Enforced Disappearance

Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance

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Gedwongen Verdwijning
Het vaststellen van staatsaansprakelijkheid onder het Internationaal Verdrag inzake de bescherming van alle personen tegen gedwongen verdwijning

(met een samenvatting in het Nederlands)

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Preface

The topic of enforced disappearance was first presented to me during one of my LLM classes given by Prof. Françoise Hampson at the University of Essex. The sharp contrast between on the one hand the importance of holding states accountable for this human rights violation and on the other hand the states' attempt to cover-up all the evidence, including the disappeared person him or herself, intrigued me from the beginning.The numerous questions around this cruel 'perfect crime of no information' motivated me to plunge into the topic for my PhD and learn to swim in the academic world.

Writing a PhD might seem a lonely experience at first but for me, the opposite has fortunately proven to be true, both in good times and bad times. In particular, there are a number of people without whom the process would not have been such an inspiring, stimulating and gratifying experience.

First of all, I would like to thank my supervisors, Prof. Jenny Goldschmidt, Prof. Fried van Hoof and Prof. Cecilia Medina Quiroga for their support and willingness to share their expertise. Their incisive comments, even from across the ocean, have provided me with a constructive learning experience throughout the process. A special thank you to Jenny for being my main supervisor and for her encouragement and faith in the project. My thanks also go to the members of the reading committee, Prof. Antonio Cançado Trindade, Dr. Gabriella Citroni, Prof. Cees Flinterman, Prof. Manfred Nowak and Prof. John Vervaele, for the time and effort they took reading through the manuscript and for providing me with much appreciated comments on the final draft.

Throughout the process of writing my dissertation, I feel fortunate and honoured to have been able to work with and meet a number of wonderful people with a great wealth of expertise and experience. I would like to thank Hugo Argente, Madre Elia Espen, Prof. Daniel Feierstein, Judge Sergio García Ramírez, Dr. Philip Grant, Judge Lucila Larrandart, Prof. Martín Lozada, Judge Margarette Macaulay, Dr. Ernesto Moreau, Ewoud Plate, Dr. Andrea Pochak, Judge Daniel Rafecas, Judge Carlos Rozanski, Oswaldo Ruiz Chiriboga, Dr. Pablo Saavedra Alessandri, Judge Diego García Sayán and Jan de Vries for sharing their views and experiences with me. In addition, I would not have been able to do the research without the enjoyable and excellent Spanish classes given to me by Marta Lammen, a teacher that has inspired me in many ways. Carolina and María Thompson were in particular of great assistance in conducting interviews in Argentina. My thanks also go to the Inter-American Court of Human Rights for giving me the opportunity to gain insight into how the Court operates by being a member of the legal team of Francisco Rivera.

Preface

The Netherlands Institute of Human Rights (SIM) has been an extremely inspiring and pleasant environment for me to conduct this research. I owe a big thank you to Hanneke van Denderen, Esther Heldenbergh-Bode and Marcella Kiel for taking care of the organisational matters that are involved in writing a dissertation. I would also like to express my gratitude to Saskia Bal for her advice on a variety of topics and to Else Rowel for her assistance. Moreover, I am grateful to Peter Morris and Klaartje Hoeberechts of the Wiarda Institute for helping me during the final stage of realising this book. My PhD colleagues at SIM, Ramona Biholar, Diana Contreras Garduño, Masha Fedorova, Katharine Fortin, Jayshree Mangubhai, Brianne McGonigle Leyh, Hana van Ooijen, René Rouwette, Sarah Speekenbrink and Yanqing Hong, ensured that I was looking forward to come to SIM every day. I feel proud to be part of this PhD generation of the SIM family. I would like to thank Brianne and Diana for their helpful comments on draft sections of my work.

Great encouragement has come from my *paranimfen*, Hana and Katharine. I would like to thank Hana for being an irreplaceable roommate, dear friend and a faithful colleague for more than six years. I will never forget the many pleasant talks and witty e-mails that always put a smile on my face. I would like to thank Katharine for her precious friendship, humour and emotional support. The many intriguing discussions with her have shaped my thoughts on and understanding of complex academic issues. Both of them have been indispensable for enjoying the ups and enduring the downs that come with writing a PhD. Another person that deserves a special thank you is Antoine Buyse; he filled our room with concentration and with lovely conversations while enjoying cookies and tea.

I would like to thank my family, family-in-law and friends with all my heart. Without their support and attentiveness, I would not have been able to complete this project. I am especially grateful to my parents, Erwin and Ike, for being unconditionally supportive and always willing to read and comment on my work, notify me about interesting articles and think along with me on the topic of my PhD. I would also like to thank my dear friends Clare and Julia for their valuable comments on previous draft sections of the manuscript. I am indebted to Ian for his excellent suggestions to improve the drafts.

Last but not least, I cannot but acknowledge that without Arjan, my husband, I would have still been in the painful process of finalising my manuscript now. Not only did his willingness to spend long nights programming on the computer save me a tremendous amount of time and mistakes when working on the footnotes but his capacity to put matters into perspective has also pushed me forward to completing the manuscript on time. I love him, if not only for that. Livia-Mae, our daughter, has had her share in counter-balancing the thinking process with her heart-warming smile and enthusiasm that fill my heart with joy every day. I am looking forward to walking the path of life and career with them at my side.

Utrecht, February 2012

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List of Abbreviations

ACHR	American Convention on Human Rights
AI	Amnesty International
APT	Association for the Prevention of Torture
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	Commission on Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEH	Commission for Historical Clarification (Guatemala)
CEJIL	Center for Justice and International Law
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
CoM	Committee of Ministers of the Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DPPED	Declaration on the Protection of all Persons from Enforced Disappearance
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
FEDEFAM	Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos
GPO	General Prosecutor's Office
HRC	Human Rights Committee
HRW	Human Rights Watch
IACFD	Inter-American Convention on Forced Disappearance of Persons
IAComHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICAED	International Coalition against Enforced Disappearances

ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ILC	International Law Commission
IOWG	Intersessional Open-ended Working Group
NGO	Non-governmental organisation
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP	Optional Protocol
PACE	Parliamentary Assembly Council of Europe
UDHR	Universal Declaration of Human Rights
UN Charter	Charter of the United Nations
UN Sub-Commission	Sub-Commission on the Promotion and Protection of Human Rights (before 1999, known as the Sub-Commission on Prevention of Discrimination and Protection of Minorities)
UN	United Nations
UNComHR	United Nations Commission on Human Rights
UNGA	United Nations General Assembly
UNHRCouncil	United Nations Human Rights Council
UNSC	United Nations Security Council
UNWGEID	United Nations Working Group on Enforced and Involuntary Disappearances
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

Introduction

Chapter 1
Introduction

1.1 Introduction

Enforced disappearance is a human rights violation the essence of which is relatively easy to describe but its extreme cruelty is difficult to entirely comprehend.[1] Most commonly, a person is arrested without an arrest warrant by agents of the state or persons acting with the support of the state. Subsequently, the state authorities deny having apprehended the person or having any knowledge of the event and conceal his or her whereabouts. The cruelty originates from the fact that the disappeared person is at the complete mercy of the perpetrators and has no contact with his or her family or any other person outside his or her captivity. Being in this situation, he or she is at serious risk of being tortured and, eventually, killed. In the meantime, relatives are in a continuous state of uncertainty and anguish about the fate and whereabouts of the disappeared person. As a result of the denials concerning the person's detention, the perpetrators are shielded from any form of accountability.

Enforced disappearance is not only an extremely cruel crime, but also a complex human rights violation. The denials by the state authorities, the lack of information and the continuous uncertainty give enforced disappearance a terrifying uniqueness that makes adequate legal protection against this crime extremely challenging.[2] The International Convention for the Protection of All Persons from Enforced

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1 The term 'enforced disappearance' is used throughout the book to indicate the crime of enforced disappearance as a human rights violation in general. Such use of this term, while not necessarily grammatically correct, is in line with the text of the International Convention for the Protection of All Persons from Enforced Disappearance. This book uses 'an enforced disappearance' or 'enforced disappearances' when it refers to a specific case of enforced disappearance. The term 'crime of enforced disappearance' is used to indicate the offence in domestic law. The terminology of enforced disappearance is not without hesitation. Amnesty International has placed this term in quotation marks because the victim has not really disappeared because someone, the state, knows where he or she is. This was also noted by the Chilean National Commission on Truth and Reconciliation that, nonetheless, used the term to indicate 'an arrest along with, or followed by, measures to conceal it and official denials', see Center for Civil & Human Rights & Notre Dame Law School (eds.), *Report of the Chilean National Commission on Truth and Reconciliation* (Notre Dame, Indiana: University of Notre Dame Press 1993), p. 36.

2 M.R. Berman & R.S. Clark, 'State Terrorism: Disappearances' (1981-1982) 13 *Rutgers L J* 3 pp. 531-577, at p. 533; J.J. Shestack, 'The Case of the Disappeared' (1980) 8 *Human Rights* 4 pp. 24-27 and 51-53, at p. 27.

Disappearance ('ICPPED')[3] is the first universal and binding instrument that aims to provide such protection. The purpose of this convention is to prevent enforced disappearance and to provide justice to those who have suffered as a result of this human rights violation.[4] As such, it is an important tool both for standard-setting and for holding states accountable for this crime. The present book aims to contribute to the provision of adequate legal protection by creating a framework for determining state responsibility under the ICPPED.

The adoption of the ICPPED within the United Nations ('UN') was a clear response to the occurrence of the phenomenon of enforced disappearance worldwide. Therefore, this introductory chapter first explains this phenomenon as it has occurred in different contexts since World War II. Secondly, the developments towards an international convention against this crime within human rights law are briefly explained. Thirdly, this chapter sets out the main research question, followed by a section on the scope and methodology of the present study. Lastly, the structure of the book is set out.

1.2 The phenomenon of enforced disappearance

The essence of an enforced disappearance is the apprehension of a person by state agents, or at least through an act in which the state is involved, while at the same time the state denies this deprivation of liberty. As a consequence, the apprehended person 'disappears' in the sense that his or her relatives and loved ones do not know where he or she is and who is responsible for the disappearance. In spite of a general understanding of what enforced disappearance entails, there is not just one scenario that can be classified as an enforced disappearance; this phenomenon may take various forms and scales.

The act of being forcefully taken away directly or indirectly by state agents from everything that is dear and known for an indefinite period of time became widely known as a result of World War II.[5] The phenomenon of enforced disappearance

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3 International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, opened for signature 6 February 2007, entered into force on 23 December 2010), UNGA Resolution 61/488.

4 S. McCrory, 'The International Convention for the Protection of All Persons form Enforced Disappearance' (2007) 7 *Hum Rts L Rev* 3 pp. 545-566, at p. 545.

5 Hitler was not the first to employ enforced disappearance as a means to repress political opponents. For instance, another less known use of this human rights violation occurred under the regime of Stalin, see A. Vranckx, 'A long road towards universal protection against enforced disappearance' (2007) *International Peace Information Service (IPIS)*, section 2; B. Finucane, 'Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War' (2010) 35 *The Yale Journal of International Law* 1 pp. 171-198, at p. 172; J. Kikhia, 'Enforced Disappearance in International Law: Case Study of Mansur Kikhia' (2009) XXVII *Journal of International Politics and Economics* pp. 27-39, at p. 28.

further developed on a systematic and large scale under several dictatorships in Latin America during the 1970s and 1980s. Hence, one could say that the phenomenon of enforced disappearance became widely known as a human rights violation committed under dictatorial regimes as part of an organised plan of the government.[6] However, the presumption that enforced disappearance is intertwined with dictatorships has been refuted by the large variety of situations from which complaints of enforced disappearance have emerged. Consequently, the UN Working Group on Enforced and Involuntary Disappearances ('UNWGEID') has concluded that enforced disappearance is a phenomenon occurring in complex situations of internal armed conflict, in regimes that undergo radical political changes and regimes that feel the need to repress political enemies such as guerrillas, terrorists and political opponents.[7] The following subsections describe in more detail this historical context and the scope of the phenomenon of enforced disappearance using several country examples on the European, Latin-American and African continent.[8]

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6 C. Ramón Chornet, Las Desapariciones Forzadas de Personas ante el Derecho Internacional, *PhD thesis,* (Universidad de Valencia 1986), p. 10; Council of Europe, Parliamentary Assembly of the Council of Europe ('PACE'), Resolution 828 (1984) on Enforced Disappearances, para. 5.

7 UNHRCouncil, 'Summary Record of the 3rd Session, report of the Chairman of the Working Group on Enforced or Involuntary Disappearances' (3 October 2006) UN Doc. A/HRC/2/SR.3, paras. 3 and 5; UNComHR, 'Report by the Working Group on Enforced and Involuntary Disappearance' (27 December 2005) UN Doc. E/CN.4/2006/56 (hereinafter: 'Annual report 2005'), para. 18 (stating that '[t]he total number of cases under active consideration that have not yet been clarified or discontinued stands at 41,128 and concerns 79 States'). See also UNComHR, 'Report of the Working Group on Enforced or Involuntary Disappearances' (21 January 2004) UN Doc. E/CN.4/2004/58 (hereinafter: 'Annual report 2003'), para. 3. In 2010, the UNWGEID reviewed information on enforced disappearances in respect of 94 countries, see UNHRCouncil, 'Report of the Working Group on Enforced or Involuntary Disappearances' (26 January 2011) UN Doc. A/HRC/16/48 (hereinafter: 'Annual report 2010'). It is rather exceptional that an enforced disappearance occurs in a non-conflict situation. An example of an alleged enforced disappearance in a non-conflict situation is the disappearance of Julio Lopez in Argentina. He disappeared in 2006 after having testified as a key witness in the trial against Etchecolatz, a senior Argentinian police officer who was accused (and finally convicted) of crimes against humanity in the framework of genocide during the military dictatorship that ruled Argentina from 1976-1983. However, investigations have not yet shown who is behind the disappearance and thus whether and to what extent the state apparatus is involved.

8 This introductory chapter does not seek to provide a complete overview of the situations in which enforced disappearance has been reported. In particular, it must be recognised that not all situations on these continents are discussed and that in several Asian countries, such as Nepal and Sri Lanka, enforced disappearances have been committed. Recently, the several UN bodies have expressed particular concern about, for instance Syria, see UNHRCouncil, 'Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic' (15 September 2011) UN Doc. A/HRC/18/53, paras. 22 and 82. See also T. Scovazzi & G. Citroni, *The Struggle against Enforced Disappearances and the 2007 United Nations Convention* (Leiden: Martinus Nijhoff Publishers 2007), chapter I (providing a thorough overview of the phenomenon of enforced disappearance).

1.2.1 The *Nacht und Nebel* decree issued by Adolf Hitler

One of the best known examples in history of an official practice of enforced disappearance took place during World War II.[9] On 7 December 1941, Adolf Hitler, the German Führer and Supreme Commander of the Armed Forces, issued the *Nacht und Nebel* decree. This decree introduced a 'fundamental innovation' to deter civilians in the occupied territories from committing offences against the *Reich* or against the occupation forces. According to this decree, in cases where prisoners were not sentenced to death, they were to be secretly transported to Germany. Their offence would be further dealt with there. The rationale behind issuing this decree was recalled in the proceedings before the Nuremberg Tribunal:

> […] these measures will have a deterrent effect because (a) the prisoners will vanish without leaving a trace, (b) no information may be given as to their whereabouts or their fate.[10]

On 12 December 1941, the Chief of the Armed Forces Supreme High Command, Wilhelm Keitel, published regulations supplementing this decree and explaining that '[a]n effective and lasting deterrent can be achieved only by the death penalty or by taking measures which will leave the family and the population uncertain as to the fate of the offender. The deportation to Germany serves this purpose.'[11] In addition, this policy was communicated by the Chief of the *Sicherheitspolizei* (Security Police) and the *Sicherheitsdienst* (SD, or 'Security Service') in a letter dated 24 June 1942. This letter emphasised the rationale and elaborated future dealings with prisoners. According to the letter, the purpose of the policy was:

> […] to create, for deterrent purposes, uncertainty over the fate of prisoners among their relatives and acquaintances, through the deportation into Reich territory of persons arrested in occupied areas on account of activity inimical to Germany. This goal would be jeopardised if the relatives were to be notified in cases of death. Release of the body for burial at home is inadvisable for the same reason, and beyond that also because the place of burial could be misused for demonstrations.[12]

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9 R. Brody & F. González, 'Nunca Más: An Analysis of International Instruments on "Disappearances"' (1997) 19 *Human Rights Quarterly* 2 pp. 365-405, at p. 366; R. Brody, 'Commentary on the Draft UN "Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances"' (1990) 4 *NQHR* 8 pp. 381-394.

10 English translation of the decree as cited in The Trial of German Major War Criminals (Session 25), The Trial of German Major War Criminals, Sitting at Nuremberg, Germany, December 17, 1945 to January 4, 1946, vol. 3, Session 25, 2 January 1946, part 4, available at www.nizkor.com (last visited on 10 February 2010), pp. 214 and 215.

11 *Ibid*., p. 214.

12 *Ibid*., p. 215.

As these extracts clearly demonstrate, the method of enforced disappearance was employed not only to punish offences against the *Reich* but also to deter the population from opposing the regime. The main advantage over other repressive measures was believed to be that enforced disappearance would discourage participation or collaboration against the regime's policies due to the uncertainty and lack of information on the fate of the disappeared persons.

1.2.2 Dictatorships in South and Central America

1.2.2.1 Introduction

Enforced disappearance as a method to suppress political dissidents, whose existence is perceived by the authorities as a threat to the regime, was further expanded in Latin America during the 1960s to the 1980s.[13] The background against which these violations were committed was one of political tension. After World War II, a social dissatisfaction spread over the Latin American continent, resulting in growing support for the leftist vision of a socially just society.[14] Working class movements, the poor and their allies stood up to demand influence over national policies and socio-economic resources. As a response, military dictators, supported by the conservative traditional elites, arose and established regimes in which harsh methods played a dominant role to control such leftist ideas and movements.[15] These regimes and their methods were justified by so-called national security doctrines.[16] These doctrines

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13 J.P. McSherry, *Predatory States: Operation Condor and covert war in Latin America* (Oxford: Rowman & Littlefield Publishers, Inc. 2005) (explaining that in many countries the 'theory of the two demons' was formulated purporting that the violence of the counterinsurgency militaries was provoked, and therefore justified, by the violence of guerrilla movements. As such, it was claimed that there were two parties to the conflict. The author notes that there are a number of observations that refute this theory: (1) the violence employed by the military regimes targeted their societies at large, not only the relatively small guerrilla movements. Victims included supporters of other political leaders but also unionists, students, peasants and other activists; (2) the guerrillas were virtually defeated before the coups were carried out; (3) in case of violence carried out by guerrilla groups, no equivalence existed between the systematic state terror of the military regimes and the more limited violence of such groups).

14 *Ibid*., p. 2.

15 *Ibid*., p. 26. See generally McSherry (2005) and L. Roniger & M. Sznajder, *The legacy of human rights violations in the Southern Cone: Argentina, Chile, and Uruguay* (New York: Oxford University Press Inc 1999) (both books show the various factors that paved the way for the military regimes to come to power in the different countries in Latin America. It is outside the scope of this research to go into great detail concerning the economic, social and political factors. Suffice it to mention here that all regimes resorted to the widespread repression of progressive socialist, leftist, Communist and Marxist ideas which resulted in the extensive use of enforced disappearance).

16 National security doctrines realised repressive systems aimed at depoliticising and demobilising political movements and politically active persons who were identified as 'internal enemies'. Part of such doctrines was the adoption of laws and decrees that encroached upon civil rights

justified violations of individual rights in light of the importance attached to national unity and to the primacy of national interests. Accordingly, 'internal enemies' such as politically active groups opposing the military regimes were targeted on the basis of such doctrines.[17]

The group of persons who were labelled as internal enemies, and thereby prone to being subjected to enforced disappearance, consisted mainly of workers, peasants, students, teachers and intellectuals. Nevertheless, the aspiration to exert control over society as a whole also prompted the disappearance of people who had affiliations with 'internal enemies', such as colleagues of disappeared persons or those who were simply relatives of those persons.[18] As General Ibérico Saint-Jean, governor of Buenos Aires during the first junta regime in Argentina, boasted, '[f]irst we kill the subversives; then we kill collaborators; then…their sympathizers; then those who remain indifferent; and finally we kill the timid.'[19] Such a broad view of who was to be eliminated caused an unpredictable pattern of repression.[20] Most of these military regimes also attacked the potential future generation of political opponents. They captured children after killing or seizing their parents and transferred them for adoption to military or police families in order to give them a 'non-subversive upbringing'.[21] Furthermore, legal and social structures were paralysed because of the disappearance of lawyers who were involved in the search for disappeared persons and the threats and intimidation against persons who reported enforced disappearances. At times, the use of enforced disappearance would serve a higher purpose. As Roniger and Sznajder argue, the integral approach of eliminating any opposition and paralysing structures of protection facilitated a higher goal, namely the dismantling of democratic institutions and the eradication of democratic rights and freedoms.[22]

1.2.2.2 Operation Condor: the international dimension of enforced disappearance in South America

Before describing several country examples, this section discusses the cooperation between the various dictatorships in order to provide a basis for the understanding of the scope of the use of enforced disappearance in Latin America. An important

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and liberties, or banned them altogether, in the name of national security. Legal remedies were mostly either suspended or ineffective, see *e.g.* Center for Civil & Human Rights & Notre Dame Law School (1993), chapter 2; J.L. Weil, *Brazil 76: Political prisoners and the state of emergency* (Brussels: IADL 1976), pp. 2-8.

17 McSherry (2005), pp. 3 and 4; Roniger & Sznajder (1999), p. 28.

18 Roniger & Sznajder (1999), p. 21.

19 Quoted in Roniger & Sznajder (1999), p. 21.

20 *Ibid*., p. 21.

21 McSherry (2005), p. 109.

22 Roniger & Sznajder (1999), p. 20.

umbrella for the implementation of the national security doctrines, of which the use of enforced disappearance was an important part, was Operation Condor. Following the Communist revolution in Cuba in 1959, the USA started to strengthen the South and Central American military and security forces that carried out the *coups d'état* in order to combat the leftist ideology.[23] The Cold War was an important motivation behind such support. The influence of the USA permeated most Latin American societies and its support enabled close cooperation between the various dictatorships. In cooperating, the heads of state in the Southern Cone created a joint secret intelligence and operations system named Operation Condor. This collaboration was based on, and justified by, counterinsurgency and its purpose was 'to destroy the "subversive threat" from the left and to defend "Western, Christian civilization."'[24] By means of such cooperation, the dictatorships could respond to the thousands of citizens who fled across the borders of their own countries in order to escape the repressive regimes there.[25] The founding act of Operation Condor was signed on 28 November 1975 and entered into effect on 30 January 1976.[26] Countries implementing Operation Condor were initially Argentina, Chile, Uruguay, Paraguay, Brazil and Bolivia, later joined by Peru and Ecuador.

Operation Condor was a highly sophisticated system through which the dictatorial regimes exchanged intelligence information. They could coordinate the political surveillance of targeted political dissidents and manage the list of the 'most wanted subversives'.[27] The target group was broadly defined; as Jorge Rafael Videla stated in a comment made in 1976, '[a] terrorist is not just someone with a gun or a bomb, but also someone who spreads ideas that are contrary to Western and Christian civilization.'[28] In fact, one of the purposes of the use of enforced disappearance was to instil terror among the population with the aim being to control and eradicate any aspiration of social justice.[29] In light of this aim, any legitimate democratic opposition was in itself perceived as a threat to the regime and its policy. Special, mostly secret, units of Operation Condor cooperated in the abduction of refugees and exiles who had fled the oppression in their own countries, often with the support of regular military

23 McSherry (2005), p. 3.
24 *Ibid*., p. 1.
25 *Goiburú et al. v. Paraguay* (merits, reparations and costs) IACtHR Series C No. 153 (22 September 2006), para. 61(5).
26 Operación Cóndor Acta fundacional 21 November 1975, available at constitucionweb.blogspot.com/2010/01/operacion-condor-acta-fundacional.html (last visited on 12 February 2010). The 'Terror files' found in Paraguay in 1992 reveal the intentions of the masterminds and the horrendous results of the operation. For abstracts of these files, see *Goiburú et al. v. Paraguay* IACtHR (2006), para. 61(7).
27 *Goiburú et al. v. Paraguay* IACtHR (2006), para. 61(6).
28 Quote cited in McSherry (2005), p. 1.
29 McSherry (2005), p. 6.

and security personnel. Subsequently, they would be abducted and transferred to their country of origin for the enforced disappearance to be completed.[30]

Operation Condor was such a sophisticated system that the majority of the operations were carried out in a manner by which the military regimes themselves could deny their involvement therein. In several cases these regimes even ordered symbolic police investigations.[31] Hence, this structure was an instrument to accomplish secretly what could not be accomplished in a legal or political manner. On the other hand, parts of the acts were visible as part of the strategy to terrorise the population. The paradox in this combination of secrecy and visibility was extremely powerful because, as McSherry notes, '[w]hile appearing to be out of control forces, paramilitary units were actually more dangerous and more powerful because they acted under the secret direction of a military command, backed by the full resources of the state.'[32] This 'parallel structure' allowed the military dictatorships to achieve their goals but at the same time to retain the appearance of legality and a certain legitimacy.[33] Besides, the operations were carried out in a manner so as to control and confuse the population by making the acts of Operation Condor appear to have been committed by leftist groups.[34]

1.2.2.3 Examples of dictatorships in South America

A brief overview of the situations in Brazil, Uruguay, Chile and Argentina provides an insight into the scope of the enforced disappearances used during these dictatorships.

Brazil experienced a period of military rule from 1964 to 1985. Under the presidency of General Medici (October 1969 - March 1974), a former head of the national intelligence service, the country experienced a period marked by the most severe repression the country had ever known. In this period the regime created the Operational Centres of Interior Defence (CODI) and the Task Forces of Operations and Information. These task forces operated to eliminate subversive groups, dissidents and those who were suspected of sympathising with such state enemies. The target group included teachers, students and workers. The first estimate of the number of disappeared persons was published in 1985 in the report *Brasil: Nunca Mais*. This report suggested a figure of 125 politically motivated disappearances, with many more who were killed, tortured or were forced to flee the country. The 1985 report indicated that the use of enforced disappearance brought the political repression to a higher level because the disappeared person was in the total power of the repressive

30 *Ibid*., p. 5.
31 *Ibid*.
32 *Ibid*., p. 21.
33 *Ibid*., p. 8.
34 *Ibid*., p. 7.

units without them having to account for that person. In practice, the crime was cloaked in secrecy and occurred outside the legal framework.[35]

Uruguay had known a relatively long period of civilian rule before the military came to power in the early 1970s when the civilian president invited the army to protect the political institutions. However, beginning in 1972, the power of the military began to increase and they remained in control until March 1985.[36] On 27 June 1973, the elected President, Juan María Bordaberry, carried out a *coup d'état* with the support of the armed forces, after which a period of a civil-military dictatorship ensued that targeted left-wing political organisations with harsh repressive measures.[37] According to *El Proyecto Desaparecidos*, the Uruguayans who were subjected to enforced disappearance numbered 136, of whom 34 had disappeared in Uruguay.[38] The *Comisión para la Paz* received 38 allegations of persons having disappeared in Uruguay while the number of Uruguayans who allegedly disappeared in Argentina in the context of Operation Condor reached 182.[39]

Chile had also enjoyed relatively stable democratic rule until the military coup by Pinochet in 1973. This military coup was triggered by a situation of social deterioration and political unrest.[40] Pinochet's regime remained in power until March 1990. The period directly following the coup was the most violent in an attempt to 'clean up' the persons perceived as dangerous because of their ideas and activities and to instil fear to deter persons who might potentially pose a 'threat'.[41] In 1973, a group

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35 'Nunca Mais', section 'Desaparecidos políticos', available at www.dhnet.org.br/dados/projetos/dh/br/tnmais/index.html (last visited 31 October 2011) (hereinafter: 'Nunca Mais'), section 'Desaparecidos políticos'. Excerpts of this private initiative sponsored by Paulo Evaristo Arns can be found on www.utexas.edu/utpress/excerpts/excattop.html (last visited 31 October 2011) (The conclusions describe the objective of the research project as, '[t]he objective of the research project "Brazil: Never Again," from its inception in August 1979 to its conclusion in March 1985, was to turn the wish expressed in its title into a reality, that is, to ensure that the violence, the infamy, the injustice, and the persecution of Brazil's recent past should never again be repeated.'). For more information, see www.usip.org/publications/commission-inquiry-brazil (last visited 31 October 2011).

36 Roniger & Sznajder (1999), p. 12.

37 *Gelman v. Uruguay* (merits and reparations) IACtHR Series C No. 221 (24 February 2011), para. 45.

38 www.desaparecidos.org/uru/, citing the NGO 'Madres y Familiares' ('Madres y Familiares de Uruguayos Detenidos Desaparecidos (previously called: 'Familiares'). This organisation was created in the second half of the 1970s as a result of the complaints and first searches by the families of detained and disappeared persons in Uruguay and in Argentina, see www.desaparecidos.org.uy/index.html.

39 Report by the Uruguayan Commission for Peace, 'Informe final de la Comisión para la Paz' (10 April 2003), available at www.usip.org/publications/truth-commission-uruguay (hereinafter: 'Report by the Uruguayan Commission for Peace'), paras. 41 and 56.

40 Roniger & Sznajder (1999), p. 12.

41 Report of the *Comisión Nacional de Verdad y Reconciliación* (Chilean National Truth and Reconciliation Commission), Volume I, p. 115, as cited in *Almonacid-Arellano et al. v. Chile*

of army majors and colonels, later to be called *Dirección de Inteligencia Nacional* ('DINA'), started to operate in secret in order to eliminate what was considered as the extreme left. This group of army officials practised one of the most extreme forms of counterinsurgency.[42] According to the report of the *Corporación Nacional de Reparación y Reconciliación*,[43] almost two-thirds of the 3,197 cases of identified victims of arbitrary execution and enforced disappearance occurred in the first year. In total, 33,221 persons were arrested and 94 % of the political prisoners had been tortured by state agents.[44] Victims included a wide range of persons such as renowned left-wing politicians, indigenous leaders, civil society members, trade unionists and students. Ultimately, a certain degree of arbitrariness typified the target group.

In Argentina, the phenomenon of enforced disappearance became notoriously well known mainly through the actions of the *Madres de Plaza de Mayo*, walking in circles with white headscarves in Buenos Aires, Argentina, demanding to know the whereabouts of their disappeared sons and daughters. The phenomenon of enforced disappearance took on a systematic appearance with the military coup of 1976 by the Junta. This coup was one of the many military regimes in the country since 1931.[45] The Junta military regime remained in *de facto* power until 1983. Videla, head of the Military Junta regime, led one of the most extreme repressive policies in fighting the 'internal enemy'. In the fight against the opposition, enforced disappearance was the main method by which to eliminate political and ideological resistance. The victims were not only members of subversive groups but also students, workers, relatives of persons involved in the struggle against the regime, and intellectuals who were far from being involved in terrorist activities.[46] Children of political dissidents were also targeted in an attempt to erase the present and future generations of political opponents.[47] They were either captured together with their parents or they were born in captivity. Their fate was to be separated from their parents and most often either

(preliminary objections, merits, reparations and costs) IACtHR Series C No. 154 (26 September 2006), para. 82(6).

42 Center for Civil & Human Rights & Notre Dame Law School (1993), pp. 59-62.

43 The National Commission on Truth and Reconciliation, also known as 'The Rettig Commission', was operational from May 1990 to February 1991.

44 'Victims recognized by the State, classified as disappeared or dead,' Appendix 1 to the Report on the classification of victims of human right violations and political violence of the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation), p. 576, as cited in *Almonacid-Arellano et al. v. Chile* IACtHR (2006), para. 82(5).

45 Roniger & Sznajder (1999), p. 12.

46 'Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas', report by the National Commission on the Disappeared (CONADEP) (September 1984), translation in English available on web.archive.org/web/20031002040053/nuncamas.org/index2.htm (last visited on 18 February 2010) (hereinafter: 'Nunca Más'), conclusions.

47 Scovazzi & Citroni (2007), p. 16; IAComHR, 'Annual Report of the Inter-American Commission on Human Rights 1987-1988' (16 September 1988) OEA/Ser.L/V/II.74, chapter V; *Gelman v. Uruguay* IACtHR (2011).

killed or adopted illegally by families supporting the regime. Sometimes the adoptive families were even the perpetrators of the enforced disappearance of their parents.[48] Special units had the task of eliminating persons who were, or potentially could pose, a threat to the security of the state. These units were decentralised and had unlimited power to achieve the required aim.[49] The *Comisión Nacional sobre la Desaparición de Personas* ('CONADEP') in its final report identified 340 clandestine detention centres and a minimum of 8,960 disappeared persons during the Junta regime. However, the report noted that many cases had gone unreported 'either because the victims had no relatives or because the relatives were frightened or lived a long distance from the centre of town.'[50] The estimated number of disappeared persons maintained by NGOs has risen to 30,000.[51]

1.2.2.4 The phenomenon of enforced disappearance in Central America

Apart from being used by the countries that participated in Operation Condor, enforced disappearance was also a well-known phenomenon in Central America. In fact, the first country in Latin America in which enforced disappearance was practised on a systematic scale was Guatemala. In 1950 a progressive nationalist, Jacobo Arbenz, was elected president. He was a perfect example of the new brand of reformist leaders. He established new rights for workers and indigenous peoples and implemented progressive land reforms. These reforms affected large landowners including the largest landowner in Guatemala, the U.S.-based United Fruit Company. Affected by these social reforms, the right-wing forces in Guatemala, secretly supported by the U.S. administration, overthrew President Arbenz in 1954 and replaced him with a U.S.-approved colonel. In the early 1960s a period of political unrest generated resistance groups against *inter alia* the corruption and in favour of democratic rights and liberties. In 1963, a right-wing military colonel, Enrique Peralta Azurdia, led a *coup d'état*. As a result of the coup, the Constitution was abolished and a national security doctrine was adopted.[52] This coup heralded a period of oppression through *incommunicado* detention, enforced disappearance and other

48 Scovazzi & Citroni (2007), p. 17.
49 IAComHR, 'Informe sobre la situación de los derechos humanos en Argentina' (11 April 1980) OEA/Ser.L/V/II.49, doc. 19, chapter III (g).
50 Nunca Más (1984), introductory note to Part II: victims.
51 UNHRCouncil, 'Report of the Working Group on Enforced or Involuntary Disappearance – Addendum – Mission to Argentina' (5 January 2009) UN Doc. A/HRC/10/9/Add.1 (hereinafter: 'Report of mission to Argentina (2009)'), para. 9.
52 Final Report by the Commission for Historical Clarification (CEH), Guatemala: Memoria del Silencio (25 February 1999), available at www.justiceinperspective.org.za (last visited on 10February 2010) (hereinafter: 'Guatemala: Memoria del Silencio (1999)'), conclusions annex A.

means to eliminate the perceived resistance groups or terrorist movements.[53] This policy was retained throughout the subsequent years of armed confrontation in which Guatemala was ruled by a number of elected and de facto presidents, leading to an armed conflict between the state, paramilitaries and insurgent groups. The aim of deterrence played an important role in using enforced disappearance as a method to spread terror among the population and to force the populace to submit to a regime that violated the most basic rights of its citizens.[54] At the same time, impunity dominated the very structure of the state both as a means and an end. As a means, it shielded the crimes by the state and by those with similar objectives. As an end, it was the consequence of the repressive methods used, such as enforced disappearance.[55] The Commission for Historical Clarification ('CEH') documented a total of 42,275 victims, of which 6,159 were victims of enforced disappearance. Victims included persons from all social strata but 83% of fully identified victims were Mayan. The vast majority of the enforced disappearances, 91%, were attributable to state forces or related paramilitary groups.[56] Another target group of the violence by state agents was street children.[57] In fact, the disappearance of children took a widespread appearance during the conflict.[58]

El Salvador was engulfed in an internal conflict between 1980 and 1991. The warring parties were the government and their collaborators against the insurgency group *Frente Farabundo Martí para la Liberación Nacional* ('FMLN'), which was formed in the late 1980s.[59] In January 1992, a Peace Agreement was signed between the parties as an end to the conflict. According to the report of the Commission of the Truth, more than 22,000 serious acts of violence allegedly occurred in El Salvador between January 1980 and July 1991, of which more than 25% concerned the crime of enforced disappearance.[60] The initial period in the early 1980s was characterised by the institutionalisation of violence, including selective and indiscriminate enforced

53 Molina Theissen, *La desaparicion forzada de personas en América Latina*, in KOãg Roñe'etã, Ser. VII, 1998, available at http:www.derechos.org/koaga/vii/molina.html (last visited on 8 February 2010).

54 Guatemala: Memoria del Silencio (1999), para. 89; *Molina-Theissen v. Guatemala* (merits) IACtHR Series C No. 106 (4 May 2004), para. 40(1).

55 Guatemala: Memoria del Silencio (1999), conclusions, para. 10.

56 *Ibid*., conclusions, paras. 1 and 15. See also *Chitay-Nech et al. v. Guatemala* (preliminary objections, merits, reparations and costs) IACtHR Series C No. 212 (25 May 2010).

57 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* (merits) IACtHR Series C No. 63 (19 November 1999).

58 *Molina-Theissen v. Guatemala* IACtHR (2004); *Tiu-Tojín v. Guatemala* (merits, reparations and costs) IACtHR Series C No. 190 (26 November 2008), para. 50.

59 Report of the Comisión de la Verdad para El Salvador, 'From Madness to Hope: the 12-Year War in El Salvador: Report of the Commission on het Truth for El Salvador' (1993), available at www.usip.org/files/file/ElSalvador-Report.pdf (hereinafter: 'From Madness to Hope: the 12-Year War in El Salvador (1993)'), part III 'Chronology of Violence'.

60 *Ibid*., part IV 'Cases and Patterns of Violence'.

disappearances of political leaders, trade unionists and others from the organised sectors of society.[61] The subsequent first years were the most violent.[62] According to testimonies received by this Commission, more than 85% of the violence was attributable to agents of the state, such as the army and security forces, and its collaborators. The crimes occurred in a 'political mind-set that viewed political opponents as subversives and enemies.'[63] As a result, anyone who expressed opposing views to those of the government was a potential victim. Similarly, any organisation questioning the policy of the government was automatically labelled as working for the guerrillas.[64] The aim of the operations was to eliminate political opponents and potential opponents, including children, and to spread terror among the population.[65] The counter-insurgency policy in its most extreme form ensued in a general practice of 'cutting the guerrillas' lifeline'. Within this practice, anyone living in the areas where the guerrillas were active was suspected of belonging to that movement. The remaining complaints received by the Commission of the Truth concerned crimes, such as extra-judicial killings and enforced disappearances, by the FMLN. There was no clear pattern of enforced disappearances but they were mainly committed on the territory over which the FMLN had control.[66] The *modus operandi* of the state actors included arrests in broad day light followed by detention in facilitates belonging to the army or security forces, sometimes when handed over to persons in civilian clothing. Subsequently, the arrest or detention was denied.[67] During the conflict in El Salvador, groups which were active as death squads were operating in a systematic and organised manner. State agents in the civilian branch and military branch of the government were actively involved in these groups or turned a blind eye to their activities. As such, these death squads became 'an instrument of terror used systematically for the physical elimination of political opponents'.[68] They 'usually wore civilian clothing, were heavily armed, operated clandestinely and hid their

61 *Ibid*., part III 'Chronology of Violence'.

62 UNComHR, 'Report of the Working Group on Enforced or Involuntary Disappearances – Mission to El Salvador' (26 October 2007) UN Doc. A/HRC/7/2/Add.2 (hereinafter: 'Report on Mission to El Salvador (2007)'), para. 14.

63 From Madness to Hope: the 12-Year War in El Salvador (1993), part IV 'Cases and Patterns of Violence'.

64 *Ibid*.

65 UNWGEID, Report on Mission to El Salvador (2007), para. 21 (citing the case of Ernestina and Erlinda Serrano Cruz, Report of the Procurator for the Defence of Human Rights on the enforced disappearances of two girls, Ernestina and Erlinda Serrano Cruz, the current impunity and the pattern of violence in disappearances of this kind. Office of the Procurator for the Defence of Human Rights, September 2004, p. 70). See also *Serrano-Cruz Sisters v. El Salvador* (merits, reparations and costs) IACtHR Series C No. 120 (1 March 2005).

66 From Madness to Hope: the 12-Year War in El Salvador (1993), part IV 'Cases and Patterns of Violence'.

67 *Ibid*. See also UNWGEID, Report on Mission to El Salvador (2007), para. 22.

68 From Madness to Hope: the 12-Year War in El Salvador (1993), 'Death squads assassinations'.

affiliation and identity'.[69] Their *modus operandi* included the abduction of civilians and members of the guerrillas, followed by torture, disappearance and usually the execution of the victims.[70]

Honduras has a long history of military dominance in the country. Since the late 1950s, a number of military *coups d'état* followed one after another. In 1980 presidential elections were held, but the armed forces retained a dominant position in the life of the country. Simultaneously, the armed forces tightened their counter-insurgency strategy as a result of the conflicts in its neighbouring countries. Between 1980 and 1984, the Honduras security forces carried out a systematic practice of gross human rights violations, including enforced disappearance, torture and extra-judicial killings. According to Honduras' National Commissioner for Human Rights, more than 180 persons disappeared during the 1980s in Honduras.[71] In particular, 'Battalion 316', a death squad commanded by military intelligence officials, turned out to be notorious for the elimination of leftist political activists.[72] The enforced disappearance of persons usually followed a modus operandi, namely the kidnapping of a person in broad daylight and in public places. The kidnappers were usually persons in civilian clothing using cars without any number plates or false ones.[73] Victims were brought to secret detention places where they were tortured and, often, executed. The authorities denied any responsibility when faced with inquiries from relatives or lawyers. Furthermore, the judicial system was incapable of responding adequately to the crimes and judicial remedies were utterly ineffective.[74] In addition, Honduras served as a basis for the *Contras* who fought the Marxist government of Nicaragua. The *Contras* were responsible for several enforced disappearances as well.[75]

1.2.2.5 Responses to remedy gross human rights violations of the past

The Latin American societies described in the previous paragraphs experienced a transition to either a more democratic regime or a stabilised situation according to peace agreements. These transitions were accompanied by various steps initiated by the governments in order to respond to the legacy of the grave human rights violations committed. It must be recognised that each country reacted differently to the demand

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69 *Ibid*.
70 *Ibid*.
71 UNHRCouncil, 'Report of the Working Group on Enforced or Involuntary Disappearances – Addendum – Mission to Honduras' (26 October 2007) UN Doc. A/HRC/7/2/Add.1 (hereinafter: 'Report of Mission to Honduras (2007)'), para. 13.
72 UNWGEID, Report of Mission to Honduras (2007), para. 11.
73 *Velásquez-Rodríguez v. Honduras* (merits) IACtHR Series C No. 4 (29 July 1988), para. 147(b).
74 *Ibid*., para. 147(d).
75 UNWGEID, Report of Mission to Honduras (2007), para. 12.

for justice by victims, their associations and by the international community. However, there are three general observations which should be made. First, most governments created truth commissions with the mandate to clarify the facts of the gross human rights violations. Such truth commissions were created in Argentina,[76] Chile,[77] El Salvador,[78] Guatemala,[79] Uruguay,[80] and most recently in Brazil.[81] Also, reparation schemes have been implemented to compensate the victims and exhumations have taken place to locate the remains of persons who have been killed.[82]

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76 The National Commission on the Disappeared (Comisión Nacional sobre la Desaparición de Personas (CONADEP)), completed the report 'Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas' in September 1984. The mandate was to 'clarify the acts related to the disappearance of persons' between 1976-1983 and was established by decree No. 187 of 15 December 1983 by President Alfonsín. The commission reported 8,600 cases of enforced disappearance.

77 The Report of the Chilean National Commission on Truth and Reconciliation (Comisión Nacional para la Verdad y Reconciliación), also known as the Rettig Report, published in February 1991 a list of 3,428 disappeared, killed, tortured to death or kidnapped persons. This Commission was created by Decree No. 355 of 25 April 1990 by President Aylwin. This report has been reproduced in: Center for Civil & Human Rights & Notre Dame Law School (1993).

78 A peace agreement brokered by the UN established the Commission on the Truth for El Salvador (Comisión de la Verdad para El Salvador) in January 1992 to investigate the serious acts of violence between January 1980 and July 1992. The commission reported 22,000 disappeared, killed, tortured or kidnapped persons in its 1993 report 'From Madness to Hope: the 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador'.

79 The Historical Clarification Commission ('CEH') completed a report in 1999 entitled: 'Guatemala: Memoria Del Silencio' presenting 42,275 cases of victims who had suffered from the armed conflict between approximately 1958 and 1994. The CEH was created by the peace agreements of 23 June 1994, see P. Hayner, 'Truth commissions: a schematic overview' (2006) 88 *IRRC* 862 pp. 295-310.

80 'Final Report of the Investigative Commission on the Situation of the "Disappeared" People and its Causes' by the Investigative Commission on the Situation of 'Disappeared' People and Its Causes (Comisión Investigadora sobre la Situación de Personas Desaparecidas y Hechos que la Motivaron), which was established by Parliament in 1985. The Commission reported 164 cases of disappearances between 1973 and 1982 in Uruguay, see Justice in perspective, Investigative Commission on the Situation of 'Disappeared' People and Its Causes, Uruguay, available at www.justiceinperspective.org.za/index.php?option=com_content&task=view&id=83&Itemid=134 (last visited on 30 September 2011). La Comisión para la Paz was created by Resolution No. 858/2000 (9 August 2000) and published its report 'Informe final de la Comisión para la Paz' on 10 April 2003.

81 On 21 September 2011, the Chamber of Deputies in Brazil passed a bill creating a truth commission to investigate crimes committed during the military regime. The next step is approval by the Brazilian senate, which is expected soon. (The International Center for Transitional Justice, *Brazil: six critical steps for truth commission success,* 22 September 2011, available at ictj.org/news/brazil-six-critical-steps-truth-commission-success (last visited on 30 September 2011).

82 *E.g.* the National Reparations Programme ('PNR') in Guatemala, see 'The current states of compliance with the recommendations of the Commission for Historical Clarification (CEH) on forced disappearance and exhumations' (2010) 22 *Peace Brigades International Guatemala project* 3 pp. 9-11, at p. 9.

At the same time, positive measures to uncover the truth have been accompanied by measures to impede judicial processes, such as amnesty laws or pardons, with the aim of shielding the perpetrators from prosecution. In 1978, the *de facto* government in Chile enacted Amnesty Law Decree No. 2.191.[83] In Uruguay, the Uruguayan Parliament passed the Law on the Expiry of the Punitive Power of the State (*Ley de Caducidad del Poder Punitivo del Estado*) in 1985.[84] Argentina presented a special case. In historical trials immediately after the fall of the Junta regime, some of the high commanders of the Junta regime were tried under the Raúl Alfonsín administration in 1985.[85] However, yielding to the pressure of the armed forces, the national Congress passed amnesty laws known as the Full Stop (*Ley de Punto Final*) in 1986 and the Due Obedience law (*Ley de Obediencia Debida*) in 1987.[86] These laws halted the incoming complaints and provided immunity for subordinate officials, creating the presumption that they were carrying out orders and could, therefore, not be held liable for the crimes committed.[87] President Alfonsín's successor, President Menem, created another setback by issuing two presidential pardons for those tried for human rights violations, including the military heads convicted in the 1985 trials.[88] In El Salvador, the Salvadorian Legislature passed an amnesty (Law for the Consolidation of Peace (Law 486)) five days after the presentation of the report of the Truth Commission in 1993.[89]

During the inception of the twenty-first century, several countries have taken important steps to repeal the amnesty laws and to instigate criminal investigations. One important impetus for these trials was the pressure exerted by the Inter-American Commission and a judgment by the Inter-American Court in 2001 ruling that self-amnesties for grave human rights violations were incompatible with the ACHR. As a

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83 *Almonacid-Arellano et al. v. Chile* IACtHR (2006), para. 82(10) (citing Article 1 which provides that 'Amnesty shall be granted to all individuals who performed illegal acts, whether as perpetrators, accomplices or accessories after the fact, during the state of siege in force from September 11, 1973 to March 10, 1978, provided they are not currently subject to legal proceedings or have been already sentenced.').

84 S.A. Canton, 'Amnesty Laws', in: K. Salazar & T. Antkowiak, (eds.), *Victims Unsilenced, The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington DC: Due Process of Law Foundation 2007) pp. 167-190, at p. 168.

85 M. Lozada, *Law's response to crimes against humanity: Some lessons from Argentina* (Utrecht: Utrecht University 2008), p. 4.

86 Respectively, Law 23.492 (24 December 1986) and Law 23.521 (8 June 1987).

87 L.J. Laplante, 'Outlawing amnesty: the return of criminal justice in transitional justice schemes' (2008-2009) 49 *Va J Int'l L* 4 pp. 915-984, at p. 923.

88 L.G. Filippini, 'Argentina', in: K. Salazar & T. Antkowiak, (eds.), *Victims Unsilenced, The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington DC: Due Process of Law Foundation 2007) pp. 71-94, at p. 76; Lozada (2008), p. 5.

89 B. Cuéllar Martínez, 'El Salvador', in: K. Salazar & T. Antkowiak, (eds.), *Victims Unsilenced, The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington DC: Due Process of Law Foundation 2007) pp. 33-70, at p. 42 and 43.

result, trials against alleged perpetrators of crimes during the dictatorial regimes have been initiated in Argentina,[90] Chile[91] and Guatemala.[92] In Brazil, the amnesty is still in force. For instance, Carlos Alberto Brilhante Ustra, the former head of the Sao Paulo secret police during the military rule, was found guilty of torture on 9 October 2008 by a Sao Paulo court, but was exempted from a prison sentence by the 1979 Amnesty Law.[93] The demand for justice has so far been ignored in El Salvador.[94]

1.2.3 Recent situations of internal conflict or unrest

One of the more recent examples of an internal conflict situation in which enforced disappearance occurred is the situation in Colombia. For over 40 years, a complex armed conflict has scourged Colombia. As a result of the conflict, civilians have greatly suffered from grave human rights violations, including massacres and disappearances.[95] Originally, the conflict was politically and territorially motivated

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90 The Supreme Court ruled that the two amnesty laws were unconstitutional in the case *Julio Héctor Simón et al.*, Case 17.768 (14 June 2005). In 2006, the former minister of economics, de Hoz, and former General Albano Harquindeguy, the former minister of the domestic affairs, were sent back to prison. Only a few months later, in April 2007, the Court of Appeal overturned the pardons given to Videla and Massera so they had to serve their sentence of life imprisonment, see T. Roehrig, 'Executive Leadership and Continuing Quest for Justice in Argentina' (2009) 31 *Hum Rts Q* 3 pp. 721-747, at pp. 741 and 742. Videla was again sentenced to life imprisonment by a Federal Court in Córdoba on 22 December, 2010, see www.trial-ch.org/. On 4 April 2011, General Cabanillas and three other officers were sentenced to life imprisonment for running a detention centre in Buenos Aires, see BBC News, *Former Argentine Gen Eduardo Cabanillas Jailed*, 1 April 2011, available at www.bbc.co.uk/news/world-latin-america-12929267 (last visited on 30 September).

91 From 2000 onwards Pinochet was the subject of an investigation in at least five national and international trials. However, he died on 10 December 2006, which ended all legal procedures against him. Contreras Sepulveda, General and chief of the secret police during the military regime, was convicted in Chile in 2008 to two terms of life imprisonment, see www.trial-ch.org/.

92 In 2009, the first convictions of members of the military for enforced disappearance were issued, see 'The current states of compliance with the recommendations of the Commission for Historical Clarification (CEH) on forced disappearance and exhumations' (2010) 22 *Peace Brigades International Guatemala project* 3 pp. 9-11.

93 See www.trial-ch.org/.

94 Canton (2007), p. 176; Cuéllar Martínez (2007), pp. 58 and 59. See also www.contrapunto.com.sv/politica-nacionales/el-salvador-incumple-en-casos-romero-y-uca (last visited on 31 October 2011).

95 See *e.g. The 19 Tradesmen v. Colombia* (merits, reparations and costs) IACtHR Series C No. 109 (5 July 2004); *"The Mapiripán Massacre" v. Colombia* (merits, reparations and costs) IACtHR Series C No. 134 (15 September 2005); *The Pueblo Bello Massacre v. Colombia* IACtHR Series C No. 140 (31 January 2006); *The Ituango Massacres v. Colombia* (preliminary objection, merits, reparations and costs) IACtHR Series C No. 148 (1 July 2006); UNComHR, 'Report of the Working Group on Enforced or Involuntary Disappearance - Addendum - Mission to Columbia (5-13 July 2005)' (17 January 2006) UN Doc. E/CN.4/2006/56/Add.1 (hereinafter: 'UNWGEID Report of Mission to Columbia (2006)'), paras. 40 and 50 (The last report indicates that since 2001, 390 complaints of enforced disappearance have been lodged at the national Prosecutors Office and that 1,150 cases have been reported to the UNWGEID since 1981).

but was later complicated by economic interests involving natural resources, drugs and banana farms. The main actors that have played a role in the conflict include various revolutionary groups organised as guerrilla groups, paramilitary groups and the Colombian army, the national police and other security bodies. At the beginning, between the early 1970s and the late 1990s, the Colombian state played an indispensable role in promoting the formation of the paramilitary groups, also referred to as 'self-defence units'. The state supported them with financing, training and arms. The rationale behind this support was their well-designed participation in the fight against the guerrilla groups. Cleansing operations concerning street children prompted the authorities to resort to enforced disappearances as well.[96] When the UNWGEID visited the country in 2005, the Colombian state assured the UNWGEID that such groups were considered illegal and that it had taken measures to dismantle them.[97]

In Europe, enforced disappearance has been reported in respect of *inter alia* Turkey and the Russian Federation.[98] Turkey was involved in an internal armed struggle from the mid-1980s until the end of the 1990s. The warring parties were the military government, aiming to achieve a strong united Turkish state, and the Kurdistan Workers' Party (the PKK), which was fighting for an autonomous Kurdish

96 See UNCRC, 'Concluding observations of the Committee on the Rights of the Child: Colombia' (16 October 2000) UN Doc. CRC/C/15/Add.137, paras. 34 and 35.

97 UNWGEID Report of Mission to Columbia (2006), paras. 12-14 and 55.

98 See UNComHR, 'Report by the Working Group on Enforced and Involuntary Disappearance' (18 December 2000) UN Doc. E/CN.4/2001/68 (hereinafter: 'Annual report 2000'), paras. 90-92 and 99; UNHRCouncil, 'Report of the Working Group on Enforced or Involuntary Disappearances' (26 January 2011) UN Doc. A/HRC/16/48, p. 138 and para. 145. Other situations in Europe in which enforced disappearances have been committed include the war in Bosnia Herzegovina (1992-1995), see R. Frech, *Disappearances in Bosnia and Herzegovina*, (Association for the Promotion of the Ludwig Boltzmann Institute of Human Rights 1998) and *Palić v. Bosnia and Herzegovina* ECtHR 15 February 2011 (Appl. no. 4704/04). The Human Rights Chamber for Bosnia Herzegovina, a special human rights court established in accordance with the Dayton Peace Agreement of 14 December 1995, dealt with important enforced disappearance cases committed during this war on the basis of the ECHR. For a discussion on the case law of this Chamber, see UNComHR, 'Report by the independent expert charged with examining the existing international criminal and human rights framework for the protection of person from enforced or involuntary disappearances, pursuant to paragraph 11 of the Commission Resolution 2001/46' (8 January 2002) UN Doc. E/CN.4/2002/71 (hereinafter: 'UN Report by Nowak (2002)'), paras. 41 and 42 and M.F. Pérez Solla, *Enforced Disappearances in International Human Rights Law* (North Carolina: McFarland & Company, Inc., Publishers 2006); Scovazzi & Citroni (2007), pp. 224-243. In addition, the conflict in Northern Cyprus between Cyprus and Turkey has generated reports of enforced disappearance during the conflict in the early 1970s, see *Varnava a.o. v. Turkey* ECtHR [GC] 18 September 2009 (Appl. nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) and *Cyprus v. Turkey* ECtHR [GC] 10 May 2001 (Appl. no. 25781/94).

state.[99] The conflict was mainly concentrated in Southeast Turkey. During the first years of this conflict many persons on both sides were killed, but no reports of disappearances in Turkey date from this time. In 1991 this changed, however, with every subsequent year seeing an increase in complaints of enforced disappearance. In 1994, more than 50 reports were filed to the UNWGEID, mostly concerning local politicians, journalists and Kurdish civilians who had given shelter or food to PKK members.[100] More attention for this issue was created due to the vigils of the Saturday Mothers who silently occupied a central square in Istanbul every Saturday from 27 May 1995 to 13 March 1999, similar to the actions taken by the *Madres de la Plaza de Mayo* in Argentina.[101] Their actions were brutally obstructed and prevented by the Turkish police until the point where they could not continue.[102] As a result of international pressure, the Turkish government began to show more concern towards human rights in 1997. One of their measures was to establish the Special Bureau to Investigate Allegations concerning Missing Persons to investigate the details of the missing civilians.[103] Additionally, the Turkish Parliament passed the Law on Compensation for Damage Arising from Terror and Combating Terror (Law 5233) on 17 July 2004. The purpose of the law is to 'provide compensation to displaced people for material damage caused between 1987 - 2004 by armed opposition groups and government security forces.'[104] Compensation is provided for *inter alia* physical injuries and death and Damage Assessment Commissions have been established to investigate, within the limitations of their mandate, the crimes committed.

Europe was again confronted with large-scale enforced disappearances during the 2nd Chechen war in Russia. This war commenced on 26 August 1999 with the attack by the Russian army on the Chechen capital, Grozny. The intention of the army was to dispose the separatist movement that had effective control over the area since 1996, the end of the first Chechen war.[105] The justification given by the

99 Z.F. Kabasalkal Arat, *Human Rights in Turkey* (Philadelphia: University of Pennsylvania Press 2007), pp. 7 and 8.

100 AI, 'Summary Country Report on Turkey: Information on Continuing Human Rights Abuses' (February 1996) AI Index: EUR 44/10/96, p. 3.

101 G. Baydar & B. Vegen, 'Territories, Identities and Thresholds: The Saturday Mothers Phenomenon in Istanbul' (2006) 31 *Journal of women in culture and society* 3, p. 689.

102 AI, 'Summary Country Report on Turkey: Listen to the Saturday Mothers' (November 1998) AI Index: EUR 44/17/98, p. 2.

103 UNComHR, 'Report of the Working Group on Enforced or Involuntary Disappearances, Report on the visit to Turkey by two members of the Working Group on Enforced or Involuntary Disappearances (20-26 September 1998)' (28 December 1998) UN Doc. E/CN.4/1999/62/Add.2.

104 Internal Displacement Monitoring Centre (IDMC), available at www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/A0F837DE2105E345802570B8005AAF19?OpenDocument (last visited 17 October 2011).

105 J. Barret, 'Chechnya's last hope? Enforced disappearances and the European Court of Human Rights' (2009) 22 *Harvard human rights journal* 1 pp. 133-144, at p. 133.

Russian government was the "anti-terrorist" operation, based on the 1998 Law on the Suppression of Terrorism and the 1996 Law on Defence.[106] The war and its aftermath lasted until 2009. Amnesty International estimated the number of disappeared persons to be between 3,000 and 5,000.[107] Many accounts testify to torture practices in secret detention places.[108] Russia, controversially, became a member of the Council of Europe ('CoE') in 1996 and ratified the ECHR on 5 May 1998. This gave the European Court jurisdiction to receive complaints of enforced disappearance. Though this was a new field that the European Court had to embrace, many judgments concerning these cases have recently been delivered.[109] The CoE has been working hard to ensure compliance with these judgments. In one of its reports, the introduction of a law similar to the special law 'On Compensation of Losses Resulting from Terrorism and from Measures Taken against Terrorism', adopted by the Turkish authorities, was suggested.[110]

The situation in Algeria provides an example of the phenomenon of enforced disappearance on the African continent. From 1991 until 2001, Algeria was engaged in a civil war. The warring parties, the army and the armed Islamic opposition groups, committed indescribable atrocities, including summary executions, massacres and enforced disappearances. In February 2006, the government adopted the Charter for Peace and National Reconciliation. This Charter states that the Algerian people should retract all allegations about state agents being responsible for enforced disappearance and other grave human rights violations. Article 45 of Ordinance No. 06-01 of 27 February 2006, which implements the Charter, reads:

> Legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation or preserve the

106 HRW, 'The "Dirty War" in Chechnya: Forced Disappearances, Torture, and Summary Executions' (2001), available at www.hrw.org/reports/2001/chechnya/RSCH0301.PDF (last visited on 21 September 2011).

107 AI, 'Russian Federation: What Justice for Chechnya's Disappeared?' (2007) AI Index EUR 46/020/2007, available at www.amnesty.org/en/library/info/EUR46/020/2007 (last visited on 21 September 2011).

108 UNHRCouncil, 'Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances' (26 January 2010) UN Doc. A/HRC/13/42 (hereinafter: 'Joint report on secret detention of Special rapporteurs'), paras. 208-214.

109 Barret (2009), pp. 134 and 135.

110 CoE, CoM, 'Actions of the security forces in the Chechen Republic of the Russian Federation: general measures to comply with the judgments of the European Court of Human Rights', Addendum (28 November 2008) CM/Inf/DH(2008)33.

> institutions of the Republic. Any such allegation or complaint shall be declared inadmissible by the competent judicial authority.[111]

This amnesty law has prevented victims and their families from obtaining justice. In particular, it 'renders the families of the disappeared liable to heavy fines and harsh prison sentences if they speak of or report these crimes. The Charter has therefore deprived the family of its right to institute proceedings.'[112] Many families still grope in the dark concerning the whereabouts or the fate of their loved ones.[113] In Algeria, the response has so far not been very effective. Although the government has signed the ICPPED, it has not been ratified, so it is not yet legally binding on the state. In 2003, an Ad Hoc Inquiry Commission in Charge of the Question of Disappearances (Commission d'Enquête ad hoc chargée de la question des disparus) was established. However, the government has not conducted investigations into disappearances in important areas.[114]

1.2.4 The fight against international terrorism

Recently, the fight against terrorism has prompted an unprecedented geographical dimension to enforced disappearance. In 'the war on terror' waged by the USA, extensive use has been made of illegal transfers or 'extraordinary renditions'.[115] It seems that the international fight against terrorism has triggered a perceived justification for states to engage in such practices. After 11 September 2001, the USA detained hundreds of persons in the detention facilities of Guantánamo Bay and elsewhere.[116] The government refused to release the exact number of detainees and their names and whereabouts.[117] Moreover, the then Bush administration entered

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111 *Benaziza v. Algeria* HRC 16 September 2010 (Comm. no. 1588/2007), para. 3.4.

112 *Ibid*.

113 www.trial-ch.org/en/activities/litigation/the-advocacy-center-trial-act/acts-cases/algeria.html.

114 The Human Rights Brief, Center for Human Rights and Humanitarian Law, Algerian Civil Society Demands Accountability for Systematic Disappearances, April 11, 2010, available at hrbrief.org/2010/04/mena-17-3 (last visited on 30 September 2011).

115 UNHRCouncil, 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, Mission to the United States of America' (22 November 2007) UN Doc. A/HRC/6/17/Add.3 (hereinafter: 'UN Report by Scheinin of Mission to USA (2007)'); AI, 'USA: Torture, Enforced Disappearance and Impunity' (30 April 2008) AMR 51/036/2008.

116 The detainees held in such places were categorised as 'unlawful enemy combatants', a term unknown to international law, see UN Report by Scheinin of Mission to USA (2007).

117 J.J. Paust, 'Secret Detentions, Secret Renditions, and Forced Disappearances During the Bush Administration's "War" on Terror', in: N.L. Sadat & M. Scharf, (eds.), *The theory and practice of international criminal law: essays in honor of M. Cherif Bassiouni* (Leiden: Brill 2008) pp. 253-267, at pp. 254-256.

into a complex practice of secret renditions.[118] Renditions operate in various ways. Generally speaking, this practice involves capturing, either legally or illegally, alleged terrorists outside the USA and transferring them to another country for interrogation, which often implies severe torture techniques.[119] Generally, the detained persons do not have access to a judge nor are they charged with any crimes. Their final destination may either be repatriation to their country of origin, a transfer to places of detention such as Guantánamo Bay or detention in a third country, such as Jordan or Syria.[120]

It has been alleged that European states have been implicated in the extraordinary renditions in several ways.[121] As a consequence, both the CoE and the European Parliament took thorough initiatives to investigate the allegations of the involvement of European States.[122] Resolution 1507 (2006) of the CoE entitled 'Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states'[123] reiterated the forms of involvement engaged in by European states, wilfully or at least recklessly, including:

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118 Paust (2008), pp. 255 and 256. In 2006, the Bush administration admitted that there was a rendition programme, which was operated by the Central Intelligence Agency ('CIA') as a necessary means to combat terrorism, see PACE, 'Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report', report of the Committee on Legal Affairs and Human Rights by rapporteur Mr. D. Marty (11 June 2007) Doc. 11302 (hereinafter: 'Second Report by Marty (2007)'), p. 9. For a thorough discussion of extraordinary renditions, see Scovazzi & Citroni (2007), pp. 42-58.

119 A good example of the torture used is given in Scovazzi & Citroni (2007), p. 47.

120 F. Messineo, '"Extraordinary renditions" and state obligations to criminalize and prosecute torture in the light of the Abu Omar case in Italy' (2009) 7 *JICJ* 5 pp. 1023-1044, pp. 1024 and 1025; International Commission of Jurists, 'Submission to European Parliament Temporary Committee on Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners (TDIP)' (hereinafter: 'Report to the TDIP'), p. 2.

121 International Commission of Jurists, Report to the TDIP, pp. 1 and 7-10.

122 In November 2005, the President of PACE asked the Committee on Legal Affairs and Human Rights to explore the serious allegations which were published in a Washington Post article and in a follow-up report by Human Rights Watch, see PACE, 'Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states', report of the Committee on Legal Affairs and Human Rights by rapporteur Mr. D. Marty (12 June 2006) Doc. 10957 (hereinafter: 'First Report by Marty (2006)'); PACE, Second Report by Marty (2007). See also CoE, 'Opinion on the International legal obligations of Council of Europe member States in respect of secret detention facilities and inter-State transport of prisoners', adopted by the European Commission for Democracy through Law (Venice Commission) at its 66th Plenary Session (17 March 2006) Opinion no. 363 / 2005; European Parliament, 'Alleged use of European countries by the CIA for the transportation and illegal detention of prisoners', interim report by the Temporary committee on the use of European countries by the CIA Ref. no. INI/2006/2027 (1 June 2006); European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners Ref. no. P6_TA(2006)0316 (6 July 2006).

123 CoE, PACE, Resolution 1507 (2006) 'Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states' (27 June 2006).

> 10.1. secretly detaining a person on European territory for an indefinite period of time, whilst denying that person's basic human rights and failing to ensure procedural legal guarantees such as habeas corpus;
> 10.2. capturing and handing a person over to the United States whilst knowing that such a person would be unlawfully transferred into a US-administered detention facility;
> 10.3. permitting the unlawful transportation of detainees on civilian aircraft carrying out rendition operations, travelling through European airspace or across European territory;
> 10.4. passing on information or intelligence to the United States whilst being fully aware that such material would be relied upon directly to carry out a rendition operation or to hold a person in secret detention;
> 10.5. directly taking part in interrogations of persons subjected to rendition or held in secret detention;
> 10.6. accepting or making use of information gathered in the course of detainee interrogations, before, during or after which the detainee in question was threatened or subjected to torture or other forms of human rights abuse;
> 10.7. making available civilian airports or military airfields as "staging points" or platforms for rendition or other unlawful detainee transfer operations, and facilitating the preparation and take off of an aircraft on its operation from such a point; and
> 10.8. making available civilian airports or military airfields as "stopover points" for rendition operations, whereby an aircraft lands briefly at such a point on the outbound or homebound flight, for example to refuel.

The second report by Dick Marty provided details on the way in which Romania and Poland operated 'black sites' for the secret detention of alleged suspects.[124] Other states, such as Italy, have been involved in the capture of alleged persons and the facilitation of their rendition.[125] Still other states have allowed CIA secret flights to pass through their territory without further scrutiny.[126]

1.2.5 Summary

In general, enforced disappearance usually occurs in countries where considerable political opposition or domestic unrest disturbs the authorities.[127] Indeed, the situations described in the previous subsections involve conflict in one way or another.[128] The

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124 PACE, Second Report by Marty (2007), parts III and IV.
125 Messineo (2009) (discussing the extraordinary rendition case of Abu Omar in Italy).
126 PACE, Second Report by Marty (2007), pp. 19-22.
127 Berman & Clark (1981-1982), p. 538; Scovazzi & Citroni (2007), p. 2.
128 P. Wallensteen*, Understanding Conflict Resolution*, 2nd edn. (London: SAGE Publications Ltd 2007), p. 15 (In the field of conflict studies, conflict has been defined as 'a social situation in which a minimum of two actors (parties) strive to acquire at the same moment in time an available set

fact that conflict situations are prone to the occurrence of enforced disappearance is not surprising since conflict creates fertile ground for the desire, or the perceived need on the part of one party to the conflict, to eliminate or oppress the other party. Enforced disappearance is one of the most 'suitable' crimes to achieve such an end.

Despite the different contexts and circumstances in which enforced disappearances occur, several common characteristics of this crime can be discerned. There is deprivation of liberty but no intention on the part of the state authorities to reveal the whereabouts or fate of the disappeared person, whereas it is within their exclusive knowledge what happened to the victim. Therefore, denials or refusals to provide information make up an important element that is inherent in all enforced disappearances. In this sense, enforced disappearance has also been called 'the crime of no information'. The legacy of such denials is the lack of any knowledge about what happened and about the fate of the disappeared person in the public sphere. There are no official records of the detention and there is no prisoner, no corpse and no victim. Additionally, enforced disappearance involves other serious human rights violations such as torture or extra-judicial killings. Another effect of the lack of information is that it is difficult to prove the involvement of the responsible perpetrators due to the absence of evidence and, accordingly, it is often impossible to bring them to justice. This becomes even more difficult taking into consideration the different stages of an enforced disappearance and the various perpetrators involved. This could be one of the reasons why the use of this crime has permeated many different contexts. Even formal democracies have been accused of, and condemned for, committing enforced disappearance. Even though officially checks and balances may exist that would make this crime almost impossible to commit in a democracy, an enforced disappearance can still occur in practice when state agents omit these formal safeguards.

The perpetrators of enforced disappearance have proved to be various types of actors, such as the state, groups acting with the acquiescence of the state and belligerent groups which have committed human rights violations or acts similar to such violations.[129] As such, besides being directly involved in enforced disappearance, state authorities have also been reported to be involved in more subtle ways in this crime. They can be involved by means of authorisation, support or acquiescence. For example, in situations where the state supports, orders or allows paramilitaries to carry out enforced disappearances. As *Aim for human rights* noted, 'Governments

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of scarce resources'. The term 'resources' in this definition must be understood in the broad sense as not only referring to territory or to power but also, for example, to ideology. The definition and categorization of conflict is in particular a question in conflict studies, see *e.g.* the Uppsala Conflict Data Program (UCDP), available at www.ucdp.uu.se (last visited 24 February 2010); See also A.C. Buyse*, Post-conflict housing restitution. The European human rights perspective, with a case study on Bosnia Herzegovina* (Antwerp: Intersentia 2008), pp. 5-9.

129 See *e.g.* UN Report by Nowak (2002) para. 73.

give these groups [militaries, paramilitaries, death squads] a large freedom to act but officially they are completely ignorant and not involved.'[130]

The secrecy and its consequences mean that not only the disappeared person is a victim but family, friends and society as a whole are also severely affected.[131] In this respect, one of the reasons for resorting to enforced disappearances is that 'it kills two birds with one stone'; it is an effective instrument to eliminate opposition and it creates unrest and fear among targeted sections of the population. This unrest and fear result from the uncertainty as to what has happened to the disappeared persons and who will be the next target. Resorting to enforced disappearance is then believed to bring the population into submission under the dominant regime.

Lastly, the examples presented in the previous subsections show that enforced disappearances have occurred along two important spectra. The first spectrum pertains to *quantity* with at one end single incidents of enforced disappearance, and a systematic practice of this crime at the other end. The second spectrum pertains to *time* with at one end enforced disappearances that occurred (but may continue) under a previous regime, and at the other end enforced disappearances that are being committed by a current regime. In light of the second spectrum, Méndez has noted that accountability must not only be considered in transitions from dictatorships to democracy, or in the field of transitional justice, but also in situations where governments have to deal with violations committed under their own regime.[132]

1.3 The road towards an international convention for protection against enforced disappearance

1.3.1 Towards an international convention against enforced disappearance

The atrocities committed in World War II were the direct cause for the international community to realise that international guarantees were necessary to protect the basic rights and freedoms of individuals. The Nazi regime had blatantly demonstrated the devastating power of the state to violate these rights and freedoms. The creation of the UN was the first step by the international community towards an international commitment to act together in the promotion of peace and security. The foundation for human rights within this aspiration was laid down in the UN Charter and elaborated in the Universal Declaration of Human Rights ('UDHR'). The purpose of this declaration is the promotion of and respect for human rights and, by progressive

130 Linking Solidarity, Excuses for the truth, disappearances, available at home.wxs.nl/~loz/maneng.htm (last visited 16 March 2010).

131 Scovazzi & Citroni (2007), p. 1.

132 J.E. Méndez, 'Accountability for Past Abuses' (1997) 19 *Hum Rts Q* 2 pp. 255-282, at pp. 257 and 258.

measures, securing their universal and effective recognition and observance.[133] Covering a large spectrum of basic human rights, the UDHR in turn was the basis for the International Covenant on Civil and Political Rights ('ICCPR')[134] and the International Covenant on Economic, Social and Cultural Rights ('ICESCR').[135] These three instruments together, known as the Bill of Human Rights, have served as a springboard for a vast system of various multilateral human rights treaties that either focus on the protection of specific groups[136] or further the substance of a particular right that is mentioned in general terms in the Bill of Rights.[137]

Even though enforced disappearance was an integral part of Hitler's policy that prompted international awareness of the need to create an international protection system, reference to this practice is neither found in the Bill of Rights nor until recently in subsequent binding human rights treaties.[138] In 1980, the UN took its first significant step towards protection against enforced disappearance with the creation of the UNWGEID, a special procedure of the former UN Commission on Human Rights ('UNComHR').[139] Initially established for a period of one year to examine

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133 Universal Declaration of Human Rights (adopted on 10 December 1948), preamble, recital 8. The UDHR finds its origins in the Charter of the United Nations, which lays down the principle that the UN shall promote universal respect for, and observance of, human rights and fundamental freedoms for all (Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945), Article 55 (c). Articles 1(3), 13(1)(b), 56, 62(2) and 68 also refer to human rights).

134 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA 999 UNTS 171 (ICCPR).

135 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) UNGA Res. 2200A (XXI) (ICESCR).

136 *E.g.* International Convention on the Elimination of All Forms of Racial Discrimination (adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19 (CERD); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) UNGA Res. 44/25 (CRC); Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res. 34/180 (CEDAW); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) UNGA Res. 45/158; Convention on the Rights of Persons with Disabilities (adopted 6 December 2006) UNGA Res. 61/611 (CRPD).

137 *E.g.* Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) UNGA Res. 260 A (III) (Genocide Convention); International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) UNGA Res. 2106 (XX) (CERD); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNGA Res. 39/46 (CAT).

138 N.S. Rodley*, The Treatment of Prisoners under International Law*, 2nd edn. (New York: Oxford University Press 1999), p. 243 (an explanation offered by Rodley is that certain acts appear to be 'so far beyond the pale of accustomed human behaviour that the drafting of legislation to contain them seems grotesquely eccentric').

139 UNComHR, Resolution 20 (XXXVI) (29 February 1980).

questions relevant to enforced or involuntary disappearances of persons, the mandate of the UNWGEID has been periodically renewed since then and it still exists today. Its basic mandate is 'to assist the relatives of disappeared persons to ascertain the fate and whereabouts of their disappeared family members' and 'acts essentially as a channel of communication between the families of disappeared persons and Governments'.[140]

Only after intense lobbying by several NGOs[141] did the UN General Assembly adopt the non-binding Declaration on the Protection of All Persons from Enforced Disappearances ('DPPED') in 1992.[142] More than 14 years later, the UN adopted a binding instrument, the ICPPED, at the end of 2006. At the same time, the introduction of a new convention was not without discussion. One of the arguments against a new convention was that there was no need for yet another human rights convention. Enforced disappearance had already been addressed by several supervisory human rights organs as a multiple human rights violation. States had been held responsible for such crimes at the international level under the ICCPR and, at the regional level, under the European Convention on Human Rights ('ECHR') and the American Convention on Human Rights ('ACHR') alone or together with the Inter-American Convention on Forced Disappearance of Persons ('IACFD').[143] Notwithstanding the

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140 UNWGEID, Annual report 2010, paras. 2, 3 and 4, which explain the mandate of the UNWGEID as follows:
'2. The Working Group was the first United Nations human rights thematic mechanism to be established with a universal mandate. The original mandate derives from Commission on Human Rights resolution 20 (XXXVI) of 29 February 1980. This resolution followed General Assembly resolution 33/173 of 20 December 1978, in which the Assembly expressed concern at reports from various parts of the world relating to enforced disappearances and requested the Commission on Human Rights to consider the question of missing or disappeared persons. The mandate was most recently extended by Human Rights Council resolution 7/12 of 27 March 2008.
3. The primary task of the Working Group is to assist families in determining the fate or whereabouts of their family members who are reportedly disappeared. In this humanitarian capacity, the Working Group serves as a channel of communication between family members of victims of disappearance and Governments.
4. Following the adoption of General Assembly resolution 47/133 on 18 December 1992 and of the Declaration on the Protection of All Persons from Enforced Disappearance, the Working Group was entrusted to monitor the progress of States in fulfilling their obligations derived from the Declaration. Human Rights Council resolution 7/12 encouraged the Working Group to provide assistance in the implementation by States of the Declaration.'

141 Brody & González (1997), pp. 371-374.

142 Declaration on the Protection of All Persons from Enforced Disappearances (adopted 18 December 1992) UNGA Res. 47/133.

143 Adopted on 9 June 1994 in Belem Do Para, Brazil, during the 24th Regular Session of the General Assembly of the Organization of American States, entry into force: 28 March 1996. See IAComHR, Annual report 1987-1988, chapter 5 (The IAComHR presented its first draft convention to the OAS in 1988). See also L. Joinet, 'De la déclaration de 1992 à la convention de 2006', in: E. Decaux & O. De Frouville, (eds.), *La Convention pour la protection de toutes les personnes contre les*

existence of these protection mechanisms, thorough studies showed important gaps in the existing binding framework at the time. These studies examined the norms that the ICPPED should entail.[144] One prominent study concluded that 'the protection against enforced disappearance is a slowly developing concept with many gaps, disputed questions and uncertainties.'[145] These studies, together with the continuation of intense lobbying by NGOs, relatives and victims, were the final impetus for the adoption of an international, coherent and comprehensive binding instrument adequately to address this human rights violation.[146]

1.3.2 The content of the ICPPED

The ICPPED is the first legally binding universal instrument that creates an autonomous and non-derogable right not to be subjected to enforced disappearance. A vast body of derivative obligations and rights in the ICPPED aim to realise and protect this right. Besides laying down the obligation to refrain from committing enforced disappearance, the ICPPED contains a wide range of positive obligations. States Parties[147] have to create the crime of enforced disappearance in their domestic legislation and are obliged to investigate allegations of such a crime with the aim of locating the disappeared person and bringing the perpetrators to justice. The ICPPED contains norms pertaining to both the prosecution of the accused and international cooperation in bringing them to justice. In addition, an important number of norms are dedicated to the prevention of enforced disappearance such as safeguards surrounding arrest and detention and the prohibition of secret or unacknowledged places of detention. Importantly, the ICPPED contains a broad definition of the 'victim' of enforced disappearance, which includes a wide range of persons affected by this crime. It also affords the right to truth and the right to reparation to these persons. The ICPPED also addresses the issue of the wrongful removal of children

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disparitions forcées (Brussels: Bruylant 2009) pp. 29-35, at p. 31 (The process of adopting this regional instrument within the Inter-American System had run parallel to the initiatives taken on the international level.); Brody & González (1997), pp. 374 and 375.

144 UN Report by Nowak (2002); Pérez Solla (2006).

145 UN Report by Nowak (2002), p. 4.

146 UNComHR, 'Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance' (12 February 2003) UN Doc. E/CN.4/2003/71 (hereinafter: 'IOWG Report E/CN.4/2003/71'), paras. 19 and 20. Another important argument was that the UNWGEID also addressed enforced disappearances within the UN system. However, the mandate of the UNWGEID is purely humanitarian, covering a wide geographical scope.

147 The terms 'States Parties' and 'State Party' in this book refer to states that have ratified the ICPPED. The more general term 'state' is used to either indicate the 'state' entity or those states that have ratified the ICCPR and/or the ACHR or the ECHR.

who have been subjected to enforced disappearance and children born during the captivity of their mother subjected to enforced disappearance.

The text of the ICPPED endows the Committee on Enforced Disappearance ('CED') with the competence to exercise quasi-judicial supervision over the implementation of this treaty by its States Parties.[148] As such, the CED's task is to monitor the compliance of the States Parties with the obligations arising from the ICPPED.[149] The ICPPED lays down a solid body of procedures as a tool through which the norms can be applied to the situation on the ground: a reporting procedure, an urgent action procedure, an optional individual complaints procedure, an optional interstate complaints procedure and an on-sight visit procedure. Through the individual complaint procedure, individuals are able to complain about violations of any of the provisions of the ICPPED.[150]

1.4 The main research question of this study

Now that the ICPPED has entered into force and the CED is in place, the question of the interpretation and application of the enshrined norms is at hand. Thorough reviews of the ICPPED have been published that examine the content of the ICPPED and its drafting process. These studies show that the text of the ICPPED largely corresponds with the identified gaps and that it upholds many of the standards that can be discerned from the human rights protection already existing prior to the ICPPED. Despite the fact that the ICPPED includes tailored state obligations directed specifically towards effective protection against enforced disappearances, these studies also show that leeway remains to interpret the provisions enshrined in the ICPPED.[151] Being the monitoring body, the CED has the opportunity to give an authoritative interpretation of the norms laid down in the ICPPED and to develop the rules of evidence governing the attribution of state responsibility under this treaty. This study addresses this

148 On 31 May 2011, at the first meeting of the States Parties to the ICPPED, the ten members of the Committee on Enforced Disappearances were elected: Mr. Mohammed Al-Obaidi (Iraq), Mr. Mamadou Badio Camara (Senegal), Mr. Emmanuel Decaux (France), Mr. Alvaro Garcé García Y Santos (Uruguay), Mr. Luciano Hazan (Argentina), Mr. Rainer Huhle (Germany), Ms. Suela Janina (Albania), Mr. Juan José López Ortega (Spain), Mr. Enoch Mulembe (Zambia), and Mr. Kimio Yakushiji (Japan). See CED, 'Provisional agenda and annotations' (29 August 2011) UN Doc. CED/C/1/1 (the CED held its first meeting from 8-11 November 2011. On the agenda was, amongst other matters, the adoption of the provisional rules of procedure and matters related to the methods of work of the CED).

149 Article 26 ICPPED.

150 *Cf.* I. Boerefijn, 'Establishing state responsibility for breaching human rights treaty obligations: avenues under UN human rights treaties' (2009) 56 *Netherlands international law review* 2 pp. 167-205, at p. 185 (noting a difference in treaties where individuals can complain about *rights* versus treaties where they can complain about *provisions*).

151 McCrory (2007); Scovazzi & Citroni (2007); E. Decaux & O. De Frouville (eds.), *La Convention pour la protection de toutes les personnes contre les disparitions forcées* (Brussels: Bruylant 2009).

question of interpretation and application by creating an evaluative framework for determining state responsibility under the ICPPED. Accordingly, the main research question is the following:

How should state responsibility be determined under the International Convention for the Protection of All Persons from Enforced Disappearance in order to provide protection that is in line with and in direct response to the experiences of victims?

The following paragraphs elaborate on two pillars of this research question, namely 'determining state responsibility' and 'experiences of victims', which together form the basis of the evaluative framework of the present study. The relationship between these two pillars is that the study evaluates the first pillar 'determining state responsibility' in accordance with the second pillar 'experiences of victims'.

1.4.1 Determining state responsibility

One of the added values of the ICPPED is that it is a legally binding universal instrument. This means that States Parties can be legally held accountable for the observance and implementation of the norms laid down therein upon the ratification of the ICPPED. On the basis of the several procedures available to the CED, the implementation and compliance of the States Parties can be monitored. In particular, through the optional complaint procedures, States Parties may be held responsible for concrete cases of enforced disappearance.

According to international law, a state incurs responsibility for every internationally wrongful act, as described in the following paragraphs. This subsection addresses the secondary norms for attributing state responsibility. Thereafter, this subsection addresses the interpretation methods of the substantive norms that determine an 'internationally wrongful act' and that are relevant to the present study. The interpretation methods, after all, determine to a great extent the content and scope of the internationally wrongful act. Lastly, the rules of evidence for proving that a state incurs responsibility are briefly set out, as a final step in the process of determining state responsibility.

1.4.1.1 Attribution of international state responsibility

The Articles on Responsibility of States for Internationally Wrongful Acts ('2001 ILC Articles')[152] drafted by the International Law Commission in 2001 have been regarded

152 'Responsibility of States for Internationally Wrongful Acts. Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001' (2001) UN Doc. A/56/10 (hereinafter: '2001 ILC Articles').

as the basic secondary rules for attributing state responsibility in international law.[153] As such, the 2001 ILC Articles have also been an important starting point, or at least, they have been drawn upon in the case law of human rights bodies.[154] Their dominant role justifies a brief pause to explore the content of these Articles. The basic premise of the 2001 ILC Articles is that a state incurs responsibility for every internationally wrongful act.[155] An internationally wrongful act of a state takes place when a state, by act or omission, breaches an international obligation of that state and is attributable to that state by international law.[156] The state is responsible for the acts of all its officials and organs, even when acting *ultra vires*.[157] In addition, conduct by persons or entities that are not classified as state organs may still be imputable to the state when those persons or entities are entitled by law to exercise governmental authority or act 'on the instructions of, or under the direction or control of,' the state.[158] The conduct of persons acting in a private capacity could also be attributable to the state when the state acknowledges and adopts the conduct in question as its own.[159] According to Article 12 there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation.[160] Consequently, as Crawford states, '[i]f the state acts or fails to act, its responsibility is potentially engaged and remaining questions are left to be resolved by the interpretation and application of the relevant primary rules.'[161]

Human rights bodies have adopted a wide understanding of the notion of 'state', including all branches of government (legislative, executive and judicial) and other

153 On the authority of the 2001 Draft Articles, see D.D. Caron, 'The ILC's Draft Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) 96 *American Journal of International Law* pp. 857-873.

154 Boerefijn (2009), p. 169. See also *Šilih v. Slovenia* ECtHR [GC] 9 April 2009 (Appl. no. 71463/01), paras. 107 and 108 and *Blečić v. Croatia* ECtHR [GC] 8 March 2006 (Appl. no. 59532/00), para. 48 (The European Court has referred to the Draft Articles under the heading 'relevant international law and practice').

155 Article 1 of the 2001 ILC Articles.

156 Article 2 of the 2001 ILC Articles.

157 Articles 4 and 7 of the 2001 ILC Articles.

158 Articles 5 and 8 of the 2001 ILC Articles.

159 Article 11 of the 2001 ILC Articles.

160 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, p. 55 (The report of the ILC gives as examples of acts or omissions '[…] passage of legislation, or specific administrative or other action in a given case, or even a threat of such action, whether or not the threat is carried out, or a final judicial decision. It may require the provision of facilities, or the taking of precautions, or the enforcement of a prohibition.').

161 J. Crawford, 'Revising the Draft Articles on State Responsibility' (1999) 10 *European Journal of International Law* 2 pp. 435-460.

public or governmental authorities and entities.[162] Also, both acts and omissions may engage the responsibility of the state, even when such conduct was *ultra vires*, in accordance with the 2001 ILC Articles.[163] The relevant primary rules in human rights law, which are the provisions laid down in the human rights treaties and the explicit or implied state obligations, mirror the types of conduct for which states can be held responsible as set out in the 2001 ILC Articles. As such, the interpretation and application of the state obligations are an essential step in determining state responsibility, and crucial to answering the main research question of this study as they indicate what is required from the state. Chapter 3 *infra* examines further the typologies of these state obligations as developed in the human rights law discourse. It must be noted that it is not the purpose of this study to question the obligations as such. Rather, the focus is on the manner in which they are applied by the relevant human rights treaties.

1.4.1.2 Interpretation methods

As the interpretation and application of the norms laid down in the ICPPED are important aspects for determining state responsibility, it is useful to briefly discuss the interpretation techniques that are used in human rights law. The starting point for such techniques can be found in general international law.

The primary source for the interpretation of treaties in international law is found in the Vienna Convention on the Law of Treaties ('VCLT').[164] Articles 31 to 33 of the VCLT specifically pertain to the interpretation of treaties. According to Article 31 VCLT treaties shall be interpreted 'in good faith'[165] and in accordance with the 'ordinary meaning' of the terms used 'in their context' and in the light of 'the object and purpose' of the treaty. The context refers to a systematic view of the text of the whole treaty, also referred to as a holistic interpretation.[166] The reference to the

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162 See *e.g.* HRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc. CCPR/C/21/Rev.1/Add.13 (hereinafter: 'General Comment No. 31 [80]') para. 4; *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para.169; *Juan Humberto Sánchez v. Honduras* (preliminary objection, merits, reparations and costs) IACtHR Series C No. 99 (7 June 2003), para. 110; *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), paras. 220-222.

163 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 170.

164 Vienna Convention on the Law of Treaties, Vienna 23 May 1969 (entered into force on 27 January 1980), United Nations, *Treaty Series*, vol. 115, p. 331.

165 This term 'good faith' refers back to Article 26 which states that every treaty in force must be performed by the parties in good faith.

166 M. Sepúlveda, T. Van Banning, G.D. Gudmundsdóttir, C. Chamoun & W.J.M. Van Genugten, *Human Rights Reference Handbook*, 3rd edn. (Ciudad Colón: University for Peace 2004), p. 47. See also *"relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (merits) ECtHR [GC] 23 July 1968 (Appl. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), para. B.7.

object and purpose envisages a teleological approach. Article 32 VCLT sets forth supplementary means of interpretation either in order to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the application of Article 31 leaves the meaning 'unclear or obscure' or brings about a result which is 'manifestly absurd or unreasonable'. These supplementary means include the *travaux préparatoires* of the treaty and the circumstances of its conclusion.

The interpretation techniques envisaged by the VCLT have been a source of inspiration for the human rights bodies that have dealt with enforced disappearance cases. Even though the application of the interpretation methods used by human rights bodies are subject to extensive academic debate,[167] the purpose of this section is not to expound this debate. Rather, the aim is to demonstrate the different interpretation techniques used by the European Court of Human Rights ('European Court'), the Inter-American Court of Human Rights ('Inter-American Court') and the Human Rights Committee ('HRC'), which could inspire the CED in its interpretation of the ICPPED norms.

The European Court has used the VCLT as a guiding tool for interpreting the ECHR or, at the very least, its interpretation methods mirror the VCLT rules. Primarily, the rights laid down in the ECHR are interpreted in a way that achieves the inspired goal of the Convention, namely providing effective protection for fundamental human rights.[168] As such, the ECHR should guarantee 'not theoretical or illusory rights, but rights that are practical and effective.'[169] The European Court

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167 See generally F. Vanneste, *General international law before human rights courts: assessing the specialty claims of human rights law* (Antwerp: Intersentia 2009). See also M. Killander, 'Interpreting regional human rights treaties' (2010) 7 *SUR International journal on human rights* 13 pp. 144-169 (arguing that the regional courts have increasingly followed a universalistic approach to treaty interpretation but warns against the possible consequences in respect of the quality of judicial decisions in terms of judicial reasoning); A. Orakhelashvili, 'Restrictive interpretation of human rights treaties in the recent jurisprudence of the European Court of Human Rights' (2003) 14 *EJIL* pp. 529-568 (setting out the dangers of the interpretation methods used by the ECtHR); A.C. Buyse, 'Straatsburgse echos in Genève? De invloed van EHRM-jurisprudentie op het VN-Mensenrechtencomité' (2010) 35 *NJCM-Bulletin* 7 pp. 741-753 (showing that the HRC does not shy away from using the case law of the ECtHR in order to substantiate its own reasoning but that it also interweaves such references with references to its own jurisprudence); T. Barkhuysen & M. Van Emmerik, 'Ongebonden binding: verwijzing naar *soft law* standaarden in uitspraken van het EHRM' (2010) 35 *NJCM-Bulletin* 7 pp. 827-835 (showing that the ECtHR interprets the ECHR provisions at times by referring to soft law guidelines both of the UN and the CoE. The authors cannot find a consistent approach, however, and recommend a more motivated and explicit approach).

168 *"relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* ECtHR [GC] (1968), paras. 4 and 5.

169 *Prince Hans-Adam II of Liechtenstein v. Germany* ECtHR [GC] 12 July 2001 (Appl. no. 42527/98), para. 45; *Tahsin Acar v. Turkey* ECtHR [GC] 8 April 2004 (Appl. no. 26307/95), para. 209; *Öneryıldız v. Turkey* ECtHR [GC] 30 November 2004 (Appl. no. 48939/99), para. 69; *Stoll v. Switzerland* ECtHR [GC] 10 December 2007 (Appl. no. 69698/01), para. 128.

also embraces the holistic interpretation in order to clarify the scope of certain rights, promoting internal consistency and harmony between the various provisions of the ECHR.[170] In addition, the European Court has taken into account the *travaux préparatoires* in its interpretation, especially to confirm the literal meaning of terms used in the ECHR. The preparatory work, however, is not decisive.[171] Indications in the case law point to a decrease over time in the importance that has been attached to the intention of the drafters. An important indication of that decrease is found in the Court's view in the *Loizidou Case* that held that provisions of the ECHR cannot solely be interpreted in accordance with the authors' intentions as expressed more than forty years ago at the time of the judgment.[172] Instead, greater weight is given to present-day conditions. In *Tyrer v. the United Kingdom*, the European Court mentioned for the first time that 'the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.'[173] The relevant criterion for determining the present-day conditions in this case was the developments and commonly accepted standards of the Member States of the Council of Europe concerning corporal punishment in schools, the issue that the Court had before it. In numerous subsequent cases, the European Court has reiterated and applied this dynamic approach.[174] This approach clearly assumes that human rights are not static but dynamic and evolve over time. This also confirms the decreasing importance of the *travaux préparatoires*. Lastly, it must be mentioned that even though the literal meaning of terms have guided their interpretation, several terms have an autonomous meaning within the ECHR.[175] As such, the literal meaning may be trumped by other interpretation techniques.

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170 *Pretty v. the United Kingdom* ECtHR 29 April 2002 (Appl. no. 2346/02), para. 54; *Demir and Baykara v. Turkey* ECtHR [GC] 12 November 2008 (Appl. no. 34503/97), para. 66.

171 *"relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* ECtHR [GC] (1968), p. 858, paras. 3 and 6. *Banković a.o. v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom* (admis. dec.) ECtHR [GC] 12 December 2001 (Appl. no. 52207/99), paras. 63-65.

172 *Loizidou v. Turkey* (preliminary objections) ECtHR [GC] 23 March 1995 (Appl. no. 15318/89), para. 71.

173 *Tyrer v. the United Kingdom* ECtHR 25 April 1978 (Appl. no. 5856/72), para. 31.

174 *E.g. Guzzardi v. Italy* ECtHR 6 November 1980 (Appl. no. 7367/76), para. 95 (stating that 'the Convention is to be interpreted in the light of the notions currently prevailing in democratic States'); *Soering v. the United Kingdom* ECtHR [GC] 7 July 1989 (Appl. no. 14038/88), para. 102 (stating *inter alia* that 'the Convention is a living instrument which […] must be interpreted in the light of present-day conditions'); *Lebedev v. Russia* ECtHR 25 October 2007 (Appl. no. 4493/04), para. 71; *Loizidou v. Turkey* ECtHR [GC] (1995), para. 71.

175 *Saunders v. the United Kingdom* ECtHR [GC] 17 December 1996 (Appl. no. 19187/91), para. 67; *Anheuser-Busch Inc. v. Portugal* ECtHR [GC] 11 January 2007 (Appl. no. 73049/01), para. 63.

The HRC has also interpreted the ICCPR in line with the methods laid down in the VCLT.[176] Referring to Article 31 VCLT, the HRC confirmed that the ICCPR's provisions must be interpreted in light of the object and purpose of the Covenant.[177] In addition, like the ECHR, the ICCPR must be interpreted as a 'living instrument and the rights protected under it should be applied in context and in the light of present–day conditions.'[178] In an early case, the HRC referred to the *travaux préparatoires* to confirm the literal meaning of one of the ICCPR provisions.[179] However, in later cases, the intention of the drafters is not frequently referred to.[180] Also like the European Court, the literal meaning does not prevent the terms from having an autonomous meaning, independent from the meaning that the domestic law of states accords to them.[181]

Being the ultimate interpretative body of the ACHR,[182] the Inter-American Court is bound by the limitations of Article 29 ACHR.[183] These limitations are formulated in the negative: what the interpretation should not amount to. Like its counterparts, the Inter-American Court has referred to the VCLT as the authoritative source on the interpretation of treaties. Accordingly, it has defined the effective protection of human rights as the object and purpose of the ACHR; the ACHR provisions must be interpreted in a way that enables the Inter-American system of human rights to attain all its 'appropriate results' in the domestic systems.[184] The term given to this

176 B. Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies', in: H. Keller & G. Ulfstein, (eds.), *Human rights treaty bodies: law and legitimacy* (Cambridge: Cambridge University Press forthcoming 2012).

177 *Johnston v. Jamaica* HRC 22 March 1996 (Comm. no. 588/1994), para. 8.2(c); HRC, 'General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant' (11 April 1994) UN Doc. CCPR/C/21/Rev.1/Add.6, para. 19.

178 *Judge v. Canada* HRC 5 August 2002 (Comm. no. 829/1998), para. 10.3

179 *Vuolanne v. Finland* HRC 7 April 1989 (Comm. no. 265/1987), para. 9.3.

180 Schlütter (forthcoming 2012).

181 *Sayadi and Vinck v. Belgium* HRC 22 October 2008 (Comm. no. 1472/2006), para. 10.11.

182 *La Cantuta v. Peru* (merits, reparations and costs) IACtHR Series C No. 162 (29 November 2006); *Almonacid-Arellano et al. v. Chile* IACtHR (2006), para. 124.

183 Article 29 ACHR reads: 'No provision of this Convention shall be interpreted as:
a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.'

184 *Velásquez-Rodríguez v. Honduras* (preliminary objections) IACtHR Series C No. 1 (26 June 1987), para. 30; IACtHR, 'Advisory Opinion OC-16/99 *The Right to Information on Consular Assistance*

aspiration is also referred to as '*effet utile*'. Additionally, the Inter-American Court adopts a similar 'living-instrument' approach as the European Court and the HRC.[185] According to Lixinsky, the Inter-American Court generally gives priority to the evolving interpretation method, as opposed to relying on the intentions of the drafters. As such, the circumstances prevailing at the time of its judgment play a leading role.[186] A distinct and additional approach to that of its counterparts is applied by the Inter-American Court. This approach emphasises the most conducive protection of the human being.[187] Interpreting provisions in accordance with this principle is referred to as a '*pro homine'* interpretation.[188]

Besides the interpretation methods described in previous paragraphs, all three supervisory bodies have referred to external sources for interpreting their respective treaties; to each other's jurisprudence; to other UN documents or regional documents; and to soft law guidelines. The Inter-American Court has done this most extensively, a practice which may originate from Article 29 ACHR which draws external sources into the interpretation of the ACHR. For instance, its case law has echoed the case law of the European Court on important interpretation issues, but the HRC has also been cited by the Inter-American Court. The HRC has mainly referred to other UN instruments and documents and the European Court seems to refer increasingly to the case law of its counterparts and other relevant international law or practice.[189]

To sum up, the interpretation rules used in human rights law primarily boil down to a dynamic and contextual approach that serves the object and purpose of the human rights treaties. Schuttler argues that such an approach might be inherent in human rights law because this field of law 'deals directly with the relationship of the individual and the state and is thus one of the areas of law where a change in social realities and conditions can exercise a direct influence on the applicable law.'[190] As such, it is argued that the intentions of the drafters do not generally play a major role in interpretation of human rights norms.[191] Nonetheless, the *travaux préparatoires* have been used as a supplementary means to explain certain terms.

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in the Framework of the Guarantees of the Due Process of Law' Series A No. 16 (1 October 1999), para. 105.

185 *The Mapiripán Massacre v. Colombia* IACtHR (2005), paras. 105 and 106.

186 L. Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 *EJIL* 3 pp. 585-604, at pp. 588 and 589.

187 *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 106.

188 Lixinski (2010), p. 588.

189 Killander (2010), pp. 153-161.

190 Schlütter (forthcoming 2012).

191 Sepúlveda, Van Banning, Gudmundsdóttir, Chamoun & Van Genugten (2004), p. 48.

1.4.1.3 Proving state responsibility

Apart from the norms on the basis of which state responsibility can be attributed, a decisive step in determining state responsibility is proving with sufficient and compelling evidence that the state was in fact involved. As demonstrated in subsection 1.4.1.1 above, state involvement may take various forms. The rules and approaches to evidentiary matters are decisive for the outcome of the case. At the same time, the approach to evidentiary matters introduces the issue of the credibility of human rights bodies and their proceedings. When the approach to evidence does not adhere to transparent and judicial principles, the proceedings undermine the credibility and authority of the (quasi-)adjudicating body. The different approaches taken by the three supervisory bodies with respect to evidence are set out in detail in Chapter 6 *infra*.

1.4.2 The 'experiences of victims'

Having seen the different aspects of determining state responsibility, the present study presumes that the interpretation and application of the norms and doctrines on the basis of which states can be held responsible should be in line with and in direct response to the effects on and experiences of victims. This presumption poses the question of what the justification is for applying this angle and what is meant by 'experiences of victims'.

Justifying the angle of the experiences of victims begins with the overall purpose of the ICPPED. Broadly speaking, the purpose of the ICPPED is to 'prevent enforced disappearances and to combat impunity for the crime of enforced disappearance'.[192] Ideally, this purpose is acquired at a domestic level. However, if States Parties fail to do so, they are accountable at the international level. This accountability is important because obtaining justice at the domestic level is hardly possible. The realisation of this purpose requires a thorough understanding of both the content of the right not to be subjected to enforced disappearance and the concept of its protection. The experiences of victims play a significant role in this understanding. These experiences shed light on the obstacles that victims encounter and the particular causes of their suffering and pain. The distinct suffering was in fact one of the main reasons that demonstrated the need for a separate international convention against enforced disappearance. Experiences of victims played an important role in defining the norms therein.[193] The examination of state responsibility through the lens of the effects on and the experiences of victims provides useful parameters to evaluate whether the process of determining state responsibility adequately addresses the particularities of

192 ICPPED, preamble recital 6.
193 See Chapter 2 *infra* for a discussion of the drafting process of the ICPPED.

this human rights violation. Therefore, the interpretation and application of the norms suggested in this study aim to harmonise the protection afforded by the ICPPED with the experiences of victims.

How is the phrase 'experiences of victims' then defined? In Chapter 4 *supra* the study provides an overview of the most common elements of the suffering and grief of victims. Accordingly, it discerns five main causes of victims' suffering based on relevant literature and the stories of victims. Clearly, these five main causes are not identified with the purpose of providing an exhaustive picture and do not reflect all aspects of the vast array of, either individual or collective, experiences of victims. Painting an exhaustive picture would involve other fields of science requiring thorough psychological, sociological, political and anthological studies. Instead, the aim of this study in identifying the main causes of victims' suffering is to create an evaluative framework according to which the process of determining state responsibility can be evaluated. In addition, due to time and budgetary constraints, this study was conducted in full cognizance that the main causes of victims' suffering are not identified on the basis of a complete study covering the full geographical scope of the phenomenon of enforced disappearance nowadays.

1.5 Scope and methodology of the study

1.5.1 Scope of the study

There are five important limitations of the present study that need to be acknowledged and addressed. Firstly, this research focuses on the responsibility of states and, thereby, concentrates on international human rights law. Given this focus, two other interfaces of international law which are relevant to the protection against enforced disappearances, namely international criminal law and international humanitarian law, will only occasionally be referred to when necessary to illustrate or understand the issues under consideration in this study.[194] In addition, choosing the human rights framework excludes the following categories of disappearances: voluntary disappearances, disappearances due to accidents, natural disasters or conflict during which the disappeared person could not inform his relatives due to the special circumstances, and disappearances as a result of common crimes by non-state actors such as kidnapping or murder.[195]

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194 For a thorough overview of these fields of law in enforced disappearance cases, see L. Ott, *Enforced Disappearance in International Law* (Antwerp: Intersentia 2011). These two fields of law have also played a role in human rights cases, see *e.g. Serrano-Cruz Sisters v. El Salvador* (merits, reparations and costs) IACtHR Series C No. 120 (1 March 2005).

195 This categorisation is further elaborated in: Linking Solidarity 'Using law against enforced disappearances. Practical guide for relatives of disappeared persons and NGOs' (Utrecht: Aim for human rights 2009), p. 8.

The second limitation derives from the study's focus on (quasi-)judicial protection against enforced disappearances concentrating on binding human rights mechanisms. Primarily, this study examines the work of the HRC, the European Court and the Inter-American Court (hereinafter referred to together as 'the three supervisory bodies') as the main supervisory bodies of human rights treaties, which have dealt extensively with enforced disappearance cases. The research will, where appropriate, draw on the work of the UNWGEID and the Inter-American Commission on Human Rights ('Inter-American Commission').[196] In addition, other UN bodies that have encountered enforced disappearance may be referred to in passing in order to illustrate the issues at stake.

Thirdly, the focus on *determining* state responsibility has two consequences. This study does not consider the question of substantial reparation and compensation on the international level once state responsibility for a violation has been determined. Nonetheless, the area of reparation is discussed when it is deemed relevant to the question of determining state responsibility. For example, the Inter-American Court has elaborated standards with which the investigation of an enforced disappearance should comply in the reparation stage. The second consequence is that individual complaints procedures are the most dominant procedures under consideration. The universal and regional human rights organs that have so far determined state responsibility for enforced disappearance have mostly done so through individual cases. Nevertheless, the findings of this research also pertain to the general interpretation of the norms laid down in the ICPPED. In this regard, they are relevant to the other monitoring procedures as well.

Fourthly, because of its focus the present study analyses first and foremost cases of enforced disappearance. Only where relevant and necessary does it draw on case law related to other human rights violations, without covering the entire and extensive case law on these human rights issues. In addition, an important limitation of the present study is that the illegal removal of children from disappeared persons or children born in captivity is outside the scope of this study, notwithstanding its utmost importance. It is believed that the complex issues involved in this type of enforced disappearance deserve a thorough PhD research in and of themselves.

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196 D. Rodríguez-Pinzón & C. Martin, *The prohibition of torture and ill-treatment in the Inter-American human rights system: a handbook for victims and their advocates* (Geneva: OMCT 2006), pp. 64 and 65; H. Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights. Institutional and procedural aspects*, 3rd edn. (San José: Instituto Interamericano de Derechos Humanos 2008), pp. 219-224 (In the Inter-American system, an individual petition is lodged at the Inter-American Commission on Human Rights. After considering the complaint and when no final report is adopted or when no friendly settlement is reached, either the Inter-American Commission or the responding state, when it is a party to the ACHR and it has recognised the competence of the Inter-American Court, may refer the case to the Inter-American Court. Victims themselves have no power to do so).

Fifthly, the focus of the research takes into account predominantly the countries in respect of which (quasi-)judicial bodies have adjudicated enforced disappearance cases. The European Court has dealt with violations originating from Europe and the Inter-American Court with those from Central and South America. The geographical scope of the HRC is wider and includes countries such as Algeria, Sri Lanka and Nepal. In light of this geographical delineation, it is important to acknowledge that enforced disappearances have also occurred in other countries in the world. The facts in a specific case and the many different contexts, cultures and circumstances to which the ICPPED applies always warrant attention to the specific application of the norms. As such, the geographical scope of the ICPPED, depending on the ratifying treaties and the acceptance of the individual complaint procedure, may give rise to new issues not discussed in this book.

1.5.2 Methodology

The present study describes, compares and evaluates. The methodology consists of: a) a study of the relevant literature published on the topic in general and UN documents dealing with enforced disappearance; b) an analysis of the ICPPED and its *travaux préparatoires*; c) a comparative case-law analysis of the case law of the HRC, the Inter-American Court and the European Court; (d) a number of interviews with relatives of disappeared persons, judges and lawyers in Argentina and judges at the Inter-American Court in Costa Rica.

The first method, the study of literature and UN documents, provides useful background information on the phenomenon of enforced disappearance and its effects on and the experiences of victims. This method also complements the understanding of the drafting process of the ICPPED and of the case law of the three human rights bodies. An important part of the study of the UN documents is formed by documents of the UNWGEID. Having existed for over 40 years, this body has built up a great breadth of expertise on the topic. This study also looks at the soft-law guidelines developed in the UN as useful indicators for the developing trends which the CED could take into account.

Secondly, the analysis of the ICPPED and its *travaux préparatoires* demonstrate the intentions of the drafters for the purpose of interpretation and reveal the contentious issues raised during the drafting process. As such, the *travaux préparatoires* may help to identify the room for interpretation in the ICPPED that needs further clarification. In subsection 1.4.1.2 above, it is shown that the *travaux préparatoires* have played an increasingly marginal role in the interpretation of the ICCPR, the ACHR and the ECHR. Arguably, a greater role can be, and will be, played by the intentions of the drafters of the ICPPED because those intentions are more likely to reflect society as it is now. Accordingly, the question whether the CED, a young body, should take the *travaux préparatoires* into account should probably be answered in the positive.

The third method, the comparative case-law analysis has a prominent place in Part II of this study.[197] The case law of the HRC, the Inter-American Court and the European Court lies at the heart of this study.[198] Since these three supervisory bodies have already dealt with enforced disappearance cases, their case law may provide useful lessons for the interpretation and application of the ICPPED. The HRC was the first international quasi-adjudicatory human rights body that dealt with an enforced disappearance in 1983.[199] Significantly, the Inter-American Court's first case was an enforced disappearance case and it delivered its judgment in 1988.[200] This case proved to be the first in a long line of such cases in respect of many countries in South and Central America. Since the early 1990s, the European Court has been confronted with enforced disappearance cases originating from Turkey and, later, from Russia.[201] Recently, however, important judgments have been delivered against Bosnia-Herzegovina and in relation to the conflict between Cyprus and Turkey in the 1970s.

At first glance, the comparison between the HRC, the Inter-American Court and the European Court might not be self-evident since these supervisory bodies operate in different arenas, have differences in nature and operate according to different procedures. First of all, the HRC supervises a universal binding instrument while the other two bodies operate at a regional level and in turn cover different regions. Furthermore, while the European Court and the Inter-American Court issue binding judgments, the HRC issues views that are non-binding in nature. The latter therefore has quasi-judicial powers instead of judicial powers.[202] Moreover, the three bodies operate according to distinct procedures. The most striking difference is that both the European Court and the HRC allow direct access for individuals, while the Inter-American Court examines their complaints indirectly through the applications of the Inter-American Commission. Yet, a comparison is defendable when taking into account the following:

197 While the views of the HRC are not binding, and therefore, strictly speaking not 'case law', this study uses the term 'case law' to indicate the conglomeration of judgments, decisions and orders by the Inter-American Court and the European Court together with the views and recommendations issued by the HRC.

