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Table of Contents

ACKNOWLEDGMENTS **4**

I. INTRODUCTION **5**

II. KEY RESEARCH QUESTIONS **7**

III. STRUCTURE OF THE PAPER **7**

CHAPTER ONE - THE THIRD REICH'S NIGHT AND FOG PROGRAM **11**

1.1 THE *KIETEL* AND *JUSTICE* CASES **14**

CHAPTER TWO - FROM IHL TO HUMAN RIGHTS LAW: DEVELOPMENTS IN LATIN AMERICA, EUROPE, ASIA AND THE MIDDLE EAST **19**

2.1 THE JURISPRUDENCE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS **21**

2.1.1 OVERCOMING OBSTACLES RELATING TO BURDEN OF PROOF REQUIREMENTS AND CIRCUMSTANTIAL EVIDENCE 21

2.1.2 EVOLUTION OF THE RIGHT TO TRUTH 26

2.1.3 ENFORCEMENT/IMPLEMENTATION HURDLES 29

2.1.4 AMNESTY LEGISLATION AS AN IMPEDIMENT TO ACCOUNTABILITY 31

CHAPTER THREE - THE ULTIMATE PARADOX: PROTECTORS AS PERPETRATORS **33**

CHAPTER FOUR - CASE STUDIES OF ENFORCED DISAPPEARANCES **35**

4.1 ARGENTINA **35**

4.2 PAKISTAN **40**

4.3 INDIA **45**

CHAPTER FIVE - ASSESSING THE PATTERN OF ENFORCED DISAPPEARANCES **47**

5.1 THE NEED FOR REHABILITATION, JUSTICE AND RECONCILIATION **48**

CHAPTER SIX – ANALYZING THE CURRENT GLOBAL LEGAL FRAMEWORK 50

6.1 MULTIPLE BREACHES OF HUMAN RIGHTS 51

6.2 THE 1992 DECLARATION 54

6.3 THE CONTRIBUTIONS OF THE ICPED 55

6.3.1 THE ROLE OF THE COMMITTEE ON ENFORCED DISAPPEARANCES 57

6.3.2 ADDRESSING THE ISSUE OF *RATIONE TEMPORIS* COMPETENCE 60

6.4 COMPARATIVE ANALYSIS OF THE 1992 DECLARATION AND THE ICPED 61

6.5 THE ROME STATUTE AND ENFORCED DISAPPEARANCES 63

6.5.1 COMPLEMENTARY JURISDICTION OF THE ICC WITHIN THE CONTEXT OF IMPUNITY 67

CHAPTER SEVEN – IDENTIFYING THE MAJOR PROCEDURAL AND SUBSTANTIVE GAPS IN PROTECTION 69

7.1 SYNERGIZING INTERNATIONAL AND REGIONAL EFFORTS AT ERADICATING ENFORCED DISAPPEARANCES 71

7.2 THE ROLE OF NGOS AND DOMESTIC COURTS 74

CHAPTER EIGHT – RECENT NOVEL CHALLENGES WITHIN THE FIELD OF ENFORCED DISAPPEARANCES 77

8.1 INCOMMUNICADO DETENTIONS AND EXTRAORDINARY RENDITIONS 78

CHAPTER NINE - CONCLUSIONS AND RECOMMENDATIONS 81

BIBLIOGRAPHY 86

ABSTRACT *(ENGLISH)* **..... 95**

ABSTRACT *(GERMAN)* **..... 96**

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"Deliberate and non-deliberate ignorance, neglect, denial, refusal to acknowledge, impunity, disrespect are components of patterns of injustice and inhumanity."[1]

- Theo Van Boven

i. Introduction

Although it has been eight years since the International Convention for the Protection of All Persons from Enforced Disappearance (**"ICPED"**)[2] entered into force,[3] the phenomenon of enforced disappearances remains a "global problem",[4] which is "not restricted to a specific region".[5] As "one of the core instruments"[6] in international human rights law, the ICPED codifies the law on enforced disappearance and delineates the principles and rules applicable to the offense.[7]

Article 2 of the ICPED provides a definition of "enforced disappearance" as "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". From the very outset, it is clear that this definition is lacking in that it does not refer to disappearances perpetrated by private parties. This will be discussed in greater detail in the sections below.

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[1] Van Boven, Theo. "Victim-oriented perspectives: Rights and realities." *Victims of international crimes: an interdisciplinary discourse*. TMC Asser Press, The Hague, The Netherlands, 2013: 17-27; at p. 27

[2] UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006

[3] Kyriakou, Nikolas. *An affront to the conscience of humanity: enforced disappearance in international human rights law*. Doctoral Dissertation 2012. Web, available at: http://cadmus.eui.eu/bitstream/handle/1814/22700/2012_KYRIAKOU.pdf?sequence=1&isAllowed=y [Accessed 14 July 2018]; at p. 16

[4] UN Human Rights Council, Working Group on Enforced or Involuntary Disappearances. *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council": Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/4/41 (2007); at p. 9

[5] Citroni, Gabriella and Tullio Scovazzi. "Recent Developments in International Law to Combat Enforced Disappearances." *Revista internacional de direito e cidadania*, 3 February 2009: 89-111; at p. 90

[6] *Supra at n3,* at p. 16

[7] *Supra at n3,* at p. 16

Generally speaking, enforced disappearances can be categorized as "one of the most serious human rights violations which affects a number of human rights",[8] most notably the right to be protected against arbitrary deprivation of liberty, the right not to be subjected to torture or other inhumane, degrading or cruel treatment, the right to security, and the right to be protected under the law.[9] It is thus evident that there are a wide variety of rights, contained across different international legal instruments, which are breached as a consequence of the offense of enforced disappearance.

As an "autonomous offence, having a continuing character, that does not only affect the material victim" but also the victim's family,[10] the crime of enforced disappearance is a particularly serious one:[11] it is deemed to constitute "a crime against humanity" under international law.[12] Having been labeled "a particularly heinous violation of human rights",[13] the offense of enforced disappearance "typically involves the abduction, arrest or detention of an individual – usually a perceived political opponent – by members of a state-sponsored military group, and a deliberate denial by authorities of any knowledge of the victim's arrest, whereabouts, or condition".[14] In other words: enforced disappearances entail that the disappeared individual "effectively vanishes".[15] It is worth mentioning, however, that definitions such as the aforementioned do not explicitly recognize the practice of disappearances carried out by civilian intelligence agencies.

The consequences of enforced disappearances "are a doubly paralyzing form of suffering":[16] on a first level, through removal of the victim from the protection of the law (often subjecting the victim to torture and/or extrajudicial execution);[17] and on a

[8] *Supra at n5,* at p. 90
[9] *Supra at n5,* at p. 90
[10] *Supra at n5,* at p. 90
[11] Claude, Ophelia. "A comparative approach to enforced disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights jurisprudence." *Intercultural Hum. Rts. L. Rev.* 5 (2010): 407; at p. 407
[12] *Supra at n2*, Preamble
[13] *Supra at n11,* at p. 407
[14] Anderson, Kirsten. "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 Disappearances." *Melb. J. Int'l L.* 7 (2006): 245; at p. 246
[15] *Supra at n14,* at p. 246; *See also:* Vermeulen, Marthe Lot. *Enforced disappearance: determining state responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance.* Intersentia, 2012; at p.1
[16] *Supra at n14,* at p. 246
[17] *Supra at n14,* at p. 246

second level, deliberate denial of information to the victim's family and friends vis-à-vis said victim's arrest or detention.[18] In this regard, enforced disappearances have an inherently cruel and complex nature:[19] denials of information concerning the person's detention shield perpetrators from accountability whilst simultaneously ensuring that the person detained is deprived of legal protection.[20]

ii. Key Research Questions

The objective of this paper is to provide a comprehensive understanding of the practice of enforced disappearances, as they have occurred or continue to occur in different parts of the globe. Through this, the paper aims to deduce patterns that exist across a wide variety of States with regard to enforced disappearances, so as to highlight the major loopholes in the existing framework for protection against this practice. In doing so, the paper also sheds light on the exact contours of protection, both within international humanitarian law and human rights law, against enforced disappearances. Lastly, recommendations are proposed to strengthen the global legal framework for protection from and prosecution of this crime.

iii. Structure of the Paper

The starting point for any discussion on enforced disappearances is by way of reference to the "first instance of a systematic practice of enforced disappearances"[21] which took place during the Second World War,[22] "when thousands of people were secretly transferred to Germany from the occupied territories in Europe"[23] as part of the "notorious"[24] 1941 "*Nacht und Nebel Erlass*"[25] (or Night and Fog decree).[26] This

[18] *Supra at n14,* at p. 246
[19] *Vermeulen, Marthe Lot. Enforced disappearance: determining state responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance. Intersentia, 2012;* at p.1
[20] *Supra at n19,* at p.1
[21] *Supra at n3,* at p. 25; *See also:* Kyriakou, Nikolas. "The International Convention for the Protection of All Persons from Enforced Disappearance and its contributions to international human rights law, with specific reference to extraordinary rendition." *Melb. J. Int'l L.* 13 (2012): 424; at p. 425
[22] *Supra at n5,* at p. 90
[23] *Supra at n5,* at p. 90
[24] *Supra at n3,* at p. 25
[25] Milić, Tatjana. "International Convention for the Protection of All Persons from Enforced Disappearance." *Medjunarodni problemi* 62.1 (2010): 37-64; at p. 38

Night and Fog Decree, executed indiscriminately against civilians in the occupied territories in violation of due process requirements,[27] "introduced enforced disappearance as a measure against the population of the occupied territories and was justified by the reasons of security of Third Reich or occupying forces".[28]

This paper will, therefore, start with providing the contextual landscape within which enforced disappearances were first used "as an explicit state policy".[29] Chapter one will thus include discussion on the evolution of enforced disappearances under the Night and Fog program, including analysis of the relevant jurisprudence in the *Keitel*[30] and *Justice* cases.[31] Since enforced disappearances have also been "employed extensively as a virulent form of state terrorism" since World War II by many Latin American governments[32] throughout the 1960s and 1970s,[33] as well as by regimes (democratic and non-democratic) in Europe, Asia, North Africa and the Middle East,[34] Chapter two will describe the patterns of enforced disappearances in this regard as well as the legal framework within Latin America, as the most developed system for dealing with enforced disappearances, and Europe for redressing violations of this kind. Here, the jurisprudence of the Inter-American Court of Human Rights (**"IACtHR"**) and the European Court of Human Rights (**"ECtHR"**) will be analyzed to discuss the following developments: (i) obstacles relating to burden of proof requirements and circumstantial evidence; (ii) evolution of the right to truth; (iii) implementation hurdles; and (iv) amnesty legislation as an impediment to accountability.

Chapter three will then focus on the problem as exists in the world today as "a truly universal phenomenon, believed to be occurring in approximately 90 countries, in all

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[26] *Supra at n3,* at p. 25
[27] Kyriakou, Nikolas. "The International Convention for the Protection of All Persons from Enforced Disappearance and its contributions to international human rights law, with specific reference to extraordinary rendition." *Melb. J. Int'l L.* 13 (2012): 424; at p. 425
[28] *Supra at n25,* at p. 38
[29] Finucane, Brian. "Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War." *Yale J. Int'l L.* 35 (2010): 171; at p. 175
[30] *The Trial of German Major War Criminals,* Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany 2, 22 (1946); *See also: Supra at n3,* at p. 26
[31] *The Justice Case, 3 T.W.C. 1 (1948); See also: Supra at n3,* at p. 26
[32] *Supra at n25,* at p. 39
[33] *Supra at n14,* at p. 246
[34] *Supra at n25,* at p. 39

regions of the world and affecting tens and thousands of people".[35] Within this chapter, analysis of state organizational capacity will also be presented to highlight how the culture of impunity that surrounds enforced disappearance has come to exist.

Chapter four will present three major case studies of enforced disappearances as they have occurred in Argentina, Pakistan and India. This will establish the general pattern of such disappearances in greater detail, thereby laying down the contextual landscape for Chapter 5, which will deal with the need for rehabilitation, justice and reconciliation in cases of enforced disappearances. Since these disappearances have long-lasting psychosocial effects on civilian populations, the importance of rehabilitation and reconciliation, as tools to heal society, merits adequate discussion.

Chapter six will trace the international legal developments in addressing this practice, focusing on binding and non-binding universal instruments, such as the ICPED, the Declaration on the Protection of All Persons from Enforced Disappearances (**"1992 Declaration"**)[36] and the Rome Statute.[37] In this regard, the contributions of the ICPED will be elaborated upon, whilst also highlighting the role of the Committee on Enforced Disappearances (**"CED"**) as well as that of the International Criminal Court (**"ICC"**) in combating the practice of enforced disappearance.

Chapter seven will identify the major procedural and substantive gaps in protection that remain within the global legal framework that safeguards against enforced disappearance. Here, the importance of synergizing international and regional efforts at eradicating enforced disappearances will be elaborated upon, whilst also emphasizing the significance of the role to be played by non-governmental organizations (**"NGOs"**) and domestic courts in this regard.

Chapter eight will highlight the current challenges faced by the global community in combating impunity for enforced disappearances, particularly in the aftermath of the

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[35] *Supra at n14,* at p. 247
[36] UN General Assembly, *Declaration on the Protection of All Persons from Enforced Disappearances*, 12 February 1993, A/RES/47/133
[37] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010),* 17 July 1998, ISBN No. 92-9227-227-6

9/11 attacks. Therefore, this section will focus on the issues arising from incommunicado detentions and the practice of extraordinary renditions.

Chapter nine will then summarize the major recommendations of this paper and comprehensively provide the way forward in strengthening the international legal framework to safeguard against this serious crime.

Chapter One - The Third Reich's Night and Fog Program

On 7th December 1941,[38] Adolf Hitler, having been inspired by "Stalin's reign of terror and secret arrests",[39] issued the Night and Fog Decree.[40] The purpose of this program was "to seize persons in Nazi occupied territories that were 'endangering German security' and make them vanish without a trace".[41] In fact, "the Decree stated that within the occupied territories the only adequate punishment for persons committing offences against Germany or the occupying power that endangered security or the state of readiness was in principle the death penalty".[42] Where it seemed that the death penalty could not be imposed "within eight days the prisoner would be removed and no further information on that person would be forthcoming".[43]

Under this program, "no information was given to victims' families as to their fate, even when, as often occurred, it was merely a question of the place of burial in the 'Reich'".[44] In fact, as a consequence of this Decree, normal military procedures regarding the treatment of prisoners were circumvented.[45]

Moreover, "the fundamental element of this procedure was to deny family members and the wider public any knowledge as to the whereabouts and eventual fate of the victim"[46] so as to secure a "deterrent effect on resistance activities by creating widespread fear and anxiety among relatives of 'disappeared' individuals and by intimidating the public".[47] These disappearances "were intended to paralyze the suspect's relatives and friends with fear and apprehension".[48] Persons who were

[38] *Supra at n19,* at p. 4
[39] Vitkauskaite-Meurice, Dalia and Justinas Zilinskas. "The Concept of Enforced Disappearances in International Law". *Jurisprudencija* 2.120 (2010); at p. 197
[40] *Supra at n14,* at p. 249
[41] *Supra at n39,* at pp. 197-198
[42] Maogoto, Jackson Nyamuya. "Now You See, Now You Don't – The State's Duty to Punish Disappearances and Extra-Judicial Executions." *Austl. Int'l LJ* (2002): 176; at p. 178
[43] *Supra at n42,* at pp. 178-179
[44] *Supra at n39,* at p. 198
[45] Sourav, Md Raisul Islam. "Defining the Crime of Enforced Disappearance in Conformity with International Criminal Law: a New Frontier for Bangladesh." *Bergen Journal of Criminal Law & Criminal Justice* 3.2 (2015): 221-235; at p. 222
[46] *Supra at n14,* at p. 249
[47] *Supra at n14,* at p. 249
[48] *Supra at n42,* at p. 179

arrested and subsequently transferred to Germany[49] under this program "were held incommunicado in cruel and inhumane conditions, prosecuted without due process, and were frequently sentenced to death and executed".[50] It is estimated that around 7000 persons were the victims of these secret arrests and likely executions.[51]

Such enforced disappearances were intended to "discourage participation or collaboration against the regime's policies due to the uncertainty and lack of information on the fate of the disappeared persons".[52] In fact, "the effectiveness of this Decree required prohibiting prisoners from contacting their loved ones who were not even informed of the internee's death or execution".[53]

In this regard, "enforced disappearance was initially prohibited as criminal within a narrow context, belligerent occupation during armed conflict",[54] as illustrated through the "foundational case law on enforced disappearance" contained in the judgments of the Nuremberg war crimes tribunals.[55] This is a pertinent fact to recall, particularly considering the more recent evolution of the law on enforced disappearances under the ICPED. Therefore, it is worth mentioning that the ICPED's contribution in this field has not been the criminalization of enforced disappearances under international law,[56] but the criminalization of "those disappearances which do not amount to war crimes or crimes against humanity".[57]

During situations of armed conflict, "the criminalization of enforced disappearances initially served the humanitarian function of protecting family rights".[58] In other words, "like other aspects of the laws of war, the prohibition of enforced disappearance protects noncombatants and promotes key international values by constraining the conduct of belligerents".[59] The "protected object" and associated "international value" are the institution of the family and the notion of "familial

[49] *Supra at n19,* at p. 4
[50] *Supra at n14,* at p. 249
[51] *Supra at n14,* at p. 249
[52] *Supra at n19,* at p.5
[53] *Supra at n42,* at p. 179
[54] *Supra at n29,* at p. 172
[55] *Supra at n29,* at p. 172
[56] *Supra at n29,* at p. 172
[57] *Supra at n29,* at p. 172
[58] *Supra at n29,* at p. 173
[59] *Supra at n29,* at p. 173

integrity" respectively.[60] To this extent, offenses such as homicide can be distinguished from the "criminal prohibition of enforced disappearance"[61] as the latter "protects the interests of family members in knowing the fate of the missing person",[62] whilst also providing "retribution for the harm inflicted upon these secondary victims".[63]

Accordingly, "the judgments of the Nuremberg Tribunals relating to the Night and Fog program are important because they represent the first application of international law to the conduct underlying enforced disappearance".[64] In fact, the jurisprudence emanating from these Tribunals[65] "reveals that the conduct underlying enforced disappearance was prohibited by the customary laws of war and constituted a war crime carrying individual criminal liability".[66] Moreover, these judgments highlight the nature of enforced disappearances as a crime against humanity and a war crime, particularly considering that the words "enforced disappearance" were not adopted by the Nazi regime,[67] indicating that "the offense would be criminal even when committed outside the context of military occupation".[68] In other words, "the possible victims of crimes against humanity form a much more inclusive group than those protected by the laws of war and include same-country nationals, the nationals of allied co-belligerents, and stateless persons".[69] Further, the judgments of the Tribunals are accepted as part and parcel of customary international law (**"CIL"**):[70] this "precedent alone establishes that the offense of enforced disappearance carries individual criminal liability under CIL".[71]

[60] *Supra at n29,* at p. 173
[61] *Supra at n29,* at p. 173
[62] *Supra at n29,* at p. 173
[63] *Supra at n29,* at p. 173
[64] *Supra at n29,* at p. 175
[65] *Supra at n3,* at p. 26
[66] *Supra at n29,* at p. 175
[67] *Supra at n3,* at p. 26
[68] *Supra at n29,* at p. 175
[69] *Supra at n29,* at p. 175
[70] *Supra at n29,* at p. 176
[71] *Supra at n29,* at p. 176

1.1 The *Kietel* and *Justice* Cases

Field Marshal Wilhelm Keitel, responsible for implementing the Night and Fog Decree,[72] was tried and hanged for his role in carrying out the Decree.[73] Explaining the objective of the *Nacht und Nebel Erlass* in a cover letter accompanying the Decree,[74] Keitel stated: "The Fuehrer is of the following opinion. If these offences are punished with imprisonment, even with hard labour for life, this will be looked upon as a sign of weakness. Efficient and enduring intimidation can only be achieved either by capital punishment or by other measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany".[75]

Accordingly, under the Decree, "the Ministry of Justice, courts, prosecutors, military and Gestapo caused thousands of civilians in the occupied territories to be arrested, transported to Germany, prosecuted, imprisoned in cruel and inhumane conditions and sentenced to death".[76] In effect, the Decree "was a subtly woven fabric of fear cast by Hitler over the territories his military occupied":[77] the very fear of "the silent removal of loved ones made life a torment".[78]

From this, it is clear that "the aim of the secret arrest and detention prescribed by the Night and Fog Decree was twofold":[79] firstly, "an individual was to be removed from the protection of law";[80] and secondly, "secret arrest and detention served as a form of deterrence, achieved through the intimidation and anxiety caused by the persistent uncertainty among the missing person's family".[81] In other words, "by terrorizing the occupied populations of Western Europe through a program of enforced disappearance, Hitler hoped to suppress resistance".[82]

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[72] *Supra at n29,* at p. 176
[73] *Supra at n29,* at p. 176; *See also: Supra at n27,* at p. 426
[74] *Supra at n29,* at p. 176
[75] *Supra at n29,* at p. 176
[76] *Supra at n42,* at p. 180
[77] *Supra at n42,* at p. 180
[78] *Supra at n42,* at p. 180
[79] *Supra at n29,* at p. 176
[80] *Supra at n29,* at p. 176
[81] *Supra at n29,* at p. 176; *See also: Supra at n19,* at p.4
[82] *Supra at n29,* at p. 176

The objective of the Decree is thus similar to the resort to enforced disappearances by State agencies in today's world, i.e. maintaining power, "at any cost", for the sole benefit of those who hold that power, by making "opponents disappear".[83] In fact, during the 1980s, the "national security doctrine" was used "throughout almost all the Latin American region" to "spread terror" and induce "psychological submission to the benefit of those who, while violating the most basic laws of human co-existence, enjoyed a condition of total impunity".[84] This will be discussed in greater detail in the following sections.

