forced to dig a ditch. He was then executed and buried there. The mortal remains of Mr. Gómez Palomino were only recently located in 2013. A few years after Santiago's disappearance, on the other side of the world in Grozny, Chechnya, Nura Said-Aliyevna Luluyeva, a nurse and kindergarten teacher and mother of four children, left her home early one morning with two of her cousins to sell strawberries in a market. That day at the marketplace, the Russian federal forces arrested several people and drove them away. Nura Said-Aliyevna Luluyeva and her cousins were among those people. They were never seen again. Their whereabouts were unknown until their bodies were found several months later, in February 2001, in a mass grave.[1]

These are just two of the countless experiences of victims of an international crime that constitutes one of the most serious and heinous human rights violations: enforced disappearance.

Typically, in a case of enforced disappearance, a State or an agent/s acting with the support of a State, deprives the victim of their freedom, and puts them in secret detention, where they are interrogated and tortured in complete violation of domestic law. The disappeared person is denied any access to legal assistance and is not permitted to be heard by any legitimate judicial authority in order to be interrogated and informed about the criminal charges against them. Moreover, it is virtually impossible for the families to move forward due to lack of information about the fate of their loved one. The material victim and their next of kin are removed from the protection of the law and are submitted to the unpredictable power of their perpetrators, who act with total impunity beyond the fundamental laws of human coexistence. Most often the end stage of enforced disappearance is the killing of the victim, followed by the cover-up of the crime. No ensuing impartial investigation is necessarily allowed by the State. This guarantees total impunity to those responsible, leaving families and society as a whole in a legal "no-man's-land" of fear and suffering.

[1] Case of *Luluyev and others v. Russia*, E.Ct.H.R. (First chamber), 69480/01, (9 November 2006); Andres Osborn, "Kremlin 'was complicit in Chechen murders'", The Independent, 10 November 2006.

This phenomenon results in a wide range of human rights violations, namely the right to protection under the law, the right to security and liberty of the person, the right to be recognized as a person before the law, the right to a fair trial and to judicial guarantees, and the right not to be subject to torture or other cruel, inhuman or degrading treatment or punishment. This can also be related to the violation of the right to life or to a family of rights, of freedom of thought, expression, religion and association and of the general prohibition of discrimination on every ground.[2]

This work will provide an overview of the consequences of enforced disappearances from a variety of perspectives. It will demonstrate the variable and different connections between the harm and damage caused by enforced disappearances to different subjects, and will familiarize the reader with the psychological and social issues related to the crime. This analysis will underscore questions about the social impact of enforced disappearances and its significance at both individual and collective levels. In such complex situations, how can the multiple victims of such crimes be provided with an effective and appropriate remedy?

One of the main purposes of this research is to study and compare different responses provided within the framework of international law of human rights, with particular reference to the decisions of the Inter-American and European Courts of Human Rights, and to the victims' claims for justice and redress. I argue that since enforced disappearances infringe upon multiple human rights it is necessary to consider it as a "relational" rights' violation. A thorough understanding of disappearances brings to the surface the complex social constructions from which this phenomenon stems. Its consequences must be understood in the same terms, and interventions must be designed and initiated accordingly at multiple levels, namely individual, familial, and societal. The recent developments within international human rights law reflect the need for a comprehensive approach to redress, which encompasses monetary compensation and other forms of reparation directed at restoring victims' sense of dignity and social trust. Given its complex and continuous nature, enforced disappearance can, at the forefront, represent examples of a violation that requires a far-reaching approach to remedies, which itself must go beyond a mere compensatory paradigm. The practice of enforced disappearance strikes at the very identity and dignity of a person, his or her family and their social infrastructure, and therefore requires an extensive and comprehensive response.

[2] Office Of The High Commissioner of Human Rights, Enforced or Involuntary Disappearances, Fact Sheet N°. 6 (Rev.3).

Chapter I

Defining Enforced Disappearances in International Law

1. Introduction

Enforced disappearance is a multifaceted and complex phenomenon. This chapter introduces the salient legal issues linked to enforced disappearances and exposes the latest developments in drafting legally binding instruments of prevention and protection. It concentrates on the legal definition of enforced disappearance and develops a critical analysis of the principal legal instruments applicable in cases of enforced disappearance.

A historical introduction will precede the overview of the international legal framework on enforced disappearance. The purpose of this analysis is to underscore the crucial hallmarks characterizing the evolution of the notion of enforced disappearance in the constellation of international law. Particular emphasis will be placed on the examination of the International Convention for the Protection of all Persons from Enforced Disappearances, the principal universal legal instrument that represents the culmination of a strenuous international struggle. This will lay the grounds for the successive exploration of the effectiveness of the remedies offered within the European and the Inter-American human rights regimes. The present chapter will thus offer to the reader an appropriate overview of the current international instruments that protects people from enforced disappearance, and in the light of the following analysis it will be possible to critically examine the jurisprudential practice of different regional courts.

The following chapters will deal with the different approaches developed by judicial bodies in the matter of the right to reparation in case of enforced disappearances. More specifically, I intend to adopt a particular comparative methodology that will deal with the approach of the Inter-American Court of Human Rights and the European Court of Human Rights. Indeed, while the principal remedial fora are, or should be, at the domestic level, international human rights systems often represent alternative but essential legal mechanisms through which redress can be sought, especially in cases of enforced disappearances. This incentivizes states to meet their international obligations, and therefore strengthens the victims' protection. The choice made by these two regional courts has been largely dictated by the relevance of their prolific case law on disappearances, through the development of a broad jurisprudential interpretation of the phenomenon under consideration.

A horizontal comparison will be developed and will focus on the examination of the different solutions offered by the two regional courts, stressing the commonalities and the discrepancies between their approaches. This study is not only aimed at highlighting the differences between the considered solutions, but will also enable the reader to develop a critical insight into the aforementioned approaches. It is thus essential to take in due consideration the international framework surrounding the courts' pronouncements. Indeed, as it will be demonstrated in the present chapter, the most recent international instruments pertaining to enforced disappearances can represent the starting point for a more complete and effective approach to remedies in such cases.

2. International Responses to Enforced Disappearances: a Historical Overview

Modern history ascribes the first manifestation of enforced disappearance to the Second World War II, when the German Armed Forces secretly transferred thousands of people from their homelands to Germany.[3] Convinced that public death sentences created martyrs, and that disappearances were more effective at instilling fear and uncertainty in a population and were better deterrents against supporting or joining resistance groups, the German Führer and Supreme Commander of the Armed Forces issued the "*Nacht und Nebel Erlass*" ("Night and Fog Decree") on 7th December 1941. Under this decree individuals who committed offences against the Reich or German forces in occupied territories were to be arrested, deported to Germany and likely executed in secret. German authorities were empowered through this decree to make prisoners vanish without a trace, giving no information as to their whereabouts or their fates. Indeed, it restricted all forms of information about deported people: no word of them was permitted to reach their homelands or their relatives, not even in cases of death.[4]

[3] Tullio Scovazzi & Gabriella Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention* (Martinus Nijhoff Publishers, 2007); Marthe Lot Vermeulen, *Enforced disappearance: determining state responsibility under the International Convention for the Protection of all Persons from Enforced Disappearance* (Intersentia, 2012); 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" (2006) 7 Melb J Intl L 245.

[4] In a letter by the Chief of the German Security Police, dated 24th June, 1942, it is clarified that: "It is the intent of the Führer and Commander-in-Chief of the Wehrmacht concerning prosecution of criminal acts against the Reich or the occupation forces in occupied territories (. . .) to create, for deterrent purposes, uncertainty over the fate of prisoners among their relatives and acquaintances, through the deportation into Reich territory of persons arrested in occupied areas on account of activity inimical to Germany. This goal would be jeopardized if the relatives were to be notified in cases of death. Release of the body for burial at home is unadvisable for the same reason, and beyond that also because the place of burial could be misused for demonstrations. I therefore propose that the following rules be observed in the handling of cases of death: (a) Notification of relatives is not to take

The Nazis thus understood that effective and lasting intimidation of a civilian population could be achieved through measures that keep victims' families and the population in general in a state of perpetual fear and uncertainty. In this way, disappearances had even stronger effects than outright executions, and were therefore more useful for the regime. The primary purpose of the *Erlass* was to deter the civilian population of the occupied territories by threatening them through fear. This intention was clarified by the Chief of the German Armed Forces High Command, Wilhelm Keitel, a co-signatory to the Night and Fog Decree, in a letter dated 12th December 1941:

> Efficient and enduring intimidation can only be achieved either by death penalty or by taking measures which will leave the family and the population uncertain of the fate of the offender. The deportation to Germany serves this purpose.[5]

The Nazis never used the words "enforced disappearances" to describe their deterrence policies, but it is evident that the practice sanctioned by the Night and Fog Decree fits precisely with the actual definition of the offence of enforced disappearance as described by contemporary human rights instruments. The explicit purpose of the disappearances perpetrated by the Nazis in their occupied territories was to spread terror among the population and eliminate opposition.[6] Through it, civilians that were recognized as actual or potential opponents to the regime, were deprived of their liberty without any due process of law and then taken to unknown destinations by State agents who concealed their whereabouts thereafter. It is worth remembering, that the phenomenon of disappearances is attributable not only to the Nazi Germany during the II World War. This atrocious crime has been perpetrated by many totalitarian governments, in diverse manners and for different purposes. For instance, in 1940 nearly 22,000 Polish military officers and civilians disappeared after the Soviet annexation of Poland. The United States of Soviet Russia (USSR) and then Russia repeatedly put the blame on the Nazi Germany.[7] However, investigations recently revealed that disappeared persons were arbitrarily executed and buried in mass graves by the Soviet forces.[8]

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place. (b) The body will be buried at the place of decease in the Reich. (c) The place of burial will, for the time being, not be made known." The Avalon Project, Documents in Law, History and Diplomacy, Yale Law School, http://avalon.law.yale.edu/imt/imtconst.asp (last access 25 January 2014). See, The Avalon Project, Documents in Law, History and Diplomacy, Yale Law School, http://avalon.law.yale.edu/imt/imtconst.asp (last access 25 January 2014). See also, Vermeulen, *supra* note 7.

[5] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30th September and 1st October, 1946, at 56.

[6] T. Scovazzi & G.Citroni, *The Struggle against Enforced Disappearances and the 2007 United Nations Convention* (Leiden: Martinus Nijhoff , 2007), p.7.

[7] Case of *Janowiec and Others v. Russia*, E.Ct.H.R. (Grand Chamber), 55508/07 and 29520/09, (21 October 2013), para.21.

[8] In 2010, the Russian Duma recognized that the disappearance and "mass extermination" of Polish citizens during that period "had been an arbitrary act by the totalitarian State." *Id.*, para 73.

In the aftermath of the war, the international community, after learning of the scale of the atrocities committed during it, collectively embraced the promotion and protection of human rights as a means of avoiding and preventing such horrors in the future. The International Bill of Human Rights, which consisted of the Universal Declaration of Human Rights[9], the International Covenant on Civil and Political Rights,[10] and the International Covenant on Economic, Social and Cultural Rights,[11] proclaimed a new era in international law where States were strongly motivated to adopt international standards for protecting human rights. In this early climate of general human rights euphoria around the world, the first step towards the recognizing enforced disappearance as an offence worthy of international concern was taken with the adoption of the Convention on the Declaration of Death of Missing Persons[12] in 1950. The Convention aimed at ensuring that declarations of death were provided for persons who had disappeared during the Second World War "under circumstances affording reasonable ground to infer that they have died in consequence of events of war or of racial, religious, political or national persecution."[13] However, since the purpose of the Convention was merely to provide certainty about the legal status of missing people in the aftermath of the War, it should not be regarded as an early instrument of the human rights struggle in the post-war era.

In the decades that followed, several dictatorial regimes in Latin America undertook extraordinary measures to contain political resistance and insurrections in their countries. Such measures mostly consisted of the removal of political opponents and their supporters through excessive and abusive means. Regimes in power maintained their positions by making their adversaries and opponents disappear. As a result, large numbers of citizens throughout the region were arrested and deported to clandestine centers of detention, where they could not be visited, were likely tortured, and were unlikely to survive and tell their

[9] The Universal Declaration of Human Rights, General Assembly resolution 217 A (III), (10 December 1948), http://www.un.org/en/documents/udhr/.

[10] International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976) < http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

[11] International Covenant on Economic, Social and Cultural Rights, General Assembly resolution 2200A (XXI) of 16 December 1966, (entered into force 3 January 1976), http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspxù.

[12] Convention on the Declaration of Death of Missing Persons, adopted 6 April 1950, (entry into force 24 January 1952).

[13] *Id.*

stories.[14] Such people were most often representatives of political parties, students, teachers, leaders of cultural groups, trade unionists, or minority members.[15]

The phenomenon of enforced disappearance has been explicitly condemned by the United Nations through Resolution 33/173 on "Disappeared Persons" in 1978.[16] The General Assembly referred to the practice of enforced disappearance as a violation of many fundamental human rights, such as right to life, right to personal liberty and security, freedom from torture, freedom from arbitrary arrest and detention, and the right to a fair and public trial. In 1980, the United Nations Commission on Human Rights established the United Nations Working Group on Enforced or Involuntary Disappearance (WGEID), through Resolution n.20 (XXXVI) of 29 February 1980. The WGEID was the first *ad hoc* mechanism adopted by the United Nations to examine questions relevant to enforced or involuntary disappearances. The mandate of the WGEID is to assist families with discovering the fate and whereabouts of disappeared relatives, and it is committed to creating channels of communication between families and governments to ensure that each case brought to its attention is thoroughly investigated.

In 1981, the Human Rights Institute of the Paris Bar Association promoted an international non-governmental colloquium that focused on the issue of enforced disappearances. It was at this colloquium that the idea of an international instrument against the phenomenon received its first endorsement from jurists around the world. In 1982 in the occasion of its view on the Communication No. R.7/30 (*Eduardo Bleier v. Uruguay*) the Human Rights Committee rendered the first assessment on the matter of enforced disappearance. The Committee is the only quasi-judicial international body that, still today, receives complaints concerning specific cases of enforced disappearances against Countries not belonging to Latin America or Europe.[17]

The first regional judicial body to issue judgments on cases pertaining to enforced disappearance was the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case in 1988.[18] Since then the Court has developed a complete and innovative jurisprudence regarding this heinous practice.[19]

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[14] A. Vranckx, *A long road towards universal protection against enforced disappearance,* www.wihl.nl, Website International Humanitarian Law,(2007).
[15] T. Scovazzi & G.Citroni, *supra,* note 4.
[16] General Assembly Resolution 33/173 (20 December 1978).
[17] T. Scovazzi & G.Citroni, *supra,* p. 96.
[18] Case of *Velasquez Rodriguez* , Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988);
Case of *Fairén-Garbi and Solís-Corrales v. Honduras,* Judgment of March 15, (Ser. C) No.6 (1989); Case of *Godínez-Cruz v. Honduras*, Judgment of June 26, 1987, (Ser. C) No. 3, (1987).
[19] T. Scovazzi & G.Citroni, *op.cit.,* p.96.

In the years that followed, the UN General Assembly would come to treat enforced disappearance as a "matter of priority," and requested the Commission on Human Rights to continue its analysis of it and to assist the WGEID with its tasks.[20] In December 1990, the General Assembly expressed its profound concern about "the persistence the practice of enforced or involuntary disappearances, (…) and about the growing number of reports concerning harassment of witnesses of disappearances or relatives of disappeared persons". [21]

On December 18, 1992, in response to these renewed concerns about enforced disappearances, the UN General Assembly adopted Resolution 47/133, comprising the Declaration on the Protection of All Persons from Enforced Disappearance. This instrument responds to the need to "devise an instrument which characterizes all acts of enforced disappearance of persons as very serious offences and sets forth standards designed to punish and prevent their commission,"[22] and proclaims a number of general principles that it urges all States to respect. The Declaration demands that every State not practice, permit or tolerate enforced disappearances with an ultimate aim of preventing and eradicating it entirely (Art.2). Furthermore, states are called upon, inter alia, to: take effective legislative, administrative and judicial measures to prevent and abolish this practice in any territory within their jurisdiction (Art.3); ensure a prompt and effective judicial remedy and guarantee to the relatives of the victim, protecting them from any possible intimidation or ill-treatment (Arts.9-13); moreover, states and their agents are precluded from justifying any act of enforced disappearance on any grounds whatsoever, including a public emergency such as a threat of war, a state of war, or internal political instability (Art. 11).

Despite its significant moral and symbolic value, as a resolution of the General Assembly the Declaration is not a binding legal instrument like a treaty. Nonetheless, it contains rules that have become generally accepted as customary international law, and therefore may be binding.[23] Indeed, the principles outlined in the 1992 Declaration have been subsequently confirmed by the state practice as countries responded and respected it, collectively contributing to the progressive evolution of international law. In addition, the WGEID since 1993 has reported periodically to the Human Rights Council about activities it has undertaken to implement the 1992 Declaration. In particular, the WGEID transmits to

[20] General Assembly, *Question of involuntary or enforced disappearances*, Resolutions 37/180 (17 December 1982); 38/94, (16 December 1983); 39/111 (14 December 1984); 40/147 (13 December 1985); 41/145 (4 December 1986); 40/147 (42/142 December 1987); 43/159 (8 December 1988).

[21] General Assembly, Question of involuntary or enforced disappearances, Resolution 45/165 (18 December 1990).

[22] Declaration on the Protection of all Persons from Enforced Disappearance, adopted by General Assembly resolution 47/133 of 18 December 1992.

[23] See *infra*, chapter I.

governments summaries of allegations received from relatives of disappeared persons and NGOs in their countries, and then describe any difficulties encountered with the application of the Declaration in given countries in its report to the Human Rights Council. When it submits the report, the WGEID invites the Governments to comment upon whatever allegations it makes against them if they so wish.

However, because the 1992 Declaration lacks any legally binding provisions, it can only attribute state responsibility for enforced disappearances indirectly linked to the violation of several other human rights that do have stronger protection under international and regional instruments.

A second significant measure on enforced disappearances emerged in the American regional context. Enforced disappearances spread especially in Guatemala, Argentina, Colombia, El Salvador, Chile, Peru, Uruguay, Honduras, Haiti, Bolivia and Mexico, all countries affected by persistent political instability, military regimes, guerrillas and internal armed conflicts. Because of this, it is perhaps not surprising that the first international binding legal instrument against enforced disappearances came to force in the American regional context. After a number of years of inter-state negotiations, the Inter-American Convention on Forced Disappearance of Persons (IACFP) was finally approved by the OAS General Assembly on 6 September 1994 and was entered into force on 28 March 1996. The main purpose of this new instrument was to prevent, punish and eliminate the practice of enforced disappearance throughout the region. Article 1 of the IACFP reads as follows:

> The States Parties to this Convention undertake: a. Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees; b. To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories; c. To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; d. To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.

It was breakthrough for international human rights law because it contained the first internationally agreed definition of the offence and described its systematic use by states as a crime against humanity.[24]

In spite of its dramatic symbolic value and historical significance, the Convention nevertheless has its flaws, some of which should be highlighted here. First, it does not provide any clear provisions for explicit means of preventing forced disappearances other than proclaiming the general obligation of each state party to refrain from it.

[24] T. Scovazzi & G.Citroni, *supra*, at 253.

Second, it fails to provide judicial guarantees for material victims, their families or representatives, nor does it impose any duty on states to protect all persons involved in any investigation into a case from ill-treatment or harassment. Third, it allowed state signatories to make reservations, which Guatemala and Mexico both did.[25] Finally, its utility as an internationally binding legal instrument is limited to its regional field of application, which, although impressive, nevertheless limited its global efficacy.[26]

This changed somewhat in 1998 when the Rome Statute that established the International Criminal Court included the offence of enforced disappearances of persons within its list of crimes against humanity.[27] According to Article 7.1, any act of enforced disappearance is considered to be a crime against humanity when it is "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". The inclusion of the crime in the Rome Statute represented a further historical turning point by being able to effectively account for the crime and for providing a more global reach that all previous international legal instruments had failed to achieve. The limitation of the Rome Statute, however, is its focus on widespread and systematic practices, since a considerable number of enforced disappearances can quite easily occur outside of this framework and, therefore outside of the competence of the International Criminal Court. Furthermore, the Rome Statute does not include any specific provision regarding the prevention, investigation and eradication of this crime at the domestic level. For instance, it does not refer any obligation by states to list forced disappearances as a specific criminal offense under national legislation.[28]

Despite the international recognition of enforced disappearances as a type of crime requiring sanction and the several efforts by the international community to eradicate this phenomenon, a specific human right to not be subject to it had yet to emerge in the constellation of international legal instruments. Although it had been common to recognize the crime as implicitly violating multiple human rights, there was no general agreement on which human rights other than the right to liberty were actually breached by it. Moreover,

[25] At the time being, while Guatemala withdrew its reservation in 2001, the one of Mexico is still effective. The Mexican reservation refers to the exclusion of the competence of special or military jurisdictions in cases of enforced disappearance (Art. IX).

[26] The Inter-American Convention on The Forced Disappearance of Persons, as of February 2014, had been ratified by 14 states.

[27] Art. 7.1.(i)

[28] F. Andreu-Guzmán, *Impunity, crimes against humanity and forced disappearance*, The Review of the ICJ, No. 62 – 63 (Geneva: September 2001).

attempts at defining the offence in separate international conventions left a number of discrepancies between international human rights and criminal law[29].

In 1998, after numerous consultations with various experts from the United Nations and civil society, the Sub-Commission for the Protection of Human Rights finally adopted the Draft Convention for the Protection of All Persons from Enforced Disappearance. Soon thereafter, the UN Economic and Social Council (ECOSOC) endorsed the proposal of the Commission on Human Rights to establish an Intersessional Open-ended Working Group whose purpose was to develop a binding normative instrument to protect against enforced disappearances. The Draft Convention would become the basis for subsequent negotiations. In 2001, Manfred Nowak was appointed by the UN Commission on Human Rights as an independent expert to examine the existing international criminal and human rights framework protecting against enforced or involuntary disappearances. In his first report to the Committee Mr. Nowak pointed that there was, an urgent need in the world for a universal and legally binding instrument.[30] Furthermore, both the WGEID and the UN Commission on Human Rights up to then had been repeatedly urged by civil society actors, especially NGOs in Latin America,[31] to take the initiative to develop an international convention regarding enforced disappearances. In 2003, the Intersessional Open-ended Working Group, presided by French Ambassor Bernard Kassedjian, met for the first time, and met on a biannual basis.

Eventually, after 25 years of struggle, a draft of the Convention was finalized in 2005, and on 6 February 2007 it was signed by 57 states. The International Convention for the Protection of All Persons from Enforced Disappearance (CPED) entered into force on 23 December 2010. This convention is composed of 45 articles divided into three parts: the first defines the offence of enforced disappearance; the second deals with the establishment of a Committee on Enforced Disappearances to implement the Convention and entrusted with

[29] Report submitted by Mr. Manfred Nowak, UN Commission on Human Rights, 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 2001/46E/CN.4/2002/71, (7 January 2002), para. 96.

[30] Commission on Human Rights, 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 2001/46E/CN.4/2002/71, (2002).

[31] In particular, the first Colloquium on Forced disappearances, that has taken place in Colombia in 1986, transmitted a Draft Declaration to the WGEID and the Commission on Human Rights, urging them to take initiatives in order to elaborate an International Convention on Enforced Disappearances. Two years later, FEDEFAM and the *Grupo de Iniciativa* (a federation of Argentine NGOs) presented another draft project for the adoption of an International Convention against Enforced Disappearance. See, *La desaparición forzada como crimen de lesa humanidad – El nunca más y la communidad internacional*, Colloque de Buenos Aires, 10-13 octobre 1988, (Buenos Aires : Grupo de iniciativa, 1989) ; Vibhute K., *The 2007 International Convention against Enforced Disappearance: Some Reflections,* The Mizan Law Review, Vol. 2, n. 2 (July 2008), at 293-294.

various tasks, such as, *inter alia*, examining State reports and receiving individual complaints; and the last part provides the formal requirements for its ratification and entry into force. Although years of negotiations saw that the provisions of the CPED were subject to thorough and meticulous scrutiny during negotiations in order to achieve general consensus. Nevertheless, consensus was sometimes achieved by sidestepping some crucial issues.[32] This has left considerable responsibility with states to act in good faith, as well as to future developments of customary and international human rights law to flesh these issues out further.[33] At the time of writing, 93 States are signatories and 42 are parties to the Convention.[34]

With these historical foundations in place, it is now possible to proceed to illustrate the specific problems linked to enforced disappearances and the consequent legal responses that can be found in the international law constellation. Particular emphasis will be placed on the examination of the International Convention for the Protection of all Persons from Enforced Disappearances, the principal universal legal instrument that represents the culmination of a strenuous international struggle.

3. Definition of Enforced Disappearance

There have been many attempts over the past few decades to define enforced disappearances, whether in legal instruments at global and regional levels, or in judicial decisions at domestic level.[35] Nonetheless, prior to the adoption of the 2007 Convention no single universally recognized and binding definition of the offence was available.[36] Today,

[32] See *infra*.

[33] T. Scovazzi & G.Citroni, *op.cit.*, at 263.

[34] *United Nation Treaty Collection, International Convention for the Protection of All Persons from Enforced Disappearance*, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en (last accessed: 9 February 2014).

[35] See, R. BRODY & F.GONZÀLEZ, *Nunca Mas: An Analysis of International Instruments on "Disappearances"*, Human Rights Quarterly, Vol. 19, Number 2, (1997), pp. 365-405; F. ANDREU-GUZMÁN, *The Draft of International Convention on the Protection of All persons from Enforced Disappearance*, The Review of the ICJ, *Impunity, crimes against humanity and forced disappearance*, No. 62 – 63 (Geneva: 2001); C. CALLEJON, *Une immense lacune du droit international comblée avec le nouvel instrument des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées*, Revue Trimestrielle de Droits de l'Homme, No. 2006/66 (2006) p. 343-344;T. SCOVAZZI & G. CITRONI, *supra*, n.2, pp.266-285; B. FINUCANE, *Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War*, Yale Journal of International Law, Vol. 35, (2010).