198 The present study takes into account cases, views and reports issued before 1 July 2011.

199 *Bleier v. Uruguay* HRC 29 March 1982 (Comm. no. 30/1978).

200 *Velásquez-Rodríguez v. Honduras* IACtHR (1988).

201 *Kurt v. Turkey* ECtHR 25 May 1998 (Appl. no. 24276/94); *Bazorkina v. Russia* ECtHR 27 July 2006 (Appl. no. 69481/01).

202 It must be noted that the CED also has quasi-judicial powers, which strengthens the justification to include the HRC in the comparative case-law analysis.

(1) their respective treaties find their origin in the UDHR;
(2) they are the authoritative supervisory bodies of binding treaties that entail political and civil rights;
(3) the most common human rights, on the basis of which enforced disappearance cases are adjudicated, are essentially formulated in the same way;
(4) their interpretation methods are similar;
(5) the facts with which they are confronted in each individual case may differ per country but may be similar to other cases in other parts of the world.

How does this comparison then relate to the interpretation of the ICPPED? Here is another difficulty. A comparison between the ICPPED and these three human rights instruments is not straightforward, because the ICPPED embeds a right not to be subjected to enforced disappearance while the three classical human rights treaties do not formulate such a right. The recognition of an autonomous right not to be subjected to enforced disappearance is an advance in human rights law since the existence of such right per se 'creates obligations on states parties to ensure that the right is respected'.[203] Such obligations also derive from the rights laid down in the ICCPR, the ECHR and the ACHR and require concrete conduct by states to protect these rights. Therefore and since the subject-matter is the same, it is logical that the conduct required should also be similar. This synergy is the reason why this study addresses the subject-matter by comparing the protection under these treaties from an angle of state obligations. Moreover, Article 37 ICPPED clearly opens the door to incorporate the case law of the three human rights treaties, or other sources of national or international law, into the interpretation of the ICPPED by the CED.[204] As the interpretation methods discussed in subsection 1.4.1.2 demonstrate, it is increasingly common for human rights bodies to refer to each other's case law. Finally, harmonising, or at least, comparing the ICPPED with the existing case law contributes to avoiding the unintentional fragmentation of human rights law.

The fourth method, conducting the interviews, is not a substantial part of the methodology used in this study. Instead, the interviews function as background information for the present author. Five interviews were conducted with relatives of disappeared persons and with lawyers and activists who are involved in the litigation of enforced disappearances in Argentina. Argentina was chosen because of its notorious example of the phenomenon of enforced disappearance and the

203 McCrory (2007), p. 548.
204 Article 37 ICPPED: 'Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in:
(a) The law of a State Party;
(b) International law in force for that State.'

current trials conducted in order to deal with the perpetrators. Three interviews were conducted with Argentine judges who had been involved in the adjudication of such cases in Argentina. In addition, four interviews were conducted with experts on enforced disappearances. The present author also had an opportunity to interview four judges from the Inter-American Court. All interviews were conducted in 2009. Although these interviews may not meet the standards of scientific relevance, they have been useful for providing an insight into the effects on and experiences of victims and the obstacles encountered in the litigation and adjudication of enforced disappearance cases both at the national and international level. In particular, two interviews, one with Hugo Argente (a member of the organisation *Hermanos* in Argentina) and the other with Madre Espen (a member of the organisation *Madres de Plaza de Mayo, Línea Fundadora*), have been selected to illustrate the effects of an enforced disappearance on relatives in Chapter 4 of this book.

1.6 Structure of the book

The book consists of two parts. Part I, divided into three chapters, sets the parameters for the evaluative framework that is applied in the course of the study. This part starts in Chapter 2 with an examination of the norms laid down in the ICPPED and their conceptualization in the *travaux préparatoires*. Accordingly, this chapter identifies potential room for further interpretation, which is addressed in the remaining chapters of the book. Subsequently, Chapter 3 sets out the discourse, both in theory and practice, on typologies of state obligations that provide the basis for making determinations of state responsibility in human rights law. As the last chapter of Part I, Chapter 4 examines the effects of an enforced disappearance on persons affected by this human rights violation and their most common experiences. Accordingly, this chapter discerns the main causes of victims' suffering that explain the experiences of victims. The room for interpretation in the ICPPED, the main causes of victims' suffering and the state obligations together provide the basis for the comparative case-law analysis in the second part of this book, and ultimately, for the conclusions of this book.

Part II scrutinises, in the course of five chapters, the standards related to determining state responsibility for enforced disappearance developed in the case law of the HRC, the Inter-American Court and the European Court. The standards relate to the norms laid down in the respective treaties, the corresponding obligations and the approaches to evidentiary issues. Subsequently, this part evaluates the lessons and shortcomings of the case law and provides, where necessary, alternative approaches in light of the identified main causes of victims' suffering. The chapters in this part are arranged according to seven state duties. Before discussing the separate duties, this part starts with a preliminary chapter on definitional issues (Chapter 5). This chapter clarifies a number of crucial notions of enforced disappearance that are used

in the ICPPED. Having defined these crucial terms, Chapter 6 discusses issues related to the duty to respect the right not to be subjected to enforced disappearance. Chapter 7 scrutinises the duty to prevent enforced disappearance. The duties to investigate the facts, to prosecute and punish the perpetrators and to compensate the victims are the subject-matter of Chapter 8. Lastly, Chapter 9 focuses on the duty to protect persons from crimes that are similar to enforced disappearance but are committed by non-state actors.

This book concludes with suggestions for the interpretation and application of the norms laid down in the ICPPED that are in line with and in direct response to the experiences of victims (Chapter 10). These suggestions are based on the findings in Part II and are made in light of the evaluative framework defined in Part I. The conclusion ends with guiding recommendations for the interpretation and application of the discussed norms relevant to protection from enforced disappearance. The formulation of these recommendations is directed towards the CED, as the supervisory body of the ICPPED. Nevertheless, these recommendations address issues that are broader in scope and may be relevant for other (quasi-)judicial bodies dealing with enforced disappearance cases as well.

1.7 Concluding remarks

The ICPPED has in and of itself an added value for protection against enforced disappearance. The existence of a separate and binding international convention sends a strong message to the international community that enforced disappearance is strictly prohibited and draws attention to the seriousness of this crime.[205] The CED, as its supervisory body, has the task of interpreting and applying the norms in a manner that further strengthens this protection and contributes to combating this phenomenon worldwide. The present study provides a framework that evaluates the existing protection in light of the experiences of victims and discerns the gaps and lessons for the interpretation of the ICPPED. The result is a framework that bridges the existing protection and the protection offered by the ICPPED. As such, it consolidates, refines and complements the conceptualisation of the protection from enforced disappearance.

It is hoped that the findings of this study will provide a useful tool in accordance with which the CED could undertake its activities. A tool that combines an analysis of the interpretation and application of norms related to protection from enforced disappearance with the perspective of the experiences of victims. Apart from contributing to the work of the CED, it is hoped that this study may also be of value to other human rights bodies that deal with this human rights violation and to

205 UN Report by Nowak (2002), para. 99.

NGOs, experts, persons affected by this violation and lawyers dealing with enforced disappearances.

Part I

Parameters of the Evaluative Framework

Chapter 2
Protection under the ICPPED

2.1 Introduction

The ICPPED is the first universal and legally binding instrument whose objective is to prevent enforced disappearances and to combat impunity for this crime.[1] It establishes an autonomous right not to be subjected to enforced disappearance. Accordingly, the ICPPED imposes on States Parties a coherent body of obligations with the aim of realising this right in practice. These norms form the substantive basis for determining state responsibility under the ICPPED.

This chapter discusses the norms laid down in the ICPPED. In doing so, it aims to identify the room that the ICPPED leaves to the CED for the interpretation and application of the enshrined norms. To this end, this chapter examines the text of the ICPPED and its drafting history.[2] First, this chapter briefly explains the drafting process of the ICPPED.[3] Second, it examines several definitional issues enshrined in the ICPPED that are important for a thorough understanding of the concept of enforced disappearance. Third, this chapter discusses the norms related to the prohibition of enforced disappearance and the prevention of this human rights violation, followed by an examination of norms related to the investigation of the crime and the prosecution and punishment of the perpetrators. Subsequently, the provisions governing compensation for victims are explained. This chapter concludes with a summary of the interpretation conundrums in the ICPPED that will be addressed in Part II of this book.

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1 ICPPED, preamble, recital 6. See also IOWG Report E/CN.4/2003/71, para. 18 (The preventive function of the ICPPED was an important initial reason to draft this convention. Several delegations felt that the elaboration of a universal instrument was useful, even for states not exposed to the problem or not believed to be at risk because it would have a preventive effect).

2 This chapter notes the relevant differences between, on the one hand, the ICPPED, and on the other, the DPPED, the 'Draft international convention on the protection of all persons from enforced disappearance', as drafted by the sessional working group on the administration of justice (UN Doc. E/CN.4/Sub.2/1998/19, annex) (26 August 1998) (hereinafter: 'Draft Convention 1998') and the UN Report by Nowak (2002). These documents formed the basis for the negotiations on the text of the ICPPED. It must be noted that the CAT was also an important source of inspiration.

3 See generally Decaux & De Frouville (2009) (This book provides a comprehensive overview of the build-up to the drafting of the ICPPED and a thorough account of the drafting process itself).

2.2 The drafting of a binding international convention against enforced disappearance

> The Convention breaks new ground in the fight against the scourge of enforced disappearances, […]. This is a momentous step, a day that has been looked forward to by many in all parts of the world, including families of those who have disappeared.[4]

On 23 December 2010, the ICPPED entered into force, 30 days after the Republic of Iraq deposited the 20th instrument of ratification with the UN Secretary-General. The entry into force of a binding and universal convention against enforced disappearance is a historical achievement, to which survivors, relatives of disappeared persons, human rights organisations and human rights experts have devoted vigorous efforts and energy.[5] A historical achievement indeed, especially considering the fact that the first concrete lobby for such an international convention dates from 1981.[6] In that year, the Human Rights Institute of the Paris Bar Association convened a high-level colloquium for the promotion of an international convention against enforced disappearance. This initiative was swiftly followed by a similar discussion in Lima, Peru, at the 1982 Conference of the family member organisation FEDEFAM.[7] On both occasions, draft declarations and conventions on enforced disappearance were presented.[8] The first attempt to address this issue within the UN was made by the former UN Sub-Commission on the Promotion and Protection of Human Rights ('UN Sub-Commission'). In 1984, this body submitted a preliminary draft declaration against unacknowledged detention.[9] However, this initiative did not prompt any meaningful follow-up steps at the time.

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4 UNWGEID, 'New Convention on Enforced Disappearance enters into force, but much remains to be done' (Press Release, Geneva, 23 December 2010).

5 Joinet (2009), p. 31 (NGOs have played from the very beginning a prominent role in the lobbying for an international convention). See also J.D. Vigny, 'Le rôle des O.N.G.', in: E. Decaux & O. De Frouville, (eds.), *La Convention pour la protection de toutes les personnes contre les disparitions forcées* (Brussels: Bruylant 2009), pp. 57-64 (This article provides an elaborate description of the role of NGOs in the lobbying towards an international convention); Press Release of ICAED, 'International Convention for the Protection of All Persons from Enforced Disappearance Enters into Force on 23 December 2010' (25 November 2010).

6 Joinet (2009), p. 30. The first important step in the process towards an international convention was the creation of the UNWGEID. This Working Group has, for instance, played an important role in revealing the facts about this crime. See chapter 1 section 3.1.

7 FEDEFAM stands for *Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos*.

8 Brody & González (1997), at p. 369.

9 United Nations, Department of Public Information, *Yearbook of the United Nations (1985)* (Dordrecht: Martinus Nijhoff Publishers 1989), p. 865.

Throughout the 1980s and 1990s, family member organisations and human rights experts continued to lobby. Their persistent efforts resulted in incremental steps towards the realisation of an international convention against enforced disappearance.[10] A notable breakthrough in this process was the discussion in the former UNComHR of a draft text for the DPPED.[11] After the approval of this draft by the UNComHR, the UN General Assembly adopted the DPPED in 1992.[12] At the same time drafting efforts for a regional convention had been ongoing within the Organization of American States ('OAS'). Two years later in 1994, the OAS General Assembly adopted a regional convention on enforced disappearance, the IACFD.

The next important advance towards a binding convention within the UN system came in 1998 with the adoption by the UN Sub-Commission of the Draft International Convention for the Protection of all Persons from Enforced Disappearance ('1998 Draft Convention').[13] By this time, the climate within the UNComHR was open to the idea of adopting a binding instrument, even though some Member States expressed a preference for reviewing and strengthening the existing mechanisms.[14] In addition to that resistance, there was no agreement about the form and content of such a convention, were it ever to be drafted. As a result, in 2001 the UNComHR appointed Manfred Nowak as an expert to examine the existing framework for protection against enforced disappearances. Also, the UNComHR created the Intersessional Open-ended Working Group ('IOWG') and entrusted it with the mandate to prepare and draft a legally binding instrument. The IOWG was to meet after Nowak had concluded and presented his report.[15] In his highly-valued report, Nowak demonstrated that there

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10 See generally Brody & González (1997) (The authors present a review of the preparation of the various instruments and standards on the issue of enforced disappearances both within the UN and within the OAS).

11 Joinet (2009), pp. 31-32 (explaining that the declaration was an initiative of a group of NGOs that was pursued by the former Working Group on the Administration of Justice, chaired by Luis Joinet. This Group, in consultation with the UNWGEID, prepared a preliminary draft, which was transmitted to the Sub-Commission and adopted accordingly).

12 See also UNComHR, 'Enforced or involuntary disappearances' (19 April 2004) UN Doc. E/CN.4/RES/2004/40 and UNHRCouncil, 'Enforced or involuntary disappearances' (27 March 2008) UN Doc. A/HRC/7/12 (The UNWGEID obtained the mandate to assist states in implementing the DPPED. It has issued general comments in the interpretation of the DPPED and issued reports on specific countries as well as annual reports).

13 See also UNComHR, 'Question of enforced or involuntary disappearances' (21 December 2000) UN Doc. E/CN.4/2001/69 21 (comments by states and NGOs on the 1998 Draft Convention). See also Joinet (2009), p. 33.

14 O. De Frouville, 'The Committee on Enforced Disappearances' (2010), available at people.pwf.cam.ac.uk/od238/page_personnelle/Curriculum_et_publications_files/FROUVILLE-CED-ALSTON.pdf (last visited on 4 November 2011), p. 2.

15 UNComHR, Resolution 2001/46 'Question of enforced or involuntary disappearances' (23 April 2001), paras.11 and 12. See also UNComHR, Resolution 2002/41 'Question of enforced or involuntary disappearances' (23 April 2002), para. 13 (confirming the creation of the IOWG).

were several important gaps in the protection against enforced disappearance. He recommended the drafting of a legally binding international instrument in order to fill these gaps.[16]

The IOWG met for the first time in 2003. The IOWG consisted of state representatives to the UNComHR and was chaired by the late French Ambassador Bernard Kessedjian. In addition, observers represented several non-members States of the UNComHR. Also, a significant number of family member organisations and other human rights organisations were represented. These organisations had a voice, but no vote.[17] After the initial meeting, the IOWG continued to meet twice a year. A series of efficient meetings resulted in a drafting process that was concluded within three years, a record in treaty making within the UN.[18] The IOWG agreed upon a proposal for a text on 25 September 2005. Subsequently, the Human Rights Council ('UNHR Council') adopted the text without amendments[19] and the UN General Assembly adopted the ICPPED on 20 December 2006.[20] The ICPPED was opened for signature on 6 February 2007 in Paris.[21]

From the previous paragraphs it can be deduced that the inception and adoption of the ICPPED was preceded by a long process in which UN bodies, experts, relatives, survivors and their respective organisations spent much time and energy to realise

16 UN Report by Nowak (2002). The exact form of this instrument remained a topic of discussion during the drafting process. Several options were discussed such as a separate instrument or an optional protocol to either the ICCPR or to the CAT.

17 The following non-governmental organisations, which had consultative status with the Economic and Social Council, were represented by observers at the Working Group's meetings: Amnesty International, Association for the Prevention of Torture, Families of Victims of Involuntary Disappearance (FIND), Human Rights Watch, International Association against Torture, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation of Human Rights Leagues, International League for the Rights and Liberation of Peoples, International Service for Human Rights, International Women's Rights Action Watch, Latin American Federation of Associations of Relatives of Disappeared Detainees, New Humanity, Non-Violence International, Permanent Assembly of Human Rights, Philippine Human Rights Information Centre, South Asia Human Rights Documentation Centre and World Federation of Trade Unions. The International Committee of the Red Cross (ICRC) was also represented by observers. Experts such as Louis Joinet, Manfred Nowak and Stephen Toope were also present during a number of the sessions.

18 Joinet (2009), p. 34. See also G. Citroni, 'Les positions des Etats', in: E. Decaux & O. De Frouville, (eds.), *La Convention pour la protection de toutes les personnes contre les disparitions forcées* (Brussels: Bruylant 2009) pp. 65-94, at pp. 67 and 68 (The author implies that a disadvantage of this swift drafting process is that it may be one of the reasons for the many general statements made by the delegations at the end of the drafting process and at the moment of adoption in the UNComHR).

19 UNHRCouncil, Resolution 1/1 'International Convention for the Protection of All Persons from Enforced Disappearance' (29 June 2006).

20 The ICPPED was adopted on 20 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/177.

21 At this event 57 states signed the ICPPED.

a universal instrument for protection from enforced disappearance. A separate and binding instrument was not self-evident, but in the end has been greatly welcomed by the international community.

2.3 Definitional issues with respect to enforced disappearance

The ICPPED defines several concepts related to enforced disappearance. Most importantly, it provides for a definition of enforced disappearance itself. The ICPPED also sets out this crime's continuous nature. In addition, the ICPPED contains a provision on enforced disappearance as a crime against humanity. Finally, the notion of victims in relation to enforced disappearance is also defined. The following subsections elaborate on these definitional issues.

2.3.1 Definition of the right not to be subjected to enforced disappearance

Article 1(1) ICPPED lays down the right not to be subjected to enforced disappearance. Article 2 ICPPED enshrines the definition of enforced disappearance and defines it as follows:

> For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.

According to this definition, enforced disappearance comprises four elements:

(1) a deprivation of liberty;
(2) the direct or indirect involvement of state agents;
(3) a refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the person who is deprived of his or her liberty; and
(4) placement outside the protection of the law.[22]

This definition is thereby essentially identical to the description of enforced disappearance laid down in the DPPED and the definition enshrined in the 1998 Draft Convention.[23] A closer examination of these four elements reveals a broad definition

22 See subsection 2.3.1.4 below for the discussion on the question whether the fourth element is a constituent element of the definition or a consequence of the former three constituent elements.

23 It must be noted that the 1998 Draft Convention does not contain the last phrase 'which places such a person outside the protection of the law'.

that confirms the traditional notion of human rights law. This notion envisions protection against acts by the state, thereby excluding acts committed solely by non-state actors. It must be observed that it is unclear whether all four elements must be regarded as *constituent* elements, as demonstrated in subsection 2.3.1.4 below.

2.3.1.1 Deprivation of liberty

The first element in the definition is the deprivation of a person's liberty. This element is broad in scope, including a wide spectrum of acts. At the start of the drafting process the first working paper did not contain any specification of the term 'deprivation of liberty'. This changed when some delegations were of the opinion that clear and simple terms should be used such as 'arrest', 'detention', and 'abduction'.[24] Such terms would narrow the scope of 'deprivation of liberty'. However, others pointed out that drawing up an exhaustive list of all acts related to the 'deprivation of liberty' was virtually impossible.[25] The drafters were to compromise and agreed to include the terms 'arrest', 'detention' and 'abduction' as concrete examples of the general term 'any form of deprivation of liberty'.[26] As such, the nature of the deprivation, whether legal or illegal, is irrelevant for the scope of the definition.

2.3.1.2 Involvement of state agents, at least indirectly by acquiescence

The discussion during the drafting process on the second element, *i.e.* the involvement of the state, focussed in particular on the question of who the possible perpetrators of enforced disappearance could be. The meaning of 'state agents' was not disputed.[27] Instead, the discussion focussed on the inclusion of an additional category, namely so-called 'non-state actors' as possible perpetrators. While the definition of this crime proposed to the members of the IOWG in the first working paper left out any reference to the possible perpetrators,[28] the second working paper contained, alongside state

24 IOWG Report E/CN.4/2003/71, paras. 34 and 36.

25 UNComHR, 'Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance' (23 February 2004) UN Doc. E/CN.4/2004/59 (hereinafter: 'IOWG Report E/CN.4/2004/59'), para. 20.

26 UNComHR, 'Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance' (10 March 2005) UN Doc. E/CN.4/2005/66 (hereinafter:'IOWG Report E/CN.4/2005/66'), para. 19.

27 *Ibid.*, para. 21 (The official documentation of the drafting process does not report on the meaning of the term 'agents of the State'. The only reference to this phrase was that some delegations considered that 'agents of the State' should be clarified by the addition of 'in the course of their duty'. Also, another wording was suggested, namely 'public officials' analogous to the wording in the definition of torture under the CAT).

28 IOWG Report E/CN.4/2003/71, para. 33.

actors, a reference to political organisations as possible perpetrators.[29] During the second meeting, the delegations reached an agreement on the prime responsibility of states in respecting and protecting human rights.[30] This agreement, however, did not silence the discussion on the question of whether non-state actors should also be included as possible perpetrators. This topic remained the subject of vigorous debate until the last session. Proponents argued in favour of including such actors stating that this would take into account 'the situation on the ground and the fact that states are no longer the sole subjects of international law'.[31] Other delegates opposed this suggestion since it would expand the definition and would undermine the force of the instrument while, at the same time, changing its nature. It would then, as was argued, also cover acts such as abduction, which was already punishable by domestic law.[32] Also, the concern was voiced that the inclusion of non-state actors as perpetrators of the offence may lead to the exoneration of states of their primary responsibility to respond to acts of enforced disappearance.[33]

The chairman included only state actors as possible perpetrators in the working paper of the ICPPED in preparation for the fifth session. In reaching a compromise between the different views expressed, the chairman proposed a separate subsection stating that 'any State might take similar measures in the case of enforced disappearances committed by an organization, a group or individuals outside the control of the State'.[34] The delegates agreed to this structure and to the insertion of a separate provision. In the end, Article 3 ICPPED reads:

> Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

In summary, it is beyond dispute that the ICPPED excludes non-state actors as possible perpetrators of enforced disappearance, if they act without any kind of involvement of the state. This exclusion does not mean that crimes committed by non-state actors are completely outside the scope of the definition. The conduct of the state may still bring such acts within the scope of the definition by means of authorisation, support

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29 This proposal was in line with the Rome Statute, which includes a reference to political organisations as possible perpetrators of the crime of enforced disappearance.

30 IOWG Report E/CN.4/2004/59, para. 32.

31 IOWG Report E/CN.4/2005/66, para. 30.

32 *Ibid*., para. 31. See also P. Rice, 'La fédération latino-américaine des organisations de familles de détenus disparus (FEDEFAM) et le projet de convention', in: E. Decaux & O. De Frouville, (eds.), *La Convention pour la protection de toutes les personnes contre les disparitions forcées* (Brussels: Bruylant 2009) pp. 37-49, p. 42.

33 IOWG Report E/CN.4/2005/66, para. 31.

34 IOWG Report E/CN.4/2004/59, para. 35.

or acquiescence. At any rate, States Parties also have obligations in accordance with Article 3 ICPPED when it is determined that non-state actors are the perpetrators of the crime. Hence, if they fail to comply with those obligations they violate the ICPPED.

2.3.1.3 Refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person

The only attempt to discuss the scope of the third element, *i.e.* the refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person, was initiated by the chairman of the IOWG. During the first session, one of his comments was that the IOWG should elaborate on the meaning of 'concealment' and 'culpable failure to act' in relation to domestic criminal law.[35] However, this initiative was not pursued in later sessions.

2.3.1.4 Placing the person concerned outside the protection of the law

The fourth element of placing the person outside the protection of the law generated heated discussion between the drafters of the ICPPED. In particular, the discussion on three issues portrayed opposing views. Firstly, the discussion broached the question of whether this last element should be seen as a constituent element of the definition or as a consequence of the former three. Since the drafters did not come to any consensus, the chairman concluded the discussion by leaving it as a 'constructive ambiguity' with respect to which States Parties may interpret its nature in their own way.[36] He also recalled that 'States were fully entitled to make an interpretative declaration on the matter at the time of ratification'.[37] Several states did so. For instance, the United Kingdom and Japan clarified that their understanding of the definition of enforced disappearance was that the fourth element was a constituent element. The fourth element in their view means that 'the person's deprivation of liberty or detention was not within the scope of relevant domestic legal rules, or that those rules were not compatible with applicable international law'.[38]

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35 IOWG Report E/CN.4/2003/71, para. 41.

36 IOWG Report E/CN.4/2005/66, para. 23. See also UNHRCouncil, Joint report on secret detention of Special rapporteurs, para. 28 (This document expresses the view that the fourth element is an objective consequence' of the three first elements and therefore does not constitute a constitutive element of the definition).

37 UNComHR, 'Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance' (2 February 2006) UN Doc. E/CN.4/2006/57 (hereinafter: 'IOWG Report E/CN.4/2006/57'), para.93.

38 UNGA, 'Third Committee Approves Draft Resolution Concerning Convention on Enforced Disappearances' (13 November 2006) UN Doc. GA/SHC/3872.

Secondly, the discussion pertained to the incorporation of an element of intent as one of the components of enforced disappearance. This discussion took place in light of the recent developments in relevant international law and, in particular, the Rome Statute of the International Criminal Court ('Rome Statute'). The Rome Statute defines enforced disappearance as a crime against humanity when it is part of a widespread or systematic attack. The definition of the 'enforced disappearance of persons' in Article 7(2)(i) of the Rome Statute includes the same elements as the human rights definition in the ICPPED, with two exceptions, namely (a) that political organisations are mentioned as possible perpetrators and (b) that the fourth element states 'with the intention of removing them from the protection of the law for a prolonged period of time'.

Some delegates expressed concern that a definition without an element of intent would differ from the definition enshrined in the Rome Statute. In contrast, others were of the view that this difference was justified by the different purposes of the two instruments. The ICPPED, being a human rights instrument, aimed at providing the broadest possible protection for victims, while the purpose of the Rome Statute was the punishment of individual criminals.[39] Another reason mentioned to include the element of intent was the requirement of such an element in national criminal law. This argument met opposition with the counterargument that intent is extremely difficult to prove in practice. A suggested compromise was to link the element of 'indirect or direct intention' to the element of concealment or refusal to acknowledge the detention.[40] This suggestion was not pursued. Instead, during the last session, the chairman suggested that an element of intent was implicit in the definition. He argued that 'it was hard to imagine that all the elements of the definition might be combined without intent'.[41] In his view, the incorporation of such an element was unnecessary. In the end, the drafters agreed to omit the element of intent. Nevertheless, consensus on the issue was not reached. The USA, for instance, explicitly expressed the understanding that *mens rea* is an essential component of the ICPPED definition of enforced disappearance and the equivalent domestic crime. In their understanding, such intent would in particular refer to the 'specific intent to place a person outside the protection of the law'.[42]

The third debated issue related to the inclusion of an element of time. The drafting process demonstrated tension between those who considered that the

39 IOWG Report E/CN.4/2004/59, paras. 17 and 18.

40 *Ibid.*, paras. 24-26.

41 IOWG Report E/CN.4/2006/57, para. 96.

42 UNHRCouncil, 'Note verbale dated 20 June 2006 from the Permanent Mission of the United States of America to the United Nations Office at Geneva addressed to the secretariat of the Human Rights Council' (27 June 2006) UN Doc. A/HRC/1/G/1, Annex, p. 2. See Scovazzi & Citroni (2007), p. 284 (arguing that this interpretation could have consequences that are in complete contradiction to the object and purpose of the ICPPED).

element of time should be incorporated in the definition and those who considered that such an inclusion would be detrimental to the purpose of the ICPPED. Some delegates favoured the insertion of 'for a prolonged period of time' so as to 'allow for a certain time to elapse between the arrest and the notification of the detention'.[43] One delegate emphasised that this element played a crucial role in the distinction between enforced disappearance and situations in which the state legitimately refuses to disclose information on what happened to a person for a certain period of time.[44] This suggestion was opposed on the basis of several arguments, namely that enforced disappearance could commence from the moment of arrest and that this insertion would result in a vague definition. Moreover, an element of time would not adhere to the purposes of the ICPPED, namely the prevention of enforced disappearance. It was explained that early warning required intervention by national and international monitoring bodies from the moment of the deprivation of liberty.[45] This discussion lasted throughout the drafting process. In the end, agreement was reached to omit a reference to time.

2.3.1.5 Relation to other rights

The delegations of the IOWG raised the abhorrent nature of enforced disappearance during the general debate held in the first session. It was agreed that this crime removes persons who have disappeared from the protection of the law and that it deprives them of all their rights. The general view was that the specificity and complexity of the concept of enforced disappearance lies in the simultaneous violations of various human rights. The rights mentioned were 'protection against torture and inhuman or degrading treatment, the right to life, liberty and security and the right to fair and public trial and the right to recognition of legal status and to equal protection of the law'.[46] During the drafting process, the proposal was brought forward to incorporate a preambular paragraph to the effect that an enforced disappearance was a grave violation of several rights enshrined in the ICCPR.[47] However, this suggestion was not pursued any further. As a result, the final text of the ICPPED does not refer to other human rights that are breached by this human rights violation.

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43 IOWG Report E/CN.4/2004/59, para. 22.
44 IOWG Report E/CN.4/2005/66, para. 24.
45 *Ibid.*, para. 23.
46 IOWG Report E/CN.4/2003/71, para. 16. Nowak identified a diverse approach by several human rights bodies as to which rights are violated by an enforced disappearance, see UN Report by Nowak (2002), paras. 17-52 and 96.
47 IOWG Report E/CN.4/2005/66, para. 12.

2.3.2 The continuous nature of enforced disappearance

The ICPPED purports that enforced disappearance has a continuous nature. This continuous nature follows from Article 8(1)(b), which governs the application of statutes of limitations.[48] The relevant paragraph of this article states that the term of limitation for criminal proceedings may only commence 'from the moment when the offence of enforced disappearance ceases, taking into account [the crime of enforced disappearance's] continuous nature.' This continuous nature also emanates from the obligation to investigate until the fate of the disappeared person has been clarified. This continuous obligation is laid down in Article 24(6) ICPPED, which indicates:

> Without prejudice to *the obligation to continue the investigation until the fate of the disappeared person has been clarified*, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, […]'. (emphasis added by author)

Thus, the ICPPED clearly recognises the continuous nature of enforced disappearance, even though it does not explicitly require defining it as such in domestic law.[49] While recognising this continuous nature, the ICPPED does not clarify when an enforced disappearance precisely ends. In this respect, questions that remain unanswered are, for instance, whether declarations of death or compensation should be considered as a means to end the enforced disappearance.[50]

In relation to the continuous nature of enforced disappearance, it must be noted that Article 35 ICPPED provides that:

> 1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.
> 2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.

This article implies that enforced disappearances that commenced prior to the entry into force of the ICPPED in relation to a State Party, but where the victim's

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48 IOWG Report E/CN.4/2005/66, para. 46 (showing that the phrase 'taking into account the continuous nature of the offence' was inserted relatively late in the drafting process).

49 *Cf.* Article 5(1) of the 1998 Draft Convention, which states: 'This offence is continuous and permanent as long as the fate or whereabouts of the disappeared person have not been determined with certainty.'

50 S. Corcuera, 'L'expérience du groupe de travail sur les disparitions forcées', in: E. Decaux & O. De Frouville, (eds.), *La Convention pour la protection de toutes les personnes contre les disparitions forcées* (Brussels: Bruylant 2009), pp. 21-27, at p. 24.

whereabouts and his or her fate have not been clarified, will not fall within the scope of the competence of the CED. This restrictive approach clearly follows from the text and *travaux préparatoires* of the ICPPED.[51] This restriction is obviously detrimental to victims who have disappeared prior to its entry into force, as well as for their relatives. Recognising this drawback, the Parliamentary Assembly of the Council of Europe ('PACE') has urged the CoE Member States to make interpretative declarations to the effect that the CED would have competence to deal with cases of enforced disappearance that commenced prior to the entry into force of the ICPPED.[52] In any case, Frouville argues that leeway exists for the CED to define the 'commencement' of an enforced disappearance. Moreover, this article only applies to the jurisdictional competence of the CED. Consequently, the obligations laid down in the ICPPED apply to crimes regardless of whether they commenced prior to the entry into force so long as the crime continues after the entry into force.[53] Another point of ambiguity is that the ICPPED is silent on the question whether the CED has the competence to receive individual complaints of enforced disappearance that commenced prior to the acceptance of the individual complaint procedure, yet after the entry into force of the ICPPED for the respondent state. At least the text of Article 35(2) ICPPED does not bar the CED from considering such cases.

2.3.3 Enforced disappearance as a crime against humanity

During the first session of the drafting process, most delegates supported the view that the future instrument should classify enforced disappearance as a crime against humanity, when carried out systematically or on a large scale.[54] Still, the suggestion to include this classification met with some opposition. The counterargument raised was that the Rome Statute already covers enforced disappearance as a crime against humanity. Yet, others felt that a reference to crimes against humanity would acknowledge the existence and serious nature of this crime. In addition, two inadequacies of the Rome Statute were raised. Firstly, the Rome Statute is an international criminal law instrument which is only concerned with the punishment of individuals (and not states) and, secondly, the Rome Statute does not oblige states to criminalise the systematic or widespread practice of enforced disappearances as a crime against humanity in their domestic law.[55] In concluding the discussion, the

51 Scovazzi & Citroni (2007), p. 314; IOWG Report E/CN.4/2004/59, para. 165.
52 CoE, 'Parliamentary Assembly Resolution 1463 (2005) Enforced Disappearances' (3 October 2005), para. 13.3.
53 De Frouville (2010), p. 9.
54 IOWG Report E/CN.4/2003/71, para. 39. This view concurs with the IACFD (preamble, recital 6), the 1998 Draft Convention (preamble, recital 5 and Article 3) and the DPPED (preamble, recital 4).
55 IOWG Report E/CN.4/2004/59, para. 45. The *travaux préparatoires* seem to imply that such practice does not necessarily need to be criminalised as a crime against humanity in domestic law.

chairman proposed that a reference be made in both the preamble and the operative part to the notion of a crime against humanity. In the subsequent sessions, further discussion focussed on the wording of such clauses. For instance, a suggestion to include knowledge of the attack was rejected. Instead, a reference to the applicable international law was inserted.[56] The drafters agreed on Article 5 ICPPED, which reads:

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

The strong reference to international law for defining the circumstances in which enforced disappearance constitutes a crime against humanity appears in preambular paragraph 5 of the ICPPED as well. The ICPPED also depends on the 'applicable international law' for the legal consequences of finding a systematic practice. The *travaux préparatoires* do not further clarify which circumstance the drafters had in mind when referring to the applicable international law. It may be inferred from the dominant role of the Rome Statute during the negotiations that this instrument is meant by 'applicable international law'.[57] On the other hand, as Scovazzi and Citroni note, the term 'applicable' suggests that possible further developments in international law should be taken into account. They express the hope that this reference may lead to the consideration that a single crime of enforced disappearance amounts to a crime against humanity.[58]

Upon the approval of the draft text of the ICPPED by the Third Committee of the UN General Assembly, New Zealand noted that the definition of enforced disappearance as a crime against humanity differed from the one in established international law. Therefore, New Zealand would interpret this article 'consistently with its understanding of already existing international law.'[59] The USA, for its part,

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See *e.g.* IOWG Report E/CN.4/2006/57, para. 106.

56 The text of the Rome Statute on the definition of the systematic practice of enforced disappearances does include an element of intention. Also the Elements of Crime show that:
'[t]he perpetrator must have been aware that:
(a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
(b) Such refusal was preceded or accompanied by that deprivation of freedom.'

57 See also UNWGEID, 'General Comment on Enforced disappearances as a crime against humanity' (21 December 2009) (taking the criteria listed in Article 7(1) of the Rome Statute as a point of departure to consider whether enforced disappearance amounts to a crime against humanity).

58 Scovazzi & Citroni (2007), para. 292.

59 UNGA, 'Third Committee Approves Draft Resolution Concerning Convention on Enforced Disappearances' (2006).

stressed that it understood Article 5 ICPPED not to impose any additional obligation to amend domestic legislation or to accede to particular international instruments.[60]

2.3.4 Victims of enforced disappearance

Article 24(1) ICPPED defines who may be considered to be a victim under the ICPPED. This provision states:

> 1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

As of the first session of the drafting process, many participants supported the view that not only the disappeared persons, but also their relatives should be considered as victims of enforced disappearance.[61] In spite of this general agreement, the scope of the term 'relatives' provoked considerable discussion. For instance, some delegations were of the view that besides spouses and children, also parents and siblings should fall within the term 'relatives'.[62] The chairman concluded the discussion in the first session with the suggestion that the ICPPED should embody a broad notion of a victim. At the same time, he stated that it might be desirable to leave a margin of appreciation to the national courts to determine the exact scope of this concept. In this regard, he also stressed that the definition of 'victim' is not necessarily the same for the purpose of reparation as for the purpose of investigation.[63] In the subsequent session, the terms 'direct victim' and 'indirect victim' were suggested. Also, the proposal was put forward not to use 'relatives', but 'those whose interests had suffered owing to the perpetration of that crime [*i.e.* the enforced disappearance], including members of the victim's family.'[64] This latter proposal was largely maintained in the working paper prepared for the last session.[65] The result in the final text of the ICPPED is a broad definition of victim that omits a specific reference to the term 'relatives'.

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60 UNHRCouncil, Note Verbale of the USA (2006), Annex, p. 4.

61 Article 1(2) of the UN Declaration on Enforced Disappearance provides that any act of enforced disappearance causes grave suffering to the disappeared person as well as to his family.

62 IOWG Report E/CN.4/2003/71, para. 83.

63 *Ibid.*, para. 88.

64 IOWG Report E/CN.4/2004/59, para. 134.

65 UNComHR, 'Working paper of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance' (12-23 September 2005) UN Doc. E/CN.4/2005/WG.22/WP.1 (hereinafter: 'IOWG Report E/CN.4/2005/WG.22/WP.1'), Article 24.

2.3.5 Room for the interpretation and application of the definitional issues

The previous subsections discussed ambiguities in respect of four definitional matters within the ICPPED:

(1) the definition of enforced disappearance itself;
(2) the continuous nature of this human rights violation;
(3) the notion of 'victim'; and
(4) this human rights violation as a crime against humanity.

These ambiguities with respect to the interpretation of the ICPPED do not necessarily demonstrate any shortcomings of the ICPPED. Rather, they indicate where the CED has the possibility to step in to interpret the text of the ICPPED.

Firstly, the definition of enforced disappearance shows interpretation conundrums in relation to the last two (of four) of its elements in particular: the refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person (the third element) and placement outside the protection of the law (the fourth element). With respect to the third element of the definition the ICPPED leaves considerable room to determine which information is exactly meant by 'the fate or whereabouts'. For instance, the question arises whether a situation amounts to enforced disappearance if state authorities were to admit that the person has been arrested, but refuse to provide any information about the well-being or location of the person. As to the fourth element, the *travaux préparatoires* clarify that States Parties have discretion to decide whether this element is a constituent element of the definition or a consequence of the first three elements. However, it is for the CED to monitor that any interpretation does not contravene the object and purpose of the ICPPED. In addition, the absence of a time element in the definition raises the question whether every period of unacknowledged detention, however short, falls within the definition of enforced disappearance.

Secondly, the ICPPED leaves leeway to decide on the exact meaning and consequences of the continuous nature of enforced disappearance. As such, the CED has room for interpretation in deciding when an enforced disappearance commences and ends. A decision on these matters has consequences for the application of the ICPPED and the interpretation of state obligations. Furthermore, determining the beginning and end is important in light of the restrictive approach laid down in the ICPPED with respect to the scope of the competence of the CED.

Thirdly, the ICPPED defines the notion of victim in an inclusive manner, extending the protection to all persons suffering harm as a direct result of the enforced disappearance. Such a broad notion leaves the determination of the exact scope to the national courts, but the CED also has the possibility to further flesh out this notion to ensure that it is legally tenable and tailored to the experiences of victims. In this

regard, the explanation of the phrase 'harm as the direct result' in the definition of 'victim' plays a determinative role.

Lastly and finally, while the ICPPED unequivocally establishes that only a widespread or systematic practice of enforced disappearance constitutes a crime against humanity, it leaves room for interpretation as to what elements need to be fulfilled for finding such practice. Also, it is not clear what the exact legal consequences are when such practice is established. Arguably, the reference to 'applicable international law' provides room for considering a single crime of enforced disappearance as a crime against humanity, if such applicable law were to move in that direction. Clearly, such a reading would be contrary to the text of the ICPPED, but to decide otherwise would then potentially contravene the applicable international law. As a last point, it must be noted that the criteria for finding a widespread or systematic practice are also important for the CED's competence under Article 33 ICPPED to refer cases of that nature to the UN General Assembly.[66]

2.4 The right not to be subjected to enforced disappearance

2.4.1 An absolute and non-derogable right

Having seen that the definition of enforced disappearance in the ICPPED leaves certain room for interpretation, the *prohibition* of this human rights violation is by no means ambiguous. The ICPPED formulates a clear and autonomous right not to be subjected to enforced disappearance. Article 1(1) ICPPED states that:

> [n]o one shall be subjected to enforced disappearance

Furthermore, the ICPPED establishes that the right not to be subjected to enforced disappearance is non-derogable and non-qualified. The absolute nature of Article 1(1) ICPPED is complemented by paragraph 2 of the same article that states:

> No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

The absolute nature of the prohibition of enforced disappearance means that this crime can never be justified. Accordingly, the right not to be subjected to enforced disappearance is protected without any limitations. This non-derogable nature means that States Parties cannot derogate from their obligations even in exceptional

66 De Frouville (2010), p. 13 (The author explains that the underlying idea of Article 33 is that the crime of enforced disappearance as a crime against humanity is excluded from the scope of the ICPPED and in particular from the jurisdiction of the CED).

circumstances. The drafters of the ICPPED envisaged that the enumeration of exceptional circumstances listed in Article 1(2) ICPPED would be non-exhaustive.[67] Despite the fact that it is clear from the text that a state of war may not be invoked to justify enforced disappearance, the discussion broached the question whether the ICPPED is applicable to international armed conflicts. During the drafting process, the International Committee of the Red Cross ('ICRC') put forward the view that, by analogy with Article 2(2) CAT and Article 7 DPPED, the ICPPED should also apply to situations of armed conflict.[68] An independent expert presented the view that it would indeed be desirable that the ICPPED should be applicable to times of war and peace. However, the ICPPED should not cover the situation of missing persons resulting from combat.[69] The next session again witnessed a discussion on the applicability of human rights law in wartime in relation to humanitarian law.[70] No clear consensus was reached on this issue. Instead, the discussion resulted in the drafting of Article 43 ICPPED, which states:

> This Convention is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the two Additional Protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.

Leaving the relationship between human rights law and humanitarian law to one side, it is clear that States Parties should refrain from committing enforced disappearance in any circumstances. Importantly, as the definition of enforced disappearance shows, States Parties should not only refrain from committing enforced disappearance, but they should also not support, consent or acquiesce to enforced disappearance.[71] Equally, the drafters did not elaborate on the meaning of these different forms of the involvement of the state.

2.4.2 Room for the interpretation and application of the right not to be subjected to enforced disappearance

One of the most essential interpretation conundrums with regard to the question of what States Parties are to refrain from doing is the meaning of 'persons or groups of

67 IOWG Report E/CN.4/2005/66, para. 26.
68 IOWG Report E/CN.4/2003/71, para. 22.
69 *Ibid.*, para. 31.
70 IOWG Report E/CN.4/2004/59, paras. 166 and 167.
71 See subsection 2.3.1.2 above.

persons acting with the authorization, support or acquiescence of the State'. Neither the text of the ICPPED nor the *travaux préparatoires* develop criteria on this matter.

2.5 Norms related to the prevention of enforced disappearance

The ICPPED contains a number of important articles related to the prevention of enforced disappearances. States Parties are to prevent this human rights violation by taking several institutional measures that safeguard against the commission of such a crime by their agents. Upon an examination of the text, these measures can be subdivided into three categories. Firstly, States Parties must criminalise enforced disappearance in their domestic law. It is debatable whether criminalisation is primarily a preventive measure because it is also relevant for instituting a criminal investigation and possible prosecution. Still, the present study explores this measure under the duty to prevent because criminalisation creates a legal norm that sends a strong message to state agents that they are to refrain from committing such a crime. Secondly, States Parties must have safeguards in place surrounding arrest and detention that prevent the possibility that persons arrested or detained are subjected to this crime. Thirdly, state agents must be properly trained with regard to enforced disappearance in order to be able to recognise and report an actual, possible or potential enforced disappearance. The subsequent subsections elaborate on the norms governing these three categories of prevention.

2.5.1 Criminalising enforced disappearance in domestic law

The ICPPED clearly obliges States Parties to criminalise enforced disappearance. Article 4 ICPPED stipulates that:

> Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

This article attends to one of the gaps identified by Nowak in the protection against enforced disappearances prior to the ICPPED.[72] Yet, this laconically formulated obligation leaves wide discretion to States Parties to define the crime of enforced disappearance. For instance, Article 4 ICPPED does not address the question whether the domestic law definition should entail the elements of the ICPPED definition of enforced disappearance. In addition, the drafters of the ICPPED were not all in agreement whether this crime must be codified as an autonomous offence.[73] As a consequence of the absence of such requirements in the ICPPED, delegates made

72 UN Report by Nowak (2002), para. 81.

73 *A contrario* see Article 5(1) of the 1998 Draft Convention (requiring the incorporation of an autonomous offence with a continuous nature).

several declarations at the end of the drafting process. The USA, for instance, declared that 'article 4 should not be read to require our various domestic legal systems to enact an autonomous offence of enforced disappearance, […]'.[74] Other states held similar positions, despite the chairman's view that such an interpretation was difficult to accept.[75] The Philippines also expressed the view that States Parties could criminalise the act of enforced disappearance in accordance with their national legislation. As such, they could also include non-state actors as possible perpetrators in their definitions.[76] Other delegations felt that *mens rea* was an essential ingredient of the crime of enforced disappearance.[77]

In contrast to this laconic wording, the grounds for liability for this crime are formulated in a precise manner. Article 6(1) ICPPED specifies who must be held responsible for the crime of enforced disappearance. According to Article 6(1)(a) ICPPED, not only any person who commits this crime must be held responsible, but also the one who 'orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance'. Furthermore, superiors must be held responsible, if they:

> (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
> (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
> (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

This article lays down the following three elements that must be fulfilled for the liability of superiors: (1) a certain degree of knowledge; (2) effective responsibility and control; and (3) a failure to take reasonable measures to prevent the crime or to submit the matter for investigation or prosecution. Literature suggests that there is ambiguity as to the relationship between these three elements.[78] However, these elements are listed in a cumulative fashion which is indicated by the term 'and'.[79] Article 6(1) ICPPED also specifies that for military commanders, or persons acting

74 UNHRCouncil, Note Verbale of the USA (2006), p. 4.
75 IOWG Report E/CN.4/2006/57, paras.100-103 (China and the Islamic Republic of Iran held similar positions, while Mexico explicitly opposed this interpretation).
76 UNGA, 'Third Committee Approves Draft Resolution Concerning Convention on Enforced Disappearances' (2006).
77 IOWG Report E/CN.4/2006/57, paras. 94 and 95.
78 Ott (2011), pp. 209-211.
79 *Cf.* Ott (2011) (noting that the *travaux préparatoires* are unequivocal in this regard, but seem to indicate that the intentions of the drafters was that the three elements are cumulative).

effectively as such, higher standards of responsibility apply as are in force under relevant international law. Additionally, Article 6(2) ICPPED stipulates that an order or instruction from any authority cannot be invoked as a justification for having committed the crime of enforced disappearance.

Hence, the grounds listed in Article 6 ICPPED not only cover the direct perpetrators, but also persons who are implicated in the crime at command levels or are complicit in the crime. This broad basis for liability appears to be important in enforced disappearance due to the various stages and several perpetrators that carry out an enforced disappearance. Furthermore, it is clear from Article 6 ICPPED that persons should be held liable for both acts and omissions.

2.5.2 Detention: communication, information and supervision

The drafters of the ICPPED paid thorough attention to the prevention of enforced disappearance in terms of communication, information and supervision when a person is arrested or detained. This means that when the provisions governing a detention are observed, there is no question of enforced disappearance being at stake. Articles 17 to 22 ICPPED govern the issues of communication, information and supervision. These articles stipulate important safeguards but, at times, with limiting restrictions.

Article 17(1) ICPPED begins with a crucial and absolute point of departure:

> 1. No one shall be held in secret detention

This unambiguous prohibition of secret detention is a norm that, so far, no other binding human rights convention has explicitly established. The wording of this provision implicates that not only secret places of detention are prohibited but also the secret detention of persons in recognised detention centres.

Article 17(2) ICPPED further requires States Parties to include in their national legislation a number of safeguards with regard to the conditions for depriving persons of their liberty, the right of detained persons to communicate and the supervision of the deprivation of liberty.[80] As such, this provision applies to any

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80 Article 17(2) ICPPED reads:
'Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:
(a) Establish the conditions under which orders of deprivation of liberty may be given;
(b) Indicate those authorities authorized to order the deprivation of liberty;
(c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
(d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the

type of deprivation of liberty, whether criminal, preventive or administrative. The first three provisions pertain to the conditions in which deprivations of liberty are in conformity with the ICPPED. Article 17(2)(a) ICPPED requires a clear regime for the conditions under which a deprivation of liberty may be ordered. Subparagraph (b) requires the codification of those authorities that are authorised to order such deprivation. Subparagraph (c) obliges States Parties to establish that persons are only detained in officially recognised and supervised detention centres. Besides these conditions, subparagraph (d) governs the right of persons deprived of their liberty to communicate. Detained persons shall be authorised to communicate with and be visited by relatives, by counsel or by other persons of their choice. Such authorisation may only be subject to conditions established by law.[81] During the drafting process, the arguments in favour of restrictions on such authorisation were mainly based on the fact that some domestic systems allow the elapsing of a certain amount of time between the arrest and notification of the arrest, especially in serious criminal cases.[82] The Mexican delegation suggested that the restrictions imposed on this right should be subject to some limitation in time so as to limit the discretion of States Parties in this respect. Such a time limitation, however, was not inserted in the text of the ICPPED.[83] The last two subparagraphs of Article 17(2) pertain to the supervision of the deprivation of liberty. Subparagraph (e) requires that competent and legally authorised authorities and institutions have access to places of detention. If necessary, such access may be subject to prior authorisation from a judicial authority. As further discussed in relation to the duty to investigate,[84] according to Article 12(3)(b) ICPPED, the judicial authority must decide promptly on the matter. Subparagraph (f) of Article 17 ICPPED lays down the right to take proceedings before a court in order to challenge the lawfulness of the deprivation of liberty. This right is afforded to the person deprived of liberty or, in the case of a suspected enforced disappearance,

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conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;

(e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;

(f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records.'

81 Similarly, foreigners shall be authorised to communicate with their consular authorities, in accordance with applicable international law.

82 IOWG Report E/CN.4/2003/71, para, 71.

83 IOWG Report E/CN.4/2006/57, para. 130.

84 See subsection 2.6.1 below.

to a person with a legitimate interest, such as a relative or legal counsel. The court must decide without delay on the lawfulness of the deprivation of liberty and order the person's release when this deprivation is deemed to be unlawful. Finally, Article 21 ICPPED obliges States Parties to take the necessary measures to ensure that the release of the person is verifiable and to assure the physical integrity of the person released.[85]

Article 17(3) deals with the information that should be included in the custody records of any place of detention. This paragraph requires the compilation and maintenance of up-to-date custody records. The minimum information that these custody records must contain is:

- the identity and health of the person deprived of his or her liberty;
- the date, time and place where the person was deprived of his or her liberty;
- the identity of the authority that deprived the person of his or her liberty and of the authority that gave the order for this deprivation; the grounds for the deprivation of liberty;
- the authority responsible for supervising the deprivation of liberty;
- the place of detention and the date and time of admission to the place of detention;
- the authority responsible for the place of detention; and
- the date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

Also, in the event of death during detention, the custody records must include the circumstances and cause of death, as well as the destination of the remains. Article 17(3) ICPPED establishes that the custody records must be made 'promptly' available to 'any judicial or other competent authority or institution' that is 'authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party'. The access by such authorities is unrestricted.

Judicial or other competent authorities are not the only ones that must be able to have access to information concerning persons deprived of their liberty. Article 18(1) ICPPED requires States Parties to guarantee access to a similar list of information to 'any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel'. This list mirrors the list in Article 17(3) ICPPED, with the exception of information with regard to the authorities that deprived the person of his or her liberty and those who are responsible for the place of detention. Moreover, the grounds for the deprivation of liberty are

85 This article mirrors Article 11 DPPED.

not listed in this article as information that should be made accessible. Article 20(1) allows for restrictions on access to information for this category of persons.

The drafters of the ICPPED debated with vigour and at length about the question whether the right to information as laid down in Article 18(1) ICPPED should be restricted.[86] The main argument in favour of restricted access was that providing information could run counter to the privacy of the detained person or to the progress of criminal investigations. In addition, arguments in favour were that the law provided for possibilities that the place of detention might not be revealed on grounds such as witness protection.[87] Arguments against the possibility of restrictions included that it would run counter to the right to know the truth and that such restrictions would be inimical to the very purpose of the ICPPED.[88] The protracted discussion resulted in a somewhat complex and intricate formulation in Article 20 ICPPED.[89] Article 20(1) ICPPED establishes three cumulative conditions when restrictions to such access to information are lawful. Firstly, restrictions are only allowed when the person deprived of his or her liberty is under the protection of the law and when the detention is subject to judicial control. The condition that the person must be 'under the protection of the law' was inserted in the last session.[90] Secondly, the right to information can only be restricted in exceptional circumstances, where it is strictly necessary and where provided for by law. Lastly, restrictions are only allowed when the transmission of the information would adversely affect the privacy or safety of the person, the criminal investigation or 'any other equivalent reasons'. Such reasons must be in accordance with the national law and in conformity with applicable international law, as well as with the objectives of the ICPPED. According to the drafters, 'in conformity with applicable international law' should be interpreted so as to embrace international human rights law and humanitarian law.[91] In particular, such restrictions cannot amount to conduct as defined in Article 2 ICPPED, *i.e.* an enforced disappearance. Nor can it lead to a violation of Article 17(1) ICPPED, which prohibits secret detention. Hence, while allowing for restrictions, Article 20(1)

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86 IOWG Report E/CN.4/2006/57, para. 23. See alsoScovazzi & Citroni (2007), pp. 335 and 338.

87 *Ibid.*, para. 17.

88 *Ibid.*, paras. 17 and 23.

89 Article 20(1) ICPPED reads:
'1. Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.'

90 IOWG Report E/CN.4/2006/57, para. 24.

91 *Ibid*., para. 25.

establishes strict limitations on restrictions to accessing information about the person deprived of his or her liberty. During the drafting process, a proposal was submitted that certain minimum information on, for instance, the fact that the person was being held in detention, the physical well-being of the person and the fate of that person could not be kept confidential. This proposal was not ultimately pursued.[92]

During the final session of the drafting process, many delegates made interpretative statements about Article 20 ICPPED. For instance, the Argentinian delegation stated that in no circumstances was it permissible 'to deny or conceal information on the fate of a person deprived of liberty, whether that person was alive or not, the person's state of physical and mental health or the location at which the person was held.'[93] Similarly, Italy made clear that it would have preferred to oblige States Parties to always grant the information listed in Article 18 ICPPED. In this respect, it reiterated that in light of the conditions set forth in Article 20 ICPPED, the restrictions could never facilitate any practice of enforced disappearance or secret detention.[94] The United Kingdom stated that 'Article 20 applied to all situations where a person was not "outside the law" but within the State's domestic legal rules governing deprivation of liberty or detention.'[95]

In implementing the norms related to the deprivation of liberty, the ICPPED obliges States Parties to include several measures in their legislation that control the compliance of state officials with these norms. Article 20(2) ICPPED contains the right to an effective judicial remedy to which recourse can be taken when the authorities deny the information listed in Article 18(1) ICPPED. This right to a remedy cannot be subject to any restrictions. Additionally, Article 22 ICPPED obliges States Parties to penalise any conduct that hinders the remedies of *habeas corpus* or of obtaining information about disappeared persons.[96] Also, the failure to

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92 IOWG Report E/CN.4/2005/66, para. 92.

93 IOWG Report E/CN.4/2006/57, para. 136.

94 *Ibid.*, annex II.

95 UNGA, 'Third Committee Approves Draft Resolution Concerning Convention on Enforced Disappearances' (2006), statement of the UK. See Scovazzi & Citroni (2007), p. 341 (According to the authors, this statement clearly shows the danger of regarding the fourth element as being a constituent element in the definition).

96 Article 22 ICPPED reads:
'Without prejudice to article 6, each State Party shall take the necessary measures to prevent and impose sanctions for the following conduct:
(a) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;
(b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate;
(c) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.'

keep accurate and up-to-date custody records and the refusal the provide information when such information should have been provided should also be punished.

At the same time, Article 18(2) ICPPED obliges States Parties to take appropriate measures, where necessary, to protect the persons mentioned in paragraph 1 (the persons to which the access applies) and other persons involved in the investigation. Such persons must be protected from 'any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty'.[97]

Having seen the norms on access to information about detained persons as a means to prevent enforced disappearance, the ICPPED also recognises that there is a potential *danger* in collecting and keeping personal information. As a last point, therefore, it is worth mentioning that Article 19 ICPPED lays down rules regarding the management of information that is obtained during the search for the disappeared person.[98] This article aims to protect the personal data of the disappeared person obtained in the course of a search from being used for purposes other than the search. The only exceptions to this norm are the use of such information in criminal proceedings relating to the crime of enforced disappearance and in the exercise of the right to obtain reparation. The wording of these two exceptions implies that the information cannot be used in possible proceedings against the disappeared person should these be instigated. Furthermore, this provision makes clear that the collection, processing, use and storage of personal data must comply with the human rights and freedoms of the person concerned.

2.5.3 Other measures not related to a specific case of deprivation of liberty

Another important aspect of prevention stipulated in the ICPPED is the training of state authorities or other persons involved in the custody or treatment of detainees. Although the delegation of Germany repeatedly stated its reservations with regard to detailed regulations on training,[99] others were of the view that this is an essential aspect of prevention. As a result, Article 23 ICPPED was included that obliges

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97 *Cf.* Article 12(1) and (3) ICPPED as discussed in subsection 2.6.1 below (stating the obligations to take adequate measures to protect persons involved in the investigation and to sanction and punish any behaviour by state authorities that hinders the investigation).

98 Article 19 ICPPED reads:
'1. Personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.
2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.'

99 IOWG Report E/CN.4/2006/57, para. 139.

States Parties in general terms to provide training to state authorities. The ICPPED mentions in Article 23 ICPPED that state authorities are 'law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty'. According to this article such training should include information about the ICPPED and should aim to:

(a) Prevent the involvement of such officials in enforced disappearances;
(b) Emphasize the importance of prevention and investigations in relation to enforced disappearances;
(c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.[100]

In addition to training, Article 23 ICPPED addresses an important aspect of the command structure of law enforcement institutions. Article 23(2) prohibits orders or instructions 'prescribing, authorizing or encouraging enforced disappearance'. The refusal to follow such an order or instruction must not be punishable. Paragraph 3 of Article 23 ICPPED requires States Parties to take the necessary measures to have procedures in place for state authorities to report any possible enforced disappearance or the planning of such crime. It points to superiors, and where necessary, appropriate authorities vested with powers of review or remedy as the bodies to which state authorities can report.

2.5.4 Room for the interpretation and application of the norms related to prevention

Having demonstrated in the preceding paragraphs that the ICPPED embodies a set number of norms related to prevention, one can also discern from these paragraphs a number of ambiguities in these norms. Firstly, the ICPPED obliges States Parties to criminalise enforced disappearance in domestic law. Yet, the laconic wording of Article 4 ICPPED leaves certain questions unanswered, such as must it be an autonomous offence and should the definition mirror the definition laid down in the ICPPED? The laconic formulation of this obligation leaves considerable room for interpretation to attune the protection to the experiences of victims.

Another important area in which the CED has ample room to interpret the ICPPED regards the various possible restrictions on communication, information and supervision when a person is detained. The ICPPED embodies a number of important norms surrounding the deprivation of liberty relating to the deprivation itself, to the release and supervision of detained persons and to the communication

100 Article 23(1) ICPPED.

with and information about those persons. Notwithstanding their importance, these norms lead to a degree of ambiguity with respect to, at least, six aspects. Firstly, Pollard accurately notes that the ICPPED does not clarify the relationship between the absolute prohibition on secret detention places and the permissible restrictions on information about detained persons.[101] In this regard, the term 'secret detention' needs further clarification, as well as the restrictions allowed on the disclosure of information about detainees. As Scovazzi and Citroni state:

> The crucial matter is to establish whether limitations to the right to obtain information on a person deprived of his liberty may be established and, in the case of an affirmative answer, under which conditions, towards whom and for how long.[102]

Such clarification is of particular importance because the denial of information marks the essence of an enforced disappearance. In this respect, there is no minimum information defined in the ICPPED that must always be available. With respect to the grounds for restrictions on accessing information on the person deprived of liberty, Scovazzi and Citroni note that the text of the ICPPED omits the term 'national security'. This omission is in their view a positive aspect because experiences of victims show that enforced disappearances have mostly been committed under the pretext of national security. At the same time, they observe that the reference to 'any other equivalent reasons' as the purpose of restricting information might imply too broad a scope within which national security could potentially fall. According to them, this reference is included due to a political compromise in the drafting process. They warn against the consequences of this compromise. Accordingly, the CED has to flesh out further the conditions under which such restrictions are in conformity with international law and the purpose of the ICPPED. Secondly, the ICPPED does not stipulate what the 'conditions under which orders of deprivation of liberty may be given' are (Article 17(2)(a)). For instance, commentators have expressed concern that there is no obligation to bring detainees before a judicial authority after having been arrested within a certain period of time (*i.e.* promptly).[103] In this respect, the consideration at the start of Article 17(2) ICPPED is important to recall as it stipulates that a deprivation must comply with other international obligations of States Parties in respect of the deprivation of liberty. Thirdly, the right of detained persons to

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101 M. Pollard, 'A lighter shade of Black? "Secret Detention" and the UN Disappearances Convention', in: G. Gilbert, F. Hampson & C. Sandoval, (eds.), *The Delivery of Human Rights. Essays in Honour of Professor Sir Nigel Rodley* (Abingdon: Routledge 2010) pp. 137-156, at pp. 151-155.

102 Scovazzi & Citroni (2007), pp. 229-330.

103 E. Prokosch, 'La convention et la prévention des disparitions forcées', in: E. Decaux & O. De Frouville, (eds.), *La Convention pour la protection de toutes les personnes contre les disparitions forcées* (Brussels: Bruylant 2009) pp. 111-115, at p. 114 (the author compares the ICPPED with Article 10(1) DPPED, which provides for such an obligation).

communicate with the outside world may be subject to conditions established by law, without setting clear limits to these conditions. That is one of the reasons why Nowak proposed an absolute prohibition of any form of *incommunicado* detention in his report.[104] Fourthly, the time frame within which judges have to decide on the access to places of detention is 'promptly' and in *habeas corpus* proceedings 'without delay'. However, no further indications are given as to the length of these time limits. Fifthly, cases have shown that a miscommunication between state agents from two different jurisdictions has enabled the commission of enforced disappearance. The ICPPED neither obliges States Parties to centralise their custody records[105] nor obliges them to designate a central authority responsible for the accuracy and integrity of custody records.[106] Lastly, the ICPPED stipulates that relatives, or other persons concerned, must be protected from any ill-treatment, intimidation or sanction. The measures that must be taken in this regard, or the criteria that they must abide by, are subject to further interpretation.

Finally, the provision on the training of officials is very general. It specifies neither the frequency nor the content of the training, other than that it must include the ICPPED. In this respect, one can imagine that a one-hour training session once a year would not make a great difference in the behaviour of state agents. In addition, the ICPPED obliges States Parties to put in place a reporting procedure when a state official believes that the crime of enforced disappearance has been committed or is being planned. However, it does not attach any safeguards to the body that considers such reports.

2.6 The duty to instigate investigations into alleged crimes of enforced disappearance

Apart from the obligations related to the prevention of enforced disappearance found in the ICPPED, the ICPPED requires a prompt, impartial and thorough investigation once a possible enforced disappearance has come to their attention.

2.6.1 Requirements for a thorough and impartial investigation

Article 12 ICPPED specifies the obligations that are applicable to situations where a person complains to the state authorities about a suspected enforced disappearance.[107]

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104 UN Report by Nowak (2002), para. 83.

105 *Cf.* UN Report by Nowak (2002), para. 83 (advocating an obligation to centralise the registers of all places of detention).

106 The 1998 Draft Convention entailed an innovative paragraph on the obligation to make a person responsible for the integrity and accuracy of the custody records. However, this norm was not followed up in the drafting process of the ICPPED.

107 IOWG Report E/CN.4/2004/59 (this article is largely based on Articles 12 and 13 CAT).

According to Article 12(1) ICPPED, any person has the right to report the facts of an alleged enforced disappearance to the competent authorities. The term 'any person' means that this right is not only attributed to persons who have some connection to the disappeared person.[108] Upon receiving a complaint, the State Party is obliged to examine the allegation 'promptly' and 'impartially'.[109] Subsequently, where necessary, the State Party must launch a thorough and impartial investigation without delay. At the same time, the State Party must also take the appropriate steps to protect persons who are involved in the investigation. Such persons include the complainant, the lawyers, the witnesses and the relatives of the disappeared person. Article 12(2) ICPPED establishes an *ex officio* obligation to initiate an investigation when there are reasonable grounds to believe that a person has disappeared, irrespective of any complaint to this end.[110]

Article 12(3) ICPPED addresses the investigation powers and resources that investigating authorities must have at their disposal in order to effectively carry out the investigation. Such tools include access to documentation and other relevant information concerning the disappearance. The access to documentation is not further restricted in the ICPPED.[111] Some delegates during the drafting process suggested including legitimate restrictions based on national security. However, no consensus was reached on such a restriction and, subsequently, it was omitted in the final text of the ICPPED.[112] In addition to information, investigating authorities must also have access to any location, if there are reasonable grounds to believe that the disappeared person is being held there. The access to possible places may be, where necessary, subject to prior authorisation by a judicial authority.[113] This authority must decide on the matter promptly. In comparison, prior authorisation was not included in either the DPPED or the 1998 Draft Convention. On the contrary, these two instruments establish a range of unrestricted powers and resources for the investigating authorities. For instance, Article 13(2) DPPED includes as necessary powers the 'powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits'. Article 11 paragraphs 3 and 4 of the 1998 Draft Convention include similar and, in some respects, even more elaborate

108 As a consequence, this right is not linked to the notion of victim as defined in Article 24 ICPPED (see subsection 2.3.4 above).

109 *Cf.* Article 11(1) 1998 Draft Convention (This article uses the term 'immediately' instead of 'promptly'. The latter seems to imply a less urgent standard).

110 IOWG Report E/CN.4/2004/59, para. 96 (The initial draft of the text used the wording 'substantial grounds', which was later changed in order to be in line with Article 12 CAT).

111 See also Article 17(3) as discussed in subsection 2.5.2 above.

112 IOWG Report E/CN.4/2005/66, para. 63.

113 The possibility to require prior authorisation corresponds with Article 17(2)(e) ICPPED, see subsection 2.5.2 above.

powers.[114] Such unrestricted powers were also envisaged at the beginning of the drafting process.[115] However, proposals by various delegations shaped the wording of the more moderate final text.

The last limb of Article 12 ICPPED lays down the obligation to take the necessary measures to prevent and sanction behaviour that hinders the investigation. This provision thereby aims to guarantee that persons allegedly involved in the crime of enforced disappearance are not in a position to influence the process of the investigation. Examples of conduct that is to be sanctioned are 'pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.' The 1998 Draft Convention includes an additional safeguard in this respect; it requires that suspects under investigation be suspended from any official duties during the investigation.[116] However, the proposal to include such disciplinary sanctions was not followed up in the drafting process.

Finally, it is relevant to note here that Article 24(6) ICPPED clarifies that the obligation to investigate is a continuous obligation until the fate of the disappeared person has been clarified. The rationale for placing this continuous nature within this article related to the rights of victims instead of framing it within Article 12 ICPPED is unclear.[117] In this respect, Article 24(3) stipulates that the state authorities have to take 'all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.' As such, this obligation pertains to both the situation where the person is still alive and the case where the person has died. Noteworthy is that the codification of an obligation to

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114 Article 11(3) and (4) of the 1998 Draft Convention state:
(3) Each State Party shall ensure that the competent authority has the necessary powers and resources to conduct the investigation, including powers to compel attendance of the alleged perpetrators or other participants in the offence of forced disappearance or other acts referred to in article 2 of this Convention, and of witnesses, and the production of relevant evidence. Each State shall allow immediate and direct access to all documents requested by the competent authority, without exception.
(4) Each State Party shall ensure that the competent authority has access, without delay or prior notice, to any place, including those classified as being places of national security or of restricted access, where it is suspected that a victim of forced disappearance may be held.

115 UNComHR, 'Working paper of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance' (4-8 October 2004) UN Doc. E/CN.4/WG.22/WP.2 (hereinafter: 'IOWG Working paper E/CN.4/WG.22/WP.2') (After the second session, this working paper included neither restrictions on on-site visits nor restrictions on access to information).

116 Article 11(8) of the 1998 Draft Convention reads: 'The alleged perpetrators of and other participants in the offence of forced disappearance or other acts referred to in article 2 of this Convention shall be suspended from any official duties during the investigation.'

117 The 1998 Draft Convention included this continuous nature of the obligation to investigate in Article 11 related to obligations pertaining to the investigation.

locate, respect and return the remains of the disappeared person is unprecedented in international human rights law.

2.6.2 Room for the interpretation and application of the norms related to investigating the crime of enforced disappearance

An important starting point for the duty to investigate is laid down in Article 12 ICPPED. Given the importance of Article 12 ICPPED, it is pertinent that the CED applies this article strictly. In particular, this article leaves room to interpret the meaning of terminology such as a 'prompt' examination of the complaint and the launching 'without delay' of a 'thorough' investigation with all the 'necessary powers and resources'. Interpreting these terms also means examining the scope of the obligation to provide access to information and to places of detention, which overlap with the norms related to the duty to prevent (see subsection 2.5.2 above). In addition, the exact consequences of the continuous nature of the obligation to investigate must be determined. Apart from these ambiguities in relation to the investigation itself, the ICPPED does not stipulate the way in which behaviour that hinders the investigation must be prevented and punished.

2.7 Norms related to the prosecution of the alleged perpetrators of the crime of enforced disappearance

Having seen that Article 12 ICPPED obliges States Parties to investigate complaints of enforced disappearance, it must be noted that the purpose of this investigation is not further specified. Article 24 ICPPED clarifies that the investigation must have the purpose of establishing the whereabouts or fate of the disappeared person. In addition to this purpose, the ICPPED devotes several articles to the obligation to conduct investigations with the aim of prosecuting and punishing the perpetrators. Subsection 2.5.1 above discussed the obligation to create the crime of enforced disappearance in domestic law under Article 4 ICPPED. This subsection sets out the norms related to establishing jurisdiction over this crime, to prosecuting or extraditing the alleged perpetrators and to applying the statute of limitations to this crime. Finally, this subsection explains the absence of a provision on amnesty laws in the ICPPED.

2.7.1 Establishing jurisdiction over the crime of enforced disappearance

The ICPPED requires States Parties to adopt a broad basis for exercising jurisdiction over the crime of enforced disappearance. As seen in subsection 2.5.1 above, States Parties must criminalise enforced disappearance. According to Article 9(1) ICPPED, States Parties are to establish jurisdiction in the following instances: when such a crime is committed within their territory (territorial principle); when the perpetrator

is one of their nationals (nationality principle); or, when they consider it appropriate, in cases where the victims are nationals of their own jurisdiction (passive personality principle). While the first two are compulsory, exercising jurisdiction based on the last principle is left to the discretion of States Parties. Furthermore, States Parties must establish jurisdiction over this crime whenever the perpetrator is found within their jurisdiction (the universality principle) in accordance with Article 9(2) ICPPED. This last requirement is coupled with the notion of *aut dedere aut judicare* (either extradite or try). States Parties have to take measures to establish their competence to try unless they extradite the person to another country or surrender him or her to a competent international tribunal. This form of jurisdiction is referred to as quasi-universal jurisdiction because it is not the most pure form of universal jurisdiction.[118] The broad legal basis provided for by the four principles envisaged in the ICPPED is without prejudice to any other form of criminal jurisdiction exercised according to national law. Thereby, the ICPPED permits an even broader basis for establishing jurisdiction.

2.7.2 The duty to either extradite or prosecute

In accordance with Article 9 ICPPED, Article 10 ICPPED obliges States Parties to take into custody the alleged offender of the crime of enforced disappearance found in its territory, when the situation so warrants. Subsequently, the State Party that has taken a person into custody is immediately to commence a preliminary investigation with the purpose of establishing the facts. In addition, the State Party must notify its measures to the state that may be interested in extradition. At the same time, the State Party must guarantee that such detention does not result in an unlawful situation. The guarantees listed in Article 10 ICPPED include holding the person for no longer than is necessary to ensure the person's presence at criminal, surrender or extradition proceedings. Also, if the detained person is a non-national he or she must be able to communicate with a representative of the state of which he or she is a national.

Accordingly, Article 11 ICPPED specifies the obligations of the State Party to extradite, surrender or submit the case to its competent authorities for the purpose of prosecution when the alleged offender is in its custody. Paragraph 1 states that:

> The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its

118 IOWG Report E/CN.4/2004/59, para. 82. The most pure form of universal jurisdiction is understood to be when states exercise jurisdiction over crimes that are committed anywhere in the world, without any link to the state concerned and without the requirement that the perpetrator is found in the jurisdiction of the state. See also A. Cassese*, International Law*, 2nd edn. (Oxford: Oxford University Press 2005), p. 338.

> international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

Paragraph 2 of Article 11 ICPPED emphasises that the crime of enforced disappearance shall be considered in the same way as 'any ordinary offence of a serious nature under the law of that State Party'. Article 11(2) ICPPED also specifically addresses adjudication on the basis of the universality principle. This paragraph establishes that standards of evidence in such cases shall 'in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1'. Neither the ICPPED nor the *travaux préparatoires* shed light on what these standards of evidence are.

Article 11(3) ICPPED stipulates the fair trial guarantees; everyone accused of the crime of enforced disappearance shall be treated fairly at all stages of the proceedings. This means that he or she has the right to be tried by a 'competent, independent and impartial court or tribunal established by law'. In comparison, Article 14 DPPED makes explicit that accused persons are to be brought before competent *non-military* authorities. Also, the 1998 Draft Convention reiterates that military courts are not the appropriate jurisdictions to try alleged perpetrators of the crime of enforced disappearance.[119] The exclusion of military tribunals was deleted from earlier drafts of the ICPPED.[120] Other standards stipulated in these instruments are not included in the ICPPED either. For instance, it is noteworthy that the 1998 Draft Convention included a provision granting broad legal standing in the judicial process to persons or organisations with a legitimate interest therein.[121] Also, Article 10(6) of the 1998 Draft Convention obliged states to make the findings of the criminal investigation available upon the request of all persons concerned and to communicate regular updates on the investigation to the relatives. These issues were not further pursued in the drafting of Article 11 ICPPED. The only reference to the right of victims to information about the investigation is made in Article 24 ICPPED, which obliges the state authorities to inform victims of the progress and outcomes of the investigation.

Article 13 ICPPED governs the rules on extradition. Article 13(1) ICPPED establishes that the crime of enforced disappearance shall not be regarded as a

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119 Article 10(1) of the 1998 Draft Convention reads:
'The alleged perpetrators of and other participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention shall be tried only in the courts of general jurisdiction of each State, to the exclusion of all courts of special jurisdiction, and particularly military courts.'
See also UN Report by Nowak (2002), para. 82.

120 See Scovazzi & Citroni (2007), p. 320; IOWG Report E/CN.4/2003/71, para. 47; IOWG Report E/CN.4/2004/59, paras. 91-93.

121 Article 10(4) of the 1998 Draft Convention reads:
'The States Parties guarantee a broad legal standing in the judicial process to any wronged party, or any person or national or international organization having a legitimate interest therein.'

political offence for the purposes of extradition. Therefore, a request for extradition on the grounds of this crime cannot be refused on grounds of a political offence alone. Furthermore, this crime must be included in all existing and future extradition treaties between States Parties, according to paragraphs 2 and 3 of Article 13 ICPPED. The ICPPED itself can also function as a basis for extradition between States Parties as laid down in Article 13(4) ICPPED. Paragraph 5 of the same article provides that, in any case, the crime of enforced disappearance shall be an extraditable offence. At the same time extradition may be subject to conditions in accordance with paragraph 6. In addition, Article 13(7) ICPPED provides for a number of reasons on the basis of which extradition may be denied. Complementing Article 13 ICPPED, Article 16 ICPPED stipulates the exception when extradition *must* be refused. This article prohibits extradition or surrender to a state when there are 'substantial reasons' to believe that the alleged perpetrators would be in danger of being subjected to enforced disappearance. Thereby, this article embeds the so-called *non-refoulement* principle. Article 16(2) specifies that all relevant considerations should be taken into account for the purpose of determining whether such danger exists. Relevant considerations include the existence in the state concerned of a 'consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.'[122] In situations where this danger exists, Article 11(1) ICPPED requires the State Party on whose territory the alleged perpetrator is present either to submit the case to its competent authorities or to surrender him or her to an international tribunal.

2.7.3 The compatibility of statutes of limitations with the ICPPED

After a vigorous debate during the drafting process, the final text of the ICPPED permits the application of statutes of limitations.[123] Article 8 ICPPED begins with a reference to Article 5 ICPPED indicating that when an enforced disappearance amounts to a crime against humanity statutes of limitations cannot apply, if that is provided for by international law.[124] The permissibility of statutes of limitations for cases of enforced disappearance that do not amount to a crime against humanity is subject to three conditions. Firstly, Article 8(1) ICPPED requires that the term of limitation '[i]s of long duration and is proportionate to the extreme seriousness of this offence'.

122 Scovazzi & Citroni (2007), p. 304 (The authors note that the broad scope of this article could also justify the denial of extradition when there is a pattern of serious human rights violations which differ from enforced disappearance).

123 *Cf.* UN Report by Nowak (2002), para. 82 (stating that statutes of limitations should not apply to the crime of enforced disappearance).

124 *Cf.* Article 16(2) of the 1998 Draft Convention (maintaining a distinction between the application of statutes of limitations to crimes against humanity and isolated cases of enforced disappearance) and Article17 DPPED (prohibiting the application of statutes of limitations to any crime of enforced disappearance).

Arguments were raised during the drafting process to make the limitation period as long as the longest period laid down in domestic law. This maximum length would avoid impunity.[125] Although most participants were in favour of such a maximum length during the 2003 session,[126] in later sessions more support was found for a proportionate length of time.[127] The second condition laid down in Article 8 ICPPED establishes that the term of limitation shall only commence 'from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature'. The continuous nature is closely linked to the answer to the question when in fact an enforced disappearance ends. Unlike the 1998 Draft Convention and the DPPED,[128] the ICPPED does not provide an answer to this question.[129] The third condition is found in Article 8(2) ICPPED. This condition requires the availability of effective remedies to the victims during the term of limitation. It must be noted that the meaning of the notion 'effective remedies' is not further clarified. The DPPED and the 1998 Draft Convention referred to remedies as provided for in Article 2 ICCPR. This reference was retained in an early proposal of the text of the ICPPED,[130] but was neither included in the subsequent working paper of the text[131] nor reported as being brought up in further discussions.

2.7.4 Amnesty laws: an unresolved issue

One of the most hotly debated issues during the drafting process in relation to the duty to prosecute appears to be the compatibility of amnesties with the ICPPED. The outcome of the negotiations is the absence of a provision addressing this specific

125 *Cf.* Article16 of the 1998 Draft Convention (requiring the limitation period to be as long as the longest period under criminal law).

126 IOWG Report E/CN.4/2003/71, para. 45.

127 IOWG Report E/CN.4/2004/59, para. 64.

128 Article 5(1) of the Draft Convention of 1998 states [emphasis added by author]:
'The States Parties undertake to adopt the necessary legislative measures to define the forced disappearance of persons as an independent offence, as defined in article 1 of this Convention, and to define a crime against humanity, as defined in article 3 of this Convention, as separate offences, and to impose an appropriate punishment commensurate with their extreme gravity. The death penalty shall not be imposed in any circumstances. *This offence is continuous and permanent as long as the fate or whereabouts of the disappeared person have not been determined with certainty*.'
Article 16(2)Article 17 DPPED reads,
'Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.'

129 *Cf.* IOWG Report E/CN.4/2005/66, para. 47 (The chairperson proposed to include 'when the offence of enforced disappearance ceases in all its elements'. The phrase 'in all its elements' was not included in the working paper to the UNComHR), see IOWG Working paper E/CN.4/2005/WG.22/WP.1, Article 8).

130 IOWG Report E/CN.4/2004/59, para. 68.

131 IOWG Working paper E/CN.4/WG.22/WP.2, Article 5.

issue. This absence appears to be a result of the inability to reach consensus between the negotiating delegates. By comparison, Article 18 DPPED stipulates that amnesties should be declared inapplicable to the crime of enforced disappearance.[132] Paragraph 2 of this article furthermore purports that in the exercise of the right to grant a pardon, the extremely serious nature of enforced disappearances shall be taken into account. The 1998 Draft Convention also establishes that the alleged perpetrators or perpetrators shall not benefit from any amnesty measure or similar measure prior to their trial.[133] However, the discussion on amnesties during the drafting process of the ICPPED initially demonstrated a favourable standpoint for an explicit reference that amnesties are allowed under certain conditions. For instance, conditions proposed were: 'an inquiry leading to the establishment of the truth; adequate compensation for the victims; and penalties imposed on the perpetrators.'[134] Despite this general preference, delegates debated once again in the second session whether and how amnesties should be addressed. This session resulted in the deletion of the provision on amnesties in the working paper for the next session.[135] This deletion was accompanied by inserting a provision, proposed by the chairman, in the chapter relating to the victims. This proposed provision stated that: 'no measure may have the effect of preventing effective recourse to any remedy or the securing of reparation, or of interrupting the search for disappeared persons', and that 'the right to obtain accurate and full information on the fate of disappeared persons, in particular' must be 'guaranteed in all circumstances'.[136] However, these suggestions were not pursued in later sessions while the silence on amnesties remained.

2.7.5 Room for the interpretation and application of the norms related to prosecution

The previous subsections illustrated the most important norms related to prosecuting the perpetrators of the crime of enforced disappearance. The present study focuses

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132 See also UN Report by Nowak (2002), para. 82 (confirming the non-applicability of amnesty laws).

133 Article 17(1) of the 1998 Draft Convention reads:
'The perpetrators or suspected perpetrators of and other participants in the offence of forced disappearance or the acts referred to in article 2 of this Convention shall not benefit from any amnesty measure or similar measures prior to their trial and, where applicable, conviction that would have the effect of exempting them from any criminal action or penalty.'
Paragraph 2 of the same article reads:
'The extreme seriousness of the offence of forced disappearance shall be taken into account in the granting of pardon.'
This view was confirmed by Mr. Nowak in his report, see UN Report by Nowak (2002), para. 82.

134 IOWG Report E/CN.4/2003/71, para. 52.

135 IOWG Working paper E/CN.4/WG.22/WP.2, Article 7 on amnesties, pardons and other similar measures was deleted. See also IOWG Report E/CN.4/2004/59, paras. 73, 79 and 80.

136 IOWG Report E/CN.4/2004/59, para. 79.

on five interpretation conundrums that can be discerned from the examination in the preceding paragraphs. Firstly, the ICPPED requires an independent and impartial investigation as well as a trial of the perpetrators by an independent and impartial court. It is not clear, however, whether the use of military tribunals in enforced disappearance cases is permissible under the ICPPED. Secondly, the requirement of an investigation does not address the problem of when prosecutors refuse to instigate an investigation. Also, the ICPPED does not attend to the problems of relatives to whom the authorities refuse to provide information on the progress of the investigation. Thirdly, the ICPPED does not address how domestic courts should approach certain evidentiary issues in criminal trials. The ICPPED only requires that the rules on evidence in trials based on universal jurisdiction must not be different from the regular rules on evidence. Fourthly, the ICPPED leaves a number of questions unanswered as to the interpretation of the conditions required for the application of statutes of limitations, such as the criteria for what an effective remedy is and when such limitation periods may start to run and whether it is permissible to apply this legal impediment to civil proceedings, for instance, to obtain compensation.[137] Fifthly and finally, the ICPPED is silent on the compatibility of amnesty laws with the ICPPED.

2.8 Additional norms related to investigation and prosecution

Having discussed the norms related to investigation and to bringing the perpetrators to justice, the ICPPED contains additional norms that provide for a further elaboration of certain aspects of such obligations: international cooperation between States Parties; a right to know the truth; and the right to unite efforts in employing activities related to enforced disappearance.

2.8.1 Cooperation between States Parties

Articles 14 and 15 ICPPED lay down standards in respect to cooperation between States Parties both in bringing the perpetrators to justice and in establishing the whereabouts and fate of the disappeared person. Article 14 ICPPED stipulates mutual legal assistance in connection with criminal proceedings instituted in respect of crimes of enforced disappearance.[138] Article 15 ICPPED goes beyond legal assistance and specifies that States Parties shall afford the greatest possible 'assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying

137 IOWG Report E/CN.4/2004/59, para. 70. See also Ott (2011), p. 216

138 IOWG Report E/CN.4/2003/71, para. 64 (During the drafting process the concern was raised that this provision should also raise cooperation in civil matters, which would be important for disappeared children).

them and returning their remains.' During the drafting process, several delegations were of the opinion that the ICPPED could serve as a legal basis for such cooperation in the absence of any treaty on judicial cooperation. Therefore, it was suggested to include 'a list of minimum investigatory measures which a State party could request of another State party'.[139] However, a follow-up on this suggestion does not appear in the subsequent *travaux préparatoires*.

2.8.2 The right to know the truth

The ICPPED is the first binding human rights instrument that explicitly stipulates the right of victims of enforced disappearance to know the truth.[140] Neither the DPPED nor the 1998 Draft Convention makes a reference to a right to know the truth. Still, Nowak presented the absence of a clear conceptualisation of this right as a major failing in the protection against enforced disappearance.[141] Subsequently, this right played a pertinent role in the debates during the drafting process of the ICPPED.[142] The debate resulted in the inclusion of a preambular paragraph that states:

> *Affirming* the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end,[143]

Even more revolutionary is the inclusion of a separate operative provision on the right to know the truth. Article 24(2) ICPPED states:

> Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

The term 'each victim' implies a wide range of persons who fall within the ambit of this right, in particular in light of the broad definition of 'victim' laid down in Article 24(1) ICPPED. Furthermore, the right to know the truth covers the circumstances of the enforced disappearance and the fate of the disappeared person, as well as the progress and results of a pending investigation. Whether the term 'pending investigation' also refers to the criminal investigation is unclear. Accordingly, States Parties are to take

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139 *Ibid.*, para. 64.
140 *Cf.* Additional Protocol I to the Geneva Conventions, 1977, Articles 32-34 and Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, Article 26 (embedding the right to truth in humanitarian law).
141 UN Report by Nowak (2002), para. 80.
142 IOWG Report E/CN.4/2005/66, para. 104; IOWG Report E/CN.4/2006/57, paras. 140-144.
143 ICPPED, preamble, recital 8.

appropriate measures in this regard. During the drafting process, the obligation was first worded in terms of 'necessary measures'. Some delegations, however, felt that a formulation in terms of 'appropriate measures' would accord greater latitude to States Parties in view of the possibilities to conduct such an investigation.[144] It must be noted that the right to know the truth was included with strong reservations. For instance, the USA opposed the inclusion of a new international right and made clear that its interpretation of this right boils down to the existing freedom to seek, receive and impart information, as enshrined in the ICCPR.[145]

2.8.3 The right to unite efforts in the search for disappeared persons and in assisting victims

The ICPPED establishes the right to form and participate in organisations devoted to the issue of enforced disappearance. Article 24(7) ICPPED states:

> Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

Concerns were raised during the drafting process about the appropriateness of this provision. The major concern was that the right to form and participate in organisations does not deal specifically with enforced disappearance. Nonetheless, most participants felt that the major role such associations played in combating the phenomenon of enforced disappearance justified the inclusion of this provision.[146] Moreover, the threats such organisations often received further warranted this right.

2.8.4 Room for the interpretation and application of the additional norms related to investigation and prosecution

For the purpose of the present study, two issues related to investigation and prosecution should be highlighted that leave room for interpretation. Firstly, the general formulation in Articles 14 and 15 ICPPED needs to be complemented by further specifications of the kind of measures States Parties must take in light of their obligation to cooperate in cases of enforced disappearance. Secondly, the right to know the truth raises three questions in particular. As Article 24(2) ICPPED does not

144 IOWG Working paper E/CN.4/2005/WG.22/WP.1, para. 44.
145 UNHRCouncil, Note Verbale of the USA (2006), p. 3; IOWG Report E/CN.4/2006/57, annex II, p. 48.
146 IOWG Report E/CN.4/2005/66, para. 114.

allow for restrictions, scholars have interpreted this right as being non-derogable.[147] However, it is not clear whether there are limits to the non-derogable nature of this article. Also, the use of 'appropriate measures' raises questions as to whether this is an absolute right and whether the corresponding obligation is only an obligation of means. In addition, the right to know the truth as laid down in Article 24(2) ICPPED includes information on the progress of the investigation, but does not specify whether this also includes a criminal investigation.[148] In this respect, it is the question whether this article must be seen in light of the obligations laid down in Article 24(3) ICPPED. The content of the right is as yet not entirely concretised, as can be inferred from the position of the USA. On the other hand, scholars have raised questions as to the conceptual difference between the right to know the truth and the freedom to receive, seek and impart information.[149] Lastly, an investigation must mostly lead to a conclusion as to whether or not an enforced disappearance is at stake. In this light, it is unclear at which stage of the investigation this right must be realised.

2.9 Norms related to the punishment of the perpetrators of the crime of enforced disappearance

The previous subsections demonstrated the content and nature of the obligation to conduct an investigation with the aim of identifying and prosecuting the perpetrators. When state agents are found guilty, the ICPPED furthermore obliges States Parties to impose appropriate sentences.

2.9.1 The duty to punish and possibilities for mitigating and aggravating circumstances

According to Article 7(1) ICPPED, a person who is found guilty of having been implicated in the commission of the crime of enforced disappearance shall be punished by 'appropriate penalties'.[150] Appropriate penalties are those that take the extremely serious nature of this crime into account. Paragraph 2(a) of Article 7 ICPPED allows for establishing mitigating circumstances. Mitigating circumstances are permissible when the convicted person has contributed effectively to (1) finding the person back alive, or (2) facilitating the clarification of the enforced disappearance or the identification of the perpetrators. Equally, paragraph 2(b) allows for aggravating circumstances. Such circumstances include *inter alia* the death of the disappeared

147 Scovazzi & Citroni (2007), p. 359.
148 In this respect, it is interesting to note that Article 10(6) of the 1998 Draft Convention is not mirrored in the ICPPED.
149 Scovazzi & Citroni (2007), p. 360.
150 It is interesting to note that in Article 2(1) of the 1998 Draft Convention an element of 'intention' was included in the punishment.

person and when the disappeared person belongs to a vulnerable group of persons such as pregnant women or minors. The text of this article formulates these possibilities in terms of 'may establish', leaving discretion to States Parties whether to use them or not.

2.9.2 Room for the interpretation and application of the norms related to punishment

An essential point of ambiguity with respect to punishment is that Article 7(1) ICPPED does not clarify what the appropriate punishment is. Also, no safeguards are included for ensuring that imposed mitigated sentences do not result in impairing bringing the perpetrators to justice. In this respect, Canada noted that this article could not be interpreted in such a way that mitigating circumstances effectively amount to an amnesty or granting impunity.[151] Hence, the limits to the implementation of mitigating circumstances need further elaboration. At the same time, there is no explicit prohibition of pardons included in the ICPPED.

2.10 Norms related to the compensation of victims of enforced disappearance

Besides the obligation to punish the perpetrators as described in the previous section, the ICPPED also obliges States Parties to take steps to provide the victims with reparation. The ICPPED codifies two novelties in this respect: an elaborate right to obtain reparation and the obligation to take steps with regard to the legal situation of the disappeared person.

2.10.1 The right to obtain reparation

One of the developments in recent doctrine and soft law within human rights law is a comprehensive right to obtain reparation. This right is clearly codified in the ICPPED. Article 24(4) ICPPED obliges States Parties to ensure that victims of enforced disappearance 'have the right to obtain reparation and prompt, fair and adequate compensation'. Thereby, the ICPPED expands on a similar right laid down in both the DPPED and the 1998 Draft Convention.[152] Paragraph 5 of Article 24 ICPPED further specifies the forms of reparation:

> The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:
> (a) Restitution;

151 See IOWG Report E/CN.4/2006/57, para. 112.
152 *Cf.* Article 19 DPPED and Article 24(2) of the 1998 Draft Convention.

(b) Rehabilitation;
(c) Satisfaction, including restoration of dignity and reputation;
(d) Guarantees of non-repetition.

Earlier working papers considered during the drafting process left the specific forms of reparation more optional.[153]

During the drafting process, one delegation raised the question at what stage States Parties must guarantee the right to reparation. An enforced disappearance, after all, may take a long time to resolve while continuously affecting the lives of the relatives. Accordingly, this delegation proposed that States Parties should provide some assistance to relatives who can be considered as victims for the duration of the disappearance.[154] In contrast, several delegations proposed a less far-reaching provision. They preferred to include only a very general provision on reparations and to leave discretion to States Parties to enforce this right in their national systems. The chairman responded to this proposal, stating that States Parties should not have too much leeway. A more detailed provision would 'establish a basic minimum, which could at the same time serve as a guide for national authorities.'[155] Other suggestions that were submitted during the discussion were *inter alia* including a distinction between criminal, civil and administrative reparations, formulating a 'right to seek' rather than a 'right to obtain', and the inclusion of the right to know the truth.[156] Furthermore, proposals were put forward to include a provision that statutes of limitations should not form an obstacle to the right to reparation.[157] These proposals were not incorporated in further working papers of the text of the ICPPED. Moreover, a proposal to include 'full reparation' instead of 'fair reparation' was rejected on the basis that full reparation could not actually be guaranteed (amongst other reasons).[158] Noteworthy is that the right to reparation as formulated in Article 24 ICPPED is not subject to national law. The statement made by India upon the adoption of the text of the ICPPED in the IOWG illustrates one of the difficulties with this right. India raised the point that common-law systems do not grant a right to a remedy, but that

153 IOWG Report E/CN.4/2005/66, paras. 103 and 113 (the suggested wording was that the right to obtain reparation included 'full compensation for material and psychological harm. It *may* also include other means of reparation such as: (a) restitution; (b) rehabilitation; (c) satisfaction, including restoration of honour and reputation; (d) a guarantee of non-recurrence.' [emphasis added by the author]).
154 IOWG Report E/CN.4/2003/71, para. 84.
155 IOWG Report E/CN.4/2004/59, para. 136.
156 *Ibid.*, paras. 137 and 138; IOWG Report E/CN.4/2005/66, para.109.
157 *Ibid.*, para.70; IOWG Report E/CN.4/2005/66, para. 46.
158 IOWG Report E/CN.4/2005/66, para. 112.

judiciary and national human rights systems grant compensation to victims of human rights violations.[159] This remained an unsolved issue.

Despite specifying the four types of possible reparation, the final text leaves discretion to States Parties to decide what the appropriate situations are in which such reparations are awarded. In addition, Article 24 ICPPED does not flesh out what the different forms of reparation exactly entail. In contrast, the 1998 Draft Convention, for instance, clarified that the rehabilitation of victims of enforced disappearance will be 'physical and psychological as well as professional and legal.'[160] Also, Nowak elaborated on the various forms of reparation in his report: examples of restitution should include releasing the disappeared person or returning his or her remains, whereas rehabilitation should include a proper burial and psychological and social support. Satisfaction should include apologies, thorough investigations, public commemorations, guarantees of non-repetition pertaining to ending the violation by clarifying the whereabouts or fate of the disappeared person, criminalising enforced disappearance, and other preventive measures.[161] In respect to the latter type of measures, Nowak suggested as one of the measures of prevention '[t]he liability of the perpetrators of enforced disappearance under civil law'.[162] Obviously, such details were not finally pursued.

2.10.2 Administrative measures regarding the legal status of victims

In addition to reparation when an enforced disappearance is committed, Article 24(6) ICPPED governs the legal situation of the disappeared person and his or her relatives when his or her fate has not been established. This article states:

> 6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

The ICPPED does not provide guidance on how these matters must be resolved. For instance, some countries have issued death certificates, which is a controversial matter because it presumes that the disappeared person is dead.

159 IOWG Report E/CN.4/2006/57, annex II.
160 Article 24(2) of the 1998 Draft Convention.
161 UN Report by Nowak (2002), paras. 86-90.
162 *Ibid*., para. 83.

2.10.3 Room for the interpretation and application of the norms related to reparation

The CED leaves considerable room for interpreting certain issues related to the duty to provide reparation. Importantly, the question arises whether there are any limitations on the discretion assigned to States Parties in determining 'where appropriate' and which considerations must be taken into account in this regard. Secondly, the formulation of the forms of reparation is not adapted to the specific features of enforced disappearance. Also, the way in which this right must be implemented is not entirely clear. Lastly and finally, Article 24(6) ICPPED gives examples in which fields appropriate measures should be taken with respect to the legal situation of the victims. Nonetheless, this article does not specify the way in which such matters should be resolved.

2.11 The duty to respond to crimes committed by non-state actors

2.11.1 The duty to investigate crimes and to bring the perpetrators to justice

The ICPPED addresses the duty to protect persons from being captured in secret by third parties. As discussed in subsection 2.3.1.2 above, the definition of enforced disappearance excludes crimes committed by non-state actors when the state is neither directly nor indirectly involved in the crime. Nevertheless, States Parties are to take 'appropriate measures' to investigate such acts and to bring the perpetrators to justice. During the fifth session, a proposal was put forward to oblige States Parties to take the 'necessary measures' to investigate and bring the perpetrators to justice. The proposed wording using 'necessary' was replaced by 'appropriate' because some delegations felt that the first terminology put an excessively heavy burden on States Parties.[163] The less stringent burden also becomes clear from the rejection of the suggestion made by the delegation of Mexico to include an obligation to take appropriate measures to ensure the protection of victims in such a context.[164]

2.11.2 Room for the interpretation and application of the norms related to protection from crimes by non-state actors

Article 3 ICPPED is formulated in a laconic manner. Crimes that fall within the scope of this article are excluded from the obligations laid down in the remaining articles of the ICPPED. As a result, the CED has an important task to clarify the scope and meaning of this article. There are several conundrums that need further interpretation. Firstly, the scope of 'appropriate measures' needs further elaboration. This could

163 See also IOWG Draft report E/CN.4/2005/WG.22/CRP.9/Rev.1, paras. 1-4.
164 IOWG Draft report E/CN.4/2005/WG.22/CRP.12/Rev.1, para. 11.

include the enactment of criminal law measures and the implementation of criminal investigative powers in relation to such acts but the exact scope remains ambiguous.[165] Moreover, it is unclear what requirements are attached to the investigation and bringing the perpetrators to justice. For instance, issues such as information on the results of the investigation and the participation of relatives therein are not addressed. Secondly, it is interesting to note that Article 3 ICPPED does not include a duty to take operational measures to prevent persons at risk from disappearing. As such, the CED most likely has to face situations where the state authorities have done nothing to prevent acts as defined in Article 3 ICPPED despite indications in this regard. The question is then what conduct raises issues of acquiescence in the crime which would amount to an enforced disappearance (Article 2 ICPPED)?

2.12 Concluding remarks: interpretation conundrums in the ICPPED that need further exploration

> The way towards the effective eradication of this scourge and the full implementation and respect of the right of every person not to be subject to enforced disappearance is still long. Many obstacles may arise. New setbacks may be envisaged.[166]

This chapter has addressed the norms laid down in the ICPPED. These norms are the basis for determining state responsibility under the ICPPED. Furthermore, this chapter has discerned a selected number of important issues in respect to which further interpretation by the CED is needed.

Firstly, the ICPPED defines certain significant notions related to enforced disappearance. Central to the ICPPED is the definition of this human rights violation itself. A key question is what information is meant by the 'concealment of the fate or whereabouts' of the disappeared person as embodied as one element in the definition. It is essential that the definition must be interpreted in such a way that is does not legitimise any form of this crime. In addition, the absence of the element of time in the definition warrants a closer examination of the distinction between unacknowledged detention and enforced disappearance. Besides the elements in the definition of enforced disappearance, the continuous nature of this crime raises questions such as at what moment does this crime end. Finally, the notions of 'systematic practice of enforced disappearances' and 'victims' of enforced disappearance need further elaboration.

Secondly, the ICPPED clearly prohibits the commission of enforced disappearance. In other words, States Parties are to respect the right not to be subjected to enforced disappearance. Determining responsibility for a violation of this

165 McCrory (2007), p. 551.
166 Citroni (2009), p. 93.

right warrants a closer examination of the conduct that falls within the definition of enforced disappearance. Besides defining the exact scope of the 'state' requirement, it must be noted here that an essential issue in determining state responsibility on the basis of the duty to respect is the approach to evidence. The ICPPED is silent on the evidentiary rules that the CED will have to abide by in its consideration of enforced disappearance cases, leaving discretion to the CED to attune its approach to the particularities of enforced disappearance.

Thirdly, the ICPPED includes several articles on the prevention of enforced disappearance. The issues that warrant further elaboration pertain to the domestic definition of the crime of enforced disappearance and to restrictions on communication, supervision and information when a person is detained. In addition, the duty to provide training to state officials needs further elaboration as to its implementation. Also, the obligation to establish procedures for state officials to report the crime of enforced disappearance leaves gaps for further interpretation. As a last element of prevention, the rigour with which persons, who are involved in the search for the disappeared person, must be protected when they are threatened warrants more attention.

Fourthly, it is clear from the content of the ICPPED that States Parties need to respond once an enforced disappearance has been committed or when an allegation to this end has been made. The ICPPED entails obligations with respect to the duty to investigate, the duty to prosecute, the duty to punish and the duty to provide reparation. With respect to the duty to investigate, questions arise such as what is a 'thorough' and impartial investigation. Is this an obligation of means or result? What are the implications of the fact that this obligation has a continuous nature? And in what way does behaviour by an individual state official who hinders the investigation need to be punished?

Once the alleged perpetrators are identified, States Parties are obliged to prosecute them. Several dilemmas arise with respect to this duty. It is unclear whether the use of military courts and amnesties are compatible with the ICPPED. In addition, a statute of limitations, as another impediment to prosecution, may be applied to this crime, but the conditions attached leave many questions open. Also, the ICPPED does not provide guidance as to the remedies when prosecutors fail to institute proceedings. Additionally, the silence in the ICPPED on how domestic courts should deal with evidence raises the question whether this issue lies outside the scrutiny of the CED. Lastly, the right to know the truth and the cooperation between states in bringing the perpetrators to justice and in clarifying the whereabouts or the fate of the disappeared person need further interpretation.

When the perpetrators are found guilty, the ICPPED requires States Parties to impose appropriate punishment. The interpretation conundrums in this regard pertain to the forms of punishment and to the safeguards for imposing mitigated sentences.

The ICPPED is also silent on possible disciplinary sanctions for the alleged or convicted perpetrators.

Apart from discovering the whereabouts or fate of the disappeared person and bringing the perpetrators to justice, the ICPPED imposes the duty on States Parties to award reparation to the victims. This duty leaves room for interpreting the scope and meaning of this obligation. Similarly, the obligation to determine the legal status of the disappeared person and his or her relatives leaves questions unanswered.

Finally, the ICPPED imposes duties upon States Parties to investigate and punish a disappearance when the perpetrators are non-state actors acting without any involvement of the state. The laconic formulation of this duty imposes an important task on the CED to clarify the scope and meaning of this obligation. Also, the relationship between these obligations and the definition of enforced disappearance need further clarification.

The conundrums signalled above will be further analysed in Part II of this study. Part II examines whether and to what extent the case law of the HRC, the European Court and the Inter-American Court provide guidance for their interpretation. Before going into the case law of these three supervisory bodies, Chapter 3 elaborates on the general types of state obligations as one of the pillars of the evaluative framework of this study. Thereafter, Chapter 4 addresses the second pillar of this framework. This chapter strives to identify the parameters on the basis of which the interpretation and application of the norms in the ICPPED are evaluated when taking into consideration the experiences of victims.

Chapter 3
Determining State Responsibility through the Examination of State Obligations

3.1 Introduction

The overall aim of the present study is to create a guiding framework for determining state responsibility for enforced disappearance under the ICPPED that is attuned to the experiences of victims. Determining state responsibility presupposes the involvement of the state in the crime for which it can be held responsible. The exploration of the phenomenon of enforced disappearances in Chapter 1 illustrated that states have been involved in different ways in enforced disappearance. Most obviously, there are instances where state agents themselves are the perpetrators of this crime. The police, security forces or the intelligence services arrest a person and hold him or her in secret prisons while categorically denying the act to the outside world. However, there are also instances when state involvement is less clear-cut. For instance, state authorities may support non-state actors such as paramilitaries in the commission of this crime. Moreover, although in many cases it is not clear who the direct perpetrators are, the state authorities may have failed to either take adequate measures to prevent the crime or to subsequently investigate it. Lastly, in some cases non-state actors, such as opposition group members, cause a person to disappear without any involvement by the state. When such situation does not reach a threshold that dictates state responsibility for the crime itself, the question remains whether and to what extent the state still incurs responsibility for not having reacted adequately to the crimes. These situations require a set of state obligations that together cover the full range of protection from enforced disappearance.

This chapter sets out the foundation for the evolution of state obligations in human rights law in general and explores the various types of duties. First, this chapter discusses the general theoretical discourse on typologies of state duties. Secondly, it outlines the most common typologies used by the HRC, the Inter-American Court and the European Court in their respective case law. The last and final section argues that a typology of seven duties is particularly apt for determining state responsibility for enforced disappearance and will be used in the further course of this study. These seven duties are: the duty to respect, the duty to prevent, the duty to investigate, the duty to prosecute, the duty to punish, the duty to compensate and the duty to protect.

3.2 The theory on typologies of state obligations

The realisation of a human right in practice requires certain conduct on the part of the state. Human rights law formulates such conduct in terms of state obligations. The interplay between rights and state obligations is, however, dynamic. As Steiner and Alston argue, attention to duties both clarifies the significance of the related rights and points to strategies of change.[1] Regarding the evolution of rights, they propose that:

> [o]ne way of understanding this evolution is to examine the duties related to that right, and to inquire whether and how they have expanded. The argument for a broader construction of a given right often amounts to the claim that further duties ought to be imposed on the state in order to satisfy the right.[2]

Thus, each right is accompanied by its own palette of corresponding state obligations. Several scholars have made attempts to categorise state obligations aiming to advance the conceptual clarification of human rights.[3] In particular, four typologies have influenced the evolution of the notion of state obligations.

The first typology emerged at the conception of the human rights discourse. This typology was based on the perceived dichotomy between negative and positive rights. These two categories of rights were associated with civil and political rights, on the one hand, and social, economic and cultural rights, on the other. Scholars developed this distinction in order to demonstrate the superiority of the former category over the latter.[4] The negative rights were perceived to require solely negative obligations, which require non-interference by the state. Due to this 'hands-off' character, civil and political rights were associated with no-cost obligations and were thereby perceived to apply to every state, independent of the available resources in that jurisdiction. In contrast, the positive rights – economic, social and cultural rights – were mentioned in one and the same breath as positive duties. Such positive duties were viewed as requiring states to take proactive action aimed at realising the enjoyment of these rights by individuals. That being the case, these duties were believed to have implications for resource allocation and, thus, to depend on available resources. Hence, it was argued that civil and political rights had to be realised immediately (obligation of result), while the implementation of economic, social and cultural rights had a more progressive nature (obligation of means).

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1 H.J. Steiner & P. Alston, *International human rights in context: law, politics, morals*, 2nd edn. (New York: Oxford University Press 2000), p. 180.
2 Steiner & Alston (2000), p. 181.
3 I.E. Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 *Hum Rts L Rev* 1 pp. 81-103, at p. 81.
4 Steiner & Alston (2000), p. 184.

In 1980, Shue introduced a second typology that equally applied to negative and positive rights. His typology of state obligations reflected the desire to overcome the dichotomy between the positive versus negative rights. He asserted that:

> …[T]here are distinctions, but they are not distinctions between rights. The useful distinctions are among duties, and there are no one-to-one pairings between kinds of duties and kinds of rights.[5]

Shue continued by suggesting that three types of duties correlate with every basic right, namely duties to avoid depriving, duties to protect from deprivation and duties to aid the deprived.[6] Later, he replaced the wording 'to avoid' with 'to respect' and was content with the trio of 'respect', 'protect' and 'aid'.[7] Even though no consensus exists on the precise content and scope of these three levels, the latter two seem to affect state expenditure, because they require the state to take action. One of the limitations of Shue's typology with respect to negative rights is that the 'duty to aid' focuses solely on assisting victims in their recovery from past violations. Thereby, it focuses on the remedy of failures to respect and protect rather than going beyond these duties in the sense of creating conditions that safeguard against violations.[8]

Recognising this gap in Shue's typology, the third important impetus in the discussion on state obligations came in 1983. Building on the report 'The Right to Adequate Food as a Human Right' drafted by Eide,[9] Van Hoof enunciated this impetus by referring to four 'layers' of state obligations within the realm of human rights: an obligation to respect, an obligation to protect, an obligation to ensure and an obligation to promote.[10] The first two obligations of 'respect' and 'protect' mirror Shue's duties to respect and protect. The former is a hands-off obligation while the latter requires states to take measures, by means of legislation or otherwise, 'which prevent or prohibit others (third parties) from violating recognized rights or freedoms'.[11] The last two proposed layers are more elaborate than Shue's 'duty to aid'. The 'obligation to ensure' requires states to proactively engage in creating conditions aimed at the achievement of a certain result. This result must correspond with a (more) effective

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5 H. Shue, *Basic Rights: Substance, Affluence and U.S. Foreign Policy* (Princeton: Princeton University Press 1980), p. 52.

6 *Ibid.*, pp. 52 and 53.

7 H. Shue, 'The Interdependence of Duties', in: P. Alston & K. Tomasevski, (eds.), *The right to food* (Dordrecht: Martinus Nijhoff 1984) pp. 83-95, at pp. 84 and 85.

8 *Ibid.*, p. 86.

9 UN Sub-Commission, 'The Right to Adequate Food as a Human Right, report by Eide' (1983) UN Doc. E/CN.4/Sub.2/1983/25 (hereinafter: 'UN Report by Eide (1983)').

10 G.J.H. Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views', in: P. Alston & K. Tomasevski, (eds.), *The right to food* (Dordrecht: Martinus Nijhoff Publishers 1984), p. 106.

11 *Ibid.*

realisation of recognised human rights and freedoms. The right to a fair trial provides a clear example in this regard. For a fair trial to be a reality, independent and impartial court systems, laws and other means must be in place to ensure that the rights of an accused are observed during the trial. According to Van Hoof, the fourth category of obligations – the duty to promote – also reflects the achievement of a certain result. However, this duty refers to goals that are to be achieved in the long term. In this sense, the duty to promote represents more general aspirations for the future.