The International Military Tribunal (**"IMT"**), which emerged as a consequence of an international agreement between the Allied Powers,[85] "tried the twenty-four highest ranking officials of the Third Reich in a single trial".[86] From the views espoused by the prosecution and judges of the IMT, it is evident that "they believed the disappearance of civilians by German authorities to be a war crime because of its effects on the families of the missing persons".[87] The prosecution contended that the "murders and ill-treatment" meted out under this program were "contrary to International Conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and to Article 6(b) of the Charter".[88] Further, the IMT at Nuremberg recognized that the Decree had been used by the Nazis "to perpetrate a statewide, governmentally organized system of cruelty and injustice".[89]

Equally important was the fact that the UK prosecutor, Hartley Shawcross "cited Keitel's 'efficient and enduring intimidation' letter in order to highlight the fact that the detention of prisoners 'under circumstances which would deny any information with regard to their fate' was itself criminal".[90] The IMT endorsed this view by ascertaining that the Night and Fog program was "a form of mistreatment inflicted

[83] *Supra at n5,* at p. 91
[84] *Supra at n5,* at p. 91
[85] *Supra at n29,* at p. 177
[86] *Supra at n29,* at p. 177
[87] *Supra at n29,* at p. 177
[88] *Supra at n29,* at p. 177
[89] *Supra at n42,* at p. 181
[90] *Supra at n29,* at p. 177

upon the missing persons and their families, rather than as murder or as deportation qua deportation".[91] Through its focus on "the effects of the Night and Fog program on the families of the missing", the judgment in the *Keitel* case "indicates that the IMT considered enforced disappearance as a violation of the 'family honours and rights' guaranteed by CIL and articulated in the 1907 Hague Regulations".[92]

After the *Keitel* trial, "the individual Allied Powers tried a number of lower-ranking German war criminals before national military tribunals sanctioned by the Control Council governing occupied Germany".[93] The U.S. Military Tribunal at Nuremberg (**"NMT"**) was constituted as a result of an executive order issued by President Truman.[94] Here, during the *Justice* case, "the leading lawyers of the Third Reich were tried for their roles in implementing the Night and Fog program".[95]

While endorsing the jurisprudence of the IMT in the *Keitel* case, the NMT's prosecutors and judges went a step further by developing their arguments not only within the context of the laws of war, "but also in the 'general principles of criminal law as derived from the criminal laws of civilized nations' and the 'laws of humanity' and therefore classified enforced disappearance both as a war crime and as a crime against humanity".[96] In fact, from the conclusions arrived at by the NMT, it is clear that the major emphasis of reasoning for said conclusions was the impact of the program on the missing persons' families.[97] The NMT held that the practice of disappearances under the Decree "created an atmosphere of constant fear and anxiety" among the relatives of the missing persons,[98] finding that such "secret arrest and incommunicado detention" constituted "inhumane treatment".[99]

In addition to the Nuremberg Tribunals, the United Nations (**"UN"**) War Crimes Commission also deemed the Night and Fog program "a violation of family rights"

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[91] *Supra at n29,* at p. 178
[92] *Supra at n29,* at p. 178
[93] *Supra at n29,* at p. 178
[94] *Supra at n29,* at p. 178
[95] *Supra at n29,* at p. 178
[96] *Supra at n29,* at pp. 178-179
[97] *Supra at n29,* at p. 180
[98] *Supra at n29,* at p. 180
[99] *Supra at n29,* at p. 180

secured under International Humanitarian Law (**"IHL"**).[100] The Commission asserted: "family honour and rights have been only indirectly protected, in that the violation of family rights have not been explicitly made the subject of a charge. Many of the offences for which war criminals have been condemned have, however, constituted violations of family rights".[101]

This conception of protecting families during military occupation has its clear origins in the laws of war.[102] Such protection of family rights has not been rendered "an irrelevant artifact of the nineteenth century but remains an important value safeguarded by the laws of war".[103] For instance, Article 27 of the Fourth Geneva Convention[104] stipulates: "protected persons are entitled, in all circumstances, to respect for their persons, their honour, [and] their family rights".[105] Such protection is safeguarded owing to the fact that the family, as an institution, is "the natural and fundamental group unit of society".[106] Similar protections are contained in Additional Protocol I (**"AP I"**),[107] which recognizes "the right of families to know the fate of their relatives".[108] Thus, under AP I, parties are obliged to "facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation".[109] Further, parties are also obligated "to facilitate the return of the remains of the deceased".[110]

It is important to note that IHL extends these protections to families in not only international armed conflicts, but also in non-international armed conflicts and during internal conflicts.[111] Consequently, enforced disappearances constitute "a war crime

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[100] *Supra at n29,* at p. 181
[101] *Supra at n29,* at p. 181
[102] *Supra at n29,* at pp. 181-182
[103] *Supra at n29,* at p. 183
[104] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287
[105] *Supra at n104,* Article 27
[106] *Supra at n29,* at p. 183
[107] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3
[108] *Supra at n107,* Article 32
[109] *Supra at n107,* Article 33(2)(b)
[110] *Supra at n107,* Article 34(2)(c)
[111] *Supra at n29,* at p. 185

carrying individual liability whether committed in an international or non-international conflict".[112]

[112] *Supra at n29,* at p. 186

Chapter Two - From IHL to Human Rights Law: Developments in Latin America, Europe, Asia and the Middle East

Beginning in the mid-1960s to the 1970s, enforced disappearances were used "as a tool of political repression" by security forces in Guatemala[113] and Brazil.[114] It was here "that the term *desaparecido* (disappeared one) originated in the 1960s".[115] A similar wave of disappearances occurred in massive numbers across Chile, the Philippines, Uganda and Argentina.[116] In fact, in Chile, "the systematic practice of disappearances lasted from 1973 to 1977" with approximately 1300 persons missing.[117] This is in addition to the 2000 people who were extra-judicially executed.[118]

Within Chile, the problem received recognition in the 1970s "when human rights lawyers in Chile noted that some of the prisoners they were representing had vanished even though they were ostensibly still held in custody by Chilean security forces".[119] Throughout Latin America, during the 1970s and 1980s, this practice continued extensively, "affecting tens of thousands of people".[120] Various Latin American States would "routinely abduct people, hold them in clandestine prisons, subject them to torture and often execute them without trial".[121] Various persons, including peasants, students and intellectuals,[122] were labeled "internal enemies" and subsequently made to disappear.[123]

Moreover, the bodies of the victims of enforced disappearances "were frequently hidden or destroyed to eliminate any material evidence of the crime and to ensure the impunity of those responsible".[124] As mentioned above, this practice was "particularly

[113] *Supra at n45,* at p. 222
[114] *Supra at n14,* at p. 249
[115] *Supra at n45,* at p. 223
[116] *Supra at n45,* at p. 223
[117] *Supra at n45,* at p. 223
[118] *Supra at n45,* at p. 223
[119] *Supra at n45,* at p. 223
[120] *Supra at n14,* at p. 249
[121] *Supra at n14,* at p. 249
[122] *Supra at n19,* at p.6
[123] *Supra at n19,* at p.6
[124] *Supra at n14,* at p. 249

widespread in Argentina, during the so-called dirty war".[125] In fact, the National Commission on Disappeared People in Argentina, created in 1983, reported around 8960 cases of enforced disappearances.[126] In addition to Chile and Argentina, such disappearances were also prevalent in El Salvador,[127] Peru,[128] Colombia,[129] Uruguay[130] and Honduras.[131] The practice was also adopted in the Philippines, Equatorial Guinea, Afghanistan and Sri Lanka.[132]

The overarching purpose of this practice "was to dispose of political opponents secretly while evading domestic and international legal obligations and to sow intimidation into the fabric of society".[133] As stated by General Iberico Saint-Jean, the governor of Buenos Aires at the time of the first junta in Argentina: "first we kill the subversives; then we kill collaborators; then… their sympathizers; then those who remain indifferent; and finally we kill the timid".[134] One of the most significant factors that ensured impunity for this practice was the cooperation ongoing at the time between several dictatorships in Latin America,[135] which formed part and parcel of Operation Condor, "a highly sophisticated system through which the dictatorial regimes exchanged intelligence information".[136] Under this, a major purpose of the use of enforced disappearance "was to instill terror among the population with the aim being to control and eradicate any aspiration of social justice",[137] which meant that any and all democratic opposition, was a perceived threat to the Latin American regimes.[138]

Following these developments, the Inter-American Commission on Human Rights (**"IACHR"**) emerged as the first international body to react to and publicly denounce

[125] *Supra at n14,* at p. 249
[126] *Supra at n14,* at p. 249
[127] *Supra at n14,* at p. 249
[128] *Supra at n14,* at p. 249
[129] *Supra at n14,* at p. 250
[130] *Supra at n14,* at p. 250
[131] *Supra at n14,* at p. 250
[132] *Supra at n42,* at p. 181
[133] *Supra at n14,* at p. 250
[134] *Supra at n19,* at p.6
[135] *Supra at n19,* at p.6
[136] *Supra at n19,* at p.7
[137] *Supra at n19,* at p.7
[138] *Supra at n19,* at p.7

the phenomenon.[139] In 1974, the IACHR released its report on the human rights situation in Chile.[140] The UN General Assembly (**"UNGA"**) also took this practice into account in Resolution 33/173 (1978),[141] while "referring to the situation of disappeared people in Chile and Cyprus".[142] Through this UNGA Resolution, States were called upon to: (i) allocate resources towards searching for persons who had allegedly disappeared, whilst also undertaking impartial and speedy investigations;[143] (ii) ensure accountability for this crime;[144] (iii) safeguard the human rights of all persons subjected to detention or imprisonment;[145] and (iv) engage in cooperation to locate the victims of enforced disappearances.[146]

2.1 The Jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights

2.1.1 Overcoming Obstacles Relating to Burden of Proof Requirements and Circumstantial Evidence

In 1988, the IACtHR rendered its judgment on the problem of enforced disappearances in the *Velasquez Rodriguez v. Honduras* case,[147] where the Court "stressed the complex character of the offence of enforced disappearances".[148] Here, Manfredo Angel Velasquez Rodriguez, a Honduran national, had been kept in a detention center in Tegucigalpa since 12 September 1981, after which there was no information regarding his whereabouts.[149] Mr. Rodriguez left behind a wife and four young children when he disappeared.[150]

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[139] *Supra at n5,* at p. 92
[140] Inter-American Commission on Human Rights, *Report on the Human Rights Situation in Chile*, doc. OEA/Ser.L/V/II.34 doc.21 of 25 October 1974
[141] UN General Assembly, *Disappeared persons*, 20 December 1978, A/RES/33/173
[142] *Supra at n5,* at p. 92
[143] *Supra at n141,* at para. 1(a)
[144] *Supra at n141,* at para. 1(b)
[145] *Supra at n141,* at para. 1(c)
[146] *Supra at n141,* at para. 1(d)
[147] *Velasquez Rodriguez Case,* Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988
[148] *Supra at n5,* at p. 94
[149] Grossman, Claudio. "Disappearances in Honduras: the need for direct victim representation in human rights litigation." *Hastings Int'l & Comp. L. Rev.* 15 (1991): 363; at p. 363
[150] *Supra at n149,* at p. 363

In this case, the IACtHR, for the first time, exercised its compulsory jurisdiction[151] and "recognized the continuing nature of the offence, as long as the fate or whereabouts of the victim have not been determined".[152] This has become a key characteristic in defining the offense of enforced disappearance and remains a crucial benchmark in assessing whether such an offense has been committed or not.

A key question addressed by the Court pertained to the burden of proof vis-à-vis enforced disappearances.[153] Since the American Convention on Human Rights (**"ACHR"**)[154] "does not specifically deal with such a question",[155] the Court espoused "a liberal, but fully justified, interpretation, which makes it possible for the victims and their relatives to face the serious problem of collecting evidence and substantially reverses the burden of proof if a general practice of enforced disappearances can be demonstrated".[156] In doing so, the Court "adopted a two-step approach for resolving the burden of proof issue"[157] by identifying the two criteria required to be fulfilled by the claimant to prove a person's disappearance.[158] First, the claimant must demonstrate the existence of a governmental practice of enforced disappearances;[159] and second, the claimant must illustrate that the disappearance of the particular individual in question was linked to said practice.[160] What is significant about this jurisprudence is that it is not essential to prove that the government itself is behind an enforced disappearance:[161] it is sufficient to prove that the government is tolerant of the practice.[162] Such reasoning has been adopted by different domestic courts around the world, which is a positive development considering the traditional burden of proof standard would negatively impact a victim's case within the context of an enforced disappearance.

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[151] *Supra at n149,* at p. 363
[152] *Supra at n5,* at p. 94
[153] *Supra at n5,* at p. 94
[154] Organization of American States (OAS), *American Convention on Human Rights*, *"Pact of San Jose"*, *Costa Rica*, 22 November 1969
[155] *Supra at n5,* at p. 94
[156] *Supra at n5,* at p. 94
[157] *Supra at n11,* at p. 415
[158] *Supra at n11,* at p. 415
[159] *Supra at n11,* at p. 415
[160] *Supra at n11,* at p. 415
[161] *Supra at n11,* at p. 415
[162] *Supra at n11,* at p. 415

As a result, the Court attributed the enforced disappearance of Mr. Velasquez to Honduras, "which was declared internationally responsible for the violation of Articles 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) of the American Convention".[163] Subsequently, in other cases following *Velasquez*, "the Court also found the violation of Articles 8 (right to a fair trial) and 25 (right to judicial protection), both in conjunction with Article 1 of the American Convention".[164] In fact, since 1997, the Court has consistently recognized "that enforced disappearance violates the right to know the truth of relatives of victims, as well as of the society as a whole",[165] despite the fact that this right is not codified *per se* in the ACHR.[166]

Similar developments on burden of proof requirements can be seen in the jurisprudence of the ECtHR. By their nature and definition, cases of enforced disappearance "entail the denial of the events in question by those responsible" which creates "difficulties of proof for applicants" as a consequence of State denial of relevant facts, thereby creating a hurdle for the ECtHR in making a determination that an enforced disappearance has indeed occurred.[167] Similar problems are faced by applicants at the international and domestic level, where States either refuse to disclose necessary and relevant information or decline requests to carry out investigations. This is particularly problematic for applicants at the regional level when domestic courts have not been able to determine the facts of a case due to lack of State cooperation, thus leaving applicants in a position where they have no access to proof to substantiate their claims. Such a situation usually implies that the regional court in question must "make determinations analogous to those usually made by a court of first instance".[168] This also highlights the need for regional and international courts dealing with these cases to adapt their functioning to cater to such circumstances.

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[163] *Supra at n5,* at pp. 94-95
[164] *Supra at n5,* at p. 95
[165] *Supra at n5,* at p. 95
[166] *Supra at n5,* at p. 95
[167] Keller, Helen and Corina Heri. "Enforced Disappearance and the European Court of Human Rights: A 'Wall of Silence', Fact-Finding Difficulties and States as 'Subversive Objectors'." *Journal of International Criminal Justice* 12 (2014): 735-750; at p. 738
[168] *Supra at n167,* at p. 738

Within the framework of the European Convention on Human Rights (**"ECHR"**),[169] the Court has "nuanced" its standard of proof, i.e. "beyond a reasonable doubt", in the case of enforced disappearances.[170] Here, "where the evidence required to meet the usual standard of proof is not available to the applicants, the ECtHR has relied on inferences and presumptions and has redistributed the burden of proof based on the severity of the allegations, the lack of clarity about the factual situation, and the nature of the rights in question".[171] In *Varnava and Others v. Turkey*,[172] the Court stated that "where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities",[173] an applicant's contentions "amounting to a *prima facie* case of disappearance"[174] will shift the burden of proof onto the government in question to provide a "satisfactory and convincing explanation".[175] A similar approach should be adopted by domestic courts across various States to ensure that a government cannot evade liability for its own wrongs by refusing to cooperate.

In such circumstances where there is State refusal to cooperate, the intervention of NGOs may also prove fruitful, whether through their intervention as third parties in the Court proceedings or through assistance in providing relevant documentation to the ECtHR which may facilitate the Court's own fact-finding efforts.[176] This is an especially important task to carry out where there has been no fact-finding at the domestic level.

The *El-Masri* case[177] is an apt example of the difficulties faced by regional courts such as the ECtHR in ascertaining the facts of a case where there is "comprehensive governmental silence surrounding disappearances".[178] In *El-Masri*, "the respondent Government refused to give any sort of acknowledgment of Mr. El-Masri's detention

[169] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14,* 4 November 1950, ETS 5
[170] *Supra at n167,* at p. 738
[171] *Supra at n167,* at p. 738
[172] *Varnava and Others v. Turkey*, Appl. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Council of Europe: European Court of Human Rights, 18 September 2009
[173] *Supra at n172,* at para. 183
[174] *Supra at n167,* at p. 739
[175] *Supra at n172,* at para. 183
[176] *Supra at n167,* at p. 740
[177] *El-Masri v. the former Yugoslav Republic of Macedonia*, Appl. No. 39630/09, Council of Europe: European Court of Human Rights, 13 December 2012
[178] *Supra at n167,* at p. 742

in the former Republic of Macedonia and denied his allegations that he had been held in incommunicado detention by the Macedonian authorities and subjected to extraordinary rendition and treatment amounting to a violation of Article 3 of the ECHR".[179] As witness protection was a major concern for the Court in this case,[180] domestic courts are faced with similar problems of adopting certain measures to protect key witnesses that are to testify during proceedings.