[36] See Pourgourides C., *Enforced disappearances, Report to the Committee on Legal Affairs and Human Rights*, Doc. 10679, 19 September 2005, para 45. "The description of the existing legal framework shows that a universally recognized definition of enforced disappearance is still lacking. The disputed issues include that of the responsibility for non-State actors, the requirement of a subjective element in the definition, and the concept of the right not to be subjected to enforced disappearance in terms of the specific human right(s) violated by such an act."

there are four definitions of enforced disappearance that can be found in international instruments. The first international legal instrument that offered a definition was the non-binding Declaration on the Protection of All Persons from Enforced Disappearance of 1992, which describes enforced disappearance as "an offence to human dignity" that "places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families."[37] This was far from a precise definition, and the indirectness and vagueness of the language may be somewhat surprising. In the minds of its drafters, however, given the multiple and complex forms in which enforced disappearances takes, a specific definition seemed necessary and might even be overly limiting, causing interpretative problems. [38] Article 1(2) lists in a non-exhaustive way which human rights that any act of enforced disappearance violates, affirming that:

> It constitutes a violation of the rules of international law guaranteeing, *inter alia*, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

This statement can be better understood in the light of the third paragraph of the Declaration's preamble that refers to situations in which:

> … 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 second relevant international legal instrument that offered a definition of enforced disappearance was the 1994 Inter-American Convention on Forced Disappearance of Persons, which in its Article II declared:

> … 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

[37] Art. 1, Declaration on the Protection of All Persons from Enforced Disappearance, G.A. res. 47/133, 47 U.N. GAOR Supp. No. 49, (adopted 18 December 1992).
[38] R. BRODY & F. GONZÀLEZ, *Nunca Mas: An Analysis of International Instruments on Disappearances"*, Human Rights Quarterly, Vol. 19, Number 2, (1997), at 375.

> to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

From these first two definitions, it is possible to infer that there are three basic, consistently constitutive elements of the offence of an enforced disappearance:

1) The deprivation of liberty of a victim against his or her will;

2) The direct or indirect involvement of state agents;

3) The refusal by the state or state agents to acknowledge that deprivation of liberty or to disclose the fate and whereabouts of the disappeared person.

With regard to the first element, it is important to observe that the purpose of the deprivation of liberty is irrelevant, as is as what happens to the victim after the disappearance. For the purposes of the definition, it does not matter whether the victim dies (such as from an extra-judiciary execution), or lives in secret detention (also called incommunicado detention), or is transferred abroad (such as in cases of extraordinary rendition). The second element, the state's refusal to acknowledge the truth of the disappearance, is the most characteristic required feature of the crime. It may take a number of forms. For example, a state authority may hold that it is not aware of the existence or whereabouts of victims, or it may claim that their disappearance was due to their having joined insurrectionary groups. What is important, though, for the purposes of this element is not the form that the lack of acknowledgement takes, but rather the state of uncertainty that it creates.[39] Finally, the third element, the direct or indirect involvement of state agents, is typical of most human rights violations, but is also the most debated component of the offence of enforced disappearance.[40]

The definition of enforced disappearance found in the 1998 Rome Statute for the Establishment of an International Criminal Court is quite different to these previous two. Article 7.1 labels enforced disappearances as a crime against humanity, when it is committed in a widespread or systematic manner against a civilian population, and when the state has full knowledge of it happening. The definition can be found in the second paragraph of this article:

> 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.

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[39] T. SCOVAZZI & G. CITRONI, *supra,* note 2 (Leiden: Martinus Nijhoff , 2007), at 272.

[40] See UN Commission on Human Rights, *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,* 62nd sessions, Item 11 (b) of the provisional agenda, UN Doc E/CN.4/2006/57 (2 February 2006), n. 91.

One can observe two additional elements in this definition from those that preceded it: 1) the intention to remove the victim from the protection of the law for a prolonged period of time; and 2) the possibility of recognizing non-state actors as perpetrators of the crime.[41] A further difference was that the 1998 Rome Statute was drafted from the perspective of international law, and thus is designed to search for criminal guilt, while all previous definitions were included in international human rights law instruments, which look to determine states' violations of fundamental rights. Thus, by its very nature, this latter instrument stresses intentionality in a way that the others do not.[42] This stress on intentionality and criminal culpability creates a more limited framework than the other definitions, made even more limited by the phrase "for a prolonged period of time," whose vagueness has not escaped criticism.[43] Given the scale of these limitations, one could argue that the Rome Statute definition represents a step backwards in its reduction of the threshold of protection from enforced disappearance.[44] In fact, the combination of intentionality and the vague "prolonged" time-factor places an almost impossible burden of proof on prosecutors.[45] Perpetrators are permitted to plead innocence in the event that they can prove they intended to make the victim disappear for only a limited period of time, even if, in the end, the deprivation of liberty and absence of information were actually prolonged.[46] This is somehow contrary to the very nature of the offence, which has an intrinsic continuous nature where duration of the crime can never really be predetermined or directly linked to the intentions of a single individual.[47] The second element of the Rome Statute definition to receive considerable attention and debate concerns the perpetrators of the crime. In this regard, the Rome Statute offered an important innovation in its reference to "political organizations"

[41] See, International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000).
[42] Gabriella CITRONI, "When Is It Enough? Enforced Disappearence and the' Temporal Element'" (2013) 9 Droits Fondam 1.
[43] See, *Ibid*; Marthe Lot Vermeulen, *Enforced disappearance: determining state responsibility under the International Convention for the Protection of all Persons from Enforced Disappearance* (Intersentia, 2012) at,56-58.
[44] Tullio Scovazzi & Gabriella Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention* (Martinus Nijhoff Publishers, 2007), at 274-285.
[45] See, Commission on Human Rights, 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 2001/46E/CN.4/2002/71, (2002), n. 8.
[46] Scovazzi & Citroni, *supra* note 7.
[47] *Ibid.*; See also, Commission on Human Rights, 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 2001/46E/CN.4/2002/71, (2002).

among the possible authors of the crime.[48] The rationale behind this broader understanding of possible offenders comes from the Rome Statute's consideration of enforced disappearance as a crime against humanity.[49] International criminal law recognizes can be committed not only by states but also by individuals or non-state entities that exercise *de facto* control over a specific territory.[50] This is a significant departure from the formulae embedded in the 1992 declaration and in the OAS convention, which are limited to enforced disappearances perpetrated by state-supported agents. Furthermore, apart from the general requirement of a widespread or systematic attack against a population that characterize every crime against humanity, the subjective element (*mens rea*) of the Rome Statute formula seems to define enforced disappearances in a very narrow manner that Manfred Nowak once argued could only be applied in "truly exceptional circumstances."[51]

The final relevant definition of enforced disappearances in an international legal instrument is that which is contained in Article 2 of the International Convention for the Protection of all Persons from Enforced Disappearance, which reads as follows:

> 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.

During the time that the convention was being drafting, some concerns were raised by a number of states with regard to some of the elements of the convention's new definition and their relationship to the Rome Statute. The 2007 Convention, for instance, does not include any reference to the removal from the protection of the law "for a prolonged period of time". Also controversial was the drafters' choice to avoid reference to a temporal element was intentional and designed to offer the broadest protection possible to victims.[52] The issue of

[48] Art. 7.2(i).

[49] See, *Infra*.

[50] "[u]nder international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a *de jure* state, or by a terrorist group or organization." *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-T ICTY Trial Chamber 7 May 1997, para 648.

[51] Commission on Human Rights, 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 2001/46E/CN.4/2002/71, (2002), para. 74.

[52] "Some delegations considered that the definition of the crime of enforced disappearance should contain a reference to removal from the protection of the law "for a prolonged period of time". The need to allow a certain amount of time to elapse between arrest and notification of the detention was cited in support of this proposal. Others, however, pointed out that an enforced disappearance could be carried out from the moment of arrest, if

whether a disappeared person was removed from "the protection of the law" also received considerable discussion during the negotiations, in particular the question whether such removal was a mere consequence of the crime or constituted a fourth substantial element of the offence.

One might refer to some basic international law principles on the interpretation of treaties found in Articles 31[53] and 32[54] of Vienna Convention on the Law of Treaties to clarify the content of Article 2 of the ICPED, however, neither provision really offers a clear solution to the debate. Indeed, the Chairperson of the Intersessional Open-ended Working Group once expressed concern about the "ambiguity in the text of the article, which gave legislators the option of interpreting the reference to a person being placed outside the protection of the law as an integral part of the definition or not."[55] Moreover, with regard to the *travaux préparatoires* of the Convention, the Working Group adopted the definition after observing that it would make for "constructive ambiguity."[56] Such ambiguity, however, allows a legislator to decide whether placing a person outside the protection of the law is

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there was a refusal to acknowledge the deprivation of liberty. The definition of enforced disappearances would also be less precise, owing to the vague and unspecific nature of the expression "prolonged period". Several participants, emphasizing the new instrument's aim of prevention and early warning, considered that it was important to confer on the persons concerned and the national and international monitoring bodies the ability to intervene as soon as the deprivation of liberty began, without the need to wait for a certain period to elapse." Commission on Human Rights, 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, 60th session, Item 11 (b) of the provisional agenda, UN Doc E/CN.4/2004/59 (23 February 2004), para. 22-23.

[53] Article 31 - General rule of interpretation:
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.

[54] Article 32 - Supplementary means of interpretation: 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.

[55] Commission on Human Rights, *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*, 62nd session, Item 11 (b) of the provisional agenda, UN Doc E/CN.4/2006/57 (2 February 2006) n.93.

[56] UN Commission on Human Rights, 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, 61st session, Item 11 (b) of the provisional agenda, UN Doc E/CN.4/2005/66 (10 March 2005) n.23.

automatically a consequence of the crime or as one of its substantial elements.[57] On the other hand, it seems improbable that the intentional removal of a person from the protection of the law will be made a required element of the crime in future interpretations of the Convention. It is the common practice of the Working Group, and possibly also of the Committee on Enforced Disappearances (CED), to regard intentionality as legally irrelevant.[58] Moreover, during the drafting process, several delegations objected that incorporating an intentionality criterion into the definition would merely make proof more difficult and convictions less likely. They emphasized that their domestic criminal law systems always provided for general intent (*dol général*), thereby making any specific mention of it in the definition unnecessary.[59] The unacknowledged deprivation of someone's liberty necessarily removes that person from the protection of the law.[60] This position was also reflected in the interpretation of Article 2 provided by the Associations of Families of the Disappeared and other supportive NGOs, who, in a joint statement declared that:

> [w]e are convinced that this characteristic of the definition should be interpreted as a consequence of the other constitutive elements of the crime of enforced disappearance (the deprivation of liberty and the denial of information) and not as an additional element in the definition. There can be no hypothesis of enforced disappearance that does not ipso facto exclude a person from the protection of the law.[61]

Of further concern is that the "constructive ambiguity"[62] in how the definition of the crime is transposed to domestic legislation, gives rise to a risk of creating different standards of proof, depending on whichever interpretation is adopted by any given national legislator.

The involvement of non-state agents in the commission of the crime was another issue that received much attention and disagreement. Some delegations during the drafting process argued that a singular reference to state actors was overly restrictive, and that the convention

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[57] K. ANDERSON, *supra*, note 16, at 272-273.

[58] UN Human Rights Council, Report of the of the Working Group on Enforced or Involuntary Disappearances, *General Comment on the definition of enforced disappearance*, A/HRC/7/2 (10 January 2008) para 5: " In accordance with article 1.2 of the Declaration, any act of enforced disappearance has the consequence of placing the persons subjected thereto outside the protection of the law. Therefore, the Working Group admits cases of enforced disappearance without requiring that the information whereby a case is reported by a source should demonstrate, or even presume, the intention of the perpetrator to place the victim outside the protection of the law".

[59] UN Commission on Human Rights, *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*, 61st session, Item 11 (b) of the provisional agenda, UN Doc E/CN.4/2005/66 (10 March 2005), n.25.

[60] K. ANDERSON, *supra*, note 16.

[61] Associations of Families of the Disappeared and Other Supportive NGOs, *Joint Statement on the occasion of the adoption of the Draft International Convention for the Protection of All Persons from Enforced Disappearances*, (23 September 2005).

[62] See *above*, note n.22.

represented an opportune moment to expand the definition to include the actions of organized groups and private individuals.[63] Other delegations objected to this, arguing that such an extension would allow states to circumvent their primary responsibility pertaining to acts of enforced disappearance.[64] Ultimately, in the final version of the definition, the reference to non-state actors was discarded in order to facilitate consensus. One can argue that this debate is symptomatic of the uneasiness that the international community has often felt with reconciling international human rights law (with its emphasis on state responsibility) and international criminal law (with its emphasis on individual responsibility).[65] Nevertheless, as Scovazzi & Citroni have convincingly argued, the 2007 Convention does not seem to depart from general rules of customary international law, which holds that a wrongful act should be considered as a state act when a state acknowledges and adopts such conducts as its own.[66] In the case of an enforced disappearance, this rule can be interpreted in a broader sense as encompassing all acts from which a state derives some advantage, even when it does not officially recognize it as its own.[67]

However, Article 3 of the CPED places on states an obligation 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."[68] Furthermore, Article 4 of the Convention binds states to take appropriate measures to criminalize such acts in accordance with their domestic criminal legal regimes. Through these provisions, the Convention holds states responsible for acts of enforced disappearance committed by non-state agents. This responsibility is connected to a states' duties to prevent this crime, protect people from enforced disappearances, and investigate and punish those responsible.

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[63] UN Commission on Human Rights, *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*, 60th session, Item 11 (b) of the provisional agenda, UN Doc E/CN.4/2004/59 (23 February 2004), n. 20-30.

[64] See, Commission on Human Rights, *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 Commission on Human Rights, E/CN.4/2004/59 (23 February 2004), n. 34-40.

[65] K. ANDERSON, *supra,* note 16, at 274.

[66] Scovazzi & Citroni, *supra* note 17, at 281.

[67] *Ibid*.

[68] Art. 3, *International Convention for the Protection of All Persons from Enforced Disappearance* (ICAPED), (adopted 20 December 2006, opened for signature on 6 February 2007). http://www2.ohchr.org/english/law/disappearance-convention.htm (last access: 20 February 2014).

Currently, it is the definition included in Article 2 of the ICPED that is most often found in current international jurisprudence.[69]

4. The Autonomous Human Right Not to be Subject to Enforced Disappearance

Enforced disappearance is a grave and complex crime that, due to its continuous and multi-faceted character, is a phenomenon *sui generis* in comparison to other human rights violations. This diversity was particularly tangible before the ICPED entered into force. Unlike other gross human rights violations, such as torture or genocide, enforced disappearance was not initially foreseen in any early international legally binding human rights instrument.[70] As a result, concrete protection against this offence was available only by reference to various human rights breached by the act of enforced disappearance. The definition of enforced disappearance was uncertain in such a fragmented legal environment, and the consequent protection provided by regional or universal instruments was unsatisfactory and insufficient.

Manfred Nowak once observed during a meeting of the Inter-sessional Open-ended Working Group that,

> It was not enough to affirm that enforced disappearance involved a violation of several rights, such as the right to life, the right to liberty and security, the right not to be subjected to torture or the right to acknowledgement of one's legal personality. These were only partial aspects of the act of disappearance which did not take into account its full complexity.

For these reasons, the adoption of the ICPED represented such an historical achievement in international human rights law. [71] It established an autonomous, free standing, non-derogable human right to not be subject to enforced disappearance. This right is enshrined in Article 1 of the Convention, which reads as follows:

> 1. No one shall be subjected to enforced disappearance.

[69] See, *inter alia,* Case of *Chitay Nech et al. vs Guatemala*, Judgment of May, 25 2010, (Ser. C) Inter-Am.Ct.H.R., No. 212, para 85; Case of *El-Masri v. the former Yugoslav Republic of Macedon*ia, E.Ct.H.R. (Grand Chamber), 39630/09, (13 December 2012).

[70] C. CALLEJON, *Une immense lacune du droit international comblée avec le nouvel instrument des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées,* Revue Trimestrielle de Droits de l'Homme, No. 2006/66 (2006), pp. 340-343.

[71] T. SCOVAZZI & G. CITRONI, *The Struggle against Enforced Disappearances and the 2007 United Nations Convention* (Leiden: Martinus Nijhoff , 2007), at 265.

> 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.

The establishment of an autonomous right to not be subject to enforced disappearance in a sense was the apex of the evolution of the legal norm. Starting initially as an incoherent concept spread among multitude of various non-binding instruments (except for the 1994 Inter-American Convention) related to the general protection of human rights,[72] international consensus grew over time to a point where the adoption of a universal legally binding convention as an *ad hoc* instrument to fight against enforced disappearances was possible.

Although the Convention prohibits any act of enforced disappearance, by establishing the specific right not to be subject to this crime, Article 1(2) extends this prohibition to all circumstances, covering domestic and international armed conflicts, public emergencies and any context of political instability. It does not, however, claim universal superiority over other international legal regimes. Under Article 37, for instance, the CPED does not prejudice any provisions contained in domestic or international law that offers stronger protection to all persons from enforced disappearance. Furthermore, Article 43 declares that the Convention does not affect any provisions of international humanitarian law. The significance of this is that in a situation of armed conflict, international humanitarian law is considered as *lex specialis* that takes precedence over any general provisions in legal or treaty regimes that may apply, including those contained in the CPED. It is worth noting, however, that the term "enforced disappearance" is not included in any international humanitarian law treaty. At best, enforced disappearances could be seen to violate a number of fundamental rules of customary international humanitarian law, such as the prohibitions against murder, torture, and the arbitrary deprivation of liberty.[73] Furthermore, the Rome Statute of the International Criminal Court states that the crime of enforced disappearance, where committed as part of a widespread or systematic attack against a civilian population, constitutes a crime against humanity.[74]

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[72] Such as the International Declaration of Human Rights and the International Covenant on Civil and Political Rights.

[73] See, Rule 98("Enforced disappearance is prohibited") of the *International Committee of the Red Cross Rules of Customary International Humanitarian Law*; *Enforced disappearance: a violation of humanitarian law and human rights* Statement by the International Committee of the Red Cross to the United Nations Human Rights Council, concerning the draft International Convention for the Protection of all Persons from Enforced Disappearances (27 June 2006).

[74] *Rome Statute of the International Criminal Court*, Article 7: "For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (i) Enforced disappearance of persons." See *infra*.

The relevance of the human right to not be subject to enforced disappearance has been confirmed and strengthened by the Inter-American Court of Human Rights,[75] which recognized the *ius cogens* character of the prohibition against enforced disappearances.[76] For the time being, there is a general consensus among scholars and throughout the jurisprudence of different judicial bodies, that this is a *ius cogens* prohibition.[77] The importance of this is that, given Article 53 of the Vienna Convention on the Law of Treaties, any treaty that might allow or facilitate inter-state cooperation causing or leading to acts of enforced disappearance will be considered void by jurists under international law.[78]

5. Enforced Disappearance as a Crime Against Humanity

Enforced disappearance has not been criminalized in its entirety under international criminal law. As a crime against humanity, though, it has been formally sanctioned.[79] The scholarly and juridical debate around enforced disappearance being a crime against humanity has its origins in the aftermath of the Second World War, when the German Field Marshal Keitel was convicted by the International Military Tribunal at Nuremburg (IMT) for the practice of enforced disappearance for his role in implementing Hitler's "Night and Fog" Decree. Since enforced disappearances were not yet recognized as a crime against humanity,

[75] Case of *Goiburú et al. v. Paraguay*, Judgment of September 22, 2006, Inter-Am.Ct.H.R. (Ser. C) No. 153, (2006), §84; Case of Contreras et al. v. El Salvador, Inter-American Court of Human Rights, 31 August 2011, (Ser C) No. 232, para. 83.

[76] *Jus cogens* results from the belief that there exist specific rules of international law that are so essential or fundamental that they proscribe certain actions by states irrespective of State consent. According to article 53 of the Vienna Convention on the Law of Treaties a norm of *jus cogens* is accepted and recognized by the international community as a non-derogable norm applicable *erga omnes*, which can be modified only by norms of general international law having the same nature. A clear definition of what *jus cogens* exactly is and how it is applied has been subject of great controversy. For instance, E. J. Criddle & E. Fox-Decent observed that *jus cogens* "remains a popular concept in search of a viable theory". Indeed, there has been disagreement on almost everything concerning *jus cogens*. E. J. Criddle & E. Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34:2 Yale Journal of International Law (2009). Bianchi includes in the list of norms that should be included in what constitutes *jus cogens* the prohibition of enforce disappearances; See, *A.* Bianchi, *Immunity versus Human Rights: The Pinochet Case Legal Proceedings in the UK: the Interaction of Municipal and International Law*, 10:2 European Journal of International Law (1999) at 272. B. Conforti, Diritto internazionale, 9th ed. (Napoli: Editoriale Scientifica, 2013), at 37-63;

[77] A. Bianchi, *Immunity versus Human Rights: The Pinochet Case Legal Proceedings in the UK: the Interaction of Municipal and International Law*, 10:2 European Journal of International Law (1999) at 272; J. Sarkin, *Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law*, Nordic Journal of International Law, Volume 81, Issue 4 (2012).

[78] "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Art. 53: Treaties conflicting with a peremptory norm of general international law (*jus cogens*).

[79] K. ANDERSON, *supra,* note 16, at 254.

Keitel was convicted and executed as a war criminal.[80] Following Keitel's trial, the jurists of the Third Reich that were involved in implementing the Night and Fog program were also prosecuted by the U.S. Military Tribunal at Nuremberg. The tribunal expanded its earlier decision regarding the criminality of enforced disappearance and convicted the lawyers of the Nazi regime of crimes against humanity and war crimes.[81] The crimes against humanity were listed as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds".[82]

Enforced disappearances are a direct attack on the life, dignity and liberty of the human being. It is therefore it is not surprising that these acts were among the first to be included in definitions of crimes against humanity.[83] The issue of enforced disappearances as a crime against humanity received considerable debate and discussion during the drafting process of each international legal instrument created over the past fifty years. In particular, as discussed before, Article 7(1)(i) explicitly refers to enforced disappearances as a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

The requirement that enforced disappearances have a systematic character to qualify as crime against humanity was a subject of dispute.[84] However, it is generally accepted now that infrequent or irregular acts of enforced disappearance that are not part of an official policy do not qualify as crimes against humanity.[85]

The Rome Statute did not resolve the debate on recognizing enforced disappearance as a crime against humanity. This was evident during the drafting of the 2007 International Convention for the Protection of All Persons from Enforced Disappearance. On the one hand,

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[80] See, Commission on Human Rights, 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 2001/46E/CN.4/2002/71, (2002), para. 65.

[81] B. FINUCANE, *Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War*, Yale Journal of International Law, Vol. 35, (2010), at 178-179.

[82] *Charter of the International Military Tribunal*, art. 6 (c). Available at: http://avalon.law.yale.edu/imt/imtconst.asp#art6.

[83] See, Commission on Human Rights, Report submitted by Mr. Manfred Nowak, supra, note 37.

[84] Consider, for instance, the ruling of the International Court Tribunal for the former Yugoslavia (ICTY) in the Tadic case. The ICTY found that as long as a link can be established with a widespread or systematic attack against a civilian population, or if evidence is provided of an explicit formal policy to commit acts of enforced disappearances, then also an isolated instance of an enforced disappearance can constitute a crime against humanity. *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-T ICTY Trial Chamber 7 May 1997; *Prosecutor v. Mrksic*, Trial Chamber, Case No.IT-95-13/1-R61,3 3 April 1996, para 30; *Prosecutor v. Tadic*, Judgment, Case No. IT-94-1-T ICTY Trial Chamber 7 May 1997 para 248, footnote 311.

[85] 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" (2006) 7 Melb J Intl L 245, at 258.

there was strong resistance to including a specific provision to it in the body of the Convention, regardless of the fact that the Rome Statue had already formally done so. This opposition was based on the argument that such a statement was unnecessary since the Rome Statute already listed enforced disappearances among the crimes against humanity.[86] On the other hand, a number of NGOs as well as delegations from several Latin American and European countries insisted that a specific reference to enforced disappearance being crime against humanity be included.[87] Indeed, two main deficiencies of the Rome Statute can be observed. First, international criminal law was never originally intended to become a means to punish states, but rather individuals. Second, the Rome Statute does not oblige states to criminalize enforced disappearance as a crime against humanity in their domestic law.[88] Reflecting these two concerns, the 2007 Convention ultimately came to include only a generic mention of it in its preamble along with a specific provision about the nature of crime against humanity of enforced disappearance in Article 5:

> The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Although the 2007 Convention does not specify in which cases enforced disappearance will be qualified as crime against humanity and what is the "applicable international law," Article 5 is quite clearly an implied reference to the Rome Statue.[89] However, the convention is not limited to the framework of the Rome Statute, and extends universal jurisdiction to all acts of enforced disappearance and does not limit it to crimes against humanity.[90] Structured in this way, the 2007 Convention makes the Rome Statute the residual applicable legal instrument and thereby preserves jurisdiction with the ICC for acts of enforced disappearance that constitute crimes against humanity.[91] However, the 2007 Convention distinguishes itself from the Rome Statute by differentiating enforced disappearances perpetrated as a part of a widespread or systematic practice and those committed outside of such a context.[92] This differentiation permits states to exercise their universal jurisdiction over isolated acts of enforced disappearance, even where such acts

[86] Vermeulen, *supra* note 7.
[87] Scovazzi & Citroni, *supra* note 7.
[88] Vermeulen, *supra* note 7.
[89] *Ibid* at 292.
[90] Art. 9.
[91] Anderson, *supra* note 57, at 270.
[92] Federico Andreu-Guzmán, "The Draft International Convention on the Protection of All Persons from Forced Disappearance" (2001) Rev-Int Comm Jurists 73.

amount to a crime against humanity, without having to prove the additional "systemic" and "widespread" elements characteristic of that latter crime.

As a final note, it is important to consider the severe collective consequences that result from acts of enforced disappearance when discussing how it is reflected in international legal instruments. It cannot be forgotten that enforced disappearances are acts that specifically aim at spreading terror within society and that explicitly threaten and oppress entire regions. Even an isolated act of enforced disappearance can create a state of fear that extends its impact well beyond the immediate families or close friends of a victim.[93] Given this, there is good cause for one to hope that enforced disappearances will be treated as crimes against humanity irrespective of the "massive or systematic" elements that restrict its prosecution in international criminal law. To consider enforced disappearances as a crime against humanity without the current limitation that international criminal law places on it would change the very nature of crimes against humanity. Avoiding any distortion of the concept of crime against humanity, I argue, however, that enforced disappearances should be more widely accepted as a crime beyond the limiting boundaries of the Rome Statute, not so much as a "crime against humanity" in the international criminal law sense, but as a crime worthy of international and universal sanction regardless of whether it is widespread or systematic. In this regard, the use of the wording "applicable international law" in Article 5 of the 2007 Convention leaves the door open to further developments in international law to do so in the future.[94]

6. Defining the Concept of the "Victim" of an Enforced Disappearance

The question about who might be considered a victim of the offence of enforced disappearance has generated several different answers over the years that have undergone a significant evolution, in particular as a result of the innovative jurisprudence of various international judicial bodies that deal with human rights protection.[95] An enforced disappearance affects not only the material victim, i.e. the disappeared person, but also has devastating repercussions also on his or her family, closest friends and other associates.[96] In 1983 the Human Rights Committee stated that the relatives of the direct victim of enforced disappearance deserved to be considered as independent victims of human rights violations

[93] Anderson, *supra* note 7.
[94] Scovazzi & Citroni, *supra* note 7.
[95] *Id.*, at 343; See also, Report by Mr. Novak, *supra*, at 77-78.
[96] See, Vermeulen, *supra* note 16; Scovazzi & Citroni, *supra* note 17; Vitkauskaite-Meurice & Zilinskas, *supra* note 54.

descending from enforced disappearances.[97] The Committee took into consideration the anguish and stress caused to the family members by the disappearance of their loved ones and by the continuing uncertainty concerning their fates and whereabouts. The psychological nature of the effect of the crime was considered by the Committee to be a form of inhuman and degrading treatment.