The fourth, and last, typology that has contributed to the understanding of the notion of state obligations is the categorisation proposed by Steiner and Alston. They suggest a scheme of five types of duties, which further develops the earlier typologies of Shue, Eide and Van Hoof. These five obligations are to:

i. Respect the rights of others
ii. Create institutional machinery essential to the realisation of rights
iii. Protect rights/prevent violations
iv. Provide goods and services to satisfy rights
v. Promote rights

This model distinguishes itself from the others by explicitly emphasising the institutional organisation of the state. In this regard, the second obligation relates to the fact that some rights may be impaired or effectively annulled in the absence of proper institutional machinery. It goes a step further than the first hands-off obligation; public funds must be used to create the infrastructure necessary for the practical realisation of these rights.[12] Whether this is a new layer of obligations is doubtful; Steiner and Alston rather seem to make explicit measures that fall within the scope of the 'duty to ensure' proposed by Eide and Van Hoof. The obligations to protect rights and prevent violations also imply an institutional machinery. For example, states must provide a police force to protect people against violations of their rights either by state or non-state actors. The authors stress that the notions of protection and prevention may take many different forms depending on the context.[13] The fourth and fifth categories are analogous to Eide's and Van Hoof's last two layers of obligations 'to ensure' and 'to promote'. In relation to the fifth category – 'the duty to promote' – Alston and Steiner once again refer to the creation of institutions, but instead focus on promoting the acceptance of human rights. This duty often involves, for instance, public education and raising public awareness.[14]

In sum, the theory on state obligations has evolved incrementally. Most importantly, the theory demonstrates a spectrum from non-interference by the state

12 Steiner & Alston (2000), p. 182.
13 *Ibid.*, p. 183.
14 *Ibid.*, p. 184.

to obligations to take proactive measures. The added value of Shue's typology is that it convincingly bridges the classical distinction between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. Moreover, the focus on remedies for past human rights violations is of value. The typology of Eide and Van Hoof amplifies Shue's typology by including both the creation of safeguards that constrain the likelihood of violations occurring and the promotion of human rights. The typology of Steiner and Alston appears to supplement that of Eide and Van Hoof by emphasising the importance of an adequate institutional apparatus. However, it is tenable that this layer elaborates the duty to ensure proposed by Eide and Van Hoof rather than adding a different layer of obligations.

3.3 Typologies of state obligations applied by treaty bodies

The theoretical spectrum from non-interference by the state to obligations to take proactive measures is reflected in the types of obligations that the HRC, the Inter-American Court and the European Court have developed. As the ICCPR, the ACHR and the ECHR lay down rights and freedoms rather than state obligations, the scope and content of such obligations is mainly developed through their respective case law.

3.3.1 The Human Rights Committee

The human rights discourse within the UN demonstrates an often-used tripartite typology of state obligations 'to respect, to protect and to fulfil'.[15] This tripartite typology is derived from general duties underlying the rights enshrined in the classical human rights treaties. In this respect, Article 2(1) ICCPR obliges states to *respect* and to *ensure* the rights laid down in the Covenant. The nature of these two duties is further explained in General Comment No. 31 [80].[16] Although not using the tripartite typology explicitly, the HRC clearly establishes these three layers of obligations. Firstly, the duty to respect means the duty to refrain from arbitrary interference with the enjoyment of rights by individuals or with the ability to satisfy those rights by their own efforts.[17] Secondly, the duty to ensure includes the duty to protect individuals from acts by non-state actors that infringe upon the enjoyment of their rights. In this respect, the HRC notes that the obligations emanating from

15 Sepúlveda, Van Banning, Gudmundsdóttir, Chamoun & Van Genugten (2004), p. 16; See *e.g.* CESCR, 'General Comment No. 15 The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)' (20 January 2003) UN Doc. E/C.12/2002/11.

16 HRC, 'General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (29 March 2004) UN Doc. CCPR/C/21/Rev.1/Add.13 (hereinafter: 'General Comment No. 31 [80]').

17 See also Sepúlveda, Van Banning, Gudmundsdóttir, Chamoun & Van Genugten (2004), p. 16.

Article 2 ICCPR are binding on states and, therefore, do not as such have horizontal effect. Nevertheless, the responsibility of the state may be engaged in the relationship between individuals when the state either permits such acts by non-state actors or fails to take appropriate measures to protect persons from acts by non-state actors. The state has to exercise due diligence in preventing, investigating, punishing or redressing the harm caused by such acts. Also, the HRC mentions the need to provide effective remedies when such violations have occurred.[18] Thirdly and finally, the duty to ensure includes the duty to fulfil all legal obligations by adopting legislative, judicial, administrative, educative and other appropriate measures. In this regard, the HRC attaches importance to raising levels of awareness about the ICCPR 'not only among public officials and State agents but also among the population at large'.[19] Hence, it is clear that Article 2(1) ICCPR is both negative and positive in nature.[20]

In addition to the obligations emanating from Article 2(1) ICCPR, Article 2(2) ICCPR couches the obligation to bring the state's domestic laws and practices into conformity with the Covenant with immediate effect.[21] Importantly, the HRC interprets this article as entailing the following obligation:

> where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.[22]

This obligation would appear to mean that dormant domestic law, which breaches the ICCPR, but is not applied in practice, should nonetheless be repealed.[23]

The third limb of Article 2 ICCPR entails a general obligation to ensure accessible and effective remedies to vindicate the rights laid down in the ICCPR. The HRC has interpreted this obligation as including conducting a prompt, thorough and effective investigation of alleged violations of rights by an impartial and independent body. The character of such a body, for instance criminal or administrative in nature, varies according to the right at stake. The HRC stresses the importance of this obligation in particular in respect of violations that are recognised as criminal according to domestic law or international law, including enforced disappearance. In respect of such violations, the perpetrators must be brought to justice,[24] which generally

18 HRC, General Comment No. 31 [80] (2004), para. 8.
19 *Ibid*., para. 7.
20 *Ibid.*, paras. 6 and 7.
21 *Ibid.*, paras. 13 and 14.
22 *Ibid.*, para. 13.
23 For a thorough analysis of the question whether the existence of legislation can be in breach of the ICCPR, see Boerefijn (2009).
24 HRC, General Comment No. 31 [80] (2004), paras. 15 and 18.

means prosecution and punishment.[25] Furthermore, the state is obliged to provide adequate reparation. Reparation generally includes a form of compensation. Where appropriate, it may involve 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations'.[26]

In relation to guarantees of non-repetition, the HRC is of the view that it may pronounce such measures that are not victim-specific but aim to prevent the reoccurrence of violations of the ICCPR. Such general measures aim to serve the overall purpose of the ICCPR.[27]

Hence, the obligations imposed upon states mirror the spectrum of obligations set out in the theory on state obligations. The obligations under the ICCPR include layers of duties to respect, to prevent, to protect, to create institutional machinery essential to the realisation of rights and to redress. The duty to promote is worded in terms of the obligation to create awareness and to take measures to prevent reoccurrence. Furthermore, the duties to investigate, punish and prosecute are explicitly developed as part of the duty to ensure.

3.3.2 The European Court of Human Rights

The ECHR aims at realising the assurance and collective enforcement of the embedded human rights and freedoms therein to all individuals under the jurisdiction of its member states.[28] Accordingly, under the heading 'Obligation to respect human rights', Article 1 ECHR obliges states to *secure* to everyone within their jurisdiction the rights and freedoms defined in the substantive section.[29] What does this obligation to secure mean? From the outset, the drafters of the ECHR intended this convention to protect civil and political rights, which resulted in the original thirteen rights contained in the ECHR. These were at the time almost exclusively associated with negative obligations.[30] Several exceptions to this hands-off character can be found in the text of the ECHR itself. These exceptions can be found *inter alia* in Article 5(2) ECHR (the obligation to inform the detainee of the reasons for arrest), 5(3) ECHR

25 *Mulezi v. Democratic Republic of the Congo* HRC 6 July 2004 (Comm. no. 962/2001), para. 7; *Grioua v. Algeria* HRC 10 July 2007 (Comm. no. 1327/2004), para. 9.
26 HRC, General Comment No. 31 [80] (2004), para. 16.
27 *Ibid.*, para. 17.
28 Preamble to the ECHR, recital 2.
29 Article 1 ECHR states, 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'
30 See P.H. Teitgen, 'Introduction to the European Convention on Human Rights', in: R.S.J. Macdonald, F. Matscher & H. Petzold, (eds.), *The European System for the Protection of Human Rights* (Dordrecht/Boston: Martinus Nijhoff Publishers 1993) pp. 3-14, at p. 11.

(right to be brought promptly before a judge and to a trial within a reasonable time or to release pending trial), 6(1) ECHR (right to a fair and public hearing) and 13 ECHR (right to an effective remedy).

In addition, the use of the term 'to secure' in Article 1 ECHR has proven to give substantive leeway for a broad interpretation of negatively formulated rights. The European Court has never defined the precise meaning and scope of the obligation 'to secure'. Despite this lack of definition, this article, in relation to the text of the substantive articles, has been interpreted as including both negative and positive obligations.[31] The impetus for this broad interpretation clearly appeared in the 1979 landmark case *Marckx v. Belgium*. This case introduced the doctrine of positive obligations in the case law of the European Court within the ambit of Article 8 ECHR (right to respect for family and private life).[32] The complaint in this case pertained to the Belgian Civil Code that at the time did not automatically establish maternal parentage between an unmarried mother and her 'illegitimate' child. The law required either a voluntary recognition or a court declaration as to maternity. In both cases, the child's rights remained more limited than those of a child born within wedlock. In its determination of the scope of Article 8 ECHR, the Court stated:

> As the Court stated in the "Belgian Linguistic" case, the object of the Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities (judgment of 23 July 1968, Series A no. 6, p. 33, para. 7). Nevertheless it does not merely compel the State to abstain from such interference: *in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life*.[33] (emphasis added by the author)

This consideration clearly rejects a traditional reading of Article 8 ECHR implying only a non-interference obligation. The European Court used the term 'positive obligations' to articulate those state duties that extend beyond the primary duty to refrain from unlawful interference. On the premise of ensuring 'effective' respect for family life, the European Court interposed a positive obligation that required the state to include legal safeguards in its domestic law that rendered the child's integration in his family possible from the moment of birth. These legal safeguards also had to apply to children born out of wedlock. Thus, the existence and application of discriminatory legislation resulted in a violation of Article 8 ECHR.

Another clarifying example of positive obligations under the ECHR arose a few months after the *Marckx Case*. In the case *Airey v. Ireland*, the European Court was

31 D.J. Harris, M. O'Boyle, E.P. Bates, C.M. Buckley & C. Warbrick*, Law of the European Convention on Human Rights*, 2nd edn. (New York: Oxford University Press 2009), p. 18.
32 *Marckx v. Belgium* ECtHR [GC] 13 June 1979 (Appl. no. 6833/74), para. 31.
33 *Ibid*., para. 31.

faced with the question of the right of access to court under Article 6(1) ECHR (right to a fair and public hearing). The European Court considered that:

> Furthermore, fulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and "there is... no room to distinguish between acts and omissions" […]. The obligation to secure an effective right of access to the courts falls into this category of duty.[34]

Moreover, in relation to the claim for free legal aid put forward by the applicant, the Court stated that:

> Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[35]

Hence, the Court concluded that the protection of civil and political rights may also have implications of a social or economic nature and may thereby affect public expenditure.[36] In this particular case the Court came to the conclusion that the state was not under a strict obligation to provide free legal aid for every dispute relating to a 'civil right'. Nevertheless, Article 6(1) ECHR may sometimes compel the state to provide for the assistance of a lawyer to persons who cannot afford legal representation themselves. According to the Court, the condition for such an obligation to arise is the indispensability of such assistance for an effective access to court.

The *Marckx* and *Airey* cases set the stage for the development of a solid doctrine of positive obligations. It must be noted that the Court has not gone so far as to define the exact meaning of the notion of positive obligations.[37] In fact, the European Court has stressed, especially in relation to Article 8 ECHR, that 'the boundaries between the State's positive and negative obligations under this provision do not lend themselves

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34 *Airey v. Ireland* ECtHR 9 October 1979 (Appl. no. 6289/73), para. 25.

35 *Ibid*., para. 26.

36 S. Borelli, 'Positive Obligations of States and the Protection of Human Rights' (2006) 15 *Interights Bulletin* 3 pp. 101-104, at p. 102 (arguing that the consequences for public expenditure result from changes required in the domestic law or policy).

37 A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing 2004), p. 2. See also Borelli (2006), p. 101 (arguing that various authorities and scholars have attributed different shades of meaning to the term positive obligations, depending on the context and the right at stake).

to precise definition.'[38] Nevertheless, as Judge Martens has succinctly defined, the distinction between positive and negative obligations is, generally speaking, that '[n]egative obligations require member States to refrain from action, positive obligations to take action.'[39]

The rationale behind the doctrine of positive obligations can be found in the objective to make the ECHR rights 'practical and effective'.[40] In addition, commentators have mentioned the dynamic interpretation of the ECHR by the Court in light of changing social and moral circumstances as the drive behind the implied positive obligations.[41] In this respect, the Court has called the ECHR a 'living instrument'.[42] Moreover, the underlying assumption that human rights can be best secured in the domestic systems has also generated certain additional positive obligations from Article 13 ECHR.[43]

As a result, the case law shows a spectrum of positive obligations pertaining to a wide range of ECHR rights and freedoms. While a complete overview of the positive obligations falls outside the scope of this study,[44] it is relevant to discern the *types* of obligations that fall within this doctrine. First of all, states must organise their state apparatus in such a manner that it safeguards against human rights violations. The organisation of the state apparatus requires that those laws that have been found to breach the ECHR be amended so as ensure compliance with the ECHR standards.[45] Apart from *Marckx v. Belgium*, the case *Campbell and Cosans v. United Kingdom* is exemplary in this regard. This case concerned the question whether domestic law allowing teachers in a school, within certain limitations, to use corporal punishment

38 See *e.g. Keegan v. Ireland* ECtHR 26 May 1994 (Appl. no. 16969/90), para. 49.

39 *Gül v. Switzerland* ECtHR 19 February 1996 (Appl. no. 23218/94), dissenting Opinion of Judge Martens, para. 7.

40 *Marckx v. Belgium* ECtHR [GC] (1979), para. 31; *Airey v. Ireland* ECtHR (1979), para. 24 (The Court stated that '[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'). This has been repeated in subsequent case law, see *e.g. Tahsin Acar v. Turkey* ECtHR [GC] (2004), para. 209; *Varnava a.o. v. Turkey* ECtHR [GC] (2009), para. 160. See also Mowbray (2004), p. 221.

41 D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edn. (Oxford: OUP 2002), p. 55.

42 See *e.g. Tyrer v. the United Kingdom* ECtHR (1978), para. 31 (the Court recalled under Article 3 ECHR that 'the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions.' This does not mean, however, that ECHR rights can be interpreted as protecting juridical goods that it was not intent to protect).

43 CoM, 'Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights' (27 September 2001) EG Court(2001)1, para. 44.

44 For a thorough overview of positive obligations, see generally Mowbray (2004), chapter 9; Harris, O'Boyle, Bates, Buckley & Warbrick (2009), pp. 18-21 and the chapters on the substantive articles; P. Van Dijk, F. Van Hoof, A. Van Rijn & L. Zwaak (eds.), *Theory and Practice of the European Convention on Human Rights*, 4th edn. (Antwerp/Oxford: Intersentia 2006).

45 Harris, O'Boyle, Bates, Buckley & Warbrick (2009), p. 31.

as a disciplinary measure is contrary to Article 3 ECHR. In answering this question, the Court observed that, 'provided it is sufficiently real and immediate, a mere threat of conduct [a system of corporal punishment] prohibited by Article 3 may itself be in conflict with that provision.'[46] In this case the European Court did not find a violation of Article 3 ECHR. Nevertheless, it recognised that a system that threatens the rights of individuals may in itself violate the ECHR. The obligation to organise the state apparatus as such also plays a prominent role in the case law related to Article 2 ECHR (the right to life). The European Court has derived a duty from this article 'to take appropriate steps to safeguard the lives of those within its jurisdiction.'[47] This obligation concerning safeguards applies to acts by state agents and by non-state actors[48] and applies 'in the context of any activity, whether public or private, in which the right to life may be at stake'.[49] The meaning of 'appropriate measures to safeguard' involves '[…] putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.'[50] The legal framework referred to in this consideration:

> […] requires the adoption of (usually criminal) laws prohibiting the taking of life, and calls for the regulation of the use of force by the police and other state agents and of dangerous and other activities that might involve a risk to life. The "law enforcement machinery" includes the police, the criminal prosecution services, and the courts.[51]

Hence, the obligation to have an appropriate legal and administrative framework in place is complemented by the obligation to have adequate machinery that enforces this framework.

The positive obligation to have a legal framework in place also extends to the relationship between individuals. Adequate domestic legal provisions should be in place to protect individuals from violations of their ECHR rights by other individuals.[52] A more onerous form of this positive obligation to protect is the

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46 *Campbell and Cosans v. the United Kingdom* ECtHR 25 February 1982 (Appl. nos. 7511/76 and 7743/76), para. 26.

47 *Osmanoğlu v. Turkey* ECtHR 24 January 2008 (Appl. no. 48804/99), para. 71. See also *L.C.B. v. the United Kingdom* ECtHR 9 June 1998 (Appl. no. 23413/94), para. 36.

48 *Osman v. the United Kingdom* ECtHR [GC] 28 October 1998 (Appl. no. 23452/94), para. 115.

49 *Öneryıldız v. Turkey* ECtHR [GC] (2004), para. 72.

50 *Makaratzis v. Greece* ECtHR [GC] 20 December 2004 (Appl. no. 50385/99), para. 57.

51 Harris, O'Boyle, Bates, Buckley & Warbrick (2009), p. 38.

52 See *e.g. A. v. the United Kingdom* ECtHR 23 September 1998 (Appl. no. 25599/94) (a case concerning the legal protection provided under English law to children to protect them from violence by their parents); *X and Y v. the Netherlands* ECtHR 26 March 1985 (Appl. no. 8978/80) (a case concerning a sexual assault against a mentally handicapped minor).

deployment of personnel to provide security for potential victims known to be facing immediate threats of violence.[53] It must be noted that such positive obligations affect the relationships of individuals without endowing them with so-called *Drittwirkung* (direct effect).[54] While the measures concern the relationship between individuals, the obligation still rests on the state.

Secondly, the case law of the European Court firmly establishes a procedural obligation to conduct an official and effective investigation into alleged breaches of the ECHR rights where there is an arguable claim that such a breach has occurred.[55] The European Court has derived this obligation from several ECHR provisions, mainly Articles 2, 3, 5 and 13 ECHR. The rationale behind the development of procedural obligations again primarily lies in securing the practical effectiveness of the ECHR rights.[56] The European Court addresses flaws in the investigation either under the substantive articles or under Article 13 ECHR.[57] It is not entirely clear from the case law why the choice falls for the one or the other.

A last application of the doctrine of positive obligations can be seen in cases concerning the treatment of persons in detention within the criminal justice system. For instance, these types of positive obligations require timely medical treatment

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53 See *e.g. Osman v. the United Kingdom* ECtHR [GC] (1998); *Özgür Gündem v. Turkey* ECtHR 16 March 2000 (Appl. no. 23144/93); *Bevacqua and S. v. Bulgaria* ECtHR 12 September 2008 (Appl. no. 71127/01), paras. 83 and 84; *Plattform 'Ärzte für das Leben' v. Austria* ECtHR 21 June 1988 (Appl. no. 10126/82), para. 34 (In this last case the Court established that although states have under Article 11 ECHR a 'duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they [states] cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used'. According to the Court states have an obligation 'as to measures to be taken and not as to results to be achieved'). *Ergi v. Turkey* ECtHR 28 July 1998 (Appl. no. 66/1997/850/1057), paras. 79 and 81 (In this case the Court stated that 'the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.').

54 Harris, O'Boyle, Bates, Buckley & Warbrick (2009), p. 20 (The concept of *Drittwirkung* developed in German literature implies that individuals can invoke rights against other individuals in court).

55 The European Court makes a distinction between procedural violations and substantive violations. When a state fails to comply with a procedural obligation, the Court finds a procedural violation and this Court finds a substantive violation when the right itself is violated.

56 *Ergi v. Turkey* ECtHR (1998), para. 79; *İlhan v. Turkey* ECtHR [GC] 27 June 2000 (Appl. no. 22277/93), para. 91 (The European Court stated that '[p]rocedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory but practical and effective.').

57 Van Dijk, Van Hoof, Van Rijn & Zwaak (2006), p. 411.

when necessary,[58] adequate and humane prison conditions,[59] or additional safeguards against arbitrary detention.[60]

In summary, the European Court interprets the duty to respect as entailing negative obligations, just as the HRC and the theory on state obligations. In addition, this Court has used positive obligations to indicate obligations that mirror the duties to protect and to ensure. These positive obligations cover having an adequate legal and administrative framework in place as well as practical conditions in detention centres. Also, several procedural obligations have been derived from the ECHR rights such as the duty to investigate. These duties apply not only to cases where state agents have allegedly violated certain ECHR rights, but also to cases where non-state actors are the alleged perpetrators. Upon a comparison with the theory on the typologies of state obligations, it must be noted that there is no clearly formulated duty to promote in the case law of the European Court.

3.3.3 The Inter-American Court of Human Rights

Similar to the formulation of Article 2(1) ICCPR, Article 1(1) ACHR imposes upon states a responsibility 'to respect' the rights and freedoms recognised in the ACHR and 'to ensure' the free and full exercise of these rights without discrimination.[61] On the basis of this article, the Inter-American Court made an important doctrinal contribution to the notion of state obligations in the first case before it. The *Velásquez-Rodríguez Case* pertained to the disappearance of Manfredo Velásquez-Rodríguez who was arbitrarily arrested and detained in Honduras in 1981. His detention took place in the context of a systematic practice of enforced disappearances, arbitrary killings and torture carried out by state authorities.[62] The Inter-American Court clarified that a violation of the rights recognised in Articles 3 to 25 ACHR automatically also breaches Article 1(1) ACHR.[63] The general duties laid down in Article 1(1) are

58 *E.g. Anguelova v. Bulgaria* ECtHR 13 June 2002 (Appl. no. 38361/97), paras. 125-131.

59 *Kalashnikov v. Russia* ECtHR 15 July 2002 (Appl. no. 47095/99), paras. 95-103.

60 *Kurt v. Turkey* ECtHR (1998), para. 125 (The Court established an obligation to maintain adequate and updated custody records).

61 Article 1(1) ACHR states: 'The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.'

62 *Velásquez-Rodríguez v. Honduras* IACtHR (1988).

63 *Ibid*., para. 162. See also C. Medina Quiroga*, La Convención Americana: teoría y jurisprudencia. Vida, integridad personal, libertad personal, debido proceso y recurso judicial*. (Santiago: Universidad de Chile 2005), p. 16 (noting that these general obligations only apply to the civil and political rights contained in Articles 3 to 25 ACHR. Article 26 ACHR articulates a specific obligation with respect to economic, social and cultural rights. These rights are not explicitly mentioned in the ACHR but the text refers to standards set forth in the Charter of the OAS).

thereby intrinsically linked with the substantive rights of the ACHR. Accordingly, the Inter-American Court cemented a sound foundation and structure for a further interpretation of the general duties to 'respect' and to 'ensure', as discussed in the following paragraphs.

The Inter-American Court interpreted the duty to 'respect' as a prohibition on arbitrarily or unlawfully interfering with the rights of persons within the state's jurisdiction.[64] It derived this obligation from the superiority of human rights over the power of the state; the exercise of state power has certain limits, owing to the inherent inviolable attributes that all individuals have and that human rights law protects. A state can neither limit these rights in their entirety, nor can it limit them under specific and well-defined conditions.[65] In particular, the Inter-American Court considered civil and political rights as defining the individual domain that dictates limits on the power of the state.[66] Accordingly, while recognising the right and the duty of states to take measures to protect their own security, human rights set limits to how far these measures may go in terms of restricting the rights and freedoms of persons.[67]

The Inter-American Court linked the second obligation 'to ensure' to the organisation of the governmental apparatus. A state must organise all the structures through which state officials exercise public power so that the free and full enjoyment of human rights is legally[68] guaranteed.[69] As a consequence of this obligation, states must prevent, investigate and punish any violation of the rights laid down in the ACHR. In addition, they must, if possible, attempt to restore the rights violated and provide adequate compensation for the damage incurred as a result of the violation.[70] As the Inter-American Court explained:

> The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[71]

64 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 169.
65 *Ibid*., paras. 164 and 165. See also IACtHR, 'Advisory Opinion OC-6/86 The Word "Laws" in Article 30 of the American Convention on Human Rights' Series A No. 6 (9 May 1986), para. 21.
66 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 165.
67 *Ibid*., para. 154; *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 111.
68 The IACtHR uses the Spanish term *juridicamente*.
69 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 166. See also *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 142 (In this case, the Inter-American Court left out the term 'juridically').
70 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 166.
71 *Ibid*., para. 174.

Thus, the duty to ensure generates four concrete obligations: the duty to prevent, the duty to investigate, the duty to punish, and the duty to restore and compensate.[72] In this respect, both acts and omissions of any public official or body may be imputable to the state.[73] The Inter-American Court continued by emphasising that the mere existence of a normative legal system does not satisfy this obligation; the actual conduct of the state must also be directed towards the effective guarantee of the full and free exercise of human rights in practice.[74] In this case the existence of a specific practice, on the part of state authorities, of capturing victims, subjecting them to torture and other ill-treatment, secretly executing them and concealing their bodies with the aim of ensuring impunity, showed a disregard of the duty to organise the state in such a manner.[75] Also, the duty to ensure implies the promotion of human rights so that state agents work with them and citizens have the opportunity to exercise their rights.[76] The elaboration of the duty to ensure has expanded to *inter alia* situations related to persons in state custody and to the protection of particularly vulnerable groups.[77]

In a more recent case against Mexico, the Inter-American Court used the concepts of procedural obligations in a similar fashion to the European Court. It also introduced the distinction between procedural and substantive violations. In this case

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72 *Cf. Almonacid-Arellano et al. v. Chile* IACtHR (2006), para. 111 and *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 237 (In subsequent cases concerning gross human rights violations, the Inter-American Court has also referred to the duty to prevent and combat impunity, where impunity is defined as 'the lack of investigation, prosecution, arrest, trial and conviction of those responsible for the violation of the rights protected by the American Convention.' Thus, this duty refers to the duty to investigate, prosecute and punish).

73 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 164. See also *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 142; *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 220; *La Cantuta v. Peru* (merits, reparations and costs) IACtHR Series C No. 162 (29 November 2006), para. 173; *Bámaca-Velásquez v. Guatemala* (merits) IACtHR Series C No. 70 (25 November 2000), para. 210.

74 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 167.

75 *Ibid*., para. 158; *Blake v. Guatemala* (merits) IACtHR Series C No. 36 (24 January 1998), para. 65 (the Inter-American Court stated here that 'Enforced disappearances show a disregard of the duty to organize the apparatus of the State in such a manner as to guarantee the rights recognized in the Convention.').

76 Medina Quiroga (2005), p. 20.

77 T.J. Melish & A. Aliverti, 'Positive Obligations in the Inter-American Human Rights system' (2006) 15 *Interights Bulletin* 3 pp. 120-122, at p. 122. See *e.g. Suárez-Rosero v. Ecuador* (merits) IACtHR Series C No. 35 (12 November 1997), paras. 84-91; *Lori Berenson-Mejía v. Peru* (merits, reparations and costs) IACtHR Series C No. 119 (25 November 2004), paras. 106 and 108; *The Yakye Axa Indigenous Community v. Paraguay* (merits, reparations and costs) IACtHR Series C No. 125 (17 June 2005) (The latter case pertained to members of the Yakye Axa Indigenous Community that had been dispossessed of their ancestral lands and of the use and enjoyment of the natural resources of those lands. Awaiting proceedings to reclaim their land, they had settled next to a road as a result of which they had to live in deplorable living conditions. The Inter-American Court found that the state had not taken adequate measures to provide the community with the necessary medical and nutritional assistance needed to ensure dignified life).

three young women, two of whom were minors, had disappeared and were murdered in the City of Juárez in 2001. Their bodies were found on the 6th November 2001 in 'Campo Algodonero' with signs of sexual violence and other ill-treatment. These incidents occurred in the context of recurrent violence towards women in this city starting in 1993. The family members received responses amounting to prejudice against the victims and no concrete action had been taken by the state authorities to locate them alive apart from having taken some statements.[78] While the Inter-American Court could not condemn the respondent state for the failure to respect the rights of the victims, it did find a procedural violation of the rights to life, liberty and personal integrity based on the duty to ensure. The state had neither adequately prevented nor adequately investigated the acts, which was to the detriment of the victims.

The consideration that a failure of state agents to act may attract the responsibility of the state has implications for state obligations with respect to the relationship between individuals. Illegal acts that violate the human rights of persons by private actors may fall within the realm of the notion of international state responsibility by virtue of the state's failure to take appropriate measures to prevent or to respond to these acts.[79] The Inter-American Court illustrated the ways in which the omissions of state agents could lead to the state being held internationally accountable:

> '[…] An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'[80]

78 *González et al ('Cotton Field') v. Mexico* (preliminary objection, merits, reparations and costs) IACtHR Series C No. 205 (16 November 2009), para. 277.

79 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 182. IACtHR, 'Advisory opinion OC-18 *Juridical Condition and Rights of Undocumented Migrants',* Series A No. 18 (17 September 2003), para. 140 (mentioning that, '[…] se debe tener en cuenta que existe una obligación de respeto de los derechos humanos entre particulares. Esto es, de la obligación positiva de asegurar la efectividad de los derechos humanos protegidos, que existe en cabeza de los Estados, se derivan efectos en relación con terceros (*erga omnes)*. Dicha obligación ha sido desarrollada por la doctrina jurídica y, particularmente, por la teoría del *Drittwirkung*, según la cual los derechos fundamentales deben ser respetados tanto por los poderes públicos como por los particulares en relación con otros particulares'. However, this reference must probably be seen in the framework of international human rights law in which states can only be held responsible for having failed to take action in a relationship between individuals which has resulted in a violation of the human rights of one of those persons).

80 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 172. See also *Caballero-Delgado and Santana v. Colombia* (merits) IACtHR Series C No. 22 (8 December 1995), para. 56.

In other words, the state may incur responsibility because it has failed to protect the victim with due diligence.[81] The notion of 'due diligence' indicates the standard that states have to comply with in this respect. Regarding the failure to investigate, the Inter-American Court stated that:

> Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.[82]

The Inter-American Court has stressed that this responsibility does not depend on the individual culpability of the offender.[83] In fact, the determination of individual culpability is not relevant.[84] The perpetrator does not need to be identified or known. The Inter-American Court applied this duty in the *Velásquez-Rodríguez Case* despite its conclusion that state agents had been directly involved in the enforced disappearance of Velásquez Rodríguez. It reasoned that even if direct involvement had not been proven, 'the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfil the duties it assumed under article 1(1) of the Convention'.[85] In subsequent case law, the duty to protect has been linked to the state as being the 'guarantor' of human rights; state responsibility may be incurred when agents of the state are in a position of guarantor, but fail to act to protect the human rights of one person vis-à-vis another person.[86] This position of guarantor has also played a role in cases where state agents were the alleged perpetrators in, for instance, cases concerning detention.[87]

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81 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), paras. 172 and 173.

82 *Ibid.*, para. 177.

83 *Ibid.*, paras. 172 and 173.

84 *Ibid.*, para. 134. See also *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 112 (The Inter-American Court stated clearly that 'It is not necessary to determine the guilt of the authors or their intention; nor is it necessary to identify individually the agents to whom the acts that violate the Convention may be attributable.').

85 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 182.

86 *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 111 (The Spanish wording reads: 'La atribución de responsabilidad al Estado por actos de particulares puede darse en casos en que el Estado incumple, por acción u omisión de sus agentes cuando se encuentren en posición de garantes, esas obligaciones erga omnes contenidas en los artículos 1.1 y 2 de la Convención'). This was reiterated in, for instance, *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 113.

87 *'Juvenile Re-education Institute' v. Paraguay* (preliminary objections, merits, reparations and costs) IACtHR Series C No. 112 (2 September 2004), para. 159 (The Court stated that, 'in order to protect and ensure the right to life and the right to humane treatment of persons deprived of their liberty and in its role as guarantor of those rights, the State has an ineluctable obligation to provide those persons with the minimum conditions befitting their dignity as human beings, for as long as they are interned in a detention facility'). See also *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 116 (the Inter-American Court rejects a rigid established structure of attributing state

In addition to the obligations embodied in Article 1(1) ACHR, Article 2 ACHR entails a general obligation in relation to domestic legislation.[88] The implication of the obligation formulated in Article 2 ACHR is two-fold. Firstly, it obliges states to repeal any legislation and abolish practices that are contrary to the protection of the rights enshrined in the ACHR. Secondly, this article imposes the duty to enact legislation and to develop practices 'conducive to [the] effective respect for' these rights.[89] Thus, this obligation means amending existing national legislation in order for it to comply with the ACHR and drafting laws to protect the rights set forth therein.[90] The harmonisation of domestic laws with the ACHR may go as far as including the preparation and outline of a state policy for short, medium and long-term purposes.[91] In *The Juvenile Re-education Institute* case, such policy had to be aimed at juveniles in conflict with the law.[92] The Inter-American Court even sketched what this policy should consist of. It had to include strategies, appropriate measures and the allocation of resources for obtaining the objectives of improving the detention system for juveniles as well as integral educational, medical and psychological programmes.[93]

Besides these implied proactive obligations derived from Articles 1 and 2 ACHR, the ACHR itself also explicitly enshrines several rights that are positive in nature. Positive obligations emanate from these rights that require the creation of conditions which are necessary to safeguard them in practice on the domestic level.[94] For instance, Article 25 ACHR requires states to create effective and adequate domestic remedies to address alleged human rights violations.[95] The rationale behind

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responsibility. Instead, it decides on the basis of the specific circumstances of each case and the corresponding obligations for prevention and protection that follow from the violation at stake).

88 Article 2 ACHR reads: 'Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.'

89 *Castillo-Petruzzi et al. v. Peru* (merits, reparations and costs) IACtHR Series C No. 52 (30 May 1999), para. 207; *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 109.

90 IACtHR, 'Advisory Opinion OC-13/93 *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)'* Series A No. 13 (16 July 1993), paras. 26-30. Scholars have argued that the inclusion of this provision is redundant due to the fact that, by virtue of ratification, states are to bring their domestic legislation into compliance with the standards of the ACHR, see C. Medina Quiroga*, The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System* (Dordrecht: Martinus Nijhoff 1988), pp. 90 and 100 (arguing that this provision must be seen in light of the principle *abundans cautela non nocet* (there is no harm done by great caution)).

91 Melish & Aliverti (2006), p. 121.

92 *'Juvenile Re-education Institute' v. Paraguay* IACtHR (2004), para. 316 (The Court determined these measures as forms of reparation).

93 *Ibid*., para. 117.

94 Medina Quiroga (2005), p. 19.

95 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), paras. 64 and 66-68.

this obligation is that all persons must be able to enjoy their human rights and that in the case of a violation there is a prompt remedy to protect the rights.[96] This article is an independent right but is closely linked with Article 1(1) ACHR[97] and Article 8 ACHR (the right to a fair trial).[98] Article 8 ACHR also illustrates these positive obligations. This article requires implicitly the state to allocate resources to establish an adequate judicial system and to formulate procedural norms to guarantee the rights of the accused.[99]

Thus, in essence, the layers of duties imposed by the Inter-American Court do not differ significantly from the ones established by the HRC and the European Court. The Inter-American Court has made a significant contribution to the notion of state obligations in formulating the duties to prevent, investigate, punish and compensate. In addition, it has more recently adopted the language of negative and positive obligations in an analogous fashion to the European Court.[100] The Inter-American Court is progressive in incorporating a duty to promote.

3.4 Obligations laid down in the ICPPED

The ICPPED does not entail a clause on general obligations as laid down in Article 2 ICCPR, Article 1(1) ACHR and Article 1 ECHR. In comparison, the DPPED formulates such a general obligation in Article 3 DPPED, which states:

> Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

The 1998 Draft Convention also echoed such a general obligation in Article 4(3). The suggestion during the drafting process to include a more general obligation to prevent in the ICPPED was, however, not pursued.[101] As a result, the ICPPED has formulated specific obligations to realise the right not to be subjected to enforced disappearance. Besides the obligation to refrain from subjecting persons to enforced disappearance,

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96 Medina Quiroga (2005), p. 358.

97 *Castillo-Páez v. Peru* (merits) IACtHR Series C No. 34 (3 November 1997), para. 83 (The Court stated: 'El artículo 25 se encuentra íntimamente ligado con la obligación general del artículo 1.1 de la Convención Americana, al atribuir funciones de protección al derecho interno de los Estados Partes').

98 Medina Quiroga (2005), p. 361.

99 *Ibid.*, p. 20.

100 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 110; *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 111.

101 IOWG Report E/CN.4/2005/66, para. 26 (The suggestion was to add, by analogy with the CAT, that 'each State Party shall take effective legislative, administrative, judicial or other measures to prevent enforced disappearances in any territory under its jurisdiction.').

the ICPPED establishes positive obligations concerning issues such as investigation, prosecution, punishment, prevention and reparations.[102]

3.5 Concluding remarks: types of obligations used for the purpose of this study

Both the theory on state obligations and the case law of the HRC, the Inter-American Court and the European Court reveal a varied palette of different types of duties imposed on states with the aim of realising human rights. State obligations can be placed along a large spectrum from non-interference to proactive measures. Hence, it is clear that both actions and omissions (or a combination of both) can breach human rights. The ICCPR, the ACHR and the ECHR establish, albeit in different wording, a general duty to respect and to guarantee the protected rights and freedoms. These general duties have been the basis for the formulation of more specific duties corresponding to specific human rights, in accordance with their own scope, content and nature. The tailored and more detailed obligations correspond to the particular protection that these rights and freedoms require in order to make them, in the words of the European Court, 'practical and effective' in the national systems of states. States have to comply with these duties and they incur responsibility for a violation of human rights when they fail to do so.

Upon analysis, seven duties can be discerned from the case law of the HRC, the Inter-American Court and the European Court that, in one way or the other, are relevant to enforced disappearance cases. These seven duties are: (1) the duty to respect, (2) the duty to prevent, (3) the duty to investigate, (4) the duty to prosecute, (5) the duty to punish, (6) the duty to compensate and (7) the duty to protect. This list follows most closely the typology developed by the Inter-American Court, with the duty to protect being added. Although worded differently, the interpretation given to these duties by the three supervisory bodies concurs, in essence, with the typologies as set out by the theory on state obligations. The ICPPED enshrines norms related to these duties, which makes their examination useful for evaluating to what extent the case law provides guidance for the interpretation of the ICPPED norms.

The application of these seven duties to enforced disappearance would mean the following. The duty to respect imposes a negative duty to refrain from committing, either directly or indirectly, enforced disappearance. The crime is committed directly by the state when state agents themselves are the perpetrators of the crime. The state is indirectly implicated when state agents support, consent to or acquiesce in the commission of this crime by non-state actors. The duty to prevent is a duty that requires state action on two levels. Firstly, states must prevent this crime by having an adequate system in place that safeguards against this crime and to promote respect

102 See Chapter 2 *supra* for a further examination of the norms laid down in the ICPPED.

for the right not to be subjected to enforced disappearance. Secondly, precautionary measures must be taken when a person is at risk of being subjected to enforced disappearance. The positive duties to investigate, prosecute, punish and compensate come into play from the moment that this crime is committed or that there is an allegation to this end. The duty to protect encompasses the duty of states to protect persons from being seized by other persons eventually leading to their disappearance. This duty raises the question of where the line can be drawn between the duty to protect and the duty to respect based on indirect involvement. In both cases, the direct perpetrators are non-state actors. The distinction is embodied in the extent to which the state incurs responsibility for the act itself.

For the purpose of the present study, the above-mentioned seven duties cover the spectrum of types of state duties that correspond to protection against enforced disappearance. These duties are the basis for attributing state responsibility if states fail to comply with them. As such, the exact scope and content of these duties is essential for the determination of state responsibility. Part II of this book evaluates how the HRC, the Inter-American Court and the European Court have attributed responsibility to states on the basis of these seven duties in enforced disappearance cases. Before discussing the case law, Chapter 4 identifies parameters that enable the evaluation of these duties according to the experiences of victims.

Chapter 4
Protection Attuned to Experiences of Victims

4.1 Introduction

Enforced disappearance affects its victims in an utterly complex and holistic manner. Every enforced disappearance affects a large circle of persons. At the centre of this circle is the person subjected to enforced disappearance. Additionally, this crime has grave repercussions for this person's relatives, as well as other persons close to him or her. At the periphery of the circle, it is said that this crime has an effect on society as a whole. The ways in which these effects materialise depend on the facts and the circumstances of each case, for example the duration of the enforced disappearance, the final fate of the disappeared person, and the attitude of the state authorities in responding to the crime. Furthermore, personal circumstances determine the way in which persons experience the effects, with factors such as culture, the previous psychological state of the person, the family situation, and how he or she has been able to confront the consequences of the enforced disappearance all playing an important role in shaping the effects in each specific case.[1] Hence, the experiences of the persons affected by this human rights violation are to a large extent personal and specific to each individual.

Despite the uniqueness of each case, personal stories reveal significant similarities with regard to the impact of an enforced disappearance. These similarities result from the distinct characteristics of this crime.[2] Typically, the perpetrators aim to eliminate a person by hiding him or her from anything that is known or familiar. Subsequently, the perpetrators deny their involvement in, or any knowledge of, the crime. As a result, the crime is cloaked in secrecy and surrounded by uncertainty. The secrecy is served by the complexity of the crime (*e.g.* the different stages of the crime itself) and, accordingly, the numerous perpetrators involved. In addition, this crime is designed to escape any form of accountability, which is likely to be successful due to the persistent denials and lack of information. Often, the perpetrators have some higher goal, for instance, to instil terror in certain sections of the population.

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1 C.M. Beristain, *Diálogos sobre la reparación. Experiencias en el sistema interamericano de derechos humanos, Tomo I* (San José: Instituto Interamericano de Derechos Humanos 2008), pp. 31 and 32.

2 See Chapter 1 section 2 *supra* for a more detailed description of the characteristics of enforced disappearance.

This chapter examines the most common experiences of persons confronted with an enforced disappearance. In doing so, this chapter does not endeavour to sketch an exhaustive picture of all the effects on and experiences of a victim. Instead, it provides an overview of the most common elements of the suffering and grief that relevant literature, UN documents, NGO reports, case law and conducted interviews have revealed. It then seeks to identify the specific causes of such suffering and grief. Accordingly, they provide important parameters of the evaluative framework used in this study for explaining how state responsibility should be determined under the ICPPED.

The first section focuses on the effects on and the experiences of the disappeared person. The second section sheds light on the experiences of relatives, with the impact on the society in which the crime occurs forming the basis of the third section. The fourth section sets out the specific causes of the suffering and grief, which will be divided into five main categories. These categories will henceforth be referred to as the 'five main causes of victims' suffering' or simply the 'five main causes'. These main causes are examined to then explain what is meant by protection that is in line with and in direct response to the experiences of victims for the purpose of this study.

4.2 Impact on the disappeared person

The information available about the precise impact of an enforced disappearance on the disappeared person is relatively scarce. The simple fact that most disappeared persons are never seen again results in few survivors being able to tell their story. Nonetheless, the stories that come to light present a clear picture of the anguish and torment that a disappeared person usually experiences. In addition, testimonies of victims of related human rights violations, such as illegal detention and torture, help to complete the picture.

Usually, the anxiety starts at the moment of apprehension. Testimonies show that the arrest or detention is mostly carried out unlawfully. The perpetrators generally fail either to give reasons for the arrest or to present an arrest warrant. The excessive force with which persons are commonly apprehended heralds the illicit events that are to ensue.[3] There are also instances, however, where a person has disappeared after having served his or her sentence.[4] The majority of the victims end up in clandestine prisons or secret parts of recognised detention centres, if they are not executed immediately after their apprehension. Being isolated from the outside world

3 AI, 'Morocco: Breaking the wall of silence: The "disappeared" in Morocco' (April 1993) AI Index MDE 29/01/93 (hereinafter: 'The "disappeared" in Morocco'), p. 23 (testimony of the brothers Bayazid, Midhat and Ali Bourequat, who were arrested on 8 July 1973, kept in secret detention and released on 30 December 1991). See also *e.g. Aboussedra v. Libyan Arab Jamahiriya* HRC 2 November 2010 (Comm. no. 1751/2008), paras. 2.1 and 7.6.

4 *E.g. El Abani v. Algeria* HRC 26 July 2010 (Comm. no. 1640/2007), para. 2.6.

transforms anxiety into a constant state of fear and anguish. For instance, Mohammed Nadrani, a survivor of an enforced disappearance in Morocco, was told by a prison guard, '[t]hey've brought you here to die. Too bad for those who die – there'll be no inquiry.'[5] He testified that:

> We thought our fate was decided, we would die there and no one would know what had happened to us. We felt that at least if someone could testify to this we wouldn't mind. We only lived in the hope that someone would get out and tell what we had been through. We were in total despair.[6]

The realisation that one's detention is secret and illegal creates desperate emotions. Additionally, the difficulty in merely staying alive is illustrated by the testimonies of the Bourequat brothers, who had disappeared for more than 18 years in Morocco. They were held in isolated cells and could only communicate with each other through the wall. They testified that:

> If you were sitting you could get up from the bed, but lying down... that was the end. […] We held on until it would be our turn to die. We were convinced from the first moment of our arrest that all was over. We weren't arrested in a normal way, or brought to a normal place, or anything. […] We kept sane by not thinking about our situation, or about the food. We didn't think about the present, and we escaped by thinking. We were in Paris all the time. We planned menus, we invented culinary specialities; we talked about Paris, we evolved architectural plans, we rebuilt towns... and that passed the time.[7]

Isolation from all that is familiar, from family and friends, seems to invoke indefinite strong emotions of desolation. As Nadrani described:

> The night of 5 August 1977 was disturbing. There was too much movement in the corridor. I thought it might mean we were to be released, as the warders had told us this would happen. I was sceptical, but I thought at least we'd hear what the judgment against us was. I began to think of my family, the questions I'd answer. I burnt with desire, love and longing.[8]

The hope for release that night proved to be in vain; it ultimately took more than seven years for him to be released.

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5 AI, 'The "disappeared" in Morocco' (1993), p. 26 (testimony of Mohamed Nadrani who was arrested in April 1976, kept in unacknowledged detention and released on 31 December 1984).

6 *Ibid.*, p. 30 (testimony of Mohamed Nadrani).

7 *Ibid*., p. 23 (testimony of the brothers Bayazid, Midhat and Ali Bourequat).

8 *Ibid*., p. 24 (testimony of Mohamed Nadrani).

Besides the mental suffering, an enforced disappearance facilitates physical torture and other forms of ill-treatment due to the legal void in which disappeared persons find themselves. Disappeared persons are at the complete mercy of the perpetrators carrying out the crime. Protection by the law and judicial guarantees are an illusory hope in such situations. In fact, the abuse and the torture of disappeared persons for the purpose of extracting information or simply to punish them commonly surfaces in the accounts of survivors.[9] The circumstances in which the majority of disappeared persons have been kept are abhorrent in themselves.[10] The situation that the brothers Bourequat describe is illustrative in this regard:

> In Tazmamert we used to call out to the other prisoners from one cell to another. We shouted – when we could. When we got very weak, we'd call once every three days or once a week. We were isolated; we didn't see each other again 'til the day of our release, 10 years later. The cells were 3m by 2m. The wall was at least 30cm thick... like a bank vault. The cells were made of cement – they'd left it like that; you could feel all the bumps. There was a cement bed two metres square at the end of the cell. At the entrance was a hole for the toilet and 14 holes, about 10cm in diameter, in the wall looking out on to the corridor.
> There was no light, no water... nothing. They gave us a pitcher of water, containing about 3,4,5, litres, in the morning, and for food a pot of tea, a sort of cat's piss, and 300-350 gm of bread; at midday half a pan of lentils, chickpeas or beans boiled in water and in the evening a pan of vermicelli.[11]

In addition to the extremely dark conditions of detention, torture is one of the often-used techniques in the wake of the deprivation of liberty. As Ana Maria Carega described the worst form of torture for her:

> The worst torture was with the electric prod – it went on for many hours, with the prod in my vagina, anus, belly, eyes, nose, ears, all over my body. They also put a plastic bag over my head and wouldn't take it off until I was suffocating […] I wanted to die but they wouldn't let me. They 'saved' me only so they could go on torturing me.[12]

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9 See *e.g.* AI, 'The "disappeared" in Morocco' (1993), pp. 12 and 13 and the testimonies of the brothers Bayazid, Midhat and Ali Bourequat, and of Mohamed Nadrani. See generally Center for Civil & Human Rights & Notre Dame Law School (1993); M. Feitlowitz, *A Lexicon of Terror: Argentina and the Legacies of Torture* (New York: Oxford university Press 1998); *Velásquez-Rodríguez v. Honduras* IACtHR (1988).

10 See *e.g. Bashasha v. Libyan Arab Jamahiriya* HRC 2 November 2010 (Comm. no. 1776/2008), para. 2.7.

11 AI, 'The "disappeared" in Morocco' (1993), p. 22 (testimony of the brothers Bayazid, Midhat and Ali Bourequat).

12 Feitlowitz (1998), p. 51 (testimony of Ana Maria Careaga who disappeared at the age of 16 during the Junta regime in Argentina).

The horror of the torture and the realisation of having disappeared have driven persons to the point of wanting to die. Graciela Geuna experienced in the extreme the position of power of her torturer in this regard:

> He knew the limits of human resistance […] Once, after he had beaten me, I managed to steal a razor blade from the desk. All I wanted was to kill myself, it was the only way to escape the horror. Texas confiscated it, saying "You are not going to die, little girl, until we want you to. We are God here."[13]

These are just two examples of the horrendous torture that disappeared persons have had to endure. The mere fear of being tortured yet another time has been described as 'a constant nightmare'.[14] Apart from the desperate point of wanting to die, the fear of being executed is also recognised as one of the factors that aggravate the suffering.[15]

When a person is lucky enough to be released, they often only feel partially liberated. For example, survivors are told not to talk about what happened to them and are threatened that if they do, they will be put in a secret prison again or will be executed.[16] Moreover, the period of time, sometimes months and sometimes years, spent in secret detention, together with the torture, causes mental suffering and physical problems long after their release.[17]

In summary, an enforced disappearance causes extreme suffering to the disappeared person; suffering that is beyond imagination. The examples discussed in this section, which illustrate the intense suffering, are typical of the large number of horrendous stories that victims have lived through and are experiencing even today. The feelings of insecurity, the physical and mental pain and the immense anguish elucidated by these examples attempt to put into words what is in fact indescribable; being put in a defenceless position in the darkest of dark places where one's very existence is denied on a daily basis.

4.3 Repercussions on the relatives of the disappeared person

Besides the extreme repercussions on the disappeared person, enforced disappearance also has a tremendous impact on his or her relatives. This impact shows the scale of the violation and clearly distinguishes enforced disappearance from other human rights violations. Relatives commonly believe that the state authorities are implicated

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13 *Ibid*., p. 10 (testimony of Graciela Geuna who disappeared during the Junta regime in Argentina).
14 AI, 'The "disappeared" in Morocco' (1993), p. 24 (testimony of Mohamed Nadrani).
15 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 163.
16 AI, 'The "disappeared" in Morocco' (1993), pp. 30 and 32 (testimonies of Mohamed Nadrani and the brothers Bayazid, Midhat and Ali Bourequat); *Aber v. Algeria* HRC 13 July 2007 (Comm. no. 1439/2005), para. 2.8.
17 AI, 'The "disappeared" in Morocco' (1993), p. 2.

in the enforced disappearance; sometimes they have witnessed the arrest or detention of their family member, sometimes they base their belief on various sources. The subsequent denial of the arrest, or a refusal to provide information, and the resulting uncertainty as to the whereabouts or fate of the disappeared person dominate the relatives' daily lives. The uncertainty plays a central role in the multiple effects of an enforced disappearance on relatives. Left without any information about the fate or whereabouts of the disappeared person, relatives face the agony of uncertainty for days, weeks, months or years. The attendant anguish and fear aggravate the grief that relatives already feel as a result of the absence of the disappeared person. The following subsections describe several effects on relatives.

4.3.1 The frozen grief and continuing anguish of relatives

The UNWGEID has described the psychological state of relatives after the enforced disappearance of one of their family members as 'sustained shock'. This term means 'a latent and prolonged critical state characterized by an inconclusive search for the loved-one, anguish, sorrow and incertitude.'[18] This psychological state summarises the most pertinent effects of not knowing what has happened to the disappeared person. Not knowing results in an ongoing search that persistently dominates the lives of relatives. Their search leads them to possible witnesses, police stations, prisons, army bases, prosecutors, politicians, NGOs and to whatever institution or person that might have some information. The urge for information was expressed by Madre Espen, one of the mothers from *Madres de Plaza de May - Línea Fundadora*:[19]

> That is what we did, the mothers, leave the house in the morning and come back at night. We used to go to every place, whether politicians, whether ministries … all places where we thought they could provide us with any information about our children, we used to go to.[20] [Translation by the author].

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18 UNComHR, 'Report of the Working Group on Enforced or Involuntary Disappearances' (9 December 1983) UN Doc. E/CN.4/1984/21 (hereinafter: 'Annual report 1983'), para. 147.

19 The *Madres de Plaza de Mayo* is the name for the Argentine mothers whose sons and daughters disappeared during the Junta regime. They met each other in the course of their search for their missing children. On 30 April 1977, fourteen mothers started to march in circles around Plaza de Mayo in front of the presidential palace, demanding information about their missing sons and daughters. In recognising each other's desperation, their devotion to the search and the accompanying pain and suffering, they started the association *Madres the Plaza de Mayo*. In later years, the association split in two: the *Asociacion Madres de Plaza de Mayo* and the *Madres de Plaza de Mayo - Linea Fundadora.*

20 Interview with Madre Espen, Buenos Aires, Argentina, 4 December 2009 (2009) ('Eso es lo que hacíamos las madres, salíamos a la mañana y volvíamos a la noche. Deambulábamos por todas partes, qué políticos, qué ministerios... todo donde pensáramos que nos podían dar alguna información de nuestros hijos, nosotras íbamos.').

The son of Madre Espen had disappeared during the Junta regime in Argentina. From 1977, when her son disappeared, until today she has not rested in striving for truth, memory and a just society.[21] One of the consequences of dedicating time and energy to the search was that she would spend less time with her family. Still, her desperate desire to find out where her son was led her to continue to search vigorously:

> from the beginning they called us "the old crazy women" … and indeed, we were crazy because of the pain, because of the anguish and because of the desperation which we had (…) but we were not confused, we were crazy but focused, we knew exactly what we wanted.[22] [Translation by the author].

This telling example shows the desperate, yet determined preoccupation of relatives to find out where their loved ones are. Hugo Argente,[23] whose brother disappeared during the Junta regime in Argentina, also expressed the dominant position of the search in his life. With the disappearance of his brother, his own life and expectations changed dramatically:

> my goal was to know what had happened to my brother, I did not become a doctor or a who knows what … my goal, my end, my university was to know what happened to my brother.[24] [Translation by the author].

The dominant position of the ongoing search in the lives of relatives often goes hand in hand with an emotional deadlock that an enforced disappearance creates. The uncertainty prevents relatives from achieving emotional closure; they are unable to achieve the peace of mind to stop the search and to accept the loss of their loved ones. The inability to come to terms with the loss is marked by the hope of finding the person alive. The example of the Bourequat brothers, who were released after being held for more than 18 years, shows that this continuous hope is not always unrealistic. Nonetheless, such continued hope leads to the indefinite postponement

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21 Elia Espen has been one of the *Madres de la Plaza de Mayo - Linéa Fundadora* ever since her 27-year old son, Hugo Orlando Miedan, disappeared on 18 February 1977.

22 Interview with Madre Espen (2009) ('Al principio nos llamaron "las viejas locas" a nosotras... y sí, también locas estábamos por el dolor, por la angustia y por la desesperación que teníamos, hay que ser real ¿viste? Pero no desubicadas, estábamos locas pero ubicadas, sabíamos muy bien lo que queríamos.').

23 In July 1976, Daniel Argente disappeared. It was not until 1999 that Hugo Argente learned that his brother had died in what is known as the Fátima Massacre of 20 August 1976. During this massacre 20 men and ten women were shot and their bodies blown up. In 2008 a criminal case was initiated against three former Argentine police officers for their involvement in the massacre.

24 Interview with Hugo Argente, Buenos Aires, Argentina, 31 Augustus 2009 ('[…] mi logro era saber qué pasó con mi hermano, no llegar a ser doctor o tener un qué se yo… Mi logro, mi fin, mi universidad era saber qué pasó con mi hermano.').

of a proper mourning process.[25] In this sense, the lack of evidence that someone is dead distinguishes the effects of an enforced disappearance from the effects of an arbitrary execution.[26] While mourning processes differ from culture to culture, a common function is that it enables persons to deal with loss and death.[27] Beristain emphasises the particular traumatic and adverse effect of an enforced disappearance on the mourning process of relatives.[28] Referring to the central role that mourning has in the process of emotional recovery and healing after the loss of a loved one, he shows that this crime jeopardises this process in every aspect. One of the functions of mourning is the acceptance that the loss of a loved one is definitive. However, questions typically associated with this crime, such as whether the person has died or is still alive and where the person is, make it virtually impossible to accept the loss as being definitive.[29] To accept the death would in fact 'kill' the disappeared person by extinguishing the hope that he or she is still alive. Relatives feel that the responsibility thereby weighs on them, rather than on the perpetrators as it were. Also, feelings of guilt when trying to build relationships with other persons are not uncommon amongst relatives. In fact, any improvement in the emotional lives of the relatives without knowing what has happened to their loved ones is likely to generate feelings of guilt.[30] As a consequence, family members remain in a state of 'frozen grief'.[31]

When relatives have accepted the loss, the mourning process is often further hampered by hindrances in relation to burial rituals and in expressing grief and sorrow. Firstly, the internal process of coming to terms with the sorrow for the loss might be hampered. In some cultures a burial without the remains of the disappeared person defeats the purpose of such a ritual. Burying the bones gives spirits a peaceful place and is a way of paying proper tribute to them.[32] Secondly, the expression of

25 Linking Solidarity (2009), p. 18.

26 M. Blaauw & V. Lähteenmäki, '"Denial and silence" or "acknowledgement and disclosure"' (2002) 84 *IRRC* 848 pp. 767-783, at p. 770.

27 Blaauw & Lähteenmäki (2002), p. 772.

28 The expert Carlos Beristain has testified in several enforced disappearance and massacre cases before the IACtHR, such as: *Molina-Theissen v. Guatemala* IACtHR (4 May 2004), *The Pueblo Bello Massacre v. Colombia* IACtHR (2006) and *The Ituango Massacres v. Colombia* IACtHR (2006).

29 *The 19 Tradesmen v. Colombia* IACtHR (2004), para. 72(g).

30 *Ibid.*

31 *Ibid.* (The Spanish version reads 'duelo congelado').

32 Blaauw & Lähteenmäki (2002), p. 773 (The authors refer to the example of Zimbabwe where a funeral is necessary to enable the spirits of the ancestral spirits to fulfil their essential role in society of guiding and nurturing the lives of family members. Restless spirits bring bad luck to the family and society as a whole). See also Scovazzi & Citroni (2007), p. 361 (referring to the report of the Commission for Historical Clarification for Guatemala (CHC) that testifies to the importance of burial rituals in the Mayan culture); and *Chitay-Nech et al. v. Guatemala* (preliminary objections, merits, reparations and costs) IACtHR Series C No. 212 (25 May 2010), para. 239.

grief in public is often hindered by the fear of possible threats. Expressing grief might be perceived as a sign of support for what the disappeared person stood for. Since authorities are often keen to oppress exactly that, expressing grief often proves dangerous. Also, relatives frequently experience difficulties in expressing grief due to the stigma that society puts on the disappeared person. For example, a common reaction to disappeared persons in Argentina was 'they must have done something'. Labelling the disappeared person as such rendered the terror for others less terrifying and seemingly more predictable.[33] In these ways, the uncertainty, together with the social attitudes, usually impede arranging funerals and other rites to pay tribute to the disappeared person and to accept the loss.[34] On top of these obstacles, there is hardly any room for mourning and acknowledging feelings of grief. Daily survival often becomes one of the most important preoccupations of relatives.

In summary, the adaptation of daily life to the necessities of the search for the disappeared person tremendously affects the lives of relatives. Not knowing where the disappeared person is and how he or she is doing generates a state of open-ended grief and continuing anguish and suffering. In addition, enforced disappearance impedes proper mourning processes that allow relatives to deal with the loss of their loved one. The hope that the disappeared person is still alive postpones such processes indefinitely.

4.3.2 Mental and physical deterioration

Reports of serious depression by relatives are not uncommon. Depression typically results from missing the disappeared family member in combination with the constant hope for return and the fear of what is happening to him or her.[35] For example, in their work Blaauw and Lähteenmäki have come across mothers of disappeared children 'who, after almost thirty years, are still hoping for their missing children to reappear.'[36] One of the lawyers of the mother, now deceased, who lost her sons in the Massacre of Mapiripán in Colombia,[37] recalled how she experienced the absence of her sons and the unrest that their disappearance had created; unrest that she had to endure day and night. She confessed to him that she was always waiting for her sons to come home and:

33 P. Green & T. Ward, *State crime: Governments, Violence and Corruption* (London: Pluto Press 2004), p. 113.
34 *The 19 Tradesmen v. Colombia* IACtHR (2004), para. 72(g).
35 Beristain (2008), p. 46; Blaauw & Lähteenmäki (2002), p. 771.
36 Blaauw & Lähteenmäki (2002), p. 767.
37 *The Mapiripán Massacre v. Colombia* IACtHR (2005).

> […] she would hear knocking on the door and think that it was one of her sons who had come back home.[38] [Translation by the author].

Depression has also surfaced in the testimonies of relatives during public hearings conducted by the Inter-American Court. For example, during the hearing held in *Blake v. Guatemala* Blake's brother testified that ever since his brother's disappearance, he had suffered from serious depression. Everyday life for him had become a true struggle. As a consequence, he had spent a great deal of money on psychiatric consultations and on medication.[39] Even the passing of time does not always ease the suffering of relatives. As one of the fathers of a disappeared young woman during the Junta regime in Argentina said:

> What else can I tell you. After fourteen years, every day I feel more desperate. There is no anaesthesia for this pain, no scaring over. They say time heals – but no, el tiempo no lo cura, locura. Time doesn't heal, it makes you crazy. I see my daughter being tortured. I see her alone, about to die.[40]

In fact, as long as the uncertainty prolongs, the passing of time aggravates the suffering. Moreover, the mental anguish may also have adverse repercussions on the physical well-being of relatives.[41]

Learning the truth at first sight brings consolation to the relatives because knowing the truth comes as a relief and brings the peace that they were seeking. Some, however, have also experienced adverse effects due to the shock, such as physical illness and weight loss.[42]

4.3.3 The response of the state as an aggravating factor

The response of the state authorities in the face of complaints of enforced disappearance has greatly contributed to the suffering of relatives.[43] Relatives are confronted with blunt denials, formalistic and laconic responses, a lack of respect towards them, and concealment of information. Bermans and Clark have made an illustrative observation

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38 Beristain (2008), p. 46 ('[...] escuchaba que tocaban la puerta y sentía que era alguno de sus hijos que llegaba de regreso a casa').

39 *Blake v. Guatemala* IACtHR (1998), para. 113. See also *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 65(l).

40 Feitlowitz (1998), p. 96 (testimony of Santiago).

41 *Yurich v. Chile* HRC 12 December 2005 (Comm. no. 1078/2002), para. 3.2.

42 Interview with Hugo Argente (2009).

43 Beristain (2008), p. 33. See also *e.g. Kurt v. Turkey* ECtHR (1998), paras. 133 and 134; *Baysayeva v. Russia* ECtHR 5 April 2007 (Appl. no. 74237/01), para. 142 (the European Court found a violation of Article 3 ECHR to the detriment of the relatives based primarily on the response of the authorities).

in this regard; the way in which state authorities treat disappeared persons and their family members has been strikingly similar in countries where this violation has been reported on a large scale.[44] Upon examination, one can identify four stages in which relatives have been confronted with uncooperative and hostile behaviour on the part of the state: the search for the disappeared person, bringing the perpetrators to justice, the treatment of the remains when the disappeared person is dead and the granting of compensation.

In their attempt to conceal the perpetrators of the act, examples show that state authorities have tried to hinder the search for the disappeared person by various means of intimidation.[45] For instance, in the case *Kurt v. Turkey*[46] the applicant and her relatives had been subjected to several threats after having reported the disappearance. These threats included threatening telephone calls, telephone-tapping and repeated raids and searches of their homes. The applicant and her lawyer were pressured by Turkish State officials not to pursue the case before the European Court and the applicant was detained for questioning in this regard.[47] State authorities seem to exploit threats with the aim of deterring relatives from searching for their disappeared family member. The fear of also disappearing has been expressed by Hugo Argente:

> There was a moment when that of disappearance was so terribly evil in our minds that one had more fear of disappearing than of dying, because what is it to disappear…?[48] [Translation by the author].

Unfortunately, such threats have proved to be effective in the sense that fear for their own lives or the lives of the rest of the family often delays search activities. This delay has also been caused by thoughts such as 'if we don't do anything, we might save the disappeared person.'[49] Reports of threats and illegal pressure have also come from judges and lawyers who have been involved in conducting inquiries into the whereabouts of the disappeared person.[50] Furthermore, threats have also led

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44 Berman & Clark (1981-1982), p. 532.
45 *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 2.4.
46 *Kurt v. Turkey* ECtHR (1998), para. 158.
47 *Kurt v. Turkey* ECtHR (1998), letter from the representatives to Mr H.C. Kruger of the Commission, 5 May 1995.
48 Interview with Hugo Argente (2009) ('[…] hubo un momento en que esto de la desaparición era tan terriblemente satánico para nuestras cabezas que vos tenías más miedo a desaparecer que a morir porque ¿qué es desaparecer…?').
49 Interview with Ewoud Plate and Jan de Vries, Aim for Human Rights, Utrecht, 29 April 2010 (2010); Feitlowitz (1998), p. 97.
50 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 118b; Interview with Madre Espen (2009); Interview with Judge Carlos Rozanski, Buenos Aires, Argentina, 1 September 2009 (2009).

witnesses to refuse to cooperate or retract statements.[51] Finally, meetings organised by relatives have been hampered and disturbed by state authorities.[52]

Alongside the obvious threats intended to dissuade the search for the disappeared person, state authorities have been inclined, either tacitly or explicitly, to be uncooperative in their response to inquiries and complaints by relatives. Their response often results in refusals to investigate or in replies that briefly dismiss the claim.[53] Public officials are said to have lied maliciously with a view to intimidating and punishing relatives or other persons trying to locate the disappeared person.[54] Moreover, investigations have been characterised by delays, superficiality and repeated referrals of jurisdiction.[55] The investigations that are launched are often closed in a suspiciously rapid manner based on a claimed lack of evidence.[56] In other cases, such investigations do not have the purpose of establishing what happened to the victims nor to bring the perpetrators to justice.[57] The consideration of the European Court in the *Kurt Case* is illustrative of the flaws in investigations frequently encountered by relatives:

> [...] having regard to the applicant's insistence that her son was detained in the village the public prosecutor should have been alert to the need to investigate more thoroughly her claim. He had the powers under the Code of Criminal Procedure to do so [...]. However, he did not request her to explain why she was so adamant in her belief that he was in detention. She was neither asked to provide a written statement nor interviewed orally. Had he done so he may have been able to confront the military personnel involved in the operation in the village with her eye-witness account. However, that line of inquiry was never opened and no statements were taken from any of the soldiers or village guards present in the village at the time. The public prosecutor was unwilling to go beyond the gendarmerie's assertion that the custody records showed that Üzeyir Kurt had neither been held in the village

51 *Blake v. Guatemala* IACtHR (1998), para. 52[o]; *Timurtaş v. Turkey* ECtHR 13 June 2000 (Appl. no. 23531/94), paras. 17-21, 47; *Madoui v. Algeria* HRC 28 October 2008 (Comm. no. 1495/2006), para. 2.11.

52 Roundtable meeting 'Transitional Justice: Enforced Disappearance and Impunity', organised by Aim for Human Rights (31 March 2010).

53 *Kurt v. Turkey* ECtHR (1998), paras. 16 and 17.

54 UNGA, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Sir Nigel Rodley' (3 July 2001) UN Doc. A/56/50 (hereinafter: 'Report by UN Special rapporteur on torture (2008)'); AI, 'The "disappeared" in Morocco' (1993).

55 *Kurt v. Turkey* ECtHR (1998), paras. 16, 17 and 18; *Mahmut Kaya v. Turkey* ECtHR 28 March 2000 (Appl. no. 22535/93), paras. 24-52 and 104; *Kurt v. Turkey* ECtHR (1998), paras. 18 and 141; *Timurtaş v. Turkey* ECtHR (2000), para. 89.

56 See *e.g.* J. Brandt Corstius, 'Meenemen en afmaken verdomme!' (2006) *Wordt vervolgd, Amnesty International* 10 pp. 24-26, p. 25.

57 *Blake v. Guatemala* IACtHR (1998), para. 52[o]; *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), paras. 99-102.

> nor was in detention. He accepted without question the explanation that Üzeyir Kurt had probably been kidnapped by the PKK during the military operation and this explanation shaped his future attitude to his enquiries and laid the basis of his subsequent non-jurisdiction decision.[58]

Another example can be found in relation to *habeas corpus* proceedings. Such proceedings tend to fail in cases of enforced disappearance primarily because the executive authorities deny the arrest or detention and the sitting judges take this reply as an indication not to pursue the writ of *habeas corpus*. There have been situations where the state authorities denied detentions even in instances where the disappeared person was later released.[59] Moreover, relatives are hardly informed of the progress of these investigations and the authorities rarely involve them in the investigations. The example of one of the replies that the father of a disappeared son in Chechnya received is illustrative in this regard. The reply took the form of a standard letter informing him tersely that no information could be given about the criminal investigation into the disappearance. The indifference and carelessness was shown by the incorrect subject heading of the letter: 'Regarding your missing sister'.[60] This lack of communication ensures that relatives remain in their permanent state of anxiety.

The wall of uncooperative responses and obstruction by the authorities is not only a source of bitter frustration for relatives, but may also hamper access to important remedies. For instance, legal systems that grant access to the courts for relatives only through the police and prosecutors prove meaningless when the police refuse to register complaints in the first place. Additional problems occur when relatives either do not have the means to seek legal advice or do not even know where and how to get it.[61] The negative reactions of the authorities and the attendant impunity often leave families and friends of the disappeared person with a deep sense of anger and humiliation,[62] and feelings of injustice, defencelessness, frustration and despair.[63] Furthermore, testimonies show that these feelings have resulted in the loss of faith in the authorities and the public system in general.[64] This general distrust and the fear

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58 *Kurt v. Turkey* ECtHR (1998), para. 126.

59 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 118(a).

60 See *e.g.* Brandt Corstius (2006), p. 24 [translation by the author of: 'betreffende uw verloren zus'].

61 Blaauw & Lähteenmäki (2002), p. 769. For example, additional problems can arise because of poverty and illiteracy, as noted in: UNWGEID, Report of Mission to Columbia (2006), para. 60.

62 Linking Solidarity (2009), p. 18.

63 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 65(l).

64 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), Argumentos finales de los representantes de la presunta víctima en el caso Juan Humberto Sánchez contra Honduras, p. 16, para. IV.d.2, available at www.corteidh.or.cr; M. Crettol & A.M. La Rosa, 'The missing and transitional justice: the right to know and the fight against impunity' (2006) 88 *IRRC* 862 pp. 355-362, p. 359; Blaauw & Lähteenmäki (2002), p. 778; UNWGEID, Report of Mission to Columbia (2006), para. 60.

of reprisals often impede relatives in pursuing the demand for an investigation and prosecution.

Relatives have also encountered obstructive and obnoxious behaviour on the part of state authorities with respect to locating and identifying mortal remains. Often the authorities do not locate the remains at all.[65] In Argentina, for instance, the bodies were held for a long time as NN, meaning 'without identity', so that all evidence would be lost.[66] In cases where the mortal remains of the disappeared person have been found, the way in which the state authorities have handled them has not always been respectful. For example, the relatives in the *La Cantuta Case* received the mortal remains of their loved ones in milk cartons from the authorities.[67] Other problems with exhumations occur when the remains are found in mass graves. As the father of a disappeared daughter in Argentina phrased it:

> We are legally entitled to an exhumation, but there are five hundred people in this grave. We'd need the permission of every other family, and somehow that doesn't feel right. I've seen photos of other mass graves in Argentina – pits full of broken bones, all mixed together.[68]

Hence, exhumations provide relatives with some degree of certainty, but can be extremely confrontational and painful at the same time.

Lastly, the attitudes of the authorities with respect to compensation, if awarded at all, have also aggravated the suffering of relatives. For instance, compensation has been offered to relatives on condition that they would not pursue further protests and demands.[69] Another problem signalled with respect to compensation is the lack of implementation policies. The absence of such policies leaves room for political decisions as to who receives the compensation. As a result, the allocation of resources is prone to corruption and unfair distribution.[70]

In sum, relatives have been confronted with uncooperative, disrespectful and, at times, threatening conduct and attitudes by state authorities. They have encountered such negative behaviour in their search for the disappeared person and for justice, as

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65 See *e.g.* Scovazzi & Citroni (2007), pp. 360-362; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), paras. 121m and 200.

66 Interview with Hugo Argente (2009).

67 *La Cantuta v. Peru* IACtHR (2006), paras. 60(a) and 125 (a) (testimony of Carmen Rosa Amaro-Cóndor, sister of one of the disappeared victims). See also *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 105 (In this case, the mortal remains of the disappeared person had been found in an advanced state of decay with signs of immense violence, stuck between two rocks in a river. They were buried at the place where they were found without the consent of the relatives).

68 Feitlowitz (1998), p. 96 (testimony of Santiago).

69 Roundtable meeting 'Transitional Justice: Enforced Disappearance and Impunity', organised by Aim for Human Rights (31 March 2010).

70 *Ibid.*

well as in their attempt to obtain compensation. In this respect, the initial claim by relatives to have the disappeared person returned alive changes over the course of time as the chance of finding him or her alive decreases. The initial claim is then often transformed into a claim that includes memory, truth and justice.[71]

4.3.4 Legal impediments in bringing the perpetrators to justice

Besides the conduct of the authorities that leads to *de facto* impunity, legal impediments such as amnesty laws and statutes of limitation have further hampered relatives in finding justice through judicial processes against perpetrators. For instance, the *Punto Final* and *Obediencia Debida* laws in combination with two general pardons in Argentina passed in the late 1980s prevented any further prosecutions, granted immunity for crimes committed during the Junta regime and pardoned most military personnel who had been charged with serious crimes.[72] Similar amnesties have been implemented in the transitions from dictatorships to democracies throughout Latin America.[73] Relatives have been confronted with statutes of limitation in cases where the enforced disappearance was dealt with by the judiciary as regular deprivations of liberty or murder.[74]

4.3.5 Impact of an enforced disappearance on the family as a whole

Just as an enforced disappearance affects the personal lives of relatives, it also disturbs the family as a whole. The disappearance of one of the family members is likely to lead to changes in the economic and social situation of the family and likely to have a direct and clear impact on the family dynamics.[75]

Often, the disappeared person is the breadwinner of the family. As a consequence, the economic resources and corresponding possibilities of the family change dramatically.[76] Owing to the time and energy which are necessary for the search,

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71 See *e.g.* M. Mellibovsky, *Círculo de Amor sobre la Muerte* (Buenos Aires: Ediciones del Pensamiento Nacional 2006); Interview with Hugo Argente (2009).

72 See *e.g.* R. Lichtenfeld, 'Accountability in Argentina 20 Years Later Transitional Justice Maintains Momentum', (New York: International Center for Transitional Justice 2005), pp. 3-9.

73 Laplante (2008-2009), pp. 922-925; Y.Q. Naqvi, *Impediments to Exercising Jurisdiction over International Crimes* (The Hague: T.M.C. Asser Press 2010), pp. 78-85. See also Chapter 1 subsection 2.2.5 *supra*.

74 *Yurich v. Chile* HRC (2005), para. 5; *Trujillo-Oroza v. Bolivia* (reparations and costs) IACtHR Series C No. 92 (27 February 2002), paras. 39, 44 and 45.

75 *The 19 Tradesmen v. Colombia* IACtHR (2004), para. 72(g) (Beristain points out that the 'life plan', in Spanish 'proyecto de la vida', of the family is greatly affected. The life plan refers to '[…] the hopes of a person or a family with regard to his personal relationships, his family, personal, financial and professional development, and also his ability to be happy').

76 Linking Solidarity (2009), p. 18; *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 65(l).

the remaining relatives often enter economically very challenging times, trying to provide for a sufficient income whilst simultaneously looking for the disappeared relative. In addition, relatives sometimes face everyday administrative obstacles as a result of the disappearance. Obstacles that have been reported include legal obstacles to accessing bank accounts, as well as inheritance rights and the pensions of the disappeared person.[77] A disappearance is in this regard not the same as a deceased or executed person which has a clear legal status.

On a social level, families have experienced aggression and distrust from certain groups of the community around them. Particularly in cases of state repression, disappeared persons tend to be labelled as enemies. This label damages the reputation not only of the disappeared person, but also of the family as a whole. As a consequence, families have been excluded from social life.[78] This isolation has special destructive effects because social support is said to be of the utmost importance in facilitating the process of grief.[79] Social insecurity is also at stake when an enforced disappearance forces relatives to move. Incentives for leaving familiar surroundings include the protection of the family in the face of hostile attitudes by the authorities or the community. Also, seeking jobs may prove difficult when one is associated with the disappeared person. Such displacement has a great impact on the family because greater family bonds are cut. The new 'home' is away from all that is socially and culturally known to the displaced family.[80]

Besides the economic and social consequences, an enforced disappearance has an impact on the dynamics within a family. Permanent psychological stress within the family dominates the ambience and functioning of that family.[81] Stress affects children in a specific manner; they experience, directly or indirectly, the often-reported progressive deterioration of the family structure, which is characterised by fear, injustice and silence.[82] Children are particularly sensitive to the legacy of the silence that often dominates a family.[83] Such silence is believed to result from so-called 'emotional anaesthesia'. This phenomenon refers to the mechanisms adopted by relatives in order to protect themselves from the unbearable pain by pretending they are alright. They make a tacit agreement within the family not to talk about what

77 Linking Solidarity (2009), p. 18; Crettol & La Rosa (2006), p. 356.
78 UNWGEID, Annual report 1983, para. 147; *Molina-Theissen v. Guatemala* (reparations and costs) IACtHR Series C No. 108 (3 July 2004), final submissions by the IAComHR in respect of reparations in the case Molina Theissen, para. 22; Blaauw & Lähteenmäki (2002), pp. 768 and 774.
79 Blaauw & Lähteenmäki (2002), p. 770.
80 Beristain (2008), p. 48; *Molina-Theissen v. Guatemala* IACtHR (3 July 2004), final submissions by the IAComHR in respect of reparations in the case of Molina-Theissen, paras. 16-18.
81 See *e.g. Juan Humberto Sánchez v. Honduras* IACtHR (2003), final arguments of the representatives of the alleged victim in the case of Juan Humberto-Sánchez v. Honduras, p. 15, para. IV.d.1.
82 UNWGEID, Annual report 1983, para. 147.
83 *The 19 Tradesmen v. Colombia* IACtHR (2004), para. 72(g).

has happened with regard to the disappearance.[84] As the sister of the victim in the case *Molina Theissen v. Guatemala* stated: 'I believe that when they took my brother, my family disappeared too. It broke us up, we did not want to talk, in fact we never did about this.'[85] The impact on the child's psychological well-being has been described to the UNWGEID as a feeling of having been abandoned and of being marginalised. Such feelings cause permanent and prolonged stress. Unsympathetic reactions by the official authorities, the public and the environment increase the feeling of marginalisation and rejection.[86] As Madre Espen reflected on one point during the time when she searched for her disappeared son:

> My daughter, I have the image of her sitting on the doorstep while all her friends were playing. No one approached her, it was terrible, I can assure you, it was terrible and I had no idea what on earth to do […].[87] [Translation by the author].

At the same time, the disappearance of one of the parents leaves the other parent with multiple responsibilities including finding a sufficient income, the search, as well as assuming the role of both mother and father.[88]

As a result of all these changes, children have experienced 'isolation, sadness and social withdrawal'.[89] Reports show that these feelings adversely affect the physical well-being as well as the intellectual development of children.[90] Furthermore, the marginalisation, rejection and impotence in doing something about the situation may lead the child to reject society and resort to the use of drugs or other criminal behaviour.[91] Also, research shows that many children who have witnessed the disappearance of their parents or siblings show a disturbed relationship with adults out of fear, despair and feelings of being threatened.[92] This feeling of insecurity causes persons to perceive the world differently; it shakes the basic assumption that

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84 *Ibid*., para. 72(g).

85 Testimony of Ms. Ana Lucrecia Molina Theissen before the IACtHR in the public hearing of 26 April 2004 in San José, Costa Rica. ('Yo creo que cuando desaparecieron a mi hermano desapareció mi familia. Hubo un efecto de ruptura, no queríamos hablar, de hecho nunca lo hacemos sobre esto').

86 UNWGEID, Annual report 1983, para. 148; See also *Juan Humberto Sánchez v. Honduras* IACtHR (2003), final arguments of the representatives of the alleged victim in the case of Juan Humberto-Sánchez v. Honduras, p. 31.

87 Interview with Madre Espen (2009) ('Mi hija, yo tengo la figura de ella sentadita en la puerta mientras todas las amigas jugaban. Ninguna se acercaba, fue terrible, les puedo asegurar, que fue terrible yo tenía una impotencia que no sabía viste qué miércoles hacer […]').

88 *The 19 Tradesmen v. Colombia* IACtHR (2004), para. 72(g); Beristain (2008), p. 44.

89 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 65(l).

90 UNWGEID, Annual report 1983, para. 148.

91 *Ibid.*, para. 147; *The 19 Tradesmen v. Colombia* IACtHR (2004), para. 72(g); Beristain (2008), p. 34 (drug and alcohol abuse have been found to be common not only among children but also among adults as a response to the situation after the disappearance of a family member).

92 UNWGEID, Annual report 1983, para. 149.

the world is a relatively safe and secure place in which to live.[93] Inadequately dealing with these traumatic experiences among children is likely to have a profound effect on their lives, even years later.[94]

Another dilemma that some children have had to face relates to situations of adoption after the enforced disappearance of their biological parents. For instance, it has been discussed in Chapter 1 *supra* that during the various dictatorships in Latin America a significant number of children were born during the time when their mother was being held in secret detention, tortured and later killed. Others were simply taken away from their 'subversive' parents. Supporters of the regime had the possibility to adopt these children and give them a 'proper education'. At times, they were even integrated into the families of the torturers and executioners of their biological parents. The revelation of the real identity of their biological parents and the truth about their adoptive parents causes immense dilemmas and traumatic experiences.[95] Often the biological grandparents also learn of the possibility that their grandchild is still alive and will be looking for this child who was given another identity.[96]

In summary, the enforced disappearance of persons has important economic and social consequences for their relatives. Moreover, this crime affects the dynamics between the remaining family members in a serious manner. In particular, it has been reported that children experience a severe adverse psychological impact.

4.4 Impact of an enforced disappearance on society

Generally, the impact of enforced disappearance on society seems to depend on two interrelated factors, namely the general context in which such acts are committed, as well as the scale of the acts. As to the former, the way in which society has developed economically, socially and culturally is likely to colour the impact on society as a whole. Questions of stability in a country, whether society is rife with conflict, and the type of government in power, for example a dictatorship or a democracy, are all aspects that determine this impact. As to the second factor, the effects on society of a single incident of enforced disappearance differ from the impact of a prolonged and systematic practice of enforced disappearances. In general, there are three effects that can be discerned from the literature that prevail in societies where enforced disappearances occur: distrust in state authorities, a paralysing effect on critical thinking and expression, and a deprivation of the truth.

93 This is an effect that not only children experience. Survivors and relatives tend to show similar distrust.
94 Blaauw & Lähteenmäki (2002), p. 777.
95 *Ibid.* See also *Gelman v. Uruguay* IACtHR (2011), paras. 35(b), 103, 104 and 137.
96 See *e.g. Gelman v. Uruguay* IACtHR (2011), paras. 107-111.

Distrust in the authorities is caused by one of the common denominators of enforced disappearance, namely the fact that the act is carried out by, or with the support or acquiescence of the public authorities. The police, security forces or army are usually the perpetrators of the initial arrest or detention. Their apparatus, facilities and structure are used to complete the enforced disappearance. However, these institutions are in fact the institutions that should prevent crimes from being committed. Moreover, relatives turn to these institutions once an enforced disappearance has occurred. These institutions should have the role and have the means to protect and to search. In most cases of enforced disappearance this role is purposefully not fulfilled. In addition, in most cases the judiciary is influenced by the politics behind the enforced disappearance. Therefore, the judiciary often proves to be largely ineffective. The reason for this can be found in the purpose of escaping accountability, making impunity the rule rather than the exception. Consequently, the alleged perpetrators often remain in office. The malfunctioning of these institutions is likely to result in a feeling of powerlessness and defencelessness among the population and a general distrust towards these institutions. This is a tenacious effect because this perception does not easily change when the violations cease.[97]

The second common effect is a result of the fact that an enforced disappearance is often committed with the overall aim of spreading terror among a certain section of the population. The crime is aimed at preventing the population from collaborating with dissidents or from disobeying the laws of the regime. The long-term effect of creating fear has been described as creating a 'culture of fear';[98] a culture that generally occasions a chilling effect that paralyses critical or undesired behaviour towards the regime.[99] The phenomenon of enforced disappearance is a cruel but 'suitable' tool to achieve such an effect. Commonly no-one knows the answer to questions such as: what happens to persons that disappeared, who is next and what behaviour triggers the risk of disappearing? At the same time, the perpetrators carry out the acts in such a way that it is clear that conformist behaviour towards the regime is not punished. As a result, not only the disappeared person and his relatives, but also social forces such as civil society are affected. People are more likely to shy away from involvement in politically sensitive activities. In this sense, the aim of spreading fear, together with the arbitrariness with which citizens are subjected to this human rights violation, has resulted in a qualification of this practice as 'state terrorism', in particular when practised on a large scale.[100] This label has been attached to the practice of enforced

97 Ramón Chornet (1986), p. 74; *Molina-Theissen v. Guatemala* IACtHR (3 July 2004), final submissions by the IAComHR in respect of reparations in the case of Molina-Theissen, para. 34.

98 Roniger & Sznajder (1999), p. 29, footnote 43.

99 *Molina-Theissen v. Guatemala* IACtHR (3 July 2004), final submissions by the IAComHR in respect of reparations in the case of Molina-Theissen, para. 30.

100 See *e.g. La Cantuta v. Peru* IACtHR (2006), para. 61 (c) (*cf.* the separate concurring opinion of Judge A.A. Cançado Trindade, para. 12); *Goiburú et al. v. Paraguay* IACtHR (2006), paras. 66 and 72.

disappearance in light of the defining features of state terror: unpredictable violence and, at the same time, the denial and concealment of the violence.[101]

Lastly, given the ever so often continuing lack of clarification, society as a whole is deprived of knowing the truth.[102] Truth in this sense means being able to know what is going on in their society and what happened in the past. The 'information' factor is said to be the most important remedy for a society in which the population did not know for a long time who the perpetrators were, who the victims were, what happened, and the location of the corpses of those who disappeared.[103] At the same time, it proves difficult to talk about society as a whole because obviously certain members of society participated in the enforced disappearance while others knew tacitly about it or openly supported the regime.

In summary, enforced disappearance, especially when practised on a large scale, affects society as a whole. The use of this human rights violation causes chilling effects on the population or a section thereof, and spreads fear and uncertainty. Also, this crime tends to result in a decrease in the level of confidence in the state authorities and institutions because of the impunity inherent in this crime. Lastly, it is said that society as a whole is deprived of knowing the truth about what happened due to the lack of investigations and the concealment of the crime.

4.5 The evaluative framework: five main causes of victims' suffering and the measures that contribute either to preventing them in the first place or to minimising their effects

The previous three sections have shed light on the most common effects on and experiences of the disappeared person, his or her family and society as a whole. Based on this overview, it is possible to discern five main causes of the suffering that the persons affected experience and which typify their predicament: (1) no trace of the disappeared person due to denials by the state authorities; (2) uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person; (3) *de facto* and *de jure* impunity; (4) an unsafe environment to carry out the search and other activities related to the enforced disappearance; and (5) obstacles for victims to continue their 'normal' life. These five main causes have generated extreme and ongoing anxiety,

101 Green & Ward (2004), pp. 106 and 107.

102 Scovazzi & Citroni (2007), p. 2; *Molina-Theissen v. Guatemala* IACtHR (3 July 2004), final submissions by the IAComHR in respect of reparations in the case of Molina-Theissen, para. 33; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 197 (the Commission alleged society's right to truth); *Trujillo-Oroza v. Bolivia* IACtHR (2002), para. 114.

103 Ramón Chornet (1986), p. 82.

mental and physical pain and suffering, and, at times, serious damage to the victims' sense of dignity. These five main causes cover a continuum starting from the moment of an enforced disappearance and extending to the obstacles encountered in the search for the disappeared person, in the search for justice and in coming to terms with what has happened.

Before explaining these five main causes in more detail, it is useful to pause at the term 'victim'. The term 'victim' for the purpose of describing the experiences of victims in this book includes the disappeared person and his or her relatives. While recognising the detrimental effects of enforced disappearance on society, society as a whole is omitted from this understanding of 'experiences of victims'. The reason for this limitation is that 'society' as such is difficult to conceive as an identifiable victim for the purpose of international (quasi-)adjudicatory processes. Society, after all, also includes the perpetrators or persons who tacitly agreed to the crimes. Moreover, the effects on society are more complex to put one's finger on than on the individual suffering. Nonetheless, some of the five main causes of victims' suffering reflect the effects on society through the experiences of the (formerly) disappeared persons and their relatives. As such, the measures that would alleviate or reduce the victims' suffering may address a broader societal issue beyond a specific case of enforced disappearance.

The following subsections elaborate on the five main causes of victims' suffering for the purpose of this book. Additionally, these subsections also strive to demonstrate what measures would remove or minimise the five main causes of victims' suffering and their effects, based on the stories of victims and the relevant literature.

4.5.1 No trace of the disappeared person and denials by the state authorities

One of the most striking characteristics of enforced disappearance is that there is no trace of the disappeared person and that the state authorities deny his or her detention and/or execution. This predicament is the primary and underlying cause of the victims' suffering. As a result of this situation, the disappeared person, if he or she is still alive, is at the complete mercy of the state authorities, without having any contact with the outside world. The term 'outside world' is seen from the perspective of the disappeared person and refers to persons such as relatives, lawyers and judges. At the same time, no information about the disappeared person is also the essence of the grave suffering of relatives. Upon analysis, one could say that, if the person is still alive, regular contact with the outside world is the most essential measure to remove this first main cause of suffering.

Contact with the outside world is also closely related to preventing this crime. The possibility to have such contact in fact prevents the person from disappearing or, if he or she does disappear, it increases the possibility that he or she will return alive to the regular justice system to receive a fair trial or to be released. There is actually

a period of time between the moment of apprehension and the moment of certainty that an enforced disappearance is occurring during which it is not yet clear whether an enforced disappearance is at stake. Such a situation arises, for instance, when the disappeared person surfaces shortly after his or her apprehension and is able to contact his or her relatives. As such, measures that minimise the risk in the first place that state agents apprehend someone without leaving a trace of that person has an important preventive function.

4.5.2 Uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person

The second main cause of victims' suffering centres on the efforts of the state authorities in discovering what has happened to the disappeared person and their attitude towards relatives. When it is believed that the person is still alive, this main cause relates to the conduct of state authorities in locating the person who has disappeared. When the person is dead, it covers the search for, and the returning of, his or her remains.

Relatives are largely dependent on a thorough investigation by the state authorities for locating their loved ones. The different stages of apprehension, detention and possible transferrals are intended to design a complex maze in which the person disappears. This maze makes it virtually impossible for relatives to trace the disappeared person. However, the experiences of relatives show that state authorities are reluctant to initiate a search in the first place. When they do launch an investigation, the investigation is conducted superficially which results in illusionary investigations. The resultant dependence on the state authorities calls for adequate avenues to which relatives can avail themselves in order to initiate and participate in the search. In this respect, Nesiah points to an important aspect by addressing the need for laws and institutions that enable citizens to have access to state records in ways that guarantee fundamental rights and freedoms. In his view, the classification of documents as secret should be conditioned by a high standard of proof to classify them as such.[104]

Offensive and uncooperative conduct by the state authorities is also reported when it becomes clear that the disappeared person has died. Processes of exhumation and the identification of remains are extremely sensitive, but in practice have been carried out by the state in a disrespectful manner. In order to avoid or reduce the suffering as a result of such conduct, state authorities should make serious attempts to locate the remains, to exhume them and to return them to the family in a respectful

104 V. Nesiah, 'Overcoming tensions between family and judicial procedures' (2002) 84 *IRRC* 848 pp. 823-844, at pp. 834 and 835.

manner. In this respect, Beristain asserts that the longer relatives do not know the truth about what has happened, the more detrimental the impact becomes.[105] The possession of the remains proves that the person has died, sheds light on the facts of what happened to the person and facilitates the beginning of the acceptance that the person is dead.[106] Another important spin-off effect is the possibility for relatives to cease the search. Experts have drawn attention to the need to ask relatives whether they want to see the body, if the remains are found, and to inform them about the risks of re-traumatisation. In the preparation of relatives for such processes, attention should be paid to the conditions and state in which the body will be encountered. Ideally, there should be psychological support and care before, during and after the process of disclosing the remains.[107] At least a careful consultation process is pertinent for a satisfying result.

4.5.3 *De facto* and *de jure* impunity

The third main cause of victims' suffering is the *de facto* and *de jure* impunity that accompanies enforced disappearance. Relatives and formerly disappeared persons have encountered many practical and legal impediments in their fight for justice. A criminal investigation and legal proceedings are, first and foremost, important because this counters the feeling among victims that they are being punished while the perpetrators are not held to account for their crimes. As such, the investigation to bring the perpetrators to justice is part of recovering the dignity of the formerly disappeared person and his or her relatives. In addition, Beristain found that many relatives search for an explanation as to what happened and why. They search for reasons behind the crime in order to make sense of the situation that they still find themselves in. With their efforts to request an adequate investigation relatives not only seek to achieve that justice is done, but also try to satisfy their longing for this explanation.[108] In this respect, Méndez justifies prosecution by pointing at the victim as the centre of the need to redress wrongs. Whereas, according to Mendéz, victims do not have a right to a certain type or degree of penalty, 'they do have a right to see justice done by means of a process.'[109] For these reasons, the whole process in which the perpetrators are brought to justice and the way in which the legal proceedings are conducted are important for restoring the dignity of the formerly disappeared persons and their relatives. Being involved and being treated fairly and diligently seem to be

105 Beristain (2008), p. 42; *The 19 Tradesmen v. Colombia* IACtHR (2004), para. 72(g).
106 *Ibid*., p. 45.
107 Blaauw & Lähteenmäki (2002), p. 778.
108 Beristain (2008), pp. 34 and 35; *Juan Humberto Sánchez v. Honduras* IACtHR (2003), final arguments of the representatives of the alleged victim in the case of Juan Humberto-Sánchez v. Honduras, pp. 16 and 29.
109 Méndez (1997), p. 277.

of vital importance in order for such processes to have a meaningful function in this respect.

Having seen that relatives are often confronted with not knowing the truth and with blunt denials, it is useful to examine the role of criminal investigations in more detail. Ideally, criminal proceedings contribute to both finding the truth and holding the perpetrators accountable. Experts have found that the truth and acknowledgment of responsibility contribute to restoring the dignity of victims. At the same time, criminal proceedings have their limits in light of discovering the truth. Criminal investigations are intended to respond to the goals of the prosecution and are thereby not always the most adequate instrument to finding the whole truth.[110] On the contrary, confronted with a possible conviction and punitive sanctions, the accused may be less likely to tell the truth.[111] Additionally, account must be taken of the evidentiary difficulties inherent in enforced disappearance due to the secrecy and denials.[112] Therefore, ascertaining the truth often requires also non-judicial procedures for gathering the relevant information. Literature mentions the following examples of institutions that can carry out such procedures: special working groups created for this purpose, national human rights commissions and truth and reconciliation commissions. Gathering information includes identifying the bodies of disappeared persons when they have been killed, notifying the relatives or other interested persons and instructing the relevant institutions such as the police and the army to provide all relevant information.[113] Thus, whereas the criminal justice system has the potential to contribute to disclosing information, other complementary ways of truth finding are also necessary.

Another problem signalled in relation to criminal proceedings, in particular when enforced disappearance is practised on a systematic scale, is that the judicial system is incapable of dealing with all direct perpetrators as well as all the minds behind the crimes.[114] In response to this problem, Méndez argues that selectivity is legitimate

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110 Crettol & La Rosa (2006), p. 359 (In addition to pointing out the functions of the criminal proceedings, the authors address the problem that people are rarely willing to prosecute those responsible out of fear of reprisals or distrust in the judiciary).

111 For an overview of the literature and vigorous academic debates on the proper way to address past violations, see Chapter 8 subsection 6.4.

112 The importance of, for instance, exhumations does not only lie in establishing the fate of the disappeared person, but also in providing essential objective and scientific evidence for conducting trials against the alleged perpetrators.

113 Crettol & La Rosa (2006), p. 357.

114 Interview with Ernesto Moreau, Buenos Aires, Argentina, 2 September 2009 (2009). Ernesto Moreau has been involved in the fight against impunity in many ways. He is the ex-president and member of the *Consejo Vigilancia de la Asociación de Abogados* in Buenos Aires, Argentina. He is also a member of the *Asociacion Americana de Juristas* and is actively involved in the *Asamblea Permanente de los Derechos Humanos*. In addition, he is an associate judge of the *Corte Suprema de Justicia de la provincia de Buenos Aires*.

'as long as the rules are clear and do not discriminate on the basis of a proscribed category.'[115] In fact, he argues that this problem is inherent in every justice system.

For the purpose of restoring dignity, it is also worth noting that opinions differ as to the exact way in which the trials should be carried out and in respect to the importance of the punishment imposed. For instance, the interviews conducted in Argentina show both satisfaction and dissatisfaction with respect to the trials conducted after the laws granting amnesty and pardon were annulled. Some people criticise the trials because some of the most notorious actors in the regime, such as Videla, were able to serve their sentence at home.[116] Others are indifferent to the way in which perpetrators have to serve their sentence and find it more important that society is aware of the atrocities that a perpetrator was able to commit.[117] Despite these different views, it is clear that most relatives demand justice up to the highest level of command.

In summary, measures that contribute to restoring the dignity of the disappeared person and relatives relate to identifying the perpetrators and bringing them to justice. Also, an acknowledgement of the violation and pronouncing the truth are important measures. Bringing the perpetrators to justice warrants the disclosure of as much information and evidence as possible to relatives, lawyers and judges involved in the case. In this respect, lawyers and judges should be able to function adequately. It must be recognised that where the regime in power is behind the enforced disappearance, these normative demands are most likely an idle hope. Such demands seem to have an effect on the national level only when the violation is neither part of a general policy nor is backed-up by the government, or has occurred before a regime change. Nevertheless, states can still be held accountable on the international level, even when implicated in the violation, with the aim of putting pressure on states to end the enforced disappearance and to redress the situation.

4.5.4 An unsafe environment to conduct the search and other activities related to the enforced disappearance

The fourth main cause of victims' suffering is the ever so often unsafe environment for relatives to conduct the search and other activities related to the enforced disappearance. An unsafe environment may include being subject to threats or being obstructed in the search for the disappeared person and in seeking justice. In addition, this main cause addresses the situation where relatives are confronted with the alleged perpetrators remaining in office. Such a situation means that relatives are confronted with them time and time again. Additionally, formerly disappeared persons may

115 Méndez (1997), p. 274.
116 Interview with Madre Espen (2009).
117 Interview with Hugo Argente (2009).

also be confronted with an equally unsafe environment upon their release. A famous slogan that was promulgated and promoted after many of the dictatorships in Latin America was that of 'nunca más' (this never again).[118] While this slogan was intended to call for measures after the crimes had occurred, the larger issue at hand is how the state apparatus must be organised so that state officials cannot and do not commit enforced disappearances and are not able to hinder searching relatives.

Having identified this cause of victims' suffering, the next step is to examine what measures would either remove or minimise the effects of this main cause. The field of criminology could offer a useful perspective on this issue, as discussed in the following paragraphs. As a preliminary remark, it must be recognised that this perspective is relevant to protecting possible future victims. Future victims may include relatives who search for their disappeared loved one. At the same time, it is believed that implementing the measures proposed therein restore faith in the state institutions and generate a feeling of safety for relatives and persons who are released after having been subjected to an enforced disappearance.

Criminal behaviour by state agents is determined by a complexity of factors that have been studied in many different fields of science. As Rothe and Mullins recognise, the factors that play a role in state crime[119] are more complex than those in ordinary crimes, including 'history, culture, politics, ideology, international relations, law and economics.'[120] This current research is not the place to elaborate in great depth on the factors that exactly determine the behaviour of state agents. Instead, it draws on the field of criminology, which has contributed to explaining crimes committed by state agents. This field addresses the question of what measures deter the commission of

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118 'Nunca más' was the title given to the report by the Argentine National Commission on the Disappeared (Comisión Nacional sobre la Desaparición de Personas (CONADEP)) published in 1984. One year later, the report *Brasil: Nunca Mais* was written, a private initiative to explore the human rights violations committed under the military regime.

119 Green & Ward (2004); D. Rothe & C.W. Mullins*, Symbolic gestures and the generation of global social control. The International Criminal Court* (Plymouth: Lexington Books 2006); D. Rothe, 'Beyond the Law: The Reagan Administration and Nicaragua' (2009) 17 *Crit Crim* 1 pp. 49-67. On the definition of 'state crime', see D. Kauzlarich & R.C. Kramer*, Crimes of the American nuclear state: at home and abroad* (Boston: Northeastern University Press 1998), pp. 6-8; Green & Ward (2004), pp. 1-10; Rothe & Mullins (2006), pp. 5 and 6; J.I. Ross (ed.), *Controlling State Crime*, 2nd edn. (New Brunswick, NJ: Transaction Publishers, 2000) (The definition of state crime in criminology has been the subject of vigorous academic debate. Still, the most salient features seem to be the involvement of *state agents* in *illegal acts*. The controversy pertains to the meaning of these two terms and how they should be defined. Despite the controversy surrounding the definition, there seems to be a general agreement that human rights norms, or the principles underlying these norms, are one of the defining factors. As a result, it seems uncontroversial that gross human rights violations, such as enforced disappearance, fall within the scope of this definition.) See also *Goiburú et al. v. Paraguay* IACtHR (2006), separate opinion of Judge Cancado Trindade, paras. 20-25 (advocating the existence of the notion of 'state crime').

120 Rothe & Mullins (2006), p. 9.

this kind of crime. The interface between criminology and human rights law in this respect is the common concern with the prevention of crimes by state agents, such as enforced disappearances. This, in turn, contributes to a safe environment. Hence, it is useful to turn to this field of science to discern the relevant measures that states should take in order to deter state agents from committing this crime.

4.5.4.1 Preventing state agents from committing enforced disappearances: a criminologist perspective

Theories on controlling state crime focus on explaining why states, as entities and as collections of individuals, resort to illegal means. In this respect, a thorough understanding of state crime provides an insight into the constraint and control mechanisms that influence the behaviour of (potential) perpetrators. Several pioneering studies have been published on this topic. One model by Kauzlarich and Kramer, the integrated theoretical model of state-corporate crime, which was initially developed to explain state-corporate crime,[121] has been relied upon in various prominent studies on state crime. These studies on state crime synthesised this model in order to explore state crimes such as torture, state terror and violations of international criminal law.

The integrated model of Kauzlarich and Kramer has proven to be particularly useful in exploring state crime because it integrates three levels of analysis and links them with three catalysts for action. Drawing on social-psychology theories, organisational theories and theories of political economy, the model proposes that organisational crime should be analysed on three different levels: the individual level (the micro level), the organisational level (the meso level) and the state level (the macro level). Kauzlarich and Kramer assert that these three levels are relevant to organised criminal behaviour. In their view, actions by individuals are influenced by personal factors and goals, such as personality and striving for power, by attitudes of the organisation they function in, and by state policies and action. They combine these three levels of analysis with three catalysts for action that influence whether state agents resort to organisational crime or not. These three catalysts are: (1) motivation or performance pressure, (2) opportunity structure and (3) the operationality of social control. The emphasis of the first catalyst, motivation or performance pressure, is on goal attainment. When a strong culture of realising certain goals is present at all three levels of analysis, an individual is more susceptible to pursuing criminal behaviour to attain that goal. Furthermore, factors stimulating motivation include cultures of competition, pressure from the organisation, and social forces in the organisation. The second catalyst of 'opportunities' suggests that a scarcity of legal means in relation to the aspired goals increases the likelihood of individuals seeking

121 Kauzlarich & Kramer (1998) (The term state-corporate crime describes the crime in which corporations and government agencies work together).

other illegal means. Opportunities are further said to include access to resources, the attractiveness of the illegal means, task segregation and the normalisation of deviance. The more the opportunities are limited, the less likely it will be that state agents commit crimes. The third catalyst proposes that the implementation of social control mechanisms on all three levels is likely to produce organisations with a strong culture favouring compliance with laws and regulations. Individuals functioning within these organisations will in turn develop behaviour that conforms to these norms. Social control mechanisms include legal sanctions, political pressure, social movements, stimulating a culture of compliance, codes of conduct, a reward structure for behaviour which conforms with the law, control procedures and personal morality.[122] In sum, according to this model organisational crime is believed to result from (1) pressure for goal attainment and (2) the availability of attractive illegal opportunities together with (3) an absence or weakness of social control mechanisms.

Drawing on the model discussed above, two studies are particularly illustrative for its application to state crime. In their work, Green and Ward use the model of Kauzlarich and Kramer as a basis to explore the phenomenon of state terror. They suggest that the underlying premise of this model that organisations tend to be dominated by rationality is in particular applicable to the military as an institution and to dictatorial regimes.[123] On the basis of several studies, they find that forms of control that may help to restrain state terror include 'moral norms proscribing violence and cruelty, national and international law, domestic and transnational civil society, and pressure from other states.'[124] They also refer to studies that show that techniques of neutralising the crimes associated with terror are often employed to ease the consciousness of the perpetrators. They quote as an example the case of Argentina where the moral unease in carrying out acts of terror was neutralised by, *inter alia*, 'the religious and paranoid world-view fostered by the military leadership':

> From the detention centers themselves survivors reported the repressors' initial hesitation and guilt in regard to torturing and executing teenagers, but these feelings were always allayed in the 'final solution' context ('it's better not to let those with this social restlessness grow up') or by direct resort to the underlying mythological infrastructure of the 'dirty war'.'[125]

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122 R.C. Kramer, R.J. Michalowski, *et al.*, 'The Origins and Development of the Concept and Theory of State-Corporate Crime' (2002) 48 *Crime & Delinquency* 2 pp. 263-282, at pp. 273-275.

123 Green & Ward (2004), pp. 108, 111-113 (Besides adherence to rationality, the authors argue that state terror is also driven by irrational factors. In light of the mostly unrealistic goals, it becomes difficult for state agents to make rational choices. Also, the threat is mostly a perceived threat rather than a real threat, which is used as a pretext for resorting to state terror).

124 Green & Ward (2004), p. 110.

125 Green & Ward (2004), p. 114 (citing from F. Graziano, *Divine Violence. Spectacle, Psychosexuality and Radical Christianity in the Argentine "Dirty War"*, Boulder, CO: Westview 1992, p. 31).

Moreover, the study confirms that control procedures are an important factor to limit state crime. A relatively decentralised structure of command may produce 'a very intense and relatively undiscriminating use of violent repression [that reflects] specific subculture of the repressors and their latent values and orientations rather than direct orders from above.'[126] Thus a greater autonomy may play a role in facilitating state terror. On a less systematic scale, Green and Ward also discuss police violence. They stress the importance of police culture on the individual members of the police. They argue that police culture is generally learnt by ways of acting, informal rules and values that are taught by colleagues.[127] Also on this level, civil society can generate pressure for conformity with human rights norms.[128] Thus, Green and Ward show that moral, social and legal norms are indispensable controls of state crime, just as they are for organisational crime. Furthermore, they stress the importance of centralised control proceedings for acts of state agents and of civil society as a 'watchdog' for the behaviour of the state.

Another application of the model by Kauzlarich and Kramer to state crime is presented by Rothe and Mullins. They refine the model of Kauzlarich and Kramer by distinguishing between constraints and controls and by introducing a fourth level of analysis, namely the international level. The distinction between constraints and controls elucidates the different forms of social controls that deter state agents from committing crimes. Constraints are potential barriers that stand to make the commitment of a crime either riskier or less successful.[129] Such constraints are not expected to fully control or block state or organisational criminal behaviour, nor are they aimed at penalising violators. Rothe and Mullins consider constraints to be, for instance, political pressure, media scrutiny, social movements, internal oversight and socialization.[130] In contrast to constraints, controls are defined as mechanisms that have the ability to stave off or entirely prevent criminal actions or to address such violations as a reactive mechanism in the form of accountability. They argue that this is typically in the form of formal social controls, such as laws and/or regulations that can act as a deterrent or can provide accountability, punishment, or sanctions.[131] Also, at the individual level, Rothe and Mullins mention the perception of the reality of law application. The added value of this study to this area of attention is the confirmation of laws, regulations and belief in sanctions or punitive measures as control mechanisms.[132] They stipulate that '[q]uite simply, when actors can act

126 *Ibid.*, p. 115.
127 *Ibid.*, p. 85.
128 *Ibid.*, p. 82.
129 Rothe (2009), p. 52.
130 *Ibid.*, p. 53.
131 Rothe & Mullins (2006), p. 14.
132 *Ibid.*, pp. 12 and 26.

with impunity, some will choose to do so.'[133] They stipulate that controls can be 'tangible (the firing of an agent) or symbolic (*e.g.* an official statement of denial or a promise to investigate).'[134] They note, however, that inherent in state crime is that the state is able to ignore domestic legal codes and other controls. Therefore, they also stress that media organisations, interest groups and non-governmental organisations as 'external controls' play a large role in blocking the criminal behaviour of state agents. In addition, based on several studies they are able to confirm that the absence of strong institutions encourages potential motivation and opportunities for organised criminal activity. This increased likelihood is due to a vacuum of formal and informal social controls.