Another significant case highlights the seriousness of witness protection problems faced by regional courts, and similarly shared by domestic courts. In *Tekdag v. Turkey*,[181] the wife of an alleged victim of an enforced disappearance stated before the Court that her husband had been seen by a fellow detainee in State custody.[182] The impediment here was that the many witnesses who had similar testimonies were "too afraid to testify".[183] Consequently, the applicant could not prove the detention of her husband by State agents owing to the fact that she could only produce and submit circumstantial evidence, thereby weakening her case.[184] The Court, thus, could not find a violation of Articles 2 or 5 of the ECHR,[185] leaving the applicant without a remedy.

In two cases following *Tekdag*, "the ECtHR attempted to combat the difficulties faced by applicants in disappearance cases by modifying its approach to the burden of proof under these circumstances".[186] Resultantly, the ECtHR's jurisprudence on enforced disappearance has evolved to a point where it now holds that State refusal to produce "the necessary facilities in order to allow the ECtHR to properly and effectively examine an application may not only lead to the drawing of inferences as to the well-foundedness of the applicant's allegations, but may additionally reflect negatively on the state's compliance with Article 38 of the ECHR".[187] In order to combat the culture

[179] *Supra at n167,* at p. 742
[180] *Supra at n167,* at p. 743
[181] *Tekdag v. Turkey*, Appl. No. 27699/95, Council of Europe: European Court of Human Rights, 15 January 2004
[182] *Supra at n167,* at p. 744
[183] *Supra at n167,* at p. 744
[184] *Supra at n167,* at p. 744
[185] *Supra at n167,* at p. 744
[186] *Supra at n167,* at p. 744
[187] *Supra at n167,* at p. 745

of impunity that surrounds enforced disappearance, lessons must be learnt by domestic courts from this approach.

The first handful of cases decided by the IACtHR and ECtHR on enforced disappearances have thus been crucial in developing human rights protection across Latin America and Europe, respectively.[188] In fact, the IACtHR's decision in *Velasquez,* on attribution of responsibility to Honduras and compensation to the victim's families, "represent enormous breakthroughs for the protection of human rights in the hemisphere".[189]

2.1.2 Evolution of The Right to Truth

One of the most pressing concerns vis-à-vis the issue of enforced disappearances remains the establishment of a mechanism firmly securing the "right to truth"[190] of family members of the victims of enforced disappearances. On 12 October 2009, the Human Rights Council adopted a resolution in this regard, "calling upon states to take a number of steps to facilitate efforts by victims or their next of kin to determine the truth about gross violations of human rights".[191] This principle has its origins in Article 32 of AP I, which provides "that parties shall be prompted mainly by the right of families to know the fate of their relatives".[192] Within the context of human rights, this principle is enshrined in the Preamble to the ICPED which upholds "the right of any victim to know the truth about the circumstances of an enforce disappearance and the fate of the disappeared person".[193]

The right to truth primarily developed out of the jurisprudence of the IACtHR,[194] though today it is recognized by other regional bodies such as the ECtHR as well.[195] The legal basis of this right stems "from two underlying categories of protections

[188] *Supra at n149,* at p. 365
[189] *Supra at n149,* at p. 371
[190] Groome, Dermot. "The right to truth in the fight against impunity." *Berkeley J. Int'l L.* 29 (2011): 175; at p. 176
[191] *Supra at n190,* at p. 176
[192] *Supra at n190,* at p. 176
[193] *Supra at n190,* at p. 177
[194] *Supra at n190,* at p. 177
[195] *Supra at n190,* at p. 177

found in international conventions":[196] first, "a state's failure to disclose the fate of a person in the custody of the state constitutes inhuman treatment with respect to family members and is a continuing violation of applicable protections against such treatment";[197] and second, "a state's failure to adequately investigate and prosecute crimes committed against a person in its custody constitutes a violation of family's right of access to justice".[198]

In this regard, the 1998 *Blake v. Guatemala* case is pertinent.[199] The Court here "considered whether the family of Nicholas Blake, an American journalist, had an independently enforceable right to compel the government of Guatemala to investigate his disappearance".[200] Blake had disappeared while on assignment in Guatemala in 1985,[201] and the IACtHR here found that "not only had the government failed to adequately investigate Blake's disappearance, but it had also obstructed the family's own efforts to ascertain the truth".[202] Similar reasoning, vis-à-vis the right to truth, as contained in *Blake* was subsequently applied by the IACtHR in several other cases,[203] including *Villagran-Morales et al. v. Guatemala*.[204]

The IACtHR, in *Blake*, "declared for the first time that the relatives of victims of enforced disappearance are themselves victims of inhumane and degrading treatment, which amounts to a violation of Article 5 of the American Convention".[205] Since this judgment, the IACtHR has "always presumed that the relatives of disappeared people are *ipso facto* victims of inhumane and degrading treatment, without a need to impose on them any burden of proof".[206] The Court has even adopted "a wide concept" of the term "relatives",[207] perhaps owing in large part to the "crucial importance of granting relatives of disappeared people access to justice and of avoiding the application of

[196] *Supra at n190,* at p. 177
[197] *Supra at n190,* at p. 177
[198] *Supra at n190,* at p. 177
[199] *Blake v. Guatemala*, Inter-American Court of Human Rights (IACrtHR), 24 January 1998
[200] *Supra at n190,* at p. 178
[201] *Supra at n190,* at p. 178
[202] *Supra at n190,* at p. 178
[203] *Supra at n190,* at p. 178
[204] *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights (IACtHR), 19 November 1999
[205] *Supra at n5,* at p. 95
[206] *Supra at n5,* at pp. 95-96
[207] *Supra at n5,* at p. 96

measures which may contribute to impunity".[208] However, there is still some uncertainty over "how close the relationship must be for the Court to find the necessary close ties to the victim".[209]

In the recent case of *Heliodoro Portugal v. Panama*,[210] the IACtHR established several conditions that must be considered so as to determine whether, within the context of Article 5 of the ACHR, a victim's relative is to be deemed a victim.[211] These conditions include: "(1) the existence of a close family tie; (2) the particular circumstances 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; and (5) the context of a system that prevents free access to justice as a result of not knowing the victim's whereabouts".[212]

The ECtHR has also adopted similar reasoning vis-à-vis the right to truth in its jurisprudence, most notably in *Cyprus v. Turkey*.[213] The case pertained to "the continued failure of Turkey to account for persons last seen in the custody of Turkish troops during its military operations in northern Cyprus in the summer of 1974".[214] This failure on the part of the Turkish government "constituted a continuing violation of Article 3"[215] of the Convention "with respect to the relatives of the Greek-Cypriot missing persons".[216] The Court's reasoning revealed that "the essence of the Article 3 violation is not as much the actual disappearance but rather in the state's reaction to the family's efforts to obtain information".[217]

In light of this, the right to truth can be seen as intrinsically tied to the right of access to justice, and in fact, the IACtHR's jurisprudence has affirmed the linkage between the two.[218] For instance, in *Castillo-Paez v. Peru*,[219] the Court endorsed the findings

[208] *Supra at n5,* at p. 96
[209] *Supra at n11,* at p. 441
[210] *Heliodoro Portugal v. Panama,* Inter-Am.Ct.H.R. (Ser. C) No. 186 (2008), Inter-American Court of Human Rights (IACrtHR), 12 August 2008
[211] *Supra at n11,* at p. 442
[212] *Supra at n11,* at p. 442
[213] *Cyprus v. Turkey*, 25781/94, Council of Europe: European Court of Human Rights, 10 May 2001
[214] *Supra at n190,* at p. 179
[215] *Supra at n190,* at p. 179
[216] *Supra at n190,* at p. 179
[217] *Supra at n190,* at p. 180
[218] *Supra at n190,* at p. 183

made in *Blanco-Romero et al. v. Venezuela*,[220] in which the Court stipulated: "The right to know the truth is included in the right of the victim or of the victim's next of kin to have the relevant State authorities find out the truth of the facts that constitute the violations and establish the relevant liability through appropriate investigation and prosecution".[221]

By developing this linkage between the right to truth "in the broader context of the right of access to justice", the IACtHR enhances its ability "to require states not only to adequately investigate the circumstances surrounding a gross violation but also to mandate that they undertake prosecutions and disciplinary actions warranted by the investigation".[222] In simpler terms, "the families of victims not only have the right to know the truth but also have the right to know that justice has been done".[223] This is not just a right that accrues to the family members of the disappeared person but also society at large,[224] as held by the Court in *Los Dos Erres*,[225] where it stated: "The Court considers that in a democratic society the truth on grave human rights violations must be known".[226]

2.1.3 Enforcement/Implementation Hurdles

The ECtHR has heard complaints concerning enforced disappearances from four main regions, namely Cyprus, South-Eastern Turkey, the Russian Northern Caucasus and the former Yugoslavian States.[227] The bulk of significant judgments on enforced disappearance, therefore, stems from state behaviour within these regions, which has been violative of the provisions of the ECHR.[228]

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[219] *Castillo Páez Case*, Inter-American Court of Human Rights (IACtHR), 10 September 1996
[220] *Blanco-Romero et al. v. Venezuela*, Inter-American Court of Human Rights (IACtHR), 28 November 2005
[221] *Supra at n190,* at p. 183
[222] *Supra at n190,* at pp. 183-184
[223] *Supra at n190,* at p. 184
[224] *Supra at n190,* at p. 184
[225] *Case of the "Las Dos Erres" Massacre v. Guatemala*, Inter-American Court of Human Rights (IACtHR), 24 November 2009
[226] *Supra at n190,* at p. 184
[227] *Supra at n167,* at p. 737
[228] *Supra at n167,* at p. 737

Under the ECHR, States are required to "conduct an adequate investigation of the acts in question and to take steps to ensure the accountability of those responsible".[229] Unfortunately, however, "States sometimes build a 'wall of silence' between themselves and the ECtHR by – as per the definition of enforced disappearance – denying the events in question" and even by actively undermining the proceedings before the Court.[230]

This 'wall of silence' entails a general lack of cooperation on the part of the concerned State, which "renders the process of fact-finding and the implementation of the ECtHR's judgments particularly difficult".[231]

Article 46(1) of the ECHR stipulates that Contracting States should "abide by the final judgment of the Court in any case to which they are parties". When governments refuse to implement judgments of the ECtHR on enforced disappearances, "with the national authorities taking the role of 'subversive objectors' who refuse to implement judgments at the domestic level",[232] the safeguards against this practice and the prohibition of enforced disappearances is significantly eroded. Such refusal to implement decisions of the judiciary are seen at the domestic level as well, where the executive branch declines enforcement of judicial decisions pertaining to enforced disappearances, and therefore, continues to foster a culture of impunity that allows the practice to go unchecked.

Due to the structure of the international legal system within which we operate, where States must be willing to give effect to their legal obligations, jurisprudence of international, regional or domestic courts can only go so far in building the pressure required to combat the practice of enforced disappearances.

[229] *Supra at n167,* at p. 737
[230] *Supra at n167,* at pp. 737-738
[231] *Supra at n167,* at p. 738
[232] *Supra at n167,* at p. 748

2.1.4 Amnesty Legislation as an Impediment to Accountability

The IACtHR has "repeatedly affirmed that amnesty legislation, provisions on prescription or similar measures that have the effect of preventing the investigation and punishment of those accused of enforced disappearance are inadmissible".[233] This is one of the most "crucial" contributions of the IACtHR within the realm of jurisprudence concerning grave human rights violations.[234]

Additionally, another significant hurdle to ensuring accountability for acts of enforced disappearance has been the invocation of "national security" by States.[235] The doctrine itself is problematic due to the fact that definitions of "national security" are subjective, allowing for a range of different interpretations,[236] thereby leaving much room for States to "sacrifice human rights on the altar of internal security".[237] Considering the practice of States in invoking "national security" as grounds for carrying out enforced disappearances (which persists even today),[238] the IACtHR has also provided protection against this potential loophole by holding that "States cannot invoke mechanisms such as the secret of State, the confidentiality of intelligence information or reasons of public interest or national security, to deny access to information which may contribute to the establishment of the truth on the facts and to identify and sanction those responsible".[239]

In addition, the IACtHR has deemed military tribunals "not competent in cases of enforced disappearance, as their jurisdiction must have a restrictive and exceptional application".[240] In fact, the jurisdiction of military tribunals must be restricted "to the protection of those special judicial interests that are linked with the functions that the law attributes to military forces".[241] Moreover, through its "rich jurisprudence on the

[233] *Supra at n5,* at p. 96; *See also:* Binder, Christina. "The prohibition of amnesties by the Inter-American Court of Human Rights." *German L. J.*, Vol. 12, No. 5 (2011): 1203- 1230; at p. 1204
[234] Binder, Christina. "The prohibition of amnesties by the Inter-American Court of Human Rights." *German L. J.*, Vol. 12, No. 5 (2011): 1203- 1230; at p. 1204
[235] Cornell, Angela and Kenneth Roberts. "Democracy, counterinsurgency, and human rights: the case of Peru." *Hum. Rts. Q.* 12 (1990): 529; at p. 531
[236] *Supra at n235,* at p. 542
[237] *Supra at n235,* at p. 551
[238] *Supra at n235,* at p. 531
[239] *Supra at n5,* at p. 96
[240] *Supra at n5,* at p. 97
[241] *Supra at n5,* at p. 97

subject",[242] the Court has repeatedly affirmed the duty of States "to introduce in their criminal codes the autonomous offence of enforced disappearance" as the codification of such disappearances "is an indispensable means to eradicate impunity".[243]

Another important development in the IACtHR's jurisprudence is the Court's stipulation that "given the continuing nature of the offence of enforced disappearance, even if a State codifies it after the commission of a specific disappearance, the codification will be applicable to the case in question, as long as the fate and whereabouts of the disappeared person have not been established with certainty, an impartial investigation on the facts has not been carried out and those responsible have not been judged and sentenced".[244] Moreover, in its 2006 judgment on enforced disappearances that occurred during *Operacion Condor*, the Court asserted the non-derogable nature (*jus cogens* character) of the prohibition of enforced disappearances.[245]

Additionally, with regard to measures of reparation, the IACtHR's jurisprudence has been "the most advanced and complete one on the subject",[246] including measures for pecuniary compensation, rehabilitation, restoration of honour and guarantees of non-repetition, and satisfaction.[247] Over and above pecuniary compensation, the IACtHR has required States "to take all necessary measures to locate and identify the mortal remains of the victims and to deliver them to the relatives; to investigate the facts leading to the enforced disappearance of the victims and prosecute and punish the authors, accomplices, accessories and all those who may have had some part in the events; to commemorate the names of the victims by giving them to streets, schools or public buildings" and many other measures of a similar nature, including adoption of education and training-related measures.[248]

[242] *Supra at n5,* at p. 97
[243] *Supra at n5,* at p. 97
[244] *Supra at n5,* at p. 97
[245] *Supra at n5,* at p. 97
[246] *Supra at n5,* at p. 99
[247] *Supra at n5,* at p. 99
[248] *Supra at n5,* at p. 99

Chapter Three - The Ultimate Paradox: Protectors as Perpetrators

In order to understand why it is so difficult to uncover the truth and facts pertaining to an enforced disappearance, it is important to briefly describe the "hierarchical organization" of State institutions that are often involved in this practice.[249] Amnesty International has defined these organizational characteristics rather aptly: "As an institution, the armed forces possess certain characteristics which enable them to carry out such a task: centralized command, ability to act rapidly and on a national scale, capacity to use lethal force and to overcome any resistance".[250] It is this immense resource capability of the state that places it in a position where its security forces can "cover their tracks through a series of sophisticated techniques".[251]

These techniques may include "secret crack units whose agenda and operations are not officially acknowledged or the training and arming of militant or extremist pro-government vigilantes".[252] Consequently, "efforts by relatives, lawyers, journalists and human rights organizations to obtain information… usually run into a maze of bureaucracy or a solid wall of 'classified' state security information, a legitimate ground upon which refusal may be justified".[253] The fact that this practice is thus shrouded in secrecy "facilitates the practice by confusing and neutralizing the efforts of those taking or wishing to take corrective action".[254]

Even today, despite there being many watchful eyes on the conduct of every State, where news of this practice surfaces, "the state usually tries to deflect international criticism by devising convincing excuses such as attributing the killing to independent 'death squads' and lack of evidence".[255] An apt illustration of this tactic is seen in the response of the military establishment in Pakistan to the *Pashtun Tahafuz Movement* (**"PTM"**), which has demanded answers and accountability for thousands of alleged victims of enforced disappearances throughout the country.[256]

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[249] *Supra at n42,* at p. 186
[250] *Supra at n42,* at p. 186
[251] *Supra at n42,* at p. 187
[252] *Supra at n42,* p. 187
[253] *Supra at n42,* at p. 187
[254] *Supra at n42,* at p. 187
[255] *Supra at n42,* at p. 187
[256] Siddique, Abubakar. "Pashtun people power is jolting the military establishment in Pakistan", *Washington Post*, 10 May 2018. Web, available at: https://www.washingtonpost.com/news/democracy-

There have been concerted efforts on the part of Pakistan's military establishment to "discredit the PTM's rise by calling it a hybrid war",[257] whilst also harassing and arresting its activists and effectively ensuring an "unspoken ban on media coverage of the movement".[258] Instead of acknowledging the genuine concerns of the families of *Pashtuns* who have been forcibly disappeared, the State of Pakistan has done everything in its power to malign the PTM as "an anti-state conspiracy sponsored by hostile foreign powers".[259] As has occurred in other parts of the world, this "iron curtain of secrecy effectively becomes the main line of defence while the military characterize the accusations against them as part of a black propaganda campaign orchestrated by guerilla groups to undermine public confidence in the army and police".[260]

By adopting this line of argument, the state in question is able to undercut the efforts of human rights organizations and activists by smearing them as "tools of subversion used by the armed opposition to attack the forces of law".[261] In order to counter this tactic adopted by oppressive regimes, it is crucial that the international community pressure States accused of such practices to allow within their territories monitoring and fact-finding missions so as to establish a concrete basis for claims of alleged disappearances from which a stronger counter-narrative can be developed to combat this culture of impunity.

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post/wp/2018/05/10/pashtun-people-power-is-jolting-the-military-establishment-in-pakistan/?noredirect=on&utm_term=.01b626b03541 [Accessed 08/08/2018]

[257] *Ibid*

[258] *Ibid*

[259] *Ibid*

[260] *Supra at n42,* at p. 187

[261] *Supra at n42,* at p. 187

Chapter Four - Case Studies of Enforced Disappearances

4.1 Argentina

As one of the first States "to emerge from military rule, at the dawn of the era of transitional justice",[262] Argentina makes for a significant case study in the area of enforced disappearances. The practice of enforced disappearance by the military junta in Argentina "focused its repression…. against perceived leftist political opponents, many of whom were intellectual elites – teachers, labour leaders and university students – with ties to international networks".[263] The National Commission of Disappeared Persons cited 8,961 instances of disappearances in Argentina, primarily during the first two years of the junta – a figure nine times higher than the disappearances documented in Chile.[264]

Several groups, including the Mothers of the Plaza de Mayo, were established in Argentina "to investigate and protest the repressive tactics imposed by the military junta, with a special focus on disappearances".[265] Many NGOs had close ties with various human rights organizations, including Amnesty International, which assisted in mass international and regional mobilization against the disappearances in Argentina.[266]

Within Argentina, there has been a "remarkable evolution from the years of systematic disappearances to the pioneering developments with accountability for past crimes".[267] One of the major obstacles in safeguarding accountability for such crimes in Argentina pertained to the culture of impunity fostered by amnesty laws.[268] This was largely overcome in 1992 with a decision of the IACHR that "found that amnesties for grave human rights abuses violate the American Convention on Human

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[262] Lessa, Francesca. "Beyond transitional justice: Exploring continuities in human rights abuses in Argentina between 1976 and 2010." *Journal of human rights practice* 3.1 (2011): 25-48; at p. 31
[263] Frey, Barbara A. "Los Desaparecidos: The Latin American Experience as a Narrative Framework for the International Norm against Forced Disappearances", *Hispanic Issues On Line* 5.1 (2009); at p. 58
[264] *Supra at n263,* at p. 58
[265] *Supra at n263,* at p. 59
[266] *Supra at n263,* at p. 58
[267] *Supra at n262,* at p. 31
[268] Brody, Reed and Felipe Gonzalez. "Nunca Mas: An Analysis of International Instruments on Disappearances." *Hum. Rts. Q.* 19 (1997): 365; at p. 384

Rights, in particular the state's duty to ensure and to protect human rights, and the right of the victims to seek justice".[269]

A brief historical overview is nonetheless necessary to holistically understand the major challenges posed by the practice of enforced disappearances to countering the pervasive culture of impunity for such violations.