Before 2007, there was no legally binding instrument dealing with the necessarily broad recognition of the victims' identity. Article 19 of the 1992 Declaration, distinguishes between the material victims of acts of enforced disappearance and their families, whereby families are recognized as victims of the crime, but to a different extent. Article 19 establishes that:

> 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 dependants shall also be entitled to compensation.

The 1994 Inter-American Convention makes no reference at all to the issue of victims' identity and rights. Until 2007, both the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) had to fill this gap through their judgments. Some authors have considered the jurisprudence of these two Regional Courts as a "turning point in the determination of the concept of victims in cases of enforced disappearance."[98]

The Inter-American Court in several cases provided a list of relatives who may be affected by an enforced disappearance. The list is non-exhaustive and was expected to be adapted to the peculiarities of each case.[99] In addition, the court considered that it was not necessary to provide evidence to demonstrate the grave suffering of the relatives of the material victims.[100] The case law of the European Court is similar and it has recognized a

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[97] See, *María del Carmen Almeida de Quinteros et al. v. Uruguay*, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990), para.14.

[98] Scovazzi & Citroni, *supra* note 20, at 343.

[99] See, *inter alia*, Inter-American Court of Human Rights Case of the *Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005, (Ser C) N.134, para; Inter-American Court of Human Rights Case of *the Ituango Massacres v. Colombia*, Judgment of July 1, 2006, (Ser C) N. 148para.258-265; Inter-American Court of Human Rights, Case of the *Pueblo Bello Massacre v. Colombia*, (Ser C) N. 140 Judgment of November 25, 2006, para 21-23; Inter-American Court of Human Rights, Case of the *Las Dos Erres Massacre v. Guatemala*, Judgment of November 24, 2009. Series C No. 211, para 206.

[100] See, Inter-American Court of Human Rights, Case of *the Ituango Massacres v. Colombia*, *supra*, note 103, para.258-265, Case of the *Las Dos Erres Massacre v. Guatemala*, Judgment of November 24, 2009. Series C No. 211, para 206.

victim's relatives as victims of torture and other inhuman treatments.[101] However, the orientation of the judges in the European court on the interpretation of the concept of "victim" was not always coherent. Unlike the IACtHR, the ECtHR has traditionally required proof of the suffering of the victim's relatives and generally does not allow presumptions in this regard.[102] In so doing, however, it introduced questionable quantifiable distinctions about the intensity of the relatives' anguish and distress.[103]

The 2007 Convention went further. It established a legally binding and extensive definition of the victims of an act of disappearance. Under Article 24, the convention provides that the concept of the victim encompasses "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance." This provision offers protection for a broad spectrum of people affected by an enforced disappearance that includes both its direct and indirect victims.

Article 24 continues by establishing a set of rights that pertains to each victim. In its second paragraph, it declares that victims have the right to know the truth about the fate and whereabouts of a disappeared person. This was the first time that this right was ever included in a legally binding instrument. As this provision does not include any exceptions and is expressly separated from other provisions related to appropriate forms of reparation,[104] one can infer that the right to know the truth is perceived as an autonomous and non-derogable right.[105] Moreover, Article 24.3 of the CPED expressly establishes the obligation for state parties to "take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains." Before the 2007 Convention came into force, these issues were addressed only through international humanitarian law instruments, in particular by a number of provisions of the four Geneva Conventions.[106] These provisions of the 2007 Convention now fill the prior gap that had existed within the international law framework, and provide particular obligations and remedies in relation to the issue of locating, identifying and returning the mortal remains of

[101] See, Case of *Kurt v. Turkey*, E.Ct.H.R. (Chamber), 15/1997/799/1002 (25/05/1998), para 130-134.
[102] See, infra, chapter II.
[103] See, Case of *Çakıcı v. Turkey*, E.Ct.H.R. (Grand Chamber), 23657/94, (8 July 1999), para 99.
[104] The Inter-American Court of Human Rights has sometimes interpreted the right to know the truth as a form of reparation for the victims' families, but also for the society as a whole. See, *inter alia*, Case 10.580, Report Nº 10/95, Ecuador, Manuel Bolaños, September 12, 1995; http://www.oas.org/en/iachr/expression/showarticle.asp?artID=156&lID=1. See more *infra*, chapter II.
[105] See, Scovazzi & Citroni, *supra* note 20, at 348; Vitkauskaite-Meurice & Zilinskas, *supra* note 53, at 209.
[106] For instance, Article 17 of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, reads as follows: "Parties to the conflict shall ensure that burial or cremation of the dead, carried out individually as far as circumstances permit, is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. One half of the double identity disc, or the identity disc itself if it is a single disc, should remain on the body."

disappeared victims outside of a context of armed conflict. Finally, Article 24(4) and (5) articulate the right to obtain reparation and prompt, fair and adequate compensation to which victims of enforced disappearances are entitled.

These three categories of rights will be addressed in more detail in the following chapters of this paper. However, it should be noted here that under Article 24(5) redress must cover compensation for both material and moral damages, and, where appropriate, include other forms of reparation, such as: (a) restitution; (b) rehabilitation; (c) satisfaction, including restoration of dignity and reputation; and (d) guarantees of non-repetition. It is the aim of this analysis to draw attention to the relevance of these latter forms of reparation, which at individual level appear to be the most effective, and at the collective level seem to be the only practicable solution to cope with the endemic fear and distrust that follows any act of enforced disappearance.

In the chapters that follow, analysis will focus on the multifaceted consequences of the offence of enforced disappearance, observed at both the individual and collective levels and will examine judicial responses to the individual and collective need for justice. In particular, the present analysis will emphasize the relevance of the practice of European and Inter-American Courts of Human Rights in the development of international case law on disappearances. The underlying idea is to examine and compare the governing instruments and concrete practice of the judicial bodies under consideration.

The purpose of this work is to bring to the fore the question about the individual and social impact of enforced disappearances and whether it has received an appropriate and effective legal and political response.

Chapter II

Consequences of the Offence and Rights of the Victims

Introduction

The previous chapter provided the reader with a general overview of the international legal framework on enforced disappearances, the consequences of the violation will be investigated adopting a transdisciplinar approach, embracing elements of psychology and sociology in order to pinpoint the idiosyncrasies of the crime of enforced disappearance. With these foundations in place, it followed a comparative analysis of the case-law on disappearances of most prominent human rights bodies, the European and the Inter-American Court of Human Rights.

In what follows I will discuss the impact on enforced disappearances on victims' lives and on society as a whole. The various effects of the violation will be analyzed from a variety of perspectives (i.e. economical, sociological, psychological, and spiritual) in order to reflect the complex entanglements arising from the practice of enforced disappearance. Furthermore, the analysis will proceed with exposing how these issues are translated into the language of rights. It will address the jurisprudential answers to victims' claims and will demonstrate the evolution of case law at the European Court of Human Rights and the Inter-American Court of Human Rights on the matter. This study will underscore the fundamental differences between both jurisprudential approaches and their relative effectiveness.

These observations will lay the groundwork for the analysis of the central questions of this thesis related to remedial measures for enforced disappearances. The purpose here is to highlight the advantages that a holistic approach may offer to dealing with the complex phenomenon of enforced disappearances, not only in relation to individual redress, but also in the reconstruction of people's faith in state authority and in the reinforcement of democracy.

I have chosen to divide the present chapter in two parts. The first part will familiarize the reader with the psychological and social issues related to the crime under consideration. The second part will then show how these issues are translated into the language of rights, through the comparative assessment of the jurisprudence of the European and the Inter-American Court of Human Rights.

Part I

Enforced disappearances is a ubiquitous practice that has been used by states around the world ranging from Argentina to Sri Lanka, from Morocco to Nepal, and thus constitute a global problem. They are carried out in diverse ways and by various actors, and are driven by different ideologies and purposes, and they continue to affect myriads of people all over the world. An enforced disappearance affects a large set of individuals. At its core is the violation to a direct victim, the disappeared person. Surrounding the victim, however, are various circles of people, such as his or her families and friends, who also suffer repercussions from their disappearance in many ways, depending on the context and their proximity to the victim. As mentioned in the previous chapter, these people can be defined as 'indirect victims' of the disappearance. Beyond the victims and their relatives, the broader community to which the missing person belongs can also be affected by enforced disappearances. Indeed, in most cases, the purpose behind the crime is to spread terror within society and to eliminate political opposition or quell potentially fractious minorities.

Enforced disappearances is a crime that has particular universal features that permit analogies to be drawn between different cases.[107] Typically, the commission of this crime starts with the deprivation of liberty of the material victim, who is then hidden in a secret detention site. After the abduction, perpetrators usually conceal evidence of the crime and deny any involvement or even knowledge of it. Thus, the disappearance of victims is often surrounded by secrecy and uncertainty.[108] However, in spite of the technical similarity of the manner in which the crime is perpetrated, the experiences of victims, both direct and indirect, of enforced disappearances is manifold and variable. This complexity and diversity makes it difficult to outline a uniform and exhaustive image of their effects on peoples' lives. This chapter thus aims to provide an overview of the common denominator of distress shared by people who are directly or indirectly affected by this crime, bearing in mind that behind these generalizations lies a mass of personal realities of unspeakable anguish and grief. Every one of these people has an individual story and a personal way of dealing with their trauma. Despite the uniqueness of each experience, however, one can observe a number of similarities in the suffering caused by disappearances.[109]

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[107] See, *supra*, chapter I.

[108] Marthe Lot Vermeulen, *Enforced disappearance: determining state responsibility under the International Convention for the Protection of all Persons from Enforced Disappearance* (Intersentia, 2012) at 119.

[109] Vermeulen, *supra* note 2.

Scholarly literature on this topic tends to focus on three different groups of people that are affected by disappearances: the direct victims, their families, and society as a whole. The impact of the violation on both victims and society may be characterized in terms of four different effects: physical, psychological, economic, and social, with the impact of each differing depending on the identity of the victim and on the specific context in which the violation is perpetrated.

1. Individual Consequences

The impact of an enforced disappearance encompasses both the physical and psychological integrity of its victim. In most cases the disappeared person is never seen again, leaving few victims to share their stories for posterity. Notwithstanding this scarcity of information about the material victims of enforced disappearances, it is possible to outline a relatively clear and universal picture of the anguish and grief suffered by victims by drawing on the memories of those few who have survived their ordeals.[110] Such accounts reveal that anguish and intense uncertainty begins at the very moment of a victim's unlawful and arbitrary abduction. Perpetrators generally do not have warrants and rarely explain the reasons for depriving them of their liberty. Those disappeared persons who are not immediately executed are often detained in secret and clandestine places where they are unable to communicate with the outside world and have no access to any legal assistance. Such circumstances result in a constant state of fear for victims, exacerbated by other offences that often accompany disappearances, such as torture. Survivors consistently report being subjected to ill-treatment and torture during the period of their detention.[111] In contexts where disappearances are used as a policy measure to counter political opposition, disappeared persons are generally suspected of being active or potential opponents and may be subject to inhumane interrogations, often while naked and repeatedly abused, or forced to assist with or take part in the torture of others.[112] Forced to live in degrading conditions without water or

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[110] Vermeulen, *supra* note 2.

[111] "Refworld | Without a trace: enforced disappearances in Syria", online: *Refworld* <http://www.refworld.org/docid/52b44c234.html>.

[112] Tullio Scovazzi & Gabriella Citroni, *The struggle against enforced disappearance and the 2007 United Nations convention* (Martinus Nijhoff Publishers, 2007).

sunlight, they are often deprived of their names and referred to instead by numbers assigned to them, depriving them of the very last shreds of their human dignity.[113]

The struggle to survive in inhumane conditions can only be understood from individual testimonies. The vivid testimony of three brothers who disappeared for more than 18 years in Morocco illustrates the heightening of despair that is typical of victims' struggles to stay alive and maintain their humanity.[114]

> We held on until it would be our turn to die. We were convinced from the first moment of our arrest that all was over. We weren't arrested in a normal way, or brought to a normal place, or anything. We kept sane by not thinking about our situation, or about the food. We didn't think about the present, and we escaped by thinking. We were in Paris all the time. We planned menus, we invented culinary specialties; we talked about Paris, we evolved architectural plans, we rebuilt towns... and that passed the time. What is the capital of such and such a country? We ran through African countries and Asian countries.. from one continent to another.[115]

Living conditions in detention centers are often inhumane and characterized by the suppression of all links to the outside world. For instance, in Argentina, detention centers were named *pozos* (pits), a figurative expression that powerfully depicts the image of the secret deprivation of freedom, but above all reflects the claustrophobic existential condition of victims pushed to the limits of madness.[116] The realization of their disappearance and of the loss of any sense of their existence and dignity caused some victims to wish for death to escape their daily horror. Any other form of escape is usually impossible, both physically and psychologically, after victims have submitted completely to their captors. Escape is made even more risky for victims by the unbearable threat that their escape would pose to their families.

> They let me know that they'd done impeccable research on all the members of my family (…) No, there was no way. They'd killed everyone.[117]

When an individual is fortunate enough to be released, their torture may continue:

> After I was released - they called it "supervised freedom"- I had to call in once a week, then once a month. I'd have them in a café. 'We just want to make sure you're doing okay, Tito.' They Called me Tito.[118]

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[113] The testimony of M. de M. an Argentinian *desaparecida* states: "She realized then that they called them by number, they didn't call out names and surnames. She remembers her number: 104. She recalls that when they called her it was to torture her". CONADEP, Nunca Mas – Never Again, Buenos Aires, 1984.

[114] Vermeulen, *supra* note 2, at 121.

[115] Amnesty International, " The disappeared in Morocco" (1993), at 26.

[116] CONADEP, Nunca Mas – Never Again, Buenos Aires, 1984.

[117] Marguerite Feitlowitz, *A Lexicon of Terror: Argentina and the Legacies of Torture, Revised and Updated with a New Epilogue* (Oxford University Press, 2011).

[118] *Ibid*.

In such cases, the victim is only partially released because the chains of psychological violence continue to bind them once they are physically free. A typical case will violate a multiplicity of rights protected by the Declaration on the Protection of All Persons from Enforced Disappearance. The most obvious is the right not to be subjected to torture or other inhuman or degrading treatments, but also important are the victims' right to life, right to liberty and security, right to a private and family life, and right to a fair trial and an effective remedy, as well as the right to be recognized as a person before the law. This latter right is explicitly recognized by Article 16 of the ICCPR and Article 3 of the ACHR, two provisions that may be perceived as being free-standing and declaratory in nature. The right to legal personality stems directly from the recognition of human dignity and from the individual's capacity to be a holder of duties and rights. This can be linked further to the definition of enforced disappearance provided by the ICPPED, which refers to the placement of the victim outside the protection of the law and who is *de facto* unable to exercise his or her fundamental rights. In such cases people's very existence is denied, placing them in a limbo of legal uncertainty not only for themselves but also for their families and for the communities to which they belonged.[119]

The experiences briefly surveyed above are examples that try to describe the unimaginable. This unspeakable suffering and tremendous anguish is the common denominator of many stories of enforced disappearance that victims have lived and continue to live even today.[120]

2. Consequences for Victims' Families

Beyond the tragic and extreme consequences for the material victims, enforced disappearances also affect people that surround the disappeared. According to the International Convention for Protection of All Persons from Enforced Disappearance, the concept of 'victim' encompasses "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance".[121] As discussed before, among both scholars and the international judiciary the notion of the victim of enforced disappearance is generally comprehensive, embracing not only the material victim, but also her or his relatives.

[119] Case of *Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Inter-Am.Ct.H.R. (Ser. C) No. 202, paras 90-92.

[120] Vermeulen, *supra* note 2.

[121] Article 14.

Enforced disappearances have tremendous repercussions for the families and friends of the disappeared person, and it is these repercussions that distinguish the crime from other grave human rights violations.[122]

Left without any information about the fate and whereabouts of their disappeared loved ones, many relatives search for them in vain, year after year. In an article entitled, "Denial and Silence or Acknowledgement and Disclosure", Blaauw and Lähteenmäki reported cases of many mothers of disappeared children "who, after almost thirty years... are still hoping for their missing child to appear."[123] This continued and persistent hope is a kind of open-ended suffering for family members that makes emotional closure impossible. The disappeared person is physically absent, but psychologically present because his or her status as dead or alive is uncertain.[124] Research evidence shows that the psychological impact of the unconfirmed loss of a family member has specific and significant mental health repercussions compared to the suffering caused by a confirmed loss.[125] Moreover, these studies have shown that if relatives choose to accept the death of the disappeared person, they often develop feelings of guilt and regret as if they have caused or contributed to the killing of the victim themselves.[126] In her testimony before the IACtHR, Ana Lucrecia Molina Theissen, the sister of a victim, stated: "It is very cruel, very unjust, perverse, that it is oneself, one who loves the missing person, and who awaits him, who has to kill him."[127]

In most cases the persistent hope of seeing the disappeared loved one defers the grieving process ad infinitum.[128] This can give rise to so-called "frozen-grief", where the mourning process is interrupted and remains on perpetual stand-by. Typical symptoms of this unresolved grief are anxiety, stress, survivor guilt, insomnia, preoccupation with thoughts of the deceased, unpredictable periods of anger, numbing of emotions and isolation.[129] All these

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[122] Vermeulen, *supra* note 2, at 123.

[123] Margriet Blaauw & Virpi Lähteenmäki, "Denial and silence'or 'acknowledgement and disclosure" (1997) Psychiatry, online: <http://www.mkkk.org/eng/assets/files/other/irrc_848_blaauw_virpi.pdf>.

[124] Pauline Boss, "Ambiguous Loss Research, Theory, and Practice: Reflections After 9/11" (2004) 66:3 J Marriage Fam 551.

[125] For instance, Steve Powell, Willi Butollo & Maria Hagl conducted a study on two groups of women living in Bosnia and Herzegovina, whose husbands were either confirmed as having been killed during the 1992–1995 war or who were still listed as missing. These two groups completed questionnaires on war events, postwar stressors, and mental health status. The results showed that the group with unconfirmed losses had higher levels of traumatic grief, as well as severe depression. See, Steve Powell, Willi Butollo & Maria Hagl, "Missing or killed: The differential effect on mental health in women in Bosnia and Herzegovina of the confirmed or unconfirmed loss of their husbands" (2010) 15:3 Eur Psychol 185.

[126] Blaauw & Lähteenmäki, *supra* note 18; Scovazzi & Citroni, *supra* note 7.

[127] Case *Molina Theissen vs. Guatemala*, Judgment of July 32004, Inter-Am.Ct.H.R, (Ser. C) No. 108 (2004).

[128] Vermeulen, *supra* note 2., at 126-127.

[129] Blaauw & Lähteenmäki, *supra* note 18.

ailments appear to be universal and common to the suffering of all families of disappeared persons, regardless of any economic or socio-cultural that may differentiate them.

The response of state authorities to families' claims of victimhood plays a significant role in the isolation and social stigmatization of victims' relatives. An enforced disappearance is often accompanied by the refusal of the State to disclose victims' fates or their whereabouts, or even to acknowledge that they had ever been detained. In the course of their searches for their missing loved ones, families often encounter passive, uncooperative or aggressive behaviour from state authorities, who try to impede their searches and conceal the perpetrators of the crime. Laconic or formalistic answers, bureaucratic hindrances, concealed information, lack of respect and direct intimidation are all typical in cases of enforced disappearance. In many cases, state authorities continue to deny any deprivation of liberty even after a victim's subsequent release.[130] In cases where formal investigations are initiated, families are rarely informed about their progress and are often pressured by state officials to withdraw any applications they have made before domestic or international courts.[131] Families also face physical risks with launching such lawsuits, since family members are often the main witnesses of the disappearances. In some cases, important witnesses who have testified before the Inter-American Court of Human Rights have been assassinated or themselves disappear under suspicious circumstances, and public authorities have often proven unable, or unwilling, to guarantee the personal integrity of witnesses. [132]

Families also encounter obstructions and hindrances as well as disrespectful behaviour on the part of the state authorities in relation to locating and identifying victims' mortal remains. Behind all these attitudes lies the State's denial of the human dignity not only of the material victim but also of his or her relations. An example of such disrespectful behaviour can be found in the *La Cantuta v. Peru* case, where state authorities burned the victim's body and returned his mortal remains to his family in milk boxes.[133] Such negative and obnoxious conduct leaves families and friends of disappeared persons with a deep feelings of injustice,

[130] Case of *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), para.118(a).

[131] Case of *Kurt v. Turkey*, E.Ct.H.R. (Chamber), 15/1997/799/1002 (25/05/1998), para. 19-25.

[132] Case of *Godínez-Cruz v. Honduras*, Judgment of June 26, 1987, Inter-Am.Ct.H.R. (Ser. C) No. 3, (1987); Case of *Fairén-Garbi and Solís-Corrales v. Honduras*, Judgment of March 15, Inter-Am.Ct.H.R. (Ser. C) No.6 (1989); Case of *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

[133] Case of *La Cantuta v Peru, Muñoz Sánchez and ors v Peru,* Judgment of November 29, 2006, Inter-Am.Ct.H.R. (Ser. C) No.162, para 60 ; See, Vermeulen, *supra* note 2, at 132.

humiliation and defenselessness, and can cause the public to lose faith in state authorities in general. [134]

The problems and needs of victim families are enormous, but rarely appear in scholarly literature largely because the fear and isolation surrounding them has effectively silenced them to the world.

Families are considered to all intents and purposes to be victims by the relevant international legislation, and therefore should be entitled to reparation. The next of kin's right to a family life, to a fair trial, and to not to be subjected to inhumane or degrading treatment are violated. In practice, however, access to justice and reparations for disappearances are not a reality for most people due to the enormous challenges they must overcome, challenges such as fears of the possible re-traumatization that applying for reparation may involve, as well as the lack of any available psychological and legal assistance, and the absence of strong political will to seek justice on their behalf.[135]

2.1. The Religious and Psychological Dimensions of Grief

"Parting is all we know of heaven, and all we need of hell."

These words by Emily Dickinson ring bitterly true when one reads accounts of forced disappearances and separation suffered by uncountable numbers of families and friends of disappeared people.

"Parting is all we know of heaven" - death means separation, a separation that is certain, even when coloured by hope and the mystery of personal beliefs. The void that separation leaves in the life of every person becomes a fragment of hell that everyone can bear witness to from the perspective of loss, a hell characterized by life in a limbo of uncertainty and fear, where nothing is known about missing loved ones. This speaks to a particular aspect of the collective effects of enforced disappearances that requires further analysis, in particular regarding the relationship between religious and traditional values of specific communities and the consequences of the offence. As Judge Cançado Trinidade recalled in a famous separate opinion:

> Even though the juridical subjectivity of an individual ceases with his death (thus no longer being, when having died, a subject of Law or

[134] See, Case of the *Pueblo Bello Massacre v. Colombia*, Judgment of November 25, 2006, Inter-Am.Ct.H.R. (Ser C) No. 140, para 65.

[135] Robins, *supra* note 25; Boss, *supra* note 28; Boss, *supra* note 19.

> titulaire of rights and duties), his mortal remains - containing a corporeal parcel of humanity, - continue to be juridically protected […] in the persons of the living. We all live in the time; likewise, legal norms are created, interpreted and applied in the time (and not independently of it, as the positivists mistakenly assumed). […] the time - or rather, the passing of the time, - does not represent an element of separation, but rather of approximation and union, between the living and the dead, in the common journey of all towards the unknown.[…] There is effectively a spiritual legacy from the dead to the living, apprehended by the human conscience. Likewise, in the domain of legal science, I cannot see how not to assert the existence of a universal juridical conscience (corresponding to the opinio juris comunis), which constitutes, in my understanding, the material source par excellence (beyond the formal sources) of the whole law of nations (droit des gens), responsible for the advances of the human kind not only at the juridical level but also at the spiritual one. What survives us is only the creation of our spirit, to the effect of elevating the human condition. This is how I conceive the legacy of the dead, from a perspective of human rights. [136]

This section will discuss the relevance of culturally appropriate rituals related to death, and the traumatic effects that the inability to properly observe such rituals can have on family members and on society as a whole in cases of enforced disappearances. A systematic violation of human rights like enforced disappearances, can erode a society's foundations, foundations that are often supported by religious traditions and rituals.

From time immemorial, a decent and decorous burial has been a part of every culture, recorded in literature at least as early as Sophocle's tragedy *Antigone* (ca. 441 B.C.). By disrupting societies' rituals surrounding death and burial, disappearances become ideological and political devices that can be deployed by a state to strike at the most intimate spheres of traditional communities, in particular for those with strong religious customs. Systematic campaigns of enforced disappearances can cause entire communities to suffer irreparable psychophysical harm not only from their immediate effects, but also because they deny communities any possibility to celebrate funerals for those who have disappeared, or to use ritual to manage their grief.

The common reaction to loss is grief, a multifaceted emotional and spiritual response that is particularly acute with the loss of a human significant other.[137] Such loss causes

[136] Case of *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70.

[137] Kathleen V Cowles & Beth L Rodgers, "The concept of grief: A foundation for nursing research and practice" (1991) 14:2 Res Nurs Health 119.

profound sorrow, mental distress, and suffering that is universal to every human being and community, and communities the world over employ ritual practices to guide individual responses and to alleviate feelings of anger and sorrow.

The impossibility of mourning and celebrating appropriate rituals can have severe psychological repercussions for individuals, but also for communities and society. Anxiety and uncertainty impede the establishment of any reciprocity between the living and the dead. Ghosts and spirits are common feature of bereavement in many cultures.[138] Spirits that have not been appropriately honored, are often believed to remain restless, appearing to the living and demanding their attention. Whether real or perceived, such situations can cause serious mental and psychophysical distress, affecting both individuals and entire communities.