4.5.4.2 Measures contributing to a safe environment for relatives of disappeared persons

The previous subsection demonstrated certain measures that, based on criminological research, should deter the commission of enforced disappearance. The following measures deriving from these models are useful to highlight in the context of the present study.[135] The criminological studies stress the importance of legal and disciplinary sanctions as control mechanisms. Furthermore, the actual enforcement of the law is also vital to give the legal norms practical effect. The importance of repressive measures is aptly described by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment ('CPT') in this regard:

> The credibility of the prohibition of torture and other forms of ill-treatment is undermined each time officials responsible for such offences are not held to account for their actions. If the emergence of information indicative of ill-treatment is not followed by a prompt and effective response, those minded to ill-treat persons deprived of their liberty will quickly come to believe – and with very good reason – that they can do so with impunity. […]
> Conversely, when officials who order, authorise, condone or perpetrate torture and ill-treatment are brought to justice for their acts or omissions, an unequivocal message is delivered that such conduct will not be tolerated. Apart from its considerable deterrent value, this message will reassure the general public that no one is above the law, not even those responsible for upholding it. […][136]

The deterrent effect of criminal law, however, is not undisputed. There are discourses that strongly believe that combating impunity indeed has a deterrent effect. This

133 *Ibid.*, p. 27.
134 Rothe & Mullins (2006), p. 14.
135 It must be recognised that human rights law is not able to address all the social, psychological, organisational and institutional factors that determine whether a state agent resorts to this crime.
136 CoE, '14th General Report on the CPT's activities' CPT/Inf (2004) 28, para. 25.

deterrence is confirmed by several commentators who argue that the duty to prosecute is necessary to deter future crimes, to deter vigilante justice, to promote reconciliation and to reinforce respect for the rule of law.[137] Deterrence as an underlying rationale behind investigation and punishment can also be found extensively in the literature on international criminal responsibility. The focus on individual responsibility for international crimes is based on the theory that individual accountability and punishment will serve as the best deterrent.[138] In contrast, Méndez, for instance, argues that justifying prosecutions solely on the basis of their deterrent effect 'does not provide sufficient foundation on which to advocate trials.'[139] This effect is a mere hope rather than a proven reality. He notes that in some countries one can show that impunity leads to the encouragement of further human rights violations, but that the converse is not necessarily true. Nevertheless, the function of trials can be found in the task of separating known perpetrators from law enforcement bodies and other positions of authority. This task of the state corresponds to 'a right to new, reorganized, and accountable institutions' endowed upon society.[140] As such, punishment draws a line between the present and future, on the one hand, and the past, on the other.[141] He further notes that prosecutions and punishment are means to distinguish between individual responsibility and collective guilt. This distinction helps to accept that the armed forces and executive branches are legitimate institutions by assigning guilt to individual members rather than the institutions themselves.[142] As such, punishment contributes to the restoration of confidence in public institutions. Thus, overall it appears to be possible to conclude that investigation and punishment serve to deter crimes by state agents or, at the very least, are important to restore faith in public institutions.

Additionally, the criminology models mention that subcultures within an organisation are also determinative for the behaviour of state agents. Suggestions for defying subcultures of deviance include codes of conduct and reward structures for compliance. Literature outside the field of criminology supports the argument for strong institutions with strict control procedures over the behaviour of state agents. In this regard, it is believed that strong supervision procedures are in particular warranted when operations are carried out under emergency regulations.[143] This notion of institutional responses also serves to create trust in state institutions. Lastly,

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137 M. Scharf, 'The Letter of the Law: the Scope of the International Legal Obligation to Prosecute Human Rights Crimes' (1996) 59 *Law & Contemp Probs* 4 pp. 41-61, at p. 42.

138 See *e.g.* S. Ratner & J. Abrams*, Accountability for human rights atrocities in international law: beyond the Nuremberg legacy*, 2nd edn. (Oxford: Oxford University Press 2001), p. 15.

139 Méndez (1997), p. 275.

140 *Ibid.*, p. 261.

141 See also Laplante (2008-2009), p. 921.

142 Méndez (1997), p. 274-279.

143 Nesiah (2002), p. 835.

all three criminology studies assign a prominent role to civil society and its ability to address issues of behaviour that violates human rights.

Obviously, the measures mentioned in the above paragraphs have a wider effect than only creating a safe environment for victims, extending to possible future victims. In fact, these measures are actually of a general nature for the prevention of enforced disappearances, to the advantage of all members of society. This step from the specific to the general is especially applicable to enforced disappearance because this violation is often employed to serve a broader societal purpose, most notably, spreading terror among the population.

In summary, a safe environment refers to safety and security in the lives of relatives and formerly disappeared persons to carry out their activities related to the enforced disappearance. Such a safe environment thereby includes not being subject to either threats or obstruction in the search for the disappeared person. It may even include protective measures against disappearing of relatives themselves. The creation of such a safe environment also means taking measures to restore confidence in state authorities and institutions and to ensure that there is no repetition. According to the three criminological models described above, such measures could include: clear legal provisions combating enforced disappearances, supervision mechanisms to monitor compliance with human rights, effective implementation of the law in terms of accountability and punishment, codes of conduct that are implemented to create a culture of compliance with human rights, as well as training and education for the executive branch. Furthermore, civil society must be able to act freely and have access to important and relevant documents to be able to function as a watchdog and, thereby, as a constraint that enforced disappearance are less likely to be committed. In addition to these institutional measures, it must be noted that the historical preservation of what happened is believed to contribute to the prevention of human rights violations in the future.[144]

4.5.5 Obstacles for victims to continue their 'normal' life

The fifth main cause of victims' suffering captures the psychological, social and practical need for (formerly) disappeared persons and relatives to continue their

144 UN Sub-Commission, 'The administration of justice and the human rights of detainees. Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119' (2 October 1997) UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 (hereinafter: 'UN Revised final report by Joinet on impunity (1997)'), para. 17. See also UNComHR, 'Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights' (8 February 2006) UN Doc. E/CN.4/2006/91 (hereinafter: 'UNComHR Study on the Right to know the Truth (2006)'), para. 58.

'normal' life.[145] First and foremost, official disclosure and acknowledgement have been important preconditions for socially supporting the families.[146] In this respect, Beristain has found that victims of gross human rights violations who have been able to confront the consequences of the human rights violation within a context of social support have also been able to deal with the psychological consequences much more effectively.[147] In addition, it is worth drawing once more from Beristain's research, which shows that the following measures are of great importance in restoring opportunities for survivors and relatives:

- Support in areas such as health;
- Collective and personal care programmes that take into account the social and political nature of the crime and that include specific psychological support that is specialised in the consequences of an enforced disappearance;
- Acknowledgment by society, such as a monument that recognises the dignity of the victims and provides some public expression;
- Financial compensation in order to contribute to the education and training of the children of the family of disappeared persons.[148]

In relation to the last issue, it is noteworthy that the one who disappears is in many cases the family breadwinner. Consequently, the poverty in which some families find themselves in the aftermath of a disappearance can be strenuous and hugely problematic. This is a problem that financial compensation awarded after many years of struggling does not address.[149] In addition, attention must be paid to the needs of children whose parent or parents have disappeared.

In summary, addressing this fifth main cause of victims' suffering means having possibilities to obtain compensation and to remember the disappeared person by ways of the appropriate rituals tailored to the wishes of the relatives. Damage to

145 One important field that addresses the needs of victims is the area of reparations. Reparations for human rights violations have been the subject of extensive academic research and have been discussed thoroughly in the literature. See *e.g.* Beristain (2008), p. 32 (offering an extremely useful and thorough research on reparations for victims of gross human rights violations. He takes as a starting point the impact on the victims. It must be noted that Beristain's research focuses on Latin America). See also Blaauw & Lähteenmäki (2002), p. 780; C. Ferstman, M. Goetz & A. Stephens (eds.), *Reparations for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making* (Leiden: Martinus Nijhoff Publishers 2009); K. De Feyter, S. Parmentier, M. Bossuyt & P. Lemmens (eds.), *Out of the ashes: reparation for victims of gross and systematic human rights violations* (Antwerp: Intersentia 2005).

146 Blaauw & Lähteenmäki (2002), pp. 768 and 776.

147 Beristain (2008), p. 39.

148 *The 19 Tradesmen v. Colombia* IACtHR (2004), para. 72(g).

149 Linking Solidarity (2009), p. 113; Interview with Ewoud Plate and Jan de Vries (2010).

dignity and the loss of opportunities may warrant psychological, economic and social support as well.

4.6 Concluding remarks

This chapter has sought to explain how the present study defines 'the experiences of victims', which is an essential element of the main question to be answered in this book. One of the premises of this study is that the ICPPED should be applied and interpreted by the CED taking due account of the experiences of victims. That being the case, this chapter identified five main causes of the suffering of persons affected by an enforced disappearance.

Sections 2-4 of this chapter illustrated that enforced disappearance and the obstacles encountered as a result of this human rights violation cause immense suffering to the disappeared person and to his or her relatives in almost every aspect of their lives. Accordingly, experiences of (formerly) disappeared persons and their relatives are used as a basis to define 'experiences of victims'. Additionally, there are good reasons to assert that the society in which the violation occurs is affected as a whole, especially when the perpetrators employ it on a large scale and with the aim of instilling terror among certain sections of the population. For the purpose of defining an evaluative framework, however, this book concentrates on the experiences of disappeared persons and their relatives. Accordingly, section 5 of this chapter discerned five main causes of victims' suffering that embody these experiences. These five main causes are:

(1) no trace of the disappeared person due to denials by the state authorities;
(2) uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person;
(3) *de facto* and *de jure* impunity;
(4) an unsafe environment to carry out the search and other activities related to the enforced disappearance; and
(5) obstacles for victims to continue their 'normal' life.

Accordingly, this section indicated what action could avoid, reduce or minimise the effects of the five main causes of victims' suffering based on stories of victims and according to the relevant literature. It must be noted that the importance attributed to each of these main causes is coloured by the degree of the state's involvement in this human rights violation, the context of each case and the specific experience of each individual victim.

This study argues that the interpretation and application of norms and rules on the basis of which state responsibility is determined under the ICPPED should be in line with and in direct response to these five main causes. These five main

causes form the basic parameters, together with the seven state duties identified in Chapter 3 *supra* of the evaluative framework of this book. The seven duties imposed on states on the basis of which to determine state responsibility are evaluated in light of these five main causes of victims' suffering. Accordingly, they are recapitulated in each chapter of Part II *infra*. While these main causes focus on the adverse effects of enforced disappearance, an important observation with which to conclude this chapter is that the desire to know and the fight for justice have also led to determined activism, strong characters and bustling organisations that have brought the problem of enforced disappearances on the national and international agenda.[150] Therefore, the term 'victim' also deserves a connotation of strength and persistence.

150 Interview with Ewoud Plate and Jan de Vries (2010). (The large number of family member organisations across the world clearly demonstrates this point).

Part II

Comparative Case-Law Analysis

Chapter 5
Definitional Issues in Relation to Enforced Disappearance

5.1 Introduction

Enforced disappearance has been difficult to encapsulate in a single definition. Even though it is relatively straightforward to describe a typical scenario of an enforced disappearance, it has proven difficult to draft an adequate all-encompassing legal definition that precisely covers this crime and distinguishes it from other crimes.[1] Nevertheless, the ICPPED embodies a definition that contains four elements. In addition, the ICPPED defines several notions which are essential to the protection from enforced disappearance.

Chapter 2 *supra* identified six definitional issues that need further elaboration in light of the experiences of victims. The first three issues all pertain to the definition of enforced disappearance, clarifying the scope and content of its elements. Besides questions related to the definition itself, Chapter 2 demonstrated that the scope of the concept of 'victims' of enforced disappearance leaves room for further interpretation. In addition, the meaning of a 'systematic practice of enforced disappearances' raises questions as to how such practice may be determined. Lastly, the meaning and consequences of the continuous nature of this crime as portrayed in the ICPPED needs to be further fleshed out.

Before going into these issues, this chapter examines the rights in the ICCPR, the ECHR, the ACHR and IACFD that are breached by enforced disappearance. After having examined the multiple rights approach, this chapter explores how the HRC, the Inter-American Court and the European Court have addressed the six definitional issues in their respective case law. The findings of these sections are evaluated in light of the five main causes of victims' suffering as identified in Chapter 4 *supra*.[2]

1 Brody & González (1997), p. 376.

2 These five main causes are: (1) no trace of the disappeared person due to denials by the state authorities; (2) uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person; (3) *de facto* and *de jure* impunity; (4) an unsafe environment to carry out the search and other activities related to the enforced disappearance; and (5) obstacles for victims to continue their 'normal' life.

5.2 Enforced disappearance as a multiple violation of civil and political rights

The HRC, the Inter-American Court and the European Court have considered enforced disappearance as a multiple violation of several human rights laid down in their respective treaties. Such an approach was necessary because neither the ICCPR, the ECHR nor the ACHR embodies a right not to be subject to enforced disappearance. Rodley suggests that at the time of the drafting of these instruments, the complexity of enforced disappearances seems to have hampered a satisfactory definition of this crime.[3] When, in 1994, the IACFD came into force, the Inter-American Court referred to the definition laid down therein. Still, it continued to also consider this crime according to the rights laid down in the ACHR.

The subsequent subsections illustrate the rights that the HRC, the Inter-American Court and the European Court have taken into consideration in their examination of enforced disappearance cases. Since this section focuses on the crime itself, the rights are discussed in relation to the situation of the disappeared person.[4]

5.2.1 Human Rights Committee

Generally, the HRC recognises that an enforced disappearance falls within the scope of Articles 7 (the freedom from torture or cruel, inhuman or degrading treatment or punishment), 9 (the right to liberty) and, frequently, Article 6 ICCPR (the right to life).[5]

The HRC has found a violation of Article 9 ICCPR in all enforced disappearance cases. It has justified its decision by referring to the illegal arrest, the *incommunicado* detention and the lack of information concerning the reasons for the arrest and the absence of judicial control.[6] In addition, the HRC has doctrinally stated that any act of enforced disappearance violates Article 7 ICCPR.[7] In an exceptional case, the HRC was more specific and expressed the view that an enforced disappearance constitutes cruel and inhuman treatment within the context of Article 7.[8] Despite the doctrinal approach, the HRC seems to take into account the specific facts of each

3 See *e.g.* Rodley (1999), p. 247.

4 The Inter-American Court has sometimes used the term 'direct victim' to indicate the disappeared person, see *e.g. La Cantuta v. Peru* IACtHR (2006), para. 216 and *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 168. For a discussion of the rights that are potentially violated with respect to the relatives, see subsection 5.4 below.

5 HRC, General Comment No. 31 [80] (2004), para.18.

6 See *e.g. Sharma v. Nepal* HRC 28 October 2008 (Comm. no. 1469/2006), para. 7.3; *El Hassy v. The Libyan Arab Jamahiriya* HRC 24 October 2007 (Comm. no. 1422/2005), para. 6.5.

7 *Sarma v. Sri Lanka* HRC 31 July 2003 (Comm. no. 950/2000), para. 9.3; HRC, General Comment No. 31 [80] (2004), para. 18.

8 *Laureano v. Peru* HRC 25 March 1996 (Comm. no. 540/1993), para. 8.5.

case in order to justify the finding of torture or other ill-treatment.[9] The HRC has also considered Article 6 ICCPR in a few enforced disappearance cases,[10] but has found it inappropriate to make findings in respect of this article when the author of the communication has based his or her claims on the hope that the disappeared person is still alive. At any rate, the HRC notes that such consideration does not affect the state's obligations that follow from the enforced disappearance.[11] In the leading case of *Grioua v. Algeria*, the HRC found Article 16 ICCPR (the right to be recognised before the law) to have also been violated. The reasoning behind the finding of such a violation is that where the authorities neither provide a remedy nor conduct an effective investigation, the person last seen in the hands of the state without further subsequent news is placed outside the protection of the law. In such circumstances persons are practically deprived of their capacity to exercise their entitlements under the law and of their access to any possible remedy as a result of direct action by a state.[12] A violation of Article 2(3) ICCPR (the right to an effective remedy) has also been found in conjunction with Articles 6, 7, 9 and 16 ICCPR.[13] In light of violations found on the basis of these Articles, the HRC has generally found it unnecessary to address claims of violations of Article 10 ICCPR (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) and Article 17 ICCPR (freedom from arbitrary or unlawful interference with one's privacy, family, home or correspondence).[14]

As of the entry into force of the Rome Statute, the HRC has referred to this instrument for its definition of enforced disappearance.[15] This definition has been

9 K. Anderson, 'How Effective is the International Convention for the Protection of All Persons From Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?' (2006) 7(2) *MelbJIL* 11 pp. 245-277, p. 12; *Mojica v. Dominican Republic* HRC 15 July 1994 (Comm. no. 449/1991), para. 5.7. See also UN Report by Nowak (2002), para. 75.

10 *Bousroual v. Algeria* HRC 30 March 2006 (Comm. no. 992/2001), para. 9.10.

11 *Sarma v. Sri Lanka* HRC (2003), para. 9.6.

12 *Grioua v. Algeria* HRC (2007), paras. 7.8 and 7.9.

13 *Bousroual v. Algeria* HRC (2006), paras. 9.12 and 10; *Kimouche v. Algeria* HRC 10 July 2007 (Comm. no. 1328/2004), paras. 7.10 and 8; *Madoui v. Algeria* HRC (2008), paras. 7.9 and 8. *A contrario*, see *Sarma v. Sri Lanka* HRC (2003), paras. 10 and 11 and *Laureano v. Peru* HRC (1996), paras. 10 and 11. (The HRC seems to have included a violation of art. 2(3) ICCPR from 2006 onwards with the Bousroual judgment. Before this judgment, this article was solely used as the basis for formulating a state's obligations).

14 *Sarma v. Sri Lanka* HRC (2003), para. 9.7.

15 *Bousroual v. Algeria* HRC (2006), para. 9.2; *Sarma v. Sri Lanka* HRC (2003), para. 9.3; *Grioua v. Algeria* HRC (2007), para. 7.2; *Madoui v. Algeria* HRC (2008), para. 7.2.

replaced by the definition in the ICPPED since 2009.[16] These definitions have, for instance, played a role in the interpretation and application of ICCPR rights.[17]

5.2.2 The Inter-American Court of Human Rights

As of the first case before it, the Inter-American Court has stated that 'the phenomenon of enforced disappearance is a complex form of human rights violation that must be understood and confronted in an integral fashion'.[18] Accordingly, it considers enforced disappearance as an 'a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee.'[19]

The Inter-American Court has found a violation of Article 7 ACHR (the right to liberty) in almost all enforced disappearance cases. In the *Velásquez-Rodríguez Case*, it stated:

> The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty…[20]

In addition, the Inter-American Court has found a violation of Article 5 ACHR (the right to humane treatment). The Inter-American Court has accepted that prolonged isolation breaches the right to humane treatment as laid down in Article 5 ACHR.[21] Later, it considered that even short periods of isolated detention in the context of an enforced disappearance amounts to a breach of the right to humane treatment.[22] The *Castillo Páez Case* illustrates that the placement of a person in the boot of a car by a state authority prior to the enforced disappearance is also sufficient evidence for finding a violation of the right to humane treatment.[23] Moreover, the

16 *Cifuentes Elgueta v. Chile* HRC 28 July 2009 (Comm. no. 1536.2006), para. 8.4; *Benaziza v. Algeria* HRC (2010), 9.3.

17 *Grioua v. Algeria* HRC (2007), para. 7.2 (using the Rome Statute definition to interpret Article 16 ICCPR).

18 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 150.

19 *Ibid*., paras. 155 and 158; *Blake v. Guatemala* IACtHR (1998), paras. 65 and 66; and *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 128; *Blake v. Guatemala* (preliminary objections) IACtHR Series C No. 27 (2 July 1996) (separate opinion Judge Cançado Trindade, paras. 2 and 3).

20 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 155.

21 *Ibid*., paras. 148, 156 and 187. This has been reiterated in *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 150. See also *Caballero-Delgado and Santana v. Colombia* IACtHR (1995), paras. 64-65 (In this case the Court did not find a violation due to the fact that there was evidence that the victims were killed shortly after their apprehension).

22 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 98. See also *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), paras. 162-168.

23 *Castillo-Páez v. Peru* IACtHR (1997), para. 66.

Inter-American Court has increasingly taken into account the mental effects that an enforced disappearance has on the disappeared person. For instance, in *La Cantuta v. Peru*, the Inter-American Court referred to the 'deep feelings of fear, anxiety and defencelessness' that the victims probably experienced, as well as to the anticipation of their deadly fate while witnessing crimes committed against other people.[24]

With respect to the right to life, the Inter-American Court has found presumptions of death based on the context in which the crime was committed, *i.e.* a systematic practice of enforced disappearance and arbitrary executions, and the period of time that has passed without knowledge about the fate of the victim.[25] Such a presumption has been unnecessary in cases where the remains of the body were found and it was established that the state was behind the enforced disappearance.[26] In such cases, death is beyond reasonable doubt.

In addition, the Inter-American Court has usually found breaches of Article 8 ACHR (the right to a fair trial) and Article 25 ACHR (the right to judicial protection) in relation to Article 1(1) ACHR.[27] These articles have mainly been breached on account of the lack of adequate investigations, ineffective *habeas corpus* proceedings and illusionary trials for convicting the perpetrators.

In contrast to the HRC, the Inter-American Court initially rejected any claim to violations of the right to juridical personality, as enshrined in Article 3 ACHR. The Inter-American Commission alleged such a violation in several cases, but the Court did not acknowledge that a *de facto* situation that deprives a person of the possibility to exercise the rights that he is entitled to by law falls within the scope of this Article.[28]

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24 *La Cantuta v. Peru* IACtHR (2006), para. 113; *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), paras. 162 and 163.

25 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), paras. 188 (seven years without knowledge); *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 173 (almost nine years without knowledge). *A contrario* see *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), paras. 129-132 (The Court did not rule on the alleged violation of the right to life due to the *ratione temporis* objection. It also mentioned the possibility that the sisters would still be alive. Judge Cançado Trindade expressed his great dissatisfaction with this ruling based on the fundamental importance of the right to life and the guarantees, such as the duty to prevent and investigate, attached to this right (dissenting opinion, paras. 32-39)).

26 *Blake v. Guatemala* IACtHR (1998), para. 83.

27 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 196; *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 136. *A contrario*, see *Caballero-Delgado and Santana v. Colombia* IACtHR (1995), paras. 64 and 66.

28 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), paras. 179 and 180 and the separate opinions of Judges Cançado Trindade (paras. 10-16) and de Roux Rengifo. See also *La Cantuta v. Peru* IACtHR (2006), paras. 117-121 (The Inter-American Court explicitly rejected the claim of a violation of the right to juridical personality even though the State acquiesced in a breach of this right).

In 2009, the Inter-American Court reconsidered its position in *Anzualdo-Castro v. Peru*.[29] The Court stated that:

> Nevertheless, given the multiple and complex nature of this serious human right violation, the Tribunal reconsiders its previous position and deems it is possible that, in this type of cases, the forced disappearance may entail a specific violation of said right: despite the fact that the disappeared person can no longer exercise and enjoy other rights, and eventually all the rights to which he or she is entitled, his or her disappearance is not only one of the most serious forms of placing the person outside the protection of the law but it also entails to deny that person's existence and to place him or her in a kind of limbo or uncertain legal situation before the society, the State and even the international community.[30]

In subsequent case law, the Inter-American Court has maintained this line and found violations of this right to juridical personality.[31]

The Inter-American Court has rejected alleged violations of the right to family life. In the *Castillo-Páez Case*, the Inter-American Court considered that the alleged violation concerning the protection of family life referred to a consequence of the proven forced disappearance and did not, therefore, deem it a separate violation.[32] In the *Suárez-Rosero Case*, a detention case, the Court concluded that 'the effects that Mr. Suárez-Rosero's *incommunicado* detention may have had on his family would derive from the violation of Articles 5(2) and 7(6) of the American Convention.'[33] The Court similarly did not consider a separate violation, but concluded that '[t]hose consequences may be taken up by this Court at the Reparations Stage.'[34]

Other rights of which a violation has been alleged include Articles 13 ACHR (freedom of thought and expression), 17 ACHR (rights of the family) and 22 ACHR (freedom of movement and residence). Generally speaking, these claims have on the whole been rejected. They are considered indirect consequences of the enforced disappearance.[35] An exception to this usual rejection is the case *Chitay Nech et al. v. Guatemala*. The specific circumstances of this case resulted in the Inter-American Court deciding on a whole range of violations as a result of the enforced disappearance

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29 *Anzualdo-Castro v. Peru* (preliminary objection, merits, reparations and costs) IACtHR 22 September 2009 Series C No. 202, para. 101.

30 *Anzualdo-Castro v. Peru* IACtHR (2009), para. 90.

31 *Chitay-Nech et al. v. Guatemala* IACtHR (2010), para. 102; *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (preliminary objections, merits, reparations, and costs) IACtHR Series C No. 219 (24 November 2010), para. 125.

32 *Castillo-Páez v. Peru* IACtHR (1997), paras. 85-86.

33 *Suárez-Rosero v. Ecuador* IACtHR (1997), para. 102.

34 *Ibid*., para. 102.

35 *Blake v. Guatemala* IACtHR (1998), para. 105; *Castillo-Páez v. Peru* IACtHR (1997), para. 86; *Suárez-Rosero v. Ecuador* IACtHR (1997), para. 102.

of a Mayan political leader in Guatemala in 1981.[36] The rights violated included Articles 17, 22 as well as Articles 23 (the right to participate in government) and 19 ACHR (rights of the child), alongside the commonly violated rights. In addition, the claim under Article 13 ACHR has been successful in recent case law to the effect that an inability to access important documents that would shed light on the truth about enforced disappearances violated this article.[37]

Alongside the multiple rights approach,[38] the Inter-American Court has also incorporated the definition of enforced disappearance laid down in the IACFD and, more recently, the ICPPED definition.[39] While this definition differs slightly from the definition laid down in the DPPED and the ICPPED,[40] it is argued that the differences have not played a role in the manner in which the supervisory bodies of the IACFD have applied this definition.[41] The Inter-American Court has even referred to this definition in its consideration of enforced disappearance cases against states that had not yet ratified the IACFD at the time of the proceedings before this Court. In such cases, the Inter-American Court does not apply the definition directly, but instead includes it as part of the *corpus juris* used for the interpretation of the ACHR.[42]

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36 *Chitay-Nech et al. v. Guatemala* IACtHR (2010).

37 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), paras. 230 and 231.

38 Medina Quiroga (2005), p. 259 (stating that the use of the IACFD definition has not replaced the multiple rights approach).

39 *E.g. Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), para. 104, ft 125; *Gelman v. Uruguay* IACtHR (2011), para. 70. Article 2 IACFD defines an enforced disappearance as:
'the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.'

40 See Pérez Solla (2006), p. 13 (providing a review of the differences between the various definitions).

41 See UNWGEID, 'General Comment on the definition of enforced disappearance' (20 March 2007), available at www.ohchr.org, preamble.

42 See *e.g. Blake v. Guatemala* IACtHR (1998), para. 62 and *Bámaca-Velásquez v. Guatemala* IACtHR (2000), paras. 126 and 180 (This decision dates from a time prior to the ratification of the IACFD by Guatemala); *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 97(c) (The Inter-American Commission alleged that even though Colombia was not yet party to the IACFD at the time of the consideration of this case, and therefore was not bound by it, it was legitimate to refer to this Convention. The Court did not mention the definition). *Cf. La Cantuta v. Peru* IACtHR (2006) (The Inter-American Court did not mention the definition of enforced disappearance in this case).

5.2.3 The European Court of Human Rights

The European Court seems to consider enforced disappearance primarily as an aggravated violation of the right to liberty (Article 5 ECHR).[43] In this respect, it has repeatedly considered that 'the acute concern which must arise in relation to treatment of persons apparently held without official record and excluded from the requisite judicial guarantees, is an added and aggravated aspect of the issues arising under Article 5.'[44]

In contrast to the HRC and the Inter-American Court, the European Court has rejected most claims on the basis of Article 3 ECHR (freedom from torture or inhuman or degrading treatment or punishment) to the detriment of the disappeared person. For instance, in *Çiçek v. Turkey* the applicant maintained that the respondent state was in breach of Article 3 ECHR. The applicant argued that her son's disappearance in and of itself – in a context devoid of the most basic judicial safeguards – must have exposed him to acute psychological torture.[45] In response to this assertion, the European Court found that:

> Where an apparent forced disappearance is characterised by total lack of information, whether the person is alive or dead or the treatment which she or he may have suffered can only be a matter of speculation.[46]

Consequently, the European Court found no violation of Article 3 ECHR. The European Court has maintained this reasoning in more recent cases against Russia. In *Luluyev v. Russia*, the European Court concluded that state servicemen had apprehended the victim during a security operation.[47] However, the fact that they had forced the victim into an armoured personnel carrier with a sack over her head was not sufficient to find inhuman treatment, even in the context of an enforced disappearance.[48] In *Baysayeva v. Russia*, the European Court had access to a video recording of the victim lying on the ground while a soldier kicked him immediately

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43 *Kurt v. Turkey* ECtHR (1998) (The European Court found a violation of the right to liberty with respect of the applicant's son who had disappeared at the hands of the security forces, but the Court did not find any additional violations of the rights enshrined in the ECHR). See also CoE, PACE, 'Enforced Disappearances: Report of the Committee on Legal Affairs and Human Rights by M. Pourgourides' (19 September 2005) Doc. 10679 (hereinafter: 'PACE Report by Pourgourides (2005)') and UN Report by Nowak (2002), para. 76.

44 See *e.g. Kurt v. Turkey* ECtHR (1998), para. 115 and *Çiçek v. Turkey* ECtHR 27 February 2001 (Appl. no. 25704/94), para. 156.

45 *Çiçek v. Turkey* ECtHR (2001), para. 152.

46 *Ibid*., para. 155.

47 *Luluyev a.o. v. Russia* ECtHR 9 November 2006 (Appl. no. 69480/01), para. 82.

48 *Ibid*., para. 11.

before being escorted away by soldiers after which he disappeared.[49] The European Court did not find that this treatment met the threshold of severity required by Article 3 ECHR nor did it generate a presumption in this respect.[50] The European Court has also not recognised a violation of inhuman treatment in cases in which it found prolonged isolation.[51]

On the other hand, the European Court has generally accepted claims of violations of Article 2 ECHR (the right to life) based on presumptions of death, when a person's whereabouts or fate could not be established.[52] The case of *Timurtaş v. Turkey* is illustrative for the reasoning of the European Court. The Court accepted that Timurtaş had been apprehended by state agents and was subsequently taken into custody. The Court considered that:

> Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody.[53]

The facts showed that more than six and a half years had passed without any news as to the fate or whereabouts of Timurtaş.[54] Furthermore, the European Court deduced from the attitude of the authorities that they had felt the need to conceal his arrest and

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49 *Baysayeva v. Russia* ECtHR (2007), para. 33.

50 *Ibid.*, para. 136.

51 *Taş v. Turkey* ECtHR 14 November 2000 (Appl. no. 24396/94), para. 76. Detainees in solitary confinement have only been found to be victims of inhuman treatment in exceptional circumstances where medical reports could be produced that substantiated claims thereof, see Van Dijk, Van Hoof, Van Rijn & Zwaak (2006), p. 421.

52 See *e.g. Çakici v. Turkey* ECtHR [GC] 8 July 1999 (Appl. no. 23657/94), para. 87; *Ibragimov a.o. v. Russia* ECtHR 29 May 2008 (Appl. no. 34561/03), para. 87.

53 *Timurtaş v. Turkey* ECtHR (2000), para. 82 (The Court referred to a previously established principle that 'where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which an issue arises under Article 3 of the Convention.'. This principle has been developed in the cases *Tomasi v. France* ECtHR 27 August 1992 (Appl. no. 12850/87), paras. 108-111 and *Ribitsch v. Austria* ECtHR 4 December 1995 (Appl. no. 18896/91), para. 34). The Court also referred to *Kurt v. Turkey* ECtHR (1998) (para. 124) where the Court stated that 'Article 5 imposes an obligation on the State to account for the whereabouts of any person taken into detention and who has thus been placed under the control of the authorities'.

54 *Timurtaş v. Turkey* ECtHR (2000), para. 83 (Even though the Court did not consider the time which had elapsed as a decisive element in finding a violation of the right to life, it did consider that the passage of time may affect the weight that is to be attached to other circumstantial evidence that a person must be presumed dead). See also *Vagapova and Zubirayev v. Russia* ECtHR 26 February 2009 (Appl. no. 21080/05), para. 86 (no news of the victim for over 4 years). *A contrario*, see *Kurt*

detention. Finally, the state authorities had Timurtaş under suspicion for his alleged PKK activities.[55] Consequently, the European Court stated that 'in the general context of the situation in south-east Turkey in 1993, it can by no means be excluded that an unacknowledged detention of such a person would be life-threatening.'[56] Given that the respondent state had not provided any plausible explanation as to what had happened after the apprehension of Timurtaş nor had relied on any justification for the use of lethal force,[57] the European Court presumed that the victim died following unacknowledged detention by the security forces. This conclusion was reached despite the fact that the applicant had not presented proof 'beyond reasonable doubt' that Timurtaş had died due to actions attributable to the state.[58]

Applicants have also alleged violations of Article 13 (the right to an effective remedy), which the European Court has usually accepted in conjunction with Article 2 ECHR when the facts revealed superficial and ineffective criminal investigations.[59]

Claims by applicants to the effect that their right to family life had been violated as a result of the enforced disappearance have generally been rejected with the statement that no separate issue arises under this article in light of the findings under Articles 2 and 3 ECHR.[60] Other alleged violations such as violations of Articles 6 and 14 ECHR have been rejected as well.[61]

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v. Turkey ECtHR (1998) (The Court did not consider the four and a half years that had elapsed since the arrest of the applicant's son to be a sufficient basis for a presumption of death).

55 *Timurtaş v. Turkey* ECtHR (2000), para. 85. *A contrario*, see *Orhan v. Turkey* ECtHR 18 June 2002 (Appl. no. 25656/94), para. 330 (The European Court seemed to attach importance to the circumstances in which the 'disappeared' person was last seen) and *Kurt v. Turkey* ECtHR (1998) (The Court did not establish that the applicant's son had been taken into custody).

56 *Timurtaş v. Turkey* ECtHR (2000), para. 85. Similarly *Baysayeva v. Russia* ECtHR (2007), para. 119 and *Imakayeva v. Russia* ECtHR 9 November 2006 (Appl. no. 7615/02), para. 141 (The Court noted in respect to Russia that in the context of the conflict in Chechnya unacknowledged detention by unidentified servicemen can be regarded as life-threatening).

57 *Timurtaş v. Turkey* ECtHR (2000), para. 86.

58 See also *Çiçek v. Turkey* ECtHR (2001), para. 145 (The Court also found a violation of the right to life. After finding that the victim must be presumed to have died following unacknowledged detention, it stated that 'liability for their death is attributable to the respondent Government'). See also the concurring opinion of Judge Maruste annexed to this case.

59 *Timurtaş v. Turkey* ECtHR (2000), para. 113; *Taş v. Turkey* ECtHR (2000), para. 93; *Çiçek v. Turkey* ECtHR (2001), para. 181; *Sangariyeva a.o. v. Russia* ECtHR 29 May 2008 (Appl. no. 1839/04), para. 108; *Baysayeva v. Russia* ECtHR (2007), para. 158. *A contrario* see *Varnava a.o. v. Turkey* ECtHR [GC] (2009), para. 211 (The Court considered that there was no need to separately consider the complaint under Article 13 ECHR, because it had examined the main legal questions that arose in the case in the context of Articles 2, 3 and 4 ECHR).

60 *Ibragimov a.o. v. Russia* ECtHR (2008), para. 126. *A contrario*, see *Uçar v. Turkey* ECtHR 11 April 2006 (Appl. no. 52392/99) (This case is discussed in more detail in Chapter 7 subsection 4.3.3 *infra*).

61 See *e.g. Baysayeva v. Russia* ECtHR (2007), para. 152; *Akdeniz a.o. v. Turkey* ECtHR 31 May 2001 (Appl. no. 23954/94), para. 135; *Uçar v. Turkey* ECtHR (2006), para. 159; *Kurt v. Turkey* ECtHR

Unlike the HRC, the European Court has refrained from 'borrowing' a definition of enforced disappearance until fairly recently. The first time a definition appeared in the case law of this Court was in the *Varnava Case* where the Grand Chamber set out the definitions laid down in the DPPED and the ICPPED.[62] It referred to these definitions to reiterate the statement that an enforced disappearance creates an 'ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred'.[63]

5.2.4 Comparative remarks on the multiple rights approach in light of the experiences of victims

All three supervisory bodies have predominantly examined an enforced disappearance case on the basis of a multiple rights approach. The HRC has 'borrowed' definitions of this crime as enshrined in the Rome Statute and, later, as laid down in the ICPPED. The European Court has also referred to the latter definition. The Inter-American Court has used the definition laid down in the IACFD. This treaty falls within the jurisdiction of the Inter-American Court with respect to states that have ratified it. The Inter-American Court has, however, also referred to this definition in cases where the respondent state had not ratified this treaty at the time of considering the case. The reference to these definitions has not replaced the multiple rights approach. Rather, the use of the definitions, at least by the HRC and the European Court, was employed to complement the understanding of how a certain right or obligation should be interpreted.

The most prominent rights that relatives have invoked in enforced disappearance cases on behalf of the disappeared person are the right to liberty, the right to life, the right to an effective remedy and freedom from torture or other ill-treatment. Other rights, if at all, have played a more exceptional role in determining what an enforced disappearance entails or have been subsumed in the commonly accepted rights. The role that these rights have played obviously depends on which rights are laid down in the respective treaties. As a necessary consequence, the HRC, the Inter-American Court and the European Court have considered enforced disappearance in terms of civil and political rights. In this respect, economic, social and cultural rights have not been considered. Also, the supervisory bodies are dependent on the claims of the

(1998), para. 147; *Çiçek v. Turkey* ECtHR (2001), paras. 184 and 188; *Luluyev a.o. v. Russia* ECtHR (2006), para. 145; *Cyprus v. Turkey* ECtHR [GC] (2001), paras. 228-240.

62 *Varnava a.o. v. Turkey* ECtHR [GC] (2009), paras. 89 and 91 (The European Court referred to the definition of the ICPPED, which had not yet entered into force, under the heading 'Relevant international law and practice').

63 *Varnava a.o. v. Turkey* ECtHR [GC] (2009), para. 148.

applicants, even though they have used the principle of *iuria novit curia* to consider rights *ex officio* that the parties have not invoked themselves.[64]

The case law reveals that the most undisputed violation at stake is a violation of the right to liberty. In contrast, the extent to which the freedom of torture or other ill-treatment is breached to the detriment of the disappeared person is far from unanimous between the treaty bodies. In particular, the European Court takes a divergent view that the treatment received by the person who has disappeared is only a matter of speculation. A violation of the right to life has generally been established on the basis of a presumption of death, or on evidence that the person has been killed. The HRC has generally taken the view that this right is only at stake when there is no hope of finding the victim alive. The right to an effective remedy is another right whose violation appears in most, if not all, enforced disappearance cases. The Inter-American Court takes this right together with the right to a fair trial, while the European Court has rejected a consideration of this latter right. Both the HRC and the Inter-American Court have found violations of the right to be recognised before the law. The few claims of violations of the right to respect for family life have largely been rejected because the issues had been considered under other provisions. Lastly, in exceptional cases, the Inter-American Court has found other rights to have been violated such as the freedom of movement and the right to participate in government, depending on the particular circumstances of the case.

Experiences of victims and the five main causes of victims' suffering show that an enforced disappearance affects many aspects of their lives. The multiple rights approach allows the protection offered by the ICCPR, the ACHR and the ECHR to respond to the specific circumstances of the case. The Inter-American Court has in particular made use of this possibility to expand the case law in the context of the enforced disappearance of indigenous persons. Recently, a clear stance also emerged on the accessibility of official documents on enforced disappearance that occurred in the past. The multiple rights approach as such has set important standards on the protection of persons from this crime. On the other hand, the multiple rights approach has also led experts to conclude that such an approach has caused divergent standards in the case law of the three supervisory bodies and has led to gaps in the

64 J.M. Pasqualucci*, The practice and procedure of the Inter-American Court of Human Rights* (Cambridge: Cambridge University Press 2003), p. 154; *Godínez-Cruz v. Honduras* (reparations and costs) IACtHR Series C No. 8 (21 July 1989), para. 172. The views of the HRC also reveal the use of *iuria novit curia*, see *Cifuentes Elgueta v. Chile* HRC (2009), para. 1.1. See also *Aboussedra v. Libyan Arab Jamahiriya* HRC (2010), para. 7.8 and *Benaziza v. Algeria* HRC (2010), partially dissenting opinion of Mr. Fabián Salvioli, paras. 7-15 (arguing for a more consistent and explicit approach to the use of *iuria novit curia*). The European Court has used this principle outside the body of case law on enforced disappearances, see *Handyside v. the United Kingdom* ECtHR [GC] 7 December 1976 (Appl. no. 5493/72), para. 41.

protection of victims from this human rights violation.[65] For instance, the European Court's reluctance to find a violation of the freedom from inhuman treatment to the detriment of the disappeared person does not do justice to the first main cause of victims' suffering (no trace of the disappeared person and denials by the state authorities). Reality, after all, shows that a denied detention goes hand in hand with great psychological suffering and, in the overwhelming majority of cases, with torture. The rights considered have been important because they are decisive for state obligations that emanate therefrom, as further examined in the remaining chapters of Part II of this book.

5.3 The definition of enforced disappearance

As set out in Chapter 2 *supra*, the definition of enforced disappearance enshrined in the ICPPED is composed of four elements: (1) deprivation of liberty, (2) the direct or indirect involvement of state agents, (3) a refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person, and (4) placement outside the protection of the law.[66] The first three elements are constituent elements, while the nature of the last element is unclear. The first element of the deprivation of liberty is broadly formulated and does not raise particular difficulties. The second element defines the ways in which the state can be involved in the crime. Its scope will be further elaborated in Chapter 6 *infra* when discussing the duty to respect. The third and fourth elements raise definitional questions that will be addressed in the following three subsections. Firstly, it is unclear what information is referred to with the phrase 'concealment of the fate or whereabouts' of the disappeared person as embodied in the third element of the definition. Secondly, the last function of the fourth element of the definition, *i.e.* 'placing the person outside the protection of the law', is unclear. Thirdly, the absence of the element of time in the definition leads to uncertainty with regard to the distinction between related human rights violations and enforced disappearance.

5.3.1 Refusal to acknowledge the deprivation of liberty or disclose the fate or whereabouts of the person concerned

One of the distinct features of enforced disappearance is the denial that relatives encounter when inquiring into the whereabouts or fate of the disappeared person. Accordingly, relatives are left with virtually no information, apart from the pieces of information that relatives themselves have or have been able to obtain. The refusal

65 UN Report by Nowak (2002), para. 96; Pérez Solla (2006), p. 190.

66 See Chapter 2 subsection 3.1.4 *supra* for the discussion on the question whether the fourth element is a constituent element of the definition or should be considered as a consequence of the former three constituent elements.

to acknowledge the detention or to disclose information is evidently an essential element of the definition. Also, the three supervisory bodies have considered that not knowing the fate or whereabouts of the disappeared person contributes to the finding of a violation of the freedom from inhuman treatment or torture to the detriment of relatives.[67]

The essential question is, therefore, what the phrase 'whereabouts or fate' entails. None of the three main human rights bodies have defined these terms explicitly. In the vast majority of enforced disappearance cases, the enforced disappearance as a whole is denied and no information whatsoever is available about what happened. An exception to such a denial has occurred in the case law of the Inter-American Court. The Inter-American Court has considered cases in which the respondent state acknowledged the facts, in particular subsequent to a regime change.[68] Still, in such cases, initial denials were given to the relatives and the whereabouts or fate of the disappeared persons remained unclear for a long period of time.

The case law of the three supervisory bodies does not provide a clear definition of these terms. The Inter-American Court's case law suggests that the term 'whereabouts' only pertains to the location of the disappeared person, not to his or her physical condition or other information pertaining to the detention.[69] Other indications of the meaning of these terms may be derived from an examination of the duties to prevent and investigate an enforced disappearance. As such, the findings in Chapters 7 and 8 *infra* shed more light on this question. Therefore, a further answer is sought in those chapters.

5.3.2 Placement of the person concerned outside the protection of the law

Chapter 2 subsection 3.1.4 *supra* showed the discussion on the nature of the fourth element of placing the person outside the protection of the law. One of the questions raised was whether the fourth element must be regarded as a constituent element of the ICPPED definition or as a consequence of the first three elements.

The fourth element in the definition of the ICPPED has been copied from the description of an enforced disappearance as laid down in the DPPED. According to Brody and Gonzáles, this phrase was inserted in the text 'to exclude situations in which the authorities momentarily delay notification of an arrest in order to complete

67 See section 5.4 below.

68 *La Cantuta v. Peru* IACtHR (2006).

69 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), para. 107 (The Court used the terms 'whereabouts and physicial condition'). This is in line with Article X IACFD, which includes the terms 'whereabouts or state of health of a person'.

an operation.'[70] An additional question is whether complainants have to evince that the disappeared person was held outside the protection of the law.

The case law of the HRC, the Inter-American Court and the European Court reveal no indications that complainants must provide evidence that the disappeared person was held outside the protection of the law. The case law focuses on evidence that a person was detained by state authorities, whilst the state authorities deny this deprivation of liberty and have not taken meaningful steps to clarify the fate or whereabouts of the person in question. As such, the case law appears to point towards the fourth element being a consequence rather than a constituent element of the definition.

If the fourth element is nonetheless considered to be a constituent element of the definition, the question remains whether state authorities may deny a detention or refuse to disclose the fate or whereabouts of the disappeared person for a certain period of time if so allowed by their domestic law. The danger would be that such a denial could potentially lead to legitimising certain situations that would normally constitute an enforced disappearance. Such situations would arise where domestic law permits state agents to deprive a person of his or her liberty and to deny his or her detention or refuse to disclose his or her fate or whereabouts for a certain period of time. This question is closely related to the duty to prevent as discussed in Chapter 7 section 4 *infra* and will be further discussed there.

5.3.3 Enforced disappearance as a distinct human rights violation

Enforced disappearance is closely related to two other human rights violations, namely (1) other forms of arbitrary or unlawful deprivations of liberty and (2) arbitrary executions. In order to highlight the differences between these violations, it is useful to briefly pay attention to the debate on the question of what features of enforced disappearance distinguish this violation from these two related human rights violations.

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70 Brody & González (1997), pp. 365 and 377 (text accompanying footnote 55) (The authors demonstrate that within the OAS system, the draft IACFD required that no information had been provided 'within a reasonable period of time', citing the Draft Inter-American Convention on the Forced Disappearance of Persons, OAS Doc. AG/RES. 1172 (XXII-0/92), compiled in Proceedings: Twentieth Regular Session (of the OAS General Assembly) 70, paras. 3-4 (1992). In the final text, however, the reference to time was deleted).

5.3.3.1 Enforced disappearance vs. other forms of deprivation of liberty

The underlying presumption, then, is that there is a difference between, on the one hand, unacknowledged detention[71] and *incommunicado* detention,[72] and, on the other, enforced disappearance. It is clear that most enforced disappearance cases involve unacknowledged detention, which also implies isolation.[73] However, the question is whether every form of unacknowledged detention also amounts to enforced disappearance. For instance, the European Court has been criticised for primarily considering enforced disappearance as an unacknowledged detention.[74] This criticism is based on the argument that the notion of unacknowledged detention fails to capture the reality;[75] it does not respond to two important features of an enforced disappearance, namely the explicit denial of the detention by state authorities and the indefinite nature of the removal from the protection of the law.[76] These two features are integral to the serious nature of this crime and, thereby, distinguish enforced disappearance from unacknowledged detention.[77]

The case law of the HRC, the Inter-American Court and European Court does not provide a clear answer to the question where the line should be drawn between these two human rights violations. As stated in section 5.3.1 above, the term enforced disappearance is usually used for cases in which the whereabouts or fate of the disappeared person was still unclear at the time of the judgment or where the dead body was found after several years of uncertainty. The term is, on the other hand, only occasionally mentioned in cases in which the disappeared person has reappeared

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71 Association for the Prevention of Torture, 'Incommunicado, unacknowledged, and secret detention under International Law' (hereinafter: 'APT report (2006)'), p. 1 (The Association for the Prevention of Torture ('APT') provides a useful definition of unacknowledged detention, which means that the authorities explicitly deny or refuse to confirm an act of deprivation of liberty or actively conceal the fact of the detention when family members, legal counsel or anyone else inquire into their fate).

72 APT report (2006), p. 1 (providing a useful definition of 'incommunicado detention', which means that the person detained is barred from any contact with the world outside the place of detention or incarceration. The authorities, however, do not conceal the fact that he is being detained. The APT notes that some commentators imply that detention is not truly *incommunicado* detention if the person deprived of his liberty has access to independent judicial supervision. In accordance with the Inter-American Court's stance, this study understands *incommunicado* detention as isolated detention after a judicial order and surrounded by the safeguards laid down in the law).

73 An exception to this prototype is the situation where the disappeared person is presumed to have been killed at the moment from which his whereabouts and fate have been unknown, see *e.g. Durand and Ugarte v. Peru* (merits) IACtHR Series C No. 68 (16 August 2000).

74 Rodley (1999), p. 247 (criticising the working description enshrined in the UN Declaration for refraining from touching upon the time factor so that it appears to be essentially the same as the notion of unacknowledged detention).

75 Rodley (1999), p. 245.

76 Rodley (1999), p. 246.

77 See *e.g.* R. Heringa, 'De VN Verklaring inzake de Berscherming van alle Personen tegen Gedwongen Verdwijning' (1993) 42 *AA* 4 pp. 257-261, at pp. 257 and 259.

after a short period of having disappeared at the hands of the state. The HRC and the European Court have been confronted with relevant facts, but have refrained from defining a clear line when the facts were labelled as an enforced disappearance as opposed to other violations of the right to liberty, as the following paragraphs illustrate.

The HRC has considered unacknowledged detention, in which the person was held in isolation and his or her whereabouts were not revealed for three months, to be a violation of the ICCPR without defining it as an enforced disappearance.[78] It must be noted that the complainants did not allege an enforced disappearance. In *Arzuaga Gilboa v. Uruguay*, the victim was held in isolation for fifteen days, without her whereabouts being known. The HRC did not classify this case as an enforced disappearance case, but rather as a violation of Article 10 ICCPR.[79] In contrast, the HRC used the classification of enforced disappearance in a case where the victim had disappeared for seventeen days after which he had been held in *incommunicado* detention for a subsequent period of time.[80] Yet again, the HRC did not classify an *incommunicado* detention of 218 days as an enforced disappearance. The facts reveal that the detention was denied for at least the first six weeks. The complainant, the father of the victim, had communicated the case to the UNWGEID, but had not worded the communication to the HRC in terms of enforced disappearance.[81] At the time of the consideration, the son was still in detention awaiting trial. Strikingly, the HRC did not find the state responsible for an enforced disappearance in the case *Aber v. Algeria*. Instead, this body found separate breaches of Articles 7 and 9 ICCPR alone and in conjunction with Article 2(3) and Article 10(1) ICCPR. In this case, the author had claimed that his secret detention accompanied with torture in the period from 1997 to 1998 amounted to enforced disappearance. Even though his family learnt of the location of his secret detention from a released prisoner, the authorities had denied his detention.[82] Similarly, the HRC did not consider an isolated and secret detention for almost thirteen months as an enforced disappearance case,[83] even though

78 *Caldas v. Uruguay* HRC 21 July 1983 (Comm. no. 43/1979), paras. 12.1 and 13.3. See also *Hiber Conteris v. Uruguay* HRC 17 July 1985 (Comm. no. 139/1983), paras. 1.4 and 9.2.

79 *Lucía Arzuaga Gilboa v. Uruguay* HRC 1 November 1985 (Comm. no. 147/1983), paras. 2.1 and 14. See also *Arutyunyan v. Uzbekistan* HRC 29 March 2004 (Comm. no. 917/2000), paras. 5.6 and 6.2 (The facts of this case pertained to the complainant's brother who was sentenced to death and was detained in Tashkent awaiting his execution. The allegation included that he was secretly detained for two weeks and tortured before his trial. The HRC did not consider this case as an enforced disappearance case but found a violation of Article 10 ICCPR on this account).

80 *Barbato v. Uruguay* HRC 21 October 1982 (Comm. no. 84/1981), paras. 1.2 and 8.3 (The alleged facts mention that the victim disappeared for 17 days, but the complainant did not use the terminology of 'enforced disappearance.').

81 *Medjnoune v. Algeria* HRC 14 July 2006 (Comm. no. 1297/2004), paras. 2.2, 3.1 and 8.6.

82 *Aber v. Algeria* HRC (2007), para. 2.7, 2.8 and 3.1.

83 *Yubraj Giri v. Nepal* HRC 24 March 2011 (Comm. no. 1761/2008), paras. 7.2-7.7.

the complainant had claimed such a violation.[84] Yet again, the HRC classified periods of secret detention as an enforced disappearance in another case where the victim had been sentenced to twelve years imprisonment by a military court and was held in *incommunicado* detention on three occasions during those twelve years.[85]

The European Court seems to follow a more consistent line and has found a violation of the right to liberty on the basis of unacknowledged detention in cases where the victim was held in such detention for two days,[86] four days,[87] and 19 days.[88] In these cases, the applicants did not allege an enforced disappearance and the European Court did not label them as such. In the cases in which the European Court used the term 'disappearance', the whereabouts or fate of the disappeared person had remained unknown even many years after the actual moment of disappearance.

Hence, periods of unacknowledged detention for several days, after which the person was found alive, have mainly been considered by the HRC and the European Court to be violations of the right to liberty, without labelling such situations as an enforced disappearance. Arguably, the reason for the lack of clarity on this question is two-fold. Firstly, the respective treaties do not entail a definition of enforced disappearance and, therefore, it is unnecessary to make a clear distinction between the two human rights violations. Secondly, the labelling of a situation in terms of human rights also depends on the allegation of the complainants. When the complainants allege a deprivation of liberty rather than an enforced disappearance, the supervisory bodies seem to follow that claim. Therefore, as the tendency of the three supervisory bodies might be linked to reasons which are not relevant for the ICPPED, it is premature to conclude that short periods of unacknowledged detention should fall outside the scope of the ICPPED definition of enforced disappearance.

5.3.3.2 Difference between enforced disappearances and extra-judicial killings

The distinction between enforced disappearances and extra-judicial executions is subtle since enforced disappearance and extra-judicial execution often go hand in hand.[89] Again, making an exact distinction between these two human rights violations

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84 *Ibid*., paras. 5.2 and 5.4.

85 *Benhadj v. Algeria* HRC 20 July 2007 (Comm. no. 1173/2003), paras. 8.2-8.4.

86 *Iskandarov v. Russia* ECtHR 23 September 2010 (Appl. no. 17185/05), paras. 115 and 150 (The applicant was detained on the evening of 15 April 2005 and was detained arbitrarily and unacknowledged until 17 April 2005 by Russian agents when he was handed over to Tajik police authorities at the airport).

87 *Chitayev and Chitayev v. Russia* ECtHR 18 January 2007 (Appl. no. 59334/00), para. 173.

88 *Khadisov and Tsechoyev v Russia* ECtHR 5 February 2009 (Appl. no. 21519/02), paras. 13-33, 147 and 148 (Torture was also alleged and accepted by the Court during the first four days, after those four days the applicants were detained under satisfactory conditions and provided with food).

89 AI, '"Disappearances" and Political Killings: Human Rights Crisis of the 1990s: A Manual for Action' (1 February 1994) AI Index: ACT 33/01/94, p. 85.

has not been the main concern of the three supervisory bodies. Nevertheless, the Inter-American Court has explicitly clarified its view:

> [...] the Court bears in mind that one of the characteristics of forced disappearance, in contrast to extra-legal executions, is that it implies the State's refusal to acknowledge that the victim is under its custody and provide information in that regard, in order to create uncertainty as to his whereabouts, life or death and cause intimidation [...].[90]

Despite this distinction, it would seem that the possible death of the person who has disappeared is irrelevant. In the case *Durand and Ugarte v. Peru*, two persons had disappeared after a violent suppression of a prison riot by Peruvian Naval Forces in which many detainees had died. The Inter-American Court concluded that the right to life had been violated based on the disproportionate use of force with which the riot was crushed and the fact that the whereabouts of the two persons were unknown for over fourteen years.[91] Despite the presumption that the persons had died in the clash between the prisoners and the Naval Forces, the Inter-American Court still regarded their situation as an enforced disappearance since their whereabouts remained unknown.[92] Furthermore, the authorities had not taken the necessary measures to discover their remains and uncover the truth.

Other cases that illustrate that the distinction is a subtle one are cases in which the Inter-American Court had to deal with large-scale massacres perpetrated by the state or with the indirect involvement of the state authorities. In many of these cases, the location of the remains of the persons killed continued to be hidden. The Inter-American Court has not always classified such situations as enforced disappearances.[93]

The European Court considered *Kukayev v. Russia* as a disappearance case despite the fact that the son of the applicant had been taken into custody and murdered by state agents on the same date.[94] The applicant had not been aware of his fate for almost five months. Moreover, he had been excluded from monitoring the progress of the investigation. Hence, the European Court considered both his death and his disappearance.

Hence, the case law of these two Courts show that the fact that the perpetrators execute the disappeared person soon after his or her apprehension does not necessarily exclude the possibility of considering the situation as an enforced disappearance. The

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90 *Anzualdo-Castro v. Peru* IACtHR (2009), para. 91.
91 *Durand and Ugarte v. Peru* IACtHR (2000), paras. 68-71.
92 *Ibid*., para. 109.
93 See *e.g. The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 96.56. *A contrario*, see *The Pueblo Bello Massacre v. Colombia* IACtHR (2006) (The Court did regard the facts as amounting to, *inter alia*, enforced disappearance).
94 *Kukayev v. Russia* ECtHR 15 November 2007 (Appl. no. 29361/02), paras. 90-91 and 107.

distinguishing factor between these two violations appears to be the denial of the detention by and the refusal of the state authorities in enforced disappearances. When such denials and refusals result in uncertainty for relatives over a prolonged period of time as to the fate of the disappeared person, the situation may qualify as an enforced disappearance.[95]

5.3.4 Comparative remarks on the definition of enforced disappearance in light of the experiences of victims

The issues set out in the previous paragraphs about the definition of enforced disappearance closely relate to three of the five main causes of victims' suffering, namely the first main cause (no trace of the disappeared person due to denials by the state authorities), the second main cause (uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person) and the fifth main cause (obstacles for victims to continue their 'normal' life). The denials and refusal to provide information on the victim's whereabouts or fate is one of the most important elements that make an enforced disappearance such an abhorrent crime. This element causes the disappeared person to be at the complete mercy of the perpetrators. Also, it prevents him or her from having any contact with the outside world. At the same time, denials and refusals to provide information illustrate the uncooperative behaviour of the state agents that relatives are usually confronted with in their search for the disappeared person. As a result, relatives remain in a state of uncertainty that only the state can alleviate. However, the state commonly has no intention of doing so. Consequently, relatives are forced to continue the search indefinitely. Accordingly, it is arguable that when the deprivation is no longer denied and adequate information is given to relatives, the enforced disappearance ceases to continue. At the same time, knowing the whereabouts or fate of the disappeared person provides relatives with a starting point to invoke remedies that establish contact with the detained person or that assess the legality of the detention. In cases of death, news that the disappeared person has

95 See also UNWGEID, General Comment on the definition of enforced disappearance (2007), paras. 6, 9 and 10. This understanding is in line with the UNWGEID, which considers that a detention, either short-term in the sense of a few hours or days or unduly prolonged, followed by an extra-judicial execution is a violation of the right not to be subject to enforced disappearance. Circumstances that show that a detention took place may consist of clear signs of having been tortured on the dead body of the victim, mutilation, or tied arms or legs. Thus, a detention followed by an extrajudicial killing is an enforced disappearance as long as the three elements of the definition are satisfied. Generally, in cases where the victim's dead body has been found prior to lodging the application, the UNWGEID declares the case inadmissible for transmission to the government. It considers such cases to be clarified *ab initio*. The inadmissibility does not mean, however, that such cases fall outside the definition of the UN Declaration on Enforced Disappearance. Rather, it is a consequence of the limited mandate of the UNWGEID.

died opens opportunities for starting the mourning process. Ceasing the search and continuing 'normal' life, however, is only possible after knowing where the remains are located.

The supervisory bodies have not further refined the terms 'whereabouts' or 'fate', except that a textual reading of the case law of the Inter-American Court suggests that the health of the person is not included in the term 'whereabouts'. The Association for the Prevention of Torture ('APT') is a NGO that has assessed the meaning of these terms and suggests that the appropriate interpretation of the phrase should be to provide the family, or any other interested persons, with any of the following information items: whether the person is in custody, whether he is alive or dead and where he is currently being detained.[96] This view corresponds with the distinct suffering of the relatives that is caused by the uncertainty as to what has happened to the disappeared person and where he or she is. Upon an examination of the main causes of suffering, however, the location of the remains and the delivery thereof must at least be added to the list. As will be seen in subsection 5.5.2 below, this proposition is supported by the case law of the Inter-American Court. One other aspect of the suffering of the disappeared person is his or her risk of extreme forms of torture. Simultaneously, the lack of information about the state of health of this person is typically one aspect of the pain and suffering experienced by his or her relatives. Nonetheless, adding this information to the list would lead to the far-reaching conclusion that an acknowledged detention with a refusal to provide information on the state of health constitutes an enforced disappearance. Such a conclusion would go beyond the essence of an enforced disappearance.

The answer to the question whether the supervisory bodies have required any proof as to the fact that the person is placed outside the protection of the law is in the negative. This answer is most likely due to the fact that such element is not found in their respective treaties. The element of 'outside the protection of the law' is difficult to prove in practice because: (a) the perpetrators usually 'only intend to abduct the victim without leaving any trace behind in order to bring him or her to a secret place for the purpose of interrogation, intimidation, torture or instant but secret assassination';[97] and (b) the act of enforced disappearance often consists of various stages including different perpetrators so that not everyone knows the final fate of the victim.[98] Therefore, such a reading of not requiring proof is in line with the main causes of victims' suffering.

The fact that the ICPPED entails an autonomous right not to be subjected to enforced disappearance raises the question of what is the difference between enforced disappearance and other human rights violations such as unacknowledged

96 APT report (2006), p. 10.
97 UN Report by Nowak (2002), para. 74.
98 *Ibid.*, para. 74.

detention and arbitrary executions. The distinction between enforced disappearance and unacknowledged detention is most contentious. The lack of information and the resulting suffering is a typical issue in enforced disappearance cases due to the denial and refusal to provide information. This characteristic, however, is also present in unacknowledged detention. As such, almost every enforced disappearance entails unacknowledged detention. Arguably, the opposite is not necessarily true. The case law of the supervisory bodies does not provide a clear indication of the distinction between the two human rights violations. Mostly, when the disappeared person has reappeared after a number of days, the HRC and the European Court have considered it to be an unacknowledged detention without classifying the situation as an enforced disappearance. A guiding answer is provided by the APT: this NGO considers secret or unacknowledged detention that either lasts for more than one or two weeks or that has the purpose of placing a person outside the protection of the law to amount to an enforced disappearance.[99] In other words, an unacknowledged detention that lasts for less than a week or two would fall outside the scope of the definition of enforced disappearance, unless the act had the purpose of shielding a person from the protection of the law.[100] At the same time, the report by a group of UN Special Rapporteurs stipulates that every instance of secret detention also amounts to an enforced disappearance.[101] This unconditional statement makes clear that neither time nor purpose play a role when it concerns keeping a person in a secret detention centre.[102] The threshold of one or two weeks is shorter than some of the periods considered as unacknowledged detention as opposed to enforced disappearance by the HRC and the European Court. In fact, it may seem to have been drawn arbitrarily. In reality, it might not be possible or desirable to define a strict threshold. Instead, it might be useful to consider it as a gliding scale; unacknowledged detention turns into an enforced disappearance when considerable time has passed or when it is clear that the person has been detained outside the protection of the law.

Arbitrary killing and enforced disappearance are also human rights violations that are closely intertwined. Arbitrary killings have been considered by the European Court and Inter-American Court as amounting to enforced disappearance when such a situation was accompanied by denials and refusals which resulted in prolonged uncertainty for relatives. This is clearly in line with the main causes of victims' suffering as it is mostly established long after the actual disappearance what happened to the disappeared person.

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99 APT report (2006), pp. 11, 15 and 16.

100 *Ibid.*, pp. 11, 15 and 17. This report refers to Rodley (1999), pp. 245-246 and the UN Working Group on Arbitrary Detention, 'Report to the Commission on Human Rights' UN Doc. E/CN.4/2006/7, paras. 53-59.

101 UNHRC, Joint report on secret detention of Special rapporteurs, para. 28.

102 See also UNHRC, Joint report on secret detention of Special rapporteurs, para. 8 (The definition of secret detention contains similar elements to the ones in the definition of enforced disappearance).

5.4 Victims of enforced disappearance

Due to the fact that in most enforced disappearance cases the disappeared persons cannot participate in a procedure before an adjudicating body, relatives have litigated on their behalf. These relatives have claimed that they themselves have also been victims of the enforced disappearance.[103] Chapter 4 *supra* illustrated the ramifications for the relatives as a result of not knowing whether the victim is still alive and, if so, where he or she is being detained, under what conditions, and in what state of health.[104] Their suffering is rooted in the primary violation against the disappeared person. However, their suffering has such a distinct and grave nature that it has generally been alleged that it reaches the threshold of at least inhuman treatment.

The case law of the HRC, the Inter-American Court and the European Court indicates the acceptance of relatives as victims of breaches of certain human rights due to the enforced disappearance. Where the boundaries of this concept of victims lie is the subject-matter of the following paragraphs. As a preliminary remark, the three supervisory bodies have used the terms 'relative', 'next of kin' and 'immediate family and family members' to indicate the persons who may fall under the protection of the respective treaties.[105] It seems that these terms are used interchangeably.

5.4.1 The Human Rights Committee

The HRC considered the issue of relatives as victims of an enforced disappearance for the first time in *Quinteros v. Uruguay*. In this case, the mother of a disappeared woman claimed that she too was a victim. She substantiated this claim with the argument that she suffered psychological torture as a result of not knowing the whereabouts of her daughter.[106] The HRC accepted that she had indeed suffered stress and anguish, noting in particular the continuous nature of the uncertainty. Accordingly, the HRC concluded that there was a violation of Article 7 ICCPR (freedom from torture or cruel, inhuman or degrading treatment or punishment).[107] The view that parents of the disappeared person can be victims of the enforced disappearance in this manner has

103 *Kurt v. Turkey* ECtHR (1998); *María del Carmen Almeida de Quinteros et al. v. Uruguay* HRC 21 July 1983 (Comm. no. 107/1981). *A contrario,* see *Velásquez-Rodríguez v. Honduras* IACtHR (1988).

104 See also UNWGEID, Fact Sheet No. 6 (Rev.2) available at http://www.ohchr.org/english/about/publications/docs/fs6.htm, p. 1.

105 The Inter-American Court also refers to '*familiares*' in Spanish, see *e.g. Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 101.

106 *María del Carmen Almeida de Quinteros et al. v. Uruguay* HRC (1983), para. 1.9.

107 *Ibid*., para. 14.

been confirmed in subsequent cases.[108] Spouses, sisters and brothers,[109] children[110] and granddaughters[111] have also been considered as victims under Article 7 ICCPR, alone or read in conjunction with Article 2(3) ICCPR. A cousin who had lived together with the disappeared person and was more or less a father to him was also considered to be a victim.[112]

5.4.2 The Inter-American Court of Human Rights

The Inter-American Court has produced extensive case law on the issue whether, and to what extent, relatives may be regarded as autonomous victims of enforced disappearances. Already in 1978, the Inter-American Commission stated that an enforced disappearance is a true form of torture for the victim's family and friends because of the uncertainty and the fact that they are powerless when it comes to providing assistance.[113] Since the 1998 *Blake Case*, the Inter-American Court has also adopted such a broad understanding of the concept of victim. Generally, the Inter-American Court considers the question of relatives as victims under three provisions of the ACHR, namely Article 5 (the right to humane treatment), Article 8 (the right to a fair trial) and Article 25 (the right to judicial protection).

In the *Blake Case*, the Inter-American Court interpreted Article 8(1) ACHR as including the right of Blake's relatives to have his death and his disappearance investigated effectively and to have the perpetrators brought to justice and be appropriately punished. Accordingly, this Court decided that they were also eligible for compensation for the damage and injuries they had suffered.[114] Also, the Inter-American Court concluded that a breach of Blake's relatives' right to mental and moral integrity protected by Article 5 ACHR in conjunction with Article 1(1) ACHR

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108 *Sarma v. Sri Lanka* HRC (2003), para. 9.5 and *Grioua v. Algeria* HRC (2007), para. 7.7.

109 *El Abani v. Algeria* HRC (2010), para. 7.5.

110 *Aboussedra v. Libyan Arab Jamahiriya* HRC (2010), para. 7.5; *Mériem Zarzi v. Algeria* HRC 22 March 2011 (Comm. no. 1780/2008), para. 7.6

111 *Benaziza v. Algeria* HRC (2010), paras. 9.6 and 9.9 (The granddaugther was the author of the communication and had been involved in the search).

112 *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), paras. 2.1 and 7.5.

113 OAS, 'Annual report of 1977 of the IAComHR to the GA of the OAS' (20 April 1978) OEA/Ser.L/V/II.43, part II.

114 *Blake v. Guatemala* IACtHR (1998), para. 97. See also *The Pueblo Bello Massacre v. Colombia* IACtHR (2006). *A contrario* see C. Medina Quiroga, 'La Corte Interamericana de Derechos Humanos y los Familiares de las Víctimas'*, in: La ciencia del Derecho Procesal Constitucional. Estudios en homenaje a Héctor Fix-Zamudio en sus 50 años como investigador del Derecho*, Tomo IX: Derechos Humanos y Tribunales Internacionales (Ciudad Universitaria (Mexico): Instituto de Investigaciones Jurídicas (UNAM) 2008) pp. 545-571, at p. 564 (It must be noted that this reading of Article 8(1) ACHR has attracted criticism. Medina Quiroga has criticised this reading by stating that this article should protect a distinct right, namely the right of access to court. This right has its own autonomous content distinct from the procedural rights mentioned by the Court).

was a direct consequence of his enforced disappearance. The Court considered that enforced disappearances 'generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate.'[115] In this particular case, this suffering was aggravated by the fact that the perpetrators had burnt Blake's remains in an utterly crude manner.[116] In addition, the Inter-American Court has found a violation of Article 25 ACHR to the detriment of the immediate next of kin.[117]

In *Bámaca-Velásquez v. Guatemala*, the Court confirmed the trend of considering relatives as victims. In this case, Bámaca Velásquez, the leader of a revolutionary group, disappeared during a gunfight between the army and the guerrillas. According to several witnesses he was still alive after the clash, but was kept for interrogation and then killed by the army. The Court found a violation of Article 5 ACHR to the detriment of his wife and his father and sisters.[118] The Inter-American Court did not apply a test to consider them as such, but did cite the case law of the European Court and the HRC in order to illustrate the criteria that these supervisory bodies have taken into account in assessing whether the relatives can be considered as victims.[119]

These considerations raise the immediate question of *which* relatives fall within the scope of the suffering that amounts to violations of the ACHR. A definition of the 'familiares immediatos' is given in the case *The Ituango Massacres v. Colombia*, a massacre case. The Court considered under Article 5 ACHR that the adequately-identified immediate next of kin:

> …are the direct descendents and ascendants of the alleged victim, namely: mother, father, children, and also siblings, and spouse or permanent companion, or those determined by the Court based on the characteristics of the case and the existence of some special relationship between the next of kin and the victim or the facts of the case…'[120]

The definition that the Court gives here is an interpretation that potentially qualifies a wide circle of relatives as the immediate next of kin. This broad interpretation was further elucidated in another massacre case, *The Mapiripán Massacre v. Colombia*. In this case, more than 100 paramilitaries took control of a village for five days with

115 *Blake v. Guatemala* IACtHR (1998), para. 114. See also *La Cantuta v. Peru* IACtHR (2006), para. 113 (With regard to mental suffering, the Inter-American Court referred to the 'deep feelings of fear, anxiety and defencelessness' that the victims probably experienced, as well as the anticipation of their deadly fate while witnessing acts perpetrated against other people).

116 *Blake v. Guatemala* IACtHR (1998), para. 115.

117 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 238.

118 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 166.

119 *Ibid*., paras. 163 and 164.

120 *The Ituango Massacres v. Colombia* IACtHR (2006), para. 264.

the acquiescence of the state in question. They killed and tortured a large number of citizens in the village. The Inter-American Court again recognised the grave impact on the next of kin and clearly stated that it is 'reasonable to presume that all of these, whether identified or not, suffered the extreme circumstances of the massacre or its consequences.'[121] One of the factors that played a role in requiring no further evidence were the specific circumstances of the case. The circumstances prevented the national authorities, as well as the Court itself, from identifying all the next of kin.

Despite this inclusive approach, the limits on the circle of relatives as victims of enforced disappearance were clearly set in the *La Cantuta Case*. In 1992 during the internal armed conflict in Peru a paramilitary group (Grupo Colina) burst into the campus of La Cantuta University and abducted nine students and one professor, of whom six were later found dead and four were still missing at the date of the judgment. In comparison to the massacre cases, the Inter-American Court narrowed the notion of the next of kin as direct victims under Article 5 ACHR by imposing a burden of proof on some of the siblings to prove that they had suffered emotional harm. This burden of proof required some evidence to be established with regard to the actual damage.[122] Judge Cançado Trindade in his separate opinion to the interpretation of this judgment called this approach a major backward step in the case law of the Inter-American Court. He argued that it is unimaginable that the brothers and sisters of victims of such grave violations would not suffer great sadness and anguish even though they might not have been actively involved in the process. Therefore, there must at least be the presumption that they did suffer. It is subsequently for the state to rebut these claims. For that reason, he called upon the Inter-American Court to abandon this 'restrictive, reactionary, and unsustainable criterion' of placing such a burden of proof on siblings.[123] It must be noted that, in contrast to this more restrictive consideration under Article 5 ACHR, these siblings were considered to be direct victims under Articles 8(1) and 25 ACHR in relation to Article 1(1) ACHR. The stricter approach in the *La Cantuta Case* has been pursued in subsequent case law.[124] Nevertheless, such an approach has not prevented the Court from considering (young) children as victims of Articles 5, 8(1) and 25 ACHR in later cases.[125]

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121 *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 146.

122 *La Cantuta v. Peru* IACtHR (2006), para. 128.

123 *La Cantuta v. Peru* (interpretation of the Judgment on the merits, reparations and costs) IACtHR Series C No. 173 (30 November 2007), separate opinion of Judge Cançado Trindade.

124 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), paras. 235-238 (The Court distinguished 'direct family members', *i.e.* mothers and fathers, daughters and sons, husbands and wives, and permanent companions, on the one hand, and siblings and other relatives, on the other. There is a presumption of harm to the right to mental and moral integrity of the former type of victims, while the latter type requires some evidence of harm).

125 *Heliodoro-Portugal v. Panama* (preliminary objections, merits, reparations, and costs) IACtHR Series C No. 186 (12 August 2008), para. 175.

The above paragraphs demonstrate that there is a wide definition of victims, including descendants and ascendants or any other relative with a special relationship with the victim or the facts of the case, taking into account the specific characteristics of the case, which brings relatives within the ambit of the protection of the ACHR. The factors that determine the special relationship between the relatives and the victims or the facts are unclear. In her analysis of the case law of the Inter-American Court, Medina Quiroga discerns two factors that determine the distinct suffering of relatives, which brings them within the scope of Article 5 ACHR. First, the type of violation is determinative and, second, the acts and omissions of the authorities after the violation occurred.[126] As to the first factor, enforced disappearance is without doubt a type of violation that attracts a distinct suffering. As to the second factor, acts or omissions resulting in the lack of an investigation to discover the whereabouts or fate of the disappeared person and in disrespectful treatment of the remains have played an important role in considering relatives to be victims. Still, instead of vague presumptions, Medina Quiroga argues that the Court should apply the following criteria: the close family ties, the specific circumstances of the relationship between the relative and the victim, the type of violation, the efforts of the relative in the search for truth and justice, and the effects of the negligence or inactivity in the response of the state to inquiries and complaints. In this regard, she favours requiring proof showing that the suffering of the person falls within these criteria rather than vague presumptions.[127] A situation does not necessarily have to be assessed according to all these criteria, but they should be taken into account in a consistent and rigorous manner. These criteria are very similar to the special factors identified by the European Court, as described in the following subsection.

In conclusion, the Inter-American Court has given a broad definition of relatives, while in a later case imposing a burden of proof on some of them to prove damage as a result of emotional harm. In enforced disappearance cases, the distinct suffering seems to be a consequence of the failure to investigate resulting in a prolonged situation in which the whereabouts and fate of the disappeared person remain unknown despite requests to the authorities for clarification. The parent-child bond and the bond between partners seem to create a presumption of suffering that reaches the threshold of inhuman treatment. The position of other relatives is, however, more ambiguous. They may need to provide some evidence of their claim to be a victim. While it is difficult to imagine what kind of evidence is needed, it could include proof of their involvement in the search for the disappeared person or the affective relationship with the disappeared person.

126 Medina Quiroga (2008), p. 557.
127 *Ibid.*, pp. 559 and 560.

5.4.3 The European Court of Human Rights

The European Court has set a clear framework for determining whether relatives can be considered to be victims of inhuman treatment. In *Kurt v. Turkey*, the first disappearance case before it, the European Court found that the mother of the disappeared person was a victim of inhuman treatment that reached the level of severity required by Article 3 ECHR (freedom from torture or other ill-treatment or punishment):

> The Court notes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 […]. It recalls in this respect that the applicant approached the public prosecutor in the days following her son's disappearance in the definite belief that he had been taken into custody. She had witnessed his detention in the village with her own eyes and his non-appearance since that last sighting made her fear for his safety, as shown by her petitions of 30 November and 15 December 1993 […]. However, the public prosecutor gave no serious consideration to her complaint, preferring instead to take at face value the gendarmes' supposition that her son had been kidnapped by the PKK. As a result, she has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time.[128]

The factors considered by the Court were that the mother witnessed the detention by persons whom she believed to be state agents. However, her complaints were met with no serious response which caused her to suffer prolonged uncertainty and anguish. The complacency by the state authorities also played a significant role in the consideration of the Court.[129]

In subsequent case law, the European Court developed several 'special factors' that determine whether the level of severity reaches Article 3 ECHR. These factors distinguish the dimension and character of the suffering from the emotional distress that other serious human rights violations cause:

> Whether a family member is such a victim will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared

128 *Kurt v. Turkey* ECtHR (1998), para. 133.
129 *Ibid*., para. 134.

> person and the way in which the authorities responded to those enquiries. The Court would further emphasise that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.[130]

Thus, five factors can be discerned from this case that determine whether a relative qualifies as a victim: (1) the proximity of the family tie with special weight being given to the parent-child relationship; (2) the particular circumstances of the relationship; (3) the extent to which the relative witnessed the events; (4) the involvement of the relative in attempting to discover information on the fate and whereabouts of the disappeared person; and (5) the attitude and reaction of the authorities to requests for information. The essence of the violation lies in particular in the last factor. Applying these factors, in *Çakici v. Turkey* the Court rejected, by fourteen to three votes, the claim of the applicant (who was the brother of the disappeared person) that he had suffered to such an extent that it reached the threshold of Article 3 ECHR.[131] The dissenting Judge Thomassen, joined by Judges Jungwiert and Fischbach, recognised that a brother can suffer immensely from the disappearance of his sibling and the uncertainty as to his fate and whereabouts. They argued that the Court should have found a violation to his detriment in light of his involvement in the search. However, apparently the majority of the Court found that the sibling relationship was too distanced and trumped his involvement in the search. In spite of this rejection, the European Court considered that Article 13 ECHR (the right to an effective remedy) had been violated.[132]

Sangariyeva v. Russia ushered in a significant change in attitude in 2008, through widening the scope of the concept of a victim. In this case, the applicants were close relatives and had witnessed the arrest of their disappeared family member. Furthermore, they had not received any adequate response to their inquiries for almost four years. Two children of the disappeared person were only one and three years old at the time of the disappearance. They were obviously not involved in the search but were still regarded as victims under Article 3 ECHR.[133] Also, in *Gekhayeva and Others v. Russia* the sisters of a disappeared girl, while not having witnessed the event, had been involved in the search, albeit not as the main actors. The Court

130 *Çakici v. Turkey* ECtHR [GC] (1999), para. 98. See also *Timurtaş v. Turkey* ECtHR (2000), para. 95; *Orhan v. Turkey* ECtHR (2002), para. 358.

131 *Çakici v. Turkey* ECtHR [GC] (1999), para. 99.

132 *Ibid.*, paras. 108 and 114 (The applicant alleged a violation in respect of himself and his disappeared brother. The European Court concluded generally that Article 13 ECHR had been violated).

133 *Sangariyeva a.o. v. Russia* ECtHR (2008), paras. 91 and 92.

found this sufficient to include them as victims of inhuman treatment under Article 3 ECHR.[134]

While the 'special factors' do not include a time indication as to the suffering, the case law of the European Court clarifies that an enforced disappearance of four days, after which the dead bodies were found, does not necessarily bring the suffering of relatives to the required minimum threshold of Article 3 ECHR. In the case of *Nasukhanov v. Russia*, the Court observed that:

> […] that Movsar and Movladi Nasukhanov were abducted on 14 February 2002. Their remains were found on 18 February 2002, that is, four days later. The Court is not persuaded that in the present case there was a distinct long-lasting period during which the applicants sustained the uncertainty, anguish and distress characteristic of the specific phenomenon of disappearances […]. Moreover, there were no specific circumstances in the present case precluding the applicants from burying their loved ones in a proper manner […]. The Court thus considers that the moral suffering endured by the applicants has not reached a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation […].[135]

An important consideration was that the relatives could bury their loved ones. In a preceding case, the remains had also been found after four days, but the dead bodies were dismembered and decapitated. Moreover, even after six years some parts of the corpses were still missing. As a result, the applicants had not been able to bury the dead bodies of their loved ones in a proper manner. This aggravating factor was considered to cause 'profound and continuous anguish and distress' which met the threshold of Article 3 ECHR.[136]

Hence, the factors for determining who is considered to be a victim besides the disappeared person have been applied in an increasingly inclusive manner by the European Court. The family bond and a long-lasting uncertainty and anguish as a result of inaction or uncooperative behaviour seem to be the dominant factors. Article 13 ECHR seems to be applied to a broader range of persons, also to those who have not been considered to fall within the ambit of Article 3 ECHR.

134 *Gekhayeva a.o. v. Russia* ECtHR 29 May 2008 (Appl. no. 1755/04), paras. 118-120. See also *Ibragimov a.o. v. Russia* ECtHR (2008).
135 *Nasukhanovy v. Russia* ECtHR 10 February 2011 (Appl. no. 1572/07), para. 107.
136 *Khadzhialiyev a.o. v. Russia* ECtHR 6 November 2008 (Appl. no. 3013/04), para. 121.

5.4.4 Victims and their personal claims in relation to the exhaustion of domestic remedies

Interesting to note is that while involvement in the search, and if relevant the criminal proceedings, is one of the criteria for being considered a victim, the case law does not appear to require relatives to have brought their own claim before domestic courts for the purpose of admissibility. Rather, they must have exhausted domestic remedies in respect to the disappearance of their family member.[137] The only case in which such a claim was rejected at the admissibility stage was handed down by the HRC. In *Yurich v. Chile*, the HRC was of the view that the complaint of the mother, the applicant in the case, under Article 7 ICCPR due to the adverse effect that the search for the whereabouts and fate of the disappeared person had had on her physical and mental health was not admissible; she had not demonstrated that she had availed herself of domestic remedies concerning this complaint.[138]

Another related issue arose in the case *Skendžić and Krznarić v. Croatia* before the European Court. In this case the complaint of the relatives under Article 3 ECHR was declared inadmissible as the relatives did not suffer significant disadvantage.[139] The reason was that the state authorities had acknowledged the suffering of the relatives as a result of the disappearance by means of a court judgment in which state responsibility on the basis of inhuman treatment had been determined and appropriate redress had been afforded.[140]

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137 It appears that when the domestic remedies are generally ineffective, relatives do not have to have exhausted all of them. See *e.g. Betayev and Betayeva v. Russia* ECtHR 29 May 2008 (Appl. no. 37315/03), para. 106 (The Court stated that 'Having regard to the Government's objection concerning the applicants' failure to complain of their relatives' unlawful detention to domestic authorities, the Court observes that after their sons had been taken away by armed men on 26 April 2003, the applicants actively attempted to establish their whereabouts and applied to various official bodies, whereas the authorities denied their responsibility for their sons' detention. In such circumstances, and in particular in the absence of any proof to confirm the very fact of the detention, even assuming that the remedy referred to by the Government was accessible to the applicants, it is more than questionable whether a court complaint of the unacknowledged detention of the applicants' sons by the authorities would have had any prospects of success. Moreover, the Government have not demonstrated that the remedy indicated by them would have been capable of providing redress in the applicants' situation, namely, that it would have led to the release of Lecha and Ibragim Betayev and the identification and punishment of those responsible. Accordingly, the Government's objection concerning non-exhaustion of domestic remedies must be dismissed.'); *Bousroual v. Algeria* HRC (2006), para. 8.3.

138 *Yurich v. Chile* HRC (2005), para. 6.5.

139 *Skendžić and Krznarić v. Croatia* ECtHR 20 January 2011 (Appl. no. 16212/08), para. 97 (referring to Article 35(3) and (4) ECHR).

140 *Ibid*., paras. 95 and 96.

5.4.5 Comparative remarks in light of the experiences of victims

As the experiences of victims show, enforced disappearance has a distinct and abhorrent impact on disappeared persons themselves as well as on their relatives. As Chapter 4 *supra* indicated, this ripple effect extends far into society as a whole. All five main causes of victims' suffering are relevant for the concept of 'victim'. The disappeared person is without doubt considered to be a victim. The lack of contact with the outside world and the accompanying human rights violations make the suffering of the disappeared person more than clear. At the same time, such a lack of contact also prompts the suffering of his or her relatives. The negative attitude of the authorities towards relatives in their search for information regarding the whereabouts or fate of the disappeared person prolong the suffering of these relatives because of the responding enduring uncertainty. The impunity with which the perpetrators escape accountability damages their sense of dignity and justice. In addition, relatives are often threatened during the course of their attempt to find out what has happened. This aggravated suffering is part of the fourth main cause of victims' suffering (an unsafe environment to carry out the search and other activities related to the enforced disappearance). Often, the suspected perpetrators work for the same state institutions that relatives must turn to in order to report and complain about the enforced disappearance. Also, the continuing psychological and social impact hinders relatives, as well as the disappeared, in their opportunities to develop and lead a 'normal' life.

The continuous nature and ongoing uncertainty as a result of the inadequate response by the state authorities is viewed by the three supervisory bodies as one of the distinct features that makes the suffering of relatives reach the threshold of, at least, inhuman treatment. As such, the case law of the three human rights bodies makes clear that in general the parents of a disappeared person who lodge a complaint are considered to be victims of, amongst others, breaches to the freedom from ill-treatment. The treaty bodies have also accepted such claims by the partners of victims. Children of the disappeared person, even toddlers, have also been considered victims of the enforced disappearance of their father or mother. In contrast, a greater burden of proof seems to rest on siblings and other family members.

The case law of the supervisory bodies in respect of the violation of the freedom from ill-treatment seems to be the best indicator for determining whether the harm suffered draws relatives within the notion of victims.[141] The supervisory bodies have assessed the distinct suffering of relatives with respect to this right. The

141 It is important to focus on this article because both the Inter-American Court and the European Court have considered certain relatives of the disappeared person as victims of the right to a fair trial and the right to judicial protection but not as victims of the freedom from torture or other ill-treatment.

HRC and the Inter-American Court have not set clear criteria for when relatives can be considered victims. However, the proximity requirement and the causal link between the suffering and the adverse effects of the response of the state seem to be determinative. In contrast, the European Court has been the forerunner in setting criteria for considering relatives as victims.

Despite the lucidity of the European Court regarding the criteria on the basis of which it evaluates who can be considered a victim, its approach has also attracted discussion. Feldman argues that these criteria are 'extremely restrictive, exclusive and divisive'.[142] For instance, he argues that the requirement of the involvement of the relatives in the search for the disappeared family member and for justice is difficult to satisfy. First of all, it is likely that not all close family members are involved in the search, but instead share the burden and divide the tasks. Also, psychological hindrance can prevent persons from taking part in the search.[143] Moreover, he argues that it is not clear which characteristics of the response of the state amount to conduct that breaches Article 3 ECHR to the detriment of relatives. While the Court requires particular aggravating features in some cases, in other cases it has found slow and inefficient investigations to be sufficient.[144] Feldman's approach corresponds with the main causes of victims' suffering. Due to the five main causes of victims' suffering, continued efforts to search for the disappeared person affect the lives of the family as a whole. As a result, families have to divide the tasks to be able to continue their lives, which may mean that not every family member is involved in the search. Additionally, the great psychological and physical impact and the threats and hindrances by the state authorities may provide important blockades to searching activities. Finally, it must be recognised that when the disappeared person was a parent the impact on his or her children is immense, both psychologically as well as socially. These considerations should indeed be taken into account when applying any factors determining the scope of the notion of a victim.

5.5 The continuous nature of enforced disappearance

Various sources have considered enforced disappearance as a continuous crime.[145] As Rodley has accurately explained: '[t]he idea of 'disappearances' constituting a

142 T. Feldman, 'Indirect victims, direct injury: recognizing relatives as victims under the European human rights system' (2009) 1 *EHRLR* pp. 50-69, at p. 51.

143 *Ibid.*, p. 63.

144 *Ibid.*, p. 64.

145 UNWGEID, 'Report of the Working Group on Enforced or Involuntary Disappearances. General Comment on article 17 of the Declaration' (2000) UN Doc. E/CN.4/2001/68, paras. 27-32; UNWGEID, 'General Comment on enforced disappearance as a continuous crime', reported in UNHRCouncil, 'Report of the Working Group on Enforced or Involuntary Disappearances' (26 January 2011) UN Doc. A/HRC/16/48; Article III IACFD. In published documents and case

continuing offence is logical, since non-acknowledgement of the detention and non-disclosure of the fate or whereabouts of detained persons are key elements in the offence itself.'[146] The view that enforced disappearance is by nature continuous has raised several issues. In the adjudication of enforced disappearance cases at the international level, such a qualification has been of particular relevance for the admissibility stage. This continuing nature has played a role in assessing compliance with the six-month rule[147] and with respect to the preliminary objection *ratione temporis*. An examination of the latter preliminary objection illuminates what the continuous nature exactly implies.

The preliminary objection *ratione temporis* has been extensively considered by the three supervisory bodies in several enforced disappearance cases. According to the *ratione temporis* principle, states cannot be held accountable for acts that occurred before they ratified the international human rights treaty in question or before they recognised the competence of a supervisory organ to receive individual complaints about a violation of this treaty, hereinafter to be referred to as the 'crucial' date. This criterion is based on the principle of the non-retroactivity of treaties in international law.[148] If enforced disappearance is considered to be continuous, this crime may fall within the competence of the supervisory bodies even though the crime commenced before the date of ratification or recognition.[149]

The fact that enforced disappearance has been considered as a violation of multiple human rights under the ICCPR, the ACHR and the ECHR raises questions as to which part of the crime constitutes a continuous crime and who can be considered a victim accordingly (the disappeared person and/or his or her relatives). The case law discussed below is illustrative of those aspects of an enforced disappearance that have been considered to be continuous.

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law, the term 'continuous crime', 'continuous violation', 'continuing crime' and 'continuing offence' are used to indicate that the human rights violation extends in time and causes constant suffering to its victims during that time. This study uses the term continuous crime, but it leaves the quotations cited in their original wording. See also P. Dijkstra, H. Klann, R. Ruimschotel & M. Wijnkoop, *Enforced disappearances as continuing violations* (Amsterdam International Law Clinic 2002) (This report provides a thorough overview of the doctrine and case law on the issue of continuous crimes).

146 Sir Nigel Rodley, The UN Draft Declaration on the Protection of All Persons from Enforced Disappearance, Paper presented at the International Conference on Political Killings and Disappearances, Sponsored by Amnesty International (Amsterdam 1992), as cited in Brody & González (1997), p. 389.

147 Article 26 ECHR and Article 46(1)(b) ACHR. The First Optional Protocol of the ICCPR does not contain a similar six-month rule. See *e.g. Varnava a.o. v. Turkey* ECtHR [GC] (2009), paras. 162-167.

148 Article 28 Vienna Convention on the Law of Treaties.

149 The question whether an alleged human rights violation is indeed continuous has often been joined to the merits of the case, see *e.g. Varnava a.o. v. Turkey* ECtHR [GC] (2009), para. 150 and *Loizidou v. Turkey* ECtHR [GC] (1995), para. 104.

5.5.1 The Human Rights Committee

The continuous suffering of the relatives of a disappeared person appeared early in the views of the HRC. In *Quinteros v. Uruguay*, the HRC decided on a communication with respect to the disappearance of the complainant's daughter in June 1976 in Uruguay. This event occurred after the crucial date of the entry into force of the ICCPR. Still, this case is important because the HRC concluded that the mother of the disappeared woman was a victim of Article 7 ICCPR due to 'the anguish and stress caused to the mother by the disappearance of her daughter and by the *continuing* uncertainty concerning her fate and whereabouts'.[150] This continuing uncertainty has not, however, played a role in considering the act itself as being continuous, as explained in the following paragraphs.

In one of its other early cases, *Bleier v. Uruguay*, the HRC considered the continuous nature of the enforced disappearance itself. Uruguay ratified the ICCPR and OP-1 on 23 March 1976. The HRC recognised that the communication was admissible in so far as it related to the events that occurred after this date.[151] The HRC established, according to the available evidence, that the victim was detained prior to this date by state agents (at the end of October 1975), but that he continued to be detained by the Uruguayan authorities or had died while in custody.[152] Consequently, the HRC declared the case admissible and concluded a breach of, *inter alia*, the freedom from torture or other ill-treatment and the right to liberty.[153]

Two cases, *Sarma v. Sri Lanka*[154] and *Yurich v. Chile,*[155] with opposite outcomes further illustrate the implications of this continuous nature by virtue of the preliminary objection *ratione temporis*. In *Sarma v. Sri Lanka* the HRC rejected the *ratione temporis* objection. The ICCPR entered into force on 11 June 1980 while Sri Lanka recognised the right of individual petition on 3 October 1997. Sri Lanka made a declaration at the time that it only recognised the competence of the HRC in relation to events following the entry into force of the OP-1 for Sri Lanka. The author claimed that on 23 June 1990 his son, some others and he himself were seized during a military operation and transferred to a detention centre. The alleged reason for the apprehension was that his son was suspected of being a member of the LTTE (Liberation Tigers of Tamil Eelam). His son was allegedly beaten and tortured. After having been transferred to another detention centre, the author and others were released while his son remained in custody. During a meeting in May 1991, a

150 *María del Carmen Almeida de Quinteros et al. v. Uruguay* HRC (1983), para. 14 (emphasis added by the author) See also *Yurich v. Chile* HRC (2005), para. 6.4.
151 *Bleier v. Uruguay* HRC (1982), para. 7(b).
152 *Ibid*., paras. 11(2) and 13.
153 *Ibid*., para. 14.
154 *Sarma v. Sri Lanka* HRC (2003).
155 *Yurich v. Chile* HRC (2005).

Brigadier had told the author's wife that her son was dead. However, a few months later, the complainant claimed to have seen his son in the van of an army officer.[156]

The respondent state alleged that the HRC was precluded *ratione temporis* from considering the communication because the events had occurred before the crucial date. Conversely, the author alleged that the enforced disappearance continued and noted the 39 letters and other requests filed in respect of the disappearance of his son to numerous authorities. He had sent his last request in July 1998 (after the crucial date) and received a reply in February 1999 that his son had not been taken into custody by the army. In March 1999 the author once again petitioned the President in order to seek a full inquiry without any result. Subsequently, he submitted his communication in 1999. The HRC considered that:

> [...] although the alleged removal and subsequent disappearance of the author's son had taken place before the entry into force of the Optional Protocol for the State party, the alleged violations of the Covenant, if confirmed on the merits, may have occurred or continued after the entry into force of the Optional Protocol.[157]

The HRC did not distinguish between the alleged violations at stake, namely violations of Articles 1, 2(3), 6, 7, 9 and 10 ICCPR. On the merits, it found a violation of Article 7 to the detriment of the complainant and his wife and of Articles 7 and 9 ICCPR to the detriment of his disappeared son.

In contrast, the facts in *Yurich v. Chile* prompted the HRC to accept the *ratione temporis* objection of the respondent state. The author alleged that her daughter and her son-in-law had disappeared in 1974 in Chile following an arrest by the National Intelligence Directorate (DINA). Several witness statements confirmed that they were held in *incommunicado* detention and were subjected to torture or inhuman treatment. She and her husband had been missing ever since. The author filed several unsuccessful applications for *amparo* in the period between 11 November 1974 and 3 October 1975. The case was referred to a criminal court for investigation, but was dismissed since no offence could be shown to have been committed. On 28 May 1975 a complaint for mass abduction in respect of 163 persons was lodged with the Santiago Appeal Court requesting the appointment of an inspecting magistrate to take charge of the investigation. This request was rejected up to and including the highest domestic court. In addition, a criminal complaint was lodged on 29 March 2001 for the disappearance of more than 500 persons, including the author's daughter. Despite there efforts, at the time of her communication to the HRC the author had no clarity about the whereabouts and fate of her daughter.

156 *Sarma v. Sri Lanka* HRC (2003), paras. 2.1-2.6.
157 *Ibid*., para. 6.2.

The respondent state maintained that the communication should be declared inadmissible *ratione temporis* because the events complained of had occurred or commenced prior to the entry into force of the Optional Protocol for Chile. Upon ratifying the Protocol on 28 August 1992, Chile made a declaration stating that it understands the competence of the HRC to be limited to individual complaints relating to events occurring after the entry into force of Protocol for Chile or, in any event, to acts that had begun after 11 March 1990. The state objected to the admissibility of this communication by maintaining that the events that gave rise to this communication took place prior to the date of the Covenant's international entry into force.[158] Interestingly, it also recognised that 'abduction is an ongoing offence or an offence with ongoing effect, *i.e.,* one that continues over time until the victim is found alive or dead'.[159]

The HRC considered that the initial acts of arrest, detention or abduction, as well as the refusal to give information about the deprivation of freedom – both key elements of the offence or violation – occurred before the crucial date and before 11 March 1990. Even though the HRC regarded enforced disappearance as a continuous crime, it considered that it also had to take into account the declaration made by the respondent state. In the light of this declaration, the majority concluded that the case was inadmissible *ratione temporis*. In reaching this conclusion, the HRC also took account of the fact that Chile admitted responsibility for the crime and that the complainant had not made any reference to actions of the respondent state after the crucial date that 'would constitute the confirmation of the enforced disappearance'.[160] The majority decision prompted a strong dissenting opinion by the minority expressing the view that because an enforced disappearance constitutes a continuing violation, it precludes the application of the exception *ratione temporis*.[161] The approach taken in *Yurich v. Chile* was upheld more than three years later in the case *Cifuentes Elgueta v. Chile*.[162] This time, the decision also included two dissenting opinions which argued, *inter alia*, that the continuing and complex character of enforced disappearance precludes the application of *ratione temporis*.[163] One of the

158 *Yurich v. Chile* HRC (2005), paras. 4.1-4.3.

159 *Ibid*., para. 4.8.

160 *Ibid*., para. 6.4. See *Simunek, Hastings, and Prochazka v. the Czech Republic* HRC 19 July 1995 (Comm. no. 516/1992), para. 4.5 (The HRC defines a continuous crime in the following terms: 'A continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of the previous violations of the State party').

161 *Yurich v. Chile* HRC (2005), dissenting opinion of Ms. Chanet, Mr. Lallah, Mr. O'Flaherty, Ms. Palm and Mr. Solari-Yrigoyen.

162 *Cifuentes Elgueta v. Chile* HRC (2009), para. 8.5.

163 *Ibid*., individual opinion of Chanet, Lallah and Majodina and the individual opinion of Keller and Salvioli.

opinions linked the continuing character to the failure to provide an effective remedy under Article 2(3) ICCPR in light of the implied right to truth.[164]

The examination of the two cases in the preceding paragraphs shows that preliminary objections of a procedural nature may trump the consequences of the continuous nature of enforced disappearance at the admissibility stage. The difference in outcome between *Sarma v. Sri Lanka*, on the one hand, and *Yurich v. Chile* and *Cifuentes v. Chile*, on the other, lies in the fact that in the latter the respondent state made an explicit declaration upon the ratification of OP-1. This declaration was made to the effect that Chile only recognised the competence of the HRC to consider individual complaints with respect to events that had begun after 11 March 1990. In this case, the *Yurich Case*, the alleged detention and subsequent disappearance had occurred far before the crucial date. It is not entirely clear what the HRC understands by action that would 'confirm' the disappearance after that date, which would bring the disappearance within the competence of the HRC. Apparently, a failure to clarify the whereabouts does not fall within the meaning of such action.

Having established that a declaration by the respondent state is decisive, the decision in the case *S.E. v. Argentina* again challenges this conclusion. In this case, the alleged disappearance took place ten years before the crucial date, but the whereabouts were not clarified after that date. The facts of the case pertained to the disappearance in 1976 of the three children of the complainant. Argentina had ratified the ICCPR and OP-1 on 8 November 1986. Argentina had not made a similar declaration as Chile did at the time of the ratification. Nevertheless, the complaint was declared inadmissible. The HRC considered that the events that could have led to a violation of several ICCPR rights occurred prior to this date.[165] As a consequence, the claim of a violation of the right to a remedy as enshrined in Article 2(3) ICCPR, which is an auxiliary right, was also inadmissible.[166] A factor that could have played a role is that the ICCPR had not entered into force at the time of the disappearance in the *S.E. Case*, while Sri Lanka was already bound by the ICCPR at the time of the facts that gave rise to the *Sarma Case*. Also, in the latter case, there was still hope that the disappeared person was still alive. Such a reading would be in line with the outcome of the *Bleier Case* with which this subsection started.

It is noteworthy that a common feature of the views is that the HRC considered the disappearance as a whole, rather than deconstructing it into several individual violations and considering aspects such as the right to liberty and the suffering of relatives separately. Accordingly, either the whole complaint was declared admissible or the complaint was rejected in its entirety. A further and final point that is illustrated

164 *Ibid*., individual opinion of Keller and Salvioli.
165 *S.E. v. Argentina* HRC 26 March 1990 (Comm. no. 275/1988), para. 5.3.
166 *Ibid*., (Article 2(3) ICCPR can only be invoked in conjunction with other rights laid down in the ICCPR).

by the discussed views by the HRC is that the arrest or detention itself marks the moment from which an enforced disappearance commences.

5.5.2 The Inter-American Court of Human Rights

In the first case before it, the Inter-American Court pronounced the continuous character of an enforced disappearance.[167] In subsequent case law, this Court has elaborated the consequences of this statement. In the *Blake Case,* for example, the Inter-American Court had to deal with the issue of a continuous violation in a similar fashion as the HRC. The facts of this case pertained to the disappearance of Mr. Blake on 28 or 29 March 1985. Mr. Blake was an American journalist residing in Guatemala at the time of the events. His detention and murder were carried out around those two days. Since Guatemala had recognised the jurisdiction of the Inter-American Court nearly two years later, the Inter-American Court accepted the objection *ratione temporis* of the respondent state with respect to the arbitrary deprivation of liberty and the murder of the victim. The fact that Blake's remains were only found in 1992, which established the date of the murder, did not alter this conclusion.[168] While recognising that enforced disappearance is a continuous violation until the fate and the whereabouts of the victim are established, the Inter-American Court decided that it only 'had the competence to rule on the effects and acts subsequent to the date of recognition of its jurisdiction'.[169] The aspect of Blake's enforced disappearance that fell within these 'effects and acts' were those events related to the right to a hearing within a reasonable time under Article 8(1) ACHR with respect to Blake's relatives. At the time of consideration by the Inter-American Court, the *Blake Case* was still pending in the domestic courts.[170] Moreover, the suffering of the relatives violated Article 5 ACHR.[171] Hence, the Court found a violation in this respect.

Judge Cançado Trindade delivered a separate opinion on the point of the *ratione temporis* exception. He argued that the emphasis of the reasoning of the Inter-American Court,

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167 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 155.

168 *Blake v. Guatemala* IACtHR (1998), paras. 82 and 86 (The Commission argued that a rejection of the claim under Article 4 ACHR in such cases would set a precedent contrary to international human rights law. Also, it would imply that it would be better for families not to investigate what had happened to their disappeared relatives (para. 56)).

169 *Ibid*., para. 86; *Blake v. Guatemala* IACtHR (1996), paras. 39 and 40.

170 *Blake v. Guatemala* IACtHR (1998), para. 89.

171 *Blake v. Guatemala* IACtHR (1998), paras. 112-116. See also *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 115 (The Court found a breach of Article 5 ACHR to the detriment of the relatives due to the continuing uncertainty and negative attitude of the state); *Heliodoro-Portugal v. Panama* IACtHR (2008), paras. 43 and 175 (The Court found violations of Articles 5, 8(1) and 25 read together with Article 1(1) ACHR to the detriment of the partner and children of Heliodoro Portugal, which implied the continuous nature of this suffering).

> should be placed, not on the sword of Damocles of 09 March 1987, the date on which Guatemala accepted the jurisdiction of the Court (which is to be accepted as a limitation *ratione temporis* to the competence of this latter (...)), but rather on the nature of the alleged multiple and interrelated violations of protected human rights, and prolonged in time, with which the present case of disappearance is concerned.[172]

In his view, the nature of enforced disappearance as a multiple human rights violation and as prolonging over time must be seen as a whole. The majority, however, preferred a narrow reading of the continuous nature of enforced disappearances.

Similarly, the Inter-American Court accepted the preliminary objection *ratione temporis* raised by the respondent state in *Serrano-Cruz Sisters v. El Salvador*. In this case, two sisters had allegedly been captured by soldiers during a military operation on 2 June 1982, resulting in their disappearance. The respondent state had accepted the competence of the Court to consider individual petitions from 6 June 1995. Upon this acceptance, El Salvador made a declaration excluding facts from the competence of the Inter-American Court commencing prior to this date, even if these events had lasting effects after this date.[173] Even though the whereabouts of the two sisters remained unclear at the time of the consideration of the case, the Inter-American Court accepted the arguments of the state with respect to the disappearance itself in light of the compatibility of this declaration with the ACHR.[174] However, the Court found that the facts relating to the judicial proceedings, which gave rise to the compliant under Articles 8(1) and 25 ACHR, constituted independent facts that commenced after the date of the recognition of the Court's jurisdiction. Hence, the Court declared itself competent to consider those complaints.[175] As to the alleged violation of Article 4 ACHR (the right to life) read together with Article 1(1) ACHR, the Court left room in its decision on the preliminary objections for a consideration of the facts that commenced after the critical date to be considered on the merits.[176] On the merits, the Court indeed concluded that there had been a violation of Articles 8(1) and 25 ACHR read together with Article 1(1) ACHR to the detriment of the sisters and their next of kin.[177] At the same time, the Court decided that it could not rule on the right to life due to the lack of temporal jurisdiction.[178] The Court also noted that there was still a possibility that the disappeared children would be alive.

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172 *Blake v. Guatemala* IACtHR (1996), dissenting opinion of Judge Cançado Trindade, para. 12.
173 *Serrano-Cruz Sisters v. El Salvador* (preliminary objections) IACtHR Series C No. 118 (23 November 2004), para. 72.
174 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2004), para. 79.
175 *Ibid*., paras. 84 and 85.
176 *Ibid.*, para. 95.
177 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 106.
178 *Ibid.*, paras. 125 and 130-132 (In addition, the Court ruled that it had no jurisdiction in respect of Articles 17, 18 and 19 ACHR in light of the declaration made by the state on limits to the jurisdiction of the Court).

In *Heiliodoro-Portugal v. Panama*, the Inter-American Court took a slightly different, and more controversial, approach. The case concerned the disappearance of Heliodoro Portugal in 1970, a time when a military regime ruled Panama. His remains were identified in August 2000. Panama had accepted the competence of the Inter-American Court to consider individual complaints on 9 May 1990. The Inter-American Commission alleged a violation of Articles 4, 5, 7, 8(1), 13 and 25 ACHR read together with Article 1(1) ACHR. On the issue of the limitation *ratione temporis*, the Inter-American Court made a distinction between the extrajudicial killing of Heliodoro Protugal and his enforced disappearance. As to the former violation, the Inter-American Court recognised that it was not known with certainty when the murder of the victim took place, either before or after the crucial date of 9 May 1990. However, basing its decision on the report of the Institute of Forensic Medicine and on the time that had elapsed since his disappearance, the Court presumed that Heliodoro Portugal had been murdered prior to the acceptance of the individual complaint procedure. Hence, it declared the complaint of a violation of the right to life inadmissible.[179] However, the Inter-American Court did not accept the preliminary objection *ratione temporis* in its entirety with regard to the enforced disappearance. The Inter-American Court deconstructed the enforced disappearance into the different alleged violations. On the one hand, it declared itself incompetent to decide on the facts giving rise to a complaint under Articles 4, 5 and 13 ACHR because of the presumption of death prior to 9 May 1990. On the other hand, it rejected the preliminary objection in respect of the alleged violation of the right to liberty (Article 7 ACHR) since 'this related to his alleged forced disappearance, which continued after 1990, and until his remains were identified in 2000.'[180] Hence, it found itself competent to examine the alleged failure of the state to investigate the case, as well as the way in which the investigations were conducted after the crucial date.[181] On the merits, the Court concluded that the right to liberty of Heliodoro Portugal was continuously violated until the date when his remains were located.[182]

One of the criticisms of this judgment points to the illogical – but necessary – conclusion that the Court, on the one hand, decided that the victim died long before the crucial date for the purpose of temporal jurisdiction while, on the other, the state was responsible for his deprivation of liberty even after this crucial date. Such a conclusion leads to the remarkable question: who, then, was deprived of liberty, Heliodoro Portugal or his remains? Rivera Juaristi argues that if the enforced disappearance had been treated in an integral manner, the Court could have avoided

179 *Heliodoro-Portugal v. Panama* IACtHR (2008), paras. 31 and 32.
180 *Ibid.*, para. 37.
181 *Ibid.*, para. 38.
182 *Ibid.*, para. 113.

such an illogical conclusion.[183] The Inter-American Court could then have considered all alleged violations by rejecting the preliminary objection *ratione temporis* as a whole.

A last landmark case relevant to the continuous nature was handed down in 2009. In *Radilla-Pacheco v. Mexico*, the Court dismissed the preliminary objection *ratione temporis* raised by the state.[184] The respondent state argued that the disappearance of the victim occurred prior to the entry into force of both the ACHR and the IACFD for that state,[185] which allegedly barred the Court's jurisdiction to consider the case. The Court dismissed the arguments of the state by concluding that the ACHR 'is applicable to those facts that constitute violations of a continuous or permanent nature, that is, those that occurred prior to the entry into force of the treaty and persist even after that date, since they are still being committed.'[186] The whereabouts and fate of the disappeared victim had not been clarified since his disappearance. Because an enforced disappearance has a permanent and continuous character as long as the fate and whereabouts have not been discovered, the Court declared itself competent to hear the case. Based on the continuous character of enforced disappearance, the Court also dismissed the arguments of the state in respect of the inapplicability of the IACFD.[187] The Court continued to examine the complaints under Articles 2, 3, 4, 5, 7, 8 and 25 ACHR.

In summary, the Inter-American Court is of the opinion that enforced disappearance is to be integrally considered as an autonomous and continuing, or at least permanent, crime composed of multiple elements with complex interrelationships and related criminal acts.[188] At the same time, when considering the continuous nature in terms of admissibility, this Court tends to deconstruct the crime into separate elements of detention, torture, death, remedies and the impact on relatives. The elements that are considered to be continuous are the right to a fair trial and the right to juridical protection, as long as the whereabouts or fate of the person involved are not clarified. Also, the suffering of the relatives is believed to be continuous. The Court considers the acts in relation to these rights as independent facts that may commence after the

183 F.J. Rivera Juaristi, 'La competencia ratione temporis de la Corte Interamericana en casos de desapariciones forzadas: una crítica del caso Heliodoro Portugal vs. Panamá' (2009) 4 *Revista Cejil* 5 pp. 20-37, at p. 26. *Cf. Heliodoro-Portugal v. Panama* IACtHR (2008), separate opinion of judge Ramirez, paras. 16 and 17 (arguing in favour of the separation of the death from the disappearance).