In 1976,[270] a new military government in Argentina took over, instituting a "policy of state terror, designed and implemented to intimidate, erode and weaken civil society".[271] What distinguished this new military regime from previous ones was the "politics of disappearances",[272] which "relied on an extensive network of over 500 clandestine detention centres that existed throughout Argentina, where the *desaparecidos* (disappeared) were detained, interrogated and tortured, and later assassinated".[273] Estimates illustrate the forceful apprehension of at least 30,000 individuals,[274] at the hands of the junta that led a "brutal crackdown on political dissidents".[275]

The "multi-faceted human cost" of enforced disappearances,[276] particularly when carried out on a widespread and systematic basis,[277] is most aptly illustrated through taking a glance at the statistics resulting from this practice in Argentina: "500 children

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[269] *Supra at n268,* at p. 384
[270] *See generally:* Hernandez, Vladimir. "Painful search for Argentina's disappeared", *BBC*, 24 March 2013. Web, available at: https://www.bbc.com/news/world-latin-america-21884147 [Accessed 14 July 2018]
[271] *Supra at n262,* at p. 32
[272] *Supra at n262,* at p. 32
[273] *Supra at n262,* at p. 32
[274] *Supra at n262,* at p. 32; *See also:* Djokanovic, Bojana. "Argentina's rule-of-law approach to addressing a legacy of enforced disappearances", *International Commission on Missing Persons*. Web, available at: https://www.icmp.int/news/argentinas-rule-of-law-approach-to-addressing-a-legacy-of-enforced-disappearances/ [Accessed 14 July 2018]; OHCHR. "Enforced Disappearances: progress and challenges in South America". Web, available at: https://www.ohchr.org/EN/NewsEvents/Pages/EnforcedDisappearancesprogressandchallengesinSouthAmerica.aspx [Accessed 14 July 2018]
[275] Hernandez, Vladimir. "Painful search for Argentina's disappeared", *BBC*, 24 March 2013. Web, available at: https://www.bbc.com/news/world-latin-america-21884147 [Accessed 14 July 2018]; *See also:* Djokanovic, Bojana. "Argentina's rule-of-law approach to addressing a legacy of enforced disappearances", *International Commission on Missing Persons*. Web, available at: https://www.icmp.int/news/argentinas-rule-of-law-approach-to-addressing-a-legacy-of-enforced-disappearances/ [Accessed 14 July 2018]
[276] *Supra at n262,* at p. 32
[277] *Supra at n14,* at p. 249

whose identities were altered through illegal adoptions;[278] 12,890 political prisoners; 2,286 murders; and an estimated 250,000 people, in a population of 25 million, forced into exile".[279]

Eventually, however, in the early 1980s, a series of internal and external political and financial factors provided the impetus for transition.[280] Consequently, since then, Argentina has adopted various transitional justice mechanisms, including "trials, truth commissions and reparations",[281] whilst also pioneering new mechanisms such as truth trials.[282] Such external political and financial factors mobilizing change within a State towards the practice of disappearances highlights the pressure-power available to the international community to effect change within a State that is otherwise unwilling to act on this front.

In 1983, with the establishment of the National Commission on the Disappearance of Persons (**"CONADEP"**), "Argentina began exhuming unmarked graves in which victims of enforced disappearance were believed to be buried".[283] In a report that was produced by the CONADEP,[284] the "absolute power and impunity" of military-sponsored kidnappings, tortures and murders of thousands was brought to light.[285] It recorded around 8960 cases of enforced disappearances,[286] while estimating a much higher actual figure.[287]

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[278] *See generally:* Djokanovic, Bojana. "Argentina's rule-of-law approach to addressing a legacy of enforced disappearances", *International Commission on Missing Persons*. Web, available at: https://www.icmp.int/news/argentinas-rule-of-law-approach-to-addressing-a-legacy-of-enforced-disappearances/ [Accessed 14 July 2018]; OHCHR. "Enforced Disappearances: progress and challenges in South America". Web, available at: https://www.ohchr.org/EN/NewsEvents/Pages/EnforcedDisappearancesprogressandchallengesinSouthAmerica.aspx [Accessed 14 July 2018]

[279] *Supra at n262,* at p. 32

[280] *Supra at n262,* at p. 32

[281] *Supra at n262,* at p. 33

[282] *Supra at n262,* at p. 33

[283] Djokanovic, Bojana. "Argentina's rule-of-law approach to addressing a legacy of enforced disappearances", *International Commission on Missing Persons*. Web, available at: https://www.icmp.int/news/argentinas-rule-of-law-approach-to-addressing-a-legacy-of-enforced-disappearances/ [Accessed 14 July 2018]

[284] *Supra at n262,* at p. 33

[285] *Supra at n262,* at p. 33

[286] Amnesty International, "Argentina: Investigation into 'disappearances' – a step towards settling outstanding debt from 'dirty war'", 11 June 1998. Web, available at: https://www.amnesty.org/download/Documents/152000/amr130101998en.pdf [Accessed 14 July 2018]

[287] *Supra at n14,* at p. 249

Despite recent improvements in Argentina regarding the protection of human rights,[288] there are a series of "significant problems" that are important within the context of this paper.[289] These issues include, for the purposes of this paper: "slow progress in judicial proceedings relating to past human rights abuses; the use of excessive force by the security forces; alleged torture and inhuman treatment of suspects and prisoners".[290]

The Argentina Center for Legal and Social Studies (**"CELS"**), in its 2010 report, "describes in detail the case of Jonathan Lezcano and Ezequiel Blanco – two youngsters from Villa Lugano neighbourhood in Buenos Aires – who disappeared in July 2009".[291] It wasn't until September 2009 that "judicial authorities informed the families that Jonathan and Ezequiel's bodies had been buried anonymously in Buenos Aires' Chacarita cemetery two months before",[292] after the two had been "shot dead by a member of the *Policia Federal Argentina*" on the day they disappeared.[293]

Not only had the judicial investigation into the disappearance been slow-paced and "marred by irregularities",[294] but the relatives of the disappeared persons "also suffered intimidation",[295] with Jonathan's mother being "detained without reason, beaten and held with no access to her regular medication for hours" in October 2009.[296] Although this was a fairly recent case to emerge, it is eerily similar to the practice of "disappearances, executions, unmarked graves and burials, and threats against the victims' families" that dominate much of Argentina's past,[297] particularly during the military repression that occurred from 1976 to 1983.[298] The reason that this case is perhaps more worrisome is due to Argentina's status as a democracy for the last 27 years.[299] In fact, "the persistence of such crimes is deeply disturbing, calling us

[288] *Supra at n262,* at pp. 25-26
[289] *Supra at n262,* at p. 26
[290] *Supra at n262,* at p. 26
[291] *Supra at n262,* at p. 26
[292] *Supra at n262,* at p. 26
[293] *Supra at n262,* at p. 26
[294] *Supra at n262,* at p. 26
[295] *Supra at n262,* at p. 26
[296] *Supra at n262,* at p. 26
[297] *Supra at n262,* at p. 26
[298] *Supra at n262,* at p. 26
[299] *Supra at n262,* at p. 26

to question the depth of Argentina's democracy and its commitment to human rights protection".[300]

When reports of other similar cases began emerging, it became clear that the case of Jonathan and Ezequiel "only constitutes the tip of an iceberg of violence by the security forces in Argentina".[301] In August 2008, a 16-year-old boy Luciano Arruga was detained by the police in Buenos Aires.[302] Luciano "later denounced them for ill-treatment and for attempting to force him to commit crimes on their behalf",[303] and due to his refusal to engage in such crimes "Luciano was constantly harassed by officers in his neighbourhood until 31 January 2009, when he was held at a police station in Lomas del Mirador".[304]

There is still no information as to Luciano's whereabouts, nor are there any on-going efforts to prosecute those behind his disappearance.[305] As occurred in the Jonathan and Ezequiel case, "Luciano's case has been characterized by irregularities: evidence has been tampered with or altered; local political authorities did not assist Luciano's family; and, once again, several of Luciano's relatives and friends have been threatened, including his mother".[306]

It is this culture of impunity that constitutes "one of the key factors sustaining continuity in human rights abuses in Argentina",[307] as well as in other countries in different regions such as South Asia, most notably Pakistan,[308] India[309] and Bangladesh.[310] It is, therefore, crucial to examine whether similar patterns can be seen

[300] *Supra at n262,* at p. 26
[301] *Supra at n262,* at p. 35
[302] *Supra at n262,* at p. 35
[303] *Supra at n262,* p. 35
[304] *Supra at n262,* at p. 35
[305] *Supra at n262,* at p. 35
[306] *Supra at n262,* at p. 35
[307] *Supra at n262,* at p. 37
[308] International Commission of Jurists, "No More 'Missing Persons': The Criminalization of Enforced Disappearance in South Asia" (August 2017). Web, available at: https://www.icj.org/wp-content/uploads/2017/08/South-Asia-Enforced-Disappearance-Publications-Reports-Thematic-Reports-2017-ENG.pdf [Accessed 13 July 2018]; at p. 5
[309] *Supra at n308,* at p. 6
[310] *Supra at n308,* at p. 6

in other States where the practice of enforced disappearance is rampant and "where impunity for human rights violations has become institutionalized and systemized".[311]

4.2 Pakistan

Since Pakistan became involved in the US-led War on Terror in 2001,[312] "hundreds of people accused of terrorism-related offences have reportedly been 'disappeared' after being abducted by the security agencies and detained in secret facilities".[313] Prior to its involvement in the War on Terror, reports had emerged of cases of enforced disappearances and discoveries of mass graves in the Province of Balochistan:[314] such violations allegedly having been perpetrated by the Pakistani security forces.[315] In fact, enforced disappearances in Balochistan are commonplace, with Pakistan's Minister of Interior, in 2012, claiming that around 6,000 persons had gone missing.[316] The targets of these disappearances include "the Baloch literary class, such as journalists, lawyers", etc.[317] Unfortunately, however, there is no exact estimate of how many Baloch have gone missing over the last many decades.[318]

Similarly, across the country, "terrorism suspects are frequently detained without charge"[319] and it is almost entirely "impossible to ascertain the number of people 'disappeared' in counterterrorism operations because of the secrecy surrounding such operations".[320]

The situation of these disappearances in Pakistan is actually so widespread that it "has now become a national phenomenon".[321] There is a pattern vis-à-vis the types of

[311] *Supra at n308,* at p. 6
[312] *Supra at n308,* at p. 25
[313] *Supra at n308,* at p. 25
[314] Siddique, Qandeel. "Pakistani or Baloch? A Precursory Study of the Baloch Separatist Movement in Pakistan." *SISA Report No. 20* (2014); at p. 3
[315] *Supra at n314,* at p. 3
[316] *Supra at n314,* at p. 7
[317] *Supra at n314,* at p. 7
[318] *Supra at n314,* at p. 8
[319] Inam, Syed Tazkir. "Asian Human Rights Mechanism: Problems and Prospects". (2010); at p. 11
[320] *Supra at n319,* p. 11
[321] *Supra at n308,* at p. 25

persons "disappeared".[322] The victims include: social media activists, human rights defenders and bloggers, students and other critics of the military establishment in Pakistan.[323]

In August 2015, a Pakistani journalist, Zeenat Shahzadi, went missing from the city of Lahore[324] after she began "following the alleged enforced disappearance of an Indian engineer, Hamid Ansari".[325] Additionally, Zeenat's family reported that the journalist had been receiving threats demanding she not pursue the case and till very recently,[326] "her fate and whereabouts" remained unknown.[327] While several bloggers and activists have also disappeared[328] from different cities across Punjab in 2017 alone,[329] "Zeenat's case is one of the rare cases of alleged enforced disappearance where the victim is a woman".[330]

Similar disappearances have taken place across the country,[331] particularly in what was till very recently the Federally Administered Tribal Areas (**"FATA"**)[332] and the Province of Balochistan.[333] In fact, according to the Voice of Baloch Missing Persons, around 18,000 people have gone 'missing' from Balochistan since 2001.[334] The Pakistan Commission of Inquiry on Enforced Disappearances has reported 1,256

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[322] *See generally:* Mazari-Hazir, Imaan. "How the establishment is pushing Pakistan towards another civil war", *Daily Times*, 17 April 2018. Web, available at: https://dailytimes.com.pk/228997/how-the-establishment-is-pushing-pakistan-towards-another-civil-war/ [Accessed 13 July 2018]
[323] Mazari-Hazir, Imaan. "The cost of criticizing the military in Pakistan", *Daily Times*, 20 January 2018. Web, available at: https://dailytimes.com.pk/184519/cost-criticizing-military-pakistan/ [Accessed 13 July 2018]; *See also*: "Pakistan: Bloggers Feared Abducted", *Human Rights Watch*, 10 January 2017. Web, available at: https://www.hrw.org/news/2017/01/10/pakistan-bloggers-feared-abducted [Accessed 14 July 2018]; "Pakistan blogger Aasim Saeed says he was tortured", *BBC*, 25 October 2017. Web, available at: https://www.bbc.com/news/world-asia-41662595 [Accessed 14 July 2018]; "Abducted bloggers breaks silence: 'We want a Pakistan with rule of law'", *Dawn*, 9 February 2017. Web, available at: https://www.dawn.com/news/1313745 [Accessed 14 July 2018]
[324] "Zeenat Shahzadi: Fears for missing Pakistan reporter", *BBC*, 11 May 2016. Web, available at: https://www.bbc.com/news/world-asia-36149315 [Accessed 14 July 2018]
[325] *Supra at n308,* at p. 25
[326] "Missing journalist Zeenat Shahzadi recovered after more than 2 years", *Dawn*, 20 October 2017. Web, available at: https://www.dawn.com/news/1365073 [Accessed 14 July 2018]
[327] *Supra at n308,* at p. 25
[328] *Supra at n323*
[329] *Supra at n308,* at p. 25
[330] *Supra at n308,* at p. 25
[331] "Pakistan: End enforced disappearances now", *Amnesty International,* 6 November 2017. Web, available at: https://www.amnesty.org/en/latest/research/2017/11/pakistan-end-enforced-disappearances-now/ [Accessed 14 July 2018]
[332] *Supra at n308,* at p. 25
[333] *Supra at n308,* at p. 25
[334] *Supra at n308,* at p. 25

cases of alleged disappearances since 31st July 2017.[335] Similar alarming statistics, around 400 cases of enforced disappearances since 2014, are reported by the Human Rights Commission of Pakistan, "which documents human rights violations in 60 selected districts in the country".[336]

Despite international pressure,[337] both in the form of multilateral pressure through UN forums[338] and bilateral pressure through the European Union, "the government has failed to bring perpetrators to account in even a single case involving enforced disappearance".[339] In fact, the State of Pakistan has "enacted legislation that facilitates the perpetration of enforced disappearance – including by explicitly legalizing forms of secret, unacknowledged, and incommunicado detention and giving immunity to those responsible".[340]

A major factor that fosters the culture of impunity pertains to the conduct of the police in Pakistan which "often refuse to identify members of the security or intelligence forces as the alleged perpetrators" of these disappearances.[341] Consequently, many of the First Information Reports (**"FIRs"**) that are registered are filed against "unknown persons".[342] However, jurisprudence in Pakistan has progressed significantly in this area, for instance in the *Mohabbat Shah* case before the Supreme Court,[343] in which the Court held "that the unauthorized and unacknowledged removal of detainees from an internment centre amounted to an enforced disappearance".[344]

The Supreme Court of Pakistan also referred to the 1992 Declaration[345] and the ICPED,[346] despite the fact that Pakistan is not a State Party to the latter Convention.[347]

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[335] *Supra at n308,* at pp. 25-26
[336] *Supra at n308,* at p. 26
[337] Rehman, I.A. "World focus on disappearances", *Dawn*, 19 January 2017. Web, available at: https://www.dawn.com/news/1309275 [Accessed 14 July 2018]
[338] "Pakistan: Ratify Treaty on Enforced Disappearance", *Human Rights Watch*, 28 August 2013. Web, available at: https://www.hrw.org/news/2013/08/28/pakistan-ratify-treaty-enforced-disappearance [Accessed 14 July 2018]
[339] *Supra at n308,* at p. 26
[340] *Supra at n308,* at p. 26; *See also: Supra at n338*
[341] *Supra at n308,* at p. 26
[342] *Supra at n308,* at p. 26
[343] *Mohabbat Shah* case, H.R.C. No. 29388-K/13 (Supreme Court of Pakistan)
[344] *Supra at n308,* at p. 28
[345] *Supra at n36*
[346] *Supra at n308,* at p. 28
[347] *Supra at n308,* at p. 28

In fact, the Supreme Court has stipulated that despite Pakistan's non-party status to the ICPED, the "principles enunciated in the Convention are applicable in Pakistan in the interpretation of other rights such as the right to life".[348] Despite this jurisprudence, however, Pakistan has yet to comply with the recommendations of the UN Working Group on Enforced and Involuntary Disappearances,[349] the Human Rights Committee (**"HRC"**)[350] and the Committee against Torture.[351]

Recently, however, in Pakistan, the Islamabad High Court (**"IHC"**) issued a landmark judgment in *Mahera Sajid v. Station house Officer*,[352] in the case of a woman "asserting that the failure on the part of the respondents and other State functionaries to fulfill their obligations has led to the grave violation of her fundamental rights".[353] The brief facts of the case are as follow: "The petitioner asserts that on 14-03-2016, around a dozen men, who had come in two vehicles described as 'double cabins', forcefully entered their house. Some were wearing masks while others were in uniform, which according to the petitioner resembled that of the special police force. After forcefully entering the house they searched the premises and forcibly abducted the Detenu".[354]

Interestingly, the Joint Investigation Team (**"JIT"**) that was constituted to investigate this case "had unanimously concluded that it was a case of enforced disappearance":[355] Such unanimity excluding only a representative of the Military Intelligence.[356] The petitioner requested compensation for herself and her three daughters owing to the State's failure to trace her husband despite the fact that her husband was "the sole bread earner of the family".[357]

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[348] *Supra at n308,* at pp. 28-29
[349] *Supra at n308,* at p. 30
[350] *Supra at n308,* at p. 30
[351] *Supra at n308,* at p. 30
[352] *Mahera Sajid v. Station House Officer, Police Station Shalimar & 6 others, Writ Petition No. 2974/2016*, Islamabad High Court. Web, available at: http://mis.ihc.gov.pk/attachments/judgements/Mahera_Sajid_v_SHO_Shalimar_etc_WP_No_2974_of_2016_636669175440972079.pdf [Accessed 12 July 2018]
[353] *Supra at n352,* at pp. 1-2
[354] *Supra at n352,* at p. 3
[355] *Supra at n352,* at p. 3
[356] *Supra at n352,* at p.3
[357] *Supra at n352,* at p. 3

In a strongly worded order, the IHC stated: "The frequency of such constitutional petitions indicates that either public functionaries are, directly or indirectly, complicit or they do not consider such complaints important enough to satisfy the aggrieved persons through prompt and effective response and action so that there is no need for them to invoke the jurisdiction of this Court".[358] The Court highlighted that "the most cherished and valuable fundamental rights guaranteed under the Constitution are security, life and liberty (Article 9); the right not to be arrested or detained in custody without being informed of the grounds for such arrest and the right to consult and be defended by a legal practitioner of choice; to be produced before a Magistrate within the specified period of his or her arrest or detention (Article 10)… fair trial and due process", among others.[359]

Despite the fact that Pakistan is not a State Party to the ICPED, the IHC refers to the Convention, clarifying that enforced disappearances constitute a crime against humanity,[360] as "has been unambiguously endorsed" by the Supreme Court of Pakistan.[361] Even more important is the Court's observation that "the positive Constitutional obligation of a State to protect fundamental rights and to prevent, investigate and punish any perpetrator in accordance with law is not only severely breached but simultaneously gives rise to an unimaginable paradox when the State and its functionaries assume the role of abductors".[362] In addition, enforced disappearance is "one of the most heinous crimes and cannot be justified on any ground whatsoever, particularly under the Constitution of Pakistan".[363] This highlights the significant role domestic courts can play in situations where States are not parties to the ICPED but the State's own domestic law can be aligned with international legal provisions to strengthen legal safeguards against the practice of disappearances.