Despite their differences, rituals and ceremonies have an essential value that is shared across cultures: they help individuals and groups to cope with the loss of loved ones. Research has demonstrated that a culturally appropriate farewell ceremonies usually have positive effects on processing grief and trauma.[139] The circumstances surrounding enforced disappearances, however, prevent such processes from being properly played out. With no proof of death, relatives are denied emotional closure. They are forced into a condition where they don't know whether to close the missing one out of their lives or to keep the door open in hopes that he or she might one day return. For those left behind, the disappeared are denied a place among the living and also among the dead.[140] Decent funerals or appropriate cultural rituals cannot be performed when the fate and whereabouts of victims are uncertain, and even when their deaths are known, their untraceable mortal remains can prevent final closure. Indeed, the absence of any information, the acceptance of the victim's death is unconceivable for families.

It is important, therefore, to bring to the fore relevance of the right to truth as an appropriate redress for victims. The important relation between the victims' needs for justice and redress and the right to truth will be discussed in the following parts of this work. For the moment I will limit myself to refer that research has shown that public recognition of truth and appropriate acknowledgment of the identities of responsible persons can play an integral role in victim recovery.[141] Moreover, for society in general, the desire to ascertain the truth

[138] *Ibid*. Scovazzi & Citroni, *supra* note 6. In Guatemala and in Zimbabwe, for instance, ancestral spirits play a fundamental guiding role in the life of their families.

[139] Blaauw & Lähteenmäki, *supra* note 18.

[140] Shari Eppel & Matabeleland Director, "Healing the dead to transform the living: Exhumation and reburial in Zimbabwe" (2001) 26 Univ Calif Berkeley 27.

[141] Case of El-Masri v. the former Yugoslav Republic of Macedonia, E.Ct.H.R. (Grand Chamber), 39630/09, (13 December 2012), at 77.Expert report of Dr. M. Robertson, chartered clinical psychologist.

plays an important part in reconstructing collective identities jeopardized or destroyed by disappearances.

3. Collective Consequences

The effect of enforced disappearances goes far beyond the individual victim and his or her family. It impairs the community in which they belong, and causes multiple and interrelated repercussions for society. Enforced disappearance is a violation that can take various forms and thus can have variable consequences that often depend on the idiosyncrasies of the affected communities, such as their cultural and social values, and their levels of economic development. Other relevant factors that may influence the impact of enforced disappearances on society are rates of occurrence of such acts and the political contexts in which they are perpetrated. A country facing a situation of political instability or internal armed conflict is often an essential variable.[142]

Despite their potential variability, it is possible to discern four common effects of enforced disappearances on society: (a) a diffuse and pervasive distrust in State authority; (b) group polarization, characterized by fear; (c) a collective paralysis at both socio-cultural and economic levels; and (d) a need for the recognition of a collective right to truth.

One of the common elements of every act of enforced disappearance is that the identity of perpetrators usually coincides with public authority. The crime is most often committed by state agents themselves or carried out with their support or acquiescence.[143] Uncooperative and offensive behaviour following disappearances are typical of state authorities involved in disappearances.[144] Such conduct arises from the *de facto* and *de iure* impunity of those responsible, who are often remain in office thereafter.[145] When institutions that are normally charged with protecting citizens and enforcing justice purposefully disavow their public responsibilities, the feelings of powerlessness and distrust towards public institution experienced by victims of disappearances and their families often diffuse among the circle of people around them. As a result, the underlying reciprocal relation of trust between state authority and citizens is breached, creating antagonism and distrust of state authorities that can be difficult to erase even long after the violations cease.

[142] Vermeulen, *supra* note 2, at 136-138.
[143] Art. 2, ICPPED.
[144] Vermeulen, *supra* note 2.
[145] *Ibid*.

The second common social effect of enforced disappearances is extreme group polarization created within society. Often this is the result of what has been called "state terrorism," namely actions taken by the State whose purpose is to spread terror in society, whether to impede rebellions, or to prevent populations from cooperating with dissidents, or even to outright destroy a targeted minority. Minorities and vulnerable groups, such as women and children, are particularly victimized and marginalized by such practices, and the destructive impact on civil society as a whole can be profound.[146] During the Guatemalan civil conflict, the Mayan indigenous minority was identified by the national Army as allies of anti-government guerrilla forces. This identification, rooted in historical racist prejudices, was purposefully exaggerated by the State to justify attacks on Mayan communities whether or not they may have been involved in the conflict. This official policy made massive use of disappearances that was specifically intended to eliminate indigenous minorities wholescale, which, as mentioned earlier, the CHC concluded amounted to acts of genocide against the Mayan people.[147] Analogous occurrences can be found in other Latin American countries during the Cold War era. Systematic campaigns of disappearances were undertaken also against members of leftist movements throughout the continent. These policies of disappearances were designed to create a state of fear and suspicion, as well as to ostracize and isolate potential dissidents from the wider population.[148] A further example of systematic disappearances that had both political and racial motivations is that of the Sri Lankan state's assault on its Tamil minority[149].

The third consequence of enforced disappearances on society is related to group polarization, where a sub-section of the population is made a scapegoat for the activities of anti-government forces, whether because of genuine links to such forces, or because they are considered "dangerous" for having particular professions or personal interests. Public campaigns to scapegoat entire groups foment distrust and suspicion that permeate through society, resulting in further fragmentation and paralysis at both the socio-cultural and economic levels.

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[146] See, *inter alia,* Case of *La Cantuta v. Peru*, Judgment of November 29, 2006, Inter-Am.Ct.H.R. (Ser. C) No.162, separate concurrent opinion of Judge Cançado Trinidade.

[147] Commission, *supra* note 62, paras 31-32 and 108-123.

[148] See, Frank M Afflitto, "Methodological Demands of Qualitative Research under Regimes of State-Sponsored Terrorism: Researching Justice in Guatemala" (1998) 21:2 PoLAR Polit Htmlent Glyphamp Asciihtmlent Glyphamp Ascii Leg Anthropol Rev 96, at 188;Barbara A Frey, "Los Desaparecidos: The Latin American Experience as a Narrative Framework for the International Norm against Enforced Disappearances" (2009) 4:5 Hisp Issues Line 52.

[149] See, *Report on the visit to Sri Lanka by a member of the Working Group on Enforced or Involuntary* Disappearances (25-29 October 1999, E/CN.4/2000/64/Add.1, issued on 21 December 1999.

In contexts where people who are labelled 'internal enemies'[150] because of their political involvement or cultural backgrounds disappear without a trace, people tend to avoid activities that might appear openly critical of state actions. When professionals, intellectuals, trade unionists, politicians, artists and teachers, among others, disappear, so too disappear society's capacity to think critically or to educate new generations to be critical thinkers. When this "creative power"[151] that is so critical for healthy democracies is erased and replaced instead with fear, silence and apathy, this poses an onerous obstacle for citizens to overcome in the (re)construction of democracy.[152] These disappearances also amount to an economic loss for society that can result in economic stagnation.[153] Human rights scholars have long supported the idea that there is a strong association between economic development and better human rights standards.[154] This is particularly true in cases of enforced disappearances. First, the destruction of the human and social capital of a community is an obvious direct economic loss. Second, medical and psychosocial support required by victims burdens public health systems, and where the state is unable to provide treatment, the subsequent (re)victimization can wrack further damage to society. Untreated victims are left unable to pursue healthy productive lives or to contribute to welfare of society. Michal Gilad[155] has noted that child victims suffer from a heightened risk for criminal behaviour and substance abuse, thereby further compromising community safety and unnecessarily burdening or consuming already scarce public resources further later on in their lives.[156] In short, disappearances as human rights abuses can trigger downward spirals among individuals and within society as a whole that can have further, spillover economic effects over time.

Finally, given the lack of clarity about the fates and whereabouts of victims, society as a whole is deprived of the possibility of knowing the truth about itself. "Truth" requires knowledge of both the past and the present afflictions to one's society. The IACHR has acknowledged that:

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[150] Commission, *supra* note 4.

[151] *Ibid*.

[152] *Ibid*.

[153] Howard M Kleinman, "Disappearances in Latin America: A Human Rights Perspective" (1986) 19 N Y Univ J Int Law Polit 1033; Clair Apodaca, "Global Economic Patterns and Personal Integrity Rights After the Cold War" (2001) 45:4 Int Stud Q 587.

[154] Apodaca, *supra* note 96.

[155] Michal Gilad, "The Young and The Helpless: Re-Defining the Term 'Child Victim of Crime'", McGill Annual Graduate Conference in Law, "Emerging Scholars, Emerging Scholarship", McGill University Faculty of Law, Montreal, May 29 – 30, 2014.

[156] *Id.*

> Public recognition helps to free up the pain locked up inside the person, which causes a "privatizing of the damage." The next of kin's feelings of guilt are very frequent in cases of forced disappearance. If there is no social response, acknowledging the facts and the dignity of the victims, the interiorization of the damage will be much greater.[157]

One could argue, therefore, that there is a general, societal right to truth, a right that, when honoured, accomplishes the fundamental task of preserving society's sense of justice and trust in those authorities that are supposed to be its guardians.

On the other hand, one cannot claim that every single member of society experiences the same need for truth and information. Direct perpetrators, their accomplices, or tacit spectators of the crime, although also members of 'society,' have strong incentives to prevent truths about disappeared persons from surfacing.[158] It might be difficult, therefore, to consider society as a whole to be a singular "victim" or "injured party" of enforced disappearances when certain sectors of that same society may have committed or silently supported mass violations in ways that they wish to remain secret.[159] This presents a challenge for finding a legal basis to consider reparations to society as a whole from a collective perspective.

Notwithstanding this, it is undeniable that the collective repercussions of enforced disappearances cause damage beyond the individual, and in ways that are intertwined and interrelated with broader social concerns. In order to better understand the relations between the various levels of its impact, it should be sufficient to refer to the crime in terms of its manifold effects. We have seen above that both the direct and indirect victims of enforced disappearances can suffer from (re)victimization from their stigmatization and marginalization within the unhealthy social environment in which they are forced to live. Furthermore, individual suffering brought on by collective states of fear and psychological subjugation caused by the deliberate policies of those who hold power can cause further harm to the foundations of democracy and the rule of law.

My argument for this kind of understanding of the damages that the phenomenon of enforced disappearance can cause to individuals and to society as a whole is not original. It constitute the foundation for Charles Taylor's communitarian theory, which emphasizes the importance

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[157] "Expert report of Carlos Martín Beristain, doctor, specialist in the care of victims of torture, human rights violations and other forms of violence", Case of the 19 *Merchants v. Colombia*, Judgment of July 5, 2004, Inter-Am.Ct.H.R, (Ser. C) No. (2004), para 71 (G).

[158] Vermeulen, *supra* note 2, at 138.

[159] Schönsteiner, *supra* note 84.

of social constructions in the development of individual meaning and identity.[160] I argue that the distinction between public/private, individual/community or self/other are often rigidly conceptualized. Indeed, the social nature of the human being and the fundamental interdependence of the human activity leads to the recognition that the rigid distinction between these dyads collapses. Uncovering this misrepresentation opens the way to a broader understanding of the notion of "injured parties", which become individual and collective. Finally, in the light of these observations, measures of reparation needs to be interpreted and applied in a relational and holistic fashion, taking into due consideration the interdependence of all the above mentioned factors of the damage created by an enforced disappearance.

[160] See generally, Charles Taylor, *Sources of the self: the making of the modern identity* (Cambridge, Mass.: Harvard University Press, 1989);Ruth Abbey, *Charles Taylor* (Princeton: Princeton University Press, 2000).

Part II

In Part I of this chapter, I demonstrated the complex challenge of understanding the variable impact of enforced disappearances on different subjects. That discussion has laid the groundwork for the remainder of this chapter, which will provide a comparative analysis of the jurisprudence of two international judicial bodies, namely the Inter-American Court of Human Rights and the European Court of Human Rights. I will examine the criteria they set up with regard to burden and standard of proof in order to tackle the juridical difficulties that arise in cases of disappearances. This analysis will expose the different interpretative methods undertaken by both courts to frame enforced disappearance in relation to human rights enshrined in the corresponding regional conventions. The theoretical background of this analysis is the fragmented nature of international human rights law and the judicial dialogue that has emerged between these two systems.[161]

1. The Right Not to be Subject to Enforced Disappearance in Relation to Other Rights in ACHR and ECHR Jurisprudence

The definition of enforced disappearances is not included in regional human rights instruments such as the European Convention of Human Rights and Fundamental Freedoms or the Inter-American Convention on Human Rights. Thus, in order to answer claimants' submissions in cases involving disappearances, human rights bodies have instead developed their own jurisprudence interpreting different conventional provisions in relation to the practice.[162]

In the Inter-American system, this normative gap was filled by the adoption of the Inter-American Convention on Forced Disappearances of Persons (IACFD) in 1994. However, unlike the International Convention for the Protection of All Persons (ICPED), the IACFD does not include an autonomous right not to be subject to enforced disappearances.[163]

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[161] Monica Pinto, "Fragmentation or Unification among International Institutions: Human Rights Tribunals" (1998) 31 N Y Univ J Int Law Polit 833; Anne-Marie Slaughter, "Typology of Transjudicial Communication, A" (1994) 29 Univ Richmond Law Rev 99.

[162] Dalia Vitkauskaite-Meurice & Justinas Zilinskas, "THE CONCEPT OF ENFORCED DISAPPEARANCES IN INTERNATIONAL LAW." (2010) 2:120 Jurisprudencija, online: <http://search.ebscohost.com/login.aspx?direct=true&profile=ehost&scope=site&authtype=crawler&jrnl=13926195&AN=52286914&h=%2BGuG3AMNTmdoXmyXZdQLjWv3zl3m%2BImhN973UmWHOW7be%2BBW%2Bf4IozhtsrQtoyr8syGEX6K%2BegC47t4vUkg3kw%3D%3D&crl=c>.

[163] Ophelia Claude, "Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence, A" (2010) 5 Intercult Hum Rights Law Rev 407.

Thus the Inter-American Court developed its own comprehensive approach that considers an enforced disappearance as the violation of multiple rights.[164] The Court's ambition was to adopt a complete view of all the aspects surrounding this complex violation and grant appropriate reparations to its victims.[165] When the Court deals with cases of enforced disappearances it automatically considers the violation of several rights, such as the right to life, the right to liberty, the right to humane treatment, and the right to an effective remedy. However, in the light of the uniqueness of enforced disappearances as a human rights violation, all are considered together as a whole instead of separately.

In 1988, the IACtHR rendered its first decision in a case of an enforced disappearance[166], and declared that it was a "complex form of human rights violation that must be understood and confronted in an integral fashion."[167] In subsequent cases and in the same spirit, the Court explicitly recognized the autonomous and permanent nature of forced disappearance and "the need to consider the offence of forced disappearance *in toto*, […] with its multiple elements intricately interrelated." [168]Accordingly, the Court's assessment of human rights violations in cases of disappearances does not approach the topic in an isolated and fragmented manner, considering merely the deprivation of liberty, or the causing torture, or loss of life on an individual basis, but will rather focus on all facts of the case[169].

With respect to the European system, even though the Parliamentary Assembly of the Council of Europe has recently encouraged the negotiations of a "European Convention for the Protection of All Persons From Enforced Disappearance"[170], the European Court of Human Rights must still adopt approaches in the absence of any single definition of 'enforced disappearance'. Unlike the IACtHR, the European Court considers the violation of multiple

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[164] This "multiple right approach" was later confirmed in the preamble of the IACFD that reads as follows: "the forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights".

[165] Maria Fernanda Perez Solla, *Enforced Disappearances in International Human Rights* (Jefferson, N.C: McFarland, 2006); Claude, *supra* note 105.

[166] Case of *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

[167] *Id.*, para 150.

[168] Gabriele Della Morte, "International Law between the Duty of Memory and the Right to Oblivion" (2014) 14:2 Int Crim Law Rev 427.

[169] Case of Goiburú et al. v. Paraguay, Judgment of September 22, 2006, Inter-Am.Ct.H.R. (Ser. C) No. 153; Case of *Heliodoro Portugal v. Panama*, Judgment of August 12, 2008, Inter-Am.Ct.H.R. (Ser. C) No.186, paras 107 and 112; 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*, SSRN Scholarly Paper ID 1158883 (Rochester, NY: Social Science Research Network, 2008).

[170] Council of Europe, Parliamentary Assembly, Recommendation 1995 (2012).

rights separately, as if they occurred independently or resulted from separate situations. The Court dealt with disappearance cases in three main contexts: the Turkish invasion of Cyprus; the internal conflict in Turkey between state's security forces and members of the Kurdistan Workers Party (PKK) in the Kurdish region of south-eastern Turkey; and the armed conflict in Chechenia.[171]

As correctly noted by Claude, enforced disappearance is a phenomenon whose complexity makes it very difficult to prove violations of multiple rights in this manner.[172] Hence, the Court should adopt a more flexible approach to this kind of violation, one that can guarantee the complete and effective protection of human rights within the European framework. One should also hope that the Strasbourg Court will make an effort to frame a definition for enforced disappearances, or will at least encourage an internal debate to seek out a specific method for dealing with it[173].

2. Comparative Overview of Victims' Rights

A plethora of epithets indicate the phenomenon of enforced disappearance. The UN General Assembly has repeatedly called enforced disappearances "an offence to human dignity" and "a grave and flagrant violation" of human rights.[174] The Inter-American Convention on the Forced Disappearance of Persons describes it as "as an affront to the conscience of the Hemisphere"[175] and "one of the gravest crimes that can be committed against a human being."[176]

The offence typically breaches fundamental rights protecting the life, security and liberty of a human being, and any given case has the potential to violate numerous others,

[171] Commission on Human Rights, 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 2001/46E/CN.4/2002/71, (2002), para 34; Nikolas Kyriakou, *An affront to the conscience of humanity: enforced disappearance in international human rights law* European University Institute, 2012) [unpublished]; Vermeulen, *supra* note 2.

[172] Claude, *supra* note 105.

[173] *Id.*

[174] Inter-American Convention on Forced Disappearance of Persons, Preamble, par. 3; Resolution 49/193 of the General Assembly, adopted 23 December 1994.

[175] Inter-American Convention on The Forced Disappearance of Persons is a treaty, adopted 9 June 1994 (entry into force 28 March 1996), preamble.

[176] Colloque le refus de l'oubli la politique de disparition forcée de personnes & Julio Cortázar, *Le Refus de l'oubli: la politique de disparition forcée de personnes : colloque de Paris, janvier-février 1981* (Berger-Levrault, 1982), at 90. Andreu-Guzmán, *supra* note 60.

including the right not to be subjected to torture or other cruel, inhumane or degrading treatment, or the right to an effective remedy.[177]

In the sections that follow I will refer to these fundamental international human rights and I will try to elucidate how they result intertwined in enforced disappearance cases. This analysis will be conducted within the framework of two prominent human rights regimes, the Inter-American and the European one. Thus, the jurisprudence of the IACtHR and of the ECtHR will guide the inquiry.

It seems appropriate to begin with reference to the standards of proof that are required by both Courts to recognize such violations. Questions concerning standards of proof are particularly important in cases of enforced disappearances because perpetrators' attempts to destroy or conceal all information about the victim's fate and whereabouts are very often an essential feature of the crime committed.[178] Requiring victims' relatives, for instance, to provide direct evidence to prove what happened is a *probatio diabolica*, that could irreparably obstruct the process.[179] Because of this, both the IACtHR and the ECtHR have developed a flexible jurisprudence on the matter, admitting a wide range of evidence.

Since the beginning of its jurisprudence, the IACtHR has recognized that the unique nature of the crime of enforced disappearance requires consideration of circumstantial evidence, indicia, and presumptions, provided that they lead to inferences that are consistent with known facts.[180] In *Velasquez-Rodriguez* case of 2000, the IACtHR established two specific criteria for cases of enforced disappearance that permit the reversal of the burden of proof in recognition of power imbalances between the parties where the state controls "the means to clarify the facts that have occurred in its jurisdiction."[181] In order to reverse the burden of proof an applicant must meet the requirements of a two-part test. He or she must prove: 1) that there was a governmental practice of disappearances at the time of the event, and 2) that the disappearance of the individual in question was linked to that practice.[182] If the applicant can meet this two-part threshold, the burden of proof shifts onto the respondent state. The principle "*affirmanti incumbit probatio"* thus is not rigidly applied by the Court,

[177] Kyriakou, *supra* note 114.

[178] Case of *Velasquez Rodriguez v. Honduras*, Judgment , para 131.

[179] Scovazzi & Citroni, *supra* note 6.

[180] *Id.* para 130.

[181] Case of *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70.

[182] *Id.* para 126.

which instead has prioritized the equality among parties in cases following *Velasquez-Rodriguez.*[183]

2.1. Right to Life (Art. 4 ACHR / Art. 2 ECHR)

The flexibility of this kind of approach is particularly relevant when the Courts must establish the presumption of death of a victim, and has been employed in numerous cases before both the IACtHR and the ECtHR,[184] who have been guided by the generally life-threatening nature of enforced disappearances.[185] In jurisprudence following *Velasquez-Rodriguez*, the IACtHR has considered that the disappearance of a person is *ipso facto* "a flagrant violation of the right to life."[186] In those cases where the body of the victim is not found,, the court recognized that the proof of an existing pattern of disappearances[187], in conjunction with the passage of time, leads to the reasonable presumption of the victim's death. In addition, the Court recognized that a State's failure to investigate a disappearance constituted a further breach of its obligation to protect human rights,[188] in particular the victim's the right to life.[189]

The ample flexibility of the IACtHR's approach is an appropriate response to victims' needs. As shown above, when families and friends search for their disappeared loved ones they often feel disempowered by state authorities' uncooperative and offensive behaviour

[183] See, *inter alia*, Case of *Gómez-Palomino v. Peru*, Judgment of November 22, 2005, Inter-Am.Ct.H.R. (Ser C), paras 47-48.

[184] See, Case of *Luluyev and others v. Russia*, E.Ct.H.R. (First chamber), 69480/01, (9 November 2006); Case of *Aslakhanova and Others v. Russia*, E.Ct.H.R. (First Section), 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, (18 December 2012); Case of *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4; Case of *La Cantuta v Peru*, Judgment of November 29, 2006, Inter-Am.Ct.H.R. (Ser. C) No.162.

[185] In the General Comment 6 on the right to life, the Human Rights Committee stated that: "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." General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

[186] Case of *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4, para 157.

[187] In those contexts authorities "systematically executed detainees without trial and concealed their bodies in order to avoid punishment". Case of *Velasquez Rodriguez v. Honduras,* Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4, para 188; Case of Godínez-Cruz v. Honduras, Judgment of June 26, 1987, Inter-Am.Ct.H.R. (Ser. C) No. 3, para 198.

[188] Art. 1 American Convention on Human Rights, adopted 1969 (entry into force 18 July 1978).

[189] Case of *Gómez-Palomino v. Peru*, Judgment of November 22, 2005, Inter-Am.Ct.H.R. (Ser C) para 54.1; Case of *Velasquez-Rodriguez v. Honduras*, Judgement, para 188.

during investigations. When the burden of proof lies on the state, however, claimants are granted some relief from the suffering that such behaviour can cause.

The IACtHR approach to the burden and standards of proof is considerably more liberal and flexible than its European counterpart, which typically has been more rigid in its treatment of such matters. [190]

In the first case of disappearance to come before the ECtHR[191], *Kurt v. Turkey*, the ECtHR did not find a violation of the victim's right to life because of a lack of direct evidence of the disappearance and of the identity of the perpetrators. In that case the Court required the applicants to meet the strict beyond reasonable doubt standard of proof. In more recent jurisprudence, however, the Court has adopted more progressive mitigation, especially where the Court deals with violations of the right to life. Similar to the approach taken by the IACtHR, the Strasbourg Court has identified a set of crucial elements that must be taken into consideration in order to presume the death of a disappeared person.[192] Where the applicant submits prima facie evidence that the state was involved in a disappearance as well as evidence that the circumstances of the case could be considered life threatening, the burden of proof shifts to the respondent Government to disprove the claim. If the state is unable to submit any convincing explanations of what happened to the victim, the latter will be presumed dead, thereby permitting the award of measures of redress.[193] The responsibility of the State springs from the violation of the duty to refrain from unlawful killings,[194] or, in cases where perpetrators are not state actors, from failing in their positive obligation to safeguard the lives of those within their jurisdiction.[195] Both obligations are linked to the to the substantive violation of the right to life. Furthermore, following the IACtHR's interpretation about effective investigations, the ECtHR has articulated a third procedural obligation that stems from the right to life. This procedural obligation requires that there should be "some

[190] Claude, *supra* note 105.

[191] Case of *Kurt v. Turkey*, E.Ct.H.R. (Chamber), 15/1997/799/1002 (25/05/1998), para 107.

[192] Case of *Akkum and Others v. Turkey*, E.Ct.H.R. (first section) 21894/93, (24 March 2005), para 211; Case of *Bazorkina v. Russia*, E.Ct.H.R. (First Section), 69481/01, (27 July 2006), para 110; case of *Varnava and Others v. Turkey*, E.Ct.H.R. (First Section), 16064/90, 16065/90, etc, (18 September 2009) para 184.

[193] Case of *Varnava and Others v. Turkey*, *supra*.

[194] In this respect, the Court evaluates that "for a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk". Thus, this this interpretation of the right to life has been rarely used. Case of *Koku v Turke*, ECtHR (Second Section), 27305/95 (31 May 2005) paras 125-128.

form of effective official investigation"[196] when individuals have been killed in life-threatening circumstances under the State's jurisdiction.

2.2. The Right to Humane Treatment (Art.5 ACHR/Art.3 ECHR)

Bearing in mind the difficulty, even the impossibility in the absence of a corpse, to provide physical proof that the victim of a disappearance was subjected to torture or other cruel or inhuman treatment, both Courts have had to face cases where they were called upon to establish whether or not the mere disappearance of the victim *per se* necessarily entailed torture or other ill-treatment.[197]

The IACtHR answered this question in the affirmative, observing that the unlawful detention, deprivation of communication and solitary confinement that are typical of every disappearance represent in themselves cruel and inhumane treatment that is harmful to the psychological and moral integrity of the person, and that exacerbates further their situation of vulnerability.[198] This approach confirms the opinion expressed by the U.N. Working Group on Enforced or Involuntary Disappearances, which maintained that enforced disappearances constituted *ipso facto* torture or other prohibited treatments.[199] The flexible approach adopted by the IACtHR is reflective of the Court's willingness to consider the deep suffering of indirect victims of disappearances and in many circumstances,[200] has recognized the violation of their right to humane treatment. In these cases, the Court used expert psychological and psychiatric opinions to achieve a complete view of the impact of disappearances on family members and to prove violations of their mental and moral integrity as a result of them.[201] While the IACtHR applies a presumption *iuris tantum* regarding the violation of the right to human treatment of the victim and his or her direct next of kin, the ECtHR's interpretation of the same right has typically demanded a higher standard of proof. Indeed, with regard to the material victim of a disappearance, the Court has usually been reluctant to hold that an

[196] Case of *Cyprus v. Turkey*, E.Ct.H.R. (Grand Chamber), 25781/94, (10 May 2001).