184 *Radilla-Pacheco v. Mexico* (preliminary objections, merits, reparations, and costs) IACtHR Series C No. 209 (23 November 2009).

185 *Ibid.*, para. 28 (The respondent state had made an 'interpretative statement' at the time of ratification of the IACFD to the effect that the provisions of the IACFD 'shall apply to acts constituting the forced disappearance of persons ordered, executed, or committed after the entry into force of this Convention.').

186 *Ibid.*, para. 24.

187 *Ibid.*, paras. 31 and 32.

188 *Goiburú et al. v. Paraguay* IACtHR (2006), para. 83.

actual arrest or detention and the subsequent disappearance. The *Heliodoro Portugal Case* leads to some confusion as to the continuous nature of the violation of the right to liberty; a continuous substantial violation of this right was found even though the Court accepted that the person had died some eighteen years previously. At the same time, such a conclusion is consistent with the consideration by the Inter-American Court that the duty to investigate continues until the fate or whereabouts of the victims has been established and to use all the means at the state's disposal 'to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains'.[189]

Having concluded that the Inter-American Court in principle considers enforced disappearance as a continuous violation, a final point for consideration can be derived from the analysis above. When a person has died as a result of the enforced disappearance, the location of the remains and the notification of the relatives seem to mark the ending of the violation. More recent case law confirms this view and reiterates that the remains must be located and their identity affirmed with certainty.[190]

5.5.3 The European Court of Human Rights

The European Court has also applied the concept of a continuous crime to enforced disappearance cases. Like its counterparts, the European Court has recognised that the relatives of the 'disappeared' persons suffer from 'doubt and apprehension' that lasts for 'a prolonged and continuing period of time' resulting in 'severe mental distress and anguish' within the meaning of Article 3 ECHR.[191] In *Timurtas v. Turkey*, the European Court concluded that 'noting, finally, that the applicant's anguish concerning his son's fate continues to the present day, the Court considers that the disappearance of his son amounts to inhuman and degrading treatment contrary to Article 3 of the Convention in relation to the applicant.'[192]

In addition, the continuous nature of the crime itself was applied in an enforced disappearance case for the first time in *Cyprus v. Turkey*.[193] In this case, the European Court concluded that:

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189 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 181.

190 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), para. 121; *Ibsen-Cárdenas and Ibsen-Peña v. Bolivia* (merits, reparations and costs) IACtHR Series C No. 217 (1 September 2010), paras. 82, 88 and 92.

191 *Çiçek v. Turkey* ECtHR (2001), para. 173. See section 4 above for a discussion on relatives as victims of enforced disappearance.

192 *Timurtaş v. Turkey* ECtHR (2000), para. 98.

193 *Cf. De Becker v. Belgium* ECtHR 27 March 1962 (Appl. no. 214/5), para. 8 (referring to the admissibility of the Commission in relation to art. 10 ECHR, which recognised: 'in regard to its competence *ratione temporis* that the Applicant had found himself placed in a continuing situation which had no doubt originated before the entry into force of the Convention in respect of Belgium

> …during the period under consideration, there has been a continuing violation of Article 5 of the Convention by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared.[194]

Thus, the European Court found a procedural violation pertaining to the lack of an effective investigation into the whereabouts and fate of the missing persons. The European Court concluded that it had not been established that during the period under consideration a substantive violation of the right to liberty had taken place.[195] Similarly, the European Court found a continuing violation of Article 2 ECHR in respect of 'the failure of the authorities of the respondent State to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances'.[196]

A more recent case sheds light on the relationship between the continuous nature and the preliminary objection *ratione temporis*. In the high-profile case of *Varnava v. Turkey*, the Grand Chamber confirmed that the procedural aspect of Article 2 ECHR in the context of enforced disappearances is of a continuous nature as long as the whereabouts or fate of the person are unaccounted for.[197] The facts of this case pertained to nine missing men who had disappeared in the context of the Turkish military operations in Northern Cyprus in July and August 1974. The applicants alleged that witnesses last saw them in Turkish custody. Since then the applicants had not heard any news about the missing men. The remains of one of the missing persons were identified in 2007 in the context of exhumations carried out by the United Nations Committee on Missing Persons ('CMP'). The respondent state raised preliminary objections based on *ratione temporis* because the facts giving rise to the dispute occurred prior to the acceptance of the individual complaint procedures. While Turkey ratified the ECHR on 18 May 1954, it only accepted the right of individual petition on 28 January 1987 and the jurisdiction of the old Court on 2 January 1990. In its consideration, the European Court took 28 January 1987 as the crucial date from which Turkey could be held responsible under the individual complaint procedure. Accordingly, the Court noted that the applicants' complaints related to the situation after that date, 'namely the continuing failure to account for the fate and whereabouts of the missing men by providing an effective investigation.'[198]

(14th June 1955), but which had continued after that date, since the forfeitures in question had been imposed "for life"').

194 *Cyprus v. Turkey* ECtHR [GC] (2001), para. 150.

195 *Ibid.*, para. 51.

196 *Ibid.*, para. 136.

197 *Varnava a.o. v. Turkey* ECtHR [GC] (2009).

198 *Ibid.*, para. 134.

In establishing its temporal jurisdiction, the European Court tackled three issues: (1) the nature of the procedural obligation under Article 2 ECHR; (2) the presumption that the missing persons had died around 1974; and (3) the nature and scope of the duty to investigate disappearances in particular. As to the nature of the procedural obligation to investigate under Article 2 ECHR, the European Court reiterated its case law that such an obligation can arise when persons have gone missing in life-threatening circumstances, even when it cannot be established that state agents were responsible for the disappearance. It further stressed that the procedural obligation evolved into a 'separate and autonomous duty'[199] that operates independently of the substantive obligations of Article 2 ECHR. Moreover, the European Court considered that the fact that this interpretation evolved after the date of Turkey's acceptance of the right of individual petition did not bar its application in the case.[200]

Regarding the second issue – the presumption of death – the Court admitted the possibility that the missing men had died around 34 years previously,[201] but stressed the difference between the making of a factual presumption and the legal consequences that may flow from such a presumption. In particular, a presumption of death does not discharge the state from its obligation to investigate.[202] Lastly, the European Court emphasised the distinct nature of the obligation to investigate disappearances. Such violations are, in contrast to investigating deaths, surrounded by an ongoing situation of uncertainty and unaccountability. The failure to account for the whereabouts and fate of the disappeared persons and to institute the requisite investigation 'will be regarded as a continuing violation', even in cases where death is presumed.[203]

Hence, it is beyond question that the European Court considers the duty to investigate an enforced disappearance and to prosecute the perpetrators as a continuous obligation. This obligation still applies even when there is a presumption of death long before the state in question has accepted the right of individual petition. It is also indisputable that the state will not be held responsible in those situations for the substantive aspects of the relevant ECHR rights.

199 *Ibid*., para. 138.
200 *Ibid*., para. 140.
201 *Ibid*., para. 112 (The Court noted that the remains of one of the missing men, Savvas Hadjipanteli, were discovered in a mass grave in 2007 within the area controlled by the 'TRNC'. The Court noted that neither the forensic nor the medical certificates indicated an approximate date and time of death, but that the few details given supported the hypothesis that he had been killed at or about the time of hostilities in 1974).
202 *Ibid*., paras. 141-146.
203 *Ibid*., para. 148.

5.5.4 Comparative remarks on the continuous nature in light of the experiences of victims

The case law examined in the previous subsection confirms, at least to a certain extent, the continuous nature of enforced disappearance. Defining enforced disappearance as continuous is important for both the disappeared person and his or her relatives. First and foremost, the experiences of victims have shown instances where disappeared persons have been released after years of secret detention. Consequently, it is evident that this crime continues during the weeks, months or years that the disappeared person is at the complete mercy of the perpetrators. The characterisation of such a situation as continuous is therefore in line with the first main cause of victims' suffering, *i.e.* no trace of the disappeared person due to denials by the state authorities. Furthermore, the ongoing uncertainty for the relatives, and the enduring suffering as a result of that uncertainty, also continues as long as the whereabouts or fate of the disappeared person is concealed. Moreover, relatives often have to face constant uncooperative and often hostile attitudes by state authorities in the search for the disappeared person (the second main cause of suffering). Impunity, the third main cause of victims' suffering, has been another factor recognised by the Inter-American Court and European Court. These Courts have found the obligation to prosecute to be continuous. Lastly, the ongoing efforts to search for the disappeared person and the attendant grief foster obstacles to continuing their 'normal' life, as being the fifth main cause of victims' suffering.

The three supervisory bodies have all recognised the special character of enforced disappearance caused by the inherent denials and uncertainty; as long as the fate or whereabouts are not clarified there seem to be continuous aspects in an enforced disappearance. The characterisation as continuous does, however, lead to subtle distinctions in its application. Unequivocally, the three human rights bodies have determined that the suffering of the relatives is continuous as long as the fate or whereabouts are not clarified. Besides the relatives' suffering, the HRC and the Inter-American Court have doctrinally defined an enforced disappearance as a continuous violation. The European Court has mostly considered the duty to investigate to be the continuing element of the enforced disappearance.

The exact continuous elements of an enforced disappearance have become clear through the consideration of the procedural objections *ratione temporis* in the admissibility of individual complaints. This objection has played a large role in cases in which the deprivation of liberty and subsequent disappearance, and possibly death, commenced before the 'crucial date' of acceptance by the respondent state of the competence of the supervisory bodies to consider individual complaints. Considering the case law, it would appear that the enforced disappearance commences from the moment of the deprivation of liberty. However, the effects of the enforced disappearance may continue in time. What are these effects?

The continuous nature as understood by the HRC means that an enforced disappearance violates the ICCPR rights, even if the initial deprivation of liberty occurred prior to the crucial date. Still, declarations by states that have ratified the OP-1 related *ratione temporis* may trump the continuous nature of enforced disappearance. In cases that are consequently inadmissible, the HRC has not considered the right to an effective remedy because of its auxiliary nature compared to the other rights laid down in the ICCPR. In fact, the HRC has considered the crime of enforced disappearance as a whole and, as a result, declared the whole communication inadmissible. Hence, it is clear that neither the lack of an investigation nor the resultant constant suffering of the relatives can draw the enforced disappearance within the competence of the HRC in such cases. This result clearly does not respond to the ongoing suffering of victims.

The case law of the Inter-American Court and European Court show a tendency towards accepting preliminary objections *ratione temporis* in terms of substantive violations of the right to liberty, the freedom from torture or other ill-treatment and the right to life. The only case that contradicts this tendency is the judgment in *Heliodoro Portugal v. Panama*. In this case, the right to liberty was violated despite the fact that the disappeared person was presumed to have died before the crucial date. At the same time, several effects of, and acts related to, the enforced disappearance continue after the crucial date. This has been considered as such even if the enforced disappearance itself commenced prior to this crucial date. Such effects and acts have in most cases amounted to facts related to the duty to investigate, the right to an effective remedy and the impact on the relatives. In this respect, the failure to effectively investigate the whereabouts or fate of the disappeared person and to provide information to the relatives has brought the right to life and the right to liberty within the ambit of the jurisdiction of the European Court. Conversely, the Inter-American Court has considered such facts mostly under the right to an effective remedy and the right to a fair trial.

5.6 The systematic practice of enforced disappearance as a crime against humanity

Article 5 ICPPED states that the systematic or widespread practice of enforced disappearance constitutes a crime against humanity as defined by applicable international law. Chapter 2 *supra* discussed the fact that the criteria to determine whether a situation amounts to a systematic or widespread practice are not defined in a clear manner. The HRC has not ventured into assessing whether such a practice exists.[204] In contrast, the case law of the Inter-American Court and European Court has set clear criteria as to what situation amounts to systematic practice.

204 *E.g. Medjnoune v. Algeria* HRC (2006), para. 5.1 (The author of the communication alleged that there was a systematic practice, but the HRC did not deal with this part of the allegation).

5.6.1 The Inter-American Court of Human Rights

Within the Inter-American system, the preamble to the IACFD uses firm language in stating that 'the systematic practice of the forced disappearance of persons constitutes a crime against humanity'. Already in 1983, the General Assembly of the OAS proclaimed that the practice of enforced disappearance in the Americas constituted a crime against humanity.[205] The Inter-American Court cited this view in its first case in 1988.[206] Likewise, the Inter-American Court held that:

> […] the international responsibility of the Sate is aggravated if the disappearance is part of a systematic pattern or a practice applied or tolerated by the State, for it constitutes a crime against humanity involving a flagrant disavowal of the essential principles on which the inter-American system is based.[207]

The assessment of the existence of an official practice consists of an analysis of various conditions and elements. In the *Velásquez-Rodriguez Case*, this Court put forward four conditions on which the acceptance of the existence of an official practice of enforced disappearance rests: (1) a significant number of disappearances must have occurred during a particular period of time; (2) those disappearances must follow a similar pattern; (3) the kidnappings must be attributable to the state; and (4) the disappearances must have been carried out in a systematic manner.[208] Concerning the forth condition, the Court paid particular attention to the following elements: (a) that the victims were usually persons whom the state's officials considered dangerous to the regime; (b) that there was a particular *modus operandi* in which the enforced disappearances were carried out; (c) that the authorities systematically denied any knowledge of detention, of the whereabouts, or of the fate of the victims; and (d) that military and police officials as well as those from the Executive and Judicial Branches either denied the enforced disappearances or were incapable of preventing or investigating them, punishing those responsible, or helping those interested to discover the whereabouts and fate of the victims or locate their remains.[209] The State of Honduras was not able to refute the cogent evidence presented by the Inter-American Commission in a convincing manner. Therefore, the Court accepted that there was an official systematic practice of enforced disappearance.[210]

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205 OAS, 'Annual report of the Inter-American Commission 1983-1984' (24 September 1984) OEA/Ser.L/V/II.63, chapter IV, para. 12.
206 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 153.
207 *La Cantuta v. Peru* IACtHR (2006), para. 115.
208 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 147.
209 *Ibid*., para. 147 (v).
210 *Ibid*., para. 147(d, i-v).

5.6.2 The European Court of Human Rights

Like the case law of the Inter-American Court, the ECHR case law lays down conditions and elements for the existence of a systematic practice. This doctrine, however, has not been developed within the context of enforced disappearance cases, but in cases pertaining to *inter alia* torture practices on a massive scale. Two conditions must be satisfied on the basis of which to conclude the existence of a systematic practice. The first condition requires a repetition of acts and the second condition requires official tolerance. The elements that the applicant needs to prove concerning the repetition of acts seem to be: (1) that one particular breach is at stake; (2) that a sufficient number of these breaches have occurred; and (3) that the breaches are interconnected so that they amount to a pattern.[211] The elaboration of the latter element seems to be rather broad, it may be:

> either, on the one hand that they occurred in the same place, that they were attributable to the agents of the same police or military authority, or that the victims belonged to the same political category; or on the other hand that they occurred in several places or at the hands of distinct authorities, or were inflicted on persons of varying political affiliations.[212]

The second condition of official tolerance relates to State conduct and manifests itself in two different ways: (1) that the superiors of those directly responsible do not take any action to punish the violations or prevent their repetition, even though they are aware of the illegal acts; and (2) that the authorities deny the victims an effective investigation into the case or that the victims had no access to a fair hearing in judicial proceedings.[213] The concept of official tolerance reflects a broad scope. It also includes the attitude of the authorities in reacting to allegations of an existing practice when there is substantive evidence to this end. In this regard, the Commission stated that, 'The question to be decided is whether or not the higher authorities have been effective in bringing to an end the repetition of acts.'[214]

In the first enforced disappearance case before the European Court, the applicant maintained that there was an officially tolerated practice of enforced disappearance and the ill-treatment of detainees. The Court considered that there was not enough evidence to establish such a practice. In subsequent cases, the Court has been persistent in laconically dismissing any claim of an official practice in relation to

211 *Ireland v. the United Kingdom* ECtHR [GC] 18 January 1978 (Appl. no. 5310/71), p. 64.
212 *Denmark, Norway, Sweden, the Netherlands v. Greece* EComHR *Yearbook of the Convention 1969*, Vol. 12bis, pp. 195-196.
213 *Ibid*.
214 *France et al. v. Turkey* EComHR (1983), p 164.

enforced disappearance.[215] This rejection appears to be based on a lack of sufficient evidence to prove such practice instead of a lack of clear criteria.

5.6.3 Comparative remarks on the existence of a systematic practice in light of the experiences of victims

The European Court and the Inter-American Court seem to be largely in agreement on the elements of a systematic practice. Even though organised in a different fashion, these elements amount to (1) the repetition of similar acts and (2) official tolerance of those acts. Repetition means that there must be a significant number of enforced disappearances during a specific period of time. These enforced disappearances must have something in common so as to follow a pattern. For instance, the victims may belong to a specific group or the perpetrators belong to the same military or police authority. In addition, the Inter-American Court has taken into account whether there was a particular *modus operandi* in which the enforced disappearances were committed. The second element, official tolerance, takes the form of, at least, not responding adequately on the part of the state authorities. An inadequate response is understood to be either having failed to prevent the crimes, even though the state authorities were aware of them, or of having failed to investigate and to bring the perpetrators to justice.

Having found that the European Court and Inter-American Court have identified similar elements of a widespread or systematic practice, it now remains to evaluate these elements in light of the five main causes of victims' suffering. The first element, a significant number of enforced disappearances, seems to be a necessary element for finding a practice. When assessing this element in light of the main causes of victims' suffering, there are several remarks to be made about the term 'significant'. The first main cause of suffering (no trace of the disappeared person and denials by the state) together with the second main cause (uncooperative behaviour in the search for the disappeared person) may impede the possibility to determine whether an enforced disappearance is at stake and thus the number of persons subjected to enforced disappearance. Furthermore, the fourth main cause of suffering (unsafe environment in which to carry out activities related to the enforced disappearance) may hamper denouncing the state authorities for an alleged enforced disappearance. In this respect, it is important to recall that enforced disappearance is often used to spread fear among the population. These considerations seem to be important to keep in mind when assessing whether the number is 'significant'. The explanation of the second element, official tolerance, seems to strike with the main causes of victims' suffering. In particular, the perpetrators of enforced disappearances enjoy impunity

215 *Kurt v. Turkey* ECtHR (1998), para. 112. See also *Çiçek v. Turkey* ECtHR (2001), paras. 152 and 155.

because their crimes are backed up and hidden with the use of the state apparatus (the third main cause). This results in an unwillingness to investigate the case and to search for the disappeared person (the second main cause). Hence, when assessing intolerance it seems to be of particular importance that general situations of impunity are taken into account.

5.7 Concluding remarks

Chapter 2 *supra* identified the critical definitional issues in respect of which the ICPPED leaves room for interpretation and application. These issues relate to the definition of this human rights violation, to the concept of 'victims', to the concept of 'continuous crime' and to the criteria for determining a 'systematic practice'. This chapter examined the way in which the HRC, the European Court and the Inter-American Court have dealt with the identified definitional issues. Subsequently, this chapter evaluated their approaches in light of the five main causes of victims' suffering as set out in Chapter 4 *supra*. The findings demonstrate that the three supervisory bodies have developed useful guidelines for the interpretation of the notions of 'victim', 'systematic practice' and the continuous nature of enforced disappearance, while several questions related to the definition of enforced disappearance remain unanswered.

As a preliminary point, it is helpful to recall that the three supervisory bodies have adopted a multiple human rights approach in considering enforced disappearance cases. This approach was prompted by the lack of a definition of enforced disappearance in their respective treaties. Such an approach has advantages and disadvantages. On the one hand, a multiple rights approach generates the possibility to recognise the different aspects and stages of an enforced disappearance in each specific case. The Inter-American Court has used the multiple rights approach to its fullest potential. This Court has looked at the broader consequences of the enforced disappearance, taking into account the specific circumstances of the case. Where relevant, rights such as the right to participate in government and the freedom of movement have been considered. In respect of other rights, such as the right to be recognised before the law, the HRC has been the forerunner. On the other hand, this necessary approach leaves it up to the supervisory body and the rights recognised in the treaties which rights are considered to have been violated, which may not always serve the optimal protection from enforced disappearance.

A clear guidance for the issues related to the definition of enforced disappearance is difficult to discern from the case law. This difficulty is particularly due to the fact that the three supervisory bodies have predominantly considered enforced disappearance as a multiple violation of several human rights. While the supervisory bodies have used, or at least referred to, definitions of enforced disappearance found in other treaties, most norms have been elaborated on the basis of this multiple rights

approach. Against this background, it is not surprising that the case law has not addressed the elements of the definition as such. Still, there are indications in the case law that give guidance to a certain extent. Before setting out these indications, it is useful to recall the ICPPED definition of enforced disappearance. This definition comprises four elements:

(1) a deprivation of liberty;
(2) the direct or indirect involvement of state agents;
(3) a refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person; and
(4) placement outside the protection of the law.

The first issue considered in this chapter was whether the case law of the three bodies defines 'the fate or whereabouts' of the disappeared person. While these terms appear in the case law, a clear definition is not presented. At first glance, there is only clarity that information on the health of detained persons falls outside the meaning of the term 'whereabouts' as understood by the Inter-American Court. Furthermore, the examination of the continuous nature of the crime at least supports the view that the terms pertain to the location of the person or the identification and delivery of the remains, according to this Court. This kind of information is more elaborate than the view of the APT, an NGO concerned with the prevention of torture, which has indicated that information should at least give an answer to the questions whether the person is held in custody, whether he or she is alive or dead, and where he or she is detained. As information on detained or disappeared persons is closely linked with the duty to prevent and the duty to investigate, Chapters 7 and 8 *infra* demonstrate whether a more detailed examination of these duties as developed by the HRC, the Inter-American Court and the European Court could offer a further explanation of these terms. A final observation related to this point is that whatever the exact information may be, the fact that relatives know the whereabouts or fate of the person in question does not prevent the situation of the detained person from transforming into another human rights violation. As such, the situation may continue to violate human rights if the person concerned is still unable to communicate with his relatives, has been tortured or has been arbitrarily executed.

The second issue considered in relation to the definition of enforced disappearance was whether 'placing the person outside the protection of the law' must be considered as an inherent aspect of enforced disappearance that needs to be proved separately. There are no indications that such an element has played a role in the adjudication of enforced disappearance cases by the three supervisory bodies in a way that the victim needs to prove this element. Such an understanding is in line with the main causes of victims' suffering, in particular given the fact that there is no trace of the disappeared person, the impunity that often accompanies this crime and the inadequate action

on the part of the state to search for the disappeared person. This issue also raises the question whether for a certain amount of time the state authorities may deny the deprivation of liberty or refuse to give information on this deprivation. This issue is closely related to the duty to prevent and is further discussed in Chapter 7 section 4 *infra*.

A final question related to the definition of enforced disappearance relates to the distinction between this human rights violation and related human rights violations such as unacknowledged detention and arbitrary executions. The three human rights bodies have not clearly distinguished, if there is a distinction at all, between unacknowledged detention and enforced disappearance, on the one hand, or between arbitrary executions and enforced disappearance, on the other. In light of their multiple rights approach, they have not been in a position that necessitates them to do so. There seem to be indications, however, that short periods of unacknowledged detention do not necessarily amount to an enforced disappearance.[216] Similarly, it is clear that an execution does not exclude a situation from the definition of enforced disappearance. Yet, there must be a considerable time of uncertainty about the deaths or the location of the bodily remains for such situation to constitute an enforced disappearance.

While several issues related to the definition of enforced disappearance remain unclear for now, the case law provides clear guidance in order to determine who can be considered as a victim of enforced disappearance. Apart from the disappeared persons, the European Court has set clear factors on the basis of which it assesses whether relatives can also be considered as victims. The Inter-American Court and the HRC appear to take into account similar considerations but have not set clear indicators in this respect. While the European Court is most transparent concerning the factors it uses, which serves the credibility of the Court, this chapter showed that these factors require caution in light of the main causes of victims' suffering. For instance, participation in the search – now one of the ECHR criteria – should not be decisive for considering someone as a victim or not due to the necessary division of tasks within a family. Also, the immense impact on children within families in which one of the parents was subjected to an enforced disappearance must be taken into account. Accordingly, the following factors can be taken into consideration: (1) the family bond or specific circumstances that show a close relationship with the disappeared person; (2) the extent to which a person has been exposed to negative responses by the state authorities in the face of complaints and inquiries; (3) the degree of participation in the search for discovering the whereabouts or fate of the

216 Chapter 7 section 4 *infra* attempts to identify further the conditions when such unacknowledged detention either amounts to enforced disappearance or falls outside the definition of this human rights violation.

disappeared person; and (4) the effects on the well-being or family life of the person concerned.

The next concept that was considered in this chapter was an enforced disappearance as a continuous human rights violation. The case law of the three human rights bodies has been partly in line with the experiences of victims in this respect. The continuous nature of an enforced disappearance has consequences for the interpretation of the duties to investigate and prosecute and has procedural consequences for the competence of international adjudicatory bodies to consider a case. The latter issue was under scrutiny in this chapter, while the former is addressed in Chapter 8 *infra*. There seems to be a consensus among the three supervisory bodies that enforced disappearance is a violation of a continuous nature. The HRC and the Inter-American Court have held that enforced disappearance is itself a continuous violation. Still, the actual continuation seems to lie in the effects of the lack of investigation and adequate remedies, according to the Inter-American Court. The HRC has treated enforced disappearance as a whole, the consequence being that communications as a whole have been rejected on the basis of *ratione temporis*. The European Court has focused on the continuous duty to investigate effectively the whereabouts or fate of the disappeared person. The reason for this caution may lie in the political concerns. It has been argued that, while protection against enforced disappearances is benefited by viewing the violation in an integral manner, thereby bringing as many aspects within the jurisdiction of the supervisory bodies, states may refrain from signing up to human rights treaties for fear of retrospective application.[217] At the same time, the distinction between the enforced disappearance itself and the procedural obligations emanating from such a crime has enabled the regional Courts to consider cases of enforced disappearance that commenced well before the entry into force of the respective treaties for the respondent state. Such an approach appears to be facilitated by the multiple rights approach.

A further point that the case law on the continuous nature of enforced disappearance illuminates is the moment when an enforced disappearance is considered to commence and to end. The considerations under the preliminary objection *ratione temporis* by all three supervisory bodies demonstrate that the enforced disappearance in considered to commence from the moment of the deprivation of liberty after which the person disappears. The end of an enforced disappearance is when the whereabouts or fate of the disappeared person is known. According to the Inter-American Court this means that in the case of death the remains must be located in a manner that enables the identification and the relatives must have access to the bodily remains.

The final notion under scrutiny in this chapter was the notion of a 'widespread and systematic practice'. Both the European Court and the Inter-American Court

217 T.R. Gibson, 'True fiction: competing theories of international legal legitimacy and a courts battle with ratione temporis' (2007) 29 *Loy L A Int'l & Comp L Rev* pp. 153-166, at p. 157.

have set similar criteria for assessing the existence of such practice, which seem to be at least not detrimental to the five main causes of victims' suffering. These criteria are essentially the same in that they require a considerable amount of interconnected violations that are attributable to the state and that the state has not prevented them or brought them to an end or provided effective remedies to the victims. The importance of establishing a systematic practice for victims lies in the consequences attached to the notion of a crime against humanity. Such a classification may colour certain state obligations (Chapter 8 *infra*). In addition, the finding of a systematic practice provides important circumstantial evidence for relatives to evince their claim of an enforced disappearance.[218] Such circumstantial evidence may prove essential due to the frequent lack of information related to the facts of the case itself, as will be discussed in the next chapter.

Having discussed and elaborated crucial concepts for the understanding of protection from enforced disappearance, this study continues to examine the scope of the state obligations on the basis of which state responsibility for this human rights violation can and should be determined.

218 See Chapter 6 *infra* on the duty to respect and the evidentiary approaches of the HRC, the Inter-American Court and the European Court.

Chapter 6
Determining State Responsibility for Enforced Disappearance on the basis of the Duty to Respect

6.1 Introduction

The right not to be subjected to enforced disappearance as laid down in the ICPPED is primarily formulated in terms of the duty to respect; Article 1(1) ICPPED prescribes that 'no one shall be subjected to enforced disappearance'. This provision clearly establishes that States Parties are to refrain from committing enforced disappearances. They are in breach of the ICPPED if they engage in this human rights violation, and accordingly can be held accountable.

As Chapter 2 *supra* illustrated, the definition of 'enforced disappearance' in the ICPPED clearly contains a 'state' requirement.[1] This requirement means that the basic principle of attributing responsibility for this human rights violation is that either state agents have subjected a person to enforced disappearance or the state has authorised, supported or acquiesced in similar crimes committed by private persons or groups of persons. One of the key challenges in litigating enforced disappearance cases before human rights bodies has been to prove that the respondent state was indeed implicated in this crime. The facts in this regard are frequently highly contested; the allegation of the complainants that the state is involved in the enforced disappearance is disputed by the respondent state in the strongest terms.[2] Hence, a crucial step in the process of determining state responsibility based on the duty to respect is establishing that the state was or is involved in the enforced disappearance. The current chapter elaborates the ways in which the state could be implicated in this human rights violation and how to establish such participation at the international level.

This chapter examines how state involvement has been, and should be, established at the international level. Firstly, this chapter explains preliminary terminology relating to evidentiary matters. The next section examines the approach of the HRC, the Inter-American Court and the European Court to determining direct state involvement in an enforced disappearance. Issues addressed include the type of evidence that is admissible, the standard of proof for evincing responsibility, the burden of proof, and the probative value of the types of evidence. Thereafter,

1 See Chapter 2 subsection 3.1.2 and Chapter 5 section 3 *supra* for a detailed discussion of the definition of enforced disappearance in the ICPPED.

2 An exception to the disputed facts arises in situations where a regime change has occurred and the new government acknowledges that the former regime committed the crimes. See *e.g. La Cantuta v. Peru* IACtHR (2006), paras. 39 and 40.

this chapter examines responsibility based on indirect forms of participation in the crime, with a special focus on the notion of acquiescence. These last two sections each conclude with comparative remarks in light of the five main causes of victims' suffering defined in Chapter 4 *supra*.[3]

6.2 Preliminary remarks on evidentiary matters

None of the three human rights instruments – the ICCPR, the ECHR or the ACHR – provide clear statutory provisions relating to evidentiary matters. The First Optional Protocol of the ICCPR ('OP-1')[4] and the procedural rules of the two regional Courts only provide some basic guidelines.[5] Consequently, these issues have generally been addressed in the case law of the three supervisory human rights bodies. Before discussing how the three supervisory bodies have established that state agents were implicated in an enforced disappearance, it is useful to clarify the reoccurring terminology that is used in the course of this chapter with respect to the admissibility of evidence, the burden of proof and the standard of proof.

Firstly, for the purpose of this study, the admissibility of evidence is understood to pertain to (1) the type of evidence that the three supervisory bodies admit and (2) the time-limits for submitting such evidence to these bodies. Generally, a distinction can be made between direct evidence and circumstantial evidence. Direct evidence is understood to be evidence 'that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.'[6] Circumstantial evidence – also referred to as 'indirect evidence' – is defined as '[e]vidence based on inference and not on personal knowledge or observation.'[7]

Secondly, the burden of proof refers to the legal obligation on the parties to the case to satisfy the adjudicating body, to a specified standard of proof, that certain

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3 These five main causes are: (1) no trace of the disappeared person due to denials by the state authorities; (2) uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person; (3) *de facto* and *de jure* impunity; (4) an unsafe environment to carry out the search and other activities related to the enforced disappearance; and (5) obstacles for victims to continue their 'normal' life.

4 The First Optional Protocol to the ICCPR is the optional protocol dedicated to the individual complaint procedure under the ICCPR.

5 HRC, 'Rules of procedure of the Human Rights Committee' (24 April 2001) UN Doc. CCPR/C/3/Rev.6 (hereinafter: 'Rules of procedure'), rules 80(2), 93 and 94; Articles 2, 4 and 5 of the OP-1; Article 38 ECHR; ECtHR, 'Rules of Court' (1 June 2010) (hereinafter: 'Rules of Court 2010'), rules 44(a) and (c), 38, 59 and A1-8; IACtHR, 'Rules of Procedure of the Inter-American Court of Human Rights' (November 2009) (Approved by the Court during its LXXXV Ordinary Period of Sessions, held from November 16 to 28, 2009) (hereinafter: 'Rules of Procedure 2009'), Articles 37-58.

6 Black's Law Dictionary (7th ed. 1999).

7 *Ibid*.

facts are true.[8] Legal scholars distinguish between two types of burden of proof: the evidential burden and the legal burden.[9] The first type, the evidential burden, is relevant for the admissibility stage. This burden of proof refers to the obligation to adduce sufficient evidence to raise an issue under one of the treaties for the claim to be considered in the first place. This onus is discharged when the party that bears it makes out a *prima facie* case.[10] The second type, the legal burden, is relevant for the merits stage and pertains to all evidence submitted by the parties. The legal burden determines the division of the onus of proof on the parties to submit sufficient evidence for the supervisory body to establish the facts on the merits.[11] The human rights discourse has not used this distinction between the two burdens of proof clearly and consistently. Still, this distinction is useful for understanding how the burden of proof is allocated in the course of the adjudicatory proceedings of the three supervisory bodies.

Thirdly, the standard of proof is understood to be the level of persuasion necessary for reaching a particular conclusion. In relation to this standard, the terms 'presumption' and 'inference' are in particular relevant in enforced disappearance cases. There is, after all, rarely direct evidence available.[12] The term 'presumption' in this context means the drawing of inferences from a proven fact. It is a conclusion that a certain fact must be presumed to exist once another fact has been established, unless proven otherwise.[13] By the term 'inference' is meant the 'conclusion reached by considering other facts and deducing logical consequences from them'.[14] The difference between a presumption and an inference is then that an interference is a permissive conclusion that can be drawn from other facts, while a presumption embodies a legal rule that asserts that if the basic fact is proved, 'the presumed fact must be accepted as established unless and until rebutted.'[15]

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8 I.H. Dennis*, The Law of Evidence*, 2nd edn. (London: Sweet & Maxwell 2002), p. 369.

9 Dennis (2002); K.A. Young*, The Law and Process of the U.N. Human Rights Committee* (Ardsley, New York: Transnational Publishers, Inc. 2002), pp. 224 and 225. It must be noted that different terminology has been used to indicate the difference between the evidential burden and the legal burden).

10 Young (2002), p. 231.

11 Dennis (2002), pp. 370-372.

12 C. Grossman, 'The *Velásquez Rodríguez* Case: The Development of the Inter-American Human Rights System', in: J.E. Noyes, L.A. Dickinson & M.W. Janis, (eds.), *International Law Stories* (Foundation Press 2007) p. 77, at p. 89.

13 See *e.g.* Dennis (2002), p. 419.

14 Black's Law Dictionary.

15 F.J. Kauffeld, 'Ordinary practice of presuming and presumption with special attention to veracity and the burden of proof', in: F.H. Van Eemeren, J.A. Blair, C.A. Willard & A.F. Snoeck Henkemans, (eds.), *Anyone who has a view: theoretical contributions to the Study of Argumentation* (Dordrecht: Kluwer Academic Publishers 2003) pp. 133-146, at p. 135, footnote 2.

6.3 State agents as the perpetrators of the crime of enforced disappearance

When examining the duty to respect, the focus is on what states must refrain from doing. In the context of the present study, this duty clearly requires state agents to refrain from depriving a person of his or her liberty and, subsequently, denying the detention or any knowledge thereof. The contentious issue in the case law of the three supervisory bodies has not been so much whether the situation fell within the definition of enforced disappearance, but rather whether state agents were indeed involved in the crime. Producing evidence that demonstrates the involvement of the state has proven to be exceptionally complicated. There is hardly any evidence available for relatives due to state authorities covering up the crime and the secrecy surrounding the whereabouts or fate of the disappeared person.

The dearth of evidence in enforced disappearance cases has prompted the three supervisory bodies to adopt a specific approach to evidence. This section scrutinises the evidence upon which the three human rights bodies have had to make a decision and their approach to establishing that state agents were the direct perpetrators. In this respect, this section examines the admissibility of evidence, the burden of proof, the standard of proof and the evaluation of evidence.

6.3.1 The Human Rights Committee

6.3.1.1 The admissibility of evidence: types of evidence and time-limits

The legal basis upon which the admissibility of evidence is framed according to the ICCPR is Article 5(1) OP-1. This article endows the HRC with the competence to consider individual communications 'in the light of all written information made available to it by the individual and by the State Party concerned'.[16] Two admissibility requirements are apparent in this provision. The HRC is to base its views on (1) *written* information and (2) information that is *submitted to it by the parties to the procedure*.

The HRC has so far strictly adhered to the literal meaning of Article 5(1) OP-1. As a result, the decisions have been made solely on the basis of written information.[17] While several authors argue that the text of this article does not exclude the HRC from expanding its avenues for obtaining evidence to oral hearings or fact-finding missions,

16 Article 5(1) OP-1.

17 See M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary*, 2nd revised edn. (Kehl am Rhein: N.P. Engel Verslag 2005), p. 872 (asking the question whether films, television programmes or works of art can be permissible under Article 5(1) OP-1).

the HRC has not adopted such options.[18] The HRC also seems to strictly adhere to the second criterion, only admitting information provided by the complainant and by the respondent state. This element thereby excludes evidence from unsolicited third parties, such as unsolicited *amicus curiae* briefs. Still, the evidence for consideration is not only dependent on the submission by the parties. The HRC has requested on its own motion additional information from either party. Furthermore, the HRC has referred to its own country reports issued under the Article 40 procedure in respect of the respondent state as a form of 'judicial knowledge'.[19] Such documents seem to be used as circumstantial evidence to either demonstrate country conditions or evaluate arguments put forward by the respondent state in light of claims made in earlier cases.

Within the limits of the minimum requirements laid down in Article 5(1) OP-1, the HRC has admitted a wide range of evidence. One commentator has concluded after surveying the practice of the HRC that 'it would appear open to the HRC to consider evidence from whatever source admissible and then decide as to its relevance and probative value.'[20] One can indeed distinguish a wide range of sources in the views issued in enforced disappearance cases. Apart from the account of the author of the communication, accepted evidence has included hearsay testimonies of co-detainees, eye-witness testimonies, informative books, documents issued by government officials such as investigation files and judicial decisions, documents of other UN bodies and statements of the respondent state before the UNWGEID.[21]

The varied body of evidence as a result of the flexibility towards accepting various sources of information has further benefited from the HRC's lenient approach to time-limits. The only time-limit that can be found in the OP-1 for submitting information is laid down in Article 4(2) OP-1, namely that the respondent state has to reply to the communication by the author within six months from the moment the communication has been transmitted to the state by the HRC. The state has to do so in the form of written explanations or statements clarifying the matter and the measures, if any, that have been taken to remedy the situation. Rule 91(2) of the Rules of Procedure specifies that this response shall relate to both the admissibility and the

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18 See *e.g.* D. McGoldrick, *The Human Rights Committee. Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press 1994), pp. 144-145; Young (2002), pp. 194-196 (arguing that oral hearings would make the HRC more efficient); Nowak (2005), pp. 871-872 and 874. *Cf.* Article 41(1)(g) ICCPR, which allows oral submissions in inter-state communications.

19 Nowak (2005), pp. 872 and 873. See also *Oxandabarat Scarrone v. Uruguay* HRC 4 November 1983 (Comm. no. 103/1981), para. 10.2; *Lanza v. Uruguay* HRC 3 April 1980 (Comm. no. 8/1977), para. 13; *Mukong v. Cameroon* HRC 21 July 1994 (Comm. no. 458/1991), para. 8.4; *Estrella v. Uruguay* HRC 29 March 1983 (Comm. no. 74/1980), para. 9.1.

20 McGoldrick (1994), p. 143.

21 *Bleier v. Uruguay* HRC (1982), paras. 8.1, 10.1 and 10.2; *María del Carmen Almeida de Quinteros et al. v. Uruguay* HRC (1983), paras. 1.4 - 1.6, 10.7 and 12.1; *Vasilskis v. Uruguay* HRC 31 March 1983 (Comm. no. 80/1980), para. 2.3; *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 2.6.

merits of the communication. This rule would appear to suggest that the applicant has to furnish all evidence when submitting the communication in accordance with Article 2 OP-1.[22] Subsequently, each party has the opportunity to submit comments on the submissions within fixed time-limits laid down on a case-by-case basis by the HRC.[23]

The HRC has generally refrained from the strict enforcement of the set time-limits in enforced disappearance cases.[24] Exemplary is the enforced disappearance case *Sharma v. Nepal*. The date of the initial communication was 26 April 2006. Shortly after the receipt of this communication, the HRC transmitted it to the respondent state on 9 May 2006. The respondent state gave its first reaction by a *note verbale* almost two years later on 12 February 2008. On 11 March 2008 and on 5 June 2008, the HRC requested Nepal to submit information on the merits, thereby accepting the delay of the state in its initial reaction. When the state failed to do so, the HRC finally went on to consider the case on the basis of the information available.[25]

It is possible to conclude from the previous paragraphs that the approach taken by the HRC with respect to admitting evidence seems to be inspired by ensuring that as much information as possible is brought to light. Except for the minimum requirements that the evidence must be in writing and is submitted by the parties, there does not seem to be any other requirement for admissibility. In addition, the HRC has collected information of its own motion by requesting additional information from the parties or by taking into account its own 'judicial knowledge'. Accordingly, the HRC considers the communication in light of all the evidence before it.

6.3.1.2 The burden of proof

The main rule for allocating the burden of proof does not differ from other adjudicatory processes; in principle, the burden of proof rests on the party that alleges a violation of the ICCPR. However, in respect of some violations the HRC has stated that the burden of proof cannot solely rest on the author of the communication. Such a division of the burden of proof was introduced for the first time in an enforced disappearance case. In *Bleier v. Uruguay*, the HRC considered that:

> With regard to the burden of proof, this cannot rest alone on the author of the communication, especially considering that the author and the State party do not

22 Article 2 OP-1 states: 'Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration'.

23 HRC, Rules of procedure 2001, rule 91(6).

24 See also Young (2002), p. 221. *Cf. Bethel v. Trinidad and Tobago* HRC 30 April 1999 (Comm. no. 830/1998) (This flexible approach has been challenged by the dissenting opinions in this case).

25 *Sharma v. Nepal* HRC (2008), paras. 1.1, 1.2, 4.1 and 4.6.

> always have equal access to the evidence and that frequently the State party alone has access to relevant information. It is implicit in article 4(2) of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities, especially when such allegations are corroborated by evidence submitted by the author of the communication, and to furnish to the Committee the information available to it. In cases where the author has submitted to the Committee allegations supported by substantial witness testimony, as in this case, and where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party.[26]

The *raison d'être* for the shared burden of proof is the unequal position of the parties in obtaining or accessing the evidence; often only the state has access to the relevant information. Moreover, the state has the duty to investigate the complaint in good faith in accordance with Article 4(2) OP-1. Such an investigation is an important tool to obtain evidence as to what happened and a lack thereof implies a great impairment in revealing the facts. As the HRC introduced this consideration on the merits, this division of the burden concerns the legal burden of proof (as opposed to the evidential burden that is applicable to the admissibility stage).

The shared burden of proof opens the door for rendering a so-called default decision. If the author of a communication establishes a *prima facie* case, and thereby satisfies the evidentiary burden, the legal burden shifts to the respondent state. Accordingly, the HRC may consider the complaint as substantiated if the state did not contest the allegation and failed to submit detailed and documented evidence or an explanation to the contrary.[27] The HRC may do so provided that further clarification depends on information that lies exclusively in the hands of the state. As a safeguard, the HRC will examine whether the alleged facts are plausible in light of the evidence submitted.[28]

The division of the legal burden, and the possibility of issuing a default judgment, has been applied in the majority of enforced disappearance cases.[29] Not

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26 *Bleier v. Uruguay* HRC (1982), para. 13.3.

27 *Ibid.*

28 Whether the default judgment is really a matter of the burden of proof is debatable. The legal concept seems to suggest that after the author of the complaint has satisfied the evidentiary burden at the admissibility stage, the onus of the burden of proof shifts to the state that then has the legal burden on the merits. Alternatively, it is possible to argue that it is an issue of the standard of proof; when the state is not able to refute the evidence presented at the admissibility stage, more weight is given to the statements and evidence presented by the complainant. The possible outcome of this debate is not determinative for the further discussion of the case law for the purpose of this study, and therefore, not further pursued.

29 See *e.g. Hiber Conteris v. Uruguay* HRC (1985), para. 7.2; *Grioua v. Algeria* HRC (2007), para. 7.4; *Sharma v. Nepal* HRC (2008), para. 7.5 ; *Madoui v. Algeria* HRC (2008), para. 7.3; *Benaziza*

surprisingly, the use of the default judgment has not been free from criticism by respondent states. For instance, the respondent state in *Bleier v. Uruguay* contested the 'rash' conclusion and accused the HRC of ignorance of all legal rules regarding the presumption of innocence. The reply of the HRC was that it had strictly adhered to the principle of *audiatur et altera pars* and had given the state ample opportunity to furnish information and refute the allegations.[30] Hence, the HRC does not shy away from using the default mechanism in such cases when the state shows no interest in contesting the allegations made by the author of the communication or fails to rebut the allegations thoroughly.

6.3.1.3 The standard of proof and the evaluation of evidence

In order to establish a *prima facie* case, the author of a communication must provide the HRC with a claim supported by a certain amount of substantiating materials.[31] Commentators have regarded this standard as perhaps being the lowest standard of proof possible.[32]

As the burden of proof usually shifts to the state after the case has been declared admissible, this shift requires the respondent state to submit on the merits evidence or explanations to refute the allegations made by the complainant. It is clear that refutations of the allegations in general terms are not sufficient to discharge the legal burden.[33] Rather, the HRC has in particular appreciated precise information including dates, the names of the perpetrators and official domestic documents.[34]

When the allegations presented by the author of the communication are uncontested or are only refuted by general statements, the HRC gives 'due weight' to these allegations on the merits 'to the extent that they have been substantiated'.[35] What this standard of proof is exactly has not, however, been clarified by the HRC. Nor is it clear whether this standard differs from the standard at the admissibility

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v. Algeria HRC (2010), para. 9.4; *El Alwani v. the Lybian Arab Jamahiriya* HRC 11 July 2007 (Comm. no. 1295/2004), para. 6.3; *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 7.2; *Bousroual v. Algeria* HRC (2006), para. 9.4; *Medjnoune v. Algeria* HRC (2006), 8.3.

30 *Bleier v. Uruguay* HRC (1982), para. 13.1. See also *María del Carmen Almeida de Quinteros et al. v. Uruguay* HRC (1983), para. 11.

31 UNGA, 'Report of the Human Rights Committee (Volume I)' (10 November 2009) UN Doc. A/64/40 (VOL. I) (hereinafter: 'Annual report 2009'), para. 118.

32 Young (2002), p. 237.

33 *Santullo Valcada v. Uruguay* HRC 26 October 1979 (Comm. no. 9/1977), para. 10; *Grille Motta v. Uruguay* HRC 29 July 1980 (Comm. no. 11/1977), para. 13.

34 *Vasilskis v. Uruguay* HRC (1983), para. 10.2; *Lanza v. Uruguay* HRC (1980), para. 15 (The HRC mentioned copies of relevant court decisions and findings of any investigation in the validity of the complaints made); *Weismann and Perdomo v. Uruguay* HRC 3 April 1980 (Comm. no. 8/1977), para. 15.

35 HRC, Annual report 2009, para. 138; *Mojica v. Dominican Republic* HRC (1994), para. 5.2. See also *Laureano v. Peru* HRC (1996), para. 8.2.

stage. McGoldrick concludes that the standard of proof on the merits generally requires evidence that is 'specific, substantial, not insubstantial nature and of pertinent character'.[36] In enforced disappearance cases, the HRC has used terms such as 'overwhelming evidence'[37] or 'credible evidence'[38] to indicate the body of evidence that satisfies the standard of proof. Accordingly, the HRC may consider the allegations substantiated when such evidence is not refuted by satisfactory evidence or explanations presented by the respondent state.[39]

The attempt to assess what 'credible' or 'overwhelming' evidence means is somewhat obfuscated by the fact that the HRC often neither explicitly evaluates the pieces of evidence nor comprehensibly justifies on the basis of which evidence the facts are established. Nevertheless, the views show that as a result of the default mechanism, the HRC has sometimes based its decisions on scanty evidence presented by the authors of the communications. The following cases provide an indication of what the HRC seems to consider as 'credible' or 'overwhelming' evidence that the person disappeared at the hands of the state.

In many cases, the complainant presented testimonies of witnesses to the arrest of his or her disappeared family member.[40] In *Grioua v. Algeria* the author was able to submit statements by witnesses who officially declared that they had witnessed the events.[41] However, such information is not always available. Instead, the author might have presumed from different sources that the state authorities must have been responsible for the enforced disappearance. In *Bleier v. Uruguay*, the HRC found that the testimonies of co-detainees submitted by the author together with the list on which the author's father and husband appeared constituted 'overwhelming' evidence. In light of the silence of the state, the HRC noted that this evidence was uncontested and concluded that the disappearance of Bleier could be attributed to the state authorities.[42] In *Arévalo v. Colombia*, the mother of the two disappeared brothers claimed that her two sons had left their homes to attend a job offer. They both never returned. She had heard from neighbours that members of the police force had been watching their home.[43] Based on these indications, together with the fact that the criminal investigations had not suggested that the perpetrators were persons other than

36 McGoldrick (1994), p. 146.
37 *Bleier v. Uruguay* HRC (1982), para. 11.2.
38 *Benaziza v. Algeria* HRC (2010), para. 9.4; *Madoui v. Algeria* HRC (2008), para. 7.3; *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 7.2.
39 *Benaziza v. Algeria* HRC (2010), para. 9.4.
40 *E.g. El Hassy v. The Libyan Arab Jamahiriya* HRC (2007), paras. 2.3 and 6.8; *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 2.2.
41 *Grioua v. Algeria* HRC (2007), paras. 2.2, 6.4 and 7.4.
42 *Bleier v. Uruguay* HRC (1982), paras. 11.2 and 13.4. See also *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 2.6 (The HRC relied on hearsay evidence from released co-prisoners as a source to confirm the detention by state authorities).
43 *Arévalo Perez et al. v. Colombia* HRC (1989), paras. 2.1 and 2.2.

state officials, the HRC concluded that the right to life and the right to liberty of the two brothers had not been effectively protected by the respondent state. Accordingly, it found a violation in this regard.[44] In *Madouni v. Algeria*, the complainant had heard from various sources that the state authorities had arrested her son. Co-prisoners and soldiers had, unofficially, confirmed to her his detention in places belonging to the military. The explanation of the state that her son suffered from psychiatric problems and had frequently run away from home was not substantiated by evidence and was accordingly dismissed by the HRC. Also, the HRC considered that the state's claim that the author's son was neither arrested nor detained was not supported by any actual evidence.[45] Hence, the enforced disappearance could be attributable to the state.

In other cases, the state acknowledged that the disappeared person had indeed been arrested but had escaped or been released after a certain period of time and subsequently was kidnapped by unidentified men. For instance, in *Sharma v. Nepal*, the HRC seemed to accept the account of the complainant that her husband had been arrested during a military operation. She had seen him for the last time at military barracks and had heard from a soldier at the gate that he was being held there. While the respondent state did not contest his arrest, it argued that he had drowned in a river while escaping from an expedition to show the hideouts of rebels. The state did not submit any evidence to prove the course of events that it alleged. Furthermore, the respondent state failed to follow up the request of the HRC to submit information on the merits. In its decision, the HRC exclusively relied on the account of the author that he was held in detention in light of the fact that he was arrested by the military in the first place.[46]

Bousroual v. Algeria illustrates the kind of information that the HRC requires from the respondent state to substantiate arguments that the disappeared person was initially detained but is no longer in state custody. In this case, the author claimed that her husband, at the time a prominent member of the prohibited political party 'Front Islamiste de Salut', had been arrested on 29 May 1994 at his home. She supported her claim with a letter received in 1997 from the judicial section of the police informing her that her husband had been arrested and then transferred to a military centre on 3 July 1994.[47] However, on 10 December 1998, the author received information from the National Observatory for Human Rights stating that, according to information received from the security services, a non-identified armed group had kidnapped her husband while in the custody of the Territorial Centre. Since then, the complainant

44 *Ibid*., para. 11.
45 *Madoui v. Algeria* HRC (2008), paras. 7.4 and 7.6.
46 *Sharma v. Nepal* HRC (2008), para. 7.6.
47 *Bousroual v. Algeria* HRC (2006), para. 2.6. See also *Saker v. Algeria* HRC 24 April 2006 (Comm. no. 992/2001), para. 9.3.

had not received any other information as to his whereabouts.[48] In this case, Algeria submitted information on the admissibility and the merits. It confirmed that the husband of the author had indeed been arrested and questioned, but claimed that he had been released soon after his arrest.[49] The HRC did not attribute substantial weight to the refutations of the state. In its decision, the HRC reasoned that the respondent state had not submitted evidence 'such as arrest warrants, release papers, records of interrogation or detention.'[50] Ultimately, it found a violation of Articles 6 (the right to life) and 9 ICCPR (the right to liberty).

As stated before, in the cases described in the preceding paragraphs, the HRC did not explicitly explain which sources had persuaded it to consider the enforced disappearance proven according to the required standard of proof. An illustrative case that could have been reasoned in a stronger fashion is *Bashasha v. the Libyan Arab Jamahiriya*. The HRC noted that 'the author's cousin was reportedly arrested in October 1989 by what clearly appears to be internal security officers, armed and in plain clothes.'[51] The HRC seemed to base this conclusion on the account of the author that the victim's family had witnessed the arrest and was present when internal security police came to fetch his belongings the following day. However, the HRC did not refer to other corroborative evidence submitted such as hearsay from released co-prisoners who had seen the victim in detention or the general context of mass arrests by the security forces. Even though it may well be that such evidence contributed to the actual findings of the HRC, an explicit evaluation would have made the decision more solidly reasoned.

The *Bashasha Case* is not the only case in which an examination of the general context could have strengthened the reasoning of the HRC. In a couple of enforced disappearance cases the authors of the communications alleged a systematic practice of enforced disappearances at the time of the events in the particular case.[52] However, the HRC has never addressed such a claim and, hence, a systematic practice has never played a significant role in the assessment of evidence. Instead, the HRC seems to employ the default mechanism, which appears to render the need to establish such practice irrelevant.

In summary, there seems to be a need on the merits for the author of a communication to submit 'overwhelming' or 'credible' evidence that demonstrates that the state authorities were behind the disappearance of their family member. The

48 *Bousroual v. Algeria* HRC (2006), para. 2.7.
49 *Ibid*., paras. 4.4 and 6.
50 *Ibid*., paras. 9.5 and 9.11.
51 *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 7.4.
52 *Medjnoune v. Algeria* HRC (2006), para. 5.1; *Sarma v. Sri Lanka* HRC (2003), para. 8.2; *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 2.3 (In this case, the author did not allege a systematic practice, but instead invoked the general context of mass arrests by the Libyan authorities at the time of the arrest of his cousin).

HRC does not meticulously set out an evaluation of the evidence in its views. One can deduce from the enforced disappearance cases that the complainant presented some kind of proof that the disappeared person was *detained* by state authorities. However, such proof is not always solid; it might be hearsay or only the account of the author. Accounts of authors have been generally accepted when the state either failed to respond or only superficially responded to the communication. Indeed, the HRC appears to attach great weight to the absence of information, or inadequate information, submitted by the respondent state. The HRC has made clear that in cases where the state submitted an exculpatory counter-plea, such a plea must be substantiated with detailed and precise evidence. In addition, a greater burden appears to rest on the state when it admits that the person was detained but argues that the person was released after a certain amount of time. In such cases, the HRC requires evidence such as arrest warrants, release papers, records of interrogation or detention from the state. At any rate, a general examination of the views has led commentators to conclude that the standard of proof leans definitely more towards a 'balance of probabilities' test than to the standard of 'beyond reasonable doubt'.[53]

6.3.2 The Inter-American Court of Human Rights

Like the HRC, the Inter-American Court has mostly developed rules of evidence in its case law. The Rules of Procedure, however, provide some guidelines which address the issue of evidence. During the course of its existence, the Inter-American Court has issued five versions of the Rules of Procedure of which several were in turn amended. The first Rules of Procedure were adopted in 1980 and the fifth, and most recent, at the end of 2009.[54] As a consequence, different rules have been applied to the enforced disappearance cases discussed in the course of this study. Where necessary, the version of the Rules of Procedure is pointed out. However, although the Inter-American Court has referred to the Rules of Procedure, it predominantly appears to have elaborated the rules of evidence through doctrine.

6.3.2.1 The admissibility of evidence

The Rules of Procedure do not limit the Inter-American Court as to the type of evidence that it may accept. As a result, the Court has admitted a large spectrum of different types of evidence. Evidence that litigants were able to produce, and that the Court has allowed, includes *inter alia*: testimonial evidence, affidavits, hearsay, photocopies, forensic evidence, documents of the various UN bodies on the situation

53 McGoldrick (1994), p. 150.

54 The different versions of the Rules of Procedure are available on http://www.corteidh.or.cr/reglamento.cfm.

of a particular country[55] and reports of national human rights bodies.[56] With respect to documentary evidence, the Inter-American Court has set some important 'minimum formal requirements for admissibility'.[57] The source and the way in which the evidence was obtained must be transparent for the Court.[58] In addition, sworn statements not made before a public notary have been accepted subject to the condition that this evidence does not affect legal certainty and the procedural balance among the parties.[59] Photocopies must be certified by reliable authorities, but when their authenticity is not questioned,[60] the Court accepts them as valid.[61] Litigants have also presented the Court with newspaper articles in order to demonstrate a specific case or the context in which the alleged violation took place. The Court has accepted such evidence as corroborative evidence. Finally, the Court accepts unsolicited *amicus curiae* briefs.[62]

The Rules of Procedure (November 2009) of the Inter-American Court require the parties to the case to introduce all evidence in the initial communications to the Court and within the time-limits that have been set for submitting these communications.[63] This restriction does not bar, however, all evidence introduced at a later stage.[64] In the view of the Court, such formalities may not impede the search for justice:

> [T]he procedural system is a means of attaining justice and [...] cannot be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved.[65]

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55 See *e.g. Blake v. Guatemala* IACtHR (1998), para. 75 (The Inter-American Court credited the United Nations 1990 Report of the UNWGEID).

56 *Castillo-Páez v. Peru* IACtHR (1997), para. 42 (The Inter-American Court considered the 1991 Annual Report by the National Human Rights Coordinator on the Human Rights Situation in Peru; Reports [of 1991 and 1993] of the [United Nations] Task Force on Forced or Involuntary Disappearances and the expert report by Dr. Enrique Bernales-Ballesteros). For a thorough overview see Pasqualucci (2003), p. 204 and Faúndez Ledesma (2008), pp. 697 and 704.

57 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 105 and separate concurring opinion of Judge Sergio García Ramírez, para. 27. See also Pasqualucci (2003), p. 205.

58 Pasqualucci (2003), p. 205; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), paras. 104 and 105 and separate concurring opinion of Judge Sergio García-Ramírez, paras. 26-29.

59 *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 82.

60 Pasqualucci (2003), p. 205.

61 *Blake v. Guatemala* IACtHR (1998), para. 49.

62 IACtHR, Rules of Procedure 2009, Article 44. In the Rules of Procedure before 2009, there was no explicit article on *amicus curiae*, but such briefs were admitted, for instance, with or without mentioning Article 45(1) Rules of Procedure (2003) which stipulated the possibility to hear 'any person'. See *e.g. Almonacid-Arellano et al. v. Chile* IACtHR (2006), para. 80; *The Mapiripán Massacre v. Colombia* IACtHR (2005), paras. 41, 42 and 46;

63 IACtHR, Rules of Procedure 2009, Article 57(1).

64 Faúndez Ledesma (2008), p. 685.

65 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 96.

When striking a balance between justice and legal certainty, the circumstances in each specific case should be taken into account.[66] Also, parties have the possibility to allege and prove one of the legitimate exceptions that waive the time-limits.[67] Such justification is not always accepted. For instance, in the *Bámaca-Velásquez Case*, the Inter-American Commission presented documents collected by the US Government. The Court considered them time-barred because the Inter-American Commission could not justify an exception to the time requirement for admission.[68]

The Court has granted itself a wide discretion to decide what evidence is necessary in order to reach a decision in the case and subsequently to obtain that evidence. On the one hand, in some instances, the Court has considered certain evidence to be irrelevant to the case and excluded it from the evidentiary file.[69] On the other hand, the Court may at any stage of the proceedings obtain evidence *proprio motu* that it considers helpful and necessary by, for instance, hearing victims or appointed experts.[70] In fact, oral proceedings in the form of hearings are a common method to obtain better insight into the case. With regard to testimonies, the Inter-American Court has allowed a wide range of witnesses to appear before the Court. In addition, the Court has incorporated evidence that was submitted in similar and previously decided cases against the same respondent state.[71] In addition, the Court itself may request information from all parties during the course of the proceedings. States have an obligation to comply with such requests.[72] Such requests for evidence do not, however, give permission to expand upon or complement the original arguments with additional arguments unless the Court expressly permits this.[73] As a last further point, the obligation to cooperate led the Court to assess the situation where respondent states withhold requested investigation files because they are classified as confidential. In the case *Radilla-Pancheco v. Mexico*, the Court reiterated that the state should nevertheless submit the requested information and should explain the situation as well as the necessity, the interest or the appropriateness of maintaining

66 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 33.
67 IACtHR, Rules of Procedure 2009, Article 57(2) (stating that evidence may be admitted at a later stage due to *force majeure*, serious impediments or when it relates to events that occurred after the indicated procedural moments).
68 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 38.
69 Faúndez Ledesma (2008), p. 713.
70 IACtHR, Rules of Procedure 2009, Article 47(1). See *e.g. Fairén-Garbi and Solís-Corrales v. Honduras* (merits) IACtHR Series C No. 6 (15 March 1989), para. 117.
71 Pasqualucci (2003), p. 206.
72 *La Cantuta v. Peru* IACtHR (2006), para. 66.
73 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 32. See also *Molina-Theissen v. Guatemala* IACtHR (3 July 2004), para. 22.

the confidentiality of such information. It is then for the Court to evaluate carefully whether to include it in the case file.[74]

In summary, the Inter-American Court has accepted most evidence submitted at the appropriate time as long as the source and the manner in which it was obtained is verifiable. The time-limits for submitting evidence have not always been strictly applied and the search for justice may justify delays in presenting evidence.

6.3.2.2 The burden of proof

The allocation of the burden of proof is neither included in the ACHR nor in the Rules of Procedure of the Inter-American Court. In its case law, the Inter-American Court adheres in principle to the basic principles of law that assign the burden of proof to the party presenting the allegations.[75] However, like the HRC, it has accepted that there are instances that justify a shift in the burden of proof. One of the most prominent examples of such a shift in the case law of the Inter-American Court can be found in enforced disappearance cases. The Inter-American Court has repeatedly emphasised that the state has control over, and at the same time attempts to eliminate, all evidence of the enforced disappearance.[76] Accordingly, the Court has recognised that the respondent state is often in control of the means to clarify the facts.[77] As a consequence of the particularities the alleging party is not always in a position to access the evidence necessary to prove the claim. At least, the argument of the respondent state that the alleging party has not submitted particular evidence is not always accepted:

> As this Court has often repeated, in cases of forced disappearance, the State's defense cannot rely on the impossibility of the plaintiff to present evidence in the proceedings since, in such cases, it is the State that controls the means to clarify the facts that have occurred in its jurisdiction and, therefore, in practice, it is necessary to rely on the cooperation of the State itself in order to obtain the required evidence.[78]

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74 *Radilla-Pacheco v. Mexico* IACtHR (23 November 2009), para. 91. (The Court stated that: 'El Tribunal destaca que, anteriormente, en un caso contra el Estado mexicano, ya había señalado que cuando las actas de investigación se encuentren bajo reserva, corresponde al Estado enviar las copias solicitadas informando de tal situación y de la necesidad, conveniencia o pertinencia de mantener la confidencialidad debida de dicha información, lo cual será cuidadosamente evaluado por el Tribunal, para efectos de incorporarla al acervo probatorio del caso, respetando el principio del contradictorio en lo que correspondiere.'). See also Medina Quiroga (2005), pp. 26 and 27.

75 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 123.

76 *Ibid*., para. 131.

77 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 152.

78 *Ibid*., para. 152. See also *Velásquez-Rodríguez v. Honduras* IACtHR (1988), paras. 135 and 136.

Therefore, the Court takes the view that when the Inter-American Commission presents a *prima facie* case,[79] the Government must then disprove the allegations with exculpatory evidence. Either the silence of the state or elusive or ambiguous answers on the part of the state may lead to an acknowledgement of the truth of the allegations.[80]

This seems to be analogous to the default mechanism employed by the HRC. In this respect, Rodríguez-Pinzón notes that the Court has not been confronted with the failure to appear in the proceedings. Rather, the problems that the Court has faced concern the lack of cooperation by the respondent states.[81] In his view, the Inter-American Court has made it clear in the *Vélasquez-Rodríguez Case* that 'a state may appear and discuss the jurisdiction of the case, but the lack of adequate participation in the merits of the case by Honduras could amount to default.'[82] Obviously, the lack of adequate participation by the respondent state on the merits in the *Vélasquez-Rodríguez Case* did not forfeit the Court's authority to consider the case. However, the Court has mostly assessed that evidence carefully in order to find that the Inter-American Commission has submitted a *prima facie* case.

An important way in which the Inter-American Commission has built a *prima facie* case is by adducing evidence to prove that a systematic practice of enforced disappearances existed at the time of the particular disappearance. When the Inter-American Commission subsequently presents circumstantial evidence supporting a link between the systematic practice and the individual case, the burden of proof shifts to the respondent state to disprove the allegation, according to the Inter-American Court.[83] The acceptance of the 'systematic practice' construction renders the application of a default judgment in most cases unnecessary.[84] The reason for this lack of necessity is that the Inter-American Commission has been able to submit enough circumstantial evidence to find state responsibility in such cases.

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79 See C. Cerna, 'The Inter-American Commission on human rights: its organization and examination of petitions and communications', in: D.J. Harris & S. Livingstone, (eds.), *The Inter-American system of human rights* (Oxford: Clarendon 1998), p. 98 (explaining that for a presumption of truth to apply before the Inter-American Commission, the petitioner's version of the facts must comply with the criteria of 'consistency, specificity and credibility'). See also Rule 39 of the Rules of Procedure of the Inter-American Commission (stating that facts alleged by the petitioner on which the state does not provide any information will be presumed to be true by the Commission as long as other evidence does not lead to a different conclusion).

80 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), paras. 128-138. It must be noted that there is a default provision in the Rules of Procedure, but which has not often been applied in the case law (Articles 25 and 27 as of 16 September 1996). See also D. Rodríguez-Pinzón, 'Presumption of veracity, nonappearance, and default in the individual complaint procedure of the Inter-American system on human rights' (1998) 25 *Revista IIDH* pp. 125-148, at pp. 145 and 146.

81 Rodríguez-Pinzón (1998), p. 146.

82 *Ibid*.

83 See subsection 6.3.2.3.3 below.

84 See Rodríguez-Pinzón (1998), pp. 146 and 147.

A second shift in the burden of proof that appears in the case law on enforced disappearances derives from the duty imposed upon states to take care of detained persons. The Inter-American Court's premise that the state is the guarantor of human rights has also led to a shift in the burden of proof, when it is a proven fact that the person was detained by state agents:

> As guarantor of this right, the State must prevent those situations – such as the current *sub judice* one – that might lead, by action or omission, to suppression of inviolability of the right to life. In this regard, if a person was detained in good health conditions and subsequently died, the State has the obligation to provide a satisfactory and convincing explanation of what happened and to disprove accusations regarding its responsibility, through valid evidence, because in its role as guarantor the State has the responsibility both of ensuring the rights of the individual under its custody and of providing information and evidence pertaining to what happened to the detainee.[85]

This shift in the burden of proof is based on a duty to care for the well-being of detainees, which includes a duty to prevent threatening circumstances for these persons. The relevance of this shift for enforced disappearances is that, once it is established that state agents detained the disappeared person, it is for the state to explain what subsequently happened to him or her.

6.3.2.3 The standard of proof and the evaluation of evidence

6.3.2.3.1 General considerations

During the proceedings in the *Velásquez-Rodríguez Case*, the Inter-American Court established clearly that '[i]t is within the discretion of the Court to weigh the evidence.'[86] This premise affords the Court a broad discretion given its view that international proceedings are 'less formal and more flexible' than domestic proceedings with respect to the evaluation of evidence.[87] In particular, this flexibility allows the Court greater latitude to use 'logic and experience' in the evaluation of the evidence.[88] The Court justifies this approach by considering the purpose of international human rights law, which is not to punish those individuals who are guilty of crimes, but rather to protect the victim and to provide reparations for damages resulting from acts attributable to the state concerned.[89]

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85 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 111.
86 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 141c.
87 *Ibid.*, para. 128; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 97.
88 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 97; *Castillo-Páez v. Peru* IACtHR (1997), para. 39.
89 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 134.

This flexibility and the lack of provisions governing the standard proof have granted latitude to the Inter-American Court in determining the requisite standard of proof.[90] For the satisfaction of this standard of proof, the Court has always refrained from rigidly determining 'the quantum of evidence needed to support a judgment.'[91] The rule that the Court has set for itself that governs the evaluation of evidence is that of 'sound criticism'.[92] Furthermore, there are a few safeguards, such as the adversary principle (respecting the right of the parties to defend themselves), that have also been applied to evaluating evidence.[93]

There are a number of consequences that the application of the rule of sound criticism has brought along. Taking into account the particular characteristics of enforced disappearance cases, and in particular the attempt by the authorities to suppress all information about the deprivation of liberty and the whereabouts and fate of the victim, the Inter-American Court may attribute weight to circumstantial evidence, inferences and presumptions. However, such evidence and constructions should point to conclusions which are consistent with the facts.[94] It appears, therefore, that such information cannot form the sole basis for the substantiation of the allegations. Additionally, uncontested evidence in itself is attributed probative value.[95] The Inter-American Court appears to view its flexibility in enforcing the time-limits for adducing evidence and the request for additional evidence *proprio motu* as compensating the consequence of this doctrine.[96]

6.3.2.3.2 Testimonies

Applying the possibility to use 'logic and experience' in evaluating evidence, the Inter-American Court has attributed high probative value to testimonial evidence in enforced disappearance cases.[97] The Inter-American Court has permitted witnesses to

90 *Ibid*., para. 127 (referring to the practice of the ICJ as set out in its case law); Pasqualucci (2003), p. 213; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 97; *Castillo-Páez v. Peru* IACtHR (1997), para. 39.

91 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 33.

92 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 100; *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 33; Pasqualucci (2003), p. 190. According to the former Inter-American Commission member Prof. Diego Rodríguez-Pinzón, the Inter-American Commission weighs the evidence before it on the basis of preponderance (Informal discussion between Prof. Rodríguez-Pinzón and the author on 22 August 2007, Utrecht).

93 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 31.

94 *Blake v. Guatemala* IACtHR (1998), para. 47.

95 *La Cantuta v. Peru* IACtHR (2006), para. 62. See also *Goiburú et al. v. Paraguay* IACtHR (2006), para. 57.

96 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 138. See also *Bámaca-Velásquez v. Guatemala* IACtHR (2000), paras. 100 and 106.

97 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 131.

testify as to hearsay,[98] but hearsay alone is not sufficient to meet the required standard of proof. In view of the weight attached to testimonies, the Inter-American Court has carefully assessed the testimonies of persons with a direct interest in the outcome of the case. In *La Cantuta v. Peru*, the Court stated that:

> […] the Court points out that since said witnesses are alleged victims or their next of kin, their statements cannot be assessed separately for they have a direct interest in the outcome of the case, and therefore, must be assessed as a whole with the rest of the body of evidence.[99]

Likewise, the testimonies of persons who have indirectly witnessed aspects of the enforced disappearance are also evaluated in combination with all the other evidence.[100]

Furthermore, the party that challenges the testimonies bears the burden of proof in refuting the testimony.[101] Respondent states have generally put forward numerous arguments that would discredit witnesses presented by the Inter-American Commission. The Court has established that the challenging party must either present concrete evidence that shows that the witness in question has not told the truth or refute the testimony. Accordingly, general allegations based on beliefs, nationality, familial relations, criminal records or a desire to discredit the state or disloyalty because they report to the Inter-American system are not sufficiently concrete.[102]

6.3.2.3.3 The role of finding a systematic practice of enforced disappearance

Having established that the burden of proof may shift and that circumstantial evidence, inferences and presumptions may be drawn, it is helpful to examine how these two conclusions come together in assessing the role of a systematic practice of gross human rights violations. In arguing enforced disappearance cases, the Inter-American Commission has in the majority cases presented the line of argument that the particular case at hand was part of a systematic practice of enforced disappearance. As discussed in Chapter 5 section 6 *supra*, the *Velásquez Rodriguez Case* shows the four conditions that must be satisfied for proving such a practice, namely: (1) a significant number of disappearances must have occurred during a particular period of time; (2) those disappearances must follow a similar pattern; (3) the kidnappings

98 See *e.g. Blake v. Guatemala* IACtHR (1998), para. 31.
99 *La Cantuta v. Peru* IACtHR (2006), para. 64. See also *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 83.
100 *Blake v. Guatemala* IACtHR (1998), para. 46; *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 73.
101 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 141f.
102 *Ibid*., paras. 142-145.

must be attributable to the state; and (4) the disappearances must have been carried out in a systematic manner.[103] In relation to the fourth condition, the Inter-American Commission presented evidence in this case to demonstrate that the victims were usually persons whom the state's officials considered dangerous to the regime and captured according to a reoccurring *modus operandi*. Subsequently, the state authorities systematically denied any knowledge of the detention, of the whereabouts, or of the fate of the victims. The investigative authorities and the judiciary were systematically incapable of preventing or investigating the crimes and of punishing those responsible. In addition, these authorities remained inert in helping to discover the whereabouts and fate of the victims or locating their remains.

A closer examination of this case illustrates the apparent evidence required to attain the standard of proof required for evincing a systematic practice. In support of its claims, the Inter-American Commission presented testimonial[104] and documentary evidence[105] to illustrate that there were many kidnappings and enforced disappearances in Honduras in the period between 1981 and 1984, and that those kidnappings and enforced disappearances were attributable to the Armed Forces of Honduras.[106] In particular, Battalion 316 operated as a special and secret operations group of the armed forces with the task of carrying out the enforced disappearances and other human rights violations. Honduras was unable to refute the cogent evidence in a convincing manner. The Inter-American Court heard testimonies from two members of the Armed Forces who were military officers at the relevant time. They denied the existence of Battalion 316 and the existence of a practice of enforced disappearance. However, the Court apparently did not find their testimony credible in light of the overwhelming consistent evidence presented by the Inter-American Commission. Therefore, the Court accepted that there was an official systematic practice of enforced disappearance, which included torture and arbitrary executions.[107]

After the Inter-American Court established that a systematic practice of enforced disappearance had ensued at the time of the disappearance of Velásquez Rodríguez, it accepted that the link of the particular case to the practice could be proven through

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103 *Ibid*., para. 147.

104 *Ibid*., paras. 84, 91 and 100. Testimonies substantiating the claim included: statements from persons detained and tortured by the Armed Forces of Honduras; statements by a former member of Battalion 316, a secret unit involved in the practice of enforced disappearance; and a statement made by the President of the Committee for the Defence of Human Rights in Honduras. See also T. Buergenthal, R. Norris & D.L. Shelton*, Protecting Human Rights in the Americas, Selected Problems*, 3rd edn. (Kehl am Rhein: Engel 1990), pp. 226-234.

105 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), paras. 38 and 106 (documentary evidence included, *inter alia*, *amici curiae* from non-governmental organizations, such as Amnesty International and CEJIL and press clippings from the period between 1981 and 1984, which contained information on at least 64 occurrences of enforced disappearances).

106 *Velásquez-Rodríguez v. Honduras* IACtHR (1988). para. 82.

107 *Ibid*., para. 147d (i-v).

presenting circumstantial or indirect evidence.[108] The Inter-American Commission presented the sister of Velásquez Rodríguez who had witnessed the kidnapping of her brother. In addition, Mr Caballero, a former member of the secret unit executing the practice of enforced disappearance, testified before the Inter-American Court that Velásquez Rodríguez had secretly been detained and had been subjected to torture.[109] Also, one of the witnesses who had been detained in the same detention centre had heard a person crying out in pain, identifying himself as Velásquez Rodríguez.[110] Besides these testimonies, the particularities of the enforced disappearance of Velásquez Rodríguez corresponded to the features of the systematic practice. He was a student who was involved in activities that the authorities considered 'dangerous'. Furthermore, his kidnapping followed the usual *modus operandi*. Additionally, when faced with inquiries made by relatives and lawyers, the authorities had denied his detention and any knowledge about his fate or whereabouts. Lastly, there had been the typical omissions of the state in the investigation of his case and the judiciary had shown the same ineffectiveness in discovering his whereabouts and identifying the perpetrators.[111] Considering that Honduras did not convince the Inter-American Court that something else had happened to Velásquez Rodríguez, the Inter-American Court held the respondent state responsible for his enforced disappearance in breach of the ACHR.

Whereas the Inter-American Court found that there was sufficient evidence to link the disappearance of Velásquez Rodríguez to the practice of enforced disappearance in Honduras at the time, this Court came to the contrary conclusion in *Fairén-Garbi and Solís-Corrales v. Honduras*. This case pertained to the disappearance of Fairén Garbi and Solís Corrales during the same time period in Honduras. The Inter-American Commission alleged that these two Costa Rican citizens disappeared in Honduras as they were travelling from Costa Rica to Mexico in December 1981. Honduras denied that these two persons had even entered Honduras, while the government of Nicaragua submitted evidence that these two persons had crossed the border from Nicaragua to Honduras. Contradictory evidence was presented to the Court as to the question whether they had subsequently entered Guatemala in that same month.[112]

The Inter-American Court noted that there were many 'insurmountable difficulties' in proving whether these two disappearances occurred in Honduras and whether the disappearance could be attributable to that state.[113] The Court reiterated that it had been sufficiently proven that, in the period in which the events occurred,

108 *Ibid*., paras. 124 and 126.
109 Buergenthal, Norris & Shelton (1990), p. 231.
110 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 115.
111 *Ibid*., paras. 147 (g) and 148.
112 *Fairén-Garbi and Solís-Corrales v. Honduras* IACtHR (1989), paras. 3, 39 and 40.
113 *Ibid*., para. 157.

there was a systematic practice of enforced disappearance for political motives for which Honduras was legally responsible. The existence of such a practice, however, was not sufficient in and of itself to conclude that the disappearance of the two persons could also be attributable to Honduras. Corroborative evidence, whether circumstantial or indirect, was necessary to determine such responsibility. The Inter-American Court found that such evidence had not been presented before the Court.

The reasoning of the Court demonstrates why the evidence was not sufficient. Firstly, the Court considered that there was no evidence that the two alleged victims were under suspicion of being dangerous persons or under surveillance by the Honduran authorities, as they had no political background. Secondly, the Court found the testimony of a key witness in the *Velásquez-Rodríguez Case* recalling that he had seen the name of Fairén Garbi on a list of disappeared persons under detention to be unconvincing. This witness, Mr. Caballero, only recalled this information after he had been questioned for a second time. Another witness statement was dismissed as 'mere reference and very circumstantial'.[114] Thirdly, the lack of a diligent investigation, explained by the Honduran authorities with the belief that the persons had entered Guatemala, was insufficient to create a legal presumption that Honduras was responsible for the enforced disappearances. Fourthly, the lack of diligence, 'approaching obstruction', by these authorities in locating and exhuming an identified corpse, which could have shed light on the fate of Fairén Garbi, was also not sufficient to create such a presumption in light of all the other contradictory evidence. Hence, the Inter-American Court concluded that there was insufficient evidence to relate the disappearance of the two alleged victims to the systematic practice carried out at the time by the Honduran authorities.[115] What seems to have been determinative is that there was contradictory evidence that the two alleged victims had been in Honduras at the time and no evidence was presented as to their arrest or subsequent detention. Moreover, they did not match the political profile of most victims whose disappearance was attributable to the activities of the Honduran state.

In summary, an allegation of the existence of a systematic practice of enforced disappearance has been the dominant strategy to prove an enforced disappearance case. Indeed since 1988, the Inter-American Commission has continued to use the 'systematic practice' construction. In almost all enforced disappearance cases, the Inter-American Court accepted such a practice.116 It must be noted that such practices occurred in the context of dictatorial regimes and allegations in this regard

114 *Ibid*., para. 158.

115 *Ibid*., para. 161.

116 See *e.g. Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 132; *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 97; *La Cantuta v. Peru* IACtHR (2006), para. 113; *Goiburú et al. v. Paraguay* IACtHR (2006), para. 61(3); *Radilla-Pacheco v. Mexico* IACtHR (2009), paras. 132-137; *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 48. *A contrario,* see *Caballero-Delgado and Santana v. Colombia* IACtHR (1995).

had been made against countries that had experienced a transition from such regime to a democratic regime. The standard of proof for proving a systematic practice seems to be 'beyond reasonable doubt'. Such practice allows a 'balance of probabilities' standard for linking an individual case to such a practice. It must be noted that in the more recent case law the Court has been assisted in reaching such conclusions by the decisions of national bodies such as Truth and Reconciliation Commissions, which had already established the existence of a systematic practice.[117]

6.3.3 The European Court of Human Rights

6.3.3.1 The admissibility of evidence: types of evidence and time-limits

In its early case law, the European Court established that '[t]he Court is not bound, under the Convention or under the general principles applicable to international tribunals, by strict rules of evidence. In order to satisfy itself, the Court is entitled to rely on evidence of every kind, […].'[118] The Rules of Court are silent on the type of evidence that can be submitted to it. Hence, the Court has wide discretion in considering the admissibility and relevance of the evidence before it. As a result, the European Court, like its counterparts, has allowed a wide range of documentary and oral evidence in enforced disappearance cases, including witness testimonies, hearsay and reports of governmental and non-governmental organisations. For instance, the Court has admitted relevant documents from other human rights organisations such as the Committee for the Prevention of Torture as corroborative evidence.[119] Videos and photographic evidence have also been presented before the Court. Owing to the developments in modern technology, the Court emphasised the caution with which photocopies must be considered and declared as true copies of the original.[120] However, the criteria for such close scrutiny were left unspecified. Circumstantial evidence has also been admitted.[121] Under the former system, when evidence was gathered by the former European Commission on Human Rights ('former European Commission'), the European Court attached importance to the cross-examination of the evidence given by witnesses. The absence of such cross-examination did not bar the use of the evidence, but rather affected the weight attached to it.[122]

The wide variety of evidence is complemented by several powers of the European Court to request and gather evidence *proprio motu*. The Rules of Court bestow upon the Court a wide discretion to adopt investigative measures in order to

117 See *e.g. La Cantuta v. Peru* IACtHR (2006), para. 88.
118 *Ireland v. the United Kingdom* ECtHR [GC] 18 January 1978 (Appl. no. 5310/71), para. 209.
119 Harris, O'Boyle, Bates, Buckley & Warbrick (2009), p. 849.
120 *Timurtaş v. Turkey* ECtHR (2000), para. 66.
121 *Khadzhialiyev a.o. v. Russia* ECtHR (2008), para. 98.
122 *Ireland v. the United Kingdom* ECtHR [GC] (1978), para. 210.

clarify the facts of the case. Such measures include requesting documents from the parties, appointing delegates to carry out on-site investigations, conducting an inquiry and the hearing of witnesses or any other person it deems capable of assisting in the finding of facts.[123] In respect to the latter, the Court has the competence to convoke hearings.[124] In various landmark enforced disappearance cases, the former European Commission, previously assigned with the task of carrying out on-site investigations and hearings, used this competence as an important tool to gather and verify evidence. The present permanent Court has not employed such investigative powers, but has convened public hearings in a few cases.[125] Requests for information and case files from the respondent state have also facilitated in disclosing such information. An additional way to obtain more information is the possibility for the President of the Chamber to grant leave to any person concerned with the application or any Contracting State which is not party to the case to intervene in the case. Intervention may take place at the hearing or in the form of written comments.[126] At the same time, the President of the Chamber may exclude inappropriate submissions by the parties on the grounds laid down in Rule 44D.[127]

The Rules of Court of the European Court stipulate several rules as to the time-limits for the admissibility of evidence. These Rules grant authority to the President of the Chamber or the Judge Rapporteur to set time-limits within which the parties may file written observations or other documents. Unless the President of the Chamber decides otherwise, documents filed at a later instance will be excluded from the case file.[128] The Court may extend a time-limit set under Rule 38 at the request of one of the parties to the case.[129]

6.3.3.2 The burden of proof

At the admissibility stage, the approach of the Court to the burden of proof does not differ substantially from other international (quasi-)judicial proceedings. The applicant has to adduce sufficient evidence to show that the complaint is not completely without merit.[130] The onus is then on the state to refute the arguments

123 ECtHR, Rules of Court 2010, annex to the Rules, rule A1.
124 Article 40 ECHR reads:
1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.
125 See *e.g. Varnava a.o. v. Turkey* ECtHR [GC] (2009); *Bazorkina v. Russia* ECtHR (2006).
126 Article 36 ECHR and ECtHR, Rules of Court 2010, rule 44.
127 ECtHR, Rules of Court 2010, rule 44D.
128 *Ibid.*, rule 38(1).
129 *Ibid.*, practice direction 'written pleadings', para. 19.
130 Harris, O'Boyle, Bates, Buckley & Warbrick (2009), p. 849.

of the applicant.[131] At the merits stage, the European Court has adhered to a distinct approach to the burden of proof that is 'subtle and context-dependant'.[132] Analogous to the HRC and the Inter-American Court, the European Court has also stated that ECHR proceedings do not lend themselves in all cases to a rigorous application of the principle of *affirmanti incumbit probation*. This consideration is based on the premise that states should furnish all necessary facilities to make possible a proper and effective examination of applications. The European Court has generally accepted a possible shift of the burden of proof in exceptional cases under Articles 2 (the right to life) and 3 (freedom from torture) ECHR:[133]

> The Court observes that where the applicant makes out a prima facie case and the Court is prevented from reaching factual conclusions owing to the lack of documents, it is for the Government to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicant, or to provide a satisfactory and convincing explanation of how the events in question occurred. The burden of proof is thus shifted to the Government and if they fail in their arguments, issues will arise under Article 2 and/or Article 3.[134]

The European Court has explicitly applied this shifting of the burden of proof in enforced disappearance cases. It has done so after the applicant has presented a *prima facie* case and essential documents lacking in the process were exclusively in the responding Government's possession.[135]

The shifting of the burden of proof is also based on the reasoning set out in detention cases. The European Court considers in such cases that the distinct and pertinent power position of the authorities over detainees brings about a great burden which is incumbent on the state:

> Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, such as in cases where persons are under their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring

131 See *ibid.*, p. 849 (discussing the burden of proof with regard to the exhaustion of domestic remedies at the admissibility stage).

132 *Ibid.*, p. 849. See also subsection 6.3.3.3 below.

133 J.G. Merrils*, The Development of International Law by the European Court of Human Rights*, 2nd edn. (Manchester: Manchester University Press 1995), pp. 15-16.

134 *Betayev and Betayeva v. Russia* ECtHR (2008), para. 69; *Khadzhialiyev a.o. v. Russia* ECtHR (2008), para. 86; *Khakiyeva, Temergeriyeva a.o. v. Russia* ECtHR 17 February 2011 (Appl. nos. 45081/06 and 7820/07), para. 189.

135 *Toğcu v. Turkey* ECtHR 31 May 2005 (Appl. no. 27601/95), para. 95; *Akhmadova and Sadulayeva v. Russia* ECtHR 10 May 2007 (Appl. no. 40464/02), para. 86.

> during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.[136]

The European Court has applied a modified version of this shift in enforced disappearance cases, stating that:

> [t]hese principles apply also to cases in which, although it has not been proved that a person has been taken into custody by the authorities, it is possible to establish that he or she entered a place under their control and has not been seen since. In such circumstances, the onus is on the Government to provide a plausible explanation of what happened on the premises and to show that the person concerned was not detained by the authorities, but left the premises without subsequently being deprived of his or her liberty […].[137]

The European Court has applied such a shift in the burden of proof in all enforced disappearance cases; when applicants are able to present a *prima facie* case, the burden of proof shifts if further clarification is within the exclusive control of the state. Moreover, a greater burden rests on the respondent state when it is established that state agents have deprived a person of his or her liberty and that person has subsequently disappeared. In such situations, the authorities must provide a convincing and credible explanation of what happened to the disappeared person.

6.3.3.3 The standard of proof and the evaluation of evidence

6.3.3.3.1 General considerations

The first enforced disappearance cases came before the European Court when the former European Commission was still operational. According to the former system, the European Commission gathered evidence and decided on the admissibility of the case. In doing so, it adjusted the required standard of proof to the objective of the proceedings under the ECHR.[138] The rationale behind this approach was the inherent predominant position of the state to collect, present, conceal and destroy evidence.[139] Even though the former European Court did not feel bound by the

136 *Khadzhialiyev a.o. v. Russia* ECtHR (2008), para. 79 (referring to *Tomasi v. France* ECtHR (1992), paras. 108-11, *Ribitsch v. Austria* ECtHR (1995), para. 34 and *Selmouni v. France* ECtHR [GC] 28 July 1999 (Appl. no. 25803/94), para. 87). See also *Bazorkina v. Russia* ECtHR (2006), para. 105.

137 *Khadzhialiyev a.o. v. Russia* ECtHR (2008), para. 80.

138 L.G. Loucaides*, Essays on the developing law of human rights* (Dordrecht: Martinus Nijhoff Publishers 1995), p. 162.

139 *Ibid.*, p. 167.

European Commission's findings of fact, it clarified that '[…] it is only in exceptional circumstances that it will exercise its powers in this area'.[140]

The present permanent Court has emphasised that it is aware of its subsidiary nature to domestic courts with respect to the evaluation of evidence.[141] Nonetheless, the Court applies a certain, and at times thorough, scrutiny to the evidence supporting the allegations.[142] In this sense, the European Court, like the Inter-American Court, has allowed itself to 'decide on the evidentiary value of the documents submitted to it […].'[143] In determining the evidentiary value in the absence of any predetermined formula for assessment, the European Court bears in mind the seriousness for the respondent state of finding a breach of an ECHR right.[144]

The European Court has emphasised that the context is determinative for the level of persuasion necessary for reaching a certain conclusion. This level is intrinsically linked to the specific circumstances of each case, the nature of the allegation made, and the ECHR right at stake.[145] In its consideration of enforced disappearance cases, the European Court generally applies the 'beyond reasonable doubt' standard of proof. While this standard seems to be derived from national criminal procedural law, it appears to have an autonomous meaning in the context of proceedings before the European Court.[146] In this respect, the European Court has stressed that:

> in the absence of direct evidence, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact […].[147]

What have been the consequences of this explanation of the 'beyond reasonable doubt' standard? Applying the above doctrines, the European Court has established in a large number of cases against Turkey and Russia that the perpetrators of the alleged enforced disappearance were state agents. In the first case before it, the Court found the evidence presented sufficient to find the state responsible for the deprivation of liberty and subsequent disappearance of the applicant's son.[148] This case immediately showed the challenges in respect of evidence in enforced disappearance cases, namely the contradictions in statements and the lack of direct evidence. The

140 *Timurtaş v. Turkey* ECtHR (2000), para. 63.
141 *Tahsin Acar v. Turkey* ECtHR [GC] (2004), para. 216.
142 *Ibid*., para. 78.
143 *Khadzhialiyev a.o. v. Russia* ECtHR (2008), para. 85.
144 *Nachova a.o. v Bulgaria* ECtHR [GC] 6 July 2005 (Appl. nos. 43577/98 and 43579/98), para. 147.
145 *Ibid*.
146 *Osmanoğlu v. Turkey* ECtHR (2008), para. 45.
147 *Ibid*., para. 45; *Nachova a.o. v. Bulgaria* ECtHR [GC] (2005), para. 147. See also *Ireland v. the United Kingdom* ECtHR [GC] (1978), para. 161; *Tahsin Acar v. Turkey* ECtHR [GC] (2004), para. 216; *Bazorkina v. Russia* ECtHR (2006), para. 106.
148 *Kurt v. Turkey* ECtHR (1998).

mother of the disappeared person had testified to the European Commission on the deprivation of liberty and on the ill-treatment her son had received.[149] Both the European Commission and the European Court found the testimony of the applicant credible as to the fact that she had seen security forces detaining her son outside the house, despite contradictory evidence from the statements of other witnesses. The testimonies before the European Commission played a dominant role in this decision. In fact, the European Court seems to generally attribute higher probative value to oral testimonies given to delegates of the European Commission than to written statements taken by police officers on the domestic level when those are brief and imprecise.[150] Multiple eyewitness testimonies, which were found consistent, credible and convincing by the former European Commission, have also been sufficient to determine state responsibility for the detention and disappearance in question.[151]

In the enforced disappearance cases against Russia, several elements of proof have been crucial in establishing that state agents committed the enforced disappearance. The case *Khakiyeva, Temergeriyeva a.o. v. Russia* is exemplary in this regard. The European Court took into account that the perpetrators drove in armoured vehicles, a type of vehicle that the Ministry of Defence and the Ministry of the Interior possessed, and were able to drive around freely during curfew hours. According to witnesses, the perpetrators had followed the *modus operandi* of a security operation, including identity checks, and had spoken Russian. Furthermore, the disappeared person had expressed his recognition of the perpetrators as ROVD officials at the moment of arrest. Moreover, the domestic investigating authorities obtained proof that a special operation had taken place carried out by the military that night.[152] In contrast, the respondent state had not substantiated its claim that the victim had been detained by non-state actors with sufficient evidence. In addition, the Court found it appropriate to draw inferences from the unwillingness of the respondent state to disclose the whole investigation file.[153] In fact, the use of APC vehicles by the perpetrators, curfews and checkpoints, specific *modus operandi* and the profile of the victims have played a crucial role in most enforced disappearance cases against Russia as circumstantial evidence that the perpetrators were indeed state agents.[154]

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149 It must be noted that the evidence presented by the applicant was not sufficient to evince the alleged torture of her son, which implies a difference in the standard of proof in this respect. For an elaboration of this difference, see M.L. Vermeulen, '"Living beyond death": torture or other ill-treatment claims in enforced disappearances cases', (2008) 1 *Inter-American and European Human Rights Journal* 2 pp. 159-198.

150 *Çakici v. Turkey* ECtHR [GC] (1999), para. 50; *Kurt v. Turkey* ECtHR (1998), para. 50.

151 *Ibid*., paras. 47, 50 and 92.

152 *Khakiyeva, Temergeriyeva a.o. v. Russia* ECtHR (2011), para. 190.

153 *Ibid*., paras. 188 and 191.

154 See *e.g. Khadzhialiyev a.o. v. Russia* ECtHR (2008), paras. 87 and 88; *Dzhabrailovy v. Russia* ECtHR 20 May 2010 (Appl. no. 3678/06), paras. 62 and 63.

Moreover, the drawing of inferences from the uncooperative behaviour of the state in furnishing the Court with information has played a major role in the adjudication of enforced disappearance cases. Generally, the European Court takes into account the conduct of the parties to the case with respect to their willingness to submit evidence.[155] In this regard, Articles 34 and 38(1) ECHR lay down an obligation to co-operate with the proceedings before the European Court.[156] As the European Court considered:

> The Court has previously held that it is of the utmost importance for the effective operation of the system of individual petition instituted under former Article 25 of the Convention (now replaced by Article 34) that States should furnish all necessary facilities to make possible a proper and effective examination of applications […]. It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent State has access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information as is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (former Article 28 § 1 (a)), but may also give rise to the drawing of inferences as to the well-foundedness of the allegations.[157]

In enforced disappearance cases, this obligation to co-operate becomes particularly stringent at the merits stage.[158] In this regard, a failure on the part of the respondent state to provide certain relevant documents without any plausible explanation may lead to supporting the applicant's allegations.[159] An example of a failure to co-operate can be found in *Baysayeva v. Russia*, in which the Government only submitted one-third of the criminal investigation file and did not specify the reasons why the other two-thirds could not be disclosed to the Court. In this context, the Court noted that 'the

155 *Ireland v. the United Kingdom* ECtHR [GC] (1978), para. 161; *Ireland v. the United Kingdom* ECtHR [GC] (1978), para. 161; *Timurtaş v. Turkey* ECtHR (2000), para. 66; *Bazorkina v. Russia* ECtHR (2006), para. 106.

156 ECtHR, Rules of Court 2010, rules 44A-44C (These rules further elaborate on the duty of the parties to co-operate with the European Court and the consequences if they fail to do so. For instance, the ECtHR may draw inferences when a party fails to adduce evidence or provide information).

157 *Timurtaş v. Turkey* ECtHR (2000), para. 66; see also *Baysayeva v. Russia* ECtHR (2007), para. 163; *Khadzhialiyev a.o. v. Russia* ECtHR (2008), para. 76; *Tahsin Acar v. Turkey* ECtHR [GC] (2004), para. 254.

158 *Baysayeva v. Russia* ECtHR (2007), para. 167.

159 *Timurtaş v. Turkey* ECtHR (2000), para. 66; *Mikheyev v. Russia* ECtHR 26 January 2006 (Appl. no.77617/01), paras. 102-106.

documents of the criminal investigation were fundamental to establishing the facts and their absence may prejudice the Court's proper examination of the complaint'.[160]

In fact, the Court generally attaches significant weight to official documents or photocopies thereof such as investigation reports, custody records, medical reports and other official reports.[161] Respondent states must have very good reasons not to disclose such information. For instance, justifications by the respondent state that the law prohibited the disclosure of data obtained during the preliminary investigation and that this prevented the government from submitting the rest were, according to the Court, not sufficient to withhold key information.[162]

Nonetheless, the required standard of proof is not always met by the evidence submitted by the applicants in a case, even when the state fails to cooperate with the European Court. For instance, in a number of cases against Turkey, the applicants could not adduce sufficient evidence that the state was involved in the crime itself.[163] In *Tahsin Acar v. Turkey*, the applicant claimed that his brother had disappeared at the hands of the state. The Grand Chamber of the European Court found that there was insufficient evidence to conclude beyond reasonable doubt that the state authorities were responsible for the disappearance of his brother. This conclusion was reached despite the fact that the applicants claimed to have seen NTV broadcasts in which the disappeared person was shown to be in the hands of the state after his disappearance. The state refused to produce the video recording of this broadcast. The allegations by the applicants were contradicted by two eyewitnesses who could not verify that the

160 *Baysayeva v. Russia* ECtHR (2007), para. 164. See also C. Ovey & R. White*, Jacobs and White, The European Convention on Human Rights*, 4th edn. (New York: Oxford University Press 2006), p. 88 (The authors conclude that '[t]he Court's approach to internal investigations can, accordingly, have a double sting in the tail. A failure to conduct a proper and timely investigation may itself constitute a violation of the Convention, but the absence of such an investigation is likely to make it difficult to provide a plausible explanation for injuries suffered by applicants, and in effect, supports the applicant's evidence.').

161 See *e.g. Timurtaş v. Turkey* ECtHR (2000), paras. 28 and 68 (In this case, the applicant produced a photocopy of a post-operation report that described the apprehension of Timurtaş and a Syrian man. The respondent state cast doubt on the authenticity of the photocopy, because it had no original at all and it had been impossible for the applicant to obtain the said photocopy. However, the respondent state refused to present another report with the same document number, because allegedly this report contained classified information. Among other reasons, this led the Court to agree with the Commission that the photocopy was proof of and corresponded with a once existing original. From this report it was held beyond reasonable doubt that the applicant's son had been apprehended). See also *Baysayeva v. Russia* ECtHR (2007), para. 146; *Dikme v. Turkey* ECtHR 11 July 2000 (Appl. no. 20869/92), para. 75.

162 *Khadzhialiyev a.o. v. Russia* ECtHR (2008), para. 82. This consideration has been made repeatedly in cases against Russia, in which the government invoked Article 161 CCP as a justification not to disclose certain information from the investigations to the European Court.

163 *Tahsin Acar v. Turkey* ECtHR [GC] (2004); *Nesibe Haran v. Turkey* ECtHR 6 October 2005 (Appl. no. 28299/95).

perpetrators were state agents. The fact that officers of the anti-terrorism branch raided his sister's home and threatened her with death after she had accused state officials of having been involved in the disappearance was not considered. Instead, the European Court found a procedural violation of the right to life since the authorities had failed to investigate the claim by the applicant. Also, the European Court found a violation of Article 38 ECHR since the state had not complied with the Court's order to co-operate with the proceedings before the Court.[164] Despite the failure to investigate and the lack of co-operation with the Court, the Court concluded that the evidence was not solid enough to infer state involvement:

> On the basis of the material in its possession, and noting that the alleged involvement of gendarmerie officers in the disappearance of Mehmet Salim Acar is not only contradicted by the repeated and consistent statements of the two eyewitnesses, but is also not corroborated by any other evidence, the Court considers that the claim that Mehmet Salim Acar was abducted and detained by agents of the State is based on hypothesis and speculation rather than on reliable evidence. The Court finds that, in the circumstances, it has not been established beyond reasonable doubt that the responsibility of the respondent State was engaged in the abduction and disappearance of Mehmet Salim Acar.[165]

This consideration prompted Judge Bonello to remark in his concurring opinion that, as the case law stands, '[t]he drawing of these compelling inferences, so far, remains a forlorn hope.'[166] While agreeing with the majority that it is not proven beyond reasonable doubt that the applicant was subjected to enforced disappearance by the security forces, he disagreed with this high standard of proof:

> It appears to me axiomatic that, in a scenario in which the Government is at fault where evidence-building is concerned, then a legal inference of culpability on the merits of the complaint should have been drawn. States, in detestable circumstances such as the disappearance in question, cannot be let off with benign raps on the knuckles. In my view the Court ought to have declared, boldly and defiantly, that, when a State defaults in its duties to investigate and to hand over what evidence it has under its control, the burden of proof shifts. It is then for the Government to disprove the applicant's allegations. Failure to draw these inferences will only embolden rogue States in their efforts to rig sham investigations, and encourage the suppression of incriminating evidence.

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164 Article 38 ECHR reads: 'The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.'

165 *Tahsin Acar v. Turkey* ECtHR [GC] (2004), para. 217.

166 *Ibid.*, concurring opinion of Judge Bonello, para. 11.

> The way forward, in my view, can only lie in the practical and effective use of inferences of culpability, and a consequent shift of the burden of proof, in cases in which a State is found to have disregarded its obligations to investigate or to make available to the Court whatever information it is the depositary of.[167]

Judge Bonello has repeatedly advocated a more credible standard of proof than the one currently used by the European Court, also outside the context of enforced disappearance. He proposes a standard that is based 'on a balance of probabilities'.[168]

The previous paragraphs show that the European Court, unlike its counterparts, adheres to the 'beyond reasonable doubt' standard. Nevertheless, the European Court uses circumstantial evidence and inferences on the basis of which to conclude that the state is responsible for an enforced disappearance. In particular, it takes careful account of the conduct of the state and draws inferences accordingly. The fact that the state fails to investigate well-founded claims by the applicant and fails to cooperate with the European Court does not lead to inferences from the account of the applicant, unless sufficient proof exists to substantiate the claims.

6.3.3.3.2 Circumstantial evidence: the role of a systematic practice

Like the case law of the Inter-American Court, the ECHR case law lays down conditions and elements for the existence of a systematic practice as explained in Chapter 5 section 6 *supra*. The first condition requires a repetition of acts and the second condition requires official tolerance of such acts. When applying these criteria to enforced disappearance cases, the first condition requires that a sufficient number of enforced disappearances have occurred and that they amount to a pattern. The second condition of official tolerance relates to state conduct and manifests itself in two different ways: (1) that the superiors of those directly responsible take no action to punish the crimes or prevent their repetition, even though they are aware of the crimes; and (2) that the authorities deny the victims an effective investigation into the case or that the victims had no access to a fair hearing in judicial proceedings.[169] According to the European Commission, the question is 'whether or not the higher authorities have been effective in bringing to an end the repetition of acts.'[170]

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167 *Ibid*., paras. 12 and 13.

168 *Veznedaroğlu v. Turkey* ECtHR 11 April 2000 (Appl. no. 32357/96), partly dissenting opinion of Judge Bonello, para. 13. The application of the 'beyond reasonable doubt' standard of proof has been criticised in various dissenting opinions as being inadequate. See *e.g. Hasan İlhan v. Turkey* ECtHR 9 November 2004 (Appl. no. 22494/93), partly dissenting opinion of Judge Loucaides; *Anguelova v. Bulgaria* ECtHR 13 June 2002 (Appl. no. 38361/97), dissenting opinion of Judge Bonello, para. 12.

169 *The Greek Case* EComHR (1969), pp. 195-196.

170 *France et al. v. Turkey* EComHR (1983), p. 164.

The European Court has faced allegations of a systematic practice of enforced disappearance and the repeated failure of the legal system to deal with this human rights violation. In the first enforced disappearance case before the European Court, the applicant maintained that there was an officially tolerated practice of enforced disappearance and ill-treatment of detainees in Turkey.[171] The Court considered that there was not enough evidence to establish such a practice. In subsequent cases, the Court has been persistent in laconically dismissing any claim of an official practice in relation to enforced disappearances.[172]

Why has the Court considered the evidence to substantiate an allegation of an official practice insufficient? Some conclusions follow from the evidence presented on the basis of which the Court rejected the allegation of an official practice. In *Kurt v. Turkey*, the applicant submitted that there was overwhelming evidence of the practice of torture in detention throughout Turkey in the early1990s. The applicant substantiated her arguments with the inclusion of findings from other cases, as well as reports by other inter-governmental and non-governmental human rights bodies. The applicant established a high incidence of violations of fundamental human rights in Southeast Turkey, as well as high-level official tolerance of many grave human rights violations. For instance, the applicant emphasised the second public statement of the European Committee on the Prevention of Torture ('ECPT') on Turkey. The ECPT stated that it had found '[c]lear evidence of the practise of torture and other forms of severe ill-treatment'.[173] It concluded that 'to attempt to characterise this problem as one of isolated acts of the kind which occur in any country…is to fly in the face of the facts.'[174] Furthermore, the applicant argued that the degree of official tolerance evident in the practices had rendered the system of remedies in that region wholly ineffective.[175] Nonetheless, both the Commission and the Court found the evidence presented insufficient to establish a systematic practice.

The applicant in *Timurtaş v. Turkey* also presented a comprehensive argument with regard to the context in Southeast Turkey and the ineffectiveness with which the legal system was dealing with allegations of ill-treatment, deaths in custody and enforced disappearances. The applicant recalled the evidence of a practice of

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171 *Kurt v. Turkey* ECtHR (1998). See also *Kurt v. Turkey* (admissibility decision) EComHR 22 May 1995 (Appl. no. 24276/94) (such practice was also alleged at the admissibility stage in order to demonstrate that all possible remedies in Southeast Turkey were 'illusory, inadequate and ineffective').

172 *Kurt v. Turkey* ECtHR (1998), para. 112; *Çiçek v. Turkey* ECtHR (2001), paras. 152 and 155. See also Pérez Solla (2006), p. 28.

173 CoE, 'Public Statement on Turkey (issued on 6 December 1996) of the European Committee for the Prevention of Torture' (6 December 1996) CPT/Inf (96) 34 [EN].

174 *Ibid.,* para. 10.

175 *Kurt v. Turkey* ECtHR (1998), Verbatim Record of the hearing held on 26 January 1998. No. 74251 (on file with the author).

torture presented in the *Aksoy Case*, *Aydin Case* and *Tekin Case*.[176] With regard to the elements of the repetition of acts, the applicant referred to the reports of the UNWGEID to prove that there were a substantial number of disappearances in the relevant period. One of the reports revealed that in 1993 the UNWGEID transmitted a total of 44 cases to Turkey and this UN body reported that in 1994 Turkey recorded the highest incidence of alleged enforced disappearances of any country in the world.[177] Furthermore, the *amicus* brief to the European Court prepared by the Centre for Justice and International Law ('CEJIL') compared the situation in Honduras, where the Inter-American Court found a systematic practice during the 1980s, to that in Turkey. The *amicus* brief stated that 179 persons were forcibly 'disappeared' at the hands of the armed forces in Honduras from 1980 to 1993.[178] Accordingly, the applicant concluded that at least 18 people had 'disappeared' in Southeast Turkey in 1993. The applicant based this number on the number of pending and decided cases before the European Court and argued that this number was higher than the average number per year in Honduras.[179]

In relation to the requirement of repetition, it must be noted that most of the enforced disappearance cases against Turkey originated from the South-eastern region of the country involving persons of Kurdish origin. Last but not least, the Court recognised in this case under Article 2 ECHR that:

> […] the Court has held in two recent judgments that defects undermining the effectiveness of criminal law protection in the south-east region during the period relevant also to this case permitted or fostered a lack of accountability of members of the security forces for their action.[180]

Hence, the authorities failed to end the violations. Nevertheless, the European Court again dismissed the claim by the applicant with respect to a systematic practice:

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176 *Aksoy v. Turkey* ECtHR 18 December 1996 (Appl. no. 21987/93); *Aydin v. Turkey* ECtHR 25 September 1997 (Appl. no. 23178/94); *Tekin v. Turkey* ECtHR 09 June 1998 (Appl. no. 22496/93) (In these cases, the applicant relied on the Committee for the Prevention of Torture's Public Statement on Turkey (15 December 1992), the United Nations Committee against Torture's Summary Account of the Results of the Proceedings Concerning the Inquiry on Turkey (9 November 1993) and the United Nations Special Rapporteur on Torture's Report of 1995 (E/CN.4/1995/34). The Court did not find the evidence sufficient to establish a systematic practice).

177 *Timurtaş v. Turkey* ECtHR (2000), Verbatim Record of the hearing held on 23 November 1999 (on file with the author).

178 *Timurtaş v. Turkey* ECtHR (2000), written Comments of the Centre of Justice and International Law, p. 3 (on file with the author).

179 *Timurtaş v. Turkey* ECtHR (2000), verbatim Record of the hearing held on 23 November 1999, p. 7 (on file with the author).

180 *Timurtaş v. Turkey* ECtHR (2000), para. 85 (The Court referred to *Kiliç v. Turkey* ECtHR 28 March 2000 (Appl. no. 22492/93), para. 75 and *Mahmut Kaya v. Turkey* ECtHR (2000), paras. 98 and 360).

> The Court considers that the scope of the examination of the evidence undertaken in this case and the material on the case file are not sufficient to enable it to determine whether the failings identified in this case are part of a practice adopted by the authorities.[181]

Thus, it is unclear from the laconic dismissals what kind of evidence the European Court is looking for to satisfy the standard of proof for establishing a systematic practice. Nonetheless, it is evident that this standard is rather high.

Since early 2000, the European Court has again been confronted with a large number of grave human rights violations in respect of the situation in Chechnya, Russia. In the cases originating from this conflict area, the Court has recognised that the phenomenon of enforced disappearance is 'well known' in the region of Chechnya.[182] Bearing in mind that a large number of cases originating from Chechnya are still pending before the Court alleging enforced disappearance and torture, and the large number of cases decided with respect to enforced disappearances, it is not unimaginable that this situation will once again raise the issue of a systematic practice.[183] In this regard, it is useful to recall that the European Court has referred to the *modus operandi* and security operations in Russia to come to the conclusion that enforced disappearance is a well-known phenomenon in that region. In a recent case, *Khakiyeva v. Russia*, the applicants referred to NGO reports underlining the systematic practice of enforced disappearance in Chechnya.[184] However, the European Court did not comment on the use of this evidence. Despite the reluctance to find a systematic practice, the European Court appears to use the fact that enforced disappearances are 'well known' in this conflict as important circumstantial evidence in order to establish state involvement. However, such findings do not seem to have the implications of the 'systematic practice' construction employed by the Inter-American Court.