The IHC referred to several cases of enforced disappearances before the ECtHR,[364] including *Bazorkina v. Russia*[365] and *Aslakhanova v. Russia*,[366] whilst also making

[358] *Supra at n352,* at p. 17
[359] *Supra at n352,* at p. 19
[360] *Supra at n352,* at p. 23
[361] *Supra at n352,* at p. 23
[362] *Supra at n352,* at p. 24
[363] *Supra at n352,* at p. 26
[364] *Supra at n352,* at p. 27

reference to the jurisprudence of the IACtHR,[367] in concluding that the public functionaries in this case would pay costs to the petitioner.[368] This judgment is an extremely significant development in Pakistan, where enforced disappearances are widespread with little to no consequences for the State.

4.3 India

Unlike Pakistan, India is a signatory to the ICPED as of 6th February 2007,[369] though it has yet to ratify the Convention.[370] Still, the International Peoples Tribunal on Human Rights and Justice in Indian-Occupied Kashmir reports around 8,000 cases of enforced disappearances in Kashmir between 1989 to 2012.[371] Like its neighbour, discussed in the preceding section, India has yet to specifically criminalize enforced disappearance in its penal code.[372]

Where cases pertaining to enforced disappearances are filed against officers of the Indian security forces, "investigations and prosecutions are hindered by the prevalence of sanction provisions in Indian law".[373] Such provisions "require permission from the Government before prosecutions can be initiated against public servants and members of security forces",[374] and said permission is "rarely, if ever, granted in cases of human rights violations".[375]

Unlike Pakistani jurisprudence, which has evolved significantly to extend protections to citizens against enforced disappearances, the Indian Supreme Court "has not expressly commented on the practice of enforced disappearance as a distinct, autonomous offence or highlighted the importance for perpetrators of the enforced

[365] *Bazorkina v. Russia,* 69481/01, Council of Europe: European Court of Human Rights, 27 July 2006
[366] *Aslakhanova v. Russia* [2012] ECHR 2075
[367] *Supra at n352,* at p. 28
[368] *Supra at n352,* at p. 47
[369] *Supra at n308,* at p. 22
[370] *Supra at n308,* at p. 22
[371] *Supra at n308,* at p. 19
[372] *Supra at n308,* at p. 20
[373] *Supra at n308,* at p. 20
[374] *Supra at n308,* at p. 20
[375] *Supra at n308,* at p. 20

disappearance to be held criminally accountable".[376] In fact, "in some cases, courts have dismissed writ petitions without offering any relief".[377] This is despite the fact that India, by virtue of being a signatory to the ICPED, is bound in principle not to violate the spirit of the Convention.

It is interesting to note India's lack of progress in safeguarding the provisions of the ICPED, in spite of having signed the Convention and thereby incurring an obligation "not to act contrary to the object and purpose of the treaty".[378] Moreover, even though India is not a State Party to the Convention, it participated in the drafting of the ICPED.[379] Unfortunately, however, "the Indian government has systematically failed to investigate claims of enforced disappearances".[380]

[376] *Supra at n308,* at p. 21
[377] *Supra at n308,* at p. 21
[378] Fletcher, Laurel E. "The Right to a Remedy for Enforced Disappearances in India: A Legal Analysis of International and Domestic Law Relating to Victims of Enforced Disappearances." *IHRLC Working Paper Series No.1* (April 2014); at p. 29
[379] *Supra at n378,* at p. 29
[380] *Supra at n378,* at p. 58

Chapter Five - Assessing the Pattern of Enforced Disappearances

Apart from the practice as used in Latin America, the phenomenon of enforced disappearances is "by no means limited to the Latin American region",[381] as illustrated through the case studies of Pakistan and India above. Amnesty International has estimated that around 100000 Kurdish people were forcibly disappeared during Operation Anfal in Iraq.[382] Similarly, such "disappearances also reached catastrophic proportions in Sri Lanka"[383] during the 1980s, "following the creation of a specialized police commando unit to respond to insurgents in the south".[384] Sri Lankan government forces also adopted this practice "to target Tamil separatists in the north-eastern region of the country".[385]

Additionally, it is believed that "the use of enforced disappearance has increased exponentially" across all regions of the world,[386] particularly "within states suffering from internal tensions or conflict", including Colombia, Sudan, Nepal and the Russian Federation.[387] In fact, Human Rights Watch deemed enforced disappearances in Nepal to "have reached crisis proportions",[388] especially in the aftermath of the "Nepalese people's war" which commenced in 1996.[389] Similarly, in the Russian Federation, an estimated 3000 to 5000 people have "disappeared" in Chechnya "at the hands of Russian military units and pro-Moscow Chechen forces".[390]

Recently, within the context of the War on Terror, both Amnesty International and Human Rights Watch have reported widespread use of this practice by the US

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[381] *Supra at n14,* at p. 250
[382] *Supra at n14,* at p. 250; *See generally:* European Parliament, *The Kurdish Genocide: Achieving Justice through EU Recognition.* Web, available at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/d-iq/dv/03_kurdishgenocidesofanfalandhalabja_/03_kurdishgenocidesofanfalandhalabja_en.pdf [Accessed 14 July 2018]; at p.3
[383] *Supra at n14,* at p. 250
[384] *Supra at n14,* at p. 250
[385] *Supra at n14,* at p. 250
[386] *Supra at n14,* at p. 250
[387] *Supra at n14,* at p. 250
[388] *Supra at n14,* at p. 251
[389] *Supra at n14,* at p. 251
[390] *Supra at n14,* at p. 251

Government, "with perceived members of terrorist organizations being arrested and apparently held in secret detention centres".[391]

Three countries (two of which are discussed as case studies above), which warrant special mention where a "climate of impunity" exists for enforced disappearances are Bangladesh, India and Pakistan.[392] Here, "not a single perpetrator has been held criminally accountable for enforced disappearance despite attempts by victims, including families of the 'missing', to lodge criminal complaints and pursue other legal remedies".[393] Obstacles exist at all stages, including the stage of registering FIRs,[394] as police commonly refuse to register the same, and also at the stage of investigations where such FIRs are formally registered.[395] Such impediments allow a culture of impunity and lack of access to justice for victims to prevail, which grants perpetrators the space to continue engaging in this practice.

What all these States have in common is a lacking domestic legal framework for "ensuring accountability for past human rights violations, and deterring future ones".[396] Considering the fact that enforced disappearance *per se* has not been criminalized in the domestic legal systems of these States, "victims and their families have utilized other means, such as the writ of *habeas corpus*, bringing complaints of abduction or kidnapping, and filing human rights petitions in the Supreme Court to trace the whereabouts of their loved ones".[397]

5.1 The Need for Rehabilitation, Justice and Reconciliation

As discussed above, one of the major hurdles in ending the practice of enforced disappearance is the culture of impunity that surrounds the commission of this offense. Consequently, prosecutions of offenders are necessary to combat this impunity. There are several objectives that can be sought through prosecutions of this offense, including but not limited to: (i) punishing perpetrators and working towards

[391] *Supra at n14,* at p. 252
[392] *Supra at n308,* at p. 6
[393] *Supra at n308,* at p. 6
[394] *Supra at n308,* at p. 6
[395] *Supra at n308,* at p. 6
[396] *Supra at n308,* at p. 6
[397] *Supra at n308,* at p. 7

future deterrence; (ii) ascertaining the truth for families of the victims and for society at large; (iii) compensating, through reparations, the loved ones of the victims who have suffered due to the commission of this heinous offense; (iv) promoting reconciliation to heal society; and (v) working towards institutional reform and strengthening due process and the rule of law.

It must, however, be emphasized that prosecutions are not enough on their own. The trauma and terror caused by the practice of enforced disappearance requires the development of a comprehensive remedy that includes capacity building within State institutions (specifically, law enforcement agencies), as well as psychosocial rehabilitation and outreach programs aimed at healing the wounds of families who have experienced this distress.

The work of the Asian Federation Against Involuntary Disappearances (**"AFAD"**) in developing psychosocial rehabilitation programs is a solid model to replicate across various countries affected by this practice. In its 2004 workshop, titled "Healing Wounds, Mending Scars", held in Jakarta, Indonesia,[398] the AFAD selected participants who were family members of victims of enforced disappearances from AFAD member states (including, Pakistan, Sri Lanka, Thailand, etc.).[399] Following this workshop, the AFAD launched an ambitious training workshop called "From Survivors to Healers", which aimed at training "local psycho-social facilitators to minister to victims' families in their own locality".[400] These programs are key in healing societies in which this heinous crime is rampant, whilst also ensuring that each society enhances its own capacity to move forward from this trauma without reliance on external sources.

[398] Lauritsch, Katharina and Franc Kernjak. "We Need The Truth: Enforced Disappearances in Asia", ISBN No. 978-9929-9096-4-2. Web, available at: http://www.simonrobins.com/ECAP-We%20need%20the%20Truth-Asia%20disappearances.pdf [Accessed 8 August 2018]; at p. 164
[399] *Ibid*
[400] *Supra at n398,* at p. 167

Chapter Six – Analyzing the Current Global Legal Framework

Since July 2016, the Working Group on Enforced and Involuntary Disappearances "was actively considering" 44,159 cases of enforced disappearances across 91 States.[401] Although enforced disappearances were predominantly used by military regimes in the past, they are "now perpetrated in a variety of political systems and contexts for many different purposes",[402] including *inter alia* "as a means of political repression of opponents and human rights defenders; as a preventive or intelligence gathering part of counter-terrorism strategies; as a method of war; and in response to organized crime".[403]

Several steps have been taken by the international community of States to combat enforced disappearances.[404] These steps include measures at the regional and international level[405] in the form of 1992 Declaration,[406] the ACHR, the ECHR,[407] the Rome Statute[408] and the ICPED. Nevertheless, despite the existence of these instruments, "considerable human rights violations in the form of enforced disappearances have taken place in South America, Asia, and Central and Eastern Europe (in particular Belarus)".[409]

Since the disappearances in Latin America "occurred with exceptional intensity",[410] they were the first reference point for discussion in the preceding sections. In this section, analysis is focused on two focal areas: first, understanding "the multiple nature of enforced disappearances",[411] in particular "its interrelation with torture and crimes against humanity";[412] and second, dissecting "the principal provisions" of the

[401] *Supra at n308,* at p. 11
[402] *Supra at n308,* at p. 11
[403] *Supra at n308,* at p. 11
[404] *Supra at n39,* at p. 198
[405] *Supra at n39,* at p. 198
[406] *Supra at n36*
[407] *Supra at n169*
[408] *Supra at n37*
[409] *Supra at n39,* at p. 199
[410] *Supra at n39,* at p. 199
[411] *Supra at n39,* at p. 199
[412] *Supra at n39,* at p. 199

ICPED to shed light on "the positive obligations of States Parties, the 'victim' notion, effective remedies for enforced disappearances, and monitoring mechanisms".[413]

6.1 Multiple Breaches of Human Rights

As a consequence of the inherent "continuity and complexity" of the phenomenon of enforced disappearances,[414] the practice "must be understood and confronted in an integral fashion".[415] Since "the practice of enforced disappearance is not only a human rights violation" but also a crime under international law,[416] States have a series of obligations with regard to preventing and punishing this crime.[417] These obligations include: (i) criminalizing acts of enforced disappearance;[418] (ii) impartially, thoroughly, promptly and effectively investigating allegations of enforced disappearance and holding perpetrators accountable;[419] (iii) refraining "from transferring a person to another country where that person would be at real risk of enforced disappearance";[420] (iv) cooperating in prosecuting or extraditing for prosecution "anyone in the State's territory who is accused of enforced disappearance".[421]

Moreover, since "enforced disappearance is also typically a composite of other serious human rights violations",[422] including arbitrary or extrajudicial executions,[423] torture or inhuman or degrading treatment,[424] arbitrary arrest and detention,[425] denial of the right to recognition before the law,[426] "some of these violations can themselves constitute crimes under international law".[427]

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[413] *Supra at n39,* at p. 199
[414] *Supra at n39,* at p. 199
[415] *Supra at n39,* at p. 199
[416] *Supra at n308,* at p. 11
[417] *Supra at n308,* at p. 11
[418] *Supra at n308,* at p. 11
[419] *Supra at n308,* at p. 11
[420] *Supra at n308,* at p. 11
[421] *Supra at n308,* at p. 11
[422] *Supra at n308,* at pp. 11-12
[423] *Supra at n308,* at p. 12
[424] *Supra at n25,* at p. 41
[425] *Supra at n25,* at p. 42
[426] *Supra at n25,* at p. 42
[427] *Supra at n308,* at p. 12

The HRC, which is the monitoring body for the International Covenant on Civil and Political Rights (**"ICCPR"**),[428] has "denoted that any act leading to such a disappearance constitutes a violation of many of the rights" contained within the ICCPR.[429] For instance, "the right to liberty and security of person (Article 9); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Article 7); and 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 (Article 10)".[430] Often, enforced disappearances will also either definitively violate or pose "a grave threat" to Article 6 of the ICCPR (the right to life).[431] These linkages between enforced disappearances and rights contained in other human rights instruments, such as the ICCPR or otherwise, are pertinent to develop to close existing lacunae in protection against the practice of disappearances.

It is worth mentioning that the term "enforced disappearances" is not contained in either the ECHR[432] or the ACHR.[433] Such exclusion of this term requires a separate examination of "every segment of human rights violations, which corresponds to enforced disappearance".[434] In fact, this issue of enforced disappearances has been addressed by both the ECtHR and the IACtHR in extensive detail, as discussed in preceding sections.[435] Moreover, many regional and international human rights bodies have identified linkages between "elements of torture that relate to enforced disappearances".[436] For instance, in the *Bazorkina v. Russia* case[437] before the ECtHR, the Court looked at an alleged violation of Article 3 (prohibition of torture) of the ECHR, emphasizing "that the essence of such a violation does not mainly lie in the fact of the 'disappearance' of the family member, but rather concerns the authorities' reactions and attitudes to the situation when it was brought to their attention".[438] It is

[428] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[429] *Supra at n39,* at p. 199
[430] *Supra at n39,* at p. 199
[431] *Supra at n39,* at p. 199
[432] *Supra at n169*
[433] *Supra at n39,* at p. 200
[434] *Supra at n39,* at p. 200
[435] *Supra at n25,* at p. 42
[436] *Supra at n39,* at p. 201
[437] *Supra at n365*
[438] *Supra at n39,* at p. 201

with respect to the authorities' reaction "that a relative may directly claim to be a victim of the authorities' conduct".[439]

Moreover, much like the jurisprudence of the IACtHR, the ECtHR in this case also found "that the applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of her son and her inability to find out what happened to him".[440] In other words, inhumane treatment, prohibited by Article 3 of the ECHR, resulted from the manner in which the applicant's complaints were dealt with by the authorities.[441] Thus, a clear link emerges between enforced disappearances and the prohibition against torture. The Convention against Torture (**"CAT"**)[442] is, therefore, a significant "source of reference" for the ICPED.[443]

The principal aim shared by the CAT and ICPED "is based on the experience that impunity for perpetrators of torture is one of the main reasons that torture (and enforced disappearances) continues to be widely practiced in many countries despite its absolute prohibition under international human rights and humanitarian law".[444] It is pertinent here to draw a parallel between the *Velasquez* case (discussed above) and the *Bazorkina* case. In both these cases, the respective Courts "stressed the obligation of the authorities to act on their own volition once the matter has come to their attention".[445] In effect, delayed investigations negatively impact "the prospects of arriving at the truth".[446]

This practice has been endorsed by universal human rights treaty bodies, such as the HRC.[447] In the *Edriss El Hassy v. The Libyan Arab Jamahirya* case,[448] "the Committee concentrated on the obligations of the State Party and referred to the importance of States Parties' establishment of appropriate judicial and administrative

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[439] *Supra at n39,* at p. 201
[440] *Supra at n39,* at p. 201
[441] *Supra at n39,* at p. 201
[442] UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85
[443] *Supra at n39,* at p. 201
[444] *Supra at n39,* at p. 202
[445] *Supra at n39,* at pp. 202-203
[446] *Supra at n39,* at p. 203
[447] *Supra at n39,* at p. 203
[448] *Edriss El Hassy and Abu Bakar El Hassy v. Libya*, Human Rights Committee, U.N. Doc. CCPR/C/91/D/1422/2005 (24 October 2007)

mechanisms for addressing the alleged violations of rights under domestic law".[449] Referring to its General Comment No. 31,[450] the HRC reaffirmed that "failure by a State Party to investigate allegations of violations could give rise to a separate breach of the Covenant".[451]

From all the aforementioned jurisprudence (of the HRC, ECtHR and the IACtHR), it is clear that States owe positive obligations with respect to "combating the phenomenon of enforced disappearances".[452]

6.2 The 1992 Declaration

The 1992 Declaration is a non-binding instrument adopted by the UNGA.[453] As the "first universal legal instrument that focuses specifically on enforced disappearances",[454] it sets out some key provisions. For instance, Article 1 of the 1992 Declaration stipulates: "1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the UN and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. 2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. 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".