[197] Claude, *supra* note 105.

[198] Case of *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70, para 150.

[199] Report of the U.N. Working Group on Enforced or Involuntary Disappearances, UN/Doc. E/CN.4/1983/14, (January 21 1983); Claude, *supra* note 105.

[200] The Court established the violation of the relative's right to human treatment for the first time in case of *Blake v. Guatemala*, Judgment of January 24, 1998, Inter-Am.Ct.H.R. (Ser. C). This orientation was confirmed in the subsequent case-law of the Court. See, *inter alia*, Case of *Bamaca Velasquez v. Guatemala*, *supra*; Case of *La Cantuta v Peru*, Judgment of November 29, 2006, Inter-Am.Ct.H.R. (Ser. C) No.162; Case of *Cantoral Huamaní and García Santa Cruz*, Judgment of July 10, 2007, Inter-Am.Ct.H.R., (Ser C) No. 167.

[201] Case of *Molina Theissen vs. Guatemala*, Judgment of July 3 2004, Inter-Am.Ct.H.R, (Ser. C) No. 108.

enforced disappearance *ipso facto* entails torture or other ill-treatment, even in spite of the extreme difficulty of proving beyond a reasonable doubt any such violation in the absence of direct evidence.[202] The ECtHR on numerous occasions has found that close relatives of disappeared persons were themselves victims of torture or other ill-treatment, however this in those cases it did not establish any general principle or make a rebuttable presumption.[203] Instead, the European Court fixed a set of criteria to evaluate whether a family member of a disappeared could be considered a victim a violation of a right to humane treatment. This set of criteria includes: the proximity of family ties; the particular circumstances of the relationship; the extent to which the family member witnessed the disappearance; the involvement of the family member in the search of the disappeared person; and the authorities' reactions and attitudes to that situation.[204]

The purpose behind these elements is to introduce objective standards to the Court's evaluation, however its interpretation of those criteria in cases since then has been incoherent and rigid that oftentimes has disregarded the suffering of relatives who have searched strenuously for justice in vain. [205] An example of the inconsistent way in which the Court has invoked these criteria can be found in *Koku v. Turkey*, a case concerning the disappearance and the murder of a prominent local politician of the Turkish People's Democracy Party (HADEP). Because of the lack of any appropriate official investigation into the victim's disappearance, the victim's brother struggled to bring the case to the attention of international organizations. In the Court's opinion, however, the applicant failed to make sufficient inquiries with domestic authorities, and since the attitude of the authorities was not sufficiently poor or egregious to constitute an aggravating factor, the Court ruled that there was no special reason to justify a finding of a violation of the applicant's right not to be subject to torture or other inhuman or degrading treatment. Considering that the Court recognized that the victim's brother "has suffered anguish and distress in the face of the authorities' complacency in relation to his brother's disappearance", the requirement that he exhaust all means of domestic enquiry appears paradoxical particularly in light of the fact that enforced disappearances by definition are characterized by the lack of adequate formal investigations.

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[202] See, *e.g.*, Case of *Bazorkina v. Russia*, E.Ct.H.R. (First Section), 69481/01, (27 July 2006).

[203] Case of *Orhan v. Turkey*, E.Ct.H.R. (First Section), 25656/94,(18 June 2002), para 358.

[204] Case of *Çakıcı v. Turkey*, E.Ct.H.R. (Grand Chamber), 23657/94, (8 July 1999), para 99.

[205] Solla, *supra* note 107; Claude, *supra* note 105, at 445.

The conservative jurisprudence of the ECtHR later influenced the IACtHR in the decision o *Heliodoro Portugal v. Panama*, where the Court listed several particular circumstances that had to be taken into account in order to find that a relative of a disappeared person had been a victim of torture or inhuman treatment. [206] More recently, however, the IACtHR abandoned this path and reiterated its previous jurisprudence according to which the close next of kin of the victims of enforced disappearance are presumed to be victims of the violation in their own right.[207]

2.3. The Right to Liberty and Security (Art. 7 ACHR/ Art.5 ECHR) and the Right to an Effective Remedy (art. 25 ACHR / art. 13 ECHR)

The right to liberty and security is the principal human right that is violated by an enforced disappearance. The IACtHR has declared disappearances "a clear instance of abuse of power."[208] An enforced disappearance is different from lawful detention because of its arbitrary nature characterized by the absence of arrest warrants or of any notification of reasons for the arrest, as well as by systematic torture in detention sites. In this respect, both the Inter-American and the European Courts have determined that the prompt judicial supervision of official detentions is a critical requirement for preventing arbitrariness. The jurisprudence of IACtHR is characterized by its strong emphasis on the principle of *habeas corpus*,[209] linking the right to liberty and security to the right to an effective remedy. Having access to a judge determines the legality of the deprivation of one's liberty.[210] The IACtHR has pointed out in many occasions that for a *habeas corpus* petition to be effective, it must not only be formal but also substantial.[211] The IACtHR has ruled that the theoretical existence

[206] These conditions revoke those fixed by the ECtpò0HR and include: "1) the existence of a close family tie; 2) the particular conditions of the relationship with the victim; 3) the extent to which the family member was involved in the search for justice; 4) the State's response to their efforts; 5) the context of a "system that prevents free access to justice," and 6) the constant uncertainty in which the next of kin live as a result of not knowing the victim's whereabouts." Case of , Judgment of August 12, 2008, Inter-Am.Ct.H.R. (Ser. C) No.186, para 163.

[207] Case of *Chitay Nech et al. vs Guatemala*, Judgment of May, 25 2010, (Ser. C) Inter-Am.Ct.H.R., No. 212, para 220.

[208] Case of *La Cantuta v Peru*, Judgment of November 29, 2006, Inter-Am.Ct.H.R. (Ser. C) No.162, para 109.

[209] Case of *La Cantuta v Peru*, para 112; Case of *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70, para 194.

[210] Vermeulen, *supra* note 2.

[211] See, *inter alia*, Case of *the Mayagna (Sumo) Awas Tingni Community*, Judgment of August 31, 2001. Series C No. 79, para 114; Case of *Las Palmeras v. Colombia*, Judgment of December 6, 2001, Inter-Am.Ct.H.R. (Ser.C) No. 90; Case of *Juan Humberto Sánchez v. Honduras*, Judgment of June 7, 2003, Inter-Am.Ct.H.R. (Ser C) No. 93 para. 121. Case of *Las Palmeras v. Colombia*, Judgment of December 6, 2001, Inter-Am.Ct.H.R. (Ser.C) No. 90.para.

of a remedy within a domestic judicial apparatus alone is not sufficient, and the effectiveness of the remedy in practice must be demonstrated. In order to establish state responsibility, this evaluation takes into consideration the general situation of the country in question, and asks whether the obstructive or aggressive conduct of the state authorities may constitute a source of suffering for victims and an insurmountable barrier to their access to justice.[212]

With regard to judicial control over custodial measures, both the Inter-American and European Conventions provide that detained or arrested persons shall be brought "promptly" before a judge or other authorized officer and shall be entitled to trial "within a reasonable time".[213] The two Courts have made similar rulings that the promptness of judicial control over detentions must be assessed in light of the object and purpose of the right to liberty and security, as well as the special characteristics of each case.[214] Despite that similar foundation, however, the Courts have reached different conclusions. Since the *Brogan and Others v. The UK* case, the ECtHR has ruled that the period of unsupervised detention cannot exceed four days.[215] In contrast, the IACtHR has adopted a more rigorous standard for cases involving disappearances, one that requires individual to be brought "immediately" before a judge after being taken into custody.[216]

Article XI of the Inter-American Convention on Forced Disappearance, as well as Article 17.3 of the ICPED, obliges states to compile and maintain up-to-date official registers of persons deprived of their liberty that must be made available to any person with a legitimate interest, such as judges, attorneys, and relatives. This obligation is essential to guarantee the right to liberty and security as well as the right to an effective remedy against the arbitrary deprivation of liberty. However, in IACtHR rulings the question of prison registers has been relatively marginal addressed only in exceptional circumstances.[217] ECtHR

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[212] Evidence and testimonies show that the authorities against whom the remedies were brought ignored them, or threatened and intimidated judges and lawyers who filed the writs of *habeas corpus*. See, *inter alia*, Case of *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 paras. 70-80.

[213] Art. 7.5 ACHR; Art. 5.3 ECHR. The obligation is expressed in English by the word "promptly", in French by the word "aussitôt" and in Spanish by the words "sin demora". It may be interesting to note that the ECHR noted that the English term may be understood as having a broader significance than "aussitôt", which literally means immediately. See, case of *Brogan and Others v. The United Kingdom,* (Court Plenary).

[214] Case of *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70; case of *Brogan and Others v. The United Kingdom,* (Court Plenary) 11209/84 11234/84 11266/84…(29/11/1988) paras. 59-61; case of Aksoy v. Turkey, E.Ct.H.R. (Chamber), 21987/93 (18/12/1996) paras. 71-76.

[215] Case of *Brogan and Others v. The United Kingdom,* (29/11/1988)

[216] Case of *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70, para. 220.

[217] Case of *Juan Humberto Sánchez v. Honduras*, Judgment of June 7, 2003, Inter-Am.Ct.H.R. (Ser C) No. 93 para. 189.

jurisprudence, in contrast, has placed greater stress on the importance of accurate custody records and on effective preventive measures to safeguard persons from the risk of disappearance.[218] Importantly, in the case *Cyprus v. Turkey* the Court affirmed that the state's obligation to account for detainees' whereabouts cannot be waived in situations of internal conflict. The Court maintained that even in the absence of custody records, state authorities should make further inquiries in order to account for the disappearance of persons under their control. This obligation is derived from the general prescription that "having assumed control over a given individual, it is incumbent on the authorities to account for his or her whereabouts."[219] It should be noted that the Court has mostly relied upon the procedural violation of the right to life when considering a state's failure to conduct a prompt and effective investigation in relation to a complaint of an unlawful arrest and detention of an individual by security forces under life threatening circumstances.[220]

The main purpose of the ECtHR's emphasis on custody records is to prevent the violation of the right or liberty and security of the person and other related abuses. At the same time, however, custody records also constitute a primary source of information for relatives, who, in their absence, must endure prolonged uncertainty that has been recognized as a form of inhumane treatment. Moreover, the State's obligation to inform relatives of detainees also acts as a safeguard against impunity by making it possible to identify those behind it.

3. The Right to Truth

In ancient Greek the word "*aletheia*" is often translated as "truth," but literally means "that which is beyond oblivion" (*lèthe*). *A-lethèia*, in other words, thus, is "that which cannot be forgotten."[221] The Greek word *amnestia*, on the other hand, means the exact opposite: forgetfulness.[222] These concepts are philosophically and linguistically antithetical, and represent a dichotomy that can be transposed to the international human rights law framework

[218] Vermeulen, *supra* note 2, at 291. See, Case of *Çakıcı v. Turkey,* E.Ct.H.R. (Grand Chamber), 23657/94, (8 July 1999); case of *Timurtas v. Turkey*, E.Ct.H.R. (First Section), 23531/94, (13 June 2000); case of *Luluyev and others v. Russia*, E.Ct.H.R. (First chamber), 69480/01, (9 November 2006);

[219] Case of *Cyprus v. Turkey*, E.Ct.H.R. (Grand Chamber), 25781/94, (10 May 2001) paras. 145-148.

[220] Case of *Kurt v. Turkey*, E.Ct.H.R. (Chamber), 15/1997/799/1002 (25/05/1998), para 124; case of *Timurtas v. Turkey*, E.Ct.H.R. (First Section), 23531/94, (13 June 2000) para 103; case of *Luluyev and others v. Russia*, E.Ct.H.R. (First chamber), 69480/01, (9 November 2006) para 122; Case of *Baysayeva v. Russia*, E.Ct.H.R. (First Section), 74237/01, 5 April 2007, para 147.

[221] Raul Corazzon, *Martin Heidegger on Aletheia (Truth) as Unconcealment*.

[222] Online Etymology Dictionary, <http://www.etymonline.com/index.php?term=amnesty>; Kyriakou, *supra* note 112, at 183.

in the a persistent tension that exists between the right to truth and the permissibility of amnesty.[223]

The right to truth is still a fairly vague concept in international law.[224] The "right of families to know the fate of their relatives" is explicitly recognized in Article 32 of Additional Protocol I to the Geneva Conventions, but is limited to the context of an international armed conflict. More generally under international human rights law, the concept of the right to the truth has evolved alongside the development of the right to an effective remedy and reparations for gross and systematic human rights violations as matters of jurisprudence and legal standards. In particular, Article 24 of the CPED recognizes 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."

In cases of enforced disappearance, the concealment of facts is characteristic of all stages of the crime.[225] As discussed above, one of the most pervasive consequences of disappearances is the suffering caused to victims' families and friends from their lack of knowledge about what happened to their loved ones. Moreover, this uncertainty has a chilling effect on the societal environment surrounding them. Since the victims of enforced disappearances can be understood to be not only the disappeared individuals, but also entire communities, the right to truth can be observed from the different but intertwined perspectives of the individual and the collective.

In the Inter-American system, the IACtHR's understanding of the right to truth has evolved in recent years, and it is now considered to be a right that belongs to victims and family members, as well as to society as a whole. Under its current interpretation, the normative content of the right to the truth can be inferred from the combination of other rights, and is understood to emanate from a state's positive obligation to conduct an effective investigation, but also in terms of it being a remedy for victims and for society as a whole.[226]

An important example of the IACtHR's approach to the right to truth can be found in *Blake v. Guatemala*, where the IACtHR found that the family of Nicholas Blake, an American

[223] Hélène Ruiz Fabri et al, "Les institutions de clémence (amnistie, grâce, prescription) en droit international et droit constitutionnel comparé" (2006) 28:1 Arch Polit Criminelle 237 ; Gabriele Della Morte, "International Law between the Duty of Memory and the Right to Oblivion" (2014) 14:2 Int Crim Law Rev 427. Kyriakou, *supra* note 117; Scovazzi & Citroni, *supra* note 7; Vermeulen, *supra* note 2.

[224] Commission on Human Rights, 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 2001/46E/CN.4/2002/71, (2002).

[225] Case of *Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Inter-Am.Ct.H.R. (Ser. C) No. 20, para. 63.

[226] Kyriakou, *supra* note 114.

journalist, had an enforceable right to compel Guatemalan authorities to investigate his disappearance. In 1985 Blake and Griffith Davis, his photographer companion, had been in Guatemala reporting on its internal armed conflict. After their disappearance, the Guatemalan government did not help the attempts of their families to ascertain the truth or recover their mortal remains. On the contrary, state authorities actively obstructed their investigations and provided contradictory information. The Court found that their disappearance and the State's subsequent failure to investigate constituted a violation of the mental and moral integrity of Blake's relatives, and thereby breached their right to human treatment and their right to a fair trial, enshrined in Articles 5 and 8 of the ACHR.[227]

The ECHR has taken a more timid approach to the right to truth, but implicitly reached a similar conclusion in the case of *Cyprus v. Turkey*. The complaints arose out of the Turkish military operations in Northern Cyprus in 1974. In the interstate application filed in 1994, Cyprus claimed that about 1,491 Greek Cypriots were still missing twenty years after the cessation of hostilities.[228] These persons had been last seen alive in life-threatening circumstances in Turkish custody, and their fate had never been accounted for by Turkish authorities. In this case, the Court indirectly addressed the issue of the right to truth by describing it as a right that could be inferred from the violation of the right to not be subject to torture or other ill-treatment, the right to an effective remedy, and the right to an effective investigation.[229]

Taken together, one can argue that the right to truth derives its normative basis from two fundamental categories of safeguards underlying international human rights law: 1) the protection from torture, in the sense that victims' relatives are exposed to inhumane treatment when a state fails to disclose the fate and whereabouts of those it arrests or detains; and 2) the right of access to justice, which can be violated by a state's failure to effectively investigate and prosecute crimes committed against in its custody.[230]

Thus, even though Article 24 of the ICPED enshrines an autonomous right to truth, international human rights Courts do not treat it as an independent right itself. This approach seems to be at odds with the view of the WGED, according to which the right to the truth in relation to enforced disappearances should be clearly distinguished from the right to obtain

[227] Case of *Blake v. Guatemala*, Judgment of January 24, 1998, Inter-Am.Ct.H.R. (Ser. C) No. 36, paras. 112-116.

[228] Case of *Cyprus v. Turkey*, E.Ct.H.R. (Grand Chamber), 25781/94, (10 May 2001), para.20.

[229] Case of *Cyprus v. Turkey*, E.Ct.H.R. (Grand Chamber), 25781/94, (10 May 2001).

[230] Dermot Groome, "Right to Truth in the Fight against Impunity, The" (2011) 29 Berkeley J Intl L 175.

information about a person who is deprived of his or her liberty.[231] While that latter right, together with the right of *habeas corpus*, is a key tool to prevent enforced disappearances, the right to truth has a more complex nature. Indeed, the content of the right to truth has a chiastic structure whereby it is both an individual and a collective right that serves preventive as well as compensatory purposes.[232] Each victim has the right to know the truth about violations committed against him or her, but that truth must also be told at the societal level as a "vital safeguard against the recurrence of violations".[233] This collective dimension of the right to truth, as set out in the *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, which specifies that the State has a correlative duty to preserve collective memory. [234] In the same vein, the WGED has repeatedly recommended that states adopt measures to promote truth as a means of implementing reconciliation in their societies, and respect the right to integral reparation for victims of enforced disappearances.[235]

In many instances the IACtHR has recognized the collective character of the right to truth. This was first done in the *Bamaca* case, where the IACtHR considered the right of society to have access to essential information for the development of democratic systems, alongside the specific and individual right of victims' relatives to know what has happened to their loved ones, both of which open the door to reparations.[236] At the individual level, the search for truth represents the starting-point for the liberation and the protection of the human

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[231] Case of *El-Masri v. the former Yugoslav Republic of Macedonia*, E.Ct.H.R. (Grand Chamber), 39630/09, (13 December 2012).

[232] Moreover, the WGED also makes it clear that the right of the relatives to know the truth of the fate of a disappeared persons is an absolute right, not subject to any limitation or derogation. This means that no State secret privilege or derogation based on emergency situations should be applicable in cases of enforced disappearances. See, General Comment on the Right to the Truth in Relation to Enforced Disappearances, Working Group on Enforced or Involuntary Disappearances, (2010); Claude, *supra* note 101.

[233] Principle 2 of the "Set of principles for the protection and promotion of human rights through action to combat impunity", Commission on Human Rights, Report submitted by Diane Orentlicher, independent expert to update the Set of principles to combat impunity, E/CN.4/2005/102/Add.1, (2005).

[234] Principle 3 of the said document states: "A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments." *Ibidem*.

[235] General Comment on the Right to the Truth in Relation to Enforced Disappearances, Working Group on Enforced or Involuntary Disappearances, (2010).

[236] "It is clear that the right to the truth […] has a collective and general nature, a type of extended right, whose effectiveness should benefit society as a whole." Case of *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70, separate concurring opinions of Judge Ramìrez and Judge Salgado-Pesantes; see, case of the *Las Dos Erres Massacre v. Guatemala*, Judgment of November 24, 2009, Inter-Am.Ct.H.R. (Ser. C) No. 211, para. 149. See also, case of *Las Dos Erres Massacre v. Guatemala*, Judgment of November 24, 2009, Inter-Am.Ct.H.R. (Ser. C) No. 211.

being. In fact, Judge Cançado Trinidade aptly recalls that "without truth (however unbearable it might come to be) one cannot be freed from the torment of uncertainty, and it is not possible either to exercise the protected rights."[237] The right to access to justice and the obligation of the state to conduct an effective investigation are the premise to the right to truth. At the collective level, the right to truth is ineluctably connected to the very realization of justice and to the struggle against impunity. It can serve reconciliatory purposes, overcoming frictions between the states institutions and society.[238] This orientation has been confirmed recently in the case of *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil.*[239] The case concerns the disappearance of 70 persons, as a result of the operations of the Brazilian Army between 1972 and 1975, aimed at eradicating the *Guerrilha do Araguaia*. In the context of the transition to democracy, the subsequent adoption of an amnesty law prevented any liability of those responsible for the crime. Moreover, the information about the disappearances was first denied and then delayed. In its judgment the Court maintained that the right to truth was part of the right to freedom of expression, which implies the right to access to information. The right to access information has two dimensions - the individual and social – which, according to the Court, must be guaranteed by the State in a simultaneous manner.[240]

On the other side of the Atlantic, the ECtHR has usually been more timid in addressing the questions related to the right to truth, considering in particular its individual dimension, that presupposes access to the results of investigations, as well as to investigative files.[241] In the first enforced disappearance case before the ECtHR, the word "truth" appears in the reasoning that sustained the award of compensation for non-pecuniary damage. The Court maintained that:

> [g]iven that the authorities have not assisted the applicant in her search for the truth about the whereabouts of her son, which has led it to find a breach of Articles 3 and 13 in her respect, the Court considers that an award of compensation is also justified in her favour.[242]

[237] Case of *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70, separate opinion of Judge A.Cançado Trinidade, para.30.
[238] *Id.* separate concurring opinion of Judge Salgado-Pesantes.
[239] Case of *Gomes-Lund et al. (Guerrilha do Araguaia) v. Brazil*, Inter-Am.Ct. H.R., Judgment of November 24, 2010, (Ser C) No. 219.
[240] *Id.* para 197.
[241] Case of *Janowiec and Others v. Russia*, E.Ct.H.R. (Grand Chamber), 55508/07 and 29520/09,(21 October 2013), para. 124.
[242] Case of *Kurt v. Turkey*, E.Ct.H.R. (Chamber), 15/1997/799/1002 (25/05/1998), para. 175.

In its following case-law, the Court limited itself to observe *passim* that in the investigations on human rights abuses there must be a sufficient degree of public scrutiny, which may however vary from case to case. In all cases, the next of kin of the victim of a human right violation must be involved in the investigation procedure "to the extent necessary to safeguard his or her legitimate interests."[243]

More recently, the ECtHR has rendered a milestone decision[244] where the Court changed its prior stringent orientation and instead embraced a new paradigm of the right to truth. [245] *El-Masri v. the former Yugoslav Republic of Macedonia*, is a case concerning one of the most debated counter-terrorism practices employed by the United States Government in recent years that bears considerable similarity to a number of constitutive elements of enforced disappearances.[246] Extraordinary rendition is a "hybrid human rights violation"[247] that involves the state-sponsored abduction of a person suspected to be involved in terrorist activities and the subsequent transfer of that person to a third country where he/she is secretly detained, interrogated, often tortured and sometimes killed.[248] A detailed examination of this specific practice goes beyond the scope of this thesis, it is however important to emphasize

[243] Case of *Kelly and Others v. the United Kingdom*, E.Ct.H.R. (Grand Chamber), 30054/96, (4 May 2001) para 98.

[244] Case of *El-Masri v. the former Yugoslav Republic of Macedonia*, E.Ct.H.R. (Grand Chamber), 39630/09, (13 December 2012).

[245] Federico Fabbrini, "The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism" (2014) 14:1 Hum Rights Law Rev 85.

[246] Dick Marty, Report to the Committee on Legal Affairs and Human Rights, Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states, Explanatory memorandum, (7 June 2006); Kyriakou, *supra* note 144; Scovazzi & Citroni, *supra* note 6; Fabbrini, *supra* note 21.

[247] David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, SSRN Scholarly Paper ID 924146 (Rochester, NY: Social Science Research Network, 2006).

[248] Leila Nadya Sadat, "Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror" (2006) 75 George Wash Law Rev 1200. The definition of extraordinary rendition differs depending upon the source. The European Parliament has recently condemned the US-led CIA rendition and secret detention program involving "multiple human rights violations, including unlawful and arbitrary detention, torture and other ill-treatment, violations of the *non-refoulement* principle, and enforced disappearance.", European Parliament resolution on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report (2012/2033(INI)), 11 September 2012; The New York City Bar Association report uses the following definition: "the transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment." cited in Leila Nadya Sadat, "Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law" (2005) 37 Case West Reserve J Int Law 309; Scholars has also contributed to refine the definition. "An 'extraordinary rendition' typically consists of a complex series of events. After being captured in a certain country, the rendered person is transferred to a detention facility in another country. There, he is interrogated, and, in many cases, tortured or subjected to other forms of inhuman treatment. He does not face any criminal charge or a trial by an independent judicial body." Francesco Messineo, "'Extraordinary Renditions' and State Obligations to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy" (2009) 7:5 J Int Crim Justice 1023; "What it means is that the United States seizes individuals, presumably terror suspects, and sends them off without even a nod in the direction of due process to countries known to practice torture.", Bob Herbert, Op-Ed, It's Called Torture, N.Y. Times, Feb. 28, 2005, *available at* http://www.nytimes.com/2005/02/28/opinion/28herbert.html?_r=0.

the similar constitutive elements that it shares with enforced disappearance. Indeed both violations basically consist in: the deprivation of liberty, directly or indirectly operated by state agents, who do refuse to acknowledge it.[249]

In casu, Khaled El-Masri, a German national, who was arrested by Macedonian agents while travelling to Macedonia in 2003 because of his suspected involvement in terrorism. Following his arrest, he was handed over to the United States Central Intelligence Agency (CIA), which then transferred him involuntarily to Kabul, Afghanistan, where he was secretly detained in Afghanistan for the next four months. During his detention, he was subjected to torture and repeated interrogation about his alleged links with *Al-Qaeda*. After eventually realizing they had mistakenly detained the wrong man, the CIA flew Mr. El-Masri back to Europe, and abandoned him near the Albanian border. While in the hands of Macedonian and US agents, Mr. El-Masri was given no access to any due process, nor was he allowed any contact with the outside world despite his repeated requests to contact his family, a lawyer, or representatives from the German Government. Following his ordeal, Mr. El-Masri initiated proceedings seeking damages for his experiences in courts in the United States and in Macedonia. In the United States, the federal district court dismissed his case because the State secret imposed by the Government barred the suit from continuing. This decision was upheld by the US Supreme Court , which denied his plea for certiorari. In Macedonia, the claim of Mr. El-Marsi was similarly discontinued. The Grand Chamber found violations of Article 3 of the ECtHR (prohibition of torture) both because of the torture suffered by the applicant and for the absence of any effective investigation into his claims. The Court interpreted the applicant's right to truth under the procedural branch of Article 3 of the ECtHR as implicitly flowing from the State's obligation to undertake appropriate investigation in crimes of torture. The seventeen judges also found violations of the applicant's right to liberty and security because of his detention both in Macedonia and Afghanistan, as well as violations of his right to private life and to an effective remedy.[250]

The ruling may be regarded as a milestone decision since through it the ECtHR expressed its opinion for the first time about the impact of inadequate investigation on the right to the truth. The Court observed that State secrets privileges had often been invoked to obstruct the search for the truth by the Macedonian government and other European

[249]As is the case with enforced disappearances, "extraordinary rendition appears to be a practice in which perpetrators attempt to avoid legal and moral constraints by denying their involvement in the abuses."Weissbrodt & Bergquist, *supra* note 215; Kyriakou, *supra* note 114.