6.3.4 Comparative remarks in light of the experiences of victims

The previous subsections demonstrated the way in which the three supervisory bodies have determined state responsibility on the basis of the direct involvement of state agents in the enforced disappearance. One of the main concerns in the proceedings before the supervisory bodies was whether it could be established that state agents

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181 *Ibid.*, para. 115.

182 *Baysayeva v. Russia* ECtHR (2007), para. 119 (The Court referred to *Bazorkina v. Russia* ECtHR (2006), *Imakayeva v. Russia* ECtHR (2006), and *Luluyev a.o. v. Russia* ECtHR (2006)).

183 Russian Justice Initiative, Annual Report 2010, available at www.srji.org/ (last visited on 18 November 2011).

184 *Khakiyeva, Temergeriyeva a.o. v. Russia* ECtHR (2011), para. 177; HRW, 'Worse Than a War: "Disappearances" in Chechnya - a Crime Against Humanity' (March 2005), available at www.hrw.org (last visited on 24 May 2011).

were behind the enforced disappearance. Evincing direct state involvement has proven to be extremely difficult. Enforced disappearance puts the state in a position to conceal evidence about the crime or to be inactive in tracing the perpetrators. In this regard, an enforced disappearance is also accurately described as the perfect crime of no information.[185] The conglomerate of the salient characteristics of enforced disappearance places almost all evidence of such a crime within the exclusive control of the state. Accordingly, it is important that the five main causes of victims' suffering, as defined in Chapter 4 *supra*, are taken into account in the approach to evidence by international adjudicatory bodies. Three of the five main causes are particularly important. First and foremost, there is no trace of the disappeared person (the first main cause). Only in exceptional cases is there direct evidence such as a survivor who can testify or a dead corpse that may help to identify the perpetrator.[186] Furthermore, denials by the state authorities leave relatives and lawyers groping in the dark because such denials bar any access to information. Moreover, the state has the most inclusive and comprehensive apparatus available to thoroughly investigate the crime. However, the involvement of state agents in the enforced disappearance renders it unlikely that the state will indeed use this apparatus in a fair and adequate manner (the second main cause). Finally, the relatively long period of time that relatives spend searching for the disappeared person together with an unsafe environment (the fourth main cause) often leads to contradicting statements and difficulties in finding persons to testify. Threats and other forms of obstructing the activities of relatives by the state authorities make the building of a case extremely difficult. It is not only relatives who are threatened when inquiring and presenting writs to the authorities, but also lawyers, judges and witnesses have been reported as victims of such behaviour. As shown in the previous subsections, the three supervisory bodies have tailored their approach to establishing that state agents are behind the enforced disappearance to the particularities of this human rights violation.

First of all, the three bodies must be applauded for having allowed a wide range of evidence from various sources, including hearsay and other circumstantial evidence. This has allowed relatives to present a *prima facie* case in the first place. A few restrictions on the admissibility of evidence can be discerned from the case law. The HRC has strictly adhered to the two minimum requirements laid down in OP-1 and, accordingly, has only considered written information that is submitted by the parties. The Inter-American Court has set the requirement that the source and the way in which the information was obtained must be verifiable. The European Court does not seem to set such a strict requirement, but takes into account the adversarial principle in the evaluation of the evidence. Also, the active stance of the three supervisory

185 Interview with Ewoud Plate and Jan de Vries (2010).

186 For example, the place where the corpse is found or if the dead body were to be discovered in an area under the control of the army makes the argument that the state was involved rather strong.

bodies in collecting information has enabled them to obtain as much information as possible. In this respect, they have requested additional information from the parties and have taken into account previous case law. The possibilities that the European Court and the Inter-American Court have used to convene oral hearings have been important in particular to assess the credibility of witnesses. The Inter-American Court has most extensively made use of hearings in order to clarify the facts. This use is important because most of the available evidence is oral evidence. Moreover, due to threats or other obstacles, the testimonies gathered by the national authorities may not always be trustworthy.

The disposition of the three supervisory bodies to obtain as much information as possible is also reflected in the flexibility towards enforcing time-limits. This flexibility has mostly benefited the respondent state and has caused serious delays in the proceedings. Given the seriousness of finding a state guilty of enforced disappearance and given the shared burden of proof, such flexibility might be unavoidable for the credibility of the final decision towards the respondent state.

Secondly, all three supervisory bodies have applied an unusual shift in the burden of proof in enforced disappearance cases. All three supervisory bodies have accepted the possibility to use circumstantial evidence and inferences on which legal presumptions can be built as this is often the only means available to prove the crime of enforced disappearance.[187] One of the most prominent common denominators in the case law of the three supervisory bodies is the weight given to unresponsive or uncooperative behaviour of respondent states, as well as their failure to investigate the claims at the domestic level. Accordingly, they have reversed the burden of proof on the basis that the state was in the exclusive possession of essential information. Also, it seems that when there is proof that the person was arrested, but the state claims that he or she was released or escaped, a greater burden seems to rest on the state to substantiate such claims with accurate and detailed documentary evidence. Nowak and other commentators welcome the shared burden because it prevents the possibility for states to stall or block a decision on the merits.[188]

The application of the shared burden of proof as one of the solutions to unresponsive states and the usual dearth of evidence has manifested itself in different ways in the case law of the three supervisory bodies. The HRC has issued so-called default decisions. Commentators have generally evaluated the default mechanism employed by the HRC as an important tool to have any power of persuasion in cases where the information lies exclusively within the control of the state. Young stresses in this respect the ample opportunity for the respondent state to refute the allegations

187 This observation was made with respect to the Inter-American Court in: J.E. Méndez & J.M. Vivanco, 'Disappearances and the Inter-American Court: Reflections on a litigation experience' (1990) 13 *Hamline L Rev* 3 pp. 507-578, at p. 557.

188 Nowak (2005), p. 873. See also Rodríguez-Pinzón (1998), p. 125.

and the clarity on this point in the case law.[189] On the other hand, some commentators have criticised the HRC for not always applying the division of the burden of proof consistently. The critique concerns in particular the ambiguity around the evidence that is required to satisfy the standard of proof for establishing a *prima facie* case.[190] As shown in this chapter, the decisions of the HRC lack clear guidance in this respect.

The Inter-American Court seems to recognise the possibility of rendering a default judgment as well. However, it appears to have given more weight to the allegations of the complainants, but has still evaluated the supporting evidence carefully. In general, the Inter-American Court has repeatedly adopted the 'systematic practice' approach. According to Rodríguez-Pinzón, this method of using a systematic practice to evince an enforced disappearance case improves the credibility of human rights bodies. He concludes that:

> [T]he standards required by the Court in its default doctrine are lower than those required in a case where direct or indirect evidence is available. In the sense we must say that the avenue chosen by the Court is stronger than the alternative of using its default doctrine. As we have seen, a decision on the grounds of existing direct or indirect evidence regarding an alleged violation is more desirable for the victim's interests than a default decision, because the former type of decision is more credible. Baring [bearing, (sic)] in mind that the Court's authority relies heavily on the credibility of its decisions, we must conclude that the Court will remain reluctant to use its default doctrine in future cases.[191]

However, the required standard of proof for evincing a systematic practice is high. In contrast to the Inter-American Court, the European Court has not found any sufficient evidence to substantiate a systematic practice, in spite of several attempts by applicants. Instead, this Court has attributed weight to circumstantial evidence and the general context in which an enforced disappearance has occurred. As such, the repeated recurrence of enforced disappearances has supported the reasoning to bring an enforced disappearance case within the ambit of Article 2 ECHR (the right to life). In this respect, the European Court has mentioned that the phenomenon of enforced disappearance is 'well known' in Chechnya. It must be noted that the evidence presented to the European Court and the evidence presented to the Inter-American Court in, for instance, the *Velásques-Rodráguez Case* differed for two reasons. Firstly, the applicants before the European Court have not been able to establish a clear *modus operandi* relating to the kidnapping of the victims. The only indication could be that many of the enforced disappearances happen in the context of State

189 Young (2002), p. 235.

190 J.T. Möller & A. De Zayas, *United Nations Human Rights Committee case law 1977-2008. A handbook* (Kehl am Rhein: N.P. Engel Verslag 2009), p. 37. See also Young (2002), p. 231.

191 Rodríguez-Pinzón (1998), p. 147.

security operations. Secondly, no former member of the security forces has testified before the European Court to affirm the involvement of security forces in a practice of enforced disappearances in Turkey.

The third way in which the supervisory bodies have adapted their approaches to evidence of enforced disappearance lies in the requisite standard of proof. It must be noted that the standard of proof to evince an enforced disappearance case is not always clear, with the exception of the 'beyond reasonable doubt' standard for evincing systematic practices. The Inter-American Court is the most elaborate of the three bodies with regard to its reasoning in relation to evidence. The European Court mostly evaluates the evidence in an explicit manner, albeit on a less detailed level. In contrast, the HRC usually does not explain the reason why it attributes a certain weight to particular evidence and adopts a very succinct evaluation of the evidence.

The previous subsections demonstrated that the HRC and the Inter-American Court appear to adopt a balance of probabilities standard. It must be noted that, as a result of the default mechanism, the HRC tends to regard evidence, however thin, to substantiate the claim of the author of the communication. On the other hand, the European Court adheres to a high standard of proof, namely that of 'beyond reasonable doubt'. Fortunately, the European Court interprets this standard in an autonomous manner, which is different from the standard used in domestic criminal proceedings. As such, sufficient evidence may follow from inferences and presumptions of fact, as long as they are consistent with the facts. Still, the strict application of this standard has been criticised with respect to torture claims in enforced disappearance cases.[192] In respect of claims of the right to liberty, however, the flexibility of the application of this standard is employed taking into account the difficulties in adducing evidence in enforced disappearance cases. Still, the application of this standard remains ambiguous. The Inter-American Court's balance of probabilities seems to be most in line with the experiences of victims; such standard is transparent, credible and avoids an impossible burden of proof for victims.

The approaches of the three supervisory bodies to the evaluation of evidence have several common features. They take into account the conduct of the state in gathering and providing evidence; silence or general refutations have resulted in considerable weight being given to the allegations of the alleging party. Additionally, high probative value has been attributed to witness testimonies and hearsay, as well as other indirect evidence. The Inter-American Court has explicitly taken into account the reliability of testimonies from persons with an interest in the case; it has considered such evidence carefully and together with all other evidence. This interpretation of testimonial evidence is important in enforced disappearance cases

192 See Vermeulen (2008), pp. 159-198; Barret (2009); I. Taqi, 'Adjudication Disappearance Cases in Turkey: An Argument for adopting the Inter-American Court of Human Rights' Approach' (2001) 24 *Fordham International Law Journal* pp. 940-987.

because co-detainees often provide important evidence in testifying that they have heard screams, voices or names rather than actually having seen the disappeared person with their own eyes. Lastly, the adversary principle, giving the opportunity to the parties to refute the evidence, has been taken into account by the Inter-American Court and European Court in attributing probative value to the evidence.

Contrary to the modified standard of proof described in the previous paragraphs, the standard of proof for finding a systematic practice appears to be 'beyond reasonable doubt'. The Inter-American Court is so far the only supervisory body that has established a systematic practice of enforced disappearance in contentious cases. In finding such practice, important pieces of evidence seemed to include: witness testimonies by relatives and survivors; testimonies of former members of the armed forces testifying against the respondent state; expert evidence on the general situation; testimonies of human rights defenders; documents of national commissions such as truth commissions; information from other human rights organs; newspaper articles; and other cases before the Court as 'judicial knowledge'. The European Court has repeatedly mentioned that the phenomenon of enforced disappearance is 'well known' in Chechnya, but has never found a systematic practice on the merits. Given the large number of enforced disappearance cases decided by the European Court and the findings of other reports on this situation, it is unclear what further evidence is needed to conclude a systematic practice in accordance with the criteria developed in *The Greek Case* and the *France et al. v. Turkey* decisions. Upon an analysis of the breadth of evidence presented before the European Court, it seems virtually impossible for victims to satisfy the standard of proof for evincing a systematic practice.

In conclusion, the supervisory bodies have tailored the rules of evidence on several important points to the difficulties that are inherent in evincing an enforced disappearance. In particular, the three supervisory bodies have taken into account the absence of the disappeared person as an important piece of evidence and the concealment of information by the state authorities. In addition, oral hearings have proven to be particularly important to assess the credibility of witnesses. A shortcoming that can be found at times is the lack of clarity on the approach to evidence, which does not serve the credibility of the (quasi-)judicial outcomes.

6.4 Responsibility based on the indirect involvement of the state

The definition of enforced disappearance in the ICPPED, which contains a constituent element that requires state involvement in the deprivation of liberty, seems to be intended to protect states from being held accountable for acts over which they do not have control. The inclusion of this constituent element, however, does not completely exclude crimes committed by non-state actors. This conclusion follows from the four

levels of state involvement as portrayed by the 'state' requirement in the ICPPED definition:

1. committed by state agents
2. authorisation by state agents
3. support by state agents, and
4. acquiescence by state agents

As discussed in section 6.3 above, the most obvious form of state involvement is where state agents, such as the military or the police, are the ones that deprive the person of his or her liberty. On the other hand, 'acquiescence' appears to mark the minimum threshold for attributing state responsibility for the enforced disappearance itself, on the basis that the verb 'to acquiesce' is defined as 'to accept tacitly or passively [or] to give implied consent to (an act)'.[193] As such, acquiescence has also been defined as 'wilful blindness'[194] or turning a blind eye to acts committed by non-state actors. The meaning of this term, and how to prove it, thereby becomes essential for attributing state responsibility.

The term 'acquiescence' is not used in the texts of the ICCPR, the ACHR or the ECHR. Accordingly, the HRC has not used this term in its views in enforced disappearance cases. 'Support or acquiescence' was introduced in the domain of the Inter-American Court in 1996 with the entry into force of the IACFD. The definition of enforced disappearance in this convention has a similar 'state' requirement to the ICPPED. The European Court has also applied this concept of acquiescence.

6.4.1 The Inter-American Court of Human Rights

Two landmark cases in which the Inter-American Court determined state responsibility based on support or acquiescence shed light on the meaning of this notion.

The first enforced disappearance case in which the Inter-American Court elaborated on the scope of the notion of acquiescence was *Blake v. Guatemala*. This case was considered after the entry into force of the IACFD, but before Guatemala ratified it. Nonetheless, the Inter-American Court referred to the definition therein. The facts of this case pertained to the disappearance of two American citizens, a journalist and a photographer, residing in Guatemala in 1985. One of the major disputes between the parties was whether the perpetrators of Blake's enforced disappearance could be considered to be state actors. The established facts revealed that during

193 Black's Law Dictionary.

194 US Court of Appeals, *Zheng v. Ashcroft*, 332 F.3d 1186 (9th Cir 2003); US Court of Appeals, *Silva-Rengifo v. Atty. Gen. Of United States*, 473 F.3d 58, 70 (3rd Cir. 2007) (interpreting 'acquiescence' in the definition of torture in the CAT).

their travel, they were questioned by a commander of one civil defence group who, after receiving instructions from officers of the military garrison, ordered members of the civil patrol to take them away, telling them 'you can kill them if you wish'. The patrols immediately took them and killed them. They remained unaccounted for until the date on which their remains were discovered on 16 March 1992 and 14 June 1992.[195] The Inter-American Commission alleged that the connection between the civil patrols and the state was so close that their actions were imputable to the respondent state. In contrast, Guatemala argued that, in the context of the subversion struggle, these civil patrols were voluntary community organisations with close connections to the Army. However, it claimed that the connections did not imply that the members of these patrols 'belong[ed], or [performed] the same functions as the Armed Forces and that they [were] agents of the Guatemalan State'.[196]

After careful consideration, the Inter-American Court concluded that, during the period in which the enforced disappearance of Blake occurred, the civil patrols were in fact acting as agents of the state.[197] The factors which the Court took into consideration were: (a) the institutional relationship between the civil patrols and the Army; (b) the fact that the civil patrols carried out activities in support of the Army's functions; (c) the supervision of the Army under which the civil patrols operated; and (d) the supply of weapons and the fact that these civil patrols had received training from the Guatemalan Army.[198] In assessing the evidence pertaining to this point of law, the Inter-American Court took account of national documents issued by organs of the Guatemalan government, reports by international NGOs, a report by the US Department of State and reports of the UNWGEID.[199] Special value was attributed to a decree issued by the Congress of the Republic of Guatemala that stated that the civil patrols over the years had 'fulfilled missions belonging to the regular State organs, provoking repeated human rights violations.'[200] The Inter-American Court concluded on the basis of this 'overwhelming'[201] evidence that the state bore responsibility for the enforced disappearance of Blake, stating that 'the acquiescence of Guatemala in the perpetration of such activities [grave crimes] by the civil patrols indicates that those patrols should be deemed to be agents of the State'.[202]

In a later case, *Mapiripán Massacre v. Colombia*, the Inter-American Court assumed collaboration or acquiescence in a massacre case on the basis of a more

195 *Blake v. Guatemala* IACtHR (1998), paras. 52 (a) and (b).
196 *Ibid*., para. 73.
197 *Ibid*., para. 75.
198 *Ibid*., para. 76.
199 *Ibid*., para. 75.
200 Decree 143-96 of the Congress of the Republic of Guatemala of November 28, 1996 as cited in *Blake v. Guatemala* IACtHR (1998), para. 77.
201 The original Spanish text uses the word 'abundante'.
202 *Blake v. Guatemala* IACtHR (1998), para. 78.

tenuous bond between the paramilitaries and the army.[203] The facts of the case pertained to the massacre of approximately 49 persons in Mapiripán, a municipality of Colombia, and the terrorisation of the population by AUC paramilitaries for an entire week.[204] The proven facts revealed that approximately one hundred members of the AUC landed on charter flights at the airport of San Jose de Guaviare, an airport nearby Mapiripán. They were picked up by members of the armed forces without being subjected to any form of control.[205] The paramilitaries were then free to get into trucks usually used by the armed forces and were able to drive through army training areas to the municipality of Mapiripán without being checked. The paramilitaries occupied Mapiripán from 15 July until 20 July 1997. From the commencement of the massacre, several authorities, including two Commanders of the armed forces, were alarmed and informed, but failed to investigate and intervene in the situation.[206] In fact, the troops present in the area were transferred to other places while the massacre ensued. When the army finally arrived in Mapiripán, the massacre had ceased and much of the evidence had been destroyed. For instance, the majority of the dead and dismembered bodies were thrown into the river and important witnesses were killed.[207]

The respondent state acknowledged the facts, but argued that Colombia could not be held responsible for the crimes committed by the paramilitaries. Colombia stated explicitly that the paramilitaries were not agents of the state; there was no effective control over the paramilitaries and they neither acted under the instruction of the state nor was there any delegation of public power to these criminal groups. Furthermore, the respondent state also put forward that the members of the armed forces, who aided the paramilitaries, had acted outside the law and, as a result, had been sentenced accordingly[208] Moreover, the respondent state argued that, even though civil defence groups were originally created by the state, since 1989 extensive

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203 *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 116(d) (The Inter-American Commission had alleged the Colombian Army's collaboration and acquiescence in the crimes. The Inter-American Court did not consider this case as an enforced disappearance case. However, some of the alleged victims remained missing or their remains were not identified at the time of the judgment. As a consequence, at the time of the consideration of the case the number of dead persons had not been established exactly).

204 AUC stands for *Autodefensas Unidas de Colombia* (United Self-Defence Forces of Colombia).

205 *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 96.30.

206 *Ibid*., paras. 96.31-96.37.

207 *Ibid*., paras. 96.39-96.42.

208 In 2009, the Army General Jaime Humberto Uscátegui was sentenced to 40 years imprisonment by the Supreme Court. The court found Uscátegui guilty of murder, kidnapping and falsifying public documents, see 'Former Colombian general jailed for role in Mapiripán Massacre', www.guardian.co.uk/world/2009/nov/26/former-colombian-general-jailed-massacre (last visited on 24 May 2011). He was sentenced to 40 months imprisonment in 2001 by a military court for 'omission', see Colombian Military Officers Convicted in '97 Village Killings, www.nytimes.com/2001/02/14/world/colombian-military-officers-convicted-in-97-village-killings.html (last visited on 24 May 2011).

measures had been taken and efforts pursued to criminalise these groups and to break up the organisations.[209]

In its consideration of the merits, the Inter-American Court emphasised that for international responsibility to exist, it is sufficient to demonstrate that there has been support or tolerance by the state in the infringement of the rights set forth in the ACHR or that omissions by state authorities have enabled the commission of such violations.[210] The Court concluded in this case that such support or tolerance had been proven. The evidence presented to the Inter-American Court included documentary evidence including statements by family members and by expert witnesses. At the public hearing convened by the Court, the Court heard statements of officials of the Public Prosecution Office, of family members and of human rights specialists. In addition, the Court relied on declarations made by a member of the military unit in the area who testified that members of the Army not only failed to impede the arrival of the paramilitaries in Mapiripán but also provided them with munitions and means of communications.[211] Furthermore, the Court based its conclusion on the findings of the Attorney General's Office that filed charges against several paramilitaries, as well as military sergeants for their involvement in the crimes,[212] and on subsequent judicial decisions.[213] Finally, the Inter-American Court took account of documents of the UN Office of the High Commission for Human Rights demonstrating in general the link between paramilitary groups and the armed and security forces of the state of Colombia.[214]

The Inter-American Court acknowledged that there was no documentary or sufficient evidence before it proving either direct supervision by the state over the commission of the massacre, or indications that a dependent relationship existed between the Army and the paramilitaries or a delegation of public functions to the paramilitaries. Nevertheless, the Inter-American Court concluded that the acts of the paramilitaries in the areas under control of the Army were attributable to the state through the accumulated acts of grave actions and omissions of members of the armed forces. The Court based this conclusion on the facts acknowledged by the responding state and on the evidence before it showing that:

> In fact, the incursion of the paramilitaries into Mapiripán was an operation planned during several months before July 1997 and carried out with full knowledge, logistic preparations and the collaboration of the Army. The Army enabled the paramilitaries to leave Apartadó y Neclocí and to make their way to

209 *The Mapiripán Massacre v. Colombia* IACtHR (2005), paras. 97 (e)-(g).
210 *Ibid.*, para. 110.
211 *Ibid*., para. 96.35.
212 *Ibid*., paras. 96.38 and 96.82-96.89.
213 *Ibid*., para. 118.
214 *Ibid*., para. 119.

> Mapiripán through areas that were under their control. Furthermore, they left the civilian population defenceless during the days of the massacre by unjustifiable transfers of the troops to other places.[215] [Unofficial translation by the author]

Thus, the Inter-American Court considered the collaboration of the Army in the crimes carried out by the paramilitaries as amounting to at least acquiescence by the state. These crimes were carried out in a coordinated, parallel or linked manner between the paramilitaries and the Army. Additionally, the omissions of the state agents, who had failed in their duties to protect the victims against the said crimes and to investigate the crimes effectively, had contributed to the massacre being able to take place.[216] Hence, the considerations by the Court appear to be primarily based on the fact that the area in which Mapiripán is located had been under the control of the state, that the Army made it possible for the paramilitaries to carry out the massacre, and that it had done nothing to protect the population or to investigate the acts.

In summary, the meaning of acquiescence as elaborated by the Inter-American Court in the *Blake Case* reveals the need for a close connection between non-state actors and the state. The *Massacra Mapirpán Case* seems to suggest that a less obvious connection does not necessarily exclude responsibility on the basis of the notion of acquiescence. Despite the less intertwined connection between the armed forces and non-state actors than was the case in *Blake v. Guatemala*, this case showed active participation by a number of members of the armed forces in facilitating the massacre carried out by the paramilitaries. It must be noted that the evidence presented and considered seems to be analogous to the evidence available for proving the direct involvement of the state.

6.4.2 The European Court of Human Rights

Acquiescence has in several forms appeared in the case law of the European Court. The European Court has stated generally:

> […] that the acquiescence or connivance of the authorities of a Contracting State in the acts of private individuals which violate the Convention rights of other individuals within its jurisdiction may engage that State's responsibility under the

215 *Ibid*., para. 120 ('En efecto, la incursión de los paramilitares en Mapiripán fue un acto planeado desde varios meses antes de julio de 1997, ejecutado con pleno conocimiento, previsiones logísticas y la colaboración de las Fuerzas Armadas, quienes facilitaron la salida de los paramilitares desde Apartadó y Neclocí y su traslado hasta Mapiripán en zonas que se encontraban bajo su control y dejaron desprotegida a la población civil durante los días de la masacre mediante el traslado injustificado de las tropas a otras localidades').

216 *Ibid*., para. 123.

> Convention. Any different conclusion would be at variance with the obligation contained in Article 1 of the Convention.[217]

The European Court has so far not attributed state responsibility on the basis of the notion of acquiescence in enforced disappearance cases. Instead, this Court appears to use the term 'acquiescence' in its case law to indicate the effect of a state's failure to investigate after having established that state agents were the perpetrators of the enforced disappearance. In particular, the lack of action in the first days or weeks after the alleged detention of a person, in the face of well-established complaints, had been detrimental to protecting the victim. The European Court considered that this behaviour created a strong presumption of at least acquiescence in the situation.[218] Hence, the use of the notion of acquiescence seems to be employed to demonstrate that the failure of the state authorities to investigate claims of the crime of enforced disappearance committed by state agents had aggravated the situation by not putting an end to this crime. In these cases, 'acquiescence' did not seem to be used as a basis to determine state responsibility in the first place.

Apart from presuming acquiescence due to the failure to investigate alleged crimes by state agents, the European Court has not relied solely on the notion of acquiescence to attribute state responsibility for enforced disappearance cases. For instance, direct reliance on the notion of 'acquiescence' was rejected in *Uçar v. Turkey* based on insufficient supporting evidence. The European Court did not accept the claim of acquiescence by the state authorities in the disappearance of the applicant's son. In this case the applicant claimed that his son had been abducted and had disappeared with the support, knowledge or acquiescence of state agents for 28 days. After those 28 days he was handed over to the police in Diyarbakır and died

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217 *Cyprus v. Turkey* ECtHR [GC] (2001), para. 81.

218 *Baysayeva v. Russia* ECtHR (2007), para. 119. The Court has used the term 'acquiescence' more often in this sense in either the consideration of a violation of the right to life or when setting out the establsihed facts, see *Alikhadzhiyeva v. Russia* ECtHR 5 July 2007 (Appl. no. 68007/01), para. 61; *Magomadov and Magomadov v. Russia* ECtHR 12 July 2007 (Appl. no. 68004/01), para. 98; *Aziyevy v. Russia* ECtHR 20 March 2008 (Appl. no. 77626/01), para. 78; *Zulpa Akhmatova a.o. v. Russia* ECtHR 9 October 2008 (Appl. nos. 13569/02 and 13573/02), para. 92; *Magomed Musayev a.o. v. Russia* ECtHR 23 October 2008 (Appl. no. 8979/02), para. 104; *Akhmadova a.o. v. Russia* ECtHR 4 December 2008 (Appl. no. 3026/03), para. 135; *Abdulkadyrova a.o. v. Russia* ECtHR 8 January 2009 (Appl. no. 27180/03), para. 122; *Meshayeva a.o. v. Russia* ECtHR 12 February 2009 (Appl. no. 27248/03), para. 105; *Astamirova a.o. v. Russia* ECtHR 26 February 2009 (Appl. no. 27256/03), para. 80; *Dzhambekova a.o. v. Russia* ECtHR 12 March 2009 (Appl. nos. 27238/03 and 35078/04), para. 274; *Khasuyeva v. Russia* ECtHR 11 June 2009 (Appl. no. 28159/03), para. 109. A failure by the prosecuting authorities to adequately react to crimes has also been classified as 'acquiescence' in cases other than enforced disappearances, see *e.g. Amuyeva a.o. v. Russia* ECtHR 25 November 2010 (Appl. no. 17321/06), para. 89 (an arbitrary killing case) and *Musayev a.o. v. Russia* ECtHR 26 July 2007 (Appl. nos. 57941/00, 58699/00 and 60403/00), para. 164 (an arbitrary killing case).

in custody. The European Court noted that his son had testified to the State Security Court that his kidnappers had first told him they were police officers and later that they worked for a private individual. Based on the evidence before it, the Court concluded, however, that 'it cannot be established that the kidnappers were State officials. Nor could it be shown that State officials were implicated in the abduction'.[219] Hence, the Court concluded that the identity of the perpetrators remained a matter of speculation and assumption. Consequently, the Court rejected the claim that it was proven beyond reasonable doubt that the applicant's son was abducted and tortured by or with the connivance of state agents.[220] As to the investigation into the abduction of the applicant's son, the European Court noted the lack of any attempt to locate the applicant's son despite complaints to several authorities including the Pubic Prosecutor's Office. Moreover, the authorities had not collected any evidence in respect of the abduction.[221] They did not even take testimonies from persons who had allegedly witnessed the event. Still, the European Court did not follow the same line of reasoning that such a lack of investigation amounted to a presumption of acquiescence. The difference with *Baysayeva v. Russia* is that in the Russian cases the European Court established that the husband had last been seen in the hands of the Russian authorities whereas the identity of the Turkish perpetrators could not be established.

An exceptional example of an enforced disappearance case in which the European Court came close to attributing state responsibility on the basis of the notion of 'acquiescence' was *Mahmut Kaya v. Turkey*. In this case, the applicant's brother, who was a doctor suspected of aiding and abetting the PKK, was kidnapped, tortured and killed by unidentified individuals. The Court considered that the authorities had failed to protect the applicant's brother in the face of a real risk that his brother would be subject to an unlawful attack because of his sympathy towards the PKK. The Court found that the state authorities should have known that this risk derived from 'the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces.'[222] The European Court referred to a report presented to the respondent state, which indicated that a training camp of a group fighting the PKK 'was receiving aid and training from the security forces and concluded that some officials might be implicated in the 908 unsolved killings in the south-east region.'[223] Nevertheless, the Court relied on the findings of the European Commission that it could not be established who the perpetrators of the crime were. The European Court did not attribute state responsibility on the basis of the notion of acquiescence

219 *Uçar v. Turkey* ECtHR (2006), para. 106.
220 *Ibid*., para. 107.
221 *Ibid*., paras. 149 and 150.
222 *Mahmut Kaya v. Turkey* ECtHR (2000), para. 91.
223 *Ibid*., paras. 59 and 91.

either. Instead, the Court considered the case as a situation that warranted proactive action by the state. After careful consideration, the Court found a violation of the ECHR on the basis of a failure to prevent.[224]

A sidestep to cases concerning arbitrary killings in Turkey shows an acceptance of the allegation of acquiescence by the state. The applicants alleged tolerance or acquiescence by state agents in crimes committed by voluntary village guards in the early 1990s.[225] The European Court concluded that these village guards could be considered as acting with the acquiescence of the state because they were carrying out functions of the state with the state's support. In this respect, the European Court considered that they were accountable to the highest civil servant of the village (the *muhtar*) and fell under his supervision. In addition, these village guards were paid for their services by the Ministry of the Interior. Occupationally, they would fall under the command of the gendarme commander or, when carrying out duties of the security forces, under the command of those forces. Furthermore, the Court noted that there were no safeguards in place protecting against wilful or unintentional abuses of their position.[226] Finally, the European Court was of the opinion that a 'failure of the gendarmes to react to the unlawful activities of the village guards supports a strong inference of acquiescence in those activities'.[227]

Hence, the European Court has referred to the notion of acquiescence but has only found the responsibility of the state based on this notion when the non-state actors had carried out functions of the state and received support from the state in doing so.

6.4.3 Comparative remarks in light of the experiences of victims

The experiences of victims show that enforced disappearances are not only committed directly by state agents. Victims of this crime have been confronted with more subtle forms of state involvement. In addition, it is not always clear who the perpetrator is because the identity of the perpetrators is commonly concealed. In this respect, it is an asset that both the Inter-American Court and the European Court consider that crimes by non-state actors are not entirely excluded from the protection offered by human rights law; crimes committed by non-state actors fall within the realm of state responsibility, subject to the condition that the perpetrators act with at least the acquiescence of the state.

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224 See Chapter 9 *infra* for an analysis of the duty to take preventive measures and for a discussion of the duty to protect and acquiescence.

225 *Avşar v. Turkey* ECtHR 10 July 2001 (Appl. no. 25657/94), para. 411; *Acar a.o. v. Turkey* ECtHR 24 May 2005 (Appl. nos. 36088/97 and 38417/97), paras. 80-86; *Seyfettin Acar a.o. v. Turkey* ECtHR 6 October 2009 (Appl. no. 30742/03), paras. 34-38.

226 *Acar a.o. v. Turkey* ECtHR (2005), paras. 83 and 84.

227 *Ibid*., para. 85.

The case law of the Inter-American Court and the European Court does not show a clear and coherent doctrine with respect to the meaning of acquiescence in enforced disappearance cases. The factors taken into account by the Inter-American Court in the *Blake Case* and the *Mapiripán Masacre Case* show that complainants have to demonstrate a close connection between the non-state actors and the state authorities. In the *Blake Case*, the civil guards carried out formal functions for the armed forces in the field of support and training. The *Mapiripán Massacre Case* did not show such interrelated functions but the facts revealed that, besides abstaining from interfering, also active preparation and collaboration by state agents enabled the paramilitaries to commit the crime. Hence, some active participation seems to be required. The European Court has also considered cases that revealed such a close connection in arbitrary killing cases. In addition, this Court has used the term 'acquiescence' to indicate that, when it was established that state agents had detained the disappeared person, the failure to investigate by the state authorities led to a presumption of acquiescence. However, the case law also shows that when evidence is insufficient to support the claim that state agents were the perpetrators, a failure to investigate does not justify such a presumption. The European Court seems to take a similar stance to attributing state responsibility for crimes committed by non-state actors on the basis of acquiescence. The mere failure to investigate coupled with uncooperative behaviour on the part of the state in the proceedings before the European Court has not led to basing state responsibility on the notion of acquiescence.

Hence, as the case law stands at the moment, the question whether only an omission, or turning a blind eye, may provoke acquiescence is unanswered. The tendency seems to be that turning a blind eye – which enables non-state actors to commit 'enforced disappearances' – and, subsequently, the failure to investigate cannot be equated with acquiescence or tolerance as understood by the Inter-American Court and European Court. This conclusion is detrimental to situations in which the allegation of relatives that state agents are involved in the disappearance cannot be substantiated due to the lack of an investigation by the state authorities and refusals to disclose key information to either the relatives or the adjudicating body.[228]

6.5 Concluding remarks

Having found in Chapter 2 *supra* that the ICPPED leaves room for the interpretation and application of the scope of the 'state' requirement in the definition of enforced disappearance and for the way in which the CED approaches evidentiary issues, the current chapter examined how the three supervisory bodies have dealt with these issues in relation to the duty to respect. The duty to respect the right not to be

228 See Chapter 9 *infra* for an examination of the Inter-American Court's case law and the difference between the duty to protect and the notion of acquiescence.

subjected to enforced disappearance requires states to refrain from both directly and indirectly violating this right. Determining state responsibility based on this duty pertains to actions – instead of omissions – by the state that incur its responsibility for this human rights violation. The most contentious issue with respect to direct participation pertains to establishing whether the state was indeed responsible for the crime itself. Indirect participation broached the question of what support, tolerance or acquiescence actually means in practice and how to prove such involvement.

Direct involvement occurs when state agents are the perpetrators of the arrest or detention of the persons concerned after which that person disappears. While this form of involvement is clear in itself, proof that the state is behind the crime is hardly available. This chapter showed that the three supervisory bodies have adapted their approaches to evidentiary issues to the particularities of enforced disappearance. Firstly, they appear to allow a wide variety of evidence in order to ensure that as much truth as possible comes to light. While consistency in reinforcing time-limits can be improved, a lenient approach to such limits, in particular in respect of the respondent state, balances the more favourable stance towards victims in terms of the burden of proof and standard of proof. All three bodies have applied a shift in the burden of proof after the plaintiffs present a *prima facie* case. This shift is in line with the experiences of victims, namely that the state is in the best position to clarify the facts because it has sole access to the relevant information. Additionally, the standard of proof employed by the three supervisory bodies seems to take into account that circumstantial evidence, inferences and presumptions are often the only way in which an enforced disappearance case can be proven. The HRC and the Inter-American Court seem to employ a 'balance of probability' standard, which is in line with allowing circumstantial evidence and presumptions. The standard in the European Court's case law is that of 'beyond reasonable doubt'. Additionally, as this chapter illustrated, applying this standard has resulted in the European Court rejecting allegations of state involvement when confronted with circumstantial evidence in this regard. The refusal of the state to co-operate with the European Court and to supply relevant information that could clarify the facts did not alter that conclusion. On the other hand, the HRC's approach can be criticised in terms of transparency and credibility. This body usually refrains from making the evaluation of evidence explicit. The case law of the Inter-American Court and European Court have shown that the possibility to hear witnesses has been important to assess their credibility despite, for instance, contradictions in their statements.

In addition, the Inter-American Court's case law on enforced disappearances shows the important role of establishing a systematic practice, if the facts so allow. Despite the rather similar doctrinal understanding of the elements of a systematic practice by the Inter-American Court and European Court, there is a large discrepancy as to their application. The Inter-American Court has found a systematic practice in

respect of a vast number of countries in Latin America. In contrast, the European Court has never found such practice on the merits of a case, despite several claims to that effect. It must be recognised that the historical context of the two regions differ greatly. While the Inter-American Court was from its inception confronted with large-scale violations committed by previous dictatorships, the European Court traditionally dealt with isolated breaches of the ECHR. Nevertheless, this difference does not guarantee that the democratic states in Europe refrain from engaging in a systematic practice. The closest the European Court has come to a finding of a systematic practice is the statement that enforced disappearance is a 'well-known phenomenon' in Chechnya, Russia. The exact meaning of this qualification is not entirely clear. Certainly, it is a choice of wording that does not attract the consequences of a systematic practice in international law. Thereby, the finding of a systematic practice has a more sensitive stigma attached to it than the finding of a 'well-known phenomenon'. Instead, the European Court seems to have introduced this terminology so that the Court can use this broader context as part of circumstantial evidence in enforced disappearance cases.

In spite of these doctrines on evidence attuned to enforced disappearance cases, there are certain cases in which it could not be proven that state agents were the direct perpetrators. In such cases, the question is whether the state was involved in the enforced disappearance in a more subtle way. This chapter demonstrated that the scope of such indirect participation is more intricate. The case law of both the Inter-American Court and the European Court clarifies that when there is proof that the state provided support in terms of training, weapons or infrastructure aimed at facilitating crimes committed by private individuals, responsibility for the crime can be attributed to the state. Similarly, when such private individuals carry out functions of and acknowledged by the state, the state bears responsibility for their actions. When applicants could not prove before the Courts that the perpetrators were state agents, omitting to prevent the crimes together with a lack of investigation by the state is not sufficient to substantiate the notion of acquiescence. Instead, solely a failure to act – or turning a blind eye – has been considered to fall within the duty to prevent as a positive obligation imposed on states. The reason for this could well be that the three human rights bodies have not been confronted with the need to specifically distinguish between acquiescence and the duty to prevent. This issue is further discussed in Chapter 9 *infra*.

Chapter 7
Determining State Responsibility for Enforced Disappearance on the basis of the Duty to Prevent

7.1 Introduction

Undoubtedly, the human rights discourse aspires to a world in which all human rights are observed and guaranteed at the national level. Consequently, alongside the duty to refrain from conduct that breaches human rights, a proactive duty has evolved that requires states to take action with the aim of preventing human rights violations. Determining state responsibility on the basis of a failure to prevent presupposes an assessment of what the state 'should have done' to prevent a specific enforced disappearance and what the state 'ought to do' in order to avoid any repetition of such crimes in the future. As illustrated in Chapter 2 *supra*, the ICPPED stipulates several norms related to the prevention of enforced disappearances. These norms refer to the criminalisation of such crimes, the creation of safeguards surrounding arrest and detention, the taking of protective measures in respect of persons involved in the search and the training of state officials in human rights law. Chapter 2 also identified room for interpretation with respect to these norms.

The current chapter examines the general scope of the duty to prevent under the ICCPR, the ACHR and the ECHR, subsequent to which the case law of the HRC, the Inter-American Court and the European Court will be analysed in relation to the following three aspects: (1) protective measures in respect of non-detained persons at risk; (2) safeguards surrounding arrest and detention; and (3) other measures aimed at preventing the occurrence and repetition of human rights violations. These norms will be evaluated in light of the five main causes of victims' suffering as defined in Chapter 4 *supra*.[1]

7.2 'Reasonableness' as the limiting factor to the scope of the duty to prevent

As has been demonstrated in Chapter 3 *supra*, the HRC, the Inter-American Court and the European Court have to a varying extent recognised the duty to prevent human

1 These five main causes are: (1) no trace of the disappeared person due to denials by the state authorities; (2) uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person; (3) *de facto* and *de jure* impunity; (4) an unsafe environment to carry out the search and other activities related to the enforced disappearance; and (5) obstacles for victims to continue their 'normal' life.

rights violations. The legal basis for such a duty emanates from the substantive rights laid down in the ICCPR, the ACHR and the ECHR together with the respective auxiliary Articles 2(1) ICCPR, 1(1) ACHR and 1 ECHR. In making determinations of state responsibility on the basis of a failure to prevent, the preliminary question to ask is whether it is tenable to demand that states know all the potential risks of enforced disappearance and accordingly take action to prevent it. The HRC, the Inter-American Court and the European Court have addressed this issue in their case law.

At first glance, the HRC seems to start from the premise that the duty to prevent is unrestricted. As part of the obligation to respect and ensure as laid down in Article 2(1) ICCPR, the HRC emphasises that individuals should be protected by the state against violations of their ICCPR rights by state agents.[2] The HRC elaborates this positive nature in General Comment 6 with respect to the right to life. This right requires states to take 'measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces.'[3] The HRC continues by stating that states 'should' take 'specific and effective measures' to prevent the disappearance of individuals, because such disappearances all too often result in arbitrary deprivations of life.[4] Interestingly, the HRC neither doctrinally limits the duty to prevent nor attaches limitations to attributing state responsibility on the basis of failing to fulfil this duty. As such, this formulation appears to be rather onerous for states. Nevertheless, the use of the word 'should' arguably implies a less immediate obligation than if the word 'shall' would have been used. In addition, this General Comment lacks indications that point to an answer to the question of what is meant by 'specific and effective' measures. The views issued by the HRC refine these issues further. The duty to prevent as formulated in General Comment 6 is cited in several views in enforced disappearance cases issued by the HRC.[5] As discussed in the subsequent sections, there are certain measures that can be derived from these views that provide an indication of what is meant by 'specific and effective' measures. Moreover, these views indicate that there are in fact limitations attached to this duty.

In contrast to the unlimited starting point of the HRC, the Inter-American Court has from the outset defined the duty to prevent under the ACHR as a general

2 HRC, 'General Comment No. 20 Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment' (10 March 1992) (hereinafter: 'General Comment No. 20', available at www.ohchr.org, paras. 6 and 8.

3 HRC, 'General Comment 6, Article 6' (1994) (hereinafter: 'General Comment 6', available at www.ohchr.org, para. 3.

4 *Ibid.*, para. 4.

5 *Mojica v. Dominican Republic* HRC (1994), para. 5.5; *Bautista de Arellana v. Colombia* HRC 27 October 1995 (Comm. no. 563/1993), para. 8.3; *Laureano v. Peru* HRC (1996), para. 8.3; *Bousroual v. Algeria* HRC (2006), para. 9.11.

obligation to take *reasonable steps* to prevent human rights violations.[6] The scope of state responsibility for the prevention of human rights violations is thereby clearly limited by the term 'reasonable'. Reasonableness seems to refer to the measures that could realistically have been expected from the state, subject to the specific situation of the risk of enforced disappearance. This criterion of reasonableness is in line with the Inter-American Court's premise that the existence or occurrence of a certain violation does not automatically prove a failure to take preventive measures.[7] Within the delimiting concept of 'reasonableness', the duty to prevent covers a wide range of areas including all means of a 'legal, political, administrative and cultural nature' that (a) promote the protection of human rights and (b) ensure that any violation is considered and treated as an illegal act.[8] An important consideration in respect of Article 5 ACHR illustrates the important role attributed to this duty:

> The guarantee of physical integrity and the right of detainees to treatment respectful of their human dignity require States Parties to take reasonable steps to prevent situations which are truly harmful to the rights protected.[9]

As such, the respondent state in this case incurred responsibility for *inter alia* detaining a person in a detention centre in which the practice of torture and killings carried out by the detention authorities ensued with total impunity.[10]

The European Court has not made general pronunciations such as those by the Inter-American Court on a general duty to prevent. This Court has, however, integrated the duty to prevent in its doctrine on positive state obligations stemming from the protection afforded by the ECHR rights. Comparable to the Inter-American Court, a certain degree of reasonableness can be discerned in relation to the obligation to protect the life of persons from abuse of power by state agents:

> […] Bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the obligation to protect the right to life must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.[11]

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6 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 174 (The Inter-American Court explicitly defines this general obligation as a legal duty).

7 *Ibid*., para. 175.

8 *Ibid*. The Inter-American Court mentions that the latter may lead to the punishment of those responsible and the obligation to compensate the victims for damages that have resulted from the violation. These obligations are discussed extensively in Chapter 8 *infra*.

9 *Ibid*., para. 187.

10 *Ibid*., para. 175.

11 *Kerimova a.o. v. Russia* ECtHR 3 May 2011 (Appl. nos. 17170/04, 20792/04, 22448/04, 3360/04, 5681/05 and 5684/05), para. 246 (case concerning the indiscriminate use of force). See also *Palić*

The consideration that the duty to protect the right to life, in terms of preventing violations, must be interpreted in a way that does not impose an impossible or disproportionate burden on the state has been implied in cases where state agents were the perpetrators as well as where non-state actors committed the crime.

Hence, while the HRC formulates a seemingly unlimited duty to prevent human rights violations, the Inter-American Court and the European Court have qualified this duty to a certain extent. Exactly which measures must be taken in given circumstances in order to discharge this obligation in respect to enforced disappearances remains the crucial issue for the purpose of the present study. Given the multiple rights approach of the three supervisory bodies to enforced disappearance, the protection afforded by the right to liberty, the right to life and the freedom from torture or other ill-treatment has been crucial in formulating the content of the duty to prevent enforced disappearance.

7.3 Protective measures to prevent the enforced disappearance of persons not in detention

Protective measures to prevent the enforced disappearance of persons not in detention have been the subject of attention in two situations. The case law shows that threats by state agents have heralded the enforced disappearance of persons in the first place. In addition, relatives or other persons involved in the search for disappeared persons have, in turn, been threatened because of their activities related to the search for their family member who has disappeared. While such threats might not always have been threats of enforced disappearance, they still fall within the scope of this chapter because they hamper the activities of relatives affected by the enforced disappearance. With respect to these two situations, relevant considerations by the HRC, the Inter-American Court and the European Court to protective measures have been made in respect of substantive rights and the right to individual petition. In addition, such measures have been elaborated in interim measures as a possibility to protect potential victims of irreparable harm.[12]

7.3.1 The Human Rights Committee

With regard to persons not detained or arrested who are at risk of human rights violations, the HRC has qualified the obligation to take protective measures with the

v. Bosnia and Herzegovina ECtHR (2011), para. 70.

12 For a thorough study of provisional measures to halt threats and harassment, see E. Rieter, *Preventing Irreparable Harm: Provisional Measures in International human rights adjudication* (Antwerp: Intersentia 2010), chapter IX; C. Burbano Herrera, *Provisional measures in the case law of the Inter-American Court of Human Rights* (Antwerp: Intersentia 2010).

term 'reasonable', like its regional counterparts.[13] There have only been a few cases in which the person who disappeared had received threats prior to his or her enforced disappearance, which could have prompted protective measures with the aim of preventing the enforced disappearance. Such a situation was at stake in *Mojica v. Dominican Republic*. In this case, the son of a well-known labour leader disappeared in 1990. There was no concrete evidence that the disappeared son was actually arrested or detained by state agents on or after the date of his disappearance. Still, the HRC found a violation of Article 9 ICCPR. The most important evidence of state involvement was that the son had received death threats from several military officers in the weeks prior to his disappearance, allegedly due to his presumed communist inclinations. This information had not been refuted by the state in the proceedings before the HRC.[14] Moreover, the state had been requested in the admissibility decision to clarify the facts, but had failed to do so. Recalling earlier views, the HRC reiterated that:

> The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. In its prior jurisprudence, the Committee has held that this right may be invoked not only in the context of arrest and detention, and that an interpretation which would allow States parties to tolerate, condone or ignore threats made by persons in authority to the personal liberty and security of non-detained individuals within the State party's jurisdiction would render ineffective the guarantees of the Covenant […]. In the circumstances of the case, the Committee concludes that the State party has failed to ensure Rafael Mojica's right to liberty and security of the person, in violation of article 9, paragraph 1, of the Covenant.[15]

Thus, the protection of Article 9 ICCPR extends to situations in which persons, who are not in the custody of the state, are threatened by state agents. The failure to take protective measures in such situations can amount to a violation of this provision. Such a reading is particularly embedded in the right to security as enshrined in Article 9(1) ICCPR. In this regard, the HRC considered that:

> […] It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. […].[16]

13 *Delgado Páez v. Colombia* HRC 12 July 1990 (Comm. no. 195/1985), para. 5.5.
14 *Mojica v. Dominican Republic* HRC (1994), para. 5.3.
15 *Ibid*., para. 5.4.
16 *Delgado Páez v. Colombia* HRC (1990), para. 5.5.

Additionally, the HRC has read an obligation to provide appropriate protection for family members from harassment into the obligation to provide family members with an appropriate remedy (Article 2(3) ICCPR).[17] In the *Bautista Case*, the family members of a disappeared woman alleged that they, as well as their legal counsel who lodged the complaint, had received death threats and were subject to intimidation because they were insisting on pursuing the case against the perpetrators of the disappearance of their loved one.[18]

Formal and informal interim measures have also been used by the HRC to address threats towards alleged victims and their relatives.[19] In *Aber v. Algeria*, the Special Rapporteur on new communications and interim measures of the HRC, without specifically referring to the formal Rule of interim measures, recalled that '[…] an individual and his relatives should not be subjected to intimidation for having submitted a communication to the Committee.'[20] Similarly, General Comment 33 on state obligations under OP-1 reiterates that from Article 1 OP-1 it emanates that 'States parties are obliged not to hinder access to the Committee and to prevent any retaliatory measures against any person who has addressed a communication to the Committee.'[21] While such threats in relation to lodging a complaint do not necessarily directly involve a risk of enforced disappearance, they do provide an indication that action must be taken when threats have been received from state agents. The HRC has abstained in enforced disappearance cases from indicating more specifically the kind of measures that should have been taken.

7.3.2 The Inter-American Court of Human Rights

The duty to take preventive measures in the case law of the Inter-American Court is closely intertwined with the notion of acquiescence and the duty to protect persons from acts by non-state actors.[22] In cases where state agents were the perpetrators in enforced disappearance cases, the Inter-American Court has been confronted with circumstances with respect to witnesses, either relatives or other persons, who have been threatened as a result of having testified in the case or due to their participation in the search for the disappeared person. In the Court's case law, protective measures to prevent such persons from disappearing or being killed have mostly been considered

17 *Bautista de Arellana v. Colombia* HRC (1995), para. 10.
18 *Ibid*., para. 2.12.
19 Interim measures have been issued on the basis of Rule 86 of the Rules of Procedure (1994). See Rieter (2010), pp. 411-415 (making a distinction between the HRC's practice of issuing formal and informal interim measures).
20 *Aber v. Algeria* HRC (2007), para. 1.2.
21 HRC, 'General Comment No. 33 The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights' (31 October 2008) UN Doc. CCPR/C/GC/33 (hereinafter: 'General Comment No. 33'), para. 4.
22 See Chapter 6 section 4 *supra* and Chapter 9 *infra.*

in provisional measures. On the basis of Article 63(2) ACHR, the Inter-American Court may adopt provisional measures in 'cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons'.[23] Such measures have included clear positive obligations that are not only aimed at preserving a certain legal situation, but also meant as a true preventive judicial guarantee.[24]

A representative case in this respect is the *Velásquez-Rodríguez Case*. During the proceedings before the Inter-American Court witnesses who had testified in favour of the applicant were allegedly threatened in the respondent state, Honduras, because of their testimony. Accordingly, the Inter-American Commission requested provisional measures under Article 63(2) ACHR in order to protect them. A few months later, two persons, one who had testified before the Inter-American Court and one who was summoned to testify, were assassinated. Consequently, the Inter-American Court adopted provisional measures on the protection of witnesses in the three disappearance cases pending against Honduras. In these provisional measures, the Inter-American Court obliged the respondent state to implement such measures which were necessary 'to prevent further infringements on the basic rights of those who have appeared or have been summoned to do so before this Court […], in strict compliance with the obligation of respect for and observance of human rights, under the terms of Article 1(1) of the Convention'.[25]

An example of the strict scrutiny of the protective measures taken by the state appeared in *Blake v. Guatemala*. In this case, the Inter-American Court also adopted provisional measures to ensure the protection and personal safety of relatives of the disappeared person and witnesses in the case. The President of the Inter-American Court requested:

> […] Guatemala to adopt any measures necessary to enable those persons to continue residing in their homes, with the guarantee that they will not be persecuted or threatened by agents of the Guatemalan State or other persons acting with the acquiescence of the State.[26]

In answer to this request, Guatemala indicated the measures that had already been taken with the aim of protecting the specified persons as requested by the Inter-

23 See also IACtHR, Rules of Procedure (Nov 2009), Article 27. Interim measures are an important part of the case law of the Inter-American Court. See *e.g. Monagas Judicial Confinement Center ("La Pica"); Yare I and Yare II Capital Region Penitentiary Center (Yare Prison); Penitentiary Center of the Central Occidental Region (Uribana Prison) and Capital El Rodeo I and Rodeo II Judicial Confinement Center ('Four Prisons') v. Venezuela* (provisional measures) IACtHR (24 November 2009), paras. 3, 4, 30 and 31 (providing a thorough overview of the criteria for instituting and maintaining provisional measures and their application in concrete cases).

24 *'Four Prisons' v. Venezuela* IACtHR (2009), para. 6.

25 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 41.

26 *Blake v. Guatemala* IACtHR (1998), para. 37.

American Commission. The measures taken by the Guatemalan state in respect of one of the witnesses included a night patrol around his residence. During the public hearing convened by the Court, the witness indicated that he was only protected when in the house and he continued to fear for his and his family's lives outside of his home. Consequently, in the follow-up order, the Inter-American Court requested the respondent state to take additional protective measures when the witness and his family were outside of their homes.[27] In yet another case, the Inter-American Court linked the ongoing criminal investigation into the enforced disappearance to the need for maintaining the provisional measures of protection.[28] Without clearly specifying the measures of protection, the Court required the participation of the representatives of the persons concerned in the planning and implementation of such measures.[29]

In summary, the Inter-American Court does not shy away from a close scrutiny of protective measures, which may include examining the geographical scope of such measures. Furthermore, they must be in line with the needs of the victims. As such, the victims of such threats must be involved in the planning and design of such measures in order to tailor them to their needs.

7.3.3 The European Court of Human Rights

The European Court has determined state responsibility on the basis of the failure to take operational preventive measures in respect of persons not in detention but at risk of an abuse of powers by state agents in *Gongadze v. Ukraine*.[30] The facts of this case pertained to an enforced disappearance of a political journalist. His body was found one month after his disappearance. Two months prior to his disappearance, he had sent a letter to the Prosecutor General's Office ('GPO') requesting protective measures because he felt threatened by the intimidating behaviour of state agents. His attempt to ensure that measures were taken remained without success. At the time of the consideration of the case by the European Court, his disappearance was not clarified but police officers had been charged with his kidnapping and murder.[31] The European Court considered that:

> For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party,

27 *Blake v. Guatemala* (provisional measures) IACtHR (18 April 1997), operative para. 2.
28 *Bámaca-Velásquez v. Guatemala* (provisional measures and monitoring compliance) IACtHR (27 January 2009), paras. 50 and 58.
29 Order of the President of the Court of 11 March 2005, para. 3, as cited in: *Bámaca-Velásquez v. Guatemala* IACtHR (2009), para. 8.
30 *Gongadze v. Ukraine* ECtHR 8 November 2005 (Appl. no. 34056/02).
31 *Ibid*., para. 8.

> and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[32]

The European Court found the state responsible for the journalist's death under Article 2 ECHR. In its reasoning, the European Court first of all noted that the recent developments demonstrated that there was a high degree of probability that police officers were involved in the disappearance and murder of Gongadze. Apart from the likelihood that state agents were implicated in the crime, the Court took into account that Gongadze had reported several facts such as the questioning of his relatives and colleagues by police officers about him and his surveillance by unknown persons.[33] As a result, the authorities had been aware of a potentially threatening situation. In addition, the Court considered that in the general context of the case the authorities should have been aware of the vulnerable position of political journalists. Having established that the authorities were, and should have been, aware of the potential risk that Gongadze was facing, the European Court came to the conclusion that the GPO had been 'not only formalistic, but also blatantly negligent' in investigating the inexplicable interest in him shown by law enforcement officers.[34] As such, the reasonable measures mainly included initiating an investigation into the suspicious behaviour of state authorities.

In addition to the situation where an enforced disappearance itself could potentially have been prevented, the European Court has also considered the situation of relatives. There have been few violations found in enforced disappearance cases under Article 34 ECHR (the right to individual petition). From these violations, it is possible to deduce that instituting criminal proceedings, or the threat thereof, against persons involved in the lodging of a petition at the European Court constitutes a violation of the ECHR.[35] In addition, the persistent and intimidating questioning of applicants by state authorities concerning applications to the European Court is also contrary to the right to individual petition.[36] In addition, one exceptional interim measures case, *Bitiyeva v. Russia*, confirms that states are to take measures to ensure that the right of individual petition is not hindered.[37] While such threats or intimidation

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32 *Ibid*., para. 165. For a more detailed examination of this test, see Chapter 9 *infra*.
33 *Ibid*., paras. 166-168.
34 *Ibid*., para. 169.
35 Kurt v. Turkey ECtHR (1998), paras. 164 and 165. In contrast, see ;, Çakici v. Turkey ECtHR [GC] (1999); Imakayeva v. Russia ECtHR (2006); Alikhadzhiyeva v. Russia ECtHR (2007), para. 105 (The Court dismissed claims for violations of Article 34 ECHR in these cases).
36 *Akdeniz a.o. v. Turkey* ECtHR (2001), paras. 119 and 120.
37 *Bitiyeva and X v. Russia* ECtHR 21 June 2007 (Appl. nos. 57953/00 and 37392/03), para. 63. (This case pertained to the ill-treatment, illegal detention and killing of the first applicant and an alleged breach of Articles 3, 34 and 13 ECHR to the detriment of the second applicant). See generally Rieter (2010), pp. 415-416.

breach the ECHR, the European Court, however, has not specified what form these measures should take.

7.3.4 Comparative remarks on protective measures in light of the experiences of victims

Protective measures may prevent a person from being subjected to enforced disappearance in the first place. In light of the experiences of victims, the three supervisory bodies are to be commended in that they clearly portray the message that threats by the state should never be condoned and the failure to act upon them may constitute a breach of their respective treaties. The examination of the case law on operational measures to prevent a risk from realising, however, revealed that the three supervisory bodies are limited in their elaboration of the type of protective measures that should have been taken or ought to be taken. The Inter-American Court is the only body that has closely scrutinised the kind of measures that must be taken when the threat comes from state agents. Before discussing the measures in light of the experiences of victims, it must be noted as a preliminary point that the obligation to take protective measures against threats from state agents may seem paradoxical at first glance. In particular, such measures are problematic when there is an ongoing policy of enforced disappearance with masterminds at the highest level of government. Nonetheless, imposing such measures as a basis for determining state responsibility is important for two reasons. Firstly, since there is no trace of the disappeared person (the first main cause of victims' suffering), it may be difficult to collect enough evidence that state agents committed the act. If reported threats by state agents preceded the disappearance, it is important that the respondent state can still be held accountable for a failure to act upon such threats. Moreover, the failure to take protective measures may corroborate evidence that state agents are implicated in the crime. Is it important that such threats are reported before the state should have taken action? The HRC's views and the European Court's case law seem to suggest that the threats must be known to the authorities. On the other hand, it is arguable that threatening conduct by state agents is in and of itself conduct that is contrary to the duty to prevent and, as such, does not need reporting. The second importance for formulating protective measures derives from encountering *de facto* and *de jure* impunity (the third main cause of victims' suffering) and an unsafe environment to carry out the search and other activities related to the enforced disappearance (the fourth main cause of victims' suffering). This is a point where these two main causes meet. Due to the impunity, perpetrators often remain in office and are in positions to threaten relatives or hinder their search activities. Even when a regime change or a former policy of enforced disappearances has ended, state agents who were supporting or carrying out the former policy may have remained in office.

The Inter-American Court has developed an obligation to take policing measures to protect witnesses or alleged victims in cases before this Court when receiving threats from state agents. The Inter-American Court has employed a policy of strict scrutiny as to whether the measures taken adequately responded to the feelings of insecurity of the persons concerned. Furthermore, it has ordered that these persons must be involved in designing the measures. Such measures have involved policing measures both around the house and out-of-doors. The European Court has also dealt with threats as a result of activities related to enforced disappearance in the context of Article 34 ECHR (the right to individual petition). It is clear that the institution of criminal proceedings, or the threat thereof, is contrary to this article. Apart from finding a breach when such threats were intended to hinder the lodging of an individual complaint, the European Court has not specified the positive measures to be taken to protect this right.

In light of the main causes of victims' suffering, it is important to add to the measures considered by the three supervisory bodies that the authorities carrying out the protective measures must be independent from the authorities allegedly implicated in the enforced disappearance or making the threats. This distinction requires a disentanglement of the 'state' entity into different components that can carry out checks and balances to protect citizens from crimes by state officials. Furthermore, adequate complaint procedures must be in place in the relevant state institutions that enable persons to complain about alleged threats. In addition to the independence from the alleged perpetrators, it seems important to take into account the second main cause of suffering, namely the uncooperative behaviour of state agents. In assessing whether the state has fulfilled its obligation to take protective measures, there must be an examination of whether the formal measures were translated into effective measures in practice, both objectively in relation to the threat and subjectively for the perception of safety of the persons concerned.

7.4 Safeguards surrounding arrest and detention

Having seen that the state can be held responsible for having failed to take action when there is a risk that a person may be subjected to enforced disappearance or when relatives are threatened because of their search for the disappeared person, this section turns to safeguards when a person is detained by the state authorities. Most enforced disappearances start with the illegal or legal apprehension of the person concerned and are followed by an unacknowledged detention. In some cases, the disappeared person is executed shortly after apprehension. Accordingly, the duty to prevent state agents from subjecting a person to enforced disappearance pertains to both safeguards surrounding the apprehension as well as safeguards surrounding the detention. These two sets of safeguards are primarily part of the right to liberty and security, as laid down in Article 9 ICCPR, Article 7 ACHR and Article 5 ECHR.

These provisions have played a dominant role in enforced disappearance cases. Besides, norms related to arrest and detention also stem from other rights, such as the freedom from torture or other ill-treatment. The following sections examine the safeguards relevant to enforced disappearance.

7.4.1 The Human Rights Committee

7.4.1.1 Safeguards under Article 9 ICCPR: the right to liberty and security

Article 9 ICCPR prohibits arbitrary and unlawful arrest (paragraph 1), obliges states to inform anyone who is arrested of the reasons for the arrest (paragraph 2) and stipulates the right to either be promptly brought before a judge or be promptly released (paragraph 3). Importantly, the term 'promptly', notwithstanding the time limits fixed in most states, must be understood in terms of days; delays should not exceed a few days.[38] In this respect, the HRC urged in its concluding observations in respect of Algeria to bring persons held in secret places of detention under the protection of the law and to ensure their right to be brought before a judge 'in the shortest possible time'.[39] In addition, this article establishes the right to challenge the lawfulness of the detention (paragraph 4) and an enforceable right to compensation for an unlawful arrest or detention (paragraph 5). The right to have the lawfulness of the detention decided without delay by a court cannot be subject to derogation.[40]

In all enforced disappearance cases considered, the HRC has found a violation of Article 9 ICCPR.[41] In most cases, an overall violation of this article was found without specifying the different paragraphs or the specific flaws that led to the attribution of responsibility. For example, having concluded in one case that the grandmother of the applicant had been apprehended by state agents, the HRC considered that:

> In the absence of adequate explanations from the State party concerning the author's allegations that her grandmother's apprehension and subsequent incommunicado detention were arbitrary or illegal, the Committee finds a violation of article 9 with regard to Ms. Daouia Benaziza.[42]

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38 HRC, 'General Comment 8 Right to liberty and security of persons (Article 9)' (30 June 1982), available at www.ohchr.org, para. 2.

39 HRC, 'Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding Observations: Algeria' (12 December 2007) UN Doc. CCPR/C/DZA/CO/3 (hereinafter: 'Concluding observations Algeria (2007)'), para. 12.

40 HRC, 'General Comment No. 29 States of Emergency (Article 4)' (24 July 2001) UN Doc. CCPR/C/21/Rev.1/Add.11, para. 16 and the text in footnote 9.

41 *E.g. Sarma v. Sri Lanka* HRC (2003), para. 9.4; *María del Carmen Almeida de Quinteros et al. v. Uruguay* HRC (1983), para. 13; *Mériem Zarzi v. Algeria* HRC (2011), para. 7.7; *Yubraj Giri v. Nepal* HRC (2011), para. 7.6.

42 *Benaziza v. Algeria* HRC (2010), para. 9.7.

In other cases, the HRC has specifically mentioned all paragraphs as being violated by the enforced disappearance:

> With regard to the alleged violation of article 9, the information before the Committee shows that the author's cousin was arrested without a warrant by plain clothes agents of the State party, was then held incommunicado without access to defence counsel and without ever being informed of the reasons for his arrest or the charges against him. The Committee recalls that the author's cousin was never brought before a judge and never could challenge the legality of his detention. In the absence of any pertinent explanation from the State party, the Committee finds a violation of article 9 of the Covenant.[43]

Besides the explicit safeguards listed in Article 9 ICCPR, one can derive further implied obligations set by the HRC from the facts presented to the HRC. For instance, in *Bousroual v. Algeria*, the HRC found a violation of Article 9(4) ICCPR because during his 33 days of *incommunicado* detention prior to his disappearance, the husband of the author had no access to counsel which had prevented him from challenging the lawfulness of his detention.[44] This consideration leads to the conclusion that Article 9(4) ICCPR also implies a right to counsel. Outside the context of enforced disappearances, the time frame within which a detained person must have access to a lawyer was the subject of concern in the concluding observations in respect of France. The HRC scrutinised the anti-terrorist laws that granted jurisdiction to a centralised court and allowed detention in police custody for four days (twice the normal length of detention permitted under ordinary jurisdiction). In addition, the accused had no right to contact a lawyer during the first 72 hours of detention in police custody and no right of appeal against a decision of the special court.[45] This concern leads to the logical conclusion that generally 72 hours without access to a lawyer constitutes a breach of the ICCPR.[46] In *Sharma v. Nepal*, the complainant also provided a detailed account of the flaws that the *habeas corpus* procedure had had. Ultimately, the Supreme Court of Nepal quashed the writ of *habeas corpus* on

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43 *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 7.6. See also *Mériem Zarzi v. Algeria* HRC (2011), para. 7.7.

44 *Bousroual v. Algeria* HRC (2006), para. 9.7. See also *Kimouche v. Algeria* HRC (2007), para. 7.5. *Cf. Berry v. Jamaica* HRC 7 April 1994 (Comm. no. 330/1988), para. 11.1 (This death penalty case confirms that the lack of access to legal representation is considered to be one of the practical obstacles for an effective recourse to *habeas corpus* proceedings).

45 HRC, 'Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding Observations: France' (4 August 1997) UN Doc. CCPR/C/79/Add.80, para. 23.

46 *Cf.* HRC, 'Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding Observations: Algeria' (18 August 1998) UN Doc. CCPR/C/79/Add.95 (hereinafter: 'Concluding observations Algeria (1998)'), para. 12(c) (urging Algeria to ensure that detainees have immediate access to a lawyer).

the basis that the executive branch did not provide further information except for the argument that the husband of the applicant had died while escaping from detention.[47] The HRC noted the author's disappeared husband had never been able to challenge the legality of his detention and found, on the basis of other allegations, a general violation of Article 9 ICCPR.[48] Hence, one can conclude that such presumptuous and a superficial consideration of a writ of *habeas corpus* is not in conformity with the ICCPR.

Other relevant facts did not lead to an explicit consideration by the HRC. For instance, counsel in *Bautista v. Colombia* presented a well-founded argument that the family of the disappeared women could not file for *amparo* (a remedy for the protection of individual rights), because one of the requirements for a petition for such a remedy was that the petitioner must indicate where and by whom the person was detained.[49] Obviously, providing such information is not possible in enforced disappearance cases. Unfortunately, the HRC did not consider this allegation and only found a violation on account of the illegal arrest.[50] It would have been useful to have been provided with the HRC's view on such requirements. Similarly, the HRC's views on enforced disappearances lack a clear time requirement within which the legality must be assessed. It is clear from Article 9(3) ICCPR that persons must be brought before a judge within a few days. However, the HRC does not explicitly attach a requirement of urgency to the *habeas corpus* guarantee as a measure that could be instituted on behalf of the disappeared person in order to locate him or her. Mostly, the HRC has found a general violation of Article 2(3) ICCPR for the lack of effective remedies, without further specifying the grounds for consideration. Given this lack of clarity in its views, it is useful to turn to the HRC's considerations under the Article 40 procedure, which reveal indications of standards in this respect. In one of its concluding observations, the HRC urged Algeria to ensure that complaints about an arrest or detention must be given immediate attention to make available an effective remedy to relatives and other persons, which includes reviewing the legality of the detention.[51] This appears to imply that 'immediately' is a guiding time frame. Lastly, as an overall requirement of Article 9 ICCPR, the HRC urged Algeria to ensure that 'all persons arrested be kept at officially designated places of detention', are registered and 'their families be immediately informed' and that detainees 'have a right to medical examination on arrest and at the end of their detention.'[52] These

47 *Sharma v. Nepal* HRC (2008), paras. 2.7-2.10.
48 *Ibid*., para. 7.3.
49 *Bautista de Arellana v. Colombia* HRC (1995), para. 2.10.
50 *Ibid*., para. 8.5.
51 HRC, Concluding observations Algeria (1998), para. 12(b).
52 *Ibid.*, para. 12.

additional safeguards are all important safeguards for protection from enforced disappearance.

7.4.1.2 Articles 7, 10 and 16 ICCPR: contact between detainees and their relatives

The lack of a possibility for detainees to communicate with their relatives has been examined within the context of Article 7 ICCPR (freedom from torture or other ill-treatment). The relevance of Article 7 ICCPR is two-fold. On the one hand, prolonged *incommunicado* detention in an unknown location constitutes torture and cruel and inhuman treatment.[53] In fact, in *Sharma v. Nepal*, the HRC reiterated General Comment 20 on Article 7 ICCPR, which considers that states have to make provisions against any *incommunicado* detention.[54] On the other hand, the anguish and stress of relatives caused by the enforced disappearance of a family member and their uncertainty as to the fate of the disappeared person reveals a violation of the freedom from torture or other ill-treatment.[55] Accordingly, it is possible to infer that states have an obligation to ensure contact between detainees and their relatives shortly after the detention.

The HRC has also explicitly derived the obligation to provide information to relatives from the right to be recognised before the law (Article 16 ICCPR). In *Madoui v. Algeria*, the HRC concluded that:

> The Committee notes that the State party has failed to provide any satisfactory explanation concerning the author's claim to have had no news of her son since 7 May 1997, and it appears not to have conducted a thorough investigation into the fate of the son or provided the author with any effective remedy. The Committee is of the view that if a person is arrested by the authorities and there is subsequently no news of that person's fate, the authorities' *failure to provide information* effectively places the disappeared person outside the protection of the law. Consequently, the Committee concludes that the facts before it in the present communication reveal a violation of article 16 of the Covenant.[56] [Emphasis by the author]

It is possible to conclude from this paragraph that the obligation to provide information pertains to informing a person's relatives that he or she has been arrested, so that he or she is not placed outside the protection of the law. Obviously, before such an obligation arises, it must be established that the person was held in detention. A

53 *El-Megreisi v. Libyan Arab Jamahiraya* HRC 23 March 1994 (Comm. no. 440/1990), para. 5.4 (The HRC seems to use the term '*incommunicado* detention' in a broad sense, namely to characterise isolated detention with or without a prior judicial order).

54 *Sharma v. Nepal* HRC (2008), para. 7.2.

55 *Kimouche v. Algeria* HRC (2007), para. 7.7; *Laureano v. Peru* HRC (1996), para. 8.5; *Bousroual v. Algeria* HRC (2006), paras. 9.6 and 9.8; *Sharma v. Nepal* HRC (2008), para. 7.2.

56 *Madoui v. Algeria* HRC (2008), para. 7.8.

failure to comply with such an obligation also touches upon Article 10 ICCPR, which stipulates that persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The HRC considers the fact that a person disappeared and possibly died after having been taken into custody, coupled with the lack of information provided by the state in this respect or in relation to the conditions of detention, as a breach of this article.[57] Hence, the combination of these considerations seems to oblige states to facilitate communication between relatives and disappeared persons from the moment of their arrest or detention.

7.4.2 The Inter-American Court of Human Rights

7.4.2.1 Safeguards under Article 7 ACHR (the right to liberty and security)

Article 7(1) ACHR states '[e]very person has the right to personal liberty and security.' In several cases, the Inter-American Court has reiterated that 'the protection of both the physical liberty of the individual and his personal safety are in play, in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those arrested of the minimum legal protection.'[58] An enforced disappearance is one of those situations where there is an absolute absence of any guarantees.

7.4.2.1.1 Paragraphs 2-5 of Article 7 ACHR

Paragraphs 2 (the prohibition of the illegal deprivation of liberty) and 3 (the prohibition of arbitrary arrest or detention) of Article 7 ACHR establish clear limits to public authorities:

> According to the first of these regulatory provisions, no one shall be deprived of his physical liberty, except for reasons, cases or circumstances specifically established by law (material aspect), but, also, under strict conditions established beforehand by law (formal aspect). In the second provision, we have a condition according to which no one shall be subject to arrest or imprisonment for causes or methods that – although qualified as legal – may be considered incompatible with respect for the fundamental rights of the individual because they are, among other matters, unreasonable, unforeseeable or out of proportion.[59]

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57 *Sharma v. Nepal* HRC (2008), para. 7.7; *El Hassy v. The Libyan Arab Jamahiriya* HRC (2007), para. 6.4.

58 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 135; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 141; *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 77.

59 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 131; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 135; *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 78.

The above citation demonstrates that a person's detention must be carried out according to the law, both in the material sense as well as in the formal sense. Furthermore, such detention must not amount to arbitrary abuse of power. Thus, even when the detention was legal according to the law, it can still violate the right to liberty when it is regarded as arbitrary. Avoiding such arbitrariness involves the requirement that states have to conduct their actions 'within limits and according to procedures that preserve both public safety and the fundamental rights of the human person.'[60] In most enforced disappearance cases, the arbitrariness was rather self-evident, in particular in a context of a systematic practice of gross human rights violations. For instance, in the *Juan Humberto Sánchez Case*, the indicator for arbitrariness was that the detention of the victim fell within 'the framework of abuse of power, the objective of which was to interrogate, torture, and possibly kill the alleged victim with impunity, […].'[61]

Article 7(4) ACHR, which obliges states to inform the person of the reasons for the arrest or detention, is also violated in the great majority of cases.[62] In a case related to *inter alia* the right to liberty, *Bulacio v. Argentina*, the Inter-American Court extended this provision to include 'the right [of detainees] to notify a third party that he or she is under State custody. This notification can be, for example, to a relative, an attorney and/or a consul, as may be the case.'[63] Furthermore, the state authorities must notify the detainee of this right at 'the time the accused is deprived of his freedom, or at least before he makes his first statement before the authorities.'[64] The time limit within which a person must be able to communicate is not addressed explicitly in this case and neither is it in enforced disappearance cases. A hint of the possible approach may be inferred from one enforced disappearance case, in which the father of the victims had been detained for two days without being able to inform his next of kin. This was found to contribute to a violation of Article 7 ACHR.[65] However, it might be that this conclusion was based on the time limits set by national law. Hence, the obligation imposed on the state to notify does not seem to be stringent, except when

60 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), paras. 143 and 174; *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 86.

61 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 80.

62 *Ibid*., para. 82. See also *Usón Ramírez v. Venezuela* (preliminary objection, merits, reparations and costs) IACtHR Series C No. 207 (20 November 2009), para. 147 (This case concerned the arrest, preventive detention and conviction by a military court of Usón Ramírez due to the crime of slander against the National Armed Forces. The Court underlined that the reasons for his arrest, which included more than only the legal basis for his arrest, should have been made upon arrest).

63 *Bulacio v. Argentina* (merits, reparations and costs) IACtHR Series C No. 100 (18 September 2003), para. 130. See also *The Gómez-Paquiyauri Brothers v. Peru* (merits, reparations and costs) IACtHR Series C No. 110 (8 July 2004), para. 93.

64 IACtHR, Advisory opinion OC-16/99 (1999), para. 106.

65 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 87.

minors are concerned. The time within which a person must have the right to notify a person has neither been clearly elaborated.

In accordance with Article 7(5) ACHR, persons deprived of their liberty must be brought 'promptly' before a judge. The term 'promptly' is not defined in the ACHR, nor is there a clear time limit indicated in the case law. The Court refers, whenever possible, to domestic legislation such as constitutional provisions that limit *incommunicado* detention as guiding standards for the interpretation of this term.[66] Nevertheless, the time limit is not unfettered. The Inter-American Court generally refers to the case law of the European Court, and in particular to the *Brogan Case*, which indicated that four days and six hours without being brought before a judge violates the ECHR.[67] In this respect, the meaning of 'promptly' depends on the characteristics of the case, but no situation allows for an unduly prolonged period of detention without interference by a judge.[68] A stricter requirement appears to apply to whoever is deprived of his or her liberty without a court order. A detainee in such circumstances must be set free or be brought 'immediately' before a judge.[69] 'Immediately' seems to imply a more urgent obligation than the use of 'promptly' in the text of Article 7(5) ACHR.[70] As most disappeared persons were neither detained with a court order nor brought before a judge, the facts usually portray a clear violation of this provision.

7.4.2.1.2 Article 7(6) ACHR and the central role for habeas corpus proceedings in the prevention of enforced disappearances

The Inter-American Court attaches particular importance to the judicial remedy of *habeas corpus*, or an equivalent remedy, as laid down in Article 7(6) ACHR. This judicial safeguard also applies not only to detention related to criminal charges, but to all kinds of detention.[71] The Inter-American Court has repeatedly stressed the importance of internal remedies to challenge the legality of the arrest or detention,

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66 Rodríguez-Pinzón & Martin (2006), p. 126. See also *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), paras. 133 and 134. The Inter-American Court seems to understand *incommunicado* detention as a type of detention that is ordered by a court.

67 See subsection 7.4.3.1.1 below.

68 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 140.

69 *The Gómez-Paquiyauri Brothers v. Peru* IACtHR (2004), para. 95.

70 The Spanish version uses the term '*sin demora*' in Article 7(5) ACHR and '*immediatamente*' for a deprivation of liberty without a court order.

71 IACtHR, 'Advisory Opinion OC-8/87 *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human* Rights*'* Series A No. 8 (30 January 1987) (hereinafter: 'Advisory Opinion OC-8/87 (1987)'), paras. 34-36 and 40. See also *Castillo-Páez v. Peru* IACtHR (1997), paras. 82 and 83.

such as the *habeas corpus* guarantee, in preventing enforced disappearances.[72] As the Inter-American Court has stated, 'habeas corpus would be the normal means of finding a person presumably detained by the authorities, of ascertaining whether he or she is legally detained and, given the case, of obtaining his liberty.'[73] Also, such remedies protect the victim from torture or other ill-treatment.[74] As early as 1987, the Inter-American Court considered the right to file a *habeas corpus* writ as unable to be derogated from.[75] Along the same lines, the IACFD explicitly establishes that judicial guarantees are to be retained in situations such as war, a threat of war or political instability 'as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom'.[76] Accordingly, 'the competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is reason to believe the disappeared person might be found including places that are subject to military jurisdiction.'[77]

The *habeas corpus* procedure has been examined in the context of both Article 7(6) ACHR (the right to liberty) as well as Article 25 ACHR (the right to an effective remedy). The former is afforded to the 'person deprived of liberty' and not to his or her relatives. Even so, another person is entitled to seek such a remedy on his or her behalf.[78] Article 25 ACHR seems to afford rights to both the disappeared person[79] and the relatives.[80] The ineffectiveness of such remedies is a reason to attribute state responsibility for a failure to comply with these articles.

When is a *habeas corpus* remedy to be regarded as effective? First of all, such a remedy must not only exist formally, 'but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress'.[81] In this respect, the duty to ensure the right to *habeas corpus* must be seen in light of Article 1(1) ACHR and presumes,

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72 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 122; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 192; *La Cantuta v. Peru* IACtHR (2006), para. 111; *Blake v. Guatemala* IACtHR (1998), paras. 102 and 103. See also *Castillo-Páez v. Peru* IACtHR (1997), paras. 82 and 83; *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 135; *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 79.

73 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 65.

74 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 192.

75 IACtHR, Advisory Opinion OC-8/87 (1987), operative clause.

76 Article X IACFD.

77 *Ibid*.

78 *La Cantuta v. Peru* IACtHR (2006), para. 112.

79 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), paras. 235 and 236.

80 *La Cantuta v. Peru* IACtHR (2006), paras. 145 and 161.

81 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 235. See also *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 121.

> taking all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees. Any State which tolerates circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is consequently in violation of Article 1(1) of the Convention.[82]

In relation to Article 7(6) ACHR, the Inter-American Court has stressed the obligation that when a person is in the power of state agents, the state has to create the necessary conditions for any remedy to attain effective results. The citation above demonstrates that these conditions appear to include removing *any* impediments, which presumably means both legal and practical hindrances. Hence, the Court appears to understand the requirement of effectiveness so that any recourse must provide results or responses to the violations of rights established in the ACHR. On the other hand, in the case *Caballero-Delgado and Santana v. Colombia* the Inter-American Court made clear that the remedy of *habeas corpus* does not need to be successful for it to comply with the ACHR. In this case, the Court found the Colombian army responsible for the enforced disappearance of two persons. The Court found that the *habeas corpus* proceedings had been effective, despite the fact that they did not result in revealing the location of the victim. In particular, the Inter-American Court considered that the state had complied with its duties under Article 25 ACHR in relation to the writ of *habeas corpus* filed on behalf of one of the two victims, Isidro Caballero-Delgado, by his companion. This writ had been processed by a judicial authority. In answer to this writ, the judge at first instance had received a response from several executive branches that the disappeared person was not in their custody. The Inter-American Court concluded that the fact that this remedy was not successful did not constitute a breach of the guarantee of judicial protection.[83] Interestingly, this case is one of the exceptional cases in which the Inter-American Court did not find a systematic practice of gross human rights violations. A different context might explain the more stringent obligation on the judiciary in the *La Cantuta Case*. On the premise that petitions for *habeas corpus* should lead to serious and independent investigations,[84] the Inter-American Court subjected the conduct of the judiciary to close scrutiny. In this case, the Inter-American Court linked the inefficacy of the legal institutions to the ensuing practice of enforced disappearance.[85] The judiciary was blamed for a failure to properly investigate the *habeas corpus* petitions. Such failure derived from the fact that judges had declared petitions without merit, after their requests for information had met with silence on the part of the military branch or a refusal to provide such

82 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 194. See also *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 85.
83 *Caballero-Delgado and Santana v. Colombia* IACtHR (1995), para. 65.
84 *La Cantuta v. Peru* IACtHR (2006), para. 112.
85 *Ibid*., para. 92.

information based on reasons of 'national security'.[86] As to the latter argument, the Inter-American Court reiterated that information may be classified as secret, but for investigation purposes in cases where state officials are allegedly involved, these classifications should be subject to control 'by other branches of the State or by a body that ensures respect for the principle of the division or powers [...]'.[87]

The criterion that would appear to be most important is whether the *habeas corpus* investigation was carried out with due diligence. The due diligence with which the investigation must be carried out requires the authority that conducts the investigation to use all measures necessary to try and obtain the required results.[88] Factors that determined whether all measures necessary were indeed taken in the *Serrano-Cruz Case* were: whether the executing officer had visited the detention centres and looked into the relevant logbooks of military operations, whether enough effort had been used to locate the alleged perpetrators, whether the judge had conducted the process taking into account 'the reported facts and their context so as to manage the proceedings as diligently as possible in order to determine the facts and establish the corresponding responsibilities and reparations, avoiding delays and omissions when requesting evidence',[89] and, finally, whether the alleged perpetrators had been summoned by the judge.[90]

While the Inter-American Court does not set strict boundaries *per se* as to *when* the possibility the file a writ of *habeas corpus* must be available to detainees, in the *Street Children Case* the Inter-American Court found that the unlawful and clandestine detention for several hours followed by murder prevented the victims from exercising, either themselves or through their representatives, their right to an effective recourse before a competent domestic body as stipulated in Article 25 ACHR.[91] As to the maximum period for making such proceedings available, the Inter-American Court considered that *habeas corpus* proceedings can still be an effective remedy to discover the whereabouts of a disappeared person even if a considerable period of time has elapsed since the person disappeared. Additionally, it can be effective if the person in favour of whom the writ is filed is no longer in state custody because he or she has been handed over to an individual.[92] In these circumstances, *habeas corpus* must still be available.

In applying these norms in the process of determining state responsibility, the question arises whether the victims should have availed themselves of *habeas corpus*

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86 *Ibid*., para. 111.
87 *Ibid*., para. 112.
88 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), paras. 83 and 65.
89 *Ibid*., paras. 88, 95 and 96.
90 *Ibid*., paras. 85-88. The requirements for the investigation as part of the *habeas corpus* procedure will be further examined in Chapter 8 *infra*.
91 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), paras. 235 and 236.
92 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 79.

proceedings before finding a violation on this account. The answer would appear to depend on the context of the case. If there was a systematic ineffectiveness of such remedies there seems to be no need to do so. As such, the effectiveness of *habeas corpus* proceedings has been addressed at the admissibility stage as part of the admissibility criterion of the exhaustion of domestic remedies. In the *Velásquez-Rodríguez Case*, the Inter-American Court concluded that the *habeas corpus* was ineffective because there was sufficient evidence to the effect that the legal remedies in the respondent state may have existed theoretically, but in practice they were ineffective. This ineffectiveness followed from the clandestine imprisonment, the formal requirements that rendered them unsuccessful in practice, the disregard of the authorities against whom they were brought, and the threats and intimidations against lawyers and judges.[93] In general, the Court considers that remedies that prove to be illusory due to the general situation in a country or even in the particular circumstances of a given case do not usually have the potential to be regarded as effective in a specific case either.[94] In such a context, the Inter-American Court considered that the *habeas corpus* proceedings were illusionary within the context of Article 25 ACHR even without evidence to the extent 'that applications for *habeas corpus* or any other recourse in favour of the victims were attempted at the time of their illegal detention or abduction and subsequent disappearance, […].'[95] When the Court does not establish a general and systematic ineffectiveness of remedies, it seems that relatives must have availed themselves of such remedies before the Court can rule on the matter.[96]

In summary, it is possible to conclude that the duty to prevent includes having access to a judge who has the competence to determine the legality of the arrest or detention. The Inter-American Court has established that states must provide such remedies in their legal system and they should create conditions so that these remedies are practically effective. When relatives are able to prove that the remedy is illusionary due to either the circumstances of the specific case or to the general situation prevalent in a country at that time, relatives do not appear to have to avail themselves of such procedures prior to the finding of a violation. A judge examining a writ of *habeas corpus* has to pursue the investigation despite the silence of the alleged perpetrators, be it the police or the military, or when the state authorities deny

93 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), paras. 75-77 and 80.

94 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 121.

95 *Goiburú et al. v. Paraguay* IACtHR (2006), para. 112 (The Inter-American Court had concluded the ineffectiveness of the habeas corpus proceedings as part of the preliminary objection of non-exhaustion of domestic remedies in para. 61(4) of the judgment).

96 *Blake v. Guatemala* IACtHR (1998), para. 104. See Medina Quiroga (2005), p. 377 (noting that in this case it was apparently not sufficient that state agents had obstructed the criminal proceedings for the finding of a violation. She highlights the degree of inconsistency in this respect in the case law of the Court).

the detention and do not want to reveal the relevant documents. As such, the judge must be persistent in his or her efforts to obtain information with regard to the alleged detention.

7.4.2.2 Keeping track of detained persons through custody records

Article XI IACFD obliges states to maintain up-to-date prison registers that should be accessible to a wide range of persons such as relatives, judges, attorneys and other persons with legitimate interests. There are no restrictions to this access. In determining state responsibility, custody records have not played a dominant role in the case law of the Inter-American Court. Instead, this Court has addressed the issue of custody records in exceptional cases as one of the reparation measures. In the *Juan Humberto Sánchez Case*, the Inter-American Court obliged Honduras to create and implement a register of detainees in the framework of Article 2 ACHR (domestic legal effects). Information included in these records had to be: the identity of the detainees, the reasons for their detention, the competent authority, the day and time of admission and, if relevant, of release, and information on the arrest warrant.[97] The question concerning to whom these records must be made available was neither raised nor addressed.

7.4.2.3 Article 5 ACHR (the right to humane treatment) and the communication between detainees and their relatives

The Inter-American Court has repeatedly stated that 'prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person'.[98] The rationale behind this consideration is that '[s]olitary confinement produces moral and psychological suffering in the detainee, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in detention centers.'[99] Therefore, the Court has stated that, 'in international human rights law [...] *incommunicado* detention is considered to be an exceptional instrument and [...] its use during detention may constitute an act against human dignity.'[100] Applying this guideline, the Court appears to conclude that eight days of *incommunicado* detention constitutes a violation of Article 5 ACHR.[101] It is possible to discern from these considerations that detained persons must be able to communicate with their lawyer and relatives, at least within several days from the moment of the deprivation of liberty. Whether the state has

97 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 189.
98 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 154.
99 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 150.
100 *Ibid*., para. 150.
101 *Cantoral-Benavides v. Peru* (merits) IACtHR Series C No. 69 (18 August 2000), para. 81.

the duty to inform the relatives of the detention of their detained family member is equally an implied obligation. Indeed, in the *La Cantuta Case*, the Court underlined that the state had the duty to 'adopt all the necessary measures to avoid said events, to investigate and punish those responsible *and to inform the missing person's next of kin of his whereabouts* and compensate them as appropriate.'[102] This formulation expands the usual list of general obligations by including the obligation to inform the next of kin of the disappeared person of his or her whereabouts. It must be noted that this consideration was made in light of the many years of no investigation. Hence, it could be possible that this consideration was not meant to address the obligation to notify the relatives in the first few hours or days. Still, the norms together appear to imply that there is an obligation to inform the relatives when their family member is detained within at least a few days.

7.4.3 The European Court of Human Rights

7.4.3.1 Article 5 ECHR (the right to liberty and security)

Article 5 ECHR stipulates similar safeguards to Article 9 ICCPR and Article 7 ACHR.[103] Article 5 ECHR has as an overall purpose to protect individuals from arbitrary detention, to ensure that the deprivation of liberty is judicially scrutinised and to ensure that the authorities can be held accountable for their actions.[104] The Court has repeatedly stated that the unacknowledged detention of an individual is a complete negation of the guarantees laid down in Article 5 ECHR and that it, therefore, constitutes an exceptionally grave violation of the right to liberty.[105] In concluding an overall violation of Article 5 ECHR, the European Court has not considered all aspects of this article separately in enforced disappearance cases. It is helpful to turn to a number of detention cases for more detailed standards in this regard because the European Court has made important contributions to standard setting in relation to the right to be either released promptly or to have prompt access to a judge (paragraph 3) and the right to have the lawfulness of the detention examined by a judge (paragraph 4).

7.4.3.1.1 The right to be brought promptly before a judge

Article 5(3) ECHR states that every person who has been arrested or detained for the purpose of bringing him or her before a legal authority 'on reasonable suspicion

102 *La Cantuta v. Peru* IACtHR (2006), para. 115 (emphasis added by the author).
103 A difference between Article 5 ECHR and Article 7 ACHR is that the former defines exhaustively the circumstances in which a deprivation of liberty is lawful.
104 *Timurtaş v. Turkey* ECtHR (2000), para. 103.
105 *Bazorkina v. Russia* ECtHR (2006), para. 146.

of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so', must be promptly brought before a judge. The term 'promptly' must be interpreted according to the special characteristics of each case.[106] Nonetheless, no circumstance, however grave, grants the authorities the power to unduly prolong unsupervised detention without breaching Article 5(3) ECHR. Since the case *Brogan and Others v. UK*, pertaining to facts that occurred in the context of a terrorist investigation, it seems that four days and six hours is the upper limit.[107] In subsequent cases, this maximum period of time has been referred to as four days.[108] This period may be extended only in very exceptional cases, namely in times of a declared state of emergency under Article 15 ECHR.[109] In *Brannigan and McBride v. UK*, one of the detainees had not been brought before a judge within six days and fourteen hours. The European Court found no violation, considering that the United Kingdom had made a valid derogation under Article 15 ECHR with respect to Article 5 ECHR. Moreover, sufficient safeguards against abuse had been in place, such as a visit by a solicitor on the third day of his detention and the possibility of a judicial review of the lawfulness of the detention.[110]

7.4.3.1.2 Review of the lawfulness of the detention

The fourth paragraph of Article 5 ECHR provides that everyone has the right to proceedings that decide on the lawfulness of his or her arrest. This provision resembles the remedy of *habeas corpus*, to which the Inter-American Court attaches great importance.[111] In contrast to the Inter-American Court, the European Court has not explicitly stated that this provision cannot be derogated from,[112] nor is it listed in Article 15(2) as a non-derogable right. A similarity between the regional counterparts is found in the preventive function attached to this right. Within the structure of the ECHR, this preventive function is appreciated in particular in light of further abuse of power subsequent to detention. Accordingly, the Court stated in *Kurt v. Turkey* that:

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106 Harris, O'Boyle, Bates, Buckley & Warbrick (2009), p. 170.
107 *Ibid.*, p. 170; *Brogan a.o. v. the United Kingdom* ECtHR [GC] 29 November 1988 (Appl. nos. 11209/84, 11234/84, 11266/84 and 11386/85), paras. 18 and 58-62.
108 *McKay v. the United Kingdom* ECtHR [GC] 3 October 2006 (Appl. no. 543/03), para. 47.
109 See Article 15 ECHR. It must be noted that the criteria for satisfying Article 15 ECHR are stringent. Such derogations must be legitimate within the scope of national, and ultimately, international law. There must be a time of war or other emergency threatening the life of the nation and the measures must be strictly required by the exigencies of the situation. See also Harris, O'Boyle, Bates, Buckley & Warbrick (2009), chapter 16.
110 *Brannigan and McBride v. the United Kingdom* ECtHR [GC] 25 May 1993 (Appl. nos. 14553/89 and 14554/89), paras. 36-65.
111 Van Dijk, Van Hoof, Van Rijn & Zwaak (2006), p. 498.
112 *Ibid.*, p. 509. See also Article 15 ECHR.

> The requirements of Article 5 §§ 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention […]. What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection. […][113]

This guarantee of *judicial* intervention is viewed as being particularly important given the indolent behaviour of investigating authorities in enforced disappearance cases. As the European Court stated in *Timurtas v. Turkey*, '[t]he lethargy displayed by the investigating authorities poignantly bears out the importance of the prompt judicial intervention required by Article 5 §§ 3 and 4 of the Convention […]'.[114] Apart from these pronunciations about Article 5(4) ECHR, the European Court has refrained from examining failures of this provision in detail. Rather, a reoccurring general conclusion that an unacknowledged detention is a complete negation of the rights set forth in Article 5 ECHR appears to suffice for finding a violation of the right to liberty.

A sidestep to the case law on the right to liberty shows several important elaborations of this provision, which are relevant for safeguards surrounding detention. In the *Neumeister Case*, the Court indicated that the judicial authority 'must be independent both of the executive branch and of the parties to the case'.[115] Furthermore, Article 5(4) ECHR stipulates that the decision with respect to the lawfulness of a detention must be taken 'speedily'. While 'speedily' mainly refers to the period between the institution of proceedings until the final decision, this aspect may also be breached when the detainee has to wait for a period of time before a remedy is made available.[116] Generally speaking, the notion of 'speedily' indicates a lesser urgency than the requirement of 'promptness' in Article 5(3) ECHR.[117] The European Court considered a period of six days to be incompatible with the

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113 *Kurt v. Turkey* ECtHR (1998), para. 122.

114 *Timurtaş v. Turkey* ECtHR (2000), para. 89.

115 *Neumeister v. Austria* ECtHR 27 June 1968 (Appl. no. 1936/63), para. 24; *De Jong, Baljet and Van den Brink v. the Netherlands* ECtHR 22 May 1984 (Appl. nos. 8805/79, 8806/79 and 9242/81), para. 49; *Moulin v. France* ECtHR 23 November 2010 (Appl. no. 37104/06), paras. 57-59.

116 *Iğdeli v. Turkey* ECtHR 20 June 2002 (Appl. no. 29296/95), para. 34 (In this case, the applicant had been detained for seven days without an available remedy). See also Harris, O'Boyle, Bates, Buckley & Warbrick (2009), pp. 194-196.

117 *E. v. Norway* ECtHR 29 August 1990 (Appl. no. 11701/85), para. 64; *Brogan a.o. v. the United Kingdom* ECtHR [GC] (1988), para. 59.

Convention,[118] while a case in which the applicants had been released within 44 hours before judicial control of the lawfulness of their detention had taken place was not examined because the applicants had been released 'speedily'.[119] These two extremes still leave considerable room for uncertainty with regard to the maximum period of detention that is permitted without any review. When considering that 'speedily' is supposed to be less stringent than 'promptly', it is logical to conclude that *habeas corpus* proceedings may take longer than the four days and six hours laid down in the *Brogan Case*. At the same time, the period before having access to a judge (Article 5(3) ECHR) may be extended under Article 15 ECHR to six days and fourteen hours, subject to the condition that *habeas corpus* proceedings are available during that time. This consideration implies access to a judge before those six days and fourteen hours. One important conclusion that can be drawn is that there is an intrinsic interplay between these safeguards, which appears to be considered as a whole.

7.4.3.1.3 Measures to safeguard the overall purpose of Article 5 ECHR

The overall purpose of Article 5 ECHR has prompted the European Court to stress the importance of custody records and to formulate the need for specific measures of prevention. The Court considered that Article 5 ECHR imposes 'an obligation on the state parties to account for the whereabouts of any person taken into detention and who thus has been placed under the control of the authorities'.[120] In this respect, the Court has attributed significant importance to the keeping of accurate and updated custody records in order to safeguard the overall purpose of Article 5 ECHR. Already in the first enforced disappearance case presented before it, the Court took note of the lack of accurate custody records as one of the failings of the state. The importance of such records, according to the Court, lies in the fact that a lack thereof enables those responsible for a deprivation of liberty to 'conceal their involvement in a crime, to cover their tracks and to escape accountability for the fate of the detainee.'[121] As the European Court stated in *Timurtaş v. Turkey*:

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118 *De Jong, Baljet and Van den Brink v. the Netherlands* ECtHR (1984), para. 58. See also *Yaman v. Turkey* ECtHR 2 November 2004 (Appl. no. 32446/96), para. 79 (The European Court decided that the nine days sat uneasily with the notion of 'speedily'); *Kadem v. Malta* ECtHR 9 January 2003 (Appl. no. 55263/00), paras. 44 and 45 (The Court considered that seventeen days did not satisfy the notion of 'speedily').

119 *Fox, Campbell and Hartley v. the United Kingdom* ECtHR 20 August 1990 (Appl. nos. 12244/86, 12245/86 and 12383/86), paras. 45 and 46.

120 *Timurtaş v. Turkey* ECtHR (2000), para. 82. See also *Tomasi v. France* ECtHR (1992), paras. 108-111; *Ribitsch v. Austria* ECtHR (1995), para. 34; and *Selmouni v. France* ECtHR [GC] (1999), para. 87.

121 *Kurt v. Turkey* ECtHR (1998), para. 125.

> […], the Court notes that one of the criticisms levelled at the investigation process was the failure of the public prosecutors concerned to inspect personally the relevant custody ledgers. While this would indeed appear to have been a logical step in an investigation of this nature, it is nevertheless clear that it would have been fruitless in the present case since the detention of Abdulvahap Timurtaş was not recorded other than in the operation report, the existence of which was officially denied. This is an illustration of the serious failing which the absence of records constitutes, since it enables those responsible for the act of deprivation of liberty to escape accountability for the fate of the detainee.[122]

In the Court's view, accurate custody records must contain the date, the time and location of the detention, the name of the detainee, the reasons for the detention and the name of the person effectuating the deprivation of liberty.[123] From a logical point of view, this is a cumulative sum of elements because the absence of one of them will impair the investigating authorities in their efforts to find the disappeared person.

Importantly, the obligation to keep custody records cannot be waived in internal conflict situations (*i.e.* when fighting takes place). The reason for this appears to be that the absence of such information makes 'it impossible to allay the concerns of the relatives of the missing persons about the latter's fate.'[124] In the quoted case, the respondent state should have made 'other inquiries with a view to accounting for the disappearances', given the absence of custody records.[125] Such other inquiries could be seen in light of the well-established general duty to take effective measures to safeguard against the risk of enforced disappearances, which has been enunciated in numerous enforced disappearance cases under Article 5 ECHR.[126] The European Court has doctrinally stressed that states are to take 'prompt and effective measures' to safeguard persons against the risk of disappearance, when complaints are made to the effect that a person was detained by the security forces and taken away in life-threatening circumstances. A violation in this respect is mainly based on the failure to conduct a thorough and prompt investigation, as demonstrated by the following consideration:

> The Court further considers that the authorities should have been alert to the need to investigate more thoroughly and promptly the applicant's complaints that her

122 *Timurtaş v. Turkey* ECtHR (2000), para. 105.

123 *Kurt v. Turkey* ECtHR (1998), para. 125. See also *Bazorkina v. Russia* ECtHR (2006), para. 147; *Betayev and Betayeva v. Russia* ECtHR (2008), para. 104; *Khadzhialiyev a.o. v. Russia* ECtHR (2008), para. 147; and *Baysayeva v. Russia* ECtHR (2007), para. 146.

124 *Cyprus v. Turkey* ECtHR [GC] (2001), para. 148.

125 *Ibid*.

126 *Luluyev a.o. v. Russia* ECtHR (2006), para. 122; *Baysayeva v. Russia* ECtHR (2007), para. 145; *Timurtaş v. Turkey* ECtHR (2000), para. 103; *Çakici v. Turkey* ECtHR [GC] (1999), para. 104; *Kurt v. Turkey* ECtHR (1998), para. 124.

> husband had been detained by the security forces and taken away in life-threatening circumstances. It notes that the applicant turned to the relevant authorities immediately after her husband's apprehension. However, the Court's reasoning and findings in relation to Article 2 above, in particular as regards the delays in opening and conducting the investigation, leave no doubt that the authorities failed to take prompt and effective measures to safeguard Shakhid Baysayev against the risk of disappearance.[127]

When considering the failure to investigate in this respect, the European Court mostly refers to its findings in respect of the procedural obligations stemming from Article 2 ECHR (right to life).[128]

7.4.3.2 Article 6 ECHR and access to a lawyer

Article 6 ECHR (the right to a fair trial) is not considered in the case law on enforced disappearances. This article covers the (pre-)trial stage, a stage that has proven to be irrelevant in most enforced disappearance cases. Nevertheless, an important safeguard emanates from this article that is extremely relevant for the prevention of enforced disappearance. In *Salduz v. Turkey*, the European Court decided that Article 6(3) ECHR affords the right to immediate access to a lawyer as from the first moment of interrogation by the police. This right is not absolute, however, since compelling reasons may justify a restriction of this right. However, such restrictions may never unduly prejudice the rights of the accused.[129] In its reasoning, the European Court referred to the 2001 and 2002 reports of the CPT that expressed concern over the inability to have access to a lawyer for two days for persons suspected of offences falling under the jurisdiction of the State Security Courts in Turkey.[130] Since the

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127 *Baysayeva v. Russia* ECtHR (2007), para. 147. See also *Bazorkina v. Russia* ECtHR (2006), para. 148; *Sangariyeva a.o. v. Russia* ECtHR (2008), paras. 79 and 81; *Kurt v. Turkey* ECtHR (1998), para. 124; *Timurtaş v. Turkey* ECtHR (2000), para. 103; *Luluyev a.o. v. Russia* ECtHR (2006), para. 122.

128 See Chapter 8 *infra*.

129 *Salduz v. Turkey* ECtHR [GC] 27 November 2008 (Appl. no. 36391/02), para. 55.

130 *Ibid*., paras. 39 and 40. An update on the situation in Turkey came with the report of the CPT on its December 2005 visit to Turkey, see CoE, 'Report to the Turkish Government on the visit to Turkey carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 7 to 14 December 2005' (6 September 2006) CPT/Inf (2006) 30, para. 12 (confirming that 'detention by law enforcement agencies (police and gendarmerie) is currently governed by a legislative and regulatory framework capable of combating effectively torture and other forms of ill-treatment by law enforcement officials'). See also *Pishchalnikov v. Russia* ECtHR 24 September 2009 (Appl. no. 7025/04), paras. 79 and 80.

Salduz Case, some ambiguity remains with regard to the interpretation of the exact moment from which access to a lawyer must be granted.[131]

7.4.3.3 Article 8 ECHR and the possibility of communication between detainees and relatives

Allegations of violations of the right to respect for family life (Article 8 ECHR) because of the enforced disappearance, if made at all, have in most cases been dismissed by the European Court. The reason for this dismissal was that the complaints concerned the same facts as those examined under Article 2 ECHR in respect of the presumed death and inadequate investigation under Article 3 ECHR to the detriment of the relatives as a result of not knowing the whereabouts or fate of the disappeared person, the consideration of which led to violations of these articles.[132] In an exceptional case in which the applicant's son had disappeared on 5 October 1999 in Turkey, then reappeared in prison just over a month later and died two weeks after that in prison, the Court considered whether this set of facts constituted a violation of Article 8 ECHR. In this case, *Uçar v. Turkey*, the applicant only learnt about his son's detention on 11 November 1999 when a court ordered his son's detention on remand, despite having lodged several petitions requesting an investigation into the disappearance of his son and requesting to be informed about his son's whereabouts.[133] The facts established by the European Court demonstrated that the applicant's son was formally arrested on 2 November 1999 and that his whereabouts before this date were unclear. Consequently, the Court considered that the applicant's son had been in police custody for nine days. The European Court recognised that 'when a person is arrested his ability to communicate with his family may be of great importance. The unexpected disappearance of a family member, even for a short period of time, may provoke great anxiety.'[134] Accordingly, the Court deemed that the situation of the applicant undoubtedly caused him anxiety, in particular taking into consideration that the applicant's son had unexpectedly disappeared on 5 October 1999.[135] Turkish law lacked any legal provision that governed contact between a person held in police custody and members of his or her family. In the absence of such a legal framework,

131 J.P. Loof, M. Van Emmerik, *et al.*, 'Mensenrechten-actualiteiten.nl' (2011) 36 *NJCM-Bulletin* 1, p. 93. See also *Brusco v. France* ECtHR 14 October 2010 (Appl. no. 1466/07), para. 54 (The Court considered in this case that the situation in police custody of the applicant, who was suspected of having masterminded an act of aggression, was aggravated by the fact that he was only assisted by a lawyer after 20 hours in police custody and after being interrogated. Consequently, a lawyer had not been able to inform him of his rights to remain silent and not to incriminate himself).

132 *Bazorkina v. Russia* ECtHR (2006), para. 157; *Luluyev a.o. v. Russia* ECtHR (2006), para. 133; *Betayev and Betayeva v. Russia* ECtHR (2008), para. 117.

133 *Uçar v. Turkey* ECtHR (2006), para. 138.

134 *Ibid*., para. 136.

135 *Ibid*., para. 139.

and in the circumstances of the case, the Court concluded that the detention of the applicant's son in police custody for nine days without contact with his family amounted to a breach of Article 8 ECHR.[136] A similar result was also achieved in the detention case *Sarı and Çolak v. Turkey*, where the lack of clear and accessible procedures for detainees to contact their family members also amounted to a breach of Article 8 ECHR. This case pertained to the *incommunicado* detention of the two applicants for over seven days during their time in police custody.[137] The applicants had also alleged that it was 'the duty of the police custody officers to inform the families of persons held on police premises and thus to allow those rights to be exercised effectively.'[138] The Court did not respond to this allegation. At any rate, it is possible to conclude that the legal framework governing the contact between detainees and relatives should provide the possibility of having contact within at most seven days.

7.4.4 Comparative remarks on safeguards surrounding arrest and detention in light of the experiences of victims

The previous subsections have shown that the various articles in the ICCPR, the ACHR and the ECHR provide a network of safeguards surrounding arrest and detention situations. Before comparing the specific safeguards, it is useful to recall the first main cause of victims' suffering (no trace of the disappeared person and denial by the state). This main cause requires that these safeguards should be aimed at keeping track of detained persons so that state authorities are unable to abuse their power, and if they do so, to ensure their accountability and to locate the victim. In addition, the obligation to keep track of persons should commence at the moment of their arrest. As experiences of victims show, illegal arrests are prone to herald an enforced disappearance. Moreover, keeping track of persons arrested or detained is important not only to prevent enforced disappearance, but also to prevent the use of other attendant human rights violations. If a person is 'lost' in a maze of unacknowledged detentions, the victim is in an extremely vulnerable position and at the complete mercy of the authorities. In such situations, the risk of torture or arbitrary execution is real and imminent. The Inter-American Court has aptly recognised that, 'a person who is unlawfully detained is in an exacerbated situation of vulnerability creating a

136 *Ibid*., para. 141. *Cf. Kučera v. Slovakia* ECtHR 17 July 2007 (Appl. no. 48666/99), para. 127 (When the detention is acknowledged to relatives, there may be a legitimate impairment to the contact between detainees and relatives).

137 *Sarı and Çolak v. Turkey* ECtHR 4 April 2006 (Appl. nos. 42596/98 and 42603/98), paras. 34-37 (The European Court reiterated the *Marckx Case* in which the Court decided that 'respect' for family life also implies an obligation on the state to act in a manner calculated to allow ties between close relatives to develop normally).

138 *Ibid*., para. 30.

real risk that his other rights, such as the right to humane treatment and to be treated with dignity, will be violated.'[139]

Indeed, the various provisions protecting the right to liberty in the ICCPR, the ACHR and the ECHR encompass numerous conditions with which an arrest must comply. All three human rights treaties dictate that an arrest must be carried out according to the conditions established by domestic law, which must be in compliance with human rights law. In addition, the ECHR sets out in detail the situations that justify an arrest. According to the ICCPR and the ACHR, an arrest may not be arbitrary. The case law of the Inter-American Court demonstrates that indicators for arbitrariness may be the lack of an arrest warrant or the absence of being notified of the reasons for the arrest, which are other safeguards related to the right to liberty. A systematic practice of torture and killings in the place of detention where the person is brought subsequent to the arrest is also a clear indicator of arbitrariness. This latter indicator is in particular important in terms of evidence due to the first main cause of suffering (no trace of the disappeared person and denials by the state authorities) as there is mostly no person to testify as to the exact course of events.