[449] *Supra at n39,* at p. 203
[450] UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13
[451] *Supra at n39,* at p. 203
[452] *Supra at n39,* at p. 203
[453] Zimbabwe Lawyers for Human Rights (ZLHR), *Enforced Disappearances – An Information Guide for Human Rights Defenders and CSOs*, January 2016; at p. 20
[454] *Ibid*

In effect, the 1992 Declaration "explicitly prohibits States to practice, permit or tolerate enforced disappearances",[455] whilst counseling States to: (i) criminalize enforced disappearances; (ii) prevent impunity for those engaged in said practice; (iii) guarantee "prompt, thorough and impartial investigation of any allegation"; (iv) maintain updated detention records; and (v) secure compensation in cases of enforced disappearances.[456]

6.3 The Contributions of the ICPED

As the "first universally binding treaty dealing specifically with the subject of enforced disappearances",[457] the ICPED came into effect in December 2010.[458] It provides that "no one shall be subjected to enforced disappearance"[459] even in situations of war, internal political instability or other public emergencies.[460] This is "one of the most notable developments" brought about by the ICPED as it is a "recognition of an autonomous right of every person not to be subjected to enforced disappearance".[461] In fact, under this provision, this right is non-derogable.[462]

In Article 2, a definition of "enforced disappearance" is given to include "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". From this provision, it can be stated that "the concept of enforced disappearance has three constitutive elements: first, the deprivation of liberty; second, the fact that it is carried out by State agents or by people or groups of people acting with the acquiescence, authorization or support of the State; third, the fact that it is followed by refusal to acknowledge the

[455] *Ibid*
[456] *Ibid*
[457] *Supra at n453,* at p. 21
[458] *Supra at n453,* at p. 21
[459] *Supra at n25,* at p. 44
[460] *Supra at n25,* at p. 47
[461] *Supra at n5,* at p. 101
[462] *Supra at n5,* at p. 101

deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person".[463]

This definition is an important development that goes a step further than the definition provided within the Rome Statute: it "appropriately leaves out all reference to the ambiguous element of the 'intention of the author to place the disappeared person outside the protection of the law for a prolonged period of time', which appears in the definition of enforced disappearance" under the Rome Statute.[464] This is a significant contribution of the ICPED as it is virtually impossible in almost all cases of enforced disappearances to demonstrate specific intention on the part of alleged perpetrators for the commission of the offense.

Further, Article 4 of the ICPED requires all States Parties to "take the necessary measures to ensure that enforced disappearance constitutes an offence" under their national criminal laws. Article 5 of the ICPED deems the "widespread or systematic practice of enforced disappearance" a "crime against humanity", indicating that in such a context, the offense is "imprescriptible".[465] Moreover, taking into account the "ongoing" nature of enforced disappearance,[466] Article 8 of the ICPED requires "States which apply a statute of limitation in respect of such offence"[467] to "ensure that it is of long duration and proportionate to the extreme seriousness of the crime[468] and that it commences from the date when the fate and whereabouts of the disappeared person have been established with certainty".[469]

On the issue of jurisdiction, the ICPED "mirrors the developments of international law on the matter and provides for a quasi-universal jurisdiction",[470] by providing, in Article 9(1), that States Parties "shall take all necessary measures to exercise jurisdiction over the offence of enforced disappearance when the offence is committed in any territory"[471] under the jurisdiction of the State "or on board of a ship

[463] *Supra at n5,* at p. 101
[464] *Supra at n5,* at p. 101
[465] *Supra at n5,* at p. 102
[466] *Supra at n5,* at p. 102
[467] *Supra at n5,* at p. 102
[468] *Supra at n25,* at p. 50
[469] *Supra at n5,* at p. 102
[470] *Supra at n5,* at p. 102
[471] *Supra at n5,* at p. 102

or aircraft registered in that State, when the alleged offender is one of its nationals, and when the disappeared person is one of its nationals and the State considers it appropriate".[472] Article 9(2) further stipulates that States are required to take measures necessary to establish their competence to exercise jurisdiction over the offense "when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized".[473]

Equally important is the definition of a "victim of enforced disappearance",[474] contained in Article 24(1) of the ICPED, which includes "the disappeared person and any individual (such as, for instance, relatives) who has suffered harm as the direct result of an enforced disappearance".[475] Additionally, Article 24(2) covers "the right of any victim to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation"[476] and "the fate of the disappeared person".[477] This development, i.e. "the recognition of an autonomous and non-derogable right to know the truth",[478] is perhaps "one of the most significant developments of international human rights law"[479] ushered in by the ICPED.

6.3.1 The Role of the Committee on Enforced Disappearances

The creation of the CED, comprising ten experts, is another beneficial contribution made by the ICPED as the CED is "entrusted with the mandate to monitor the implementation of the treaty by States Parties", in addition to carrying out other key functions.[480] Some of these functions include *inter alia*: (i) consideration of reports submitted by States Parties regarding measures instituted to implement the ICPED (Article 29);[481] (ii) receiving requests by relatives of missing persons or their legal

[472] *Supra at n5,* at p. 102
[473] *Supra at n5,* at p. 102
[474] *Supra at n5,* at p. 102
[475] *Supra at n5,* at p. 102
[476] *Supra at n5,* at p. 102
[477] *Supra at n5,* at p. 102
[478] *Supra at n5,* at p. 102
[479] *Supra at n5,* at p. 102
[480] *Supra at n5,* at p. 103
[481] *Supra at n5,* at p. 103

representatives (Article 30);[482] (iii) undertaking visits to States which "according to reliable information" are in serious violation of the ICPED (Article 33);[483] and (iv) bringing the issue of widespread or systematic enforced disappearances to the attention of the UNGA (Article 34).[484]

Article 29(1) of the ICPED requires States Parties to the Convention to "report on the measures taken" to implement the provisions of the ICPED "within two years after the entry into force" of the Convention. In addition to official State reports, "parallel reports by civil society groups and national human rights institutions on the situation in regard to enforced disappearances" serve as "an important source of supplementary information" for the Committee.[485] These parallel reports are particularly "useful devices in bringing to light hidden practices of enforced disappearance" and may even "provide information from a much more critical perspective".[486] Consequently, their impact on strengthening protection against enforced disappearance cannot be underestimated.

Similarly, the Committee's power to issue General Comments, under Article 29(3) of the ICPED, is an equally important tool for clarifying the nature of obligations under the ICPED. This mandate of the Committee is a significant one because when such comments are issued by the Committee, the issue of "loopholes and disingenuous interpretations" stemming from the ambiguous language of the Convention can be overcome.[487] In this regard, "the General Comment is one of the potentially most significant and influential tools available to treaty bodies like the Committee".[488] However, it remains true that "there are concerns about the sustainability and duplication of the reporting systems of treaty monitoring bodies", often resulting in fragmentation of reporting systems.[489] The 1996 Report on the Long-Term

[482] *Supra at n5,* at p. 103
[483] *Supra at n5,* at p. 104
[484] *Supra at n5,* at p. 104
[485] Sunga III, Ricardo A. "The committee on enforced disappearances and its monitoring procedures." *Deakin L. Rev.* 17 (2012): 151; at p. 154
[486] *Ibid*
[487] *Supra at n485,* at p. 156
[488] *Supra at n485,* at p. 156
[489] *Supra at n485,* at p. 158

Effectiveness of the United Nations Treaty System[490] is a crucial document "suggesting three long term options for reducing reporting burdens",[491] which can, in effect, enhance compliance with various human rights obligations, including those provided for within the ICPED.

These recommendations include: "(i) reducing the number of treaty bodies and hence the number of reports required; (ii) encouraging states to produce a single, global report to be submitted to all relevant treaty bodies; and (iii) replacing the requirement of comprehensive periodic reports with specially tailored reports".[492] Of these suggestions, recommendations (ii) and (iii) can serve as important tools in ensuring adherence to a higher standard of human rights norms on the part of States Parties to the ICPED, as well as on the part of those States that are not parties to the ICPED but in whose territories enforced disappearances remain a systemic issue.

In fact, if the monitoring bodies of the ICCPR, CAT and ICPED coordinate their efforts, States that are not yet parties to the ICPED can still be held accountable for the practice under the provisions of these other two Covenants to which they may be Parties. For instance, both the Committee against Torture and the Human Rights Committee have concluded that enforced disappearance is a violation of the CAT[493] and the ICCPR respectively.[494]

Such coordination is particularly pertinent considering the nature of human rights obligations, i.e. they "are not expected to compel compliance to the same extent as more reciprocal obligations, where the inherent incentives to comply are stronger".[495] In other words, "the prospect of an adverse human rights judgment does not cause as much fear to states as the retaliatory threat of economic disadvantage resulting from a breach of a commercial treaty".[496] This is where the importance of tools such as the Generalized Scheme of Preferences (**"GSP"**) Plus regime comes into play, as States

[490] Alston, Philip. *Final Report on Enhancing the Long-Term Effectiveness of the United Nations Treaty System*, UN Doc E/CN.4/1997/74 (27 March 1996)
[491] *Supra at n485,* at p. 158
[492] *Supra at n485,* at p. 158
[493] *Supra at n485,* at p. 179
[494] *Supra at n485,* at p. 180
[495] *Supra at n485,* at p. 178
[496] *Supra at n485,* at p. 178

are more likely to comply with human rights obligations if such compliance is intrinsically tied to economic advantages.

6.3.2 Addressing the Issue of *Ratione Temporis* Competence

Article 35 of the ICPED provides for the competence of the CED and in doing so, limits said competence to enforced disappearances "which commenced after the entry into force" of the ICPED. This is problematic because a State Party to the Convention may evade adherence to its obligations simply by virtue of this limitation on the Committee's competence.[497] Unlike the ICPED, the Rome Statute provides for the jurisdiction of the ICC "only with respect to crimes committed after the entry into force of the Statute".[498] This is a pertinent distinction as "the use of the word 'committed' in the Rome Statute instead of the word 'commenced' in the Disappearances Convention leaves open the possibility of an exercise of jurisdiction over acts that 'commenced before entry into force for as long as they continue to be 'committed' after entry into force".[499] It can, therefore, be recommended that the language of the ICPED borrow the same terminology from the Rome Statute to close this loophole.

Such amendment to the language of the ICPED would also bring the Convention in line with the 1992 Declaration, which establishes the "continuing offence" of enforced disappearance "as long as the perpetrators continue to conceal the fate and whereabouts of persons who have disappeared and these facts remain unclarified".[500] In fact, this is the general nature of enforced disappearances prescribed by regional instruments such as the ACHR as well.[501] Moreover, the Working Group on Enforced or Involuntary Disappearances has also deemed enforced disappearance a "continuing offense" in the aforementioned circumstances.[502]

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[497] *Supra at n485,* at p. 185
[498] *Supra at n37,* Article 11(1)
[499] *Supra at n485,* at p. 185
[500] *Supra at n485,* at pp. 185-186
[501] *Supra at n485,* at p. 186
[502] Working Group on Enforced or Involuntary Disappearance. *General Comment on Article 17 of the Declaration*, UN Doc E/CN.4/2001/68 (2000); at para. 28

6.4 Comparative Analysis of the 1992 Declaration and the ICPED

The 1992 Declaration established the UN Working Group on Enforced or Involuntary Disappearances,[503] which exists even today and "carries out important work as a rapid response mechanism to request states to start investigations where it is believed that an enforced disappearance has taken place, based on reports of disappearances submitted by relatives of disappeared persons or human rights organizations acting on their behalf".[504] This Working Group has asserted that "impunity is perhaps the most significant factor contributing to the phenomenon of enforced disappearance".[505] Consequently, it has suggested "bringing individuals to justice for such acts as a crucial measure in helping to prevent their occurrence".[506]

The ICPED, "in contrast to the 1992 Declaration" as well as the regional conventions, expands upon the definition of a "victim".[507] Under the ICPED, a "victim" can be "the abducted person as well as any individual who has suffered harm as the direct result of an enforced disappearance".[508] Consequently, "this definition covers both direct and indirect victims and thus includes family members" of the disappeared person.[509]

Further, unlike the 1992 Declaration, the ICPED provides several forms of reparation, including guarantees of non-repetition, satisfaction, rehabilitation and restitution.[510] This list of possible reparation measures mirrors the provisions of UNGA Resolution A/RES/60/147:[511] The latter requires proportionality in the making of any reparation "to the gravity of the violations and the harm suffered".[512]

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[503] *Supra at n45,* at p. 226
[504] *Supra at n45,* at pp. 226-227
[505] *Supra at n14,* at p. 247
[506] *Supra at n14,* at p. 247
[507] *Supra at n45,* at p. 227
[508] *Supra at n45,* at p. 227
[509] *Supra at n45,* at p. 227
[510] *Supra at n45,* at p. 227
[511] UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution/adopted by the General Assembly,* 21 March 2006, A/RES/60/147
[512] UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution/adopted by the General Assembly,* 21 March 2006, A/RES/60/147; at para. 15

Both the ICPED and the 1992 Declaration provide that States should classify enforced disappearance as "a separate and independent offence" within their domestic legislation.[513] The 1992 Declaration lays out "three cumulative minimum elements" that should form the basis of any definition of enforced disappearance,[514] including "deprivation of liberty (whether otherwise legal or illegal) against the will of the person concerned";[515] "involvement of government officials, at least indirectly by acquiescence";[516] and "refusal to disclose the fate and whereabouts of the person concerned".[517] In addition, "as part of the duty to prosecute and punish crimes of enforced disappearance",[518] States must ensure the removal of all hurdles, "both factual and legal, that hinder the effective investigation into the facts and the development of the corresponding legal proceedings",[519] whilst also refraining from instituting "amnesties and similar measures that prevent perpetrators of enforced disappearance from being investigated, prosecuted and punished".[520]

The ICPED "requires that if in a particular State a statute of limitations is applied in respect of enforced disappearances, the term of limitation for criminal proceedings must be 'of long duration' and 'proportionate to the extreme seriousness of this offence' and only commence when the enforced disappearance ceases".[521] Moreover, Article 8(2) of the ICPED mirrors Article 17 of the 1992 Declaration "by which any limitation period should also be suspended during any time at which effective remedies, such as those contemplated under article 2 of the ICCPR, are not available".[522] In this regard, the HRC has confirmed "that unreasonably short periods of statutory limitation can act as an impediment to the establishment of legal responsibility and should be removed".[523]

[513] *Supra at n308,* at p. 13
[514] *Supra at n308,* at p. 14
[515] *Supra at n308,* at p. 14
[516] *Supra at n308,* at p. 14
[517] *Supra at n308,* at p. 14
[518] *Supra at n308,* at p. 14
[519] *Supra at n308,* at p. 14
[520] *Supra at n308,* at p. 14
[521] *Supra at n308,* at p. 15
[522] *Supra at n308,* at p. 16
[523] *Supra at n308,* at p. 16

6.5 The Rome Statute and Enforced Disappearances

Under the Rome Statute, enforced disappearances have been explicitly classified as a crime against humanity,[524] the perpetration of which "needs to follow the conditions established in Article 7, paragraph 1 of the Statute".[525] These "chapeau requirements establish a framework in which the crimes listed within Article 7 have to be committed in order to allow their judgment by the International Criminal Court".[526] Such requirements stipulate that "a crime against humanity must be committed during a widespread or systematic attack, which is directed against the civilian population" and is representative of "a part of a state or organizational policy".[527] Further, there is no requirement of "a link between the perpetration of crimes against humanity and armed conflicts".[528] In other words, an attack "can be classified as an overall conduct (*conduit globale*), which includes all the prohibited actions occurred in order to commit a determined crime".[529]

As per the ICC, "the commission of the acts referred to in Article 7(1) of the Statute constitute the attack itself and, beside the commission of the acts, no additional requirement for the existence of an attack has to be proven".[530] While the Rome Statute's definition of an enforced disappearance is distinct from other definitions of the term found in human rights treaties,[531] all the definitions "share the same core features",[532] including "deprivation of the victim's liberty and the refusal to acknowledge or give information about the victim".[533]

There are two key provisions of the Rome Statute that are pertinent with regard to the nature of enforced disappearance as a "continuous crime":[534] Articles 11 and 24(1) of

[524] Webber Ziero, Gabriel. "The Crime of Enforced Disappearance under the Rome Statute: The Possibility for Prosecution of the Crimes Committed During the Brazilian Dictatorship." *Contemporaneos, Sistemas Juridico-Penais*, Vol. 7, No. 1 (2015): pp. 162-177; at p. 166
[525] *Supra at n524,* at p. 166
[526] *Supra at n524,* at p. 166
[527] *Supra at n524,* at p. 166
[528] *Supra at n524,* at p. 166
[529] *Supra at n524,* at p. 166
[530] *Supra at n524,* at p. 166
[531] *Supra at n524,* at p. 167
[532] *Supra at n524,* at p. 167
[533] *Supra at n524,* at p. 167
[534] *Supra at n524,* at p. 168

the Statute.[535] Article 11 stipulates that "the ICC only has jurisdiction over the crimes committed after the entry into force of the Statute"[536] and Article 24(1) "expresses the principle of non-retroactivity *ratione personae*, which establishes that no one can be held criminally responsible in front of the ICC for conducts committed before the entry into force of the Statute".[537]

From these provisions, "it can be stated as a general rule that crimes committed before the critical date in which the Rome Statute entered into force, shall be prosecuted by the national courts and not by the ICC".[538] This serves as an obstacle vis-à-vis prosecutions for enforced disappearances before the entry into force of the Rome Statute.[539] Therefore, the key question that determines whether the ICC can prosecute a particular instance of enforced disappearance turns on "the question when the attack and the agent's conduct have begun and finished".[540]

As already discussed in extensive detail in the preceding sections, within Latin America, "the crime of enforced disappearance was used as a weapon by the dictatorships governments between the 1960s and 1990s against its opponents".[541] While the Brazilian civil-military dictatorship ceased to exist around 30 years ago,[542] the country "until now remained immune to the phenomenon of the justice cascade".[543] Moreover, since the crime of enforced disappearance "was absent in the statutes of the former special international criminal tribunals",[544] with the entry into force of the Rome Statute, "the international community acquired the means to prosecute and hold individuals accountable for the crime of enforced disappearance as such".[545]

As per the National Truth Commission in Brazil, "enforced disappearances were the result of a systematic policy that caused more than half of the fatal victims of the

[535] *Supra at n524,* at p. 168
[536] *Supra at n524,* at p. 168
[537] *Supra at n524,* at p. 168
[538] *Supra at n524,* at p. 168
[539] *Supra at n524,* at p. 168
[540] *Supra at n524,* at p. 169
[541] *Supra at n524,* at p. 164
[542] *Supra at n524,* at p. 164
[543] *Supra at n524,* at p. 164
[544] *Supra at n524,* at p. 166
[545] *Supra at n524,* at p. 166

regime".[546] One of the most significant instances pertaining to enforced disappearances during the period of Brazilian dictatorship relates to "the disappearance of the militants of the *Partido Communista do Brasil* (PCdoB) that participated in armed activities (guerilla) in the Amazon rainforest in the region of the Araguaia's riverbank".[547]

When Brazil was re-democratized in 1988, the State acknowledged the disappearances and subsequently established the Special Commission on Political Deaths and Disappearances,[548] as well as the Amnesty Commission.[549] Both these institutions "possess as one of their main characteristics the power to grant moral and monetary reparation for the victims or their close relatives".[550] They were also tasked with information and testimony collection.[551] However, due to a lack of judicial authority vested in the institutions, they could not prosecute the perpetrators of these crimes.[552]

The lack of prosecution for these crimes was upheld by a decision of the Brazilian Supreme Court, which endorsed "the continuation of the impunity for the crimes against humanity committed by state agents".[553] This was challenged before the IACtHR in *Gomes Lund v. Brazil*,[554] in which the Court held: "The provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention, lack legal effect, and cannot continue as obstacles for the investigation of the facts of the present case, neither for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other serious violations of human rights enshrined in the American Convention which occurred in Brazil".[555]

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[546] *Supra at n524,* at pp. 169-170
[547] *Supra at n524,* at p. 170
[548] *Supra at n524,* at p. 170
[549] *Supra at n524,* at p. 171
[550] *Supra at n524,* at p. 171
[551] *Supra at n524,* at p. 171
[552] *Supra at n524,* at p. 171
[553] *Supra at n524,* at p. 171
[554] *Gomes-Lund et al. (Guerriha do Araguala) v. Brazil*, Inter-American Court of Human Rights (IACtHR), 24 November 2010
[555] *Supra at n524,* at p. 171

This judgment prompted Brazil to adopt the Law on Public Access to Information and to establish the National Truth Commission, although the 1979 Amnesty Law remains in force even today.[556] However, the IACtHR, in October 2014, asserted that Brazil had not fully complied with the Court's judgment, holding Brazil to be in violation of its international obligations by virtue of "its unwillingness to revise the 1979 Amnesty Law, which makes the prosecution of internationally recognized crimes committed during the dictatorship regime impossible".[557]

It is interesting, therefore, to analyze whether the ICC could prosecute enforced disappearances within the context of Brazil. In this regard, there are two factors to be taken into account. First, "it is necessary to balance the principle of non-retroactivity *ratione personae* with the general principles of law and the goals of the ICC, for example, the effectiveness of the law and the end of impunity for international crimes".[558] Second, the fact remains that enforced disappearances were already a crime under international law before the entry into force of the Rome Statute.[559]

Moreover, "the conducts of the agents have to be analyzed as a whole due to the fact that they are an essential element of the attack",[560] i.e. "if the attack against the civilian population has a continuous character, the conducts of the perpetrators that are determinant for its realization are embodied with the same nature of the attack".[561] In accordance with this rationale, there is a possibility for the ICC to prosecute enforced disappearances that took place during the civil-military dictatorship in Brazil,[562] particularly considering "the unwillingness and inability of the Brazilian state" in prosecuting said crimes which thereby activates the ICC's "complementary role" in ending impunity.[563]

It is worth recalling that the major distinction between the Rome Statute and the ICPED is that the former is confined to dealing with enforced disappearance solely as

[556] *Supra at n524,* at p. 171
[557] *Supra at n524,* at p. 171
[558] *Supra at n524,* at p. 174
[559] *Supra at n524,* at p. 174
[560] *Supra at n524,* at p. 174
[561] *Supra at n524,* at p. 174
[562] *Supra at n524,* at p. 174
[563] *Supra at n524,* at p. 174

a "crime against humanity",[564] i.e. when it is "committed as part of a widespread or systematic attack directed against any civilian population".[565] Thus, the ICC's jurisdiction with regard to disappearances is limited as per the provisions of its own Statute, unlike the more general jurisdiction accorded to the CED under the ICPED to deal with enforced disappearances.