[250] These included breaches in respect of the period when the applicant was in the hands of the CIA, since "it should have been clear to the Macedonian authorities that, having been handed over into the custody of the US authorities, the applicant faced a real risk of a flagrant violation of his rights." Case of *El-Masri v. the former Yugoslav Republic of Macedonia*, E.Ct.H.R. (Grand Chamber), 39630/09, (13 December 2012), para. 239.

governments.[251] Furthermore, it stressed the importance of the right to truth not only for the applicant and his family, but also for the "general public", i.e. society at large. In its words, the right to obtain information about serious human rights violations "may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[252] The Court stressed the significance of the State's obligation to investigate human rights abuses in order for it to be accountable in practice as well as in theory.[253] Moreover, it made specific reference to the Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations, maintaining that the fight against impunity is "a matter of justice for the victims, as well as a deterrent with respect to future human rights violations and in order to uphold the rule of law and public trust in the justice system."[254] In summary, one can therefore observe that the Court has embraced an advanced understanding of the right to truth, which encompass both its individual and societal dimensions.[255] This innovative interpretation mirrors the Inter-American approach, according to which the right to truth is endowed with an individual and collective dimension.[256]

Notwithstanding this significant development, it should be noted that the European Court was greatly divided on the question of the right to truth, as reflected in the judgment's separate opinions. The concurring opinion of Judges Tulkens, Spielmann, Sicilianos and Keller found that the right to truth should not only be included and stressed through effective investigation within the procedural limb of the prohibition of torture, but should also be included as a separate element of the right to an effective remedy. Such an approach would cast renewed light on the right to truth as having both an individual and a collective dimension.[257] On the other hand, Judges Casadevall and Lopez Guerra rejected the concept of a collective right to truth, since it is the victims, and not the general public, who are entitled to

[251] See, *e.g.*, the Abu Omar case, in "Adler & 12 others, First arrest warrant for the kidnapping of Mr. Abu Omar" , n. 10838/05 R.G.N.R. and n. 1966/05 R.G.GIP, official English translation, Milan Tribunal, Judge Presiding over Preliminary Investigations, 11 March 2004, at http://www.statewatch.org/cia/documents/milan-tribunal-19-us-citizens-sought.pdf (last accessed on 21/july/2014).
[252] Case of *El-Masri v. the former Yugoslav Republic of Macedonia*, E.Ct.H.R. (Grand Chamber), 39630/09, (13 December 2012), para. 191.
[253] *Ibid.*
[254] *Id.* para. 105.
[255] Fabbrini, *supra* note 213, at 101.
[256] Case of Bamaca Velasquez v. Guatemala, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70, separate opinion of Judge A.Cançado Trinidade, para.30.
[257] Case of *El-Masri v. the former Yugoslav Republic of Macedonia*, Joint concurrent Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller , para. 6.

know the truth about the crime. Any separate analysis of the right to truth, they maintained, was therefore redundant.[258]

In spite of these difference, however, the decision of the ECtHR in *El-Masri* should still be considered an important development that broke new ground to expand the scope of accountability for future cases regarding disappearances and other abuses.

It may be worth remarking that the complexity of the profound relationship between society and individuals is greatly relevant to the right to truth and thus is worth understanding better understanding for the present work. It is important to discern why knowing the truth about what happened to the disappeared person may be so important for people and society in general. First, at the individual level, being informed of the truth enables families to properly mourn their loss and allows for at least some sense of justice for the material victim.[259] Second, at the collective level, the right to truth serves a preventive function, where the memory of past abuses can preempt their re-occurrence in the future. Moreover, it can also have a compensatory purpose, since the social response to state abuses recognizes the dignity of its victims and helps their families to free themselves from their sufferings and leave the past behind.[260]

To "leave the past behind" does not mean to project oneself into the future or bury the past without any real understanding or acceptance of the past, however. Indeed, this could be counter-productive and detrimental. In this regard, Della Morte aptly observed that the problem concerning the dialectical relationship between that which has to be a fixed memory and that which must be forgotten arises from a tension between the need for stability on the one hand and the need for change on the other.[261] This tension represents the perpetual "drama of the law"[262], which requires both stability but also change and an ability to adapt itself to the passage of time.

Paul Ricoeur once remarked in his important work on forgiveness[263] that the effort to move on and rid oneself of the past requires a combination of memory and oblivion in order to be effective, in other words, to somehow balance *aletheia* and *amnestia*. In this sense, the right to know the truth can be a bridge between the moral duty to remember and one's need to

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[258] Case of *El-Masri v. the former Yugoslav Republic of Macedonia*, Joint concurrent Opinion of Judges Casadevall and Lopez Guerra.

[259] C.M. Beristain, in an expert report observed that understanding what has happened and a public acknowledgment of truth are essential in the process of emotional recovery of next of kin. Case of the 19 *Merchants v. Colombia*, Judgment of July 5, 2004, Inter-Am.Ct.H.R, (Ser. C) para. 72 (g).

[260] *Idibem.*

[261] Della Morte, *supra* note 164, at 429.

[262] *Ibidem.*

[263] Paul Ricoeur, *Ricordare, dimenticare, perdonare: l'enigma del passato* (Il Mulino, 2004).

forget. From this perspective, the *aletheia* and *amestia* dichotomy mentioned earlier is misleading, since there cannot be any acceptable forgetting without truth, as un-concealment and understanding. In this sense, truth is a fundamental feature of forgiveness.

Further insight to abovementioned apparent dichotomy is offered by Martin Heidegger's etymological analysis of *aletheia*, which he defined as "disclosure" and "un-concealment".[264] In contrast to traditional, absolute and universal conceptions of "truth" as corresponding somehow to an external reality,[265] Heidegger understood truth to be a human activity that aims to unveil that which has been hidden. With such an approach, there can be no absolute or exclusively objective truth, since truth is perceived as relative.[266] However, it does offer a possibility not permitted by objective understandings of "truth", namely that knowledge of truth lies within the realm of human capacity, and can therefore take on the characteristic of a responsibility since it requires human beings to realize it. This notion that truth is relative to the observer, has become relevant in the development of the right to truth in international human rights law and jurisprudence. The selection of the information as "truth" that has to be examined in terms of the needs of the right-holder.[267]

In conclusion, it appears that the different dimensions and purposes of the right to truth are rooted in the need to (re)build people's trust in one another and also in public authority in order to move on and leave past abuse behind. Various juridical responses to this social need will be further addressed in the later chapter devoted to the analysis of remedies.

4. Human Dignity as Hermeneutical Key

As discussed before, deconstructing a disappearance into several autonomous violations is not an approach that fits the complex nature of enforced disappearances. As such, the IACtHR has acknowledged this complexity and has endorsed a multiple rights approach

[264] Corazzon, *supra* note 161; Martin Heidegger, *Essere e tempo* (Utet Libri, 2013).

[265] Aristotle's eminent definition of truth is: "[t]o say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true." Aristotle, *Metaphysics* (Digireads.com Publishing, 2004). In the same vein, Thomas Aquinas describes truth as "adaequatio rei et intellectus". The author accepts that judgment must to be involved in determining the truth, but a judgment is said to be true only if it conforms to the external reality. See, Tommaso d' Aquino & Nicola Petruzzellis, *Somma teologica* (Edizioni Studio Domenicano, 1996); Yasmin Naqvi, "The right to the truth in international law: fact or fiction?", (00:00:00.0), online: *Int Rev Red Cross* <http://www.icrc.org/eng/resources/documents/article/review/review-862-p245.htm>.

[266] Corazzon, *supra* note 157.

[267] This holds particularly true when one thinks about some of the most important implementation mechanisms of the right to truth, namely truth and reconciliation commissions, which mandate is to contribute to social reconciliation. Naqvi, *supra* note 161, at 251-252.

along with the recognizing an autonomous right not to be subject to enforced disappearance.[268] In contrast to the IACtHR, the ECtHR, notable for its lack of any explicit normative reference to enforced disappearances, has instead approached enforced disappearances in a fragmented fashion. These two approaches are not only indicative the complex character of this violation, but also of some disorder the manner of its adjudication. In order to unify it under a singular concept reflecting the cumulative consequences of enforced disappearances, it is useful to look at human dignity as an underlying feature of every human right.

References to dignity are copious in the human rights constellation. Indeed, so rich is the literature that dignity sometimes seems to represent the very philosophical premise underlying human rights to begin with.[269] The liberal or 'traditional' idea of human dignity[270] that supports this originally arose from the Kantian moral principle of non-instrumentalisation, whereby individuals ought to be treated as ends rather than as mere means.[271] From this perspective, dignity can be understood as the equality of every individual before the law. As a consequence, every legal authority should guarantee to its subjects individual autonomy and freedom from instrumentalization. With this philosophical definition in mind, one can easily argue that human dignity is therefore infringed at every moment of an enforced disappearance. State or state-supported entities arbitrarily deprive someone of his or her liberty, and torture and often kill him or her as a deliberate instrumental policy to instil fear and pain in the families and friends of victims, and to spread terror throughout society in order to maintain power. So instrumental are victims to this purpose that, as previously shown, in many cases disappeared people often are deprived of the very last mark of their humanity when they disappear, namely their identities and fates, which are purposefully denied by the state thereafter. An act of enforced disappearance destroys the moral existence of its victims, while their legal personality of victims is often denied.

Notwithstanding its central philosophical importance to human rights, the notion of human dignity has received scarce attention in jurisprudential and doctrinal writing on enforced disappearances. Surprisingly, the ICPED lacks any general statement about human dignity, a concept that should be the underlying Leitmotiv of the entire convention. Instead, it mentions the concept of human dignity twice in passing, first in Article 19 where it affirms that any personal information used in the context of search for a disappeared person shall be

[268] Claude, *supra* note 101, at 461.

[269] Kyriakou, *supra* note 114.

[270] Frédéric Mégret, Florian Hoffmann & others, "Dignity: A special focus on vulnerable groups" (2009) Res Pap Swiss Initiat Commem 60th Anniv Univers Declar Hum Rights.

[271] *Id.*

used in the respect of human rights and human dignity; and later in Article 24.5 regarding different forms of reparation granted to victims with the pronouncement that victims have the right to obtain "satisfaction, including restoration of dignity and reputation."

In this context it may be worth recalling that the Human Rights Committee has addressed this issue in various cases of disappearances[272] by finding violations of Article 10 of the ICCPR, which enshrines the "the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person." In contrast to these HRC rulings, the consideration of human dignity in the jurisprudence of the IACtHR and ECtHR on enforced disappearances is relatively marginal. Since its first enforced disappearance case, the IACtHR has repeatedly affirmed that the practice represented "a crass abandonment of the values which emanate from the concept of human dignity."[273] However, it has used the notion of human dignity only in a declaratory fashion.[274] Across the ocean, the ECtHR similarly has never discussed the concept of human dignity in any of the cases of disappearances that have come before it.

Christopher McCrudden has aptly observed that the meaning of dignity is context-specific, and may vary significantly over time and from jurisdiction to jurisdiction.[275] It therefore may be inherent to the concept of human dignity that there be little common understanding of what it substantively requires, and therefore leaving it with no solid and universally accepted basis for judicial decision-making.[276]

However, in spite of this, the concept of human dignity nevertheless plays an important role in human rights adjudication, not so much in terms of a universally agreed content to human rights, but rather in contributing to particular hermeneutic methods of

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[272] Case of *El Hassy v. Libyan Arab Jamahirya*, Comm. 1422/2005, U.N. Doc. A/63/40, Vol. II, at 155 (2007), 6.6.
Case of *Messaouda Grioua and Mohamed Grioua v. Algeria*, U.N. Doc. A/62/40, Vol. II (2007), Comm. No. 1327/2004, (2007), 7.2.

[273] Case of *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4, para. 158; Case of *Fairén-Garbi and Solís-Corrales v. Honduras*, Judgment of March 15, Inter-Am.Ct.H.R. (Ser. C) No.6, para 151; Case of *Godínez-Cruz v. Honduras,* Judgment, January 20, 1989, Inter-Am.Ct.H.R. (Ser. C) No. 5, para.166.

[274] Kyriakou, *supra* note 114.

[275] "[a]s might be expected from the variety of differing approaches that are apparent in the historical development of the idea of dignity, there are some significant differences in the use of dignity in human rights texts. A more pluralistic, more culturally relative approach to the meaning of human dignity can be identified by looking briefly at some of the differences in the use of dignity language between the regional texts, and between the regional texts and the international texts. [...]What emerges from these differences is that some jurisdictions use dignity as the basis for (or another way of expressing) a comprehensive moral viewpoint, 'a whole moral world view' , which seems distinctly different from region to region. What also emerges from an analysis of these texts is significant differences in the ways in which human dignity has been incorporated into positive law. […] 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." Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19:4 Eur J Int Law, at 675-676.

[276] *Ibid*.

understanding what they are.[277] With regard to enforced disappearances in particular, despite the marginal role that dignity has played in the legal discourse about this phenomenon, it is evident that this all-encompassing concept permeates every aspect of this phenomenon, from the right to liberty and security to the right to know the truth about past abuses. Indeed, one could even argue that dignity may be the single basic, unifying concept of all the different moods in which a disappearance can be conjugated. At the individual level, human dignity represents a starting point for redress and the empowerment of victims, while at the collective level, the recognition of human dignity is the *sine qua non* for the very existence the rule of law, which is infringed by forced disappearances.

When taken together, the overarching notion of human dignity then becomes a solid basis upon which an autonomous, unique and holistic interpretation of enforced disappearance and its damages can be constructed.

[277] *Ibid.*

Chapter III
Comparing Remedies for Enforced Disappearances

Introduction

Ubi jus, ibi remedium - where there is a right, there is a remedy. From this maxim descends the fundamental principle that in every complete or rightful legal system whenever a right is breached, there must be access to a remedy.

This maxim recalls to mind that the appeal for human rights is intrinsically tied to the effective vindication of these rights through an adequate remedy in cases of violation. The set of questions that I will address in this final chapter represent the core of this thesis and relate to the effectiveness and appropriateness of the remedies offered by Inter-American and European systems in order to tackle the consequences of enforced disappearances at both individual and collective levels.

I take as a point of departure the general international framework on remedies of which I will provide an overview. I will then consider the remedial scope of the two relevant regimes with regard to enforced disappearances, underlying their differences and their dialectic development. I will argue that while compensation is an essential component of redress, it should not be the only remedial measure awarded to victims of gross human rights violations, such as enforced disappearances. In the previous part of this work I have shown the manifold consequences of this phenomenon, which have a dramatic impact on individuals' psycho-social well-being as well as on the lives of entire communities. Compensation, taken alone, cannot heal such suffering, and in some cases may even have detrimental effects.

There is no panacea for an existence that is denied. International law has, however, developed important tools capable of supporting victims along the arduous path of rebuilding their lives and their trust in each other and in the public authority. I will critically analyze if and how the two Courts under consideration deal with alternative forms of reparation.

Finally, as illustrated in the previous chapter, drawing a connection between the individual and social impact of gross human rights violations, such as enforced disappearances, is unavoidable. In contrast to individual forms of redress, collective reparation has received little scholarly attention. For this reason I have chosen to try to shed light on the relevance of moral reparations, which concern both victims and the collectives to

which they belong. Even though society as a whole is generally not considered an injured party in most decisions, compensatory consideration should be given to the societies or communities to which victims belong. I propose that society as a whole should be considered a beneficiary of reparatory measures ordered by Courts. In what follows, I will demonstrate the various beneficial outcomes of a holistic approach to remedies in cases of enforced disappearances, making specific reference to the remarkable example of Inter-American case-law.

1. Defining Reparations in International Law Framework

The affirmation and protection of human rights would be ineffective without access to justice in order to vindicate their violation. Indeed, the right to a remedy is characterized by a dualistic nature; on the one hand, it implies the procedural right of access to justice and, on the other hand, it requires also the substantive right to receive redress for injuries suffered as a consequence of the breach of a right.[278] This is epitomized in Article 8 of the UDHR which reads as follows: "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."

In general, remedial measures are conceived as a repair for past damages, and are oriented at avoiding similar violations in the future. The general principle of *restitutio in integrum* hallmarks reparations. This essential principle requires the wiping out of all consequences of a wrongful act and restoring the *status quo ante* the occurrence of the violation.[279] With special regard to the human rights context, at the heart of this principle there is an inherent paradox; it is intended to restore, whenever possible, the situation as it existed prior to a violation, as if it had not occurred. Thus, restitution represents both an ideal and an unattainable goal, which in practice is impossible to realize, especially in enforced disappearance cases.[280] In this sense, reparations seek to repair the irreparable.[281] It is hard to

[278] Dinah Shelton, *The United Nations Principles and Guidelines on Reparations: Context and Content*, in Koen Feyter, *Out of the ashes: reparation for victims of gross and systematic human rights violations* (Intersentia nv, 2005), at 11-15.

[279] "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." Case of *Chorzów Factory (Claim for Indemnity*), Permanent Court of International Justice, 1928, Series A No. 17. p. 47.

[280] Naomi Roht-Arriaza, "Reparations Decisions and Dilemmas" (2003) 27 Hastings Int Comp Law Rev 157.

[281] Brandon Hamber, "Repairing the irreparable: dealing with the double-binds of making reparations for crimes of the past" (2000) 5:3-4 Ethn Health 215; Julia Mikaelsson & Anna Wergens, *Repairing the Irreparable: State*

imagine what form the compensation for victims of grave human rights violations, such as enforced disappearances, would take and how it would completely alleviate their sufferings.[282] It is even more difficult, however, to ignore the need for such support – *ubi jus, ibi remedium*.

Remedies in international human rights law constitute a relevant part of the work of international bodies and academic fora. With respect to the normative domain of international human rights, the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*[283] 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* (henceforth the *Basic Principles and Guidelines*) provide a thorough overview of the structure of remedies.[284] Though not binding, the *Basic Principles and Guidelines* offer important insight into the right to reparation.

According to these principles, reparation shall be proportional to the gravity of the violation and the resulting damages. Restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition are distinct but interlinked measures of reparation intended to provide redress to victims of human rights violations.[285] This categorization of remedies appears in a legally binding instrument, namely in Article 24 of the CPED, which was most likely inspired by the *Basic Principles and Guidelines*.[286] Accordingly, the CPED is among the core international human rights instruments, and the only one to include a thorough taxonomy of measures of reparations.[287]

The purpose of Article 24 is twofold. It ensures its victims the right to obtain moral reparation as well as prompt, fair and adequate compensation.[288] This implies respectively a right to non-pecuniary and pecuniary redress. Compensation, *i.e.* any economically assessable

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Compensation to Crime Victims in the European Union (Crime Victim Compensation and Support Authority (Brottsoffermyndigheten), 2001).

[282] Even where victims are released, as shown in the previous chapter, the consequences of the violation they have suffered are so profound and all-consuming that it seems impossible to restore them to their previous existence, as if the abduction and subsequent torture never occurred. Some of them will struggle all their lives with the psychological trauma linked to their experiences.

[283] General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34, 1985.

[284] 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*, A/RES/60/147, 2006.

[285] Roht-Arriaza, *supra* note 3.

[286] See, Commission on Human Rights, Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, 60th session, Item 11 (b) of the provisional agenda, UN Doc E/CN.4/2004/59 (23 February 2004), para. 137, which made explicit reference 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.

[287] Nikolas Kyriakou, *An affront to the conscience of humanity: enforced disappearance in international human rights law* European University Institute, 2012) [unpublished], at 165.

[288] Art. 24 (4).

damage, alone cannot provide an appropriate remedial model. As shown in the previous chapter, the complex nature of enforced disappearance entails grave and interlinked repercussions on all aspects of victims' lives and on society as a whole. Monetary compensation for material and moral damages can only partially redress the damages related to disappearances.[289] It has therefore been necessary to re-conceive reparations in light of the multiple consequences of the offence on victims and of the subsequent spillover effect on communities to which they belong. For this reason, 24 (5) provides that:

> 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.

According to Nowak's interpretation, in the context of disappearances, restitution means that the disappeared person, if still alive, must be released. If he or she has been killed, restitution comprises the exhumation and identification of the victim's body and the restitution of the mortal remains to his or her next of kin.[290] Restitution will ensure a decent burial in accordance with the religious practices of the victim and the family. This can also be regarded as a form of moral or social rehabilitation of victims. Indeed, rehabilitation embraces medical, psychological and social care, treatments and legal and social services, which the government responsible must guarantee to victims and their families. Satisfaction may come in the form of a very broad category of reparations that is of particular significance to disappearance cases. It can start with an apology by the responsible authorities or the government concerned and can be followed by the disclosure of all relevant facts at the disposal of the authorities. In this sense, satisfaction is intrinsically linked to the right to know the truth about the victims' fate and whereabouts, but it is also related to the state's obligation to conduct an effective investigation and bring perpetrators to justice.[291] Finally, one of the main examples of guarantees of non-repetition can be found in the state's obligation to criminalize the act of enforced disappearance in domestic law.

Article 24 takes into serious consideration the complex nature of enforced disappearances. This provision shifts from a mere compensatory understanding of redress to a more comprehensive paradigm, where economic compensation represents just one component of a composite scheme of remedies. The choice to also include within this model collective,

[289] Kyriakou, *supra* note 10.
[290] Commission on Human Rights, Report submitted by Mr. Manfred Nowak, *supra* note 9, para 86.
[291] *Id.* para. 88.

moral and symbolic forms of reparation, mirrors the necessity to tailor remedies to the complex nature of enforced disappearance and its consequences.

It should, however, be observed that notwithstanding the significance of the four non-pecuniary measures of reparation included in Article 24, the provision does not include any guidance in relation to their respective application. This opens the door to a vast range of interpretations and concedes an appreciable margin of discretion to the states.

Moreover, a central point of orientation in the *Basic Principles and Guidelines* is the notion of victim. This reflects the drafters' choice to follow a victim-centered approach.[292] The *Basic Principles and Guidelines* define victims as follows:

> …[v]ictims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[293]

The definition included in the *Basic Principles and Guidelines* aptly embraces a broad notion of victimhood. Moreover, it is noteworthy that the above description refers not only to direct and indirect victims, but also to individual and collective harm. Indeed, only natural persons are qualified as victims, but the harm they suffer has to be considered from both an individual and a collective perspective. These two dimensions are inherently intertwined.[294] In enforced disappearances cases, reparation is of paramount significance, not only as a matter of redress for individual victims, but also as a *sine qua non* for establishing truth, justice, and reconciliation in societies affected by such practices.[295] Under Article 24 of the CPED, the

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[292] Theo van Boven, "The United Nations 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" (2010) U N Audiov Libr Int Law N Y U N, online: <http://site1.projectlocatie.nl/user/file/van_boven_introductory_note_to_bnasic_principles_and_guidelines.pdf>; Theo Van Boven, "Victims' Rights To A Remedy And Reparation: The New United Nations Principles And Guidelines" in Cf Ferstman, Mg Goetz & A Stephens, eds, *Repar Vict Genocide War Crimes Crimes Humanity* (Martinus Nijhoff Publishers, 2009) 17.

[293] 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*, /RES/60/147, 2006.

[294] It may be worth remembering that in the context of international criminal law, notably in the Rules of Procedure and Evidence for the application of the Rome Statute of the International Criminal Court, the definition of the term victim includes natural persons, as well as legal persons such as "organizations or institutions that have sustained direct harm... ." Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002 (ICC-ASP/1/3 and Corr.1), rule n. 85 (b). Van Boven, *supra* note 15.

[295] Commission on Human Rights, 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

concept of a victim of an enforced disappearance encompasses the disappeared person as well as his or her relatives. Therefore, reparation should be designed in a way that could be applied to both types of victims. The inclusive approach embraced by the *Basic Principles and Guidelines* is, however, not completely transposed in the CPED, since it lacks an explicit stance on the collective harm caused by enforced disappearances.

The remaining part of this work will address the issues related to compensation and other forms of reparation offered by the IACtHR and the ECtHR. Throughout the course of this analysis I will bring to the fore the question of if and how these regional bodies deal with the collective spillover effect of enforced disappearances.

2. Two Jurisprudential Approaches to Remedies

In the absence of a comprehensive legally binding system of remedies, the jurisprudence of various international bodies, chiefly the European Court of Human Rights and the Inter-American Court of Human Rights, have played a significant role in guaranteeing the protection and implementation of the fundamental right to a remedy.

In the course of their evolution, the two systems under consideration have taken different paths leading to different forms of protection and diverse enforcement mechanisms.[296] Hence, it may be worth beginning this comparative analysis with a reference to the respective provisions included in the governing instruments. Article 41 of the European Convention on Human Rights provides that:

> 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.

A double condition hallmarks this narrow and somewhat cryptic formulation. First, remedies at a domestic level should not be available, or should be imperfect; second, the Court should consider it *necessary* to afford a remedy. It should be noted that the formula "if necessary" and the adjective "just" provide the textual basis for broad discretion in the exercise of the Court's remedial power. Furthermore, under Article 46, the judgments of the Court are binding on the respondent states and their execution is supervised by the Committee of Ministers of the Council of Europe (CoM). The principle of solidarity that underlies these

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enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46E/CN.4/2002/71, (2002), para 84.

[296] Kyriakou, *supra* note 10 at 142.

provisions has been interpreted in a restrictive way by the European Court. Accordingly, the Judges of Strasbourg traditionally recognize the "declaratory" character of their judgments, which represent *per se* a form of satisfaction and leave to the respondent state the choice of the necessary means to comply with its conventional obligations.[297] However, in particular cases, such as those concerning enforced disappearances, the Court goes beyond this limitation requesting states to provide redress to the victims. In these cases, the Court has, however, limited itself to granting "just satisfaction" for pecuniary and moral damages in the form of mere monetary compensation.[298]

On the other side of the Atlantic, the Inter-American Court of Human Rights has at its disposal a more complex rule, with far-reaching potential. In fact Article 63 of the American Convention reads as follows:

> 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 norm develops a response to human rights violations on three different levels. First and foremost, it is essential to restore the right that has been violated; second, the consequences of the violation have to be remedied; and third, it establishes economic compensation as a specific remedial measure. Thanks to this multilayered rule, the IACtHR has been able to develop an robust system of remedies.[299] Despite an initial cautious stance, where the Court limited itself to ordering compensation for material and moral damages, gradually Inter-American jurisprudence embraced a multilevel approach. Nowadays the remedial system of the IACtHR encompasses all categories of reparations included in the *UN Basic Principles and Guidelines, i.e.* restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In this sense, it can be regarded as a prominent manifestation of the *UN Basic Principles and Guidelines.*[300]

In the following sections I have chosen to consider the issues related to the remedial powers of the examined regional Courts following a qualitative discriminant. I will discern different remedial measures depending on their nature and on the individual or collective identity of the subjects to which such measures are directed. On the strength of this analysis, it

[297] Case of *Marckx v. Belgium*, E.Ct.H.R. (Court), 6833/74 (13 June 1979), para. 58; Kyriakou, *supra* note 10.
[298] Feyter, *supra* note 1 at 375 ; 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 Sejdovic Cases" (2007) 7:2 Hum Rights Law Rev 396.
[299] Kyriakou, *supra* note 10.
[300] *Id.*

will be possible to evaluate the effectiveness of the responses that the Inter-American and European systems offer to the demands of justice from victims of enforced disappearances. Bearing in mind the experiences of victims that have been highlighted in the previous section of this work, I intend to shed light on the advantages of a comprehensive approach to remedies, such as the one adopted by the IACtHR, in order to respond to the victims' needs. The impact of this approach may also have the additional advantage of ensuring the effectiveness of each regional system geared towards the protection of human rights.