Upon arrival in a detention centre, the case law dictates that several important safeguards must be in place. Firstly, a person must be entered into the custody records upon arrival. Custody records have played a central role in enforced disappearance cases as decided by the European Court. The Inter-American Court has occasionally elaborated on this issue in reparations, while the HRC has not addressed this issue in its views,[140] but has laid down this requirement in its concluding observations. The European Court has in particular been confronted with incomplete and forged custody records, which it has taken into account in determining state responsibility for the right to liberty in enforced disappearance cases. The important role given to custody records is in line with the main causes of victims' suffering. Updated and complete custody records enable independent judges and relatives to trace the disappeared person when he or she is in detention. As such, custody records are the primary source of information on detainees for the outside world. At the same time, forged, or the absence of, records may indicate that the state authorities do not take every possible measure to prevent enforced disappearance and may create the presumption of their involvement in such human rights violation. One of the ways to diminish the vulnerable position of disappeared persons being subjected to, for

139 *E.g. Cantoral-Benavides v. Peru* IACtHR (2000), para. 90; *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 166; and similarly *Ireland v. the United Kingdom* ECtHR [GC] (1978), para. 167.

140 See *e.g. Sarma v. Sri Lanka* HRC (2003), para. 5.7 (The author of the application in *Sarma v. Sri Lanka* addressed the issue of the absence of detention records relating to security and search operations. The HRC did not address this allegation).

instance, torture is the requirement, stated by the HRC, of a medical examination upon arrest and at the end of the detention.

The minimum information that should be in custody records according to the European Court is the date, the time and location of the detention, the name of the detainee, the reasons for the detention and the name of the person effectuating the deprivation of liberty. The Inter-American Court furthermore requires information on the arrest warrant and, if relevant, information on the release. This minimum information corresponds with the main causes of victims' suffering. The identity of the authority effectuating the detention is important in light of the third main cause of suffering (*de facto* and *de jure* impunity). Supervising and documenting the release is important because relatives inquiring into the whereabouts of the disappeared person are often confronted with the reply that he or she has already been released and, for instance, that he or she has probably joined a terrorist group. Such falsification of release records may be avoided by strict supervision of the release. At least, states can be held responsible if they fail to do so. Having regard to the experiences of victims, information on the health of the person may be added to the list.

The case law does not reveal any restrictions on access to custody records but this issue has not been explicitly discussed either. This apparent unlimited access to information is in line with developments in soft law. For instance, Article 10(2) DPPED stipulates an unrestricted and prompt access to information of detention and places of detention and any impediments to access constitutes a violation of such detention. In this regard, states have the obligation to take steps to establish centralised registers of detention.[141] This latter obligation to make the registers centralised is, however, not supported by the case law. Centralising custody records can be relevant for cases where the disappearance takes place across borders of different regional jurisdictions, which enables the different authorities to escape accountability.[142] Therefore, centralised custody records are important in light of both the first and third main cause of victims' suffering (no trace of the disappeared person and *de facto* and *de jure* impunity).

A second important safeguard is the possibility of communication between detained persons and their relatives. A right to contact with the outside world can be inferred from a combination of rights of detainees and corresponding obligations on the state under the ACCPR, the ACHR and the ECHR. The obligation to inform the relatives may be derived from the fact that the prolonged uncertainty of the relatives

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141 UNWGEID, 'General Comment on article 10 of the Declaration' (1996), available at www.ohchr.org, paras. 26-30. See also Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (Approved by the Inter-American Commission during its 131st regular period of sessions, held from March 3-14, 2008), Principle IX(2)(k) 'Signature of the persons deprived of liberty, or where this is impossible, an explanation about the reasons thereof'.

142 See *e.g. Medova v. Russia* ECtHR 15 January 2009 (Appl. no. 25385/04) (This case is discussed in more detail in Chapter 9 *infra*).

as to what happened to the disappeared person is considered to be inhuman. More explicitly, the HRC and the Inter-American Court have formulated an obligation to inform the relatives. The HRC has attached the requirement of 'immediately' to this obligation. However, the exact standards on the maximum period of time within which the relatives must be informed and on the information that must be given are not clear. The HRC's tendency to express concern over *incommunicado* detention is not altogether shared by the Inter-American Court, which allows such detention in exceptional circumstances. In principle, there are good reasons to infer that 72 hours without access to a lawyer breaches the 'immediate access' standard under the ICCPR, whilst the European Court takes as a starting point that detainees should have access to a lawyer from the first moment of police interrogation. Admittedly, this right may also be restricted as long as such a restriction is not detrimental to the position of the detainee. The Inter-American Court has found that two days without being able to notify relatives constitutes a violation of the ACHR. However, it is not clear whether this is an ACHR standard *per se*.

In view of the lack of clear guidelines on the contact between detainees and the outside world, it is useful to point out the soft law guidelines within the UN, which provide clearer conditions for communication. Rules 37, 92 and 93 of the UN Standard Minimum Rules for the Treatment of Prisoners grant the right to inform relatives 'immediately' of a broad range of persons held in the custody of the state, including untried prisoners and persons arrested or detained without charge. Rule 92 allows for restrictions for untried prisoners 'as are necessary in the interests of the administration of justice and of the security and good order of the institution.'[143] Similarly, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ('Body of Principles on Detention and Imprisonment') stipulates that each person arrested or detained shall be entitled to notify his or her relatives 'promptly' and without delay after arrest of the following information: his or her arrest or detention, transfer and the place where he is being held in custody. The authorities may delay a notification for a reasonable period for investigation purposes.[144] Contact with a lawyer may also be restricted by a judicial authority in exceptional circumstances. Exceptional circumstances must be provided for by law and supervised by a judicial body.[145] Notwithstanding these restrictions, according to Principle 15, contact with one's family or counsel shall never be denied for 'more than a matter of days'. Thus, the use of terms such as 'immediately' and 'promptly'

143 ECOSOC, 'Standard Minimum Rules for the Treatment of Prisoners', adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

144 UNGA, 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment', adopted by General Assembly resolution 43/173 of 9 December 1988, Principle 16.

145 UNGA, Body of Principles on Detention or Imprisonment (1988), Principle 18.

seems to indicate an understanding in terms of hours, especially when considering that in exceptional circumstances such notification may be delayed for a period of no longer than a matter of days. In view of the main causes of victims' suffering, it should be clear that such an exceptional restriction may only be legitimate when the detained person is detained in a lawful manner. The risk of enforced disappearance would otherwise be too great.

In view of the fact that restrictions on communications between detained persons and relatives may be lawful, judicial control becomes increasingly important. There is a solid basis to conclude that a state incurs responsibility when detained persons are not brought before a judge within four days and six hours. This maximum period without being brought before a judge is the standard case law of the European Court to which the Inter-American Court has made frequent references. This period may be extended by just over two days in situations of declared states of emergency when other guarantees, such as access to a lawyer and the *habeas corpus* guarantee, are available. This condition means in practice that the persons should nevertheless have access to a judge after a maximum of four days and a few hours.

The remedy of *habeas corpus* has been assigned great importance by the three supervisory bodies in enforced disappearance cases because it is a remedy through which an independent body is, in principle, in a position to locate a detained person. Such action, especially if taken in the first few days after the disappearance, may diminish the possibility that a disappeared person 'becomes lost' in the detention centres of a state. Accordingly, the HRC and the Inter-American Court have qualified the remedy of *habeas corpus* as being unable to be derogated from. This is an important qualification because it is not uncommon that enforced disappearance occurs during times of a state of emergency. Indeed, the second main cause of victims' suffering (*i.e.* uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person) is a dominant factor that should be taken into account because the investigating authorities, to whom relatives normally turn, usually fail to make any effort to find the person in question. Accordingly, the role of an independent and impartial judge is of particular importance. In this respect, it is useful to recall the case law of the Inter-American Court. This Court demands a proactive stance from the judiciary by demanding an investigation that goes beyond denials or silence by the executive branch in response to inquiries. The exact time frame within which *habeas corpus* must be available is not entirely clear from the case law, but the Inter-American Court has repeatedly stressed that prompt action in the initial days after the alleged enforced disappearance is essential.

As a final point of this section, it is important to highlight the difference between delays in notification, on the one hand, and denying a detention altogether, on the other. While the former may be permissible under strict conditions, there is no indication in

the case law that the latter is also in compliance with human rights standards. As the European Court has stated, unacknowledged detention is a complete negation of the safeguards surrounding a deprivation of liberty.

7.5 Additional obligations to prevent similar violations in the future

The previous section examined the relevant institutional safeguards surrounding arrest and detention aimed at preventing enforced disappearance. This section discusses those measures specifically ordered so as to avoid repetition of enforced disappearance, and thus go beyond the facts of a specific case.

7.5.1 Human Rights Committee

The general view of the HRC is that the obligation to prevent the recurrence of violations of the ICCPR emanates from Article 2 ICCPR:

> In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.[146]

In enforced disappearance cases, the HRC has indeed repeatedly stated that a state, which is found to be responsible for an enforced disappearance, is under an obligation to prevent the occurrence of similar violations in the future.[147] However, the HRC has refrained in those cases from further specifying specific measures to achieve this end.

7.5.2 The Inter-American Court of Human Rights

In contrast to the HRC's vague aspirations, the Inter-American Court has ordered specific measures of non-repetition in the reparation stage. Since reparations are part of the case law of the Inter-American Court and have legal effect as such, they are binding on the respondent state. In addition, interpretations elaborated in the reparation considerations in respect of duties stemming from Articles 1(1) and 2 ACHR have been accorded important precedential weight. For example, in the cases

146 HRC, General Comment No. 31 [80] (2004), para. 17.

147 *María del Carmen Almeida de Quinteros et al. v. Uruguay* HRC (1983), para. 16; *Bautista de Arellana v. Colombia* HRC (1995), para. 10; *Sarma v. Sri Lanka* HRC (2003), para. 11.

La Cantuta v. Peru and *Juan Humberto Sánchez v. Honduras* the Inter-American Court referred in the merits of the decision to obligations established in previous cases concerning reparations.[148]

Bringing the perpetrators to justice and, thereby, avoiding impunity is one of the granted reparation measures of non-repetition.[149] As such, an important measure specifically related to enforced disappearance is the creation of the crime of enforced disappearance in domestic law or the adaptation of such a crime to the standards of international human rights law. In its first decision in a contentious case, the Inter-American Court laid down the foundation stones for the obligation to ensure that certain violations of ACHR rights must be considered as illegal acts.[150] This obligation appears to derive from Article 2 ACHR 'which establishes the general obligation for every State Party to adapt its domestic laws to its provisions in order to give effect to the rights recognised therein, which implies that the domestic measures must be effective (the principle of *effet utile)*.'[151] There are two aspects to this obligation. First, states have to repeal laws and practices that are contrary to the ACHR and, second, they have to enact laws and develop practices that are conducive to the rights laid down therein.[152] While recognising the importance of defining enforced disappearance as an autonomous offence in criminal law for the eradication of this crime and for combating impunity, the Inter-American Court does not derive such an obligation from the ACHR. The ACHR instead requires states to criminalise violations of the rights to life, humane treatment and personal liberty embodied in the ACHR.[153] With respect to those respondent states that have not ratified the IACFD at the time of the judgment, the Inter-American Court has stressed that the definition and the corresponding punishment must be brought into compliance with international standards. In this respect, the Inter-American Court has ordered the respondent state to adopt the necessary measures to ratify the IACFD as a reparation measure.[154] Also,

148 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), footnote 125 and the accompanying text; *La Cantuta v. Peru* IACtHR (2006), footnote 109.

149 *Tiu-Tojín v. Guatemala* (merits, reparations and costs) IACtHR Series C No. 190 (26 November 2008), paras. 112-120; *Heliodoro-Portugal v. Panama* IACtHR (2008), paras. 245-247; *La Cantuta v. Peru* IACtHR (2006), paras. 222-228; *Goiburú et al. v. Paraguay* IACtHR (2006), paras. 163-170. See Chapter 8 *infra* for a further elaboration of the obligation to bring the perpetrators to justice.

150 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 175.

151 *Heliodoro-Portugal v. Panama* IACtHR (2008), para. 179. See also *La Cantuta v. Peru* IACtHR (2006), para. 171.

152 *Heliodoro-Portugal v. Panama* IACtHR (2008), para. 180.

153 *Ibid*., paras. 181-184.

154 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 174.

the Court has valued the ratification of the ICPPED, which requires States Parties to criminalise enforced disappearance, as a measure of non-repetition.[155]

Whereas the ACHR does not oblige states to make enforced disappearance a criminal offence in national law, upon the ratification of the IACFD states are obliged to criminalise enforced disappearances as a separate offence within a reasonable time.[156] The offence must comply with the minimum requirements of the definition embodied in Article II IACFD,[157] namely: (1) the deprivation of liberty 'in whatever way' by state agents or with the indirect involvement of state agents; (2) the refusal to provide information on the whereabouts of the disappeared or the refusal to acknowledge the deprivation of liberty; (3) the proportionality of the punishment with the gravity of the offence; and (4) the continuing or permanent nature of the crime and the non-applicability of statutes of limitation as long as the fate or whereabouts of the victim has not been established.[158] Upon ratification, simply resorting to the crimes of abduction or kidnapping is insufficient to satisfy the obligation to prosecute and to punish enforced disappearances. In *Trujillo v. Bolivia*, the Inter-American Court noted that dismantling the crime of enforced disappearance into independent crimes and judging them on a separate basis did not comply with the multiple violation character of the crime of enforced disappearance and it disregarded the grave nature of the crime. In this particular case, the domestic courts had ruled that with respect to the enforced disappearance of the victim, the crimes of torture and murder were of an instant nature and were time-barred, leaving only the crime of deprivation of

155 *Ticona-Estrada et al. v. Bolivia* (merits, reparations and costs) IACtHR Series C No. 191 (27 November 2008), paras. 175 and 176.

156 Article III of the IACFD includes an obligation to criminalise the act of enforced disappearance in domestic criminal law. See also *Heliodoro-Portugal v. Panama* IACtHR (2008), paras. 185 and 259; *Gómez-Palomino v. Peru* (merits, reparations and costs) IACtHR Series C No. 136 (22 November 2005), paras. 87-110; *Goiburú et al. v. Paraguay* IACtHR (2006), para. 179. For an overview of domestic crimes of enforced disappearance, see UNHRCouncil, 'Report of the Working Group on Enforced or Involuntary Disappearances - Addendum – Best practices on enforced disappearances in domestic criminal legislation' (28 December 2010) UN Doc. A/HRC/16/48/Add.3 (hereinafter: 'Report on best practices in domestic criminal legislation (2010)'). See also www.glin.gov (last visited on 18 February 2010) (In many Latin-American States, enforced disappearance is penalised in domestic criminal law. For instance, in Argentina Law 26 200 was adopted that implements the Statute of the International Criminal Court which includes the definition of enforced disappearance. The Federal Criminal Courts of Argentina have jurisdiction over crimes defined in the Rome Statute). See also E. Malarino, 'Argentina', in: K. Ambos, (ed.), *Desaparición forzada de personas. Anáslysis comparado e internacional* (Bogota: Editorial Temis S.A. 2009) pp. 5-37, at p. 7 (The sanctions for the crime of enforced disappearance are laid down in Article 9 (3-25 years and, if death had followed, life imprisonment) and Article 11 (non-applicability of statutes of limitation) and Article 12 (*medición de la pena*)).

157 *Radilla-Pacheco v. Mexico* (monitoring compliance) IACtHR (19 May 2011), paras. 27 and 28; *Goiburú et al. v. Paraguay* IACtHR (2006), para. 92.

158 *Heliodoro-Portugal v. Panama* IACtHR (2008), paras. 191-209.

liberty as a continuous crime for which the perpetrators could be convicted. This consideration amounting to the accusation of only a deprivation of liberty was contrary to the ACHR.[159]

Additionally, the Inter-American Court has paid attention to the accountability of investigating authorities. Investigating authorities that hamper or impede investigations must be punished:

> Public officials and private citizens who hamper, divert or unduly delay investigations tending to clarify the truth of the facts must be punished, rigorously applying, in this regard, provisions of domestic legislation.[160]

The way in which they must be punished, on a disciplinary basis or under criminal law, seems to be left to the discretion of the respondent state.[161]

Other non-repetition measures that have been ordered are the publication of the judgment issued by the Inter-American Court[162] and the public acknowledgment of the facts and of responsibility for the crimes, referring to the specific human rights violation found by the Inter-American Court. Such acknowledgement by the state must be made in a public ceremony where both the authorities of the state are present as well as the persons who have been declared victims in the case. The latter must have been invited with sufficient notice.[163] In the case *Ticona-Estrada et al. v. Bolivia*, the Inter-American Court considered it to be of the utmost importance that the respondent state would take measures to clarify the acts of enforced disappearance that occurred in the past in Bolivia. The Court ordered the respondent state to furnish the established National Council for Clarification of Forced Disappearances with all the human and material resources for it to be able to function effectively. The state had to present a programme of action and planning for this purpose within a year.[164]

Lastly and finally, the training of the police and the army in human rights and humanitarian law has been reiterated in several cases as a reparation measure to prevent the recurrence of enforced disappearances in the future.[165] Such programmes

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159 *Trujillo-Oroza v. Bolivia* IACtHR (2002), paras. 39, 44 and 45.

160 *The Caracazo v. Venezuela* (reparations and costs) IACtHR Series C No. 95 (29 August 2002), para. 119.

161 See also Chapter 8 subsection 6.2.3 *infra* on the discussion of the duty to punish.

162 *The Caracazo v. Venezuela* IACtHR (2002), para. 128.

163 *Heliodoro-Portugal v. Panama* IACtHR (2008), para. 249; *La Cantuta v. Peru* IACtHR (2006), para. 235.

164 *Ticona-Estrada et al. v. Bolivia* IACtHR (2008), para. 173.

165 *E.g. La Cantuta v. Peru* IACtHR (2006), paras. 230-242. See also *Blanco-Romero et al. v. Venezuela* (merits, reparations and costs) IACtHR Series C No. 138 (28 November 2005), para. 106 (The Inter-American Court ordered the state to implement a course on the principles and rules for the protection of human rights, particularly the prohibition of forced disappearance, torture and the disproportionate use of force in an educational and training programme for the Armed Forces,

must be permanent and be implemented at all levels of the police forces.[166] In *La Cantuta v. Peru*, this obligation was extended towards the implementation of human rights-oriented training programmes for the judiciary.[167] Hence, there are good reasons to presume that the training of officials falls within the duty to prevent as inferred from the ACHR by the Inter-American Court. The Inter-American Court has also formulated an obligation to adjust the planning, preparation and control of operations in response to public disturbances in accordance with human rights. The Court stated that:

> The State must, also, adjust operational plans regarding public disturbances to the requirements of respect and protection of those rights, adopting to this end, among other measures, those geared toward control of actions by all members of the security forces in the very field of action to avoid excess. Finally, the State must ensure that, if it is necessary to resort to physical means to face situations of disturbance of public order, the members of its armed forces and its security bodies will use only those means that are indispensable to control such situations in a rational and proportional manner,[168] and respecting the rights to life and to humane treatment.[169]

Hence, the case law of the Inter-American Court reveals a wide array of concrete and detailed non-repetition measures, ranging from offering permanent training to criminalising enforced disappearance.

7.5.3 The European Court of Human Rights

The spectrum of guarantees of non-repetition as set out by the Inter-American Court is far from being echoed in the European Court's case law on enforced disappearance. In fact, the European Court has only ordered financial compensation as reparation measures. Still, the case law touches upon implementing criminal law norms and the planning of operations. Also, the CoM of the Council of Europe has addressed several of the non-repetition measures set out by the Inter-American Court.

The criminalisation of enforced disappearance in domestic law does not follow from the obligations under the ECHR. This is again self-evident in light of the fact that

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'taking into account the case law of the Inter-American Protection of Human Rights System, as a way to prevent recurrence of events such as those in the instant case.' In this case, a state of emergency had been declared owing to floods in one of the regions of Venezuela that gave the army special powers. Subsequently, three persons had disappeared as a result of an illegal arrest by members of the security forces).

166 *Goiburú et al. v. Paraguay* IACtHR (2006), para. 178.

167 *La Cantuta v. Peru* IACtHR (2006), para. 241.

168 *Cf. Durand and Ugarte v. Peru* IACtHR (2000), paras. 68, 69 and 71.

169 *The Caracazo v. Venezuela* IACtHR (2002), para. 127.

there is no such norm in the ECHR itself and no other European regional convention exists on the issue of enforced disappearance. Nevertheless, on the basis of Article 2 ECHR (the right to life), the European Court has required states to formulate a legal norm which is relevant to enforced disappearance. In *Kaya v. Turkey*, the European Court interpreted this article as involving a primary duty for the state 'to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, [...].'[170] The criminal provisions must be backed up by law-enforcement machinery.[171] As this obligation derives from the right to life rather than enforced disappearance as such, it only applies when the disappeared person is presumed to be dead. Such a presumption brings an enforced disappearance within the ambit of Article 2 ECHR. The case law on disappearances, where the direct perpetrators were non-state actors or were unkown, confirms that there is no obligation to define the crime of (enforced) disappearance. For instance, in *Osmanoglü v. Turkey* the Court considered that the domestic legislation was sufficient, criminalising torture, homicide and murder, although in this case the law had not been implemented properly.[172]

The CoM, endowed with the competence to supervise the implementation of the European Court's judgments, has addressed some of the guarantees of non-repetition ordered by the Inter-America Court. For instance, the Report of the Evaluation Group to the Committee of Ministers assessed the measures that must be taken on the national level to improve the domestic implementation of the ECHR. The issue of training, including translations of abstracts from key judgments of the European Court, was addressed in general terms in the report. Furthermore, the CoM recognised the need for national courts to have the status, authority and independence to inspire public confidence. Furthermore, remedies to prevent and redress violations included procedures for proper investigations.[173] In July 2002, the CoM adopted an interim resolution on human rights abuses by Turkish state authorities. In its report, the CoM considered that Turkey's compliance with the judgment involving human rights violations by the security forces must entail *inter alia* the adoption of general

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170 *Mahmut Kaya v. Turkey* ECtHR (2000), para. 85. See also *Osmanoğlu v. Turkey* ECtHR (2008), para. 72; *Kiliç v. Turkey* ECtHR (2000), para. 62. The Court has applied this obligation in disappearance cases in which it could not be established beyond reasonable doubt that the authorities were responsible for the disappearance. Nevertheless, other cases show that it also applies when state agents are the alleged perpetrators, see *Cyprus v. Turkey* ECtHR [GC] (2001), para. 219; *Budayeva a.o. v. Russia* ECtHR 20 March 2008 (Appl. nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), paras. 129 and 130; *Makaratzis v. Greece* ECtHR [GC] (2004), para. 57.

171 *Mahmut Kaya v. Turkey* ECtHR (2000), para. 85; *Osmanoğlu v. Turkey* ECtHR (2008), para. 72. See also *Nilkolova and Velichkova v. Bulgaria* ECtHR 20 December 2007 (Appl. no. 7888/03), para. 57(b); *Mastromatteo v. Italy* ECtHR [GC] 24 October 2002 (Appl. no. 37703/97), paras. 67 and 89.

172 *Osmanoğlu v. Turkey* ECtHR (2008), paras. 83 and 84.

173 CoM, Report Evaluation Group (2001), paras. 45.

measures so as to prevent new violations similar to those found in these cases.[174] In its resolution of 2008, besides the importance of accountability, the CoM stressed the training of public officials. The CoM was satisfied with Turkey in respect of the curriculum that included a separate human rights course in the initial training of security forces, judges and prosecutors and in-service training in human rights with a focus on the ECHR and the Court's case law. The CoM also welcomed other ongoing training activities for judges and prosecutors such as seminars and study visits.[175] These measures were sufficient to decide to close these issues.

Lastly and finally, the European Court has included the planning of police or security operations within its ambit of scrutiny. The planning and organisation of operations have had a central role in several cases pertaining to arbitrary killings. Such operations must be 'sufficiently regulated by [national law], within the framework of a system of adequate and effective safeguards against arbitrariness and abuse of force […], and even against avoidable accident.'[176] This obligation is clearly aimed at preventing any human rights violations. Whilst not directly applied in enforced disappearance cases, such required planning could also be applicable to the many security operations within the context of which enforced disappearances have occurred.

7.5.4 Comparative remarks on measures of non-repetition in light of experiences of victims

Guarantees of non-repetition are mostly mentioned as reparation measures. This is clear in the case law of the Inter-American Court and in the views of the HRC. Such guarantees derive from, and at the same time elaborate upon, the obligation to prevent the repetition of enforced disappearances in the future.[177] While such measures belong to the arena of reparations, a prerequisite for which is that a violation has taken place, they are also indicative of measures that are believed to generally prevent the commission of human rights violations.

The duty to take non-repetition measures is part of the duty to prevent that goes beyond the facts of a specific case. As such, the fourth main cause of suffering (an unsafe environment to conduct the search and activities related to the

174 Van Dijk, Van Hoof, Van Rijn & Zwaak (2006), p. 386.

175 CoM, 'Execution of the judgments of the European Court of Human Rights: Actions of the security forces in Turkey' Interim Resolution CM/ResDH(2008)69 (18 September 2008) (hereinafter: 'Interim resolution Turkey').

176 *Makaratzis v. Greece* ECtHR [GC] (2004), para. 58. See also *McCann a.o. v. the United Kindgom* ECtHR [GC] 27 September 1995 (Appl. no. 18984/91), para. 150.

177 UNGA, 'The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' Res 60/147 (16 December 2005) (adopted without a vote) (hereinafter: 'Van Boven/Bassiouni Principles'), Principle 23.

enforced disappearance) is particularly relevant when contemplating guarantees of non-repetition. Such guarantees are able to respond to the factors that create an unsafe environment for victims to conduct their activities related to the enforced disappearance. These factors mostly pertain to a hostile attitude by the state authorities, being confronted with the possible perpetrators, the fear of also being subjected to enforced disappearance and the resulting negative stigma for the disappeared person and his or her relatives. In this respect, it is relevant to recapitulate the measures that curb state crime according to the criminology models discussed in Chapter 4 *supra* and to identify to what extent the non-repetition measures mirror these measures.

The criminology models show an important emphasis on clear legal provisions to combat crimes by state agents and the effective implementation of the law in terms of accountability and punishment. As such, criminalisation is believed to form an obstacle for state agents to resort to criminal behaviour. Combating impunity has indeed been included as a non-repetition measure in the two regional systems. Such measures also relate to the third main cause of victims' suffering, namely encountering *de facto* and *de jure* impunity. The content of the duties pertaining to the issues related to combating impunity is further elaborated in Chapter 8 *infra*. A clear legal norm prohibiting the crime of enforced disappearance does not emanate from the ICCPR, the ACHR or the ECHR. However, on the basis of the IACFD, the Inter-American Court has elaborately addressed the domestic prohibition in criminal law. The minimum elements that such a definition should contain are the elements in the definition enshrined in this treaty, *i.e.* legal or illegal deprivation of liberty, state involvement and denials or refusals to provide information. It is important to note the work of the UNWGEID in this respect as well. This body has already specifically dealt with the definition of enforced disappearance laid down in the DPPED. The UNWGEID has stressed that states must define a separate criminal offence in their domestic law that may be based on the Rome Statute but that is also in line with Article 2 ICPPED.[178] In addition, not only should enforced disappearance as a crime against humanity be criminalised but any kind of such act.[179] This crime should furthermore be characterised as a continuous crime until the fate or whereabouts of the disappeared person are clarified.[180] The UNWGEID clearly excludes crimes solely committed by non-state actors from the definition of the DPPED and highlights an interesting point in this respect. In the report on its mission to Colombia, the UNWGEID criticised national criminal law in Colombia for including non-state actors as perpetrators in the definition of enforced disappearance. It stated that:

178 UNWGEID, Report on best practices in domestic criminal legislation (2010), paras. 9 and 15.
179 *Ibid*., para. 18.
180 *Ibid*., para. 33.

> Although the inclusion of non-State actors acting without the support or consent of the Government may at first glance look like an advancement of the law, in the sense that it protects more than the limited definition of the Declaration, it is the opinion of the Working Group that enforced disappearance is a "State crime" (as opposed to kidnapping). Although in other cases of violations of human rights the inclusion of non-State actors indeed offers more protection to the victims (i.e. in the case of discrimination or labour or environmental human rights), in the case of enforced disappearance such inclusion dilutes the responsibility of the State.[181]

Hence, while the case law leaves discretion to states as to how to define the crime of enforced disappearance in domestic law, the tendency under the DPPED is to object to the inclusion of crimes committed by non-state actors without any involvement of the state.[182] In view of the experiences of victims, it is indeed pertinent that the responsibility of state agents is marginalised in practice due to the incorporation of non-state actors as possible perpetrators of the crime. At the same time, there are situations in which non-state actors subject persons to disappearance. Protection against those crimes by making use of the criminal law is also of great importance.

Besides criminal law measures, the criminology models also demonstrate the importance of other measures aimed at creating a culture of compliance with human rights within state institutions. These measures pertain to strong supervision mechanisms to monitor the behaviour of state agents, codes of conduct and reward structures. The case law shows that training should involve both human rights law in general and should aim at all levels of the executive branch and the judicial branch. The inclusion of such training in the initial training of state officials, as well as subsequent permanent training seems to be a well-established standard. The regional Courts do not go into more detail than these requirements. The UN soft law principles also mention training on 'a priority and continued basis'[183] or require 'comprehensive and ongoing' training of public officials.[184] In contrast, supervision and codes of conduct have not appeared in the case law of the supervisory bodies, even though the Inter-American Court has ordered disciplinary sanctions against those under investigation.[185] The limitation of the case law with respect to codes of conduct is

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181 UNWGEID, Report of Mission to Columbia (2006), para. 48. See also UNWGEID, General Comment on the definition of enforced disappearance (2007), para. 3.

182 See also UNWGEID, Report on best practices in domestic criminal legislation (2010), paras. 25 and 26 (reiterating this view but also expressing that domestic legislation that includes 'any individual' as the possible perpetrators could be in line with the DPPED as long as it does not dilute state responsibility).

183 Van Boven/Bassiouni Principles, Principle 23(e).

184 UNComHR, 'Updated Set of principles for the protection and promotion of human rights through action to combat impunity' (8 February 2005) UN Doc. E/CN.4/2005/102/Add.1 (hereinafter: 'UN Updated Set of Principles to Combat Impunity'), Principle 36(e).

185 Chapter 8 section 6 *infra* examines the content of the duty to punish.

partly addressed by UN soft law. Principle 23(f) of the Van Boven/Bassiouni Principles and Guidelines on the Right to Remedy and Reparation ('Van Boven/Bassiouni Principles') explicitly urges states to promote 'the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;'.[186] Generally, the Updated Set of Principles to Combat Impunity mentions several non-repetition measures in its final section, especially focussing on institution building. Institutional reforms should ensure 'respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions'.[187] The objectives should be, *inter alia*, that public institutions adhere to the rule of law and the civilian control of military and security forces. The Inter-American Court touches upon this issue in one of its reparation measures ordering measures to ensure control of actions by all members of the security forces. The Inter-American Court, however, does not go into detail as to how this goal must be achieved.

Finally, the criminology models emphasise the role of civil society. Civil society must be able to act freely and have access to important and relevant documents to be able to function as a 'watchdog' and, thereby, as a constraint on enforced disappearances taking place. This function of civil society has not attracted the attention of the three supervisory bodies in considerations of non-repetition in enforced disappearance cases. However, access to information has been discussed by the regional Courts and is further discussed in Chapter 8 *infra*.

In summary, while the case law of the regional Courts mirrors the repressive measures suggested by the criminological models described in Chapter 4 *supra* as guarantees of non-repetition, other measures such as codes of conduct or stimulating civil society mentioned in criminology studies have not been included in the case law. On the other hand, the training of state officials and the planning of security operations are engrained as important obligations to curb human rights violations.

7.6 Concluding remarks

Chapter 2 *supra* signalled that the ICPPED embodies several important norms related to prevention. These norms operate at different levels: a duty to prevent in relation to the disappeared person, a duty to protect persons involved in the search and a duty to prevent beyond the specific case striving to prevent similar violations in the future. At the same time, Chapter 2 *supra* indicated the room for further interpretation and application of these norms by the CED. These 'gaps' mostly related to restrictions on communication, supervision and information when a person is detained, to the

186 Van Boven/Bassiouni Principles, Principle 23.
187 UN Updated Set of Principles to Combat Impunity, Principle 35.

duty to implement training programmes for state officials and to the provision of protection when persons are threatened as a result of their activities related to an enforced disappearance. The current chapter has addressed how the three supervisory bodies have dealt with these issues and to what extent their approaches are in line with the five main causes of victims' suffering as defined in Chapter 4 *supra*. In this respect, this chapter has argued that the case law does not always suffice and, accordingly, that soft law guidelines that have been developed within the UN might provide complementary guidance.

As a preliminary point, it is noteworthy that the examination of the case law demonstrated that the duty to prevent considerably overlaps with other duties, such as the duties to investigate, prosecute and punish. Criminal law and criminal prosecution, after all, are believed to have a deterrent effect. Also, a prompt and diligent investigation in the initial days is an essential tool to prevent an unacknowledged detention from becoming an enforced disappearance and to prevent further human rights violations from being committed to the detriment of the detained person. The overlap between these duties has as a consequence a somewhat artificial distinction between, on the one hand, the duty to prevent discussed in this chapter and, on the other, the duties to investigate, prosecute and punish discussed in Chapter 8 *infra*. The awareness that there is an overlap could result in a cross-fertilisation between these duties that brings the protection against enforced disappearance into line with and in direct response to the five main causes of victims' suffering. At the same time, the overlap warrants the harmonisation of these duties, which means that the norms discussed in this chapter have consequences for the norms discussed in Chapter 8 *infra* and vice versa.

The comparative analysis in this chapter demonstrated that the standards on prevention, on the basis of which state responsibility has been determined by the three human rights bodies, are to a great extent in line with the five main causes of victims' suffering. First of all, when there are indications that a person runs the risk of being subjected to enforced disappearance by state agents, states are to undertake immediate action. A failure to do so may engage the responsibility of the state. Similarly, states are not allowed to hinder relatives in their search for justice, to which the Inter-American Court has attached measures such a police presence around the person at risk. Secondly, the three human rights bodies have developed a tight network of safeguards surrounding arrest and detention. Importantly, the case law seems to support the fact that denying a detention is never permissible. The regional bodies' focus on custody records must also be commended. Thirdly, in respect of general prevention measures, the three human rights bodies have focussed on combating impunity. In addition, the training of officials in standards relevant to protection against enforced disappearance appears in all three systems. It is clear that such training must take place in a comprehensive manner and on a continual basis.

The content must include both treaties, as well as the case law which is relevant for enforced disappearance.

At the same time, the standards in the case law can be complemented and improved by taking into account the five main causes of victims' suffering. The first issue in which the five main causes may be of assistance is the obligation to take operational preventive measures when a person is at risk or to provide protection programmes in the situation where a relative is threatened. This chapter argued that states should have an adequate complaint procedure in place. Authorities that are independent from those that are suspected of being a threat should be in charge of providing the measures. Furthermore, it is important that the practical implementation of these measures is taken into account when determining state responsibility. Such measures should not only exist formally but must also attain the practical and desired result.

On the basis of the examination of the five main causes of victims' suffering, it is also argued in this chapter that the context must be taken into account when assessing whether the conditions for a lawful arrest were met when a person has disappeared. Furthermore, one of the conditions for permissible restrictions on the communication between detained persons and the outside world should be that the person is detained in a lawful manner. The same condition must apply for delaying the notification of the arrest. At any rate, restrictions must be exceptional and should never exceed a matter of days.

Thirdly, the information that should be kept in custody records and made available to relatives should include information on the health of the person, besides the arrest or detention itself, the place of detention and details regarding any possible transfers or release. The European Court's emphasis on the role of custody records in determining state responsibility must be commended.

A final point with respect to safeguards surrounding arrest and detention must be dedicated to the important role of an independent judiciary. An independent judge is often the only hope for locating the disappeared person. As such, the strict scrutiny of the efforts by the judiciary is to be commended. In accordance with the case law of the Inter-American Court, when the judiciary fails to exercise diligent efforts, the state should be held responsible

Lastly and finally, in respect of measures to generally prevent any (re)occurrence of enforced disappearance, the main causes of victims' suffering demonstrate the importance of the criminalisation of enforced disappearance in domestic law. The case law of the Inter-American Court shows that such a crime must be an autonomous offence, containing the minimum requirements of the definition in the IACFD. Regarding the human rights definition as a minimum opens the possibility that non-state actors are also included as possible perpetrators of the crime. Accordingly, the problem signalled by the UNWGEID that such inclusion may result in the

impunity of state authorities warrants close monitoring of the application of such definition. Besides these repressive measures, the standards on general prevention could be complemented with other measures such as codes of conduct and measures stimulating the role of civil society as a 'watchdog'.

Chapter 8
Determining State Responsibility Based on the Duties to Investigate, Prosecute, Punish and Provide Reparation

8.1 Introduction

Enforced disappearance intrinsically prompts a victim to rely on action by state authorities. The state's purpose to eliminate a person through keeping him or her outside the reach of outside scrutiny results in the typical lack of information being made available to the relatives. Denials of the act ensure secrecy and impunity which prevent information from being obtained about the crime without the assistance of the independent authorities. At the same time, the act of bringing perpetrators to justice and providing compensation for such crimes also falls within the exclusive power of the state. Hence, the response of the state authorities once an enforced disappearance has taken place is of the utmost importance to locate the person and to end his or her suffering and that of his or her relatives. The state obligations within the legal human rights framework that correspond to the necessary actions by the state authorities are essentially the duties to investigate, prosecute, punish and provide reparations.

Chapter 2 *supra* identified several interpretation conundrums in the ICPPED with respect to the duties to investigate, prosecute, punish and provide reparation. These conundrums concerned the nature of these obligations and the fine-tuning of concepts such as a 'thorough' and 'prompt' investigation and 'the right to know the truth'. Other questions that were raised are whether the use of military courts and amnesties are compatible with the ICPPED, whether there should be norms on how domestic courts should deal with evidence and what the obligation to cooperate between states exactly entails. Additionally, while statutes of limitation are permitted in limited circumstances, the conditions for imposing statutes of limitation should be further clarified. For instance, what is meant by 'effective remedies' during the term of limitation and from which moment is the term allowed to start running? The appropriate forms of punishment also need further clarification and so do the safeguards for imposing mitigated sentences. Lastly, the ICPPED leaves room for interpreting the scope and meaning of the obligation to award reparations to victims and the consequences of the obligation to determine the legal status of the disappeared person and his or her relatives.

This chapter examines whether and, if so, to what extent the HRC, the Inter-American Court and the European Court have elaborated these duties in their case law, and what content is given to them. Firstly, this chapter describes the legal basis of the duties to investigate, prosecute and punish. Secondly, it touches upon the

rationale behind engraining the duties to investigate, prosecute and punish in human rights protection. Thirdly, this chapter analyses the content of these duties as defined by the three supervisory human rights bodies. The rationale, scope and content of the duty to compensate form the basis of the subsequent section. Each section concludes with an evaluation of the strengths and limitations of the approaches of the three supervisory bodies in light of the five main causes of victims' suffering as defined in Chapter 4 *supra*.[1]

8.2 Legal basis of the duties to investigate, prosecute, punish and provide reparation

Neither the ICCPR, nor the ECHR or the ACHR specify explicitly the duties to investigate, prosecute, punish and compensate.[2] Rather their supervisory bodies have construed these obligations from the substantive rights laid down in these treaties.

The HRC derives from Article 2(3) ICCPR (the right to an effective remedy) a 'general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.'3 In case such investigations reveal 'certain violations' of the ICCPR, the state 'must ensure that those responsible are brought to justice.'[4] The wording 'certain violations' refers notably to violations recognised as criminal under either domestic or international law such as torture, arbitrary killings and enforced disappearance. A failure to prosecute, try and punish are thus breaches of Article 2(3) ICCPR. A violation of this right has been found to be to the detriment of the relatives in conjunction with Article 7 ICCPR (freedom from torture and other ill-treatment), as well as of the disappeared person in conjunction with Articles 7 and 9 (the right to liberty), as well as 16 ICCPR (the right to be recognised before the law).[5] Framing the obligations in this manner logically leads to the conclusion that the state owes these obligations to both the disappeared person and his or her relatives. The auxiliary nature of Article 2(3) ICCPR requires that the relatives are also found to be victims of the substantive human rights violations

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1 These five main causes are: (1) no trace of the disappeared person due to denials by the state authorities; (2) uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person; (3) *de facto* and *de jure* impunity; (4) an unsafe environment to carry out the search and other activities related to the enforced disappearance; and (5) obstacles for victims to continue their 'normal' life.

2 The exceptions to this are Article 5(5) ECHR and Article 9(5) ICCPR that provide for a right to compensation after an unlawful deprivation of liberty.

3 HRC, General Comment No. 31 [80] (2004), para. 15.

4 *Ibid.*, para. 18.

5 *Kimouche v. Algeria* HRC (2007), para. 7.10; *Madoui v. Algeria* HRC (2008), para. 7.9; *Boucherf v. Algeria* HRC 30 March 2006 (Comm. no. 1196/2003), para. 9.9; *El Abani v. Algeria* HRC (2010), para. 7.10.

protected by the ICCPR.[6] Additionally, this provision obliges states to make reparations, entailing at least appropriate compensation to individuals whose rights laid down in the ICCPR have been violated.[7] Other provisions from which the duty to investigate is derived are Articles 4(2) OP-1 and 14(3) ICCPR. The HRC has interpreted Article 4(2) OP-1 as implying a 'duty to investigate in good faith all allegations of violation of the Covenant made against it and its authorities.'[8] In exceptional cases, the HRC has derived from Article 14(3)(c) ICCPR (the right to be tried without undue delay) the obligation to investigate, as well as to prosecute criminally, try and punish those held responsible for enforced disappearances.[9] It is clear that enforced disappearance falls within the material scope of these duties.

In the first case brought before it, the Inter-American Court derived the duties to investigate, punish and compensate from the substantive articles of the ACHR in relation to Article 1(1) ACHR (the general duty to respect and ensure).[10] It did not refer to criminal prosecution as opposed to other forms of disciplinary action or punishment.[11] In subsequent case law, the Inter-American Court elaborated upon the content and scope of these duties predominantly within the context of Article 8 ACHR (the right to a fair trial) and Article 25 ACHR (the right to effective recourse).[12] Such an elaboration is embedded in the combination of these two Articles read together with Article 1(1) ACHR[13] and a broad interpretation given to the letter and the spirit of Article 8 ACHR.[14] The interpretation of these articles in enforced disappearance cases brought extra nuance to the manner in which states can choose to give effect to the obligation to bring the perpetrators to justice, including criminal prosecution

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6 *Aber v. Algeria* HRC (2007), paras. 7.8 and 9 (In the case *Aber v. Algeria*, the author had been temporarily subjected to enforced disappearance. In this case, the violation of an effective remedy and the corresponding obligation to institute criminal proceedings and to impose an appropriate punishment was held only to be a detriment to the author himself. These claims were not found with respect to his father and sister, alleged victims in the case, who were not considered victims of inhuman treatment).

7 HRC, General Comment No. 31 [80] (2004), para. 16.

8 *Bleier v. Uruguay* HRC (1982), para. 13.3.

9 *Bautista de Arellana v. Colombia* HRC (1995), para. 8.6.

10 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 166 (The facts of this case pertained to an enforced disappearance within the context of a systematic practice of torture, arbitrary executions and enforced disappearances). See also Chapter 3 subsection 3.3 *supra.*

11 Scharf (1996), p. 51.

12 *A contrario*, see *González et al. ('Cotton Field') v. Mexico* IACtHR (2009) (The Court shifted its approach and found procedural violations of the right to life and freedom from torture based on a failure to investigate, prosecute and punish).

13 *Durand and Ugarte v. Peru* IACtHR (2000), para. 130; *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), paras. 224-227.

14 *Blake v. Guatemala* IACtHR (1998), paras. 96 and 97.

and punishment.[15] The reason for requiring criminal law measures appears to lie in the nature of the rights violated by an enforced disappearance, namely rights such as the right to life and freedom from torture and other ill-treatment. In cases where this obligation is framed within the scope of Articles 8 and 25 ACHR, the Inter-American Court seems primarily to link this obligation to the rights of relatives rather than to the rights of the disappeared persons themselves.[16] Still, this approach does not necessarily exclude the disappeared persons from the scope of these duties. For instance, in the *Serrano-Cruz Sisters Case*, the Inter-American Court found a violation of Articles 8 and 25 in relation to Article 1(1) ACHR to the detriment of both the disappeared sisters and of their relatives. What might have led the Inter-American Court to conclude a violation for both types of victims in this case is that the possibility existed that the sisters were still alive at the time of the judgment.[17] On the other hand, a violation of Article 25 has also been found to the detriment of victims that were killed after several hours.[18]

The European Court has rooted the duty to conduct an investigation that is 'capable of leading to the identification and punishment of those responsible' and the duty to compensate in Article 13 ECHR (the right to an effective remedy). Such duties emanate from this right in cases where there is an arguable claim of a violation of Articles 2 and 3 ECHR (respectively the right to life and freedom from torture or other ill-treatment).[19] The wording of the obligations derived from Article 13 ECHR focuses on the investigation; the authorities must carry out an investigation *that is capable of* leading to the prosecution and punishment of those responsible. Hence, it lacks a clearly stated obligation to prosecute and punish. Another legal basis can be found in the positive duty read into Articles 2 and 3 ECHR also obliging states to investigate alleged violations of these rights.[20] In the first disappearance case, the European Court rejected a claim related to this procedural limb of Article 2 ECHR because no concrete evidence of a fatal shooting was available which could bring that obligation into play.[21] However, in later cases the European Court accepted claims of this procedural obligation based on a presumption of death. The material scope of

15 *La Cantuta v. Peru* IACtHR (2006), para. 149. See also *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 64 (In this case the Court stated that the next of kin have a right to expect that the authorities investigate effectively and that they commence proceedings against the alleged perpetrators and that they will impose appropriate penalties).

16 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 212; *La Cantuta v. Peru* IACtHR (2006), paras. 145 and 161.

17 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), paras. 106, 130 and 131.

18 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), paras. 235 and 236.

19 *Kurt v. Turkey* ECtHR (1998), para. 140. See also *Timurtaş v. Turkey* ECtHR (2000), para. 111.

20 *E.g. Baysayeva v. Russia* ECtHR (2007), paras. 124-130; *Timurtaş v. Turkey* ECtHR (2000), paras. 87-90.

21 *Kurt v. Turkey* ECtHR (1998), para. 107.

this procedural duty extends to cases in which state agents were the perpetrators of the enforced disappearance and to cases in which the state cannot be held responsible for the disappearance itself.[22]

Within the meaning of Article 2 ECHR, the European Court has emphasised both the aim of arriving at the truth and the criminal nature of such an investigation.[23] Explicit mention of the duty to prosecute remained absent from the interpretation of Article 2 ECHR until the *Varnava Case* was handed down in 2009. In this case, the disappearances occurred well before the crucial date after which the state could be held responsible under the individual complaint procedure. Nonetheless, the procedural obligation corresponding to Article 2 ECHR drew the violation within the competence of the European Court to decide on the matter.[24] The Grand Chamber stated in respect of the preliminary objection *ratione temporis*:

> [...] Where disappearances in life-threatening circumstances are concerned, the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain.[25]

When considering Article 2 ECHR, the Grand Chamber confirmed that the investigation must also be effective in the sense that it is capable of leading to the determination of whether the death was caused unlawfully and, if so, to the identification and punishment of those responsible.[26]

Since procedural violations of Article 2 ECHR are found to be to the detriment of the disappeared person, the state owes this obligation to him or her. Obligations owed to the relatives seem to flow from Article 13 ECHR. The European Court has repeatedly stated that the obligation under Article 13 ECHR is broader than the obligation derived from Articles 2 and 5 ECHR.[27] However, it must be noted that the Court does not always specify with whose rights this obligation is linked, that is to say the disappeared person or the relatives. A final legal basis from which the duty to investigate is derived is Article 5 ECHR (the right to liberty): states owe an obligation 'to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.'[28] The right to

22 An example of the latter type of cases is *Tahsin Acar v. Turkey* ECtHR [GC] (2004).
23 *Baysayeva v. Russia* ECtHR (2007), paras. 127 and 130.
24 See Chapter 5 subsection 5.3 *supra*.
25 *Varnava a.o. v. Turkey* ECtHR [GC] (2009), para. 145.
26 *Ibid*., para. 191.
27 *Kurt v. Turkey* ECtHR (1998), para. 140; *Mahmut Kaya v. Turkey* ECtHR (2000), para. 126.
28 *Kurt v. Turkey* ECtHR (1998), para. 124; *Bazorkina v. Russia* ECtHR (2006), para. 146.

compensation as embedded in Article 5(5) ECHR has mostly been considered as a *lex specialis* of Article 13 ECHR. Consequently, the European Court has generally addressed the issue of compensation under the latter provision in cases concerning unlawful detention.[29]

The duties to investigate, prosecute, punish and prove reparation are often intertwined and are definitely interrelated. Consequently, in the following sections the first three duties are discussed together while the last obligation, the duty to provide reparation, is discussed separately.

8.3 Justifications for the duties to investigate, prosecute and punish

8.3.1 Locating the disappeared person

The first rationale behind the duty to investigate found in the case law of the three supervisory bodies is that a prompt investigation into a well-founded complaint of an enforced disappearance contributes to the likelihood of locating the disappeared person. A prompt investigation is thereby instrumental to ending the violation and preventing its continuation.[30] The clearest reference to this justification appears in the case law of the European Court. For instance, in *Baysayeva v. Russia* the European Court considered that the inaction of the law-enforcement authorities after having received well-established complaints that the victim was being unlawfully detained by state agents, and was consequently missing, contributed to the likelihood of his disappearance. Moreover, the European Court considered that the apathy of the authorities in conducting a prompt and thorough investigation into the disappearance constituted a failure to take effective measures to safeguard against the risk of disappearance.[31] Similarly, the HRC has recognised this rationale behind the duty to investigate in respect to the disappearance of a minor[32] and, more implicitly but more commonly, as deriving from Article 16 ICCPR (the right to recognition before the law). In respect of Article 16 ICCPR, the failure to conduct an effective investigation into an enforced disappearance places the disappeared person outside the protection of the law, which is a clear violation of this article.[33] The rationale of locating the

29 *Brannigan and McBride v. the United Kingdom* ECtHR [GC] (1993), para. 76.

30 The rationale of locating the person responds to the need to end the enforced disappearance. As this human rights violation is a continuous violation, the crime is likely to be prolonged without a thorough investigation. An investigation in the first days after a person has been reported missing may be essential to prevent an enforced disappearance. As such, this rationale is intrinsically connected with the duty to prevent.

31 *Baysayeva v. Russia* ECtHR (2007), para. 147. See also *Bazorkina v. Russia* ECtHR (2006) para. 148; *Sangariyeva a.o. v. Russia* ECtHR (2008), paras. 79 and 81.

32 *Laureano v. Peru* HRC (1996), para. 8.7.

33 *Kimouche v. Algeria* HRC (2007), para. 7.9; *Grioua v. Algeria* HRC (2007), para. 7.9.

disappeared person is also one of the driving forces behind the emphasis of the Inter-American Court on *habeas corpus* proceedings and related investigations.[34]

8.3.2 Revealing the truth about the whereabouts or fate of the disappeared person

A second rationale underlying the duty to investigate lies in the uncertainty surrounding an enforced disappearance and the accompanying feelings of anxiety experienced by relatives. Both the European Court and the Inter-American Court have taken into account inaction and obstruction with regard to the investigation of complaints and the denials by the authorities as a determinative factor for finding inhuman treatment of relatives.[35] Also, both Courts have referred to the truth about the whereabouts or fate of the person in question as an integral part of the investigation.[36] The Inter-American Court has connected truth finding not only to the duty to investigate, but also to the duty to prosecute. In this regard, criminal proceedings may shed light on important aspects of the truth. The HRC, on the other hand, has taken a more implicit position regarding the conduct of the authorities in the investigation and the impact on relatives. It generally states that the anguish and stress caused by the disappearance and the continued uncertainty as to the fate of the disappeared person automatically constitutes a violation of Article 7 ICCPR (freedom from torture and other ill-treatment) to the detriment of relatives.[37] Hence, all three supervisory bodies recognise to some extent this rationale behind the duty to investigate and thus to establish the truth, and the exacerbation of the suffering of the relatives as a result of the failure to fulfil this duty.[38]

8.3.3 Combating impunity and reinforcement of the rule of law

The third rationale behind the duty to investigate that can be discerned from the case law is that a criminal investigation is an essential step in bringing the perpetrators to justice, and thereby, combating impunity. The interrelationship between the duties to investigate, prosecute and punish has prompted the Inter-American Court to capture

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34 See Chapter 7 subsection 4.2 *supra*.

35 *Kurt v. Turkey* ECtHR (1998), paras. 133 and 134; *Timurtaş v. Turkey* ECtHR (2000), paras. 95-97; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 165.

36 *Bazorkina v. Russia* ECtHR (2006), para. 121; *Baysayeva v. Russia* ECtHR (2007), para. 122; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), paras. 201 and 212; *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 177; *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 226; *La Cantuta v. Peru* IACtHR (2006), para. 157.

37 *María del Carmen Almeida de Quinteros et al. v. Uruguay* HRC (1983), para.14; *Grioua v. Algeria* HRC (2007), para. 7.7; *Madoui v. Algeria* HRC (2008), para. 7.5; *Kimouche v. Algeria* HRC (2007), para. 7.7; *Sharma v. Nepal* HRC (2008), para. 7.9.

38 See section 8.4 below.

them in one concept; the duty to combat impunity. The Inter-American Court, as the only one of its counterparts, provides a definition of impunity, defining this concept as 'the lack of a complete investigation, persecution, capture, prosecution, and conviction of those responsible for the violations of the rights protected by the American Convention.'[39]

This rationale is based on the view that the enjoyment of impunity contributes to the recurrence of violations and destroys public confidence in the rule of law. In this respect, combating impunity goes beyond the specific facts of the case and pertains to a broader societal interest, relating to non-repetition of enforced disappearance and the reinforcement of the rule of law.[40] As such, the avoidance of recurrence and the confirmation of the rule of law connect the duty to investigate with the duties to prevent, prosecute and punish. In addition, the Inter-American Court has related impunity to the situation of the victim, stating that impunity leads to the total defencelessness of the victim and the relatives.[41]

The rationale of combating impunity for crimes committed by state agents also applies to crimes committed by non-state actors. In respect of both types of crimes, the European Court has stated that the criminal provisions, which should be in place to deter the commission of offences against individuals,[42] must be 'backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.'[43] This consideration also applies to cases where the perpetrators are unknown.[44] Similarly, the Inter-American Court considers that this rationale also applies to illegal acts committed by non-state actors; the failure of the judiciary

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39 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 211. See also *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 60. *Cf.* the UN Updated Set of Principles to Combat Impunity define this concept as '[…] the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.'

40 HRC, General Comment No. 31 [80] (2004), para. 18; *Heliodoro-Portugal v. Panama* IACtHR (2008), para. 189; *Goiburú et al. v. Paraguay* IACtHR (2006), para. 92; *Tahsin Acar v. Turkey* ECtHR [GC] (2004), para. 224; *McKerr v. the United Kingdom* ECtHR 4 May 2001 (Appl. no. 28883/95), para. 114 (not an enforced disappearance case); *Bazorkina v. Russia* ECtHR (2006), para. 119.

41 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 139; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 211; *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 60.

42 *Osman v. the United Kingdom* ECtHR [GC] (1998), para. 115.

43 *Mahmut Kaya v. Turkey* ECtHR (2000), para. 85; *Osmanoğlu v. Turkey* ECtHR (2008), para. 72. See also the following two cases that are not enforced disappearance cases: *Nilkolova and Velichkova v. Bulgaria* ECtHR (2007), para. 57(b); *Mastromatteo v. Italy* ECtHR [GC] (2002), paras. 67 and 89.

44 *Tahsin Acar v. Turkey* ECtHR [GC] (2004), para. 226.

to provide an adequate response to serious crimes leads to the creation of 'fertile ground', allowing for the repetition of such crimes.[45]

8.3.4 Investigation and finding of guilt as prerequisites for administrative remedies and compensation

A last and final rationale for obliging states to conduct an investigation can be found in the possible necessity of their outcomes for other remedies, such as administrative remedies and compensation. This rationale became relevant in *Kurt v. Turkey*, in which the European Court stated that the superficiality with which the public prosecutor treated the persistent complaint of the applicant did not comply with the duty to provide a remedy and was 'tantamount to undermining the effectiveness of any other remedies that may have existed'.[46] Also, the Inter-American Commission argued in the *Blake Case* that the relatives had no access to compensation due to the delays in the investigation of the facts and the judicial proceedings.[47] While the possibility to institute proceedings for compensation was not necessarily linked to criminal proceedings, such proceedings had to be filed against a specific person or state organ, which was clearly impaired by the inadequate investigation.

8.3.5 Comparative remarks in light of the experiences of victims

The case law of the HRC, the Inter-American Court and the European Court reveal four rationales for the duty to investigate, two of which also constitute a justification for the duties to prosecute and punish. An effective and prompt investigation is an indispensable tool to locate a person in the first few days and crucial to ending the violation. In addition, the suffering of the relatives in not knowing the whereabouts and the fate of the disappeared person is another justification for the duty to investigate. These two rationales obviously relate to the first main cause of suffering (no trace of the disappeared person) and the second main cause (uncooperative action or no action at all on the part of the state authorities). Furthermore, effective investigation, prosecution and punishment are viewed as important deterrents for further human rights violations and the affirmation of the rule of law.[48] As such, this

45 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 149.

46 *Kurt v. Turkey* ECtHR (1998), para. 141 (The European Court referred to its finding under Article 5 ECHR).

47 *Blake v. Guatemala* IACtHR (1998), para. 91.

48 This rationale also pertinently appears in resolutions of the UNComHR, *cf.* UNComHR, 'Enforced or involuntary disappearances' (2004), para. 5(c). See also UNWGEID, Annual report 2004, para. 377. See also Chapter 7 *supra* on the duty to prevent and Chapter 4 subsection 5.4 *supra*, which illustrate that the deterrent effect of repressive measures is highly disputed. However, the criminological models referred to in Chapter 4 show that state agents are susceptible to this deterrent effect.

rationale corresponds with the third (*de facto* and *de jure* impunity) and the fourth main causes of suffering (unsafe environment for relatives). In this respect, the Inter-American Court explicitly links the right to truth to the duty to prosecute. Lastly, the regional Courts have recognised that an effective investigation may be a prerequisite for other remedies, such as administrative remedies or civil remedies for obtaining compensation. Such options are relevant for restoring the possibilities of relatives and survivors to continue their lives as normally as possible (the fifth main cause of victims' suffering).

8.4 The duty to investigate

The justifications for the duties to investigate, prosecute and punish lead to three relevant purposes with which an investigation should be carried out: locating the disappeared person, establishing the truth and identifying and punishing the perpetrators. The investigation for these three purposes overlaps significantly, which makes it difficult to unravel the failings in respect of each kind of investigation in the case law.[49] Consequently, this section concentrates on general considerations as a response to the failings in the investigation. The subsequent section further elaborates on the criminal investigations in relation to the duty to prosecute and to punish.

8.4.1 The Human Rights Committee

The views of the HRC unequivocally embed the duty to investigate the fate and whereabouts of the disappeared person, to release him or her immediately if still alive, and to provide the appropriate information emerging from the investigation.[50] In fact, a failure to investigate allegations of violations of the ICCPR could, in and of itself, give rise to a separate breach of the ICCPR.[51] Nevertheless, the auxiliary nature of Article 2(3) ICCPR has barred the competence of the HRC to consider

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49 The European Court has considered the duty to investigate under Articles 2, 5 and 13 ECHR. The Inter-American Court has mostly considered Articles 8 and 25 ACHR together.

50 *Kimouche v. Algeria* HRC (2007), para. 9 (stating that '[i]n accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including a thorough and effective investigation into the disappearance and fate of their son, his immediate release if he is still alive, and the appropriate information emerging from its investigation, and to ensure that the authors and the family receive adequate reparation, including in the form of compensation. While the Covenant does not give individuals the right to demand the criminal prosecution of another person, the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and infringements of the right to life, but also to prosecute, try and punish the culprits. The State party is therefore also under an obligation to prosecute, try and punish those held responsible for such violations.').

51 HRC, General Comment No. 31 [80] (2004), para. 18.

whether the authorities adequately investigated an enforced disappearance. On the basis of a declaration of the respondent state upon the ratification of the OP-1, the HRC held in *S.E. v. Argentina* that the crime of the actual enforced disappearance had occurred before the crucial date after which the respondent state could be held responsible for its actions under the individual complaints procedure. Consequently, the HRC declared the complaint inadmissible *ratione temporis*. Still, it included in the decision the following paragraph:

> The Committee finds it necessary to remind the State party that it is under an obligation, in respect of violations occurring or continuing after the entry into force of the Covenant, thoroughly to investigate alleged violations and to provide remedies where applicable, for victims or their dependants.[52]

Hence, in spite of the continuous nature of an enforced disappearance,[53] procedural matters can lead to a lack of competence on the part of the HRC. This does not mean, however, that the respondent state is discharged from its obligation to investigate. In its views on enforced disappearance, the HRC has indicated several general criteria in respect of the investigation. The continuous nature of the duty to investigate can be derived from the HRC's view that the issuing of death certificates does not absolve the state of the duty to investigate the facts.[54] States that are found responsible for an enforced disappearance are also under an obligation to provide adequate information resulting from the investigation into the disappearance and, in the case of death, to

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52 *S.E. v. Argentina* HRC (1990), para. 5.4 and the individual opinion of Mr. Bertil Wennergren (clarifying that '[...] if a killing before the 'crucial date' is merely one hypothesis among several others, the case law of the Committee clearly indicates that under article 2 of the Covenant the State part is under a duty to carry out a meaningful investigation. Only when it is unimaginable that any act, fact or situation which would constitute a violation of the Covenant may have continued to exist or have occurred subsequent to the 'crucial date', such an obligation does not arise.').

53 See Chapter 5 section 5 *supra.*

54 *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 7.3 (stating that '[t]he Committee observes that on 20 June 2009, the family was provided with Milhoud Ahmed Hussein Bashasha's death certificate, without any explanation as to the cause or the exact place of his death or any information on any investigations undertaken by the State party. In the circumstances, the Committee finds that the right to life enshrined in article 6 has been violated by the State party.'). See also *S.E. v. Argentina* HRC (1990), individual opinion of Mr. Bertil Wennergren (stating that '[i]t should be added that a declaration under domestic civil law in respect of a disappeared person's death does not set aside a State party's obligation under the Covenant. Domestic civil law provisions cannot be given precedence over international legal obligations. Whatever the length and thoroughness be deemed necessary for an investigation to satisfy the requirements under the Covenant is to be considered case by case, but an investigation must under all circumstances be conducted fairly, objectively and impartially. Any negligence, suppression of evidence or other irregularity jeopardizing the outcome must be regarded as a violation of the obligations under article 2 of the Covenant, in conjunction with a relevant material article. And once an investigation has been closed due to lack of adequate results, it must be reopened if new and pertinent information comes to light.').

return the remains of the disappeared person. These obligations are derived from Article 2(3) ICCPR (an effective remedy).[55] The HRC has not further developed the criteria that should be complied with when conducting an investigation. Nonetheless, the HRC has urged the creation of central registers in which all reported cases of disappearances are recorded as well as the day-to-day action taken to retrace the disappeared persons.[56]

8.4.2 The Inter-American Court of Human Rights

Recognising that in certain circumstances carrying out an investigation may not be without difficulty, the Inter-American Court has stated that the ACHR is not breached merely because the investigation has not produced a satisfactory result.[57] What matters is whether the investigation has been conducted in compliance with certain requirements.

The overarching requirement seems to be that the investigation must have been undertaken in a serious manner and not just as a formality that is bound to be ineffective. The Court further clarifies that the term 'serious manner' should be understood with reference to three separate criteria, namely that the investigation must: (1) have an objective; (2) be initiated *ex officio* by the state; and (3) continue as long as the fate of the victim remains unknown.[58] In relation to the first criterion, the objectives of the investigation correspond with the rationales behind the investigations, *i.e.* locating the disappeared person, establishing the truth and combating impunity. The authorities must use all means at their disposal to discover the fate of the victim and, if an execution has taken place, the location of his or her remains. The state authorities are to inform relatives of the results of these efforts. This obligation exists even if the perpetrators, for some exceptional reason, cannot be legally punished.[59] Hence, states have a duty to conduct an investigation independent of the purpose to prosecute in order to establish the truth.[60] Nevertheless, the investigation must also have the

55 *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 9. See also HRC, Concluding observations Algeria (2007), para. 12 (urging the government to clarify and resolve each enforced disappearance case and '[i]n the case of deceased persons, the State party should take all necessary measures to clarify the place and cause of death, together with the place of burial, and undertake to return the bodies of deceased persons to their families;').

56 HRC, Concluding observations Algeria (1998), para. 10.

57 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 177.

58 *Ibid.*, paras. 177, 180 and 181. See also *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 61; *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 144; *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 212; *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 226; *Blake v. Guatemala* IACtHR (1998), para. 226.

59 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 181; *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 143.

60 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 177.

objective of capturing, prosecuting and punishing the perpetrators. The second criterion means that the state authorities must initiate an investigation independent of initiatives taken by victims or their relatives. Equally, such investigations must not depend on proof presented by such persons. In this sense, state authorities that have received indications of an enforced disappearance must report those acts so that action can be taken.[61] The third criterion requires the investigation to continue until the fate of the disappeared person is known. The continuing investigation appears to mean that this duty is only discharged with the release of the disappeared person or the discovery and return of his or her remains. An important aspect of this latter obligation is that the remains are respected and handed over to the family so that they can bury them according to the relatives' customs and beliefs.[62]

Apart from the three criteria as indicators of the seriousness of the investigation, the Inter-American Court has introduced a due diligence requirement.[63] What the Inter-American Court understands as falling within the concept of 'due diligence' varies on a case-by-case basis. The common aspects considered include whether the investigation and criminal proceedings were conducted within a reasonable time and whether they were effective. The term 'effective' obviously depends on the purpose of the investigation. Generally, this requirement appears to include whether the proceedings ensured 'the rights of access to justice, to the truth about the facts and to the reparation of the next of kin.'[64] The investigative steps and the collection of evidence have also been examined in this respect.[65] In addition, in cases where the body of the disappeared person was eventually found, the Court referred to the 'guiding principles' for conducting an investigation laid down in the United Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, which include:

> (a) identify the victim; (b) recover and preserve the probative material related to the death to contribute to any possible criminal investigation into those responsible; (c) identify possible witnesses and obtain their statements in relation to the death under investigation; (d) determine the cause, method, place and moment of death, as well any pattern or practice that could have caused the death, and (e) distinguish between natural death, accidental death, suicide and murder. In addition, the scene of the

61 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), para. 108.

62 A.A. Cançado Trindade, 'The right to cultural identity in the evolving jurisprudential construction of the Inter-American Court of Human Rights', in: S. Yee & J.Y. Morin, (eds.), *Multiculturalism and International Law* (Leiden: Koninklijke Brill N.V. 2009) pp. 477-499, at p. 483 (referring to the reparations judgment in *Bámaca-Velásquez v. Guatemala*).

63 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 65 (This due diligence requirement applies to criminal proceedings as well as *habeas corpus* proceedings).

64 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 170.

65 See Chapter 7 subsection 4.2 *supra* for a discussion of the effectiveness of the *habeas corpus* proceedings and subsection 8.6 below for the effectiveness of criminal investigations.

> crime must be searched exhaustively, autopsies carried out and human remains examined rigorously by competent professionals using the most appropriate procedures.[66]

The legal status of these guidelines within the UN is soft law and, therefore, not legally binding. The Inter-American Court used them to define 'guiding principles that should be observed' when there are indications that the killing of a person may be due to an arbitrary execution. In the *Juan Humberto-Sánchez Case*, the Inter-American Court concluded that the investigation failed to satisfy all these measures.[67]

It is also clear that the state agents that carry out the investigation must be independent and impartial.[68] An unusual example of a failure to observe the impartiality of the investigating authorities appeared in the *Serrano-Cruz Sisters Case*. The domestic proceedings ran simultaneously with proceedings before the Inter-American Court in respect of the same case. The Court ruled that the impartiality of the investigating authorities was not sufficiently guaranteed because the prosecutor who was involved in the case at the domestic level was also involved in the defence of the respondent state at the international level.[69]

Victim participation in the proceedings has also been included as an important requirement for effectiveness. The Inter-American Court considered that 'victims of human rights violations or their next of kin should have substantial possibilities of being heard and should be able to act in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek due reparation.'[70] They should also be able to present complaints, evidence or other information in criminal proceedings with the aim to establish the truth.[71]

In summary, the investigation must be conducted with the purpose of discovering the fate or whereabouts of the disappeared person, establishing the truth and prosecuting and punishing the perpetrators. All in all, the investigation, prosecution and punishment should be conducted in a serious manner and with due diligence by independent and impartial bodies using all available means. The due

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66 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 177.

67 *Juan Humberto Sánchez v. Honduras* IACtHR (2003), para. 127 (referring to theUnited Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, Doc. E/ST/CSDHA/12 (1991)).

68 *La Cantuta v. Peru* IACtHR (2006), para. 110.

69 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 103 (The prosecutor had accompanied the state agent representing the respondent state before the Inter-American Court on a visit to one of the potential witnesses. The Inter-American Court interpreted this behaviour as involvement in the defence of the respondent state).

70 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 227. See also *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 144; *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 63. This obligation is derived from Article 8 ACHR.

71 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), para. 139.

diligence requirement entails that the investigation and proceedings must have been conducted within a reasonable time and that they were effective. The investigation must be initiated *ex officio*, but relatives should be involved during all stages of the proceedings and informed of the progress.

8.4.3 The European Court of Human Rights

The conditions for an adequate investigation in enforced disappearance cases under the ECHR have mostly been elaborated within the ambit of Article 2 ECHR (the right to life).[72] The obligation to protect life under Article 2 ECHR, read in conjunction with the general duty under Article 1 ECHR, 'requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.'[73]

In general, the form which an investigation must take depends on the circumstances of each case. Nonetheless, several conditions are used as indicators of whether the investigation was 'effective'. These requirements do not seem to be specific to enforced disappearance cases, but apply to all cases of unlawful killings where allegedly state agents are involved. Whereas they also apply in cases where non-state actors are the perpetrators, the investigation obligation is particularly stringent where state agents are allegedly at fault; specific requirements as to the effectiveness of the investigation may apply.[74] It must be noted, however, that the cases in which the applicants complain of an enforced disappearance all show allegations of state involvement, even where ultimately the European Court could not establish such involvement.

The conditions set out by the European Court mirror to a large extent the requirements set out by the Inter-American Court. First of all, the authorities must act of their own motion once the matter has come to their attention. They cannot rely on the initiatives of the next of kin either to lodge a formal complaint or to propose a certain line of inquiry.[75]

Secondly, the persons responsible for the investigation and the ones who carry out that investigation must be independent from those allegedly involved in the

72 Van Dijk, Van Hoof, Van Rijn & Zwaak (2006), p. 411 (demonstrating that the procedural obligation that flows from Article 3 ECHR is largely similar to the procedural obligation under Article 2 ECHR).

73 *Timurtaş v. Turkey* ECtHR (2000), para. 87.

74 *Tahsin Acar v. Turkey* ECtHR [GC] (2004), para. 220 (In this case, the European Court ruled that the state could not be held responsible for the disappearance of the victim).

75 *Ibid*., para. 221. See also *Ergi v. Turkey* ECtHR (1998), para. 83 (concerning the killing of the applicant's sister in a clash between security forces and the PKK).

events. Independence not only means the absence of any hierarchical or institutional structure 'but also a practical independence'.[76]

Thirdly, the investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible. This obligation is not one of result, but of means. This signifies that the authorities must have taken the reasonable steps available to them to secure the evidence concerning the disappearance and to have carried out the investigation with due diligence. In this sense, 'any deficiency in the investigation which undermines its ability to identify the perpetrator(s) will risk falling foul of this standard'.[77] Additionally, the investigation must constitute a serious attempt to find out what had happened to the disappeared person.[78] The criminal investigation and subsequent actions may be one of means; the European Court has, like the Inter-American Court, considered that Article 2 ECHR entails a continuing obligation to account for the whereabouts and fate of disappeared persons.[79]

The case law on enforced disappearance shows recurrent flaws in the investigation that rendered the investigation ineffective. Failures by the public prosecutor have in particular come to light, including: the length of time before an actual investigation was initiated and witness statements were taken; the length of time before statements were taken from the alleged perpetrators or inquiries by police officers on duty at the time; inadequate questions put to the witnesses; a failure by the authorities to consider all relevant information; the failure of the public prosecutor to make any serious attempts to inspect the custody records and to visit the detention places himself;[80] sole reliance on the statements of police officers;[81] decisions of non-jurisdiction and the lack of securing evidence;[82] and delays through repeatedly adjourning and reopening investigations.[83] A relevant consideration concerning jurisdictional issues was made in the case *Ahmet Özkan v. Turkey* (a case concerning the inhuman and degrading treatment of villagers). The European Court considered under Article 3 ECHR that when a prosecutor, confronted with information on inhuman treatment, is not him/herself competent to pursue an investigation, he or she should bring the information to the attention of those authorities that are competent in the matter.[84]

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76 *Tahsin Acar v. Turkey* ECtHR [GC] (2004), para. 221.
77 *Ibid*., paras. 221-223.
78 *Timurtaş v. Turkey* ECtHR (2000), para. 88.
79 *Varnava a.o. v. Turkey* ECtHR [GC] (2009), para. 186.
80 *Timurtaş v. Turkey* ECtHR (2000), para. 89. See also *Mahmut Kaya v. Turkey* ECtHR (2000), para. 104.
81 *Ergi v. Turkey* ECtHR (1998), para. 83.
82 *Mahmut Kaya v. Turkey* ECtHR (2000), paras. 24-52 and 104.
83 *Baysayeva v. Russia* ECtHR (2007), para. 129.
84 *Ahmet Özkan a.o. v. Turkey* ECtHR 6 April 2004 (Appl. no. 21689/93), para. 359.

Fourthly, an investigation must be carried out promptly and with reasonable expedition. With respect to locating the disappeared person, the European Court has recognised that investigating measures in the first few days after the disappearance are essential. The circumstances in which enforced disappearances have taken place have caused respondent governments to reply by highlighting the difficult situation which they are in. Not only is it a frequently heard reply by governments that the person has disappeared because he or she has joined the 'terrorists',[85] but also the circumstances in a conflict zone have prompted governments to raise before the Court the difficulties in the investigation of complaints. The Russian government, for instance, has referred to difficulties related to the obstacles in locating witnesses, the constant threats and attacks that had hampered the work of the public prosecutors' office, and the attacks on several buildings of the public prosecutors' office as a result of which evidence and documents had been destroyed.[86] The Turkish government has also referred to the difficulties resulting from a situation of conflict due to terrorist activities. For instance, in *Koku v. Turkey* the government made extensive references to the threat posed by terrorist activities against the Turkish state, mentioning that unidentified killings, kidnappings and enforced disappearances were common in situations of terrorism.[87] It alleged that even while having to deal with this situation, the authorities had investigated each crime and identified the perpetrators.[88] The Court again acknowledged the difficulties in a conflict situation, but did not accept any significant delays given the seriousness of the crime, in particular in the first few days after the notification to the authorities by the relatives.

Finally, the investigation and proceedings must have sufficient elements of public scrutiny. Whereas the requisite degree of public scrutiny may vary in each case, at the very least the victim's next of kin 'must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.'[89] The inability to access the case file was one of the considerations by the Court to conclude a violation of the procedural aspect of Article 2 ECHR in a case where the applicant had lost her son during an operation by the security forces. In considering whether the investigation was adequate, the European Court noted:

> […] lastly, that during the administrative investigation the case file was inaccessible to the victim's close relatives, who had no means of learning what was in it (see paragraph 15 above). The Supreme Administrative Court ruled on the decision of 15 August 1991 on the sole basis of the papers in the case, and this part of

85 *Koku v. Turkey* ECtHR 31 May 2005 (Appl. no. 27305/95), para. 46; *Kurt v. Turkey* ECtHR (1998), paras. 40, 41 and 87; *Timurtaş v. Turkey* ECtHR (2000), para. 38.
86 *Bazorkina v. Russia* ECtHR (2006), para. 116.
87 See also *Mahmut Kaya v. Turkey* ECtHR (2000), para. 83.
88 *Koku v. Turkey* ECtHR (2005), para. 124.
89 *Tahsin Acar v. Turkey* ECtHR [GC] (2004), paras. 224 and 225.

> the proceedings was likewise inaccessible to the victim's relatives. Nor was the decision of 15 August 1991 served on the applicant's lawyer, with the result that the applicant was deprived of the possibility of herself appealing to the Supreme Administrative Court.[90]

The importance of access to the case file was confirmed in the case *Tsechoyev v. Russia* in which the Court considered that two relatives had had access to all the major documents of the case file, which complied with the minimum standard of Article 2 ECHR.[91]

8.4.4 Comparative remarks in light of the experiences of victims

In dealing with enforced disappearance cases, the three human rights bodies have been presented with several obstacles that the applicants, relatives in the great majority of cases, encountered as a result of the enforced disappearance. Primarily, the disappeared person is in the complete control of the authorities, as represented by the first main cause of victims' suffering (no trace of the disappeared person due to denials by the state authorities). Since the circumstances surrounding the disappearance are cloaked in secrecy and only the authorities have the key, relatives are almost entirely dependent on the search capacities of the state authorities to locate the person concerned. Moreover, the complexity of the act in terms of time and place make it difficult for relatives to trace the disappeared person without the search efforts initiated by the state. However, the need for the cooperation of the state authorities starkly contrasts with the second main cause of victims' suffering, *i.e.* uncooperative and offensive conduct, or no conduct at all, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person. Denials of the detention by the authorities in response to inquiries by relatives have significant consequences on the launching of an investigation. In denying the act altogether, the most important leads that can be followed begin to evaporate. As a result, in many cases the investigation reaches a stalemate at a very early stage. As such, the denials and the unwillingness of the authorities to act not only lead to significant impediments to find the disappeared person but also to the *de facto* impunity of the perpetrators (the third main cause of victims' suffering). Even if an investigation is launched, such investigations mostly fall foul of any diligence and are branded by significant delays and inadequate dealings with evidence. All in all, denials, an unwillingness to cooperate in the search and threats harm all those concerned; the disappeared person remains out of sight to the outside world and the relatives continue to suffer. As a

90 *Oğur v. Turkey* ECtHR [GC] 20 May 1999 (Appl. no. 21594/93), para. 92
91 *Tsechoyev v. Russia* ECtHR 15 March 2011 (Appl. no. 39358/05), para. 149.

result, they are hindered in continuing with their 'normal' life (the fifth main cause of victims' suffering).

In light of the above considerations, the purposes of the investigation as promulgated by the regional Courts can be commended. The investigation must be aimed at locating the disappeared person and at bringing the perpetrators to justice. The Inter-American Court has most explicitly also linked the purpose of the investigation to discovering the truth. While these are proclaimed to be duties of means, there are good reasons to assert that the duty to investigate with the aim of establishing the whereabouts or fate of the disappeared person has evolved and should now be considered to also include a result-oriented component. This obligation, after all, is considered by the three human rights bodies to be a continuous obligation until the fate and whereabouts of the disappeared person are established. Additionally, while the investigations for these purposes may overlap, the purposes are separate requirements. As such, when prosecutions and punishment are rendered legally or factually impossible, the state should still have the obligation to investigate and to disclose the facts.

Generally, the criteria in the regional Courts' case law in relation to adequate and effective investigations correlate with each other. The search must be initiated *ex officio* and irrespective of initiatives or evidence adduced by relatives. The investigation must be carried out with due diligence and all available means should be employed. The regional Courts' emphasis on unexplainable and unreasonable delays that render the investigation ineffective is in line with the second main cause of victims' suffering, which in turn affects the other main causes. Furthermore, the requirement that relatives should be involved in the search and informed of the progress of the investigation responds to many of the problems that relatives encounter. It must be noted that the Inter-American Court affords victims a right to participation in all stages of the proceedings. The European Court has refrained from formulating such a far-reaching right and is less explicit on the exact form of participation. Upon examining the experiences of victims, the Inter-American Court's far-reaching right is to be commended. This conclusion leads to one reservation, namely that it is not feasible to give victims an absolute right to prosecute. The decision to prosecute often lies solely within the discretion of the prosecutor, depending on the domestic system. Nevertheless, when this is the case, there should at least be an independent and impartial judicial remedy to which victims can avail themselves in order to challenge a decision not to prosecute.

8.5 The right to know the truth

The right to know the truth has gained increased attention over the past few decades from the international community. The right to know the truth originates from international

humanitarian law.[92] In 1981, the UNWGEID referred to international humanitarian law to reiterate the right of relatives to know the truth about what had happened to their disappeared loved ones. Since then, this body has continued to contribute to and to monitor the development of this right.[93] The further conceptualisation of this right in binding human rights law started within the context of codified human rights such as the right to an effective remedy. The case law in respect of these rights together with specific orders of just satisfaction or other remedies by human rights bodies also contributed to the development of this right. The increased attention over the past few decades for the right to know the truth has paved the way for an understanding of this right as an autonomous right. Accordingly, the ICPPED was the first binding human rights instrument that codifies the concept of truth in terms of such an autonomous right.[94] Despite the normative development, this right remains a concept with many ambiguities and controversies, as demonstrated in the following paragraphs.[95]

8.5.1 The Human Rights Committee

The views of the HRC portray a limited reference to the right to know the truth. The term 'truth' appeared in one of the first decisions handed down by the HRC.[96] In 1983, the HRC considered the mother of the disappeared person as a victim of inhuman treatment (Article 7 ICCPR). The HRC substantiated its reasoning by referring to the right of the complainant to know what happened to her disappeared daughter.[97] However, apart from this decision, the HRC has not further expanded on an explicit 'right to know the truth' in its views related to enforced disappearance. Nevertheless, the HRC extended its consideration of Article 7 ICCPR in a decision concerning the assassination of the late President of Burkina Faso in 1987. In this case, the family neither knew the circumstances surrounding his death nor the exact place where his remains were buried.[98] The HRC, relying in part on the Uruguay case mentioned above, observed that the family had the right to know the circumstances of his death and found a violation of Article 7 ICCPR. Another perspective on the truth is provided by the right to a remedy (Article 2(3) ICCPR): states have the obligation to conduct a diligent investigation into an alleged enforced disappearance and are obliged to

92 Articles 32 and 33 of Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.

93 UNComHR, 'Report of the working group on enforced or involuntary disappearance' (26 January 1981) UN Doc. E/CN.4/1435 and Add.1 (hereinafter: 'Annual report 1980'), para. 187; UNWGEID, 'General Comment on the Right to the Truth in Relation to Enforced Disappearances' (26 January 2011) UN Doc. A/HRC/16/48 (hereinafter: 'General Comment on the Right to the Truth').

94 Article 24(2) ICPPED.

95 See also Ott (2011), p. 111; UN Report by Nowak (2002), paras. 78 and 79.

96 *María del Carmen Almeida de Quinteros et al. v. Uruguay* HRC (1983).

97 *Ibid*., para. 14.

98 *Mariam Sankara et al. v. Burkina Faso* HRC 28 March 2006 (Comm. no. 1159/2003), para. 12.2.

provide relatives with information on the results of that investigation.[99] Therefore, although not explicitly finding a right to know the truth, it can be concluded that the HRC has found that victims have a right to factual information surrounding the disappearance and death of their loved ones.

Apart from including the results of the investigation, which does not always result in discovering the truth, it remains vague what the exact content and scope of such a right may be. The recommendations made by the HRC under its Article 40 procedure demonstrate more detailed state obligations in this respect. For instance, in its concluding observations to Guatemala, the HRC urged the Guatemalan government to take all pertinent measures that, *inter alia*, enable the victims of human rights violations to discover the truth about those acts and to know who was responsible for them.[100] Hence, these concluding observations extend the obligation to provide information to information about the identity of the perpetrators. Moreover, in respect of Algeria, the HRC expressed concern that the reports drafted by the national truth commissions[101] were not publicly available and urged Algeria to publicise them.[102] This consideration has two implications. Firstly, it appears to hint at a collective dimension of the obligation to take measures to reveal the truth. The obligation to make the findings public implies after all a wider public than the victims alone but seems to reach out to society as a whole. Secondly, this recommendation touches upon the issue of the accessibility of information for victims. Obliging a state to publicise the findings of truth commission reports implies that victims should have access to the information about what happened. Such an interpretation seems to be in line with the fact that not knowing what happened to the disappeared person plays a dominant role for the HRC in finding a violation of Article 7 ICCPR to the detriment of relatives.

Hence, even though the HRC does not embrace an explicit and clear right to know the truth, the consequences that such a right would have in terms of knowledge about the factual information in respect of the enforced disappearance are definitely found in its views and recommendations.

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99 *Benaziza v. Algeria* HRC (2010), para. 11; *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 9.

100 HRC, 'Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding Observations: Guatemala' (3 April 1996) UN Doc. CCPR/C/79/Add.63 (hereinafter: 'Concluding observations Guatemala (1996)'), para. 25.

101 See also Chapter 1 subsection 2.3 *infra* (describing the phenomenon of enforced disappearance in Algeria).

102 HRC, Concluding observations Algeria (2007), para. 10.

8.5.2 The Inter-American Court of Human Rights

The right to know the truth has been incrementally developed by the Inter-American Court. The following paragraphs demonstrate that its case law on enforced disappearance recognises the legal basis for considering the different aspects of the right to the truth and provides indications as to its nature, scope and content.

The foundation for the Inter-American Court's position on a possible right to the truth appears to have been laid in the first case to come before it. In the *Vélasquez-Rodríguez Case*, the Inter-American Court decided that in the case of enforced disappearance, the state is obliged 'to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.'[103] In later cases, a violation of the relatives' freedom from inhuman treatment has been based on a failure by the state to investigate. Such a failure would result in a total lack of information about the enforced disappearance and the whereabouts or fate of the disappeared person.[104]

The Inter-American Commission would itself claim a violation of a right to the truth for the first time in the *Castillo-Páez Case*. The Inter-American Court accepted the arguments of the Commission with regard to the right to the truth, and determined that the failure of the state to investigate the events that gave rise to the case violated the victims' right to the truth, a right embedded in Article 25 ACHR.[105] Accordingly, the Court stressed that internal impediments that may hinder the identification of the perpetrators, in this particular case an amnesty law, did not absolve the state from fulfilling the 'the right to know what happened to him and, if appropriate, where his remains are located.'[106]

The subsequent landmark case in this respect was the *Bámaca-Velásquez Case.* In this case, the Inter-American Court firmly established that the right to know the truth derives from both Articles 8 and 25 ACHR. Thereby, the Court confirmed the link between the right to the truth and the right to have access to justice and the duties to investigate and to prosecute. Interestingly, the Inter-American Court afforded the right to the truth to the victim and his relatives.[107] The Inter-American Court thereby ignored the Inter-American Commission's claim that the right to the truth entails a collective dimension, that is, a right of society to have access to information that is essential for the development of the democratic system.[108] Later, 'society' was included when the Court decided that '[…] the next of kin of the victims, and society

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103 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 181.
104 See Chapter 5 section 4 *supra*.
105 *Castillo-Páez v. Peru* IACtHR (1997), paras. 85 and 86; *Castillo-Páez v. Peru* (reparations and costs) IACtHR Series C No. 43 (27 November 1998), para. 106.
106 *Castillo-Páez v. Peru* IACtHR (1997), para. 90.
107 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 201.
108 *Ibid*., para. 197.

as a whole, must be informed of everything that happened in relation to the said violations.'[109]

Six years later, in the *Pueblo Bello Massacre Case*, the representatives of the victims in the proceedings before the Inter-American Court alleged that there should be an autonomous right to the truth emanating from Article 13 ACHR (the freedom of expression). The Court clearly rejected such an autonomous right by reiterating its usual line of reasoning that the right to the truth is embedded in the duties to investigate and prosecute.[110] In subsequent case law, the Inter-American Court has repeatedly adhered to its 'Articles 8 and 25 approach' to the right to the truth.[111] On the basis of the duties emanating from the rights laid down in these Articles, states are to search effectively for the truth.[112] The notion of truth appears to include factual information about what happened and who was responsible for the facts leading to the violation.[113] The latter aspect is confirmed by the consideration of the Inter-American Court that establishing the 'historical truth' through the establishment of truth commissions does not absolve the state's obligation to criminally investigate and punish the perpetrators.[114] At the same time, the obligation to discover the truth exists independently from criminal investigations. This separation is important in a case where, for instance, statutes of limitation bar criminal proceedings.[115]

A shift in the Inter-American Court's case law related to Article 13 ACHR and the right to know the truth was introduced in 2009 in *Gomes-Lund et al. v. Brazil*. This case pertained to the arbitrary detention, torture and enforced disappearance of 70 persons in the context of the military dictatorship which ruled the country from 1964

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109 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 62.

110 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 214. See also *Barrios Altos v. Peru* (merits) IACtHR Series C No. 75 (14 March 2001), para. 45 (The IAComHR argued that 'the right to truth has its roots in Article 13(1) of the Convention, because that article recognizes the right to seek and receive information.' In addition, it argued that 'the State has the positive obligation to guarantee essential information to preserve the rights of the victims, to ensure transparency in public administration and the protection of human rights'. The Court made no explicit statement on this right in relation to Article 13. See also *Barrios Altos v. Peru* IACtHR (14 March 2001), concurring opinion of Judge García Ramírez, para. 8 (arguing that the Inter-American Court did not reject the possibility of invoking the right to the truth under Article 13 ACHR, but rather considered the 'Articles 8 and 25' approach to be more appropriate).

111 *Goiburú et al. v. Paraguay* IACtHR (2006), para. 153; *La Cantuta v. Peru* IACtHR (2006), para. 224.

112 *Bámaca-Velásquez v. Guatemala* IACtHR (2000), para. 212; *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 177; *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 226; *La Cantuta v. Peru* IACtHR (2006), para. 157.

113 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 62.

114 *La Cantuta v. Peru* IACtHR (2006), para. 224. See also *Almonacid-Arellano et al. v. Chile* IACtHR (2006), para. 150.

115 *Vera Vera et al. v. Ecuador* (preliminary objection, merits, reparations, and costs) IACtHR Series C No. 224 (19 May 2011), paras. 122 and 123.

until 1985. The specific facts of the case occurred during the operations of the army between 1972 and 1975 in their attempt to eradicate the *Guerrilha do Araguaia*.[116] Since that time, the facts had never been investigated and the perpetrators had never been brought to justice. An amnesty law adopted in the process of transitional justice prevented any liability of state agents implicated in the crimes. Besides, access to the relevant archives that described the military operations and the methods used by these agents was first denied and, later, unduly delayed.[117] As such, the facts of the *Gomes-Lund Case* created 'the possibility for the establishment of a new perspective on the right to the truth, beyond the idea of judicial truth, that focuses on the debate of freedom of expression.'[118] The Inter-American Court indeed seized the opportunity and found a breach of Article 13 ACHR read together with Articles 8 and 25 ACHR on account of the failure to allow victims to have access to essential archives containing information on the disappearance of their loved ones.

A brief chronology of the attempts by the relatives to obtain access to the relevant archives is helpful for understanding the background of the reasoning of the Court. In February 1982, relatives initiated civil proceedings and requested:

> […] the Union to report on the burial of their next of kin, in such a way as to allow for the issuance of death certificates, the transport of the bodily remains, and the provision of the official report of the Ministry of War of January 5, 1975 on the military operations of war against the *Guerrilha do Araguaia*.[119]

This claim was rejected by the federal district court in 1989 for admissibility purposes. Four years later, an appellate court ordered the district court to hear the case anyway. The numerous appeals against this decision by the government were ultimately rejected by the Supreme Court in 1998, which ordered a full trial by the district court. During that trial, the government initially denied the existence in the military archives of any reports on the Araguaia operations. In its judgment of 2003, the district court nonetheless ordered the declassification of the relevant archives and a full investigation into the Arguaia operations. Additionally, it ordered the government to locate and identify the remains of the disappeared persons. The Supreme Court affirmed this decision in 2007.[120] Despite these outcomes, the state only made the information available in 2009.[121]

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116 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), para. 2.
117 *Ibid.*, paras. 210 and 211.
118 C. De Campo Melo, 'Transitional Justice in South-America: The Role of the Inter-American Court of Human Rights' (2009) 4 *Revista Cejil* 5 pp. 83-92, at p. 91.
119 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), para. 188.
120 *Ibid*., paras. 188-193 and 206.
121 *Ibid*., paras. 209-211.

In its reasoning under Article 13 ACHR, the Inter-American Court reiterated that information may be classified as secret. However, for investigation purposes in cases where state officials are allegedly involved, these classifications should be subject to control 'by other branches of the State or by a body that ensures respect for the principle of the division or powers [...].'[122] When such classification is ruled unlawful, the information must be made accessible within a reasonable time.[123] A prerequisite for the fulfilment of this obligation is that there must be a body that receives the requests for information and decides on them swiftly.[124] At any rate, state authorities cannot withhold information from the judicial or administrative authorities investigating an alleged enforced disappearance for reasons such as official state secrets or national security.[125] The burden of proof is on the state to prove that it was necessary to classify the documents.[126] Brazil could not provide such proof and, accordingly, the Inter-American Court held Brazil responsible for a violation of Article 13 ACHR read together with Articles 8 and 25 ACHR.

Hence, the Inter-American Court derives a right to know the truth from the right to have access to justice and the right to an effective remedy. In addition, this right is part of the right to freedom of expression, which entails an implied right of access to information independent of a criminal investigation. The right to know the truth is afforded to the victims of enforced disappearance and encompasses a collective dimension of society's right to know what happened in the past.

8.5.3 The European Court of Human Rights

The European Court has approached the concept of truth more hesitantly than the Inter-American Court. Similar to the Inter-American Court and the HRC, the uncertainty of not knowing what happened to the disappeared person has led the European Court to conclude that relatives are victims of inhuman treatment.[127] Accordingly, the term 'truth' was mentioned in the first enforced disappearance case before the European Court in order to justify awarding compensation for non-pecuniary damages. In *Kurt v. Turkey*, the Court stated that:

> […], given [the fact] that the authorities have not assisted the applicant in her search for the truth about the whereabouts of her son, which has led it to find a breach of

122 *La Cantuta v. Peru* IACtHR (2006), para. 112.
123 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), paras. 211 and 212.
124 *Ibid*., para. 231.
125 *Ibid*., para. 202.
126 *Ibid*., para. 230.
127 See Chapter 5 subsection 4.3 *supra*.

> Articles 3 and 13 in her respect, the Court considers that an award of compensation is also justified in her favour.[128]

This paragraph clearly links the failure to assist in the search for the truth about the whereabouts of the applicant's disappeared son to the inhuman treatment to which the applicant had been subjected. This consideration, however, did not generate an impetus for a further elaboration of a right to the truth. A reference to the truth, let alone to a right to know the truth, has been scarce in further case law. The few cases in which the term 'truth' has appeared in the case law on enforced disappearance were cases against Russia. In these cases, the Court found that delays in the investigation compromised the effectiveness of the investigation, as required by Article 2 ECHR (the right to life) and, as such, adversely affected 'the prospects of arriving at the truth'.[129] The European Court did not further elaborate on the implications of this phrase, for instance whether this consideration extends beyond the usual aim of a criminal investigation to discover the truth.

On the basis of the foregoing, one must conclude that within the European human rights system there is no explicit right to know the truth, but that an obligation to this end may be inferred from the reading of Articles 2 and 3 ECHR.[130] A more recent case, though outside the body of case law on enforced disappearance, seems to mark a ground-breaking change. In 2011, a right to know the truth was formulated in the context of the state authorities' use of massive lethal force against anti-government demonstrations. The facts that gave rise to the complaint in the case *'21 December 1989' a.o. v. Romania* occurred in an era preceding the transition from a totalitarian regime to a more democratic one. The Court recognised the importance of the right of victims and their family and dependants to know the truth about the circumstances of events implicating massive human rights violations.[131] Such a right was read into the procedural aspect of the right to life (Article 2 ECHR). *In casu*, the authorities failed to conduct an effective criminal investigation into the events, which led the Court to conclude that this procedural aspect of the right to life had been violated. Moreover, under Article 46 ECHR (an article on the binding force and execution of judgments), the Court stressed the importance of a criminal investigation, also taking into account the importance of Romanian society knowing the truth about what happened in December 1989.[132]

The right to truth as formulated in the *'21 December 1989' Case* recognises the importance of knowing the truth about past human rights violations, but does

128 *Kurt v. Turkey* ECtHR (1998), para. 175.
129 *Bazorkina v. Russia* ECtHR (2006), para.121; *Baysayeva v. Russia* ECtHR (2007), para. 122.
130 Scovazzi & Citroni (2007), p. 353.
131 *Association 21 December 1989 a.o. v. Romania* ECtHR 24 May 2011 (Appl. nos. 33810/07 and 18817/08), paras. 144 and 145.
132 *Association 21 December 1989 a.o. v. Romania* ECtHR (2011), para. 194.

not necessarily attach a consequence of actual access to relevant information for either victims or society as whole. The public character of information, however, has been an issue of concern in enforced disappearance cases before the European Court. States have relied upon state security as a justification to withhold information from the European Court. Scovazzi and Citroni have remarked incisively that, '[i]f information has been denied to the European Court itself, one can easily imagine how much information has been concealed to the relatives.'[133] The inability to access case files was one of the issues in a case where the applicant had lost her son during an operation by the security forces in Turkey. The European Court concluded that there had been a violation of the procedural aspect of Article 2 ECHR and noted that:

> […] during the administrative investigation the case file was inaccessible to the victim's close relatives, who had no means of learning what was in it (see paragraph 15 above). The Supreme Administrative Court ruled on the decision of 15 August 1991 on the sole basis of the papers in the case, and this part of the proceedings was likewise inaccessible to the victim's relatives. Nor was the decision of 15 August 1991 served on the applicant's lawyer, with the result that the applicant was deprived of the possibility of herself appealing to the Supreme Administrative Court.[134]

While this consideration certainly does not appear to be based on a perception of the need to know the truth but rather on procedural fairness, it provides indications that at the domestic level relatives cannot be denied all information included in the case file in administrative proceedings. Procedural fairness seems, in fact, to be one of the determinative criteria for deciding whether a denial of access to information in proceedings is in compliance with the ECHR.[135]

Outside the body of case law on enforced disappearance, the European Court has interpreted Article 10 ECHR as affording a qualified right of access to state-held information about the past to civil society, as being one of the 'social watchdogs', and to historians.[136] Accordingly, Buyse underlines that 'human rights protection offered

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133 Scovazzi & Citroni (2007), p. 335.

134 *Oğur v. Turkey* ECtHR [GC] (1999), para. 92.

135 See *e.g. A. v. the Netherlands* ECtHR 20 July 2010 (Appl. no. 4900/06), para. 160 (The ECtHR considered that, '[c]oncerning the underlying materials of the AIVD report of 9 February 2005, the Court notes that with the parties' consent these materials were disclosed to the provisional-measures judge of the Regional Court of The Hague which in the Court's view has not compromised the independence of the domestic courts involved in the proceedings concerned and neither can it be said that these courts have given less rigorous scrutiny to the applicant's Article 3 claim […]. Furthermore, the Court notes that this report and the underlying materials did not, as such, concern the applicant's fear of being subjected to ill-treatment in Libya but whether he was posing a threat to the Netherlands national security.').

136 A.C. Buyse, 'The truth, the past and the present: Article 10 of the ECHR and situations of transition', in: A.C. Buyse & M. Hamilton, (eds.), *Transitional Jurisprudence and the ECHR. Justice, Politics and Rights* (Cambridge: Cambridge University Press 2011) pp. 131-150, at p. 146

by the European Convention […] enables the re-construction or re-assessment of the past by actors outside the state'.[137]

Hence, the right to know the truth is not yet solidly rooted in the case law of the European Court, but there seems to be a recent tendency towards accepting such a right as part of the procedural obligation under Article 2 ECHR in cases of gross human rights violations. Because not knowing the truth has played an important role in considering relatives as victims under the ECHR, it is not unthinkable that such a right might be elaborated explicitly in enforced disappearance cases. The precise consequences of formulating such a right for the standards with which the state must comply are not clear, with the exception that criminal investigations must be conducted. Importantly, the few relevant examples considered under Article 10 ECHR extend the material scope of this article to the issue of access to state-held information for social 'watchdogs'. While this protection mainly pertains to a collective dimension of the right to the truth, the step to extending it to relatives can be easily made.

8.5.4 Comparative remarks in light of the experiences of victims

Concealing the truth is one of the inherent elements of enforced disappearance. For instance, the concealment of the remains was explicitly recognised in the *Nacht und Nebel* decree as an important aspect to achieve the full impact of an enforced disappearance.[138] It must be recognised that the first three main causes of victims' suffering, *i.e.* (1) no trace of the disappeared person, (2) no co-operation by the state authorities in the search and (3) impunity, are the reasons why the truth usually does not come to light. Accordingly, being deprived of knowing the truth has proven to be one of the main aspects of the relatives' suffering and a prominent driving force behind their fight for justice.

The importance of knowing the truth can most strikingly be illustrated by using the fifth main cause of victims' suffering (*i.e.* obstacles to continuing 'normal' life). The inability to continue 'normal' life is to a great extent caused by not knowing the truth about what happened to the disappeared person. Conversely, *knowing* the truth

(discussing the cases of *Társaság a Szabadságjogokért (TASZ) v. Hungary* ECtHR 14 April 2009 (Appl. no. 37374/05) and *Kenedi v. Hungary* ECtHR 26 May 2009 (Appl. no. 31475/05)).

137 Buyse (2011), p. 147.

138 The Trial of German Major War Criminals, Sitting at Nuremberg, Germany, December 17, 1945 to January 4, 1946, vol. 3, Session 25, 2 January 1946, part 4, p. 215, available at www.nizkor.com (last visited on 10 February 2010) (The purpose of this decree was '[…] to create, for deterrent purposes, uncertainty over the fate of prisoners among their relatives and acquaintances, through the deportation into Reich territory of persons arrested in occupied areas on account of activity inimical to Germany. This goal would be jeopardised if the relatives were to be notified in cases of death. Release of the body for burial at home is inadvisable for the same reason, and beyond that also because the place of burial could be misused for demonstrations.').

creates room for relatives to cease the search and to start the mourning process. Another consequence of knowing the truth is that such knowledge contributes to a feeling of justice for the victims. Beristain, one of the experts in *The 19 Tradesmen Case*, found in his research in Colombia on the repercussions of an enforced disappearance that public acknowledgement of the truth is of paramount importance to the emotional recovery of relatives. Knowing the truth would help them in their process of mourning and would be a condition for the facts not to remain unpunished.[139] In addition to allowing victims to continue their 'normal' life, it is argued that the right to the truth also has a preventive function. This preventive function results from the belief that a collective right to the truth contributes to preventing a repetition of violations in the future.[140] As such, knowing the truth relates to the fourth main cause of victims' suffering, *i.e.* an unsafe environment to carry out activities related to the enforced disappearance.

As demonstrated in the preceding subsections, the three supervisory bodies have, to a certain extent, recognised the importance of the truth in enforced disappearance cases. Does the case law reveal a right to know the truth and, if so, what is its scope and content? Both the European Court and the Inter-American Court appear to recognise a right to know the truth afforded to relatives of victims of gross human rights violations committed in the past. It is interesting to note that the European Court formulated the right to know the truth when confronted with similar facts as the Inter-American Court has historically been requested to decide upon: massive human rights violations that occurred in a prior totalitarian regime. Among the three supervisory bodies, the Inter-American Court has most clearly formulated a right to the truth in enforced disappearance cases, which has been extended in contexts other than massive human rights violations.[141]

In the context of gross human rights violations, the Inter-American Court has afforded the right to the truth not only to the specific victims of the case, but also to society as a whole. On the other hand, the European Court seems to regard such collective dimension as a justification for ordering states to investigate the facts. UN soft law seems to have the tendency to also justify a collective dimension to the

139 *The 19 Tradesmen v. Colombia* IACtHR (2004), para. 72(g).

140 UNComHR, 'Questions of the impunity of perpetrators of human rights violations (civil and political), final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119' (26 June 1997) UN Doc. E/CN.4/Sub.2/1997/20 (hereinafter: 'Final report by Joinet on impunity (1997)'), para. 17; UN Updated Set of Principles to Combat Impunity, Principle 2; D. Rodríguez-Pinzón, 'The Inter-American human rights system and transitional processes', in: A.C. Buyse & M. Hamilton, (eds.), *Transitional Jurisprudence and the ECHR. Justice, Politics and Rights* (Cambridge: Cambridge University Press 2011) pp. 239-266, at p. 263.

141 *Vera Vera et al. v. Ecuador* IACtHR (2011), paras. 122 and 123 (This case concerned the death of an injured prisoner).

right to know the truth by means of its purported preventive function.[142] The fact that society would have a right to know the truth is controversial, because can a society as such have a legally enforceable right? As demonstrated in Chapter 7 *infra*, the importance of the truth can also be embedded as one of the aspects of a more general obligation imposed on states to prevent future human rights violations. Such an obligation, in turn, benefits society as a whole. Framing this concept as such appears to be less problematic.

Having established that there are clear indications in the case law to conclude that victims of enforced disappearance have a right to know the truth, it remains to be seen what the content of this right entails. The contours of this right are somewhat ambiguous in enforced disappearance cases, except for one core element. The considerations of all three supervisory bodies suggest that this right obliges states to disclose the factual truth about the fate and whereabouts of the disappeared person. As demonstrated in Chapter 5 section 3 *infra*, the terms 'fate' and 'whereabouts' should be understood to include information about whether the person is alive or dead, whether state agents detained the person and the location of the person or of his or her remains. In addition, the previous subsections demonstrated that the right to know the truth also relates to the circumstances of the crime. As such, this right is closely linked to the state's duty to investigate the facts with due diligence and to take the necessary measures to identify the perpetrators. In this process, it is important that witnesses are protected and not impeded by either fear or actual threats in providing their testimonies.[143]

The next question is whether the right to know the truth is absolute or not. Upon examination, it is plausible to make a distinction between two aspects of the right to know the truth. The first aspect relates to the fate or whereabouts of the disappeared person and the second relates to the circumstances of the crime. Having seen in section 8.4 above that states must investigate until the fate and whereabouts of the missing person are established, it is possible to conclude that the right to know the truth about the whereabouts or fate of the person is absolute.[144] In this respect, it is relevant to draw on the Updated Set of Principles to Combat Impunity, which purports that this right is imprescriptible.[145] Such a nature is in line with the main causes of victims' suffering, since the suffering continues until this factual truth is revealed.

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142 UNWGEID, General Comment on the Right to the Truth (2010), preamble; UN Updated Set of Principles to Combat Impunity, Principle 2.

143 Ott (2011), p. 112; UNHRCouncil, 'Resolution 9/11 on the Right to the truth' (18/09/2008) A/HRC/RES/9/11 (hereinafter: 'Resolution 9/11'), para. 7; UNHRCouncil, 'Resolution 12/12 on the Right to the truth' (12 October 2009) A/HRC/RES/12/12 (hereinafter: 'HRCouncil Resolution 12/12'), para. 6.

144 See also UNWGEID, General Comment on the Right to the Truth (2010), para. 4.

145 UN Updated Set of Principles to Combat Impunity, Principle 4.

A more controversial issue is whether the truth includes an absolute right to know the identity of the perpetrators. Recent developments within the UN shed light on this question. The right to truth has been unequivocally recognised by several UN bodies, which consider the identity of the perpetrator to be included in the notion of truth.[146] However, there appears to be a tendency not to consider the right to information about the circumstances of the crime, including the names of the perpetrators, as an absolute right.[147] For instance, the Updated Set of Principles to Combat Impunity requires states to prosecute and punish the perpetrators.[148] However, the right to know the truth afforded to victims does not explicitly mention the identity of the perpetrators.[149] The Updated Set of Principles to Combat Impunity at the same time also affirms that possible amnesties should never prejudice the right to know the truth.[150] Allowing limited amnesties seems to support the stance that the right to know the truth does not always include the establishment of the identity of the perpetrators, at least not by means of criminal proceedings.

An example of the practical implications of the question about the identity of perpetrators can be seen in the debate about whether truth commissions should publish the names of officials who committed the violations.[151] While these procedures adhere to a lesser standard of the rights of the defence,[152] deference to the truth suggests the need to disclose reliable information on the behaviour of these individuals. A balanced

146 UNComHR, Resolution on the Right to Truth UN Doc. E/CN.4/2005/L.84 (15 April 2005) (The UNComHR linked the right to truth to ending impunity and promoting and protecting human rights); UNComHR, Resolution 2005/66, para. 6 (In 2005 the UNComHR requested the OHCHR to prepare a study that would examine the legal basis, scope and content of the right to the truth); UNComHR, Study on the Right to know the Truth (2006), para. 3 (This report defined truth as knowledge about 'the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.'). The HRCouncil continued to monitor the right to the truth. In an expert meeting held on 12 March 2010, High Commissioner Pillay reiterated the fundings of the report and concluded that: 'The right to the truth implies knowing the full and complete truth about events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them. In cases of enforced disappearance and missing persons, the right also implies the right to know the fate and whereabouts of the victims.' (http://www.ohchr.org/EN/NewsEvents/Pages/Therighttothetruth.aspx, last visited 15 November 2011).

147 UNWGEID, General Comment on the Right to the Truth (2010), para. 8.

148 UN Updated Set of Principles to Combat Impunity, Principle 20.

149 *Ibid.*, Principle 4.

150 *Ibid.*, Principle 20. See also UNComHR, Study on the Right to know the Truth (2006), para. 60 (stating that no restrictions, such as amnesties or restrictions on access to information, should prevent knowing the truth).

151 UNWGEID, General Comment on the Right to the Truth (2010), para. 8.

152 Important due process rights such as the right to confront those making allegations, the disclosure of evidence, the right to legal counsel and the presumption of innocence, are typically not adhered to in proceedings conducted by truth commissions as strictly as in criminal proceedings.

solution was offered in both Argentina and Chile. The truth commissions established in those countries withheld the names of the accused but submitted relevant evidence to the courts as a way of contributing to justice.[153] This solution does not suffice when truth commissions are not complemented by further investigation with a view to bringing the perpetrators before a judge. In such situations, Méndez stresses that the principle of the legitimacy of truth commissions warrants some measures of due process such as the possibility for accused individuals to rebut the incriminating information.[154] Such guarantees would then justify the publication of the names of the perpetrators.

Important to note is that the work of truth commissions, while appreciated in and of itself for establishing a 'historical truth', should not absolve the state from its obligation to investigate the specific facts of each case. For instance, states within the Inter-American system clearly owe each victim an individualised 'truth', which implies that a comprehensive report merely chronicling a government's policy and practice does not satisfy this obligation.[155]

In order to serve the truth and to realise this 'individualised' truth, investigations into the crime and subsequent proceedings must have been carried out in an adequate and thorough manner. In this respect, it is useful to recall that Beristain found that some of the next of kin felt that the trials that were being held did not reveal the truth due to either the perceived purpose of the trials to conceal the identity of the real perpetrators or to halt the process for the search of evidence. Others felt that not all the evidence had been investigated which resulted in unfair trials.[156] In view of this concern, it is important to frame the right to know the truth as an autonomous right related to the right of access to information by relatives themselves. Among the three supervisory bodies, the Inter-American Court has most clearly linked the truth to access to archives.[157] While this is not an absolute right, there must be

153 Méndez (1997), p. 268 (referring to the Comisión Nacional sobre la Desaparición de Personas, Nunca Más: the report of the Argentine National Commission on the Disappeared ((1996) and Informe de la Comisión Nacional de Verdad y Reconciliación, Tomo I at 3 (1991)); Center for Civil & Human Rights & Notre Dame Law School (1993), p. 22.