6.5.1 Complementary Jurisdiction of the ICC within the Context of Impunity

It is pertinent to understand the context within which the Rome Statute developed as a bridge between "monist and dualistic approaches towards international law"[566] to "fight against the impunity for international crimes".[567] The case of Brazil is a particularly interesting one in the context of both enforced disappearances and the complementary role of the ICC "as the non-prosecution of the perpetrators still has impacts on the current situation in the country".[568] In other words, despite the fact that Brazil "was held accountable for the violation of its international obligations" by the IACtHR,[569] its "state agents that were involved in the perpetration" of these crimes escaped accountability.[570] Therefore, in order to "fight against impunity in a holistic way",[571] the ICC has a potentially large role to play within the context of enforced disappearances within Brazil. Moreover, it also has "the duty to overcome the doctrinal debates about a fragmentary international legal system" by engaging in "a judicial dialogue with other relevant areas, such as international human rights law".[572]

If such a role is effectively played by the ICC in this context, it would also set the precedent for greater accountability for other instances of enforced disappearances, particularly in those States that are parties to the Rome Statute. The inherent nature of enforced disappearances as a "continuous" crime,[573] beginning from detention to

[564] *Supra at n37,* Article 7(1)
[565] *Supra at n37,* Article 7(1)
[566] *Supra at n524,* at p. 174
[567] *Supra at n524,* at p. 174
[568] *Supra at n524,* at p. 175
[569] *Supra at n524,* at p. 175
[570] *Supra at n524,* at p. 175
[571] *Supra at n524,* at p. 176
[572] *Supra at n524,* at p. 176
[573] *Supra at n524,* at p. 176

"denial of information" regarding the whereabouts and fate of the disappeared,[574] should prompt the ICC to act in bringing the perpetrators of this crime to justice. In fact, "it is not possible to deny the powerful impact that such prosecutions can have in the context of the fight against impunity for these crimes committed by state agents, especially the ones perpetrated by members of the security forces, which had an obligation to protect the citizens from crimes".[575]

[574] *Supra at n524,* at p. 176
[575] *Supra at n524,* at p. 176

Chapter Seven – Identifying the Major Procedural and Substantive Gaps in Protection

Even with the entry into force of the ICPED, there is a central dilemma, which persists, thereby fostering the culture of impunity in preventing and prosecuting enforced disappearance. On a first level, while States are the primary actors in investigating and prosecuting the crime of enforced disappearance, particularly in the absence of a world human rights court, "the possible involvement of state authorities in the offence or loopholes present in the law can disrupt the proper functioning of the local judiciary".[576] On a second level, non-state actors may also be involved in the commission of this offence, and since they fall outside the competence of human rights treaty bodies, such as the CED, if the State within which they operate is itself failing to prosecute this conduct by third parties, there are virtually no remedies available to victims or their families.[577]

In light of this dilemma, "the combat against impunity seems to require an alternative mechanism of reliance",[578] particularly considering the fact that "individual states are the ones interpreting and deciding the content of international law binding upon them".[579] Since Article 3 of the ICPED identifies "private individuals that have no link to the state", only within the context of the duty of States Parties to the Convention investigating conduct relating to an enforced disappearance, it may be suggested that there is a need for "inclusion and direct criminalization of those non-state actors that are capable of violating basic human values" within the definition of the crime of enforced disappearance.[580]

Additionally, while the Working Group on the Enforced or Involuntary Disappearance of Persons has emphasized that "no laws or decrees should be enacted or maintained which, in effect, immunize the perpetrators of disappearances from

[576] Genovese, Cristina and Harmen van der Wilt. "Fighting impunity of enforced disappearances through a regional model." *Amsterdam LF* 6 (2014): 4; at p. 5
[577] *Ibid*
[578] *Ibid*
[579] *Supra at n576,* at p. 9
[580] *Supra at n576,* at p. 10

accountability",[581] the ICPED does not contain any such explicit prohibition.[582] Considering the fact that "national courts are required to respect state officials' personal immunities, even when being accused of international crimes",[583] prosecution of those responsible for enforced disappearance seems virtually impossible in certain circumstances within a domestic legal court system.[584] Therefore, while "national justice enforcement is – in principle – in compliance with the obligations" contained within the ICPED,[585] "the risk that the interests of justice are not fully achieved at the national level remains".[586]

This failure to dispense justice is not confined to the national legal system of a particular State but also extends to the international arena, particularly considering that the ICC can only exercise jurisdiction in cases of enforced disappearance "when they are perpetrated as part of a widespread of systematic attack, amounting to a crime against humanity".[587] While the ICC has itself "broadened such understanding by recognizing, within Article 7(2)(a) dealing with crimes against humanity, entities having no state-like structure or any link with the state as capable violators of basic human values, thereby falling under its jurisdiction",[588] a universal enforcement mechanism nonetheless remains weak. For instance, even within the ambit of the ICC's jurisdiction, prosecution is difficult to conduct owing to the "higher degree of intent (*dolus specialis*) required by the Rome Statute for the prosecution of enforced disappearance's perpetrators".[589]

Due to the fact that Article 7(2)(i) of the Rome Statute provides for an intention of "removing" the victim "from the protection of the law for a prolonged period of time",[590] there will, more often than not, be "a heavy burden" on the prosecution to supply evidence pertaining to the perpetrator's intent during the commission of this

[581] Working Group on Enforced or Involuntary Disappearances. *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc E/CN.4/1994/26 (22 December 1993); at para. 45(g)
[582] *Supra at n576,* at p. 10
[583] *Supra at n576,* at p. 10
[584] *Supra at n576,* at p. 10
[585] *Supra at n576,* at p. 11
[586] *Supra at n576,* at p. 11
[587] *Supra at n576,* at p. 12
[588] *Supra at n576,* at p. 12
[589] *Supra at n576,* at p. 12
[590] *Supra at n37,* Article 7(2)(i)

offense.[591] Accordingly, "an individual could easily plead innocence and walk away unpunished on the basis of his intent only to cause the disappearance for a limited time".[592] Therefore, the ICC's jurisdiction, in situations of enforced disappearance, remains exceptional.[593]

There is, thus, a clear need to bridge this "impunity gap between international and national prosecutions" within the context of the crime of enforced disappearance.[594] In fact, "the lacunae present within the international and national legal instruments surely justify the need of additional means able to effectively tackle the offence".[595] However, the main hurdle in preventing and prosecuting the offense of enforced disappearance remains the notion of state sovereignty.[596] A practical illustration of how this issue can be overcome is through the example of European integration post World War II: this demonstrates "how states can concretely set aside self-interest claims for the sake of peace, rule of law, protection of human rights, combat against crime and economic stability".[597]

If similar enhanced efforts are made at various regional levels, greater protection against enforced disappearance may seem a not-so-distant reality, particularly taking into account the fact that domestic legal systems and the ICC-regime fall short more often than not.[598]

7.1 Synergizing International and Regional Efforts at Eradicating Enforced Disappearances

Regional human rights institutions, such as the ECtHR and the IACtHR, play a key role in supplementing the international norms protected and promoted by the CED.[599] In fact, the UNGA "itself has affirmed the importance of regional bodies"[600] in the

[591] *Supra at n576,* at pp. 12-13
[592] *Supra at n576,* at p. 13
[593] *Supra at n576,* at p. 13
[594] *Supra at n576,* at p. 14
[595] *Supra at n576,* at p. 14
[596] *Supra at n576,* at p. 16
[597] *Supra at n576,* at p. 16
[598] *Supra at n576,* at p. 21
[599] *Supra at n485,* at p. 182
[600] *Supra at n485,* at p. 182

promotion and protection of human rights considering their unique position in "upholding cultures, traditions and histories unique to the region".[601]

There is no doubt that "the use of disappearances and extra-judicial executions instead of official executions serve several purposes for repressive regimes in the domestic sphere",[602] granting state apparatus the ability to "eradicate actual, potential, and perceived opponents without the publicity of a public trial or the risk of creating martyrs through the imposition of death sentences".[603] Generally speaking, the effect of enforced disappearances is the terrorization of "broad sections of the population by creating a chilling effect on political activity in general" while undermining legal protections that would otherwise result in demands for accountability from the government in question.[604] Viewed from this angle, there are several core civil and political rights (contained in the ICCPR) of the general population that are violated through the practice of enforced disappearances, most notably: the right to life; freedom from torture; the right to liberty and security of person; the right to be treated humanely; the right to be presumed innocent until proven guilty; the right to be tried without undue delay; the right to recognition as a person before the law; the right not to be subjected to arbitrary or unlawful interference with one's home; the right to freedom of thought, conscience and religion; and the right to hold opinions without interference.

Since the ICCPR has a wide range of States Parties to the Convention, one can recommend a more active role for the HRC in dealing with the issue of enforced disappearances, as a breach of ICCPR-guaranteed rights, particularly considering the fact that many States in which enforced disappearances occur are parties to the ICCPR but not to the ICPED (for example, Pakistan and India).

Moreover, enforced disappearances violate the most fundamental human rights enshrined in the Universal Declaration of Human Rights (**"UDHR"**).[605] For instance, when a forcible disappearance occurs, Article 3 of the UDHR, which secures "the

[601] *Supra at n485,* at p. 182
[602] *Supra at n42,* at p. 176
[603] *Supra at n42,* at p. 176
[604] *Supra at n42,* at p. 176
[605] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III)

right to life, liberty and security of person", is violated. While the UDHR is not a legally binding treaty, "it has become widely recognized and accepted" as part and parcel of customary international law.[606] Since the right most commonly violated through the practice of enforced disappearance has largely acquired the status of customary law, there is a need to clarify the extent of State obligations vis-à-vis prevention of and responses to this practice.

Where a state demonstrates "a lack of diligence in preventing or responding to the violation",[607] it must be found to have contravened "its duty to act".[608] It should be "inconsequential if the responsible state organ or official violates domestic law or exceeds the bounds of authority, or if the perpetrator is unknown or not a state agent".[609] This approach has been adopted by the IACtHR in *Velasquez Rodriguez*, discussed extensively above, where the Court asserted that "Honduras had failed to guarantee the full and free exercise of human rights by not investigating, punishing and compensating".[610]

Such obligations, to provide remedies to victims of human rights, have not only been undertaken by States through multilateral treaties, such as the ICPED, CAT and ICCPR, but are also contained in several important UN documents. The UNGA's 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[611] specifically calls upon member states to "enact and enforce legislation proscribing acts that violate internationally recognized norms relating to human rights"[612] and to "establish and strengthen the means of detecting, prosecuting and sentencing those guilty of crimes".[613]

[606] *Supra at n42,* at p. 191
[607] *Supra at n42,* at p. 203
[608] *Supra at n42,* at p. 203
[609] *Supra at n42,* at p. 203
[610] *Supra at n42,* at p. 203
[611] UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power : resolution/adopted by the General Assembly,* 29 November 1985, A/RES/40/34
[612] *Supra at n611,* at para. 4(c)
[613] *Supra at n611,* at para. 4(d)

In a similar vein, UNGA Resolution 40/143[614] requested the UN Special Rapporteur on summary or arbitrary executions to include in his next report suspicious deaths and deaths in custody.[615] Pursuant to Resolution 40/143, the UN Special Rapporteur emphasized the need "to develop international standards designed to ensure that investigations were conducted into all cases of suspicious death".[616] The UNGA subsequently adopted a resolution endorsing the Special Rapporteur's conclusions.[617]

Many other UN reports have echoed the abovementioned views on the crucial role played by punishment "in the duty of states under customary law to protect the rights to life and freedom from involuntary disappearance".[618] These documents collectively reflect an international effort to safeguard effective investigations and prosecutions of enforced disappearances as a legally binding obligation upon states.[619]

7.2 The Role of NGOs and Domestic Courts

International and regional cooperation between NGOs is crucial in strengthening the framework for accountability in cases where enforced disappearances have occurred. This is especially pertinent considering their independent and impartial ability to identify, characterize, monitor and report on such practices. For instance, in 1980, the Guatemalan NGO, *Frente Democratico Contra la Repression*, stated at a UN hearing on enforced disappearances: "Guatemala has no political prisoners, only dead people… Generally the people who disappear have been abducted or are arrested by heavily armed groups, sometimes in uniform and frequently showing national police force identification. These groups move about in government vehicles with dirty license plates, no plates at all or foreign plates. They operate with complete impunity".[620] Such objective reporting also provides the necessary counter-narrative

[614] UN General Assembly, *Summary or arbitrary executions : resolution/adopted by the General Assembly*, 13 December 1985, A/RES/40/143
[615] *Supra at n42,* at p. 211
[616] Wako, Amos. *Report by the Special Rapporteur on Summary or Arbitrary Executions*, UN Doc E/CN.4/1986/21 (7 February 1986); at para. 209
[617] UN General Assembly, *Summary or arbitrary executions : resolution/adopted by the General Assembly*, 4 December 1986, A/RES/41/144
[618] *Supra at n42,* at p. 212
[619] *Supra at n42,* at p. 212
[620] *Supra at n263,* at pp. 54-55

to reports by States denying or underplaying the existence of the practice within their territories.

Additionally, NGOs also have a key role to play in assisting families of the victims of enforced disappearances, both in terms of rehabilitation and in their quest for answers. Guatemalan NGOs have proven their significance in this regard, particularly the *El Grupo de Apoyo Mutuo* (**"GAM"**), which, along with several other domestic NGOs, filed thousands of habeas corpus petitions on behalf of families of disappeared persons.[621] When international NGOs and civil society organizations (**"CSOs"**) synergize their efforts alongside those of domestic NGOs, there is even greater pressure on a State to provide answers. However, the work NGOs carry out vis-à-vis enforced disappearances is not without incurring personal risk as illustrated through the torture and murder of GAM leader Hector Calito in March 1985.[622] Such risks have the potential to deter NGOs from coming forward, which is why there is an urgent need to establish international linkages between different NGOs to strengthen not only their lobbying capacity but also to ensure the safety of their members.

After all, it was the concerted effort of NGOs that facilitated the international community "to develop a legal norm outlawing the practice of disappearance".[623] High-profile NGOs, "in particular Amnesty International, intentionally constructed the narrative of an enforced disappearance, and transmitted this narrative to international policy makers".[624] Therefore, reaffirming the strength of these organizations in affecting global policy changes.

When families of victims of enforced disappearances, or NGOs on behalf of these families, file *habeus corpus* writs before the domestic courts of a State in which such practice is rampant, lack of cooperation by the police and executive "impedes recourse to available legal remedies and procedural guarantees sought by the victim or concerned family members, relatives, lawyers or human rights organizations".[625]

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[621] *Supra at n263,* at p. 55
[622] *Supra at n263,* at p. 56
[623] *Supra at n263,* at p. 60
[624] *Supra at n263,* at p. 60
[625] *Supra at n42,* at p. 187

The writ of *habeus corpus*, as a "traditional remedy for those detained by the state",[626] assists in ascertaining "whether a violation has occurred, and if so, requires the release of the detainee".[627] Law enforcement personnel commonly respond to writs of this kind, in the context of cases of enforced disappearances, by claiming: "(1) the detention never occurred; (2) the missing had absconded as a proclaimed offender or killed in an encounter; (3) terrorists had kidnapped and killed the missing; or (4) the missing had simply escaped".[628]

Domestic courts must be cautious not to accept these explanations by police officials in cases of alleged disappearances. In fact, endorsing such reasoning would reflect "the judiciary's failure to acknowledge the realities of police abuse and the climate of impunity that allows the police to act without fearing the consequences including its ability to manipulate and/or destroy evidence".[629] As a "bulwark against the excesses of the executive and the legislature",[630] the judiciary must nuance its own standards of proof in cases of enforced disappearances to ensure that victims and their families are not deprived of legal redress.