2.1. Compensatory Measures

In light of Article 41 of the European Convention on Human Rights, the ECtHR clarified on many occasions that when *restitutio in integrum* was possible, it was for the states to carry it out. In the same vein, where *restitutio in integrum* cannot be attained, the Court leaves to the state the option to choose the necessary measures to comply with the judgment, provided that they are compatible with the Court's conclusions. The vexing problem of this model is the considerable room for manoeuvring left to the states in providing redress to the victims.[301] The Court's limited remedial power yields itself to a situation where the Judges of Strasbourg consider their judgments as satisfactory and may thus grant economic compensation. By contrast, the IACtHR, in the strength of the broad basis offered by Article 63 of the American Convention, has developed a more creative remedial jurisprudence. The Court of San José does not limit itself to awarding compensation, but couples it with a wide spectrum of remedial measures directed to offer "ethical redress" to victims.

I will proceed with the analysis of both Courts' remedial jurisprudence based on the differentiation between pecuniary and non-pecuniary damages.

With respect to pecuniary damages, the ECtHR have repeatedly specified that there must be a "clear causal connection" between the damage claimed and the violation, and this may include compensation in respect of loss of earnings and earning potential.[302] It is worth remembering that mere monetary compensation is not an automatic right afforded to victims descending from judgments recognizing a certain damage. Rather, pursuant to the principle of

[301] Ruth Rubio-Marin, *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge University Press, 2009).
[302] See, *inter alia*, Case of *Çakıcı v. Turkey*, E.Ct.H.R. (Grand Chamber), 23657/94, (8 July 1999), para. 129; case of *Baysayeva v. Russia*, E.Ct.H.R. (First Section), 74237/01 (5 April 2007), para. 175.

non ultra petita, it is for the parties to advance a claim for financial compensation, otherwise the Court does not proceed *ex officio*.[303]

Across the Atlantic, the IACtHR applied a slightly different (and more detailed) method in order to calculate the material damages in enforced disappearance cases. Pecuniary damage is divided into different categories, in relation to the material victim and to his or her next of kin. The starting point for the determination of the *lucrum cessans* (or loss of income and possibilities) is based on the actual wages of the victim (or the minimum wage in his or her country), which are then multiplied by the number of years between the victim's age at the time of his or her disappearance and the rate of life expectancy in his or her country. From this number, 25 percent is deducted for personal expenses, and the current interest rate is applied.[304] In this case, the IACtHR, as with its European counterpart, requires a direct causal nexus between the violation and its consequences. A second category may be observed when the Court determines the *damnum emergens* (indirect or consequential damage), which is aimed at redressing the expenses of the investigation on the disappearance, the court costs, and medical treatments.[305] The *damnum emergens* can include a subcategory, which, although not often awarded, is directed to redress the general patrimonial damage suffered by a family as a consequence of the disappearance of one of its members. In this case, it is impossible to establish a clear causal nexus between the disappearance and the consequences that have followed from it, but the damage is nonetheless related to the violation.[306] Thus, the IACHR, in order to provide redress to victims, resorts to principles of equity. This far-reaching understanding of patrimonial damage represents one of the main points of differentiation between Inter-American and European remedial jurisprudence.

Equity emerges in European jurisprudence with respect to the determination of "just satisfaction" for non-pecuniary or moral damages. In the majority of cases the Court seems not to follow explicit standards in its reasoning.[307] For this reason it is difficult to pinpoint the principles followed by the ECHR with regard to their quantification.[308] The ECHR has observed that "its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all circumstances of the case,

[303] Rule 60 of the Rules of Court; Case of *Aliyeva v. Russia*, E.Ct.H.R. (First Section), 1901/05, (18 February 2010), para 115; case of *Elmurzayev and Others v. Russia*, 3019/04, para.156, 12 June 2008. See, Michele De Salvia & Mario Remus, *Ricorrere a Strasburgo. Presupposti e procedura* (Giuffrè Editore, 2011), at 86-87.
[304] Case of *Castillo Páez v. Peru*, Judgment of, 27 November, 1998, Inter-Am.Ct.H.R. (Ser. C) No. 43, at para.75.
[305] Juan E Mendez & José Miguel Vivanco, "Disappearances and the Inter-American Court: reflections on a litigation experience" (1990) 13 Hamline Rev 507.
[306] *Id*., at para. 76.
[307] Kyriakou, *supra* note 10.
[308] Heidy Rombouts, Pietro Sardaro and Stef Vandeginste, The right to reparation for victims of gross and systematic violations of human rights, in, Feyter, *supra* note 1.

including not only the position of the applicant, but the overall context in which the breach occurred."[309] This statement is, however, not corroborated by case law within the European Courts, but rather characterized by a fixed monetary award for each disappeared person. A fixed sum of 35,000 euros was generally awarded from 2006 to 2009.[310] Starting from 2010, the amount rose to 60,000 euros per person. [311] This "fixed amount formula" adopted by the European Court risks the infringement of the general principle of "treat[ing] like cases alike", where different cases are treated equally. Moreover, the obscure and variable criteria used in the determination of moral damages may exacerbate feelings of injustice and distrust, which again victimizes persons that have already experienced immensely unspeakable psychological and physical suffering. By contrast, the Inter-American Court has not confined itself to the award of a fixed amount of money, but it considers the specificities of each particular case, deciding then "by the reasonable exercise of judicial discretion and in terms of fairness."[312] Furthermore, the IACHR has established the presumption according to which both the material victim and his or her next of kin suffered a moral damage, and it does not have to be proved. The material victim is typically awarded greater compensation than the next of kin.[313] The case of *Gelman v. Uruguay* offers an illustration of this shrewd approach. The case concerns a pregnant woman who disappeared in Argentina and was transported to Uruguay in the context of "Operation Cóndor". In Uruguay she gave birth to her daughter, who was then given to an Uruguayan family and her identity was suppressed. The Inter-American Court awarded $100,000 USD to the disappeared woman and $80,000 USD to her daughter. In

[309] Case of *Varnava and Others v. Turkey*, E.Ct.H.R. (First Section), 16064/90, 16065/90, etc., (18 September 2009), para. 224.

[310] Some recent exceptions: in the case of *Baysayeva v. Russia* the applicant received an award of 50,000 euros; the case of *Dzhabrailovy v. Russia*, a surviving victim was awarded 41,200 euros and his relatives 40,000 euros and 10,000 euros respectively; finally, in the case of *Varnava and Others v. Turkey*, the Court awarded 12,000 euros for non-pecuniary damages per person.

[311] Christos Rozakis, the former vice-President of the ECtHR, in an interview with N. Kyriakou, declared that this rise was due to the growing awareness about the gravity of enforced disappearances and the consequent need for the optimization of the Court's awarding of remedies. Kyriakou, *supra* note 10. See, *inter alia*, Case of *Medova v. Russia*, E.Ct.H.R. (First Section), 25385/04, (15 Januray 2009), case of *Varnava and Others v. Turkey*, E.Ct.H.R. (First Section), 16064/90, 16065/90, etc., (18 September 2009).case of *Iriskhanova and Iriskhanov v. Russia*, E.Ct.H.R. (First Section), 35869/05, (18 February 2010); case of *Aliyeva v. Russia*, E.Ct.H.R. (First Section), 1901/05, (18 February 2010); case *of Aslakhanova and Others v. Russia*, E.Ct.H.R. (First Section), 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, (18 December 2012); Case of *Pitsayeva and others v. Russia*, E.Ct.H.R. (First Section), 53036/08, and others, (9 January 2014).

[312] Case of the *Serrano-Cruz Sisters v. El Salvado*, Judgment of March 1, 2005, Inter-Am.Ct.H.R. (Ser C) No.131, para 156.

[313] *E.g.*, in the case of the *Serrano-Cruz Sisters v. El Salvado*,where the IACHR afforded to the material victim $80,000 USD and $30,000 USD to her next of kin; In the case of *Heliodoro Portugal v. Panama*, the Court awarded $66,000 USD to the material victim and $40,000 USD to his next of kin.. *Supra* note 36; case of Heliodoro Portugal v. Panama, Judgment of August 12, 2008, Inter-Am.Ct.H.R. (Ser. C) No.186; Case of *Gelman v. Uruguay*, Inter-Am.Ct. H.R., Judgment of February 24, 2011, (Ser C) No. 282.

general, it is possible to observe that the IACHR grants a more generous amount of monetary compensation than its European counterpart.

2.2. Reparatory Measures

In enforced disappearance cases, mere pecuniary compensation is not enough, and might even have detrimental effects on victims. In fact, the states might shield themselves behind a compensatory strategy, in order to conceal their past abuses, leaving victims to deal with the reality of impunity and unresolved grief.[314] Such a consideration seems to have been duly taken into account by the IACtHR. Since its very first cases,[315] the IACtHR has started to instruct states on their legal duties regarding their jurisdictions as a whole, irrespective of the number of victims involved in each case. As a result of its liberal standing and wide remedial competence, the Court has ordered individual and collective remedies of a varying nature, directed to redress harm on individual, communal, and structural levels.[316] The Judges of San José, in addition to the award of financial compensation, have devised a broad array of additional remedial measures. Indeed, the salient point of distinction within Inter-American jurisprudence, in relation to moral damages, is the wide set of reparative measures of a non-pecuniary nature that the Court has gradually developed. Initially the Court did not specify a precise taxonomy of remedial measures, ordering compensation for both pecuniary and moral damages, complemented by "other forms of reparations." More recently, in order to allow for an easier understanding of its orders, the IACtHR has started to clarify the legal measure of each measure.[317] These measures can be divided into three categories, namely those directed at individual victims, at communities and at society at large.[318]

The first category includes orders to release the victims, which implies the cessation of ongoing violations and represents a form of restoration. States also receive orders to comply with the obligation to investigate the facts, prosecute those responsible and conduct a genuine search for the victims,[319] coupled with the recognition of the right to truth as a remedy *per*

[314] Brandon Hamber, "Narrowing the micro and macro: a psychological perspective on reparations in societies in transition" (2006) Handb Repar 560 at 578.
[315] Case of *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4; Case of *Godínez-Cruz v. Honduras*, Judgment, January 20, 1989, Inter-Am.Ct.H.R. (Ser. C) No. 5.
[316] Thomas M Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, SSRN Scholarly Paper ID 1329848 (Rochester, NY: Social Science Research Network, 2008).
[317] Case of *Anzualdo Castro v. Peru*, *supra* note 37; Case of *Chitay Nech et al. vs Guatemala*, *supra* note 43.
[318] Antkowiak, *supra* note 39.
[319] Case of the *Serrano-Cruz Sisters v. El Salvado*, Judgment of March 1, 2005, Inter-Am.Ct.H.R. (Ser C) No.131, paras.166-175.

se.[320] Where the victims died, the Court orders the search, exhumation and proper burial of victims' mortal remains, according to their beliefs and customs.[321] These measures are clearly directed at restoring the victims' dignity and alleviating of the suffering of their families. Other related types of measures of satisfaction include public acknowledgement of the state's responsibility,[322] public apologies,[323] the erection of monuments and memorials, the naming of schools or streets in memory of the victims,[324] the publication of the judgment,[325] and measures of rehabilitation, such as medical and psychological treatments.[326]

The second category, involving the order of specific measures directed at discrete communities or minorities, with particular reference to the collective rights of indigenous groups, represents a significant point of distinction of Inter-American jurisprudence. The Inter-American Court on several occasions has ordered collective remedies in the form of developmental and educational programs.[327] For instance, in the case of *Plan de Sánchez Massacre*, the court ordered the development of programs on health, education, production and infrastructure that would benefit the members of the community. It also required the maintenance of and improvements to the infrastructure of the chapel in which the victims paid homage to those who were executed in the massacre. [328]

The third category, concerning measures directed at society as a whole, includes guarantees of non-repetition such as structural changes in domestic law and the typification of the crime of enforced disappearance in the domestic criminal code,[329] educational programs for state officials focused on human rights, the creation of genetic information systems[330] and

[320] Case of Judgment of *Trujillo-Oroza v. Bolivia*, Judgment of February 27, 2002, Inter-Am.Ct.H.R. (Ser C) No. 98, para. 114.
[321] *Id*. para 176; Case of the 19 *Merchants v. Colombia*, Judgment of July 5, 2004, Inter-Am.Ct.H.R, (Ser. C) No. 109, para.266.
[322] Case of *Anzualdo Castro v. Peru*, supra note 37, para.195-198.
[323] Case of the *Plan de Sánchez Massacre v. Guatemala*, Judgment of November 19, 2004, Inter-Am.Ct.H.R. (Ser C) No. 105, para.100.
[324] Case of *Heliodoro Portugal v. Panama*, Judgment of August 12, 2008, Inter-Am.Ct.H.R. (Ser. C) No.186; Case of *Molina Theissen vs. Guatemala*, Judgment of July 3 2004, Inter-Am.Ct.H.R, (Ser. C) No. 108, para. 88.
[325] Case of *Tiu Tojín v. Guatemala*, Judgment of November 26, 2008, Inter-Am.Ct.H.R. (Ser. C) No.190 para 108; case of *Chitay Nech et al. vs Guatemala*, Judgment of May, 25 2010, Inter-Am.Ct.H.R., (Ser. C) No. 212, para. 245.
[326] Case of *Chitay Nech et al. vs Guatemala, supra* note 43, para. 253-256.
[327] Case of the *Plan de Sánchez Massacre v. Guatemala*, Judgment of November 19, 2004, Inter-Am.Ct.H.R. (Ser C) No. 105; Case of the *Mapiripán Massacre v. Colombia*, Judgment of September 15, 2005, Inter-Am.Ct.H.R. (Ser C) No.134; Case of the *Pueblo Bello Massacre v. Colombia*, Judgment of November 25, 2006, Inter-Am.Ct.H.R. (Ser C) No. 140; Case of the *Las Dos Erres Massacre v. Guatemala*, Judgment of November 24, 2009, Inter-Am.Ct.H.R. (Ser. C) No. 211.
[328] Case of *the Plan de Sánchez Massacre v. Guatemala, supra*, paras 104 and 109.
[329] Case of *Anzualdo Castro v. Peru*, Judgment of September 22, 2009, Inter-Am.Ct.H.R. (Ser. C) No. 202, paras.190-191.
[330] Case of the *Serrano-Cruz Sisters v. El Salvado, supra* note 38, para. 192.

the recognition of a collective right to truth.[331] Moral or symbolic reparations serve to restore people's trust in the institutions and have exemplary or dissuasive purposes, preserving remembrance of the violations occurred, providing a feeling of realization of justice to the families of the victims, and contributing to ensure non-recidivism even through human rights education and training.[332]

Finally, it is important to recall the relevance, at the social level, of the obligation to prosecute and punish responsible persons. In this vein, Elin Skaar recalls that:

> Ideally, punishment creates accountability, restores justice and dignity to the victims of abuse, establishes a clear break with past regimes, demonstrates respect for democratic institutions (particularly the judiciary), reestablishes the rule of law, contributes to reconciliation, and helps ensure that similar atrocities will never happen again. If hideous crimes go unpunished, people in newly democratic countries will be unable to trust the state in general and the legal system in particular.[333]

The IACHR does not always apply every reparatory measure, but instead evaluates the specific circumstances of each case in order to tailor the best redress. The Court has built a solid and creative remedial system, which takes into serious consideration the victims' sufferings and subsequent needs, as well as their cultural identity, which in many cases was a contributing factor behind the violation. For instance, in the case concerning the disappearance of a Mayan indigenous political leader, the IACtHR has taken into special consideration the cultural uprooting that his family has suffered and ordered, inter alia, as a means of satisfaction, the radio transmission of an extract of the judgment in Spanish and Mayan Kaqchikel, the language of the indigenous community to which the victim belonged.[334] Furthermore, with specific regard to the problem of "frozen grief", the IACtHR approach seems particularly effective. In fact, where it includes specific orders to investigate, disclose the truth and return to families the victims' mortal remains to be buried in a dignified manner, it allows victims to resolve their grief and to find closure.[335] The obligation to conduct an effective investigation is linked to the right to truth. The remedial dimension of the right to truth has positive effects not only at the individual level, but also on society at large.

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[331] Case of *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70.

[332] Case of *Myrna Mack Chang v. Guatemala*, Judgment of 25 November, 2003, Inter-Am.Ct.H.R. (Ser C) No. 101, Reasoned opinion of Judge Cançado Trinidade, para.50.

[333] Elin Skaar, *Judicial independence and human rights in Latin America: violations, politics, and prosecution* (Palgrave Macmillan, 2011) at 6.

[334] *Id.*, para. 162.

[335] See, *inter alia*, Case of *Bamaca Velasquez v. Guatemala*, supra, para. 70 and Separate Opinion of Judge A.A. Cançado Trinidade.

In fact, the right to truth is essential to the struggle against impunity and consequent distrust in state authority. The collective right to truth is ineluctably related to the very realization of justice and to the guarantee of non-repetition.[336]

The impact of monetary compensation, without other reparatory measures, on family members of disappeared persons is problematic and generates controversy.[337]

One of the largest comparative investigation of the victims' needs was carried out by a Chilean human rights organization, the *Corporación de Promoción y Defensa de los Derechos del Pueblo* (CODEPU), under the auspices of the Association for the Prevention of Torture.[338] About one hundred individuals and groups of family members of disappeared people in different countries around the world were interviewed. The results of the study underscored the need for victims to be awarded symbolic or moral forms of reparation, whereas the concept pecuniary compensation appears more controversial.[339] On one hand, relatives very often perceive compensation as mere "blood money" aimed at silencing them. This may (re)victimize these persons, exacerbating feelings of mistreatment and injustice. On the other hand, victims perceive material redress as a form of recognition by the state of the harm caused. Nevertheless, they all agreed that compensation was never enough, or at least was not the most important form of redress. Official apologies are of utmost importance for victims, who also ask for specific educational programs for their children, in order to preserve the memory of past abuses.

The Court of San José seems to have acknowledged the demands and the needs for justice for victims. Indeed, the IACtHR extends beyond the pattern of commodification of injury and redress. The harm caused by an act of enforced disappearance has to be understood in non-commodifiable terms – *i.e.*, in a moral dimension.[340] This approach appears to be the most appropriate in disappearance cases. In fact, as has been shown in the previous chapter, the consequences of a disappearance are so deep and manifold that a mere sum of money cannot be regarded as an appropriate form of redress.

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[336] Idem., Separate Opinion of Judge A.A. Cançado Trinidade, paras.27-40.
[337] *Id.*
[338] CODEPU (Chile) and APT (Switzerland) "Comparative study of truth commissions in Argentina, Chile, El Salvador, Guatamala and South Africa from the perspectives of victims, their relatives, human rights organisations and experts" Executive summary by Claudia Gerez Czitrom "Truth Commission an uncertain path"; See also, See also, Priscilla B Hayner, *Unspeakable truths: Confronting state terror and atrocity* (Psychology Press, 2001), citing interview with psychiatrist Judith Herman, who asserted that,
"rather than monetary compensation from the state, victims want some kind of restitution which is different from punishment."
[339] Roht-Arriaza, *supra* note 3 ; Inger Agger & Søren Buus Jensen, *Trauma and Healing Under State Terrorism* (Zed Books, 1996).
[340] Lee Taft, "Apology subverted: The commodification of apology" (2000) Yale Law J 1135.

The creative approach of the IACtHR stands in blunt contrast to the rigid understanding of remedies of its European counterpart. Considering the continuous character of the offence of enforced disappearance, the ECtHR recognition of national authorities' discretionary powers to order specific measures of redress appears illogical.[341] This approach seems also inconsistent with respect to the Court's case law. On the one hand the Court frequently finds that the ongoing sufferings caused by the state's refusal to inform victims' relatives of their whereabouts and to conduct an effective investigation on the case constitutes a violation of the prohibition of torture and ill-treatment.[342] On the other hand, it has made clear in several occasions that the decision about the necessary measures of redress, including effective investigations and access to information about the victim, is up to the respondent state under the supervision of the CoM. Considering the continuous character of the offence of enforced disappearance, the ECtHR recognition of national authorities' discretionary powers to order specific measures of redress appears illogical.[343] This approach seems also inconsistent with respect to the Court's case law.[344]

The award of financial compensation does not change the situation of ongoing suffering experienced by the victims' families. They do not have any guarantee to discover the truth about their loved one and yet they remain exposed to the reality of presumable impunity. All in all, the traditional compensatory approach taken by the ECHR, which clings to the restrictive provision of Articles 41 and 46, appears at odds with the general principle requiring the cessation of continuous violations, which would imply a direct order to release the victim or to undertake an effective investigation about his or her fate and whereabouts. Moreover, an explicit order to the state would imply a remarkable advantage of giving concrete guidance to the supervision of the CoM in the moment of the execution of judgments'.[345] In light of these considerations, the Court began to render a handful of judgments where it cautiously took a different approach.[346] The ECtHR included in the

[341] See, the partly concurring opinion of Judge Costa in the case of *Assanidze v. Georgia*, E.Ct.H.R. (Grand Chamber), 71503/01, (08 April 2004).
[342] See, e.g., Case of *Bazorkina v. Russia*, E.Ct.H.R. (First Section), 69481/01, (27 July 2006), paras. 139-143; case of *Aslakhanova and Others v. Russia,* E.Ct.H.R. (First Section), 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, (18 December 2012), para 215; case of *Pitsayeva and others v. Russia*, E.Ct.H.R. (First Section), 53036/08, (9 January 2014), para. 477.
[343] See, the partly concurring opinion of Judge Costa in the case of *Assanidze v. Georgia*, E.Ct.H.R. (Grand Chamber), 71503/01, (08 April 2004).
[344] See, *inter alia*, case of *Assanidze v. Georgia*, E.Ct.H.R. (Grand Chamber), 71503/01, (08 April 2004); Case of *Ilaşcu and Others v. Moldova and Russia,* E.Ct.H.R. (Grand Chamber), 48787/99 (8 July 2004).
case of Varnava and Others v. Turkey, E.Ct.H.R. (First Section), 16064/90, 16065/90, etc., (18 September 2009).
[345] Kyriakou, *supra* note 10 at 154.
[346] See, Case of *Papamichalopoulos v. Greece*, E.Ct.H.R. (Court) 14556/89 (31October 1995); case of *Assanidze v. Georgia,* E.Ct.H.R. (Grand Chamber), 71503/01, (8 April 2004); case of *Ilaşcu and Others v.*

operative part of its judgment the order of specific measures, the most important of which is the immediate release of the victim, and as such, to put an end to the violation.[347] An important step forward has been taken in the recent case of *Aslakhanova and Others v. Russia,* where the Court dealt with the systemic problem of disappearances in the North Caucasus. The Court provided a number of urgent measures to be taken by the state "with the aim of putting an end to the continued suffering of the relatives of the disappeared persons."[348] Those measures were similar to those found in the Inter-American decisions, and included the creation of "a single, sufficiently high-level body in charge of solving disappearances in the region"; the allocation of resources required to carry out large-scale forensic and scientific work on the ground, including the location and exhumation of burial sites and the collection, storage and identification of remains; the guarantee to the victims' relatives access to the case files; and the combination of payment of compensation with "the clear and unequivocal admission of State responsibility" for the pain and suffering caused to the victims' families.[349]

Despite the initial optimism of some commentators,[350] these judgments remained an exception to the long-standing narrow choice presented to the respondent state to pay a mere sum of money to its victims.[351] In fact, the Court specified that the array of specific and urgent measures included in the judgment was of an exceptional nature, given the systemic failure to investigate disappearances in the North Caucasus. In particular, the reason behind these measures was the Court's concern about the growing legacy of impunity in the North Caucasus, and the obstacles impeding the implementation of the more than 120 cases on the agenda of CoM concerning the region.[352] More recently, however, the ECHR in the case of *Cyprus v. Turkey*, [353] implicitly confirmed a more comprehensive approach to remedies.[354] Even though the remedy claimed and accorded was mere pecuniary compensation, the Grand Chamber emphasized the symbolic connotation of the monetary award, recognizing that

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Moldova and Russia, E.Ct.H.R. (Grand Chamber), 48787/99 (8 July 2004); case of *Aslakhanova and Others v. Russia*, E.Ct.H.R. (First Section), 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, (18 December 2012).

[347] Case of *Assanidze v. Georgia*, supra note 24, para 203; case of Ilaşcu and Others v. Moldova and Russia, supra note 24, para 490.

[348] Case of *Aslakhanova and Others v. Russia*, E.Ct.H.R. (First Section), 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, (18 December 2012), para 221.

[349] *Id.* para 223-227.

[350] Colandrea, *supra* note 21.

[351] Kyriakou, *supra* note 10.

[352] Case of *Pitsayeva and others v. Russia*, E.Ct.H.R. (First Section), 53036/08, and others, (9 January 2014); *Court finds non-investigation of disappearances in Russia's North Caucasus a systemic problem and recommends measures to address continuing human rights violations*, Press Release of the European Court of Human Rights, 457 (2012) 18.12.2012.

[353] Case of *Cyprus v. Turkey*, E.Ct.H.R. (Grand Chamber), 25781/94, (15 May 2014).