154 Méndez (1997), p. 265.

155 J. Zalaquett, 'Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints' (1990) 13 *Hamline L Rev* 3 pp. 623-660, at p. 629.

156 *The 19 Tradesmen v. Colombia* IACtHR (2004), para.72(g).

157 See also UN Updated Set of Principles to Combat Impunity, Definition E (The Updated Set of Principles to Combat Impunity defines archives as referring to: 'collections of documents pertaining to violations of human rights and humanitarian law from sources including (a) national governmental agencies, particularly those that played significant roles in relation to human rights violations; (b) local agencies, such as police stations, that were involved in human rights violations; (c) State agencies, including the office of the prosecutor and the judiciary, that are involved in the protection of human rights; and (d) materials collected by truth commissions and other investigative bodies.').

at least an independent remedy when the request for access is denied. When it is accordingly ruled that access should be granted, the information must be released within a reasonable time. The importance of such access has also been stressed by UN soft law.[158] For instance, the UNWGEID has stressed its concern in respect of El Salvador that there was no law that positively guaranteed access to information that might be relevant for clarifying cases of enforced disappearance.[159] Such legislation would provide the adequate procedures to obtain information and would ensure that granting such access is not up to the discretion of the executive branch. The Updated Set of Principles to Combat Impunity adds an important aspect, namely the proactive duty to preserve archives.[160]

Hence, while the right to the truth has been recognised as an important right afforded to victims of enforced disappearance, different aspects of the truth must be distinguished. There seems to be general support for concluding that the right to truth includes factual information about the fate or whereabouts of the disappeared person. The right to such information should be absolute and imprescriptible. An important aspect of this right is that victims have access to relevant information held by the state authorities. Upon examining the experiences of victims, it is also important that information on the circumstances of the crime, for instance the identity of the perpetrators, is provided to them. However, the question arises whether or not there may be exceptional situations in which it might be justified to bar criminal investigations. These exceptional situations will be discussed in the next subsection.

8.6 Combating impunity

As illustrated in subsection 8.3.3 above, combating impunity is one of the rationales behind the duties to investigate, prosecute and punish. Accordingly, one of the purposes of the investigation must be to bring the perpetrators to justice. The HRC, the Inter-American Court and the European Court have been confronted with a number of issues that enable impunity, both *de facto* and *de jure*, to prevail in situations where enforced disappearances have occurred. Criminal investigations and proceedings have been plagued with delays without rendering any results or have been discontinued due to a lack of sufficient evidence. Special courts, such as military courts, have conducted the investigations and proceedings, the independence and impartiality of which are questionable. Legal impediments such as amnesty laws, pardons and statutes of limitation have prevented victims from seeing the perpetrators behind bars. The following subsections examine the way in which the

158 Van Boven/Bassiouni Principles, Principle 24.
159 UNWGEID, Report on Mission to El Salvador (2007), paras. 61 and 94.
160 UN Updated Set of Principles to Combat Impunity, Principles 3, 4 and 14-18.

three supervisory bodies have responded to these problems and interpreted the related obligations, on the basis of which state responsibility, in turn, is determined.

8.6.1 The Human Rights Committee

The first encounter with an enforced disappearance case, *Bleier v. Uruguay*, prompted the HRC to urge the respondent government 'to bring [the perpetrators] to justice'.[161] As 'bringing to justice' does not necessarily mean prosecution, this obligation was later explicated as meaning prosecution, adjudication and punishment.[162] Such an explanation has led the HRC to urge the respondent governments 'to expedite the criminal proceedings leading to the prompt prosecution and conviction of the perpetrators of the crime,'[163] and to consider states to be 'duty-bound to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances […], and to prosecute, try and punish those responsible for such violations.'[164] Thereby, in the context of enforced disappearance and notably alleged violations of the right to life, solely administrative or disciplinary measures are not adequate and effective remedies.[165] Importantly, the HRC has repeatedly and strongly emphasised that the ICCPR does not endow individuals with the right to have perpetrators prosecuted. Rather, the HRC addresses the issue of prosecution in terms of obligations on the state.[166] Yet, the question arises what this obligation exactly entails.

Surely, the duty to institute criminal proceedings is not a result-oriented obligation. This is illustrated by the fact that the HRC does not examine whether convictions have indeed taken place. Nevertheless, the separate opinion in the *Cifuentes Case* argues that '[i]n the light of the individual and social right to truth, the duty to investigate and try offences such as enforced disappearance has gradually been making the transition from being an obligation of means to being an obligation of

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161 *Bleier v. Uruguay* HRC (1982), para. 15.

162 *Bautista de Arellana v. Colombia* HRC (1995), paras. 8 and 10; *Grioua v. Algeria* HRC (2007), para. 9; *Madoui v. Algeria* HRC (2008) para. 9; *Boucherf v. Algeria* HRC (2006), para. 11.

163 *Bautista de Arellana v. Colombia* HRC (1995), para. 10.

164 *El Abani v. Algeria* HRC (2010), para. 9.

165 *Bautista de Arellana v. Colombia* HRC (1995), paras. 8.2 and 8.6; *José Antonio Coronel et al. v. Colombia* HRC 24 October 2002 (Comm. no. 778/1997), para. 6.2 (admissibility decision on the exhaustion of domestic remedies); *Benaziza v. Algeria* HRC (2010), para. 8.3 (admissibility decision on the exhaustion of domestic remedies).

166 *Kimouche v. Algeria* HRC (2007), para. 9. See also M.J. Bossuyt, *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff 1987), p. 65 (The *travaux préparatoires* of the ICCPR reject an absolute obligation to prosecute. In the drafting history of Article 2(3) ICCPR, a proposal that 'violators shall swiftly be brought to the law, especially when they are public officials' was explicitly rejected).

result.'[167] They distinguish between different components of such duties and conclude that '[i]nvestigations are supposed to establish the truth about what occurred and lead to the identification of the responsible parties so that they may be brought to justice.'[168] In order to discharge this obligation:

> the State must ensure that all public institutions extend all necessary facilities to the trial court. This means that they must furnish any information and documentation that the court requests, bring before the court any persons it designates, and take any steps that they are instructed to perform in that regard.[169]

Understood in this way, the desired result of an investigation, namely the truth and the identification of the perpetrators, could be perceived as a duty of result. Accordingly, the separate opinion argues that when the alleged perpetrators are identified, there is an obligation incumbent on the state to try them in accordance with the guarantees set forth in the ICCPR.[170] As much as this conclusion seems to be convincing, the HRC has not explicitly confirmed this approach in its views on the issue of enforced disappearance.

The HRC itself tends to motivate rather succinctly its decision on the merits for finding a violation in respect of a failure to bring the perpetrators to justice, generally stating that the author did not have access to an effective remedy.[171] Nevertheless, the case law shows several indicators that determine whether an effective remedy was available, as discussed in the following paragraphs.

8.6.1.1 Legal impediments to prosecution

States have, in principle, an obligation to bring perpetrators to justice in respect of the crime of enforced disappearance. Accordingly, legal impediments, such as certain amnesties and prior legal immunities, may not enable state agents to escape personal responsibility.[172] In its General Comment on the freedom from torture, the HRC notes that:

> Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure

167 *Cifuentes Elgueta v. Chile* HRC (2009), individual opinion of Committee members Ms. Helen Keller and Mr. Fabián Salvioli (dissenting), para. 26.
168 *Ibid*., para. 27.
169 *Ibid*.
170 *Ibid*., para. 28.
171 *Benaziza v. Algeria* HRC (2010), para. 9.9.
172 HRC, General Comment No. 31 [80] (2004), para. 18. For a thorough discussion of the HRC's stance on amnesties, see A. Seibert-Fohr, *Prosecuting serious human rights violations* (Oxford: Oxford University Press 2009), pp. 37-49.

> that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[173]

In one of its views, the HRC clearly linked the incompatibility of amnesties for gross human rights violations to the obligations arising from the right to an effective remedy (Article 2(3) ICCPR).[174] That states accordingly must ignore domestic legal impediments became clear in 1996 with the holding in the *Laureano Case*. The HRC urged 'the State party to open a proper investigation into the disappearance of Ana Rosario Celis Laureano and her fate, to provide for appropriate compensation to the victim and her family, and to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary'.[175] Hence, there must be at least some form of accountability. In more recent cases against Algeria, the HRC was again faced with the question of amnesty laws. In *Benaziza v. Algeria*, the HRC considered that Ordinance No. 06-01 of 27 February 2006 enacting the Charter of Peace and National Reconciliation, which prohibits any prosecution of members of the defence or security force, was incompatible with the ICCPR. The reason for this conclusion was that such laws appeared to promote impunity. In its reasoning, the HRC referred to earlier concluding observations in respect of Algeria.[176] In those observations, the HRC expressed particular concern about Ordinance No. 06-01 and recommended Algeria to amend Article 45 of the Ordinance[177] so that this article does not apply to crimes such as torture and disappearance.[178]

The position on the incompatibility of *general* amnesty laws with gross human rights violations was confirmed in several concluding observations in respect of

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173 HRC, General Comment No. 20 (1992), para. 15.

174 *Rodríguez v. Uruguay* HRC 19 July 1994 (Comm. no. 322/1988), para. 12.4 (The HRC noted that: 'The Committee moreover reaffirms its position that amnesties for gross violations of human rights and legislation such as the Law No. 15.848, *Ley de Caducidad de la Pretensión Punitiva del Estado* are incompatible with the obligations of the State party under the Covenant. The Committee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses.').

175 *Laureano v. Peru* HRC (1996), para. 10.

176 *Benaziza v. Algeria* HRC (2010), para. 9.2.

177 Article 45 reads: 'Legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation or preserve the institutions of the Republic. Any such allegation or complaint shall be declared inadmissible by the competent judicial authority.'

178 HRC, Concluding observations Algeria (2007), para. 7.

Argentina in 1995[179] and Peru in 1996.[180] This position is supported by the argument that such laws *may* generate impunity and weaken respect for human rights. The use of the words 'may' and 'general' amnesties indicate that there are possible amnesties that do not violate the ICCPR.[181] Still, in the following observations to Peru, the HRC deplored the fact that Peru had not repealed the amnesty laws and recommended that it should repeal them and refrain from adopting a new amnesty act.[182] As such, it appears that amnesty laws that promote impunity and weaken respect for human rights are incompatible with the ICCPR. In addition, Seibert-Fohr concluded in her study that the HRC does not allow amnesties for crimes against humanity and for war crimes.[183] Interestingly, despite having ruled that such amnesties were in breach of the ICCPR, the HRC did not recommend the investigation and prosecution of the alleged perpetrators *per se*. Rather, this Committee recommended the payment of compensatory damages to victims and disciplinary measures.[184]

8.6.1.2 The use of military courts

In the overwhelming majority of other enforced disappearance cases, it is mostly military personnel or the police that are accused of committing the crime. Thus, the lack of impartiality and independence are mostly disadvantageous for the victims.

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179 HRC, 'Consideration of reports submitted by States Parties under Article 40 of the Covenant, Comments on Argentina' (March 1995) UN Doc. CCPR/C/79/Add.46, paras. 10 and 11 (hereinafter: 'Comments on Argentina (1995)') (The HRC stated 'The Committee reiterates its concern that Act 23.521 (Law of Due Obedience) and Act 23.492 (Law of *Punto Final*) deny effective remedy to victims of human rights violations during the period of authoritarian rule, in violation of articles 2 (2, 3) and 9 (5) of the Covenant. The Committee is concerned that amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children. The Committee expresses concern that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. The Committee voices its position that respect for human rights may be weakened by impunity for perpetrators of human rights violations.'). *Cf. O.R., M.M., and M.S. v. Argentina* CAT November 1989 (Comm. nos. 1/1988, 2/1988 and 3/1988), para. 9 (The CAT found the Punto Final and the Due Obedience Acts incompatible with the spirit and purpose of the CAT.).

180 HRC, 'Consideration of reports submitted by States Parties under Article 40 of the Covenant, Comments on Peru' (25 July 1996) UN Doc. CCPR/C/79/Add.67 (hereinafter: 'Comments on Peru (1996)') para. 20; HRC, 'Consideration of reports submitted by States Parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: Peru' (18 November 1996) UN Doc. CCPR/C/79/Add.72 (hereinafter: 'Concluding observations: Peru (1996)'), para. 9.

181 Seibert-Fohr (2009), p. 48.

182 HRC, 'Concluding Observations: Peru' (15 November 2000) UN Doc. CCPR/CO/70/PER (hereinafter: 'Concluding observations: Peru (2000)'), para. 9.

183 Seibert-Fohr (2009), p. 43.

184 HRC, Comments on Peru (1996), para. 20; HRC, Concluding observations Peru (1996), para. 9.

Accordingly, the HRC attaches great significance to the impartiality of investigating authorities as stated in the case *Arévalo v. Colombia*:

> States parties should take specific and effective measures to prevent the disappearance of individuals and establish facilities and procedures to investigate thoroughly, *by an appropriate impartial body*, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.[185] [Emphasis added by the author]

The HRC has not made any general statements on the compatibility of the use of military courts to try gross human rights violations with the ICCPR. Yet, it is possible to infer from the criteria of impartiality that at the very least in cases where security forces have allegedly been involved in an enforced disappearance, military tribunals are not the appropriate impartial body. In this respect, the HRC has urged, in accordance with Article 2(3) ICCPR, the respondent state 'to conclude without delay the investigations into the violation of articles 6 and 7 and to speed up the criminal proceedings against the perpetrators in the *ordinary* criminal courts.'[186]

In general, the HRC has recommended that military jurisdiction be restricted to only trying 'military personnel charged with offences of an exclusive military nature.'[187] Similarly, in its concluding observations in respect of the Russia Federation, the HRC expressed its clear concern about the use of military courts in situations,

> in which the army is entrusted with the judgment and sentencing of the crimes committed by its own members. The Committee is concerned that such a situation may cause miscarriages of justice, particularly in the light of the Government's acknowledgement that the army, even at the highest levels, is not familiar with international human rights law, including the Covenant.[188]

Hence, it is possible to conclude that military courts are not the appropriate courts when military personnel are allegedly implicated in the crime.

The exceptional use of military courts is further illuminated by the HRC's position on trying civilians in military courts under Article 14 ICCPR (the right to a fair trial). While emphasising that military courts are not prohibited by the ICCPR

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185 *Arévalo Perez et al. v. Colombia* HRC (1989), para. 10.

186 *José Antonio Coronel et al. v. Colombia* HRC (2002), para. 10 [emphasis added by the author]. See also paras. 5.7, 7.2 and 8.2 (The proceedings were first conducted by military tribunals and later transferred to the ordinary courts).

187 HRC, 'Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding Observations: Chile' (30 March 1999) UN Doc. CCPR/C/79/Add.104 (hereinafter: 'Concluding observations: Chile (1999)'), para. 9.

188 HRC, 'Concluding Observations/Comments: Russian Federation' (26 July 1995) UN Doc. CCPR/C/79/Add.54 (hereinafter: 'Concluding observations Russian Federation (1995)'), para. 25.

in general, the HRC notes that the existence of such courts could 'present serious problems as far as the equitable, impartial and independent administration of justice is concerned.' Therefore, the HRC continued by stating that 'it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional […].'[189] States are therefore obliged to ensure 'the actual independence of the judiciary from the executive branch'.[190] In one landmark enforced disappearance case, *El Abani v. Libyan Arab Jamahiriya*, the HRC considered the conviction of the author's father by a military court after an initial period of enforced disappearance as breaching the ICCPR. Before his disappearance, the author's father had served as a civil judge at a court of first instance and was, thus, not military personnel. During the proceedings, the author's father was denied access to his criminal case file. Additionally, he could only have access to a lawyer that was appointed to him by the military court. The HRC placed the burden of proof on the respondent state to prove that the trial by a military court was necessary because ordinary courts were unable to undertake the trial and that these trials fulfilled the due process guarantees.[191] As such, the HRC showed the exceptional character of the jurisdiction of military courts. Subsequently, the HRC concluded that the respondent state had failed to prove the need to have recourse to a military court and it found a violation of Article 14(1) and (3) ICCPR.

8.6.1.3 The international dimension of the duties to investigate and prosecute

The HRC has clearly stated that '[s]tates parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law'.[192] The question whether they are also obliged to request extradition or to act upon an extradition request is not clearly addressed in enforced disappearance cases.[193] The position of the HRC is clear that states should be able to bring the perpetrators of a given crime to justice, even when they have already been tried in another state:

189 HRC, 'General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial' (replacing General Comment No. 13) (23 August 2007) UN Doc. CCPR/C/GC/32 (hereinafter: 'General Comment No. 32 (2007)'), para. 22.

190 *Ibid.*, para. 19.

191 *El Abani v. Algeria* HRC (2010), para. 7.8.

192 HRC, General Comment No. 31 [80] (2004), para. 18.

193 *Cf.* M. Nowak, 'Torture and enforced disappearance', in: C. Krause & M. Scheinin, (eds.), *International Protection of Human Rights: A Textbook* (Turku/Åbo: Åbo Akademi University Institute for Human Rights 2009), p. 164 (citing *Roitman Rosenmann v. Spain* (CAT 25 October 2000, Complaint no. 176/2000) and arguing that under CAT, states are not obliged to request extradition, but have an obligation to cooperate by, for example, supplying evidence at their disposal).

> With regard to the admissibility of the communication under article 3 of the Optional Protocol, the Committee has examined the State party's objection that the communication is incompatible with the provisions of the Covenant, since article 14, paragraph 7, of the Covenant, which the author invokes, does not guarantee non bis in idem with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.[194]

In light of international jurisdiction, this consideration of the non-applicability of the *non bis in idem* principle is relevant because it does not prevent perpetrators from being brought to justice in two different states.[195] Hence, a trial in one state does not *per se* excludes another state from exercising its jurisdiction over the same case.

8.6.1.4 Pardons and the duty to punish

As demonstrated in the previous subsection, 'bringing the perpetrators to justice' appears to mean in principle criminal prosecution in respect of enforced disappearance. The question whether states are also obliged under the ICCPR to punish the perpetrators under criminal law remains unclear. In its concluding observations to Argentina, the HRC recommended that pardons, commutations or remissions of sentence should not be granted to any person, whether a public official or a member of an armed group, implicated in disappearances.[196] Such clear language has not appeared in the views of the HRC in respect of enforced disappearance cases. Concluding observations also make clear that disciplinary sanctions should definitely be part of bringing the perpetrators to justice. The HRC stated in 1995:

> In the latter connection, the Committee regrets that evidence presented to the Senate, against members of the armed forces proving that they have engaged in extrajudicial executions, forced disappearances, torture, or other violations of human rights may in some cases prevent the promotion but does not in itself cause the dismissal of those accused.[197]

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194 *A.P. v. Italy* (admissibility decision) HRC 2 November 1987 (Comm. no. 204/1986), para. 7.3.

195 Similarly, Kamminga argues that national amnesties cannot impede prosecution in a foreign country, see M.T. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (2001) 23 *Hum Rts Q* 4 pp. 940-974, at p. 958.

196 HRC, Concluding observations Algeria (2007), para. 7(c). *Cf.* HRC, Concluding observations Algeria (1998), para. 6(c) (The HRC urged the government 'in all cases of massacres to conduct an independent enquiry into the conduct of the security forces, from the lowest to the highest levels, and where appropriate, to subject them to penal and disciplinary sanctions.').

197 HRC, Comments on Argentina (1995), para. 11.

In 2000, the HRC again expressed concern that persons involved in gross human rights violations continued to serve in the military or in public office, and in some cases even having enjoyed promotion. Accordingly, the HRC recommended that such persons be removed from the military or from public service.[198]

8.6.2 The Inter-American Court of Human Rights

In the *Velásquez-Rodríguez Case*, the Inter-American Court explicitly laid down the duties to investigate and punish. The refinement in later cases of these duties to include criminal prosecution in enforced disappearance cases poses the question of what this obligation exactly entails and whether it is an absolute obligation. The case law on enforced disappearances demonstrates a rather stringent obligation on states in this respect. In fact, the Court accords relatives of disappeared persons a right 'to have those responsible prosecuted for committing said unlawful acts'.[199] One of the reasons for such a stringent obligation may be the result of the fact that in the vast majority of such cases, the Inter-American Court found a systematic practice of, *inter alia*, enforced disappearance. The facts guiding these cases reveal such grave violations, amounting to crimes against humanity, so that the Inter-American Court felt the need to attach a specific and determining weight and significance to the content of the duty to investigate.[200] In *La Cantuta v. Peru* the Inter-American Court noted that the events took place in a context of a generalised and systematic attack against sectors of the civilian population and inferred that:

> As a result, the duty to investigate and eventually conduct trials and impose sanctions, becomes particularly compelling and important in view of the seriousness of the crimes committed and the nature of the rights wronged; all the more since the prohibition against the forced disappearance of people and the corresponding duty to investigate and punish those responsible has become *jus cogens.* The impunity of these events will not be eradicated without ascertaining general liability of the State and individual criminal liability of its agents or other individuals, both of which complement each other. Therefore, suffice it to repeat that the investigations and prosecutions conducted on account of the events in this case warrant the use of all

198 HRC, 'Concluding Observations: Argentina' (15 November 2000) UN Doc. CCPR/CO/70/ARG (hereinafter: 'Concluding observations Argentina (2000)'), para. 9. See also HRC, Comments on Peru (1996), para. 20.

199 *Blake v. Guatemala* IACtHR (1998), para. 97; *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 66.

200 *La Cantuta v. Peru* IACtHR (2006), para. 110 (The Spanish version of the text by the Court reads, '[e]sa obligación de investigar adquiere una particular y determinante intensidad e importancia en casos de crímenes contra la humanidad [...]').

> available legal means and must aim to determine the whole truth and to prosecute and eventually capture, try and punish all perpetrators and instigators of the acts.[201]

This passage underscores that the obligation to investigate and punish those responsible has attained the status of *jus cogens*.[202] Accordingly, *all* perpetrators and masterminds must be prosecuted and punished and the *whole* truth must be established. In addition, both the state and the individual perpetrators must be held liable. This special weight coincides with the fact that the state's responsibility is considered to be aggravated in such circumstances.[203]

The 'specific weight and significance' in the context of a systematic practice of gross human rights violations appears to imply that lower standards apply to single incidences of enforced disappearance. The only enforced disappearance case that allows a comparison with such a crime outside the context of a systematic practice is the *Caballero-Delgado and Santana Case*. In this case, the investigations leading to the punishment of the perpetrators were prolonged, not free from mistakes and not yet closed.[204] Nevertheless, the Inter-American Court did not find a violation of the ACHR on this account. The reasoning leading to this conclusion drew on the *Velásquez-Rodríguez Case* stating that the state does not incur responsibility merely on the basis that the investigation and prosecution did not render any result. As such, this case may indeed reveal a lower standard. However, it would be presumptuous to draw the general conclusion that a lower standard applies to a single crime of enforced disappearance than to such a crime committed in the context of a systematic practice. Leaving the exact implications to one side, the following examination of the duty to combat impunity is based on the case law of enforced disappearance, the context of which was mainly one of a systematic practice of gross human rights violations.

It is useful to pause at the preliminary question of who must be held responsible and for what at the domestic level. As the passage in the penultimate paragraph dictates, all perpetrators must be brought to justice. All perpetrators include both the minds behind the crime, as well as the actual perpetrators of the facts. This strict objective becomes particularly stringent when state agents are or may be involved.[205] As to

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201 *Ibid.*, para. 157.

202 *Ibid.*; *Goiburú et al. v. Paraguay* IACtHR (2006), paras. 84 and 131. See also *Blake v. Guatemala* IACtHR (1996), separate opinion of Judge Cancado Trindade, para. 11 (qualifying the prohibition of enforced disappearance as a *jus cogens* norm as early as 1996).

203 *Goiburú et al. v. Paraguay* IACtHR (2006), para. 82.

204 *Caballero-Delgado and Santana v. Colombia* IACtHR (1995), paras. 57 and 58.

205 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 143; *La Cantuta v. Peru* IACtHR (2006), para. 146; *Goiburú et al. v. Paraguay* IACtHR (2006), para. 117 (The Inter-American Court reiterated that 'this investigation should be conducted using all available legal means and directed at determining the truth and the pursuit, capture, prosecution and punishment of all the masterminds and perpetrators of the facts, particularly when State agents are or may be involved').

state authorities that fail to prevent an enforced disappearance, the Inter-American Court is of the view that certain situations also create an obligation to investigate with due diligence the omissions of state agents, *i.e.* the failure to act.[206] The perpetrators must be prosecuted on the basis of the adequate criminal provision in domestic law. As Chapter 7 section 5 *infra* demonstrated, states that have ratified the IACFD have to create the crime of enforced disappearance in their domestic legislation. Alleged perpetrators are to be tried for this crime, even when the enforced disappearance commenced prior to the enactment of such a crime. Obviously, this conclusion raises the issue of retroactivity. In monitoring compliance with the reparations ordered in *Trujillo-Oroza v. Bolivia*, the Inter-American Court reiterated that the crime of enforced disappearance is a continuing crime as long as the whereabouts of the disappeared person are not discovered. As such, applying the crime of enforced disappearance to a criminal trial in which the enforced disappearance commenced prior to the definition of such a crime in domestic law is not a matter of retroactivity. The application of such a crime is justified by its continuous nature.[207]

8.6.2.1 Factors leading to impunity: La Cantuta v. Peru

As the Inter-American Court established in its first case, the obligation to investigate is means-oriented rather than result-orientated.[208] At the same time, this duty must be carried out with all available means and with due diligence. As such, the Inter-American Court has not been hesitant to subject the manner in which criminal investigations and subsequent proceedings were executed to intense scrutiny. In particular, the Court has monitored whether the criminal investigations, or the lack thereof, have led to the impunity of the perpetrators of the crimes. The landmark case *La Cantuta v. Peru* is illuminating for the issues with which the Inter-American Court has been confronted and the boundaries within which states have to give effect to this duty. In this case, the Inter-American Court attributed a state of impunity to the combination of legal impediments with the factual situation, which was manifested in three ways: by the delegation of investigations to the military courts, by the removal of certain judges and prosecutors and by the enactment of amnesty laws.[209]

The facts of the case relate to ten enforced disappearances in the context of a systematic and generalised practice of illegal and arbitrary detention, torture, unlawful executions and enforced disappearances in Peru from 1988 to 1993. From May 1991, a military presence authorised by Act No. 726 was established on the campus of La

206 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 126; *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 182.

207 *Trujillo-Oroza v. Bolivia* (monitoring compliance with the judgment) IACtHR (16 November 2009), paras. 37-40.

208 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 177.

209 *La Cantuta v. Peru* IACtHR (2006), para. 92.

Cantuta University. The military monitored the entry and exit of students. On 18 June 1992, members of the army and agents of the 'Grupo Colina' entered the premises of the University. Grupo Colina was a group related to the *Servicio de Inteligencia Nacional* charged with the task of identifying and eliminating those persons belonging to insurgent groups. They were hooded and wore dark clothing. They forced all students to gather outside the building, nine of whom were on their list and they were arrested accordingly. At the same time, one of the university professors, Professor Muñoz-Sanchez, was taken from his house.[210] At the time of the judgment, the remains of two of the students had been identified while the others remained undiscovered. During the remaining months of 1992, several *habeas corpus* petitions were filed on behalf of the victims. However, they were all declared without merit because the whole operation was denied by the army.

In 1992 and 1993, ordinary criminal courts conducted investigations at the instigation of *inter alia* the relatives. However, in 1993 military courts initiated parallel investigations and started to wage a 'jurisdiction battle', attempting to prevent the ordinary criminal courts from dealing with the case. Eventually, jurisdiction was referred to the military courts as a result of a modification in domestic legislation.[211] In 1994, the military courts convicted eight army officers and discharged three persons accused of instigating the crimes.[212] However, by Amnesty Act No. 26479 passed by Congress in June 1995 and its interpretation through Act No. 26492, these persons were granted an amnesty by the Supreme Court and accordingly were released. These laws also stipulated the discontinuance of any pending investigation and barred new investigations related to events that occurred as a result of the fight against terrorism during the period from May 1980 until the date of the promulgation of this law.[213]

Following the judgment of the Inter-American Court in *Barrios Altos v. Peru*, declaring the amnesty law incompatible with the ACHR,[214] the Joint Chamber of the Supreme Council of Military Justice (SCMJ) decided to declare the 1995 decision null and void and to reverse these proceedings to the procedural stage prior to the application of the amnesty, which meant that the convictions of the military officers regained legal effect. The Inter-American Court, however, noted that there is no record that these sentences had accordingly indeed been executed.[215] Only after the fall of the Fujimori regime were new investigations carried out and proceedings initiated before ordinary criminal courts in connection with the La Cantuta events: the judges

210 *Ibid*., paras. 80(4) and 80(10)-(14).
211 *Ibid*., paras. 135-137.
212 *Ibid*., para. 138.
213 *Ibid*., paras. 80(58)-(61).
214 *Barrios Altos v. Peru* IACtHR (14 March 2001), para. 41 and *Barrios Altos v. Peru* (interpretation of the judgment on the merits) IACtHR Series C No. 83 (3 September 2001), para. 18 (declaring the Barrios Altos judgment to have general effect).
215 *La Cantuta v. Peru* IACtHR (2006), paras. 80(63)-(66).

who dismissed the case brought against the alleged minds behind the operation had been convicted; military officers were under investigation, eleven of whom had been in pre-trial detention following an arrest warrant and one of them was convicted and sentenced to four years' imprisonment; the Ad Hoc Prosecutor's Office, which was specifically established for cases against Fujimori, the then President of Peru, and his close advisor and head of the intelligence services, Montesinos, filed a complaint for, *inter alia*, the commission of the forced disappearance of Hugo Muñoz-Sanchez and the nine students in La Cantuta; and an extradition request for the accused Fujimori was pending.[216]

The question put before the Inter-American Court was whether Peru had complied with its duty to investigate, prosecute and punish the perpetrators of the events in La Cantuta. The respondent state argued that the institution of a new investigation after the fall of Fujimori discharged this obligation. Invoking the best effort nature of the obligation to investigate, the respondent state argued that the fact that no guilty sentences had been rendered against the alleged perpetrators was not in violation of the ACHR.[217]

The Inter-American Court recognised the efforts of the respondent state in the new investigations that included investigations in respect of the then highest ranking government officials including the former President. Nevertheless, the Court considered that for several reasons 'the outcome of the proceedings have been quite partial as regards bringing charges and identifying and eventually convicting those responsible'.[218] It noted, for instance, that no new proceedings had been instituted in the ordinary courts concerning the persons who had been convicted by the military courts, but profited from the amnesty law and they had not served their sentence.[219] In particular, the Inter-American Court dealt with four issues relevant to the clarification of the content of the duty to combat impunity: (1) justice within a reasonable time, (2) the use of military courts to try the perpetrators, (3) the amnesty law in place as a legal impediment, and (4) international cooperation.

8.6.2.1.1 Reasonable time

The Inter-American Court noted the time that had passed since the events and the length of the investigations and subsequent proceedings. In this regard, victims and their relatives have the right to have every necessary step taken within a reasonable time to know the truth and to punish those responsible for the crimes.[220] According to established case law, three factors determine whether the time frame was reasonable:

216 *Ibid*., paras. 80(67)-(92).
217 *Ibid*., para. 42.
218 *Ibid*., para. 147.
219 *Ibid*., para. 150.
220 *Ibid*., para. 149.

(1) the complexity of the case, (2) the procedural activity of the party concerned, and (3) the conduct of the judicial authorities. The appropriateness of applying these criteria depends on the circumstances of each case. Furthermore, the strictness of the application of the reasonable time requirement has been somewhat conditioned by the overall purpose of serving justice. In this respect, 'the duty to wholly serve the purposes of justice prevails over the guarantee of reasonable time.'[221] In assessing whether the investigations were conducted within a reasonable time in the *La Cantuta Case*, the Inter-American Court stressed that the period within which such investigations must be conducted starts to run from the time that the enforced disappearance took place. This period continued notwithstanding the discontinuation of the investigations both as a result of the amnesty law and the regime change.[222] Overall, the investigations and prosecutions lasted for more than 14 years, and this exceeded any notion of reasonableness.

8.6.2.1.2 The use of military courts

The Inter-American Court established that 'in a democratic State, the jurisdiction of military criminal courts must be restrictive and exceptional, and they must only judge military men for the commission of crimes or offences that due to their nature may affect any interest of military nature.'[223] As such, it considered that military courts are not the appropriate channel for the investigation and adjudication of serious human rights violations. Accordingly, Article 8 ACHR is violated when military courts nevertheless assume jurisdiction over such crimes. In this case, having already established the partiality and dependence of the military judges in relation to the executive branch,[224] the Inter-American Court found that the investigations and trials violated the right to an appropriate judge, due process guarantees and, ultimately, the right of access to justice.[225]

As a consequence, the respondent state had to investigate, punish and prosecute several perpetrators of enforced disappearances in the ordinary system of justice, despite the fact that they had already either been convicted but not yet sentenced, or acquitted by a military court. In answer to the objection that such a clear obligation breaches the basic criminal law principle of *ne bis in idem* or double jeopardy, the Inter-American Court stated that 'double jeopardy does not apply inasmuch as [the perpetrators] were prosecuted by a court that had no jurisdiction, was neither [sic]

221 *Ibid*.
222 *Ibid*.
223 *Ibid*., para. 142.
224 *Ibid*., para. 141.
225 *Ibid*., paras. 142 and 145.

independent nor [sic] impartial and failed to meet the requirements for competent jurisdiction.'[226]

8.6.2.1.3 Amnesty laws and the ACHR

The victims in the *La Cantuta Case* encountered the same legal impediment as the victims in an earlier landmark case against Peru, *Barrios Altos v. Peru*. In this case, the Inter-American Court ruled on the compatibility of Amnesty Act Nos. 26479 and 26492. This case pertained to a massacre that ensued on 3 November 1991 when six heavily-armed individuals burst into a building located in the neighbourhood known as Barrios Altos in Lima and killed 15 persons and injured another four.[227] The Inter-American Court stated that:

> […] all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.[228]

As a result, the Inter-American Court found the self-amnesty law in this case to be incompatible with the ACHR.[229] The rationale behind this finding was that:

> Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.[230]

Judge Cançado Trindade underlined in his concurring opinion to the *Barrios Altos Case* that self-amnesties cannot be considered as 'laws' under the ACHR and are directly in violation of the right to truth and the right to justice, starting with access thereto.[231] In the interpretation of this judgment, the Inter-American Court clarified

226 *Ibid.*, paras. 151 and 153.
227 *Barrios Altos v. Peru* IACtHR (14 March 2001), paras. 2 and 39.
228 *Ibid*., para. 41.
229 *Ibid*., para. 42.
230 *Ibid*., para. 43.
231 *Ibid*., concurring opinion of Judge Cançado Trindade, paras. 5, 6 and 7. See also A.A. Cançado Trindade, 'The right of access to justice in the Inter-American System of human rights protection' *Italian Yearbook of International Law* (Leiden/Boston: Martinus Nijhoff Publishers 2007), pp. 19 and 20 (noting that this was the first time in contemporary international law that an international

that the incompatibility consideration not only applied to the facts of that case, but had a further reaching general effect since the enactment of a law that 'overtly conflicts with the obligations undertaken by a State Party to the Convention constitutes *per se* a violation of the Convention.'[232]

The Court followed this judgment in *La Cantuta v. Peru*,[233] but had to face a subsequent problem that the amnesty laws had not been formally repealed. The Inter-American Court had to decide on the question of the compatibility with the ACHR of an amnesty law that at the time of the hearing was formally still part of domestic law, but had been rendered without legal effect in practice. The Inter-American Commission argued that Article 2 ACHR includes the positive duty to repeal any legislation that runs counter to the aim and purpose of the Convention.[234] The Inter-American Commission argued in this respect that the concept of repealing is linked to the 'principle of the rule of law and to that of legal certainty [...], which requires that the law be repealed by virtue of an official instrument of equal or superior hierarchy'.[235] On the other hand, the representatives of the victims and the state argued that sufficient measures had been taken to ensure that the amnesty was rendered without legal effect on the whole and in general. They based their arguments on the fact that the decision of the Inter-American Court in *Barrios Altos v. Peru* was part of the domestic *corpus juris*. In Peru's domestic legal order, the ACHR and the interpretation of the norms by way of the judgments of the Inter-American Court entail norms of higher normative value than the amnesty laws. Moreover, practice had confirmed the ineffectiveness of such laws by the retrial of the alleged perpetrators who had been discharged on the basis of the amnesty laws.[236] The Court in turn examined whether the measures were effective pursuant to the *effet utile* principle.[237] Since Article 2 ACHR does not define

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adjudicatory body had quashed a domestic amnesty law. He also recognises that 'the jurisprudential construction of the Inter-American Court was rendered possible due to the exercise of the right of international individual petition, whereby the victims and their relatives affirm themselves as true subjects of contemporary International law […]').

232 *Barrios Altos v. Peru* IACtHR (3 September 2001), para. 18 and the second operative paragraph. See also Rodríguez-Pinzón (2011), p. 244 (noting that this decision was a significant step in the case law of the Inter-American Court because it presumes 'an intense relationship between the Court's decisions and national constitutional structures, which consequently limits States' options in their transition processes.').

233 *La Cantuta v. Peru* IACtHR (2006), separate opinion of Judge García-Ramírez (confirming that this judgment consolidates and clarifies some of the aspects of the Barrios Altos judgment).

234 *Ibid*., para. 162(a).

235 *Ibid*., para. 162(c).

236 *Ibid*., paras. 163(b) and (d).

237 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 69 (The Court stated that '[t]he States Parties to the Convention must guarantee compliance with its provisions and its effects *(effet utile)* within their own domestic laws. This principle applies not only to the substantive provisions of human rights treaties (in other words, the clauses on the protected rights), but also to the procedural provisions, such as the one concerning recognition of the Courts contentious jurisdiction').

the specific measures to be taken, the Court established two criteria on the basis of which it determined the effectiveness:

> (i) repealing rules and practices of any nature involving violations to the guarantees provided for in the Convention or disregarding the rights enshrined therein or hamper the exercise of such rights, and (ii) issuing rules and developing practices aimed at effectively observing said guarantees.[238]

According to the Court, the question here centred around the first question: whether the amnesty laws had continued 'to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible' or whether they had or may still have 'the same or a similar impact with regard to other cases that have occurred in Peru.'[239] The Court reasoned that the Inter-American Commission had not presented any evidence that proved either the alleged continuation of the effects of the amnesty law or the risk that they would materialise in the future. Furthermore, the Court took into consideration that the *Barrios Altos* judgment had general effect. In Peru's domestic law there were internal rules in place governing the effect of decisions of the Inter-American Court and their incorporation into the Peruvian legal system. Moreover, an expert opinion confirmed that the laws no longer had any legal effect and several domestic court decisions had confirmed the immediate and binding force of the judgments of the Inter-American Court for all organs of government including the judiciary.[240] Thus, the Court concluded that when the amnesty laws were in force the state failed under its obligations under Article 2 in conjunction with Articles 4, 5, 7, 8(1), 25 and 1(1) ACHR to the detriment of the victim's relatives. However, after the *Barrios Altos Case*, the Court was of the opinion that the amnesty law had practically not been capable of having legal effect, nor could have in the future.[241]

8.6.2.1.4 International cooperation

As one of the main accused, the former President Fujimori, was arrested in Chile in 2005, the Inter-American Court discussed the international dimension of the duty to investigate with the aim of prosecution. The Court qualified the duty to cooperate in

238 *La Cantuta v. Peru* IACtHR (2006), para. 172.
239 *Ibid*., para. 175.
240 *Ibid*., paras. 176-189.
241 *Ibid*., separate opinion of García-Ramírez, para. 5 and separate opinion of Judge Cançado Trindade, para. 35 (stressing the importance of the consideration by the Court that self-amnesty laws are in conflict with the state obligations emanating from ACHR from the moment of their enactment. As a result, such laws neither had legal effect at the time of their adoption nor at present or in the future).

bringing the perpetrators to justice as an *erga omnes* obligation,[242] and contemplated that:

> Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States' erga omnes obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction. The Court points out that, under the collective guarantee mechanism set out in the American Convention, and the regional and universal international obligations in this regard, the States Parties to the Convention must collaborate with one another towards that end.[243]

The Court commended the respondent state in that it had fulfilled its obligation to 'request and promote' the extradition of one of the main defendants. The Court considered that an obligation to do so derives from the inferred duty to investigate from Article 8 ACHR read together with Article 1(1) ACHR.[244] Similarly, states on whose territory the alleged perpetrator resides must either cooperate with requests for extradition or prosecute him or her.[245]

8.6.2.2 The La Cantuta Case *in context*

The combination of the factual situation and the legal impediments as portrayed by the situation in Peru clearly resulted in a situation of impunity for the perpetrators of the enforced disappearances. There are several conclusions to be drawn from the *La Cantuta Case*. Firstly, investigations and criminal proceedings must be conducted within a reasonable time. Secondly, the use of military courts to try gross human rights violations is incompatible with the ACHR. Thirdly, amnesty laws, or at least self-amnesties, may not impede criminal investigations. Fourthly, states have a duty to cooperate in bringing the perpetrators of enforced disappearance to justice, which includes an obligation to request extradition when the accused is abroad. These four conclusions lead in turn to related questions: does the ACHR require results within this reasonable period of time? Is the use of military courts always incompatible with the ACHR? Does the application of all amnesties violate the ACHR?

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242 *Barcelona Traction, Light and Power Company, Limited, Second Phase,* ICJ Judgment, I.C.J. Reports 1970, para. 33 (stating that obligations *erga omnes* are by their very nature 'the concern of all States' and, '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection').

243 *La Cantuta v. Peru* IACtHR (2006), para. 160.

244 *Ibid*., para. 159.

245 *Goiburú et al. v. Paraguay* IACtHR (2006), paras. 131 and 132.

8.6.2.2.1 Do results matter?

The reasonable time requirement is an aspect of the duty to investigate, which also requires states to carry out criminal investigations and subsequent proceedings with due diligence. A clear obligation to ensure that every necessary measure is taken to guarantee the right of the alleged victims or their next of kin to know the truth about what happened and to sanction those who are eventually found to be responsible within a reasonable time is strongly rooted in the Court's case law.[246] The three factors that are taken into account under Article 8 ACHR to assess whether the time frame was reasonable, namely (1) the complexity of the case, (2) the procedural activity of the party concerned and (3) the conduct of the judicial authorities, are applied in the context of each case.[247] The attribution of state responsibility on the basis of this requirement suggests that, where the Inter-American Commission proves the length of the time period, the burden of proof rests upon the respondent state to evince that it has taken all steps that it could have been expected to take with reasonable expeditiousness. The unreasonable prolonged time period of 14 years in *La Cantuta* is not a threshold case. For instance, the Inter-American Court found that an investigation stage that lasted for over seven years without resulting in any indictment was too excessive as well.[248]

What are then reasonable steps and do they need to render results? On the one hand, the Inter-American Court has characterised the nature of the duty to investigate and bring to justice as one of means rather than results. This means-oriented approach corresponds with the view that the role of the Court is to assess international state responsibility instead of the individual responsibility of the perpetrators. On the other hand, the Inter-American Court took into consideration the outcomes of criminal proceedings when assessing whether the state fulfilled this obligation in the *La Cantuta Case*. One case, the *Street Children Case*, is emblematic for the thoroughness with which the Inter-American Court assesses criminal proceedings.

The *Street Children Case* concerned the death of five street children between the ages of 15 and 20 years. On 15 June 1990 and in broad daylight, four of the five youths were approached by a pick-up truck. Armed men got out of the vehicle and forced the youths to enter the truck and took them away. The bodies of the youths were found in woodland during the following two days.[249] The official causes of death were injuries due to gunshots to the head. The fifth boy was killed by gunshots

246 *E.g. Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 65.
247 *Ibid*., para. 67; *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 171.
248 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 73.
249 The *Street Children Case* was not considered by the Court as an enforced disappearance case. The killings, however, happened in the context of a systematic practice of subjecting 'street children' to threats, persecution, torture, forced disappearance and homicide, see *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 189.

at around midnight on 25 June 1990. Witnesses had identified two policemen as the perpetrators. These testimonies were confirmed by the investigations carried out by the National Police Forces themselves. However, due to the lack of evidence, the domestic judicial bodies, up to the highest instance, ruled that the identity of the perpetrators could not be established beyond reasonable doubt. The two policemen were subsequently acquitted.[250] In contrast to the domestic authorities, the Inter-American Court concluded that there was both abundant, as well as compelling evidence that state agents had abducted the four youths and were responsible for the five deaths.[251] The evidence considered by the Court was the evidence presented in the domestic proceedings corroborated by the general context of violent crimes against street children by various types of state security agents.[252] In assessing Articles 8(1) and 25 in relation to 1(1) ACHR, the Inter-American Court reiterated that it is not the function of the Court to investigate or prosecute individual conduct. Rather, the question is whether the state should incur responsibility for human rights violations.[253] Even so, the Inter-American Court considered itself competent to examine the domestic proceedings to assess whether these proceedings complied with the standards emanating from the ACHR,[254] and found:

> If we confront the facts in this case with the foregoing, we can observe that Guatemala conducted various judicial proceedings on the facts. However, it is clear that those responsible have not been punished, because they have not been identified or penalized by judicial decisions that have been executed. This consideration alone is enough to conclude that the State has violated Article 1.1 of the Convention, since it has not punished the perpetrators of the corresponding crimes. In this respect, there is no point in discussing whether the defendants in the domestic proceedings should be acquitted or not. What is important is that, independently of whether or not they were the perpetrators of the unlawful acts, the State should have identified and punished those who were responsible, and it did not do so.[255]

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250 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), paras. 84-121.

251 *Ibid*., paras. 128, 129 and 147.

252 *Ibid*., paras. 130 and 142. Cf. *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999) (The evidence for substantiating a systematic practice with street children as victims that appeared in the judgment was a report by Amnesty International and a report by Casa Alianza – an organisation that ccomplements educational and support programmes for "street children" – to the Committee against Torture. One expert witness from Casa Alianza also testified on the repeated violence, including homicides, against street children by state agents, see paras. 59(c) and 79 of this judgment).

253 *Ibid*., para. 223. See also *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 56.

254 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 224. See also *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), paras. 57 and 58.

255 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999), para. 228.

In this regard, the inadequate investigations and proceedings affected the rights of the relatives to be heard and to have their accusations discussed by an independent and impartial tribunal.[256] The sweeping statement that the respondent state should have identified and punished the perpetrators and that this failure in itself breaches Article 1(1) ACHR raises the question whether the obligation to investigate and punish is actually an obligation of means.

The violation was in particular based on two defects in the judicial proceedings: some of the crimes had not been investigated at all and serious flaws existed in securing and evaluating evidence.[257] In particular, the Inter-American Court went into great detail as to the omissions in securing evidence and the failings in the evaluation of the evidence. In view of the fact that the bodies of the victims were found, an exception in enforced disappearance cases, the Court listed the flaws in gathering evidence, including: the manner in which the autopsies had been performed, the lack of fingerprints and photographs, witnesses had not been summoned, no reconstruction of the facts had taken place, no dental expert appraisal had been ordered to determine whether one of the defendants had a particular characteristic that was described by the witnesses, the homes of the defendants had not been searched, no investigation had been conducted into the vehicles, nor into the use and registration of the weapons, and finally there had been no investigation of the threats that some of the witnesses had received, which had hampered the investigation.[258] As to the evaluation of evidence, the Inter-American Court criticised the criteria that had been used to either dismiss or accept evidence. For instance, the mothers of the victims were disqualified as witnesses due to their relationship with the victims while others were disqualified without any justification.[259] In respect to other testimonies, a certain degree of imprecision in some of the statements was used as a ground for the total rejection of these testimonies even though they provided important information with regard to other aspects of the case. Furthermore, other incriminating evidence was disregarded on unconvincing grounds. Lastly, the Inter-American Court criticised the rejection of the report of the National Police Forces that had identified the perpetrators as sufficient evidence.[260] On the whole, the Court observed that:

> it is evident that they fragmented the probative material and then endeavored to weaken the significance of each and every one of the elements that proved the responsibility of the defendants, item by item. This contravenes the principles of evaluating evidence, according to which, the evidence must be evaluated as a

256 *Ibid*., para. 229.
257 *Ibid*., para 230.
258 *Ibid*., para. 231.
259 As Chapter 6 *supra* shows, the Inter-American Court takes into account when a witness has an interest in the case, but evaluates the testimony within the body of evidence as a whole).
260 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999) para. 232.

> whole, in other words, taking into accounts mutual relationships and the way in which some evidence supports or does not support other evidence. Consequently, the State failed to comply with the obligation to carry out an effective and adequate investigation of the corresponding facts, in violation of Article 1.1 of the American Convention, in relation to its Article 8.[261]

The fragmentation of the probative pieces of evidence together with the attempt to weaken the evidentiary value of each piece separately was not in conformity with ACHR standards.

Thus, whereas the Inter-American Court pronounced a generalised statement that the lack of a successful identification and punishment of the perpetrators led to the violation of Articles 8 and 25 ACHR, the reasoning shows an examination of the way in which the evidence was collected and examined. This reasoning points to a moderation of the sweeping statement and demonstrates that the actual violation lies in the way in which the investigations and subsequent criminal proceedings were carried out. The close scrutiny of the evaluation of evidence also played a role in assessing the effectiveness of the criminal proceedings in the *Serrano Cruz Sisters Case*. The Inter-American Court came to the conclusion that the domestic proceedings failed to take into account the specific characteristics of the reported facts, the situation of armed conflict in which the events took place, and the situations in which persons who had disappeared during the armed conflict had eventually been found.[262]

At first glance, the discrepancy between, on the one hand, the means-oriented nature of the obligations to investigate and prosecute and, on the other, the examination by the Inter-American Court of the proceedings and their outcomes as well as the time within which they were conducted creates considerable confusion. It is only possible to reconcile these two ideas with the argument that the Inter-American Court examines the way in which the investigations and trials were conducted, and does not assess the outcome of domestic proceedings. At the same time, outcomes in terms of indictments or convictions, or the lack thereof, have been indicators for assessing the reasonable time requirement; when it concerns gross human rights violations, there would appear to be little room for states to conduct investigations and trials without convicting any perpetrators. Nevertheless, more recent case law has further rooted the insistence on the nature of the obligation as one of means rather than of results.[263] At any rate, it is clear that the means-oriented nature does not appear to prevent the Inter-American Court from subjecting the domestic proceedings to close scrutiny.

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261 *Ibid*., para. 233.
262 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 91.
263 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), para. 138.

8.6.2.2.2 The use of military courts

One of the major factors contributing to *de facto* impunity may also arise when the investigating and adjudicating bodies are neither independent nor impartial. The *La Cantuta Case* is not the only case in which the use of military courts was at stake. This issue has arisen in many enforced disappearance cases where military tribunals had jurisdiction over the crimes allegedly committed by the security or armed forces. As the Inter-American Court has stated, military tribunals are not *per se* contrary to the ACHR, but their jurisdiction should be strictly limited. As the case law generally shows, such jurisdiction is limited to cases in which military personnel are accused of having committed crimes or misdemeanours that, by their nature, harm the juridical interests of the military system,[264] related to the functions of the military forces under the law.[265] Consequently, the designation of jurisdiction to military tribunals over crimes that should be dealt with by the ordinary justice system breaches the right to be tried by an appropriate judge and due process guarantees.[266] In light of these general considerations, the Inter-American Court has generally opposed the use of military courts investigating and adjudicating gross human rights violations.[267] As a result, the case law of the Inter-American Court makes clear that an accused charged with the crime of enforced disappearance can be subjected to trial twice when the process and outcome of the first trial did not meet the requirements of the ACHR.

8.6.2.2.3 The compatibility of amnesties with the ACHR

The *La Cantuta Case*, based on the judgment in *Barrios Altos v. Peru*, clearly demonstrates that self-amnesties are incompatible with the ACHR. The *Barrios Altos Case* mentions the incompatibility of amnesty laws in general.[268] However, when turning to the facts of the case, the subsequent paragraphs only consider self-

264 *Durand and Ugarte v. Peru* IACtHR (2000), para. 117; *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 189; *La Cantuta v. Peru* IACtHR (2006), para. 142.

265 *Usón Ramírez v. Venezuela* IACtHR (2009), para. 108.

266 *Cantoral-Benavides v. Peru* IACtHR (2000), para. 112.

267 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), paras. 189 and 193. See also *The 19 Tradesmen v. Colombia* IACtHR (2004), para. 167. This consideration is in line with the IACFD that excludes explicitly military jurisdictions for trying alleged perpetrators. Art. IX IACFD reads: 'Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions. The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties. Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations.'

268 This has been repeated in enforced disappearance cases, such as *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005) para. 172 (the reference to Barrios Altos was incorporated in the considerations concerning reparations. The Court only addressed the issue of amnesty laws and prescription in this

amnesties.[269] Also, it must be noted that both these cases related to a systematic practice of gross human rights violations. This context raises the question whether amnesty laws are only incompatible with the ACHR in the context of a systematic practice. Such a conclusion appears to be supported by *Almonacid Arellano et al. v. Chile,* a decision in which the Court stressed that crimes against humanity cannot be susceptible to amnesty laws.[270] The term 'crimes against humanity' is used in enforced disappearance cases when the case involves a systematic practice. Hence, the scope of the *Barrios Altos Case* leaves certain questions unanswered: are only self-amnesties incompatible with the ACHR or other amnesties as well?[271] Is granting an individual amnesty for a single crime of enforced disappearance in compliance with the ACHR? An answer to the first question is given in general terms in the case *Gomes Lund v. Brazil*. The Inter-American Court considered:

> In regard to [the allegations] by the parties regarding whether the case deals with an amnesty, self-amnesty, or "political agreement," the Court notes, as is evident from the criteria stated in the present case […], that the non-compatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, "self-amnesties." Likewise, as has been stated prior, the Court, more than the adoption process and the authority which issued the Amnesty Law, heads to its *ratio legis*: to leave unpunished serious violations in international law committed by the military regime. The non-compatibility of the amnesty laws with the American Convention in cases of serious violations of human rights does not stem from a formal question, such as its origin, but rather

stage of the proceedings because it was not able to do so in the merits based on the facts since the amnesty law was still in force in El Salvador but was not used in the domestic proceedings).

269 *Barrios Altos v. Peru* IACtHR (14 March 2001), paras. 42-44.

270 *Almonacid-Arellano et al. v. Chile* IACtHR (2006), para. 114 (This case concerned the extrajudicial killing of Mr. Almonacid-Arellano, 42 years old, who was arrested at his home by the police on 16 September 1973. The police shot him on his way to the police truck and he died the next day in hospital (para. 82(8)). This extrajudicial killing occurred in the context of a systematic practice 'of arbitrary and summary executions, torture (including rape, mainly of women), and arbitrary detention at facilities not subject to legal control, forced disappearances and other human right violations committed by State officials' (para. 82(4)). See also *The Mapiripán Massacre v. Colombia* IACtHR (2005), para. 304; *Castillo-Páez v. Peru* IACtHR (1997), para. 90; *Castillo-Páez v. Peru* IACtHR (1998), paras. 105-107.

271 It must be noted that the IACFD is silent on the issue of amnesties. *Cf.* E. Lutz, 'Responses to Amnesties by the Inter-American System for the Protection of Human Rights', in: D.J. Harris & S. Livingstone, (eds.), *The Inter-American System of Human Rights* (Oxford: Oxford University Press 1998) pp. 345-370, at p. 368 (Lutz argues that the Inter-American Court has been reluctant to declare amnesties in general incompatible with the ACHR. She clearly perceives a distinction in the approach of the Inter-American Court towards self-amnesties, which are incompatible with the ACHR per se, and towards other types of amnesties).

> from the material aspect as they breach the rights enshrined in Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention.[272]

This consideration heralds the case-by-case assessment of the Inter-American Court whether the amnesty law in question impeded the right of access to courts and the right to an effective remedy for the victims. A doctrinal answer to the second question appears to be given in the *Gelman Case*, in which the Court stated that amnesties for *serious* human rights violations are not compatible with human rights.[273] In general, enforced disappearance is considered to be a serious human rights violation in the Inter-American system, which would then attract this prohibition of amnesties.

8.6.2.3 Duty to punish

The list of duties derived from Articles 1(1) and 2 ACHR in enforced disappearance cases includes the duty to punish the perpetrators. In this regard, the Court considers that relatives of persons subjected to enforced disappearance have the right to have the perpetrators prosecuted and 'the relevant punishment, where appropriate, meted out'.[274] Thus, the duty to punish requires that perpetrators are sentenced in the first place and that this punishment is appropriate according to the nature of the offence. In enforced disappearance cases, the main focus of the Inter-American Court has stated in cases in which the facts amounted to a crime against humanity that the respondent state must ensure that the crimes do not go unpunished.[275] Furthermore, three cases shed light on the content of this duty.

In the *Pueblo Bello Case*, the Inter-American Court confirmed the criminal nature of the measures with the consideration that 'disciplinary proceedings do not constitute a sufficient or effective recourse for the respective purposes. It may complement the criminal proceedings but not substitute for it in cases of gross human rights violations.'[276] In this case, the Court considered that members of the paramilitary group had benefited from the action of the justice system that convicted them, but had failed to execute the sentence. This had contributed to the impunity of most of those responsible for the gross human rights violations.[277] With regard to the duty to punish, the Court ordered Colombia to ensure that the sentences that had already been

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272 *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* IACtHR (2010), para. 175.

273 *Gelman v. Uruguay* IACtHR (2011), para. 229 (stating that 'The incompatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, "self-amnesties," and the Court, more than the adoption process and the authority which issued the Amnesty Law, heads to its *ratio legis*: to leave unpunished serious violations committed in international law'.).

274 *Blake v. Guatemala* IACtHR (1998), para. 97.

275 *Goiburú et al. v. Paraguay* IACtHR (2006), para. 128.

276 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 203.

277 *Ibid*., para. 211.

imposed on the convicted perpetrators of the massacre would be served.[278] The Court did not pronounce on the compatibility of Act No. 975 called 'Justice and Peace Act', aimed at the incorporation of members of illegal armed groups who make an effective contribution to achieve national peace,[279] with the ACHR.[280] In the reparations, the Court only ordered that:

> [t]o comply with the obligation to investigate and sanction those responsible in the instant case, Colombia must: (a) remove all the obstacles, de facto and de jure, that maintain impunity; […][281]

Later, the Inter-American Court incorporated more detailed principles for sentencing in its case law on enforced disappearances. In *Heliodoro-Portugal v. Panama*, the Inter-American Court reiterated its subsidiary nature when it comes to sentencing, but also indicated that the state's response to unlawful behaviour by state agents must be proportionate to the rights affected. The Court continued by stating:

> On this occasion, the Court deems it appropriate to reiterate this position and recall that the States have a general obligation, in light of Articles 1(1) and 2 of the Convention, to ensure respect for the human rights protected by the Convention, and that the duty to prosecute unlawful conduct that violates these rights is derived from that obligation. The prosecution must be consequent with the State's obligation to ensure rights; it is therefore necessary to avoid illusory methods that only appear to satisfy the formal legal requirements. In this regard, the rule of proportionality requires that the States, in exercising their duty to prosecute, impose penalties that truly contribute to prevent impunity, taking into account various factors such as the characteristics of the offense, and the participation and guilt of the accused.[282]

This passage shows that the requirement of the proportionality of the sentence is based on the need to combat impunity. This requirement is warranted to avoid illusionary prosecutions that enable impunity to prevail.

As examined in Chapter 7 subsection 5.2, an additional situation that prompts the duty to punish and that reinforces the pertinence of the duty to investigate, prosecute and punish is that a duty rests upon states to punish public officials who obstruct or delay the investigation.[283] The case law does not further specify that such

278 *Ibid*., para. 267.
279 *Ibid*., para. 95(20).
280 Rodríguez-Pinzón (2011), p. 245 (noting that the Inter-American Court has so far declined to issue a judgment on this matter).
281 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 268.
282 *Heliodoro-Portugal v. Panama* IACtHR (2008), para. 203.
283 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005) para. 173 (The Court stated that 'public officials and individuals who hinder, deviate or unduly delay investigations to clarify the truth

punishment must be criminal law in nature, so disciplinary sanctions appear to satisfy this obligation as well.

8.6.3 The European Court of Human Rights

As scrutinised in subsection 8.6.2 above, the Inter-American Court has dealt with a number of issues that relate to *de facto* or *de jure* impunity: the nature of the duty to investigate and prosecute; the use of military courts; amnesty laws; and international cooperation in fulfilling these duties. This section attempts to answer how the European Court has addressed these issues.

8.6.3.1 The nature of the duty to investigate and prosecute

In comparison with the Inter-American Court, the European Court is cautious in formulating the duty to prosecute and punish. Such prudence clearly follows from Article 13 ECHR, from which the European Court inferred in enforced disappearance cases that an effective remedy includes:

> in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure […].[284]

The emphasis on the investigation rather than the consequences demonstrates that the primary focus is on the duty to institute a criminal investigation rather than on duties to prosecute and punish. The procedural obligations inferred from Article 2 ECHR also primarily focus on the duty to institute criminal investigations which is an obligation of means.[285] Nevertheless, the European Court stated in the *Varnava Case* that an obligation to identify and prosecute any perpetrator of unlawful acts in connection with enforced disappearances under Article 2 ECHR does exist.[286] Must this milestone statement also be understood as a best effort obligation?

Certainly, Article 2 ECHR does not entail the right of victims to have third parties prosecuted or sentenced. If an investigation leads to prosecution, such proceedings do not necessarily need to lead to a conviction. On the other hand, the national courts

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about the facts must be punished, applying, in this regard, the provisions of domestic law with the greatest rigor.'). See also *The Caracazo v. Venezuela* IACtHR (2002), para. 119.

284 *Kurt v. Turkey* ECtHR (1998), para. 140. See also *Timurtaş v. Turkey* ECtHR (2000), para. 111.

285 *Bazorkina v. Russia* ECtHR (2006), para. 118; *Palić v. Bosnia and Herzegovina* ECtHR (2011), para. 65.

286 *Varnava a.o. v. Turkey* ECtHR [GC] (2009), para. 145; *Palić v. Bosnia and Herzegovina* ECtHR (2011), para. 64.

should ensure that life-endangering offences do not go unpunished.[287] Like the Inter-American Court, the European Court is clear on the boundaries of its competence; the Court's task is not to determine the guilt or innocence of the perpetrators. Instead, the Court assesses whether the domestic courts in reaching their conclusions have submitted the case to careful scrutiny 'so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined'.[288] Such scrutiny covers the proceedings as a whole. Accordingly, in a case of deaths due to a natural disaster and a failure by the state authorities to protect the population, the Court stated:

> Moreover, the requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law.[289]

The trial stage has mostly been the subject-matter considered under Article 6 ECHR, which has played a marginal role in enforced disappearance cases. Outside the case law on enforced disappearance, the European Court has taken the view that the evaluation of evidence is the task of the domestic courts, but it is within the province of the Court 'to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair'.[290]

In assessing the effectiveness of the criminal investigation, the outcomes have not been explicitly considered in enforced disappearance cases. Rather, the European Court has focussed on the delays in the investigation and, in particular, on flaws in securing evidence.[291] For instance, taking statements from witnesses two months after the time that the authorities were aware of the disappearance and making official inquiries after two years contributed to rendering the investigation ineffective.[292] In *Baysayeva v. Russia*, the applicant's husband disappeared on 2 March 2000. She immediately contacted the authorities, so that they were immediately aware of the disappearance. The Court noted:

> However, the investigation was opened only on 10 May 2000. When the investigation did begin, it was plagued by inexplicable delays in performing the most essential

287 *Nilkolova and Velichkova v. Bulgaria* ECtHR (2007), para. 57 (In this case, the victim had been beaten to death by police officers). See also *Budayeva a.o. v. Russia* ECtHR (2008), para. 144.
288 *Budayeva a.o. v. Russia* ECtHR (2008), para. 145.
289 *Ibid*., para. 143.
290 *Edwards v. the United Kingdom* ECtHR 16 December 1992 (Appl. no. 13071/87), para. 34; *Popov v. Russia* ECtHR 13 July 2006 (Appl. no. 26853/04), para. 178.
291 See also subsection 8.4.3 above.
292 *Timurtaş v. Turkey* ECtHR (2000), paras. 47 and 89.

> tasks. The applicant was not questioned until the end of June 2000. The local residents were questioned only in February and March 2004, and the servicemen of the OMON units from the Moscow Region only in June and December 2005, after communication of the complaint [to the European Court] to the respondent Government.
> Such delays by themselves compromised the effectiveness of the investigation and could not but have had a negative impact on the prospects for arriving at the truth. While accepting that some explanation for these delays can be found in the exceptional circumstances that have prevailed in Chechnya and to which the Government refer, the Court finds that in the present case they clearly exceeded any acceptable limitations on efficiency that could be tolerated in dealing with such a serious crime.[293]

The flaws were in particular remarkable due to the evidence that the applicant was able to submit to the authorities.[294] Furthermore, the investigation was adjourned and reopened on at least twelve occasions in six years. In spite of her procedural status as a victim in the investigation proceedings, the applicant was left virtually uninformed about the progress of the investigation. Only with respect to the adjournment and the reopening of the proceedings was she provided with sufficient information.[295] Hence, the European Court found a failure to carry out an effective criminal investigation under Article 2 ECHR.[296] Similar delays and flaws in the investigation have prompted the European Court to find repeated violations by Russia on account of its failure to comply with the procedural aspect of Article 2 ECHR in enforced disappearance cases.[297]

The landmark enforced disappearance case in which the European Court did not find a violation of the procedural duty to carry out an investigation that is capable of leading to the identification of the perpetrators despite several delays is *Palić v. Bosnia and Herzegovina*. The applicant in this case alleged a violation of *inter alia* Article 2 ECHR due to a failure to investigate the disappearance of her husband. Her husband, a military commander of a local force at the time of the war, disappeared on 27 July 1995, after he went to the opposing local forces, which had taken control of that area, to negotiate the terms of the surrender of his forces. The applicant had made various unsuccessful attempts to discover his whereabouts. In March 2007 an *ad hoc* commission, which had been created to investigate this case, established that Mr. Palić had been buried in a mass grave and possibly transferred to another mass

293 *Baysayeva v. Russia* ECtHR (2007), paras. 126 and 127.
294 *Ibid*., para. 91.
295 *Ibid*., para. 129.
296 *Ibid*., para. 130.
297 *E.g. Luluyev a.o. v. Russia* ECtHR (2006), paras. 93-101; *Sangariyeva a.o. v. Russia* ECtHR (2008), paras. 75-86; *Gekhayeva a.o. v. Russia* ECtHR (2008), paras. 100-108; *Alikhadzhiyeva v. Russia* ECtHR (2007), paras. 66-73.

grave. In August 2009, the International Commission on Missing Persons identified the body of Mr. Palić and at the end of that month he was buried with military honours.[298] The investigation, with the purpose being to identify the perpetrators, revealed a combined action between the various domestic and international bodies, dealing with the atrocities committed during the war in Bosnia and Herzegovina.[299] The European Court scrutinised the investigative steps conducted by the respondent state in order to assess whether the state had fulfilled its obligation to carry out an effective investigation. The Court began by commending the fact that the mortal remains of Mr. Palić had been identified, despite the initial delays in the investigation, in a context where almost 30,000 people had gone missing. The question posed to the Court was whether the investigation was capable of identifying the perpetrators and whether those persons could eventually be brought to justice was answered in the affirmative.[300] The Court took note of the initial delays, but recognised that as of late 2005 numerous investigative steps had been undertaken that had led to the issuing of an international arrest warrant against the alleged perpetrators. The proceedings had been at a standstill since then because the perpetrators lived in Serbia and could not be extradited as Serbian citizens. Given that the applicant herself could have taken steps to initiate proceedings in Serbia or against Serbia, the European Court found it unnecessary to examine whether the respondent state should have requested Serbia to take such proceedings. On the basis that the obligation to investigate is one of means rather than result, the European Court found no violation of the procedural aspect of Article 2 ECHR even though no persons had yet been convicted fifteen years after the disappearance of the applicant's husband.

In relation to the question whether the proceedings had been carried out within a reasonable time, the Court had the competence to examine the situation after July 2002 due to the moment of ratification of the ECHR by the respondent state. In considering that the duty to investigate must not impose a disproportionate burden on the state authorities, the Court took account of the specific facts and context of a post-conflict situation. The context of the case was that more than 100,000 people were killed, almost 30,000 persons went missing and over two million people were displaced. Accordingly, the European Court recognised that the respondent state had to make choices in terms of post-war priorities and resources. Furthermore, after the long war, the respondent state underwent fundamental changes in its internal structure and political system. The Court found it self-evident that certain sections of the former warring factions were reluctant to work with the new or restructured

298 *Palić v. Bosnia and Herzegovina* ECtHR (2011), paras. 10-31.

299 The ECtHR referred to the International Criminal Tribunal for the former Yugoslavia, the Human Rights Chamber for Bosnia and Herzegovina, *ad hoc* commissions and the War Crimes Section within the Court of Bosnia and Herzegovina.

300 *Palić v. Bosnia and Herzegovina* ECtHR (2011), para. 65.

institutions. Nonetheless, the European Court assessed that as of 2005, the legal system should have been able to deal effectively with, amongst other things, enforced disappearances, after intense vetting and other reorganisational measures. In such circumstances and given that there was no substantial period of inactivity after 2005 on the part of the domestic authorities in the present case, the Court concluded that the investigation had been conducted with reasonable promptness and expeditiousness.[301]

A comparison between the cases against Russia and the case against Bosnia-Herzegovina reveals that the length of time of the proceedings is not necessarily decisive for finding a violation. What matters is the thoroughness of the steps taken in that period and the sincere efforts on the part of the state to investigate the case and bring the perpetrators to justice. Indicators for an effective investigation in the *Palić Case* were that the remains of the disappeared husband had been found and that an international arrest warrant had been issued in respect of the alleged perpetrators. A continuation of bringing the perpetrators to justice was not solely in the hands of the State; the applicant could also take other steps to have the perpetrators tried. The European Court may also have taken into account the numerous legal and non-legal bodies that had been created to deal with the many enforced disappearances, killings and displaced persons. At any rate, the *Palić Case* clearly confirms that investigations do not necessarily have to lead to convictions.

8.6.3.2 The independence of the investigating and adjudicating authorities

In addition to examining the domestic proceedings, another area in which Article 2 ECHR is intertwined with Article 6 ECHR is the question whether the investigating and adjudicatory authorities were independent and impartial. As discussed in this subsection, this issue repeatedly emerged in cases against Turkey in which national security courts had jurisdiction over crimes committed by security forces or gendarmes in the fight against terrorism. In general, the European Court has refrained from doctrinal pronunciations about the compatibility of military courts with the ECHR. It rather takes the approach of deciding on a case-by-case basis whether such courts, or courts with certain features of military courts, comply with the requirements of impartiality and independence.[302] In this regard, the decisive factor in deciding whether there is a legitimate reason to fear the lack of impartiality or independence is whether this fear can be objectively justified.[303] The issue of military tribunals appeared in one case in which the victim had disappeared. In *Kaya v. Turkey*, the Court considered the implementation of criminal law in the region in its examination of the duty to protect

301 *Ibid*., paras. 70 and 71.
302 *Incal v. Turkey* ECtHR [GC] 9 June 1998 (Appl. no. 22678/93), para. 70.
303 *Ibid.*, para. 71.

under Article 2 ECHR.[304] In answering whether the state authorities had done all that could be reasonably expected of them to avoid the risk of the victim disappearing, the Court took into account that the jurisdiction to deal with incidents related to the PKK had been relinquished to the National Security Courts. The respondent state claimed that such courts could not be considered as military courts because they were ordinary courts with one sitting military judge. The European Court, however, decided that the National Security Courts did not fulfil the requirements of independence as required by Article 6 ECHR. The presence of a military judge gave rise to legitimate fears that 'the court may be unduly influenced by considerations which had nothing to do with the nature of the case'.[305] It can be inferred from these cases that a court with only one military judge, let alone a complete military tribunal, does not comply with Articles 2 and 6 ECHR to try crimes by security forces.[306]

Unlike the proceedings before the Inter-American Court, the consequences for finding a violation because of a court's lack of independence did not raise the issue of *ne bis in idem*. In the enforced disappearance cases in which the European Court found a failure to investigate the crimes effectively, the reparations ordered amounted to only monetary compensation. As such, the issue of double jeopardy, or *ne bis in idem*, has not appeared in enforced disappearance cases before this Court. Nonetheless, it is useful to mention Article 4 of Protocol 7 to the ECHR. This article protects the principle of *ne bis in idem*. Paragraph 2 of this article stipulates:

> The provisions (P7-4) of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

If the European Court were to follow the line propounded by the Inter-American Court, the last phrase of this exception could be a ground for deciding that a trial before an ordinary court after a decision by a military court does not breach the principle of double jeopardy, if the latter lacked impartiality and independence.

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304 For a detailed discussion of the duty to protect, see Chapter 9 *infra*.

305 *Mahmut Kaya v. Turkey* ECtHR (2000), para. 97. See also *Öcalan v. Turkey* ECtHR [GC] 12 May 2005 (Appl. no. 46221/99), para. 115 (stating that 'where a military judge has participated in an interlocutory decision that forms an integral part of proceedings against a civilian, the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court.').

306 This is in line with CoE Resolution 1463 (2005), para. 10.3.6 (This paragraph states: 'perpetrators of enforced disappearances to be tried only in courts of general jurisdiction, and not in military courts').

8.6.3.3 Legal impediments to criminal proceedings

Unlike the Inter-American Court, the European Court has not been confronted with legal impediments such as amnesty laws in enforced disappearance cases. Turkey and Russia, against whom most enforced disappearance cases are decided, for the present have not instituted such legal impediments. The European judicial system has handed down one important decision on amnesty laws issued by the former European Commission. In the case *Dujardin v. France* an amnesty was provided for around fifty individuals who were being prosecuted for the murder of several gendarmes during a political disturbance. The former European Commission stated that the fact that the crime of murder may be covered by an amnesty does not contravene the ECHR, 'unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes.'[307] Furthermore, a balance must be struck between the interests of the State and the interests of the individuals to have their right to life protected. In this case, the European Commission considered that the amnesty was of an exceptional character and that it was adopted in the context of a process which was designed to resolve conflicts between various communities. In this context, the respondent state was allowed to adopt these amnesties.[308] Some commentators have speculated that, given the current tendency in public international law towards bringing perpetrators of war crimes and crimes against humanity to justice rather than approving amnesties in a post-conflict situation, the European Court may adopt a more rigorous approach to the compatibility of amnesties with Article 2 ECHR in certain contexts.[309] In general terms, the European Court did so when stating in a case related to torture in police custody, that:

> […] where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.[310]

As torture and enforced disappearance are of the same nature, one may conclude that statutes of limitation and amnesties are incompatible with the ECHR in respect of such cases.

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307 *Dujardin v. France* (dec) EComHR 2 September 1991 (Appl. no. 16734/90) *D.R.* No. 72 p. 236, at p. 243.

308 *Ibid*., pp. 243 and 244.

309 Harris, O'Boyle, Bates, Buckley & Warbrick (2009), p. 40. See also CoE Resolution 1463 (2005), para. 10.3.5 (on the exclusion of the perpetrators of enforced disappearances from any amnesty or similar measures, and from any privileges, immunities or special exemption from prosecution).

310 *Yaman v. Turkey* ECtHR (2004), para. 55.

8.6.3.4 International cooperation and the duty to investigate

International cooperation has not been an issue in the enforced disappearance cases presented before the European Court. Outside the case law on enforced disappearances, two admissibility decisions dealing with bombings shed light on the scope of the obligation to cooperate at the international level in investigating crimes. In *O'Loughlin v. the United Kingdom*, the applicants were Irish and Italian nationals and relatives of persons who had been killed, or were themselves victims of the injuries caused, by bomb explosions in Dublin and Monaghan. Drawing on the essential purpose of Article 2 to ensure the effective implementation of domestic law and the accountability of state agents, the European Court stated:

> Accordingly, where suspected perpetrators of a bombing attack carried out elsewhere are known to be present within the jurisdiction of a Contracting State, and evidence of a criminal offence may be secured, the fundamental importance of Article 2 requires that the authorities of that State of their own motion take effective measures in that regard. Otherwise, those indulging in cross-border attacks will be able to operate with impunity and the authorities of Contracting State where the unlawful attacks have taken place will be foiled in their own efforts to protect the fundamental rights of their citizens. The nature and scope of those measures will, inevitably, depend on the circumstances of the particular case and it is not appropriate for the Court to attempt to be more specific in this decision.[311]

Besides alleging that the UK was involved in the bombings, the applicants complained under the procedural aspect of Article 2 ECHR of the failure of the respondent state to cooperate with the inquiries and requests in the Irish state into the circumstances surrounding the bombings. The lack of such cooperation rendered the investigations ineffective. Their complaint was, however, declared inadmissible *ratione temporis* due to the long time that had elapsed since the events.

In a similar case, *Cummins et al. v. the United Kingdom,* the complaint was brought by relatives of three of the persons who had been killed in bombings in Dublin in December 1971 and January 1972 and by five victims who suffered injuries in those explosions. The Court reiterated that a contracting party to which a suspect has fled must co-operate with the state conducting the investigation. The case was declared inadmissible given the length of time that had passed since the incident took place. In addition, there was no evidence of the concrete collusion of British forces in

311 *O'Loughlin a.o. v. the United Kingdom* (admissibility decision) ECtHR 25 August 2005 (Appl. no. 23274/04), para. 2.

the bombing in Ireland and no indications that the lack of cooperation blocked access to any potential suspects.[312]

8.6.3.5 The duty to punish

The duty to punish as such has not arisen in enforced disappearance cases, possibly because the flaws found in the investigation stage of the domestic proceedings led to a stalemate in the proceedings long before punishment appeared on the horizon. Yet, the duty to punish was also not incorporated in the obligations that remained according to the Court in cases where the fate of the missing person is clarified.[313] Similarly, punishment is only mentioned as one of the potential consequences of the criminal investigation under Article 13 ECHR. A sidestep to a judgment concerning deaths and property destruction as a result of a methane explosion at a municipal rubbish tip elucidates the standpoint of the European Court on meting out sentences. The Court described its task in this respect as being the following:

> Accordingly, in the Court's view, rather than examining whether there was a preliminary investigation fully compatible with all the procedural requirements established in such matters (see paragraph 94 above), the issue to be assessed is whether the judicial authorities, as the guardians of the laws laid down to protect lives, were determined to sanction those responsible.[314]

The 'derisory fines', which were, moreover, suspended, did not convince the Court that the state had fulfilled its duty in this respect.[315] It is possible to deduce that the state must impose sentences against the responsible state authorities that take into account the seriousness of the crime and deter future crimes. When state agents are convicted and have served their sentence, it seems unnecessary that disciplinary sanctions are imposed against them as well. In the admissibility decision in *McBride v the United Kingdom*, the applicants argued that 'the procedural obligation in Article 2 also required that the soldiers be discharged from the army in order to reassure the public as to the State's adherence to the rule of law and its lack of tolerance for breaches of fundamental rights.' The European Court rejected this argument by confirming that criminal prosecution is generally sufficient to discharge the obligation under Article 2 ECHR. As the state authorities had fulfilled this obligation, no wider issues arose in that case. The Court continued by stating that:

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312 *Cummins a.o. v. the United Kingdom* (admissibility decision) ECtHR 13 December 2005 (Appl. no. 27306/05).

313 *Varnava a.o. v. Turkey* ECtHR [GC] (2009), para. 145. See also section 8.2 above.

314 *Öneryıldız v. Turkey* ECtHR [GC] (2004), para. 15.

315 *Ibid*., paras. 116-118.

> While reference has also been made to the future protection of citizens, presumably through either continued risk of unlawful conduct by the two soldiers or through a deterioration in attitudes or standards in the armed forces generally, this would appear somewhat hypothetical and speculative and certainly remote in consequence as regards any effect on the rights of this applicant. To the extent concerns might arise as to the composition of the armed forces and existence of appropriate disciplinary regulations and machinery, these would appear to be matters of general policy for public and political debate falling outside the scope of Article 2 of the Convention as applicable in this case.[316]

Hence, the issue of appropriate disciplinary regulations in the armed forces fell outside the competence of the European Court because it touched upon general policy issues of public and political debate. On the other hand, in a case concerning torture in police custody, the European Court stressed the importance of suspending an agent under investigation for torture or on trial for similar crimes and of dismissing him or her when he or she is convicted.[317] The reason for this difference could lie in the nature of the rights violated.

8.6.4 Comparative remarks in light of the experiences of victims

The importance of criminal investigations followed by prosecution and punishment in relation to the five main causes of victims' suffering mainly lies in combating *de facto* and *de jure* impunity (the third main cause). As illustrated in Chapter 4 subsection 5.3 *supra*, trying the perpetrators has proven to create a feeling of justice for the victims. Additionally, prosecution may also contribute to truth finding, when the trials are conducted in a fair manner and in accordance with the rule of law.[318] Knowing the truth enables victims one again to try and resume the lives that they had had before the enforced disappearance. Moreover, trials are a form of law enforcement, which contributes to creating a safe environment for victims, as argued in respect of the fourth main cause of victims' suffering (unsafe environment).[319] The enforcement of the law is believed to have a deterrent effect and creates faith in state institutions.[320]

Bringing the perpetrators to justice is an obligation that appears in the case law of all three supervisory bodies. However, not all three human rights bodies have applied these duties in the same way in their case law. Before comparing their approaches, it

316 *McBride v. the United Kingdom* (admissibility decision) ECtHR 9 May 2006 (Appl. no. 1396/06), para. 1.
317 *Yaman v. Turkey* ECtHR (2004), para. 55 (The Court referred to the Conclusions and Recommendations of the United Nations Committee against Torture to Turkey (27 May 2003, CAT/C/CR/30/5)).
318 Méndez (1997), pp. 274- 279.
319 See Chapter 4 subsection 5.4 *supra*.
320 See also Chapter 7 subsection 5.4 *supra.*

is important to pay attention to the premise from which the three supervisory bodies operate. The Inter-American Court has formulated a *right* to have the perpetrators prosecuted, while the HRC and the European Court have referred to the obligation to prosecute. The difference is that under the ACHR protection, persons have an enforceable right in their domestic systems. While such a right may seem desirable in enforced disappearance cases due to the typical unwillingness of the prosecuting authorities to investigate the case, it is questionable whether such a far-reaching right is realistic given the differences in national systems in this respect. At the very least, however, it could be commended in light of the experiences of victims that there is an independent review procedure available to challenge decisions not to press charges by the prosecuting authority.[321]

The next question is what does the obligation to bring the perpetrators to justice entail? Scharf concludes:

> The Committee on Human Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights would all agree that measures short of prosecution – such as establishment of an investigative commission which specifically identifies perpetrators and victims, non-criminal sanctions against responsible officials and military personnel, and judicial redress for victims – would be adequate to discharge the duty to ensure human rights.[322]

The analysis conducted in the previous subsections, however, leads to a different conclusion in enforced disappearance cases. All three bodies have clearly required a criminal investigation that was capable of leading to the punishment of the perpetrator. More specifically, the Inter-American Court has most clearly obliged states to criminalise the act of enforced disappearance. In this respect, not only the actual perpetrators but also the directing minds behind the crime must be brought to justice. The importance of an autonomous crime in domestic law is clearly illustrated by the case law of the Inter-American Court. When such an autonomous definition is lacking, perpetrators may be convicted for a deprivation of liberty, thereby disregarding the grave nature of the crime of enforced disappearance. Alternatively, perpetrators may be held liable for torture or murder. A conviction on the basis of murder or torture, however, is likely to demand a high standard of proof in domestic law that relatives in enforced disappearance cases cannot satisfy due to a lack of evidence such as the certainty of death, the absence of a body or direct evidence of torture. Also, these crimes may be seen as instant crimes rather than being of a continuous nature until the whereabouts or fate of the disappeared person is established. In this respect, the Inter-

321 D.F. Orentlicher, 'Settling accounts: The duty to prosecute human rights violations of a prior regime' (1990-1991) 100 *Yale L J* pp. 2537-2615, at p. 2613.

322 Scharf (1996), p. 61.

American Court has ruled that the retroactivity of criminal provisions does not apply to enforced disappearance cases in which the whereabouts or fate of the disappeared person have not been established. The reason for subsiding this legal principle is the continuous nature of enforced disappearance. In light of these considerations, it is arguable that the creation of an autonomous offence is important to address the third main cause of victims' suffering.

According to the case law of the Inter-American Court, omissions must also be investigated. Hence, such an obligation also applies to acts of acquiescence in committing enforced disappearances. Also, omissions are usually the kind of behaviour that relatives are confronted with when inquiring about the disappearance of their family member.

Having established that there is, at least, an obligation to institute a criminal investigation and to prosecute, the question becomes whether this is an obligation of result or of means. The question whether the duties to investigate, prosecute and punish are duties of result or means seems to be unequivocally agreed upon by the three supervisory bodies, at least in the doctrine: they are duties that need to be complied with in good faith and to the best ability of the state rather than yielding specific results.[323] Consequently, a prosecution does not necessarily need to lead to conviction and punishment when the investigation and trials have been conducted with all the available means and with due diligence. In spite of this doctrine, the outcomes of proceedings have played an important role in the case law of the Inter-American Court. In particular as indicators in the assessment whether the domestic proceedings were effective and conducted within a reasonable time.

The effectiveness of the proceedings has been subject to close scrutiny by both the Inter-American Court and the European Court. These Courts recognise that it is not for the international human rights tribunals to establish individual responsibility and to pronounce on the question of acquittal or conviction. Instead, they must establish state responsibility for human rights violations. As such, it is important to keep in mind that international human rights courts are not courts of fourth instance. Both the Inter-American Court and the European Court have accordingly set criteria that the criminal investigation and subsequent proceedings must abide by:

- conducted within a reasonable time
- sufficient public scrutiny and participation of the relatives
- respect for fair trial guarantees
- independent investigating and adjudicating bodies

323 Méndez (1997), p. 264.

The reasonable time requirement has played an important role in both the case law of the European Court and that of the Inter-American Court. The European Court has mostly assessed whether the investigation steps were conducted with due expedition, as this stage was mostly where the investigation stalled. The Inter-American Court has also extended this requirement to the criminal proceedings (trials). Whether the state authorities have complied with the standard of conducting the investigations and criminal proceedings in good faith and within a reasonable time must be assessed on a case-by-case basis. It is impossible to make a general statement on how long such proceedings and investigations may take because such duration depends entirely on the facts and the situation of the case. Still, it is important that the Courts scrutinise carefully the timing when evidence was taken, the course of the proceedings and the conduct of the state authorities therein, precisely because of the contribution of these proceedings in discovering the truth.

Another important emphasis of the Inter-American Court is on the evaluation of evidence. It must be noted that the evaluation of evidence is mostly considered by the regional Courts to fall within the domain of the domestic courts. Still, they have examined the evaluation of evidence in light of their respective treaties. The Inter-American Court has focussed on whether the evidence was evaluated as a whole, rather than assessing each individual piece of evidence separately and in a fragmented manner. In addition, where relevant, the context should be taken into account. Furthermore, rejecting witness testimonies by domestic courts must be well reasoned and any justification referring only to the proximity of the witness to the victim or the issues in general is not sufficient. This careful scrutiny must be commended in light of the second main cause of victims' suffering. Experiences of victims have shown that a lack of evidence has often been a reason to discontinue the proceedings, even where this lack is the result of superficial investigations. In fact, it is inherent in the crime of enforced disappearance that there is often virtually no direct evidence available. The approach to evidentiary issues in enforced disappearance cases is closely intertwined with fair trial guarantees. On the one hand, strict adherence to the rules of criminal procedure is called for. On the other hand, it is possible to argue that domestic courts must take into account the specific features of enforced disappearance and, in particular, the lack of evidence. The balance between these two conflicting interests is not easily struck. It seems most reasonable to assess the balance in each individual case. Upon examining the experiences of victims, however, one general remark should be made. It is important to stress that the context and circumstantial evidence cannot be excluded from the body of evidence and should be attributed significant probative value.

In light of the unsafe environment that relatives are often confronted with (the fourth main cause of victims' suffering), it is important that there is an independent body, which is fully independent from the police or security forces suspected of

having committed the crime of enforced disappearance. Furthermore, it is useful to incorporate the view of Nowak in respect of torture that this body must have full police investigation powers, assisted by independent forensic experts.[324]

In order to prevent *de facto* impunity, the bodies that conduct investigations of enforced disappearances and the subsequent proceedings must be impartial and independent. As Kuijer notes, this independence includes *functional* independence and *personal* independence. The former refers to constitutional independence as well as factual independence, that is, judges should feel free to follow their own considerations free from external political or other pressure. The latter refers to the official status of the judicial officer that can be secured by rules concerning the appointment, promotion and duration of terms.[325] The first type of independence has been particularly at stake in enforced disappearance cases. In particular, issues have arisen with respect to the use of military jurisdictions in the investigation and adjudication of enforced disappearance cases.

The first question that arises is whether military tribunals are compatible with the ICCPR, the ACHR and the ECHR with respect to this human rights violation. If the answer to that question is no, the second question is what the legal consequences of such doctrine are: should the persons who have been acquitted by military courts be retried in ordinary courts? The three supervisory bodies seem to be clear on the first question: when the perpetrators are alleged to belong to the executive branch, the use of military courts is not compatible with their respective treaties.[326] The second question of what the legal consequences should be is less unambiguous. The Inter-American Court has, as the only Court, ordered the retrial of alleged perpetrators in ordinary courts. In the light of the experiences of victims, criminal justice seems to be an important aspect of reducing their suffering and, as such, justifies this requirement.

Criminal justice also plays a role in yet another obstacle to investigation and prosecution. Experiences of victims show that amnesty laws are one of the most important obstacles to obtaining justice. In particular, amnesties are often granted for the purpose of stability and peace in situations of a regime change or of a transition from conflict to peace. Extensive literature has been written on the compatibility of

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324 Nowak (2009), p. 168 (these standards are claimed by Nowak in respect to torture).

325 M. Kuijer*, The blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (Nijmegen: Wolf Legal Publishers 2004), pp. 207-209.

326 Within the UN system several soft law sources indicate that military tribunals are not the appropriate forum to investigate and hear allegations of gross human rights violations, see Updated Set of Principles to Combat Impunity, Principles 29 and 26(b) (no military jurisdiction for human rights violations); Report on Administration of Justice and military jurisdiction: E/CN.4/sub.2/2004/7 (14 June 2004) principle 3 and paras. 17-19. See also Article 16(2) of the Declaration on the Protection of All Persons from Enforced Disappearances which stipulates explicitly that persons presumed responsible for enforced disappearance 'shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts'.

amnesties with international law as well as on the desirability of this legal impediment in transitional justice.[327] The duty to investigate, prosecute and punish may clash with domestic legislation barring the implementation of this duty. This tension has resulted in a discussion as to whether the duty to investigate, punish and prosecute is absolute, and if not, when domestic impediments may wave this duty. Questions arise such as whether amnesties given to members of former regimes in order to facilitate the peace process are contrary to human rights law, whether there is a difference between a systematic practice of enforced disappearance and a single act of enforced disappearance and whether the rationale behind prescription also applies to enforced disappearances.

The stances of the Inter-American Court, the European Court and the HRC are not very far apart regarding amnesties. All three supervisory bodies appear to consider amnesties aimed at a systematic prevention of prosecution to be incompatible with their respective treaties. They appear to leave room, however, albeit very limited room, for the possible permission of individual amnesties. As such, the context and scale of the violations also seem to play an important role. This last option appears to be in contrast with UN soft law.[328] The Inter-American Court ordered that amnesty

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327 Naqvi (2010), chapter 2 (setting out the restrictive conditions under which amnesties may be permissible); Scharf (1996) p. 57; Kamminga (2001), pp. 949 and 965; Orentlicher (1990-1991) (In this ground-breaking article, Orentlicher argued that international human rights law should set standards that prohibit amnesties for atrocious crimes (grave violations of physical integrity, such as enforced disappearances and torture). The author recognises that amnesties have been common in transitions from dictatorships to democratic regimes in order to ensure stability in a country. Her argument, however, is that international standards should help victims to press their governments to prosecute such grave crimes, which in the end will help fragile democracies to survive); Laplante (2008-2009) (giving a thorough historical overview of the *truth v. justice* debate in both human rights law and international criminal law. The author discusses the trends from favouring truth commissions towards advocating criminal trials. The author demonstrates that the status of an outright prohibition on amnesties remains unclear. Factoring the demands of victims and their rights to jusditce and truth in the *truth v. justice* balancing equation, the author argues that no amnesty should be lawful in transistional justice setting for serious human rights violations. She substantiates her argument by the stance of the Inter-Americacn Court's position on amnesty laws. The author argues that the prohibition of amnesties in such circumstances leads to a new approach for dealing with transitional justice, which is far more complex and nuanced than the *truth v justice* debate); Seibert-Fohr (2009), pp. 285-288 (arguing against a categorical prohibition of amnesties. The author proposes a rebuttle presumption that amnesties for serious human rights violations are detrimental to the protection of human rights. Nevertheless, she identifies several minimum requirements such as an official investigation into the crimes committed and the perpetrators must be removed from office. Moreover, she identifies several siutations that are prohibited by international standards, which includes self-amnesties and amnesies for the crime of genocide).

328 Article 18 DPPED ('Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.'). See also UNWGEID Annual report 2004 and UNWGEID, 'General Comment on article 18 of the

laws should be rendered without effect and that alleged perpetrators must be tried accordingly. The HRC speaks of 'bringing the perpetrators to justice' in spite of existing amnesty laws that impede prosecution. The term 'bringing to justice' however, does not necessarily imply criminal prosecution. At the very least, the five main causes of victims' suffering seem to dictate that the compatibility of amnesties with human rights law should be very limited and only permitted in exceptional circumstances. Moreover, if permitted, they should go hand in hand with other efforts to establish the truth, an investigation to clarify the fate or whereabouts of the disappeared person, some other form of liability of the perpetrators such as disciplinary sanctions and awarding reparations.

Having found that there is an obligation to prosecute the alleged perpetrators, even though it is not an absolute obligation, the next stage is the punishment of the convicted persons. The significance of punishment from the perspective of the five main causes of victims' suffering is two-fold. Firstly, punishment facilitates the creation of a safe environment because the prospect of being punished is believed to have a deterrent effect. Furthermore, punishment contributes to the creation of such an environment when suspects under investigation or convicted state agents are dismissed or suspended from their posts as state officials. Knowing that the perpetrators remain in influential positions, for instance in the police, creates an immense feeling of insecurity for relatives or survivors. Secondly, punishment counters the feeling of 'we are being punished, while the perpetrators can walk around without any problems', which is one of the obstacles encountered by relatives in coming to terms with what happened.

The enforced disappearance case law confirms that there is an obligation to punish but it does not demonstrate an elaborated doctrine on this topic. They seem to leave it to the state's discretion to decide upon the type of punishment. Still, there are several limits to this discretion that can be discerned from the case law that are relevant for enforced disappearance. Punishment must be proportionate to the crime and should be serious enough to deter future crimes. In addition, there seems to be general agreement between the three supervisory bodies that authorities suspected of enforced disappearance (or torture for that matter) must be suspended pending trial and dismissed when found guilty.[329] The Inter-American Court clarifies in this respect that disciplinary measures may not substitute criminal sanctions. Finally, the HRC has clearly criticised pardons for enforced disappearances. One could conclude

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Declaration', reported in: UNComHR, 'Report of the Working Group on Enforced or Involuntary Disappearances' (27 December 2005) UN Doc. E/CN.4/2006/56.

329 See also Updated Set of Principles to Combat Impunity, Principle 36(a), which stipulates that public officials 'who are personally responsible for gross human rights violations […] shall not continue to serve in State institutions' and persons charged with such crimes 'shall be suspended from official duties during the criminal or disciplinary proceedings'.

the same from the case law of the Inter-American Court, at least in respect of crimes against humanity. The incompatibility of pardons with their respective treaties is in conformity with the line set out by the Committee against Torture.[330] Nevertheless, the question whether all pardons in any circumstances that involve enforced disappearance and for any persons implicated in the crime remains unanswered.

A final point is that enforced disappearance may either have an international dimension or the perpetrators of such crime may have left the country where they committed the crime. Moreover, experiences of victims show that often justice can only be found in countries other than where the enforced disappearance took place. As a result, international cooperation is of the utmost importance for bringing the perpetrators to justice and thereby ensuring the restoration of dignity for the victims. Furthermore, international cooperation may also be essential for the discovery of all the relevant facts.

International co-operation has not been considered elaborately by the three supervisory bodies. The European Court requires states, on whose territory a suspect of murder is found, to co-operate in bringing that person to justice. A failure to do so may engage state responsibility when such a failure contributes to ensuring impunity for the crime. The Inter-American Court appears to require extradition requests when one of the main defendants is abroad. Other measures are not further specified. Upon examination, it is possible to assert that in enforced disappearance cases, the following measures should be taken in the cooperation between states: identifying and locating possible witnesses; collecting testimonies under oath; providing access to investigation files and judicial decisions; the examination of detention places or sites; the identification and exhumation of dead bodies; and the examination of grave sites. Where necessary, the protection of witnesses should be high on the list as an integral part of this obligation.[331]

330 *Guridi v. Spain* CAT 17 May 2005 (Comm. no. 212/2002), para. 6.7 (stating that '[t]he Committee considers that, in the circumstances of the present case, the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment.' Art. 4(2) CAT reads 'Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature').

331 See also UN Sub-Commission Resolution 2001/22 'International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity'.

8.7 Rationale, scope and content of the duty to provide reparations

8.7.1 Rationale behind the duty to provide reparations

The rationale behind the concept of reparations is that the wrongdoing party should redress the damage caused to the injured party.[332] The right to reparation for any wrong done to an individual by the offender has long been recognised as a principle of law.[333] In international law, this concept implies that such 'secondary' obligation emanates from the violation of a primary substantive obligation.[334] In international human rights law, this means that states, once it is clear that a state agent is implicated in a human rights violation, provides reparation to the victims.

The right to reparation is recognised in a number of human rights instruments.[335] For the purposes of the present study, it is noteworthy that such a right is laid down in the ICCPR and the ECHR in respect of specific rights.[336] Additionally, this duty is implied in the right to an effective remedy.[337] Lastly, the ACHR and the ECHR endow the regional Courts with the competence to order compensation or reparation once a state is found responsible for violating the human rights enshrined in their respective treaties.[338] A first and leading attempt to address the issue of reparations in

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332 Redress, 'A sourcebook for victims of torture and other violations of human rights and international humanitarian law' (2003) (hereinafter: 'Redress sourcebook (2003)'), p. 7.

333 A. Buti, 'International Law Obligations to Provide Reparations for Human Rights Abuses' (1999) 6 *eLaw Journal* 4, para. 4; ICJ, 'Reparations for Injuries Suffered in the Service of the United Nations', Advisory Opinion (11 April 1949) ICJ Reports 1949, p. 14 (referring to the judgment of the Permanent Court of International Justice of July 26, 1927 (Series A., No. 9), p. 21).

334 Redress sourcebook (2003), p. 7. See also 2001 ILC Articles, Article 31(1) (The text of this article reads '[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.') and Article 34 ('Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter [chapter II].'). For a discussion of the case law of the ICJ in relation to reparations for violations of international human rights and humanitarian law, see G. Zyberi, 'The International Court of Justice and applied forms of reparation for international human rights and humanitarian law violations' (2011) 7 *Utrecht Law Review* 1 pp. 204-215.

335 See *e.g.* Article 8 UDHR; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 14 CAT; Article 75 of the Rome Statute for an International Criminal Court; Article 21(2) of the African Charter on Human and Peoples' Rights. See also the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (adopted by General Assembly Resolution 40/34 (29 November 1985)); Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council resolution 1989/65 (24 May 1989), Principle 20.

336 Articles 9(5) and 14(6) ICCPR and Article 5(5) ECHR.

337 Article 13 ECHR, Article 25 ACHR and Article 2(3) ICCPR.

338 Articles 68 and 63(1) ACHR and Article 41 ECHR.

a structured manner was undertaken by Van Boven at the request of the former UN Sub-Commission in 1989. Having examined the relevant existing human rights norms, he submitted his first report in 1993.[339] Van Boven distinguished between an effective remedy, *i.e.* the duty to investigate and punish, on the one hand, and substantive reparations, on the other. Effective remedies were the subject-matter of the previous sections of the current chapter while the substantive reparations are addressed in this section. Van Boven understood the content of reparations to mean restitution, compensation, rehabilitation and satisfaction and guarantees of non-repetition.[340] Van Boven's findings together with the work of Bassiouni, and in consultation with states and NGOs, resulted in the adoption of the Van Boven/Bassiouni Principles by the UN General Assembly in 2005.[341] These developments have given a strong impetus to the discussion on and the elaboration of the concept of reparations.[342] As will be shown in the paragraphs below, the Inter-American Court's case law has had an immense impact in this respect as well.

8.7.2 The content of the duty to provide reparations

8.7.2.1 The Human Rights Committee

The HRC considers that there is no autonomous right to compensation under the ICCPR.[343] This right is rather a *lex specialis* of the right to an effective remedy, as laid down in Article 2(3) ICCPR.[344] In its enforced disappearance views, the HRC has only very generally stated that the state is under an obligation to compensate the victims as a consequence of finding violations of ICCPR rights. In a similar fashion, the HRC has generally urged states to take measures, such as the investigation of the facts

339 UN Sub-Commission, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report' submitted by Mr. Theo van Boven, Special Rapporteur (2 July 1993) UN Doc. E/CN.4/Sub.2/1993/8 (hereinafter: 'UN Study concerning the right to reparation (1993)'). In 1996 a revised version was submitted, see UN Sub-Commission 'Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117' (24 May 1996) UN Doc. E/CN.4/Sub.2/1996/17 (hereinafter: 'Revised set of basic principles and guidelines on the right to reparation (1996)').

340 Revised set of basic principles and guidelines on the right to reparation (1996), paras. 12-15.

341 Van Boven/Bassiouni Principles.

342 See generally De Feyter, Parmentier, Bossuyt & Lemmens (2005); I. Bottigliero*, Redress for Victims of Crimes under International Law* (Leiden: Brill Academic Publishers 2004); D.L. Shelton, 'The United Nations Principles and Guidelines on Reparations: Context and Contents', in: K. De Feyter, S. Parmentier, M. Bossuyt & P. Lemmens, (eds.), *Out of the ashes: reparation for victims of gross and systematic human rights violations* (Antwerp: Intersentia 2005) pp. 11-33.

343 *Könye v. Hungary* (admiss. dec.) HRC 7 April 1994 (Comm. no. 520/1992), para. 6.6. See also *S.E. v. Argentina* HRC (1990), para. 5.3.

344 *Bashasha v. Libyan Arab Jamahiriya* HRC (2010), para. 9.

and the prosecution of the perpetrators[345] as well as measures of non-repetition.[346] In its recommendations under the Article 40 procedure, the HRC clarifies three important matters in relation to granting reparations for human rights violations. Firstly, domestic legal impediments should not hamper remedies for compensation. In respect of Peru, the HRC stated that:

> [...] In view of the fact that the Committee considers that the Amnesty laws violate the Covenant, it recommends that the Government of Peru review and repeal these laws to the extent of such violations. In particular, it urges the government to remedy the unacceptable consequences of these laws by, inter alia, establishing an effective system of compensation for the victims of human rights violations and by taking the necessary steps to ensure that the perpetrators of these violations do not continue to hold government positions.[347]

As such, providing compensation is viewed as one of the measures to remedy the effects of an amnesty law that is incompatible with the ICCPR. The second concern which is relevant to reparations was voiced in respect of Algeria. In the concluding observations against Algeria, the HRC criticised the government for having made the eligibility of family members of disappeared persons for compensation dependent on death certificates, declaring the disappeared person dead. The HRC strongly opposed this requirement and urged the respondent state to make the right to compensation not dependent on the willingness of relatives to declare their disappeared family members dead. The third consideration appeared in the same concluding observations, namely the compensation provided had to reflect 'the gravity of the violation and of the harm suffered.'[348] Hence, compensation must be proportionate to the gravity of the crime and the harm suffered. The HRC does not further indicate what compensation is proportionate to enforced disappearances.

8.7.2.2 The Inter-American Court of Human Rights

Within the Inter-American system, the obligation to provide victims of human rights violations with adequate compensation was laid down in the *Velásquez-Rodríguez Case*. The Inter-American Court derived this obligation from the general duty to guarantee the ACHR rights (Article 1(1) ACHR).[349] Accordingly, in the *Blake Case*, the Court stated that in enforced disappearance cases relatives of the disappeared

345 See subsections 8.4.1 and 8.6.1 above.
346 See Chapter 7 section 5.
347 HRC, Comments on Peru (1996), para. 20. See also HRC, Concluding observations Peru (1996), para. 9.
348 HRC, Concluding observations Algeria (2007), para. 13.
349 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 166.

person had the right to 'to be compensated for the damages and injuries they sustained.'[350] Under Article 63(1) ACHR,[351] the Court understands the concept of reparations to include a broad range of reparations.[352] Such a broad range appears to be based on the doctrine that:

> Reparation of harm brought about by the violation of an international obligation consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and compensation for patrimonial and non-patrimonial damages, including emotional harm.[353]

On this basis, the Inter-American Court has ordered, in enforced disappearance cases, compensation for non-pecuniary (the harm suffered) and pecuniary damages (the loss of income and career prospects),[354] unless a victim does not want to receive compensation.[355] In addition, the Court has ordered states to investigate the crimes and punish the perpetrators.[356] Other forms of reparation have included taking national initiatives to trace disappeared persons and the creation of a system for genetic information in the context of internal conflict,[357] organising an event in which the state publicly acknowledged the events that occurred and responsibility therefor,[358] publishing passages of the judgment of the Inter-American Court in, for instance, national newspapers,[359] and providing specialised medical and psychological care for

350 *Blake v. Guatemala* IACtHR (1998), para. 97 (the Court afforded this right based on Article 8(1) ACHR (the right to a fair trial)).

351 Article 63(1) ACHR reads: 'If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.'

352 H.S.G. Puente, 'Legislative measures as guarantees of non-repetition: a reality in the Inter-American Court, and a possible solution for the European Court' (2009) 49 *Revista IIDH* pp. 69-106, at pp. 74-79; T.M. Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond' (2008) 46 *Colum J Transnat'l L* 2 pp. 351-419, at p. 372 (arguing that reparations were fully developed since 2001).

353 *Godínez-Cruz v. Honduras* IACtHR (1989), para. 24.

354 See *e.g. Anzualdo-Castro v. Peru* IACtHR (2009), paras. 213 and 214; *Goiburú et al. v. Paraguay* IACtHR (2006), paras. 150-157.

355 *Gelman v. Uruguay* IACtHR (2011), para. 286.

356 *Goiburú et al. v. Paraguay* IACtHR (2006), paras. 164-167.

357 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), paras. 184, 188, 192 and 193.

358 *Ibid*., para. 194; *Goiburú et al. v. Paraguay* IACtHR (2006), paras. 173 and 174.

359 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 195; *Goiburú et al. v. Paraguay* IACtHR (2006), para. 175; *Tiu-Tojín v. Guatemala* IACtHR (2008), para. 106.

the victims.[360] The Inter-American Court has also ordered measures of satisfaction such as the designation of a day to the disappeared persons[361] and a monument in remembrance of the disappeared persons.[362] Another measure is noteworthy for preserving the memory of the disappeared person: to restore his dignity and to establish the historical truth in a democratic society. In *Radilla-Pancheco v. Mexico*, the Inter-American Court accepted a proposal by the state to publish a bibliographic sketch of the life of the disappeared person in which the official sources about what happened are reproduced.[363] Apart from these measures, as demonstrated in Chapter 7 *infra*, the Inter-American Court has ordered a range of measures of non-repetition such as the obligation to fight impunity and to organise human rights training for state officials.[364] There is one specific reparation measure that has been a very important reparation measure in enforced disappearance cases, and that is the obligation to identify, respect and return the remains of the disappeared person.[365]

As stated in the previous paragraph, the obligation to provide reparation is prompted when a violation of human rights is attributable to the state. At the national level, this obligation seems to operate independently of the obligations to investigate and punish.[366] At the same time, such an obligation may include the investigation of a case and the prosecution of the perpetrators.[367] In addition, the Inter-American Court has stated that reparation at the domestic level should mirror the forms of

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360 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 198; *Goiburú et al. v. Paraguay* IACtHR (2006), para. 176.

361 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), para. 196.

362 *Goiburú et al. v. Paraguay* IACtHR (2006), para. 177.

363 *Radilla-Pacheco v. Mexico* IACtHR (2009), paras. 355 and 356.

364 *The Caracazo v. Venezuela* IACtHR (2002), para. 127; *Goiburú et al. v. Paraguay* IACtHR (2006), paras. 178 and 179. For a more detailed overview, see Chapter 7 subsection 5.2 *supra*.

365 Medina Quiroga (2005), p. 117; P. Saavedra Alessandri, 'El derecho a la vida en la jurisprudencia de la Corte Interamericana de Derechos Humanos', in: C. Martin, D. Rodríguez-Pinzón & J.A. Guevara, (eds.), *Derecho internacional de los derechos humanos* (Colonia del Carmen: Distribuciones Fontamara (Mex.) 2003), p. 290; Cançado Trindade (2009). This form of reparation measure was ordered in, for instance, *Trujillo-Oroza v. Bolivia* IACtHR (2002), para. 115 and *Goiburú et al. v. Paraguay* IACtHR (2006), paras. 171 and 172.

366 *Caballero-Delgado and Santana v. Colombia* IACtHR (1995), paras. 58 and 59.

367 *Ibid*., para. 69. Judge Nieto-Navia attached a strong separate opinion, stating that '[t]he duty to make reparations is not autonomous in either the domestic or the international order. That is to say, to impose reparations it is first necessary to demonstrate a violation of the Convention. The reasoning of the Court on the subject of reparations is even weaker as it continues. Paragraph 69 of this Judgment states that "[i]n the instant case reparations should consist of the continuation of the judicial proceedings for the clarification of the disappearance of Isidro Caballero-Delgado and María del Carmen Santana and punishment in conformance with Colombian domestic law," which it then orders in the Resolutions of the Court. Interpreted strictly, one must conclude that the Court charges the Colombian Government with violation of the Convention because the internal proceedings have not yet been concluded, even though, as the Court itself sets forth (paragraph 58 of this Judgment) in citing its earlier case law, the duty to investigate is a means and not an end. In

reparation ordered on the international level: compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.[368] Many of these reparation measures were ordered in a context of a systematic practice of enforced disappearances and other gross human rights violations. Hence, several measures ordered exceed the specific facts of the case and reach out to serve a broader societal purpose. It is questionable whether the composite of these measures is the standard for how the duty to provide reparations on the domestic level should be implemented, before a violation on the international level is determined. It is clear, however, that the content of these forms should depend on the specific facts of the case. As such, victims have a right to participate in the proceedings to determine the appropriate reparations.[369] Importantly, providing those substantive reparations does not absolve the state's obligation to investigate the facts and, in the case of death, to locate the remains.[370]

Having found that the Inter-American Court's case law firmly roots the duty to provide reparation, the next question is whether domestic legal impediments can hamper remedies to realise the right to compensation. The answer to that question seems to be negative. In *Castillo-Paez v. Peru*, the Court criticised Peru for having amnesty laws in place that prevented compensation from being obtained and it found a violation accordingly.[371]

8.7.2.3 The European Court of Human Rights

Compared to the Inter-American Court, the European Court has been rather conservative in its approach to awarding compensation on the basis of Article 41 ECHR.[372] In enforced disappearance cases, the European Court has only ordered financial compensation for non-pecuniary damages[373] and, under certain conditions, pecuniary damages for the loss of the potential income of the disappeared