[626] *Supra at n42,* at p. 188
[627] *Supra at n42,* at p. 188
[628] *Supra at n42,* at p. 188
[629] *Supra at n42,* at p. 188
[630] *Supra at n42,* at p. 188

Chapter Eight – Recent Novel Challenges within the Field of Enforced Disappearances

Despite the existence of several conventions and the introduction of new mechanisms to deal with this "persisting phenomenon" of enforced disappearances,[631] several challenges remain in combating the practice. Some of these challenges emanate from the inherent nature of disappearances, which "unlike torture and extraordinary executions… cannot be easily conceptualized and further captured in a definition".[632] Resultantly, "only the systematic study of the phenomenon's historical background can determine its specificity".[633]

The "pillars" on which the ICPED rests aim to ensure that "the legal imprint of the phenomenon should correspond to all factual combinations and at the same time avoid a descriptive character".[634] Building on "the historical aspects of disappearances",[635] the ICPED's definition "serves a double goal: first, to demonstrate the distinct character of the phenomenon and protect all persons from the standardized methods reported so far and, secondly, to prevent the emergence of novel practices of disappearances".[636]

At present, one of the major hurdles to the ICPED's success, at least among States Parties to the Convention, is the application of "anti-terrorist methods" by States.[637] For instance, Amnesty International stated that at least 700 reports of disappearances were conveyed to the UN from within Pakistan in 2018,[638] with a wide range of victims encompassing journalists, students, peace activists, bloggers and human rights defenders.[639] Even more alarming statistics have been cited by Pakistan's Commission of Inquiry on Enforced Disappearances, which has reported around 4608

[631] Pervou, Ioanna. "The Convention for the Protection of All Persons from Enforced Disappearances: moving human rights protection ahead." *Eur. J. Legal Stud.* 5 (2012): 145; at p. 145
[632] *Supra at n631,* at p. 146
[633] *Supra at n631,* at p. 146
[634] *Supra at n631,* at p. 146
[635] *Supra at n631,* at p. 146
[636] *Supra at n631,* at p. 146
[637] *Supra at n631,* at p. 146
[638] "Amnesty Urges Pakistan to Resolve 'Hundreds' Of Enforced Disappearances", *RFERL*, 20 March 2018. Web, available at: https://www.rferl.org/a/pakistan-amnesty-urges-resolve-hundreds-enforced-disappearances/29111138.html [Accessed 9 July 2018]
[639] *Ibid*

cases of enforced disappearances from 2011 to December 2017.[640] The Chairperson of the Commission, Mr. Babar Nawaz Khan, stated: "We know all of them are not being picked up by intelligence agencies as some might be abducted for terrorism or criminal activities but we need to look into the complete data".[641]

Although Pakistan is not a State Party to the ICPED, the aforementioned statistics and observations illustrate the difficulties posed in combating impunity for enforced disappearances within the context of terrorism. In fact, the War against Terrorism has resulted in new challenges to combating this practice,[642] particularly with regard to "incommunicado detentions and extraordinary renditions".[643] While these new obstacles are primarily a culmination of the responses to the 9/11 attacks,[644] such policies *per se* have been implemented by States in the past. For instance, in the 1960s, "the language used by the Latin American authoritarian regimes identified military or paramilitary groups as subversives or terrorists".[645]

8.1 Incommunicado Detentions and Extraordinary Renditions

The situation in several countries across the globe at this time, however, is distinct owing to the fact that this policy is now being "adopted by democratically elected governments and generally by countries which are often referred to as liberal democracies".[646] Moreover, "the operations carried out after 9/11 against terrorism are unprecedented in terms of their intensity and state cooperation in intelligence sharing".[647] States have now "embarked on new techniques" which have lowered the applicable human rights standards.[648]

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[640] Haq, Riazul. "1,532 cases of enforced disappearances still pending", *Express Tribune*, 10 January 2018. Web, available at: https://tribune.com.pk/story/1604675/1-1532-cases-enforced-disappearances-still-pending/ [Accessed 9 July 2018]
[641] *Ibid*
[642] *Supra at n631,* at p. 161
[643] *Supra at n631,* at p. 161
[644] *Supra at n631,* at p. 161
[645] *Supra at n631,* p. 161
[646] *Supra at n631,* at p. 161
[647] *Supra at n631,* at p. 161
[648] *Supra at n631,* at p. 161

Under the definition provided in the ICPED, "every kind of deprivation of liberty might turn into a disappearance":[649] some of these deprivations of liberty undeniably "place the detainee under an incredibly high risk and result almost always in a disappearance".[650] In this regard, "incommunicado detention" is "a means of erasing all traces of the victim":[651] it effectively "describes the detainee's absolute confinement from the outside world".[652] Accordingly, victims of incommunicado detention are unable to notify their families of their situations, nor are they permitted consultation with legal counsel.[653] Further, due to the fact that the victim is not produced before a court or tribunal, these restrictions cumulatively guarantee "the captor's absolute discretion and may invite other forms of coercion".[654] Such incommunicado detention is eerily reminiscent of Hitler's *Nacht und Nebel Erlass*.

Similarly, the practice of extraordinary renditions are also "a commonly applied tool in the War on Terror".[655] This term "is now used to describe the transfer of alleged terrorists from the country where they are apprehended to states with underdeveloped and poor human rights protection".[656] Due to the fact that such practice entails "a forcible transboundary movement",[657] countering it "requires the cooperation of at least three countries: the captor, the accomplice and the extractor state".[658] A common feature of extraordinary renditions is "the element of extraterritoriality vis-à-vis the captor state".[659] This, of course, inevitably acts as an impediment to holding States participating in extraordinary renditions accountable for human rights violations.

The two goals captor States seek to achieve through the policy of extraordinary renditions are:[660] first, "increased harshness during interrogations to yield the maximum benefit on intelligence gathering grounds";[661] and second, "to fully deprive the transferred from access to their judicial system where they can challenge their

[649] *Supra at n631,* at p. 161
[650] *Supra at n631,* at p. 161
[651] *Supra at n631,* at p. 161
[652] *Supra at n631,* at p. 161
[653] *Supra at n631,* at p. 162
[654] *Supra at n631,* at p. 162
[655] *Supra at n631,* at p. 164
[656] *Supra at n631,* at p. 164
[657] *Supra at n631,* at p. 164
[658] *Supra at n631,* at p. 165
[659] *Supra at n631,* at p. 165
[660] *Supra at n631,* at p. 165
[661] *Supra at n631,* at p. 165

treatment during detention".[662] Effectively, "the detainees' lives are in jeopardy since extraordinary rendition reduces their legal protection to the bare-minimum, permitting grave human rights violations".[663]

Recently, news broke that the former President of Pakistan, General Pervez Musharraf, sold at least 4000 Pakistani citizens to the US, under the policy of extraordinary renditions.[664] Unfortunately, there are serious jurisdictional challenges pertaining to redress for such practices of extraordinary renditions, which "should be undoubtedly placed among practices to disappear individuals, as they are designed to evade public and judicial scrutiny, to hide the identity of the perpetrators and to evade the fate of the victims".[665] The complaint of Maher Arar is pertinent to examine in this regard.[666] The victim here was a national of Canada who was detained at an American airport on return from Tunisia.[667] Upon being subsequently transferred to Syria, the victim was "interrogated on his alleged links with Al-Qaeda", being kept in custody for nearly a year.[668] Once he was released, Arar brought his case before the US Courts, "only to be rejected on jurisdictional grounds".[669] Arar's case is one of many illustrating how "domestic jurisprudence has generally arrived at unsatisfactory judgments for the victims".[670]

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[662] *Supra at n631,* at p. 165
[663] *Supra at n631,* at p. 165
[664] *See generally:* Ameer, Hamza. "Pervez Musharraf sold 4,000 Pakistanis to US", *India Today*, 17 April 2018. Web, available at: https://www.indiatoday.in/world/story/-pervez-musharraf-sold-4-000-pakistanis-to-us-1214090-2018-04-17 [Accessed 9 July 2018]; "Pervez Musharraf sold 4,000 Pakistanis to US, other countries", *Khaleej Times*, 18 April 2018. Web, available at: https://www.khaleejtimes.com/international/pakistan/pervez-musharraf-sold-4000-pakistanis-to-us-other-countries [Accessed 9 July 2018]; Wasif, Sehrish. "Musharraf handed over 4,000 Pakistanis to foreign countries", *Express Tribune*, 16 April 2018. Web, available at: https://tribune.com.pk/story/1687073/1-musharraf-handed-4000-pakistanis-foreign-countries/ [Accessed 9 July 2018]; "Musharraf regime 'sold' Pakistanis to US, NA told", *Pakistan Today,* 16 April 2018. Web, available at: https://www.pakistantoday.com.pk/2018/04/16/musharraf-regime-sold-pakistanis-to-us-na-told/ [Accessed 9 July 2018]; "4,000 Pakistanis handed over to foreigners for dollars during Musharraf regime", *The News*, 17 April 2018. Web, available at: https://www.thenews.com.pk/print/305317-4-000-pakistanis-handed-over-to-foreigners-for-dollars [Accessed 9 July 2018]; Zehra, Ailia. "How much did you sell 4,000 Pakistanis for?", *Daily Times*, 23 April 2018. Web, available at: https://dailytimes.com.pk/231410/how-much-did-you-sell-4000-pakistanis-for/ [Accessed 9 July 2018]
[665] *Supra at n631,* at p. 165
[666] *Supra at n631,* at p. 165
[667] *Supra at n631,* at p. 165
[668] *Supra at n631,* at p. 166
[669] *Supra at n631,* at p. 166
[670] *Supra at n631,* at p. 166

Chapter Nine - Conclusions and Recommendations

"It is high time to put on the top of the agenda of the international community the fight against this offence to human dignity… Let's all commit today to give a meaning to these words".[671]

- Houria Es Slami (24 October 2016)

For families of those who have been made to forcibly disappear, life as they have known it comes to a standstill. Dońa Monica, a peasant woman from a village in southern Mexico, recounts the horror of her husband's abduction in the 1970s: "Many years ago, in 1974, soldiers took my husband. I have not heard anything from him since. I don't know why they took him… After they took my husband I asked everywhere about him, but they never told me anything. I fight still today that they tell me what happened to him… We are poor, so they don't listen to us".[672] From this excerpt, like many other tales of anguish on record from relatives of disappeared persons, it is crystal clear that the practice of enforced disappearance, as an act of state terrorism ensures "the dehumanization and desocialization of the other".[673]

When someone is made to disappear, relatives find themselves in a liminal state of uncertainty,[674] being denied: (i) "any knowledge about the location of relatives, be they alive or dead";[675] (ii) "mourning… provoking thus a permanent state of liminality";[676] (iii) "mortuary rituals";[677] and (iv) "memory sites".[678] This state of not knowing "is a permanent catastrophe of identity" for families of the disappeared.[679]

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[671] UN OHCHR, "Enforced disappearances: High time to put the issue at the top of UN member states' agendas", 24 October 2016. Web, available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20752&%20LangID=E [Accessed 13 July 2018]
[672] Karl, Sylvia. "Rehumanizing the Disappeared: Spaces of Memory in Mexico and the Liminality of Transitional Justice." *American Quarterly* 66.3 (2014): 727-748; at p. 729
[673] *Ibid*
[674] *Supra at n672,* at p. 730
[675] *Supra at n672,* at pp. 729-730
[676] *Supra at n672,* at p. 730
[677] *Supra at n672,* at p. 730
[678] *Supra at n672,* at p. 730
[679] *Supra at n672,* at p. 730

In light of the extensive discussion and analysis on both the practice of enforced disappearances as well as the existing legal framework for protection against said practice, there are several key recommendations of this paper.

First, since the ICPED sets out a minimum standard of protection,[680] rather than an upper limit of protection, where States have not ratified the Convention but are States Parties to other human rights instruments such as the ICCPR and the CAT, the latter instruments can be utilized to mount pressure on States to crack down against the practice of enforced disappearances. In other words, due to the complex nature of enforced disappearances, a comprehensive and dynamic approach is required to close existing loopholes in the legal framework safeguarding against this practice. Much like the offence of torture, which persists in large part due to impunity for perpetrators, enforced disappearances cannot be brought to an end unless this culture of impunity is shattered once and for all. In this regard, there is a need for cooperation between various treaty bodies, including the CED, the HRC and the Committee against Torture, to attack this culture of impunity from all directions. Therefore, clear linkages must be developed, through general comments and otherwise, by these committees, between the rights most commonly breached by the practice of enforced disappearance, thereby enhancing pressure on States to raise the applicable standard of rights-protection.

Second, where States' domestic courts have played a proactive role in strengthening legal protections against enforced disappearances, particularly by referring to judgments of the IACtHR and the ECtHR, the cohesion between these strands of jurisprudence must be furthered by greater cross-reference between domestic, regional and international courts and tribunals to one another's jurisprudence. Such cohesive interpretation not only acts as a bridge between different legal systems, but it also provides the necessary impetus to counter the fragmentation of international law, particularly with regard to a crime as heinous as enforced disappearance. Moreover, domestic and regional courts should adopt similar measures with regard to cases of enforced disappearances. For instance, courts should require "full and meaningful

[680] *Supra at n25,* at p. 59

investigations and prosecute or punish those responsible for crimes";[681] "release information related to missing persons";[682] "require a public act of apology or acknowledgment of the violation";[683] and "invalidate existing domestic law and require changes to national legislation".[684] Additionally, domestic and regional courts should encourage the participation and intervention of NGOs (either as third parties or otherwise) to assist victims of enforced disappearance and also to facilitate the fact-finding efforts undertaken by courts. Through greater NGO involvement in the adjudication process, these organizations are better able to understand problems associated with witness protection and evidence collection, which in turn can enhance their own ability to lobby for improvements on these fronts.

Third, there is a need to acknowledge that there is an inherent paradox within the very framework for preventing enforced disappearances: the State which is often a perpetrator of the crime is the same actor that is to implement the legal provisions that safeguard its citizenry against such violations. In light of this, there is a constant need for NGOs, CSOs, activists and human rights defenders to liaise on a global level to not only monitor violations but also to act as an international pressure group, lobbying and advocating against this very serious practice. Moreover, through documentation of these crimes, a much stronger case against a State practicing or tolerating enforced disappearances can be built up as the acts in question are no longer viewed internationally as isolated acts but as part of a widespread and systematic scheme.

Fourth, considering the relative success of schemes such as the European Union's GSP Plus regime, which ties market access of certain developing countries to their compliance with various human rights, labour and environmental treaties, a practical manner in which compliance with the stipulations of the ICPED, both by States Parties and non-parties, can be achieved is through the multiplication and enhancement of such initiatives. Such initiatives can then also be tied to conditions prohibiting amnesty legislation or ensuring the domestic codification of the crime of disappearance as an autonomous offence within the national legal systems of various States. This would definitely be an innovative and dynamic solution to counter the

[681] *Supra at n190,* at p. 193
[682] *Supra at n190,* at p. 194
[683] *Supra at n190,* at p. 194
[684] *Supra at n190,* at p. 194

persistent culture of impunity through a "carrots" approach, rather than using "sticks" such as sanctions.

Fifth, there is a need to clarify the contours of the provisions of the ICPED itself, perhaps through the development of soft law or manuals. For instance, Article 2 of the ICPED envisages some sort of involvement of a State in the practice of enforced disappearance. While the IACtHR and ECtHR have both repeatedly confirmed that State failure to prevent enforced disappearance can result in State responsibility for this practice, the provisions of the ICPED require further clarification in this regard to take into account the conduct of non-state actors, which are currently outside the ambit of the Convention.

The development of manuals may also be helpful in strengthening protections against traditional burden of proof requirements and evidence collection issues. So, for instance where claimants can prove the existence of a systemic practice of disappearances and place their claim of alleged disappearance within this pattern, a manual could list these conditions as factors for international, regional and domestic courts to take into consideration when dealing with cases of alleged disappearances. This would combat the culture of impunity by ensuring that claimants are not burdened with the onerous task of proving a government is behind an alleged disappearance, whilst paving the way for truth to be uncovered. Such manuals could also provide general guidelines on the types of compensation that should be made available to victims of enforced disappearances, thereby elaborating upon the categories of compensation listed within the ICPED.

Sixth, since Article 35 of the ICPED restricts the jurisdiction of the CED to offences that "commenced" after the entry into force of the ICPED, it may prove fruitful to amend this limiting language to secure the possibility of the CED's exercise of jurisdiction in cases of enforced disappearance that commenced before the entry into force of the ICPED, but that remain unresolved today. This would close a major legal loophole within the ICPED's framework and ensure balance is attained between the principle of non-retroactivity *ratione personae* and the overarching goal of the ICPED to end the culture of impunity that surrounds enforced disappearances.

Seventh, a new treaty or manual is also required to govern the application of anti-terrorism investigations and prevention techniques adopted by States that have given rise to the practice of extraordinary renditions and incommunicado detention. Due to the global threat emanating from terrorism, States have often cited national security as a valid reason to lower applicable human rights standards. While the gravity of the threat of terrorism is indeed severe, the law must evolve to strengthen protections against abuse of national security doctrines.

Lastly, there is an overwhelming need to push for the establishment of a world human rights court due to several reasons. First, the CED's jurisdiction is limited to offences carried out in those States that recognize its competence by virtue of being parties to the ICPED, and therefore, its ability to act is limited. Second, regional courts, such as the ECtHR and the IACtHR, while having made important strides in curbing the practice of enforced disappearance, remain restricted to their respective regions and cannot push for cessation of this practice on a global level in the same way a human rights court could. Third, as discussed in preceding sections, domestic courts are often unable to prosecute this crime owing to issues of immunity, and since the ICPED does not deal with this problem, national courts' jurisdiction vis-à-vis enforced disappearances is often limited. Fourth, the jurisdiction of the ICC is insufficient and remains exceptional owing to the intent requirement in Article 7(2)(i) of the Rome Statute, and also due to its jurisdiction to prosecute being confined to cases of enforced disappearances that constitute a crime against humanity, by virtue of being part of a widespread or systematic attack against a civilian population. Due to all these reasons, it becomes increasingly important for the international community to push for the establishment of an international human rights court, which is empowered enough to effectively counter the culture of impunity that surrounds enforced disappearances and allows them to persist unchallenged.

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Abstract *(English)*

The practice of enforced disappearance remains a major impediment to the global protection of human rights despite the evolution of an international legal instrument establishing safeguards against this heinous crime. As a breach of multiple human rights, enforced disappearance not only affects the victim subjected to the disappearance but also the family and friends of a disappeared person, and society at large due to the atmosphere of fear and terror it fosters. While the International Convention on the Protection of All Persons from Enforced Disappearance has set out a rather comprehensive framework for the protection of persons from this serious crime, there are substantive and procedural lacunae that still exist, thereby allowing a culture of impunity to continue to operate. Certain regional instruments, such as the European Convention of Human Rights and the American Convention on Human Rights, have been interpreted in broad and progressive ways to enhance protection against enforced disappearance and bring perpetrators of this crime to justice. However, several important gaps in protection persist, largely stemming from the inherently paradoxical nature of this crime where the State is often the perpetrator and also empowered to be the investigator and judge in its own cause. Therefore, the aim of this thesis is three-pronged: (i) to lay out the pattern that exists with regard to how this practice is carried out in different parts of the world; (ii) to understand the various systems of protection that exist, at the international, regional and domestic levels; and (iii) to recommend comprehensive measures that should be adopted to strengthen the legal framework against enforced disappearances.

Abstract *(German)*

Die Praxis des Verschwindenlassens bleibt ein wesentliches Hindernis für den weltweiten Schutz der Menschenrechte - trotz der Entwicklung eines internationalen Rechtsinstruments, das Schutzbestimmungen gegen dieses abscheuliche Verbrechen eingeführt hat. Als Verletzung zahlreicher Menschenrechte hat das Verschwindenlassen nicht nur Auswirkungen auf das Opfer des Verschwindenlassens sondern auch auf die Familie und Freunde der verschwundenen Person sowie auf die Gesellschaft im Allgemeinen, weil dadurch eine Atmosphäre der Angst und des Terrors verursacht wird. Während das Internationale Übereinkommen zum Schutz aller Personen vor dem Verschwindenlassen einen recht umfassenden Rahmen für den Schutz von Personen vor diesem schweren Verbrechen aufgestellt hat, gibt es noch immer substantielle und verfahrensmäßige Lücken, was dazu führt, dass weiterhin eine Kultur der Straflosigkeit herrscht. Bestimmte regionale Bestimmungen, wie beispielsweise die Europäische Menschenrechtskonvention und die Amerikanische Menschenrechtskonvention wurden auf umfassende und fortschrittliche Art und Weise interpretiert, um den Schutz vor dem Verschwindenlassen zu verbessern und Täter ihrer gerechten Strafe zuzuführen. Dennoch gibt es noch immer einige wichtige Lücken im Schutz, weitestgehend aufgrund der naturgemäßen paradoxen Natur dieses Verbrechens, in dem der Staat oftmals der Täter und gleichzeitig der Ermittler und Richter in eigener Sache ist. Aus diesem Grund besteht die Zielsetzung dieser wissenschaftlichen Arbeit aus drei Teilen: (i) die bestehenden Muster im Hinblick darauf, wie diese Praxis in unterschiedlichen Teilen der Welt durchgeführt wird, darzulegen; (ii) die verschiedenen bestehenden Schutzsysteme auf internationaler, regionaler und nationaler Ebene nachzuvollziehen; und (iii) umfassende Maßnahmen zu empfehlen, die eingeführt werden sollten, um die rechtliche Rahmenbedingungen gegen das Verschwindenlassen zu stärken.

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