[354] Sarah Fulton, "Redress for Enforced Disappearance Why Financial Compensation is not Enough" (2014) J Int Crim Justice mqu044.

compensation serves to acknowledge "the fact that moral damage occurred as a result of a breach of a fundamental human right and reflects in the broadest of terms the severity of the damage".[355]

One would hope that the ECtHR would follow the IACtHR into the field of moral and symbolic reparations. Those measures do not add any significant economic charge on the respondent state, but have a momentous impact on the victims' lives, and on the communities to which victims belong, allowing the Court to reach a larger audience and instill a stronger sense of credibility.[356]

2.3. The Necessity of an Effective Investigation

The conduct of an effective investigation represents the starting point and the core of victims' protection in cases of enforced disappearance. It can be represented both as a state obligation and as an individual right to have access to justice.[357]

The IACtHR and the ECtHR have reiterated several times that the duty to investigate is not an obligation of result, but of means.[358] However both Courts have developed a set of standards in order to determine under which conditions an investigation can be considered to be effective. First and foremost, the investigation must be conducted promptly and *ex officio*;[359] it must be undertaken with due diligence and in a serious and impartial manner, "not as a mere formality preordained to be ineffective;"[360] in the same line, the purpose of the investigation must be "the identification and punishment of those responsible."[361] Both Courts have recognized that the lack of an effective investigation implies serious breaches of several states' conventional obligations, affecting various individual substantial and procedural rights (*e.g.* the right to an effective domestic remedy, the right to liberty and security, the right to human treatment and the right to life.)[362] Besides, it is important to emphasize the crucial

[355] *Id.*, para 56, citing case of *Varnava v. Turkey*, *supra*.
[356] Kyriakou, *supra* note 10.
[357] *Ibid*.
[358] See, *inter alia*, case of *Bazorkina v. Russia*, E.Ct.H.R. (First Section), 69481/01, (27 July 2006), para 118;Case of *Çakıcı v. Turkey*, E.Ct.H.R. (Grand Chamber), 23657/94, (8 July 1999), paras 80-87; case of *Velasquez Rodriguez v. Honduras*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4, para 177.
[359] Case of *Bazorkina v. Russia*, E.Ct.H.R., see supra, para 117.
[360] Case of *Velasquez Rodriguez v. Honduras*, see *supra*. Case of the 19 *Merchants v. Colombia*, Judgment of July 5, 2004, Inter-Am.Ct.H.R, (Ser. C) No. 109, para. 184.
[361] Case of *Bazorkina v. Russia*, E.Ct.H.R., see *supra* note 80; CoE, "Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations" (30-31 March 2011), pp. 60-62.
[362] See, *inter alia*, Case of *Kurt v. Turkey*, E.Ct.H.R. (Chamber), 15/1997/799/1002 (25 May 1998); case of *Cyprus v. Turkey*, E.Ct.H.R. (Grand Chamber), 25781/94, (10 May 2001); case of A*nzualdo Castro v. Peru*, Judgment of September 22, 2009, Inter-Am.Ct.H.R. (Ser. C) No. 202.

remedial scope that an effective investigation essentially serves in enforced disappearance cases.

Specific orders directed to the conduct of effective investigations are essential for direct victims and have a strong impact on their families and society. It goes without saying that a specific order to conduct an effective investigation is fundamental in order to locate the disappeared person, and avoid measures that could irretrievably compromise the situation, especially where a ”race against time” in order to find the person alive is involved. As observed before, when a violation is ongoing, it is of upmost importance to take every necessary measure to put an end to it. In this sense, the conduct of an effective investigation on the fate and whereabouts of victims is fundamental to permit the cessation of the violation in enforced disappearance cases. Moreover, appropriate investigations are necessary to find victims' mortal remains and permit their dignified burial, allowing their families to find closure.

The obligation to conduct an effective investigation is inherently linked to the right to truth. Given that enforced disappearances are carried out predominantly with the purpose of eliminate political opponents and spread terror within society, reparatory measures associated with determining the truth can have a strong impact in the psychological healing process of survivors and their families. The affirmation of the right to truth contributes to restore the dignity of victims (material victims and family members), and reintegrate them into their community.[363] Moreover, the remedial dimension of the rights truth has positive effects not only at individual level, but also on the society at large. The right to truth is a vital component of the struggle against impunity, and is ineluctably related to the very realization of justice and to the guarantee of non-repetition.[364]

All reparatory measures are vain and sterile without an appropriate inquiry to establish the facts of a case. In this vein, the first measure that the IACtHR orders in its pronouncements on reparations concerning enforced disappearances is the conduct of a thorough, impartial, effective and prompt investigation of the facts in order to identify and punish perpetrators. By contrast, such a specific order is generally not included in the operative part of the judgments of the ECtHR, which remains confined into the stringent confines of its subsidiary role in line with the narrow interpretation of Article 41 of the ECHR. In this particular regard, it should be pointed out that, despite the significant developments of the European human rights system in the past six decades, Article 41 was not

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[363] Roht-Arriaza, *supra* note 3; Fulton, *supra* note 62.
[364] Idem., Separate Opinion of Judge A.A. Cançado Trinidade, paras.27-40.

subject to any amendment or modification. At the same time, international law has advanced and remedies are largely addressed in a comprehensive manner, which encompasses monetary and non-monetary measures as well. In view of these considerations, some scholars aptly suggested the rewording of Article 41, which would allow the ECtHR to implement a far-reaching spectrum of remedies.[365] The proposal appears pertinent and appropriate. However, it should be noted that this would imply the reconsideration of the principle of subsidiarity, an overarching principle within the European system. Thus, given the challenging and cumbersome negotiation process that such proposal requires, its realization, at least in the short run, appears unrealistic and not responsive to the pressing exigencies of many realities of (re)victimization, diffuse non-compliance and consequent impunity. In my opinion, the urgent necessity is a clearer and deeper interpretation of the legal tools at actual disposal of the European Court, in the light of the case-law of other judicial bodies (namely the IACtHR) and the developments of binding and non-binding international law instruments, such as the CPED and the U.N. Principles and Guidelines. An interpretation of Article 41 according to the general principle of international law requiring the cessation of the ongoing violations would enable the Court to order the release of a disappeared person and the conduct of an effective investigation. This would not entail the denial of a states' margin of appreciation nor the subsidiary role of the European Court.[366] Specific orders and discretion as to the means of compliance are not mutually exclusive, but can be conceived as a synergy.

3. The Effective Implementation of Decisions

In a famous controversy surrounding the foundation of human rights, Norberto Bobbio maintained that the crucial issue of human rights relies not on their theoretical justification nor their affirmation, but on their effective protection.[367] In the same spirit, after having analyzed the different remedies offered by the two regional Courts in cases of enforced disappearances, it seems essential to evaluate whether the implementation of the right to remedy has been effective in practice. While it is beyond the scope of this thesis to conduct a deep analysis of the implementation procedures of the two systems under consideration, some preliminary considerations may help to provide a better understanding of the underlying problems pertaining to the execution of judgments in enforced disappearance cases.

[365] Kyriakou, *supra* note 10.
[366] *Ibid*.
[367] "Il problema di fondo relativo ai diritti dell ' uomo è oggi non tanto quelli di giustifica rli , quanto quelli di proteggerli", Norberto Bobbio, *L'età dei diritti* (Einaudi, 1992); See also, Norberto Bobbio, "Sul Fondamento Dei Diritti Dell'uomo" (1965) 42 Riv Internazionale Filos Dirit 302.

The IACtHR, due to the lack of a specific provision on the implementation of its judgments, fulfills this function by itself. In the European system, pursuant to Article 46(2) of the ECtHR, this function is a competence of the Committee of Ministers (CoM), a political body that represents the States Parties to the Council of Europe.

Both the Courts under examination are grappling with the problem of a discouraging implementation rate of their judgments. With regard to the European system, the problem of diminished success in the judgments' execution can be related to the refusal of the European Court to include in its judgments explicit orders, which would enable the states to conform more promptly to the Court's decisions.[368] This, combined with the large increase in applications submitted to the ECtHR, has led the Court to deal with an asphyxiating caseload.[369] The European response to this problem was articulated in two steps. Firstly, there was the creation of a "pilot-judgment" procedure, enabling the Court to give to the respondent states and the CoM clear indicators on measures intended to eliminate systemic or structural problems giving rise to repetitive cases[370]. The second step was the elaboration and entry into force of Protocol n.14, which was comprised of measures designed to improve and accelerate the execution process, empowering the CoM to bring infringement proceedings in the Court against any state which refuses to comply with a judgment.[371] This was followed by the Interlaken Action Plan, which launched a "twin-track" supervision system providing both standard and enhanced supervision procedures for judgments disclosing major structural or complex structural or complex problems.

Dramatic problems persist with regard to the implementation of judgments concerning enforced disappearances in the European system. According to the Committee on Legal Affairs and Human Rights, Russia and Turkey are among the states with major systemic problems. In particular, the main violations allegedly committed by both states concern the torture and ill-treatment of detainees in police custody, a lack of effective domestic investigations, and several violations of the Convention regarding the actions of the security forces.[372] The very purpose of the specific orders in the operative part of the Court's

[368] "The Court, whose judgments are sometimes not sufficiently clear, and the Committee of Ministers, which does not exert enough pressure when supervising the execution of judgments share part of the responsibility." European Parliamentary Assembly, Execution of Judgments of the European Court of Human Rights, 30th Sess., Res. 1226 (2000), para.6.

[369] See, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Explanatory Report, (CETS No. 194) Agreement of Madrid, 12 May 2009.

[370] European court of Human Rights, *The Pilot-Judgment Procedure*, Information note issued by the Registrar, 2009.

[371] *Id.*

[372] Committee on Legal Affairs and Human Rights, "States with major structural/systemic problems before the European Court of Human Rights: statistics", AS/Jur/Inf (2011) 05 rev 2, 18 April 2011; Committee of

judgments is to help both respondent states and the CoM respectively in the execution of the Court's judgments and their supervision. Also, a more flexible and comprehensive approach on remedies would give breath to the Court, given the growing caseload that is asphyxiating the European system. Yet both international law[373] and the pressing necessity to alleviate the festering backlog of cases prompt the European Court to incorporate non-monetary measures into its model for just satisfaction.

On the other side of the Atlantic, the implementation crisis may be linked to states' political unwillingness, their institutional incapacity, their lack of infrastructure and resources, and a pervasive disregard for human rights.[374] Given the lack of a specific monitoring body, compliance with the judgments of the Inter-American Court depends on the strength of domestic judiciaries and administration.[375] In several occasions, it has been advanced the possibility of filling this gap through the establishment of a permanent mechanism for supervision of the execution.[376] Despite these remarkable proposals, the gap persist to date. Thus, the Court had taken the initiative of supervising, *motu propio*, the execution of its judgments.[377] Regrettably, the degree of compliance with the judgments of the IACtHR is still not satisfactory, to the detriment of victims. The current practice of the Court is to adopt successive resolutions on the supervision of compliance with its judgments, taking note of the measure(s) taken by the states, and "partially closing" the cases in respect of those measure(s).[378]In 2013, the IACtHR issued twenty-eight resolutions to monitor

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Ministers, "Surveillance de l'exécution des arrêts et décisions de la Cour européenne des droits de l'homme. 7e rapport annuel du Comité des Ministres - 2013" (March 2014), online: http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2013_fr.pdf. Last accessed: 29/10/2014.

[373] 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", A/RES/60/147, 2006.

[374] Kyriakou, *supra* note 10.

[375] C.M. Bailliet, *Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America*, The Nordic Journal of Human Rights, Vol. 31, no. 4,(2013).

[376] Report presented to the Committee on Juridical and Political Affairs (CAJP) of the Permanent Council of the OAS, reproduced in: A.A. Cançado Trindade, Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección , vol. II, 2nd. ed., IACtHR, San José de Costa Rica, 2003, at 125; A. A. Cançado Trindade, "Compliance with judgments and decisions – The experience of the Inter-American court of Human Rights: a reassessment", in "Dialogue between judges", Proceedings of the Seminar "Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?", European Court of Human Rights, Council of Europe, 31 January 2014.

[377] See, case of *Baena-Ricardo et al. Case (270 Workers) v. Panama*, IACrtHR, 2 February 2001; A. A. Cançado Trindade, "Compliance with judgments and decisions – The experience of the Inter-American court of Human Rights: a reassessment", in "Dialogue between judges", Proceedings of the Seminar "Implementation of the judgments of the European Court of Human Rights: a shared judicial responsibility?", European Court of Human Rights, Council of Europe, 31 January 2014, at para15.

[378] *Idem,* at paras 20-23.

compliance with decisions, six of which concerned cases of enforced disappearance.[379] The data supports the common idea that states are more likely to comply with judgments requiring monetary compensation, than with those requiring them to take specific measures.[380] In particular, it has emerged that there is a general reluctance to comply with orders calling upon states to investigate and prosecute responsible persons.[381] The possibility of punishment is linked to judicial independence, which is often deficient in states where disappearances are a systematic phenomenon, and is essentially a political rather than a normative question, deeply intertwined with democratic consolidation. In this sense, this problem is directly linked to the legitimacy and prevalence of the IACtHR in national systems. In the same line of analysis, even where a permanent enforced mechanism exists, as in the European system, problems of legitimacy and political reluctance persist. Indeed, the political nature of the CoM could imply its responsibility for the inactivity and slowness of the execution processes in the European regime, since its supervision has been often "too deferential with respect to the states concerned."[382]

Despite their institutional and methodological differences, partial compliance is noticeably prevalent in both human rights regimes.[383] It is possible to conclude that both systems are tackling a general challenge regarding implementation, which undermines the legitimacy and authority of the two regional Courts, as well as the concrete role they play within their respective systems of human rights protection.[384] For this reason, direct and clear orders in the Courts practice would have a beneficial impact on compliance rates, discharging their caseload burden and reinforcing their legal authority. Finally, it is important to emphasize the relevance of adopting a balanced and comprehensive institutional approach,

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[379] Inter-American Court of Human Rights, "Compliance with Judgment", online: http://www.corteidh.or.cr/index.php/en/compliance-with-judgment. Last accessed: 29/10/2014.

[380] Darren Hawkins & Wade Jacoby, "Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights" (2010) 6 J Int Law Int Rel.

Elin Skaar, *Judicial independence and human rights in Latin America: violations, politics, and prosecution* (Palgrave Macmillan, 2011).

[381] C.M. Bailliet, *Measuring Compliance with the Inter-American Court of Human Rights: The Ongoing Challenge of Judicial Independence in Latin America*, The Nordic Journal of Human Rights, Vol. 31, no. 4,(2013); See, inter alia, Case of *Contreras et al. v. El Salvador*. Monitoring Compliance with Judgment. Order of the IACtHR of May 14, 2013; case of *Anzualdo Castro v. Peru*. Monitoring of Compliance with Judgment. Order of the IACtHR of August 21, 2013.

[382] Antkowiak, *supra* note 39 at 412.

[383] Darren Hawkins & Wade Jacoby, "Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights" (2010) 6 J Int Law Int Relat 35, at 35.

[384] Lisa J Laplante, "Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention" (2004) 22 Neth Q Hum Rights 347; Thomas M Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, SSRN Scholarly Paper ID 1329848 (Rochester, NY: Social Science Research Network, 2008).

acting as a strong political endorsement to the pronouncements of both Courts under consideration.[385]

4. A Comprehensive Approach to Reparations: Advantages and Caveats

The previous analysis has showed how the remedial power of the two regional Courts has been deeply influenced by their respective governing texts. The European Court has generally adopted a merely compensatory approach. Indeed, in the European system, given the narrow boundaries of Article 41 and the inherent subsidiary nature of the ECtHR, states conserve a wide discretion with regard to the implementation of individual or general measures that they are to adopt in order to fulfil their legal duties, redress victims, and prevent further similar violations. In disappearance cases, with the exception of some particular cases,[386] the European Court generally refuses to include in the operative part of its decisions non-monetary measures or specific orders, such as the fundamental order to release victims, that is to say to put an end to an ongoing violation, or to conduct an effective investigation on the case. This inflexible approach might accidentally contribute to the solidification of the (misleading) idea that compensation represents the preferable and easier measure of redress within the international human rights adjudication process.[387] Economic compensation may be appealing as it is the simpler, and therefore most implementable, means of remedy. Nevertheless, the superficiality of such a conclusion becomes particularly clear in the light of the complex consequences of a human rights violation such as enforced disappearance, where economic compensation, is often perceived by victims as "bloody money", a means to silence them, conceal past abuses and perpetuate impunity. It has to be hoped that the Court would expand its remedial powers, ordering the states to implement specific non-monetary measures that would empower and (re)dignify victims of enforced disappearances. This would be possible thorough an interpretation of the European Convention according to the progress of international law and to the victims needs as well.

Moreover, bearing in mind that monetary compensation covers important losses and expenses and may also serve "ethical purposes", it is not to be regarded as anathema. However, even where monetary compensation has a symbolic value, it is generally awarded according to

[385] Kyriakou, *supra* note 10.

[386] Case of *Assanidze v. Georgia*, E.Ct.H.R. (Grand Chamber), 71503/01, (08 April 2004); Case of *Aslakhanova and Others v. Russia*, E.Ct.H.R. (First Section), 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, (18 December 2012).

[387] Kyriakou, *supra* note 10; Feyter, *supra* note 1.

opaque criteria, that leave people in a limbo of legal uncertainty. It is therefore important to emphasize the urgent need for a more transparent and clear approach to monetary compensation.

The traditional orientation of the ECtHR places its practice in blunt contrast with the comprehensive paradigm included in the UN Convention for the Protection of all People from Enforced Disappearances (CPED). As mentioned before, Article 24(4) of the CPED provides for a broad paradigm of redress for enforced disappearance, which comprises economic compensation and a vast array of moral or symbolic measures of reparation. This innovative understanding responds to the complex nature of enforced disappearance. The IACtHR embraces this approach. In fact, notwithstanding the fact that it awards economic compensation (generally greater than its European sister), the Inter-American Court has developed a creative jurisprudence characterized by a vast array of tailored and specific measures of reparation. These measures includes *inter alia*: orders for effective investigations and punishment of responsible persons, states' official apologies, recognition of responsibility, educational programs and measures directed to restore the victim's physical and mental health, dignity, reputation, and place in society. These measures do not allocate on the states a significant economic pressure, but have manifold encouraging results at individual and social level, namely they promote recovery processes and psychological healing, foster social awareness, and play an essential role in the struggle against impunity. The inherent purpose is to move beyond the traditional idea of individual justice to tackle the general causes underlying the violations, to reach larger population segments.[388]

Moral or symbolic measures directed to redress the incommensurable emotional damage caused by a disappearance are generally preferred by victims, while economic compensation alone is perceived as ambivalent.[389] Nevertheless, the comprehensive approach of the Inter-American Court might incur some criticisms, especially with regard to its collective dimension. Detailed orders imposed by an international human rights Court might excessively interfere with states' sovereignty. Dictating new policies intended to reform the domestic criminal justice system, ordering the introduction of new educational programs, might be perceived as paternalistic, due to the lack of democratic participation. Moreover, these collective measures might also be ascribable to the category of "positive obligations" that require specific measures to give full realization and effect to human rights, rather than

[388] Kyriakou, *supra* note 10; Roht-Arriaza, *supra* note 3.

[389] See, *inter alia*, case of *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000, Inter-Am.Ct.H.R. (Ser. C) No. 70; Antkowiak, *supra* note 39 ; Informe del Proyecto lnterdiocesano de Recuperación, "de la Memoria Histórica (REMHI). 1998" Guatem Nunca Más.

to the category of remedies.[390] This would imply a significant shift from a procedural to a substantive perspective. Furthermore, from a more operational perspective, specific measures of reparation result often difficult to enforce because of their generality and ambiguity. This compromise their remedial purpose.[391] It is therefore of essential importance that such orders be specific and clear, in order to avoid under-enforcement and a sequence of resolutions on the supervision of compliance that endangers the tasks of the Inter-American Court and of the Committee of Ministers as well.

Notwithstanding its shortfalls, the Inter-American approach appears to be the best suited to respond effectively to the needs of victims of enforced disappearances and their victimized societies. In particular, direct orders to conduct effective investigations are fundamental in disappearance cases. Effective investigation in disappearance cases is the more direct means to put an end to the violation and bring again the victim under the protection of the law. It represents the *sine qua non* for the right to truth and has a crucial impact in the struggle against impunity. For this reason, specific orders to conduct effective investigations should represent the core of every international human rights Courts decision regarding the phenomenon of enforced disappearances.

The hypothesis of a possible expansion of the remedial power of the ECtHR thorough a comprehensive approach that would embrace non-monetary measures of reparation seems far from being realized. However, the reorientation of the operative part of the Court's judgments, including clear and specific orders to respondent states – especially in order to carry out effective investigations - would have a momentous impact on European system and as well as on the victims' lives. It would support and strengthen the Court's legal authority and, at the same time, it would empower victims and frame preventive measures.

It has to be hoped that the ECtHR, in the light of the best practice of its Inter-American counterpart, would interpret the normative tools at its disposal, according to the recent developments of international law and to the needs of victims and society at large.

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[390] Antkowiak, *supra* note 39 ;Jean-François Akandji-Kombe, "Positive obligations under the European Convention on Human Rights" (2007) 7 Hum Rights Handb, online: <http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-07(2007).pdf> ;Sandra Fredman, *Human Rights Transformed: Positive Duties and Positive Rights*, SSRN Scholarly Paper ID 923936 (Rochester, NY: Social Science Research Network, 2006).

[391] *Id.*

Conclusions

In "*If this is a man/Truce*", Primo Levi wrote about what he experienced during the Jewish Holocaust that "If understanding is impossible, knowing is imperative."[392]

This thesis has attempted to investigate the causes, the consequences and the legal remedies of enforced disappearances. Throughout this study, it has been possible to illustrate the psycho-social consequences of this heinous practice and, at the same time, to pinpoint and highlight various crucial issues of international law related to the very notion of enforced disappearance and the redress owed to the victims. [393] Among these issues, the right to know the truth about the fate of the disappeared persons has emerged as a constitutive element of victim's redress.

Three key characteristics have emerged as the hallmark of enforced disappearances. First, the complex and profound harm which is caused to individuals, families and entire communities. Second, the pervasive impunity that generally follows the offence, without any appropriate investigation into cases and shared accountabilities. Third, the denial and obfuscation of truth about what has happened. All these factors result in a climate of general distrust in public authorities. Individual harm, personal uncertainty and fear all become collective and political realities.

The role of remedies in such circumstances is as relevant as it is complex. Indeed, there are harms that cannot be repaired. Such is the case of the harm generated by an enforced disappearance. That notwithstanding, it may be argued that law has an expressive function, which might serve a meaningful role in encouraging both an individual and a social healing process. The underlying idea is that corrective justice demands reparation for the relationships that such wrongdoings fracture.[394] In enforced disappearance cases the level of disruption is significant and has manifold tragic consequences. This work has attempted to demonstrate that a mere compensatory approach to such a grave violation of human rights is an incomplete response to the victims' needs.

The present study has underscored various disparities and fluctuations concerning the redress for victims of enforced disappearances in the jurisprudential discourse within both the European and the Inter-American system of human rights protection. Some jarring

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[392] Primo Levi, *If This Is A Man/truce* (Birmingham: Abacus, 1987).

[393] Sarah Fulton, "Redress for Enforced Disappearance Why Financial Compensation is not Enough" (2014) J Int Crim Justice mqu044.

[394] Scott Hershovitz, "Patching Things Up" (2014) 2014 Jotwell J Things We Lots, online: <http://torts.jotwell.com/patching-things-up/>; Linda Radzik, *Tort Processes and Relational Repair,* in John Oberdiek ed., *Philosophical Foundations of the Law of Torts*, (2014).

discrepancies, in particular those derived from the idiosyncrasies and challenges of each human rights regime, have emerged in relation to the standard of proof and to the remedial approach adopted by each court. It has been shown that the ECtHR has adopted a more rigid and demanding stance than the IACtHR, especially with regard to the standing of victims and the standard of proof for the determination of which human right has been violated. This has important repercussions on the definition of the character and extent of the remedies that are awarded. Moreover, and with particular regard to remedies, the ECtHR traditionally orders only measures of monetary compensation, whereas the IACtHR has embraced a broader approach, awarding financial compensation accompanied by symbolic and moral reparatory measures. This comparison has attempted to demonstrate that the comprehensive and creative Inter-American jurisprudence must be regarded as best practice, since it reflects the complexity of the phenomenon of enforced disappearances.

In light of the complexity of the consequences of enforced disappearances, this thesis has drawn attention to the role of non-monetary measures in such cases. The IACtHR, through its progressive case-law, has translated in judicial practice the advances of international human rights law pertaining to the legal regime of remedies. Such a flexible approach places itself in blunt contrast to the rigid traditional stance of the ECtHR. Indeed, the Court of Strasbourg is reluctant to adopt the idea of directing specific orders at states to redress victims and societies at large. Specifically, the court is reluctant to include, in the operative parts of its decisions, orders to conduct effective investigations on enforced disappearance cases. As a result, the protection and the redress offered by the European regime is limited. It is powerless in the face of the essential and pressing need to put an end to the violation, and it becomes insensitive to the victims' claim for truth. This is due to the principle of the margin of appreciation, and to the stringent confines of the ECHR pertaining to the typology and extent of remedial measures. A reform in the sense of a conceptualization of a more flexible provision on remedies, which will allow the Court to draw on a broader source of measures, appears desirable. The rephrasing of Article 41 ECHR in such a direction could have positive outcomes not only for the individuals concerned, but also for the entire European regime – which in recent years has become victim of its own success, and is now facing a docket crisis of massive dimensions.[395]

Bearing in mind the continuous nature of the offence under consideration, financial compensation emerges as an inappropriate means of redress. First, it does not allow for the

[395] Laurence R Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, SSRN Scholarly Paper ID 1021798 (Rochester, NY: Social Science Research Network, 2007).

cessation of the ongoing violation. Second, it might be counterproductive, since it often induces a sense of guilt and "frozen grief", re-victimizing de facto individuals and family members. This does not means that compensation is not an important measure of redress; it is concretely essential in order to rebuild peoples' lives. But in cases of gross human rights violations, such as enforced disappearances, it should, however, be accompanied by other reparatory measures. Symbolic and moral reparations serve a critical role in the individual healing process and in the renovation of people's faith in authorities that originally betrayed their institutional mandate.

The most important tool in healing individual sufferings and in reestablishing a relationship of trust between people and authorities is the affirmation of the right to truth, through specific orders to conduct effective investigations and disclose information about past abuses. The right to truth in its individual and collective dimensions, and the correlating duty to conduct effective investigations, have emerged as the leitmotif of the whole thesis.

Indeed, it has been shown that truth may support psychological healing and social reintegration, as well as the elaboration of a collective memory directed at the eradication of impunity, the guarantee of non-repetition and the potential restoration of people's faith in authorities.

In consideration of Primo Levi's reflections on the horrors of the Holocaust, any attempt to understand the atrocity of enforced disappearances, namely, to comprehend the perpetrators' behaviour and the victims' suffering, is impossible. However, it is necessary to understand where this phenomenon springs from, and to clarify what its consequences have been, in order to struggle against recurrence and impunity. "If understanding is impossible, knowing is imperative."[396]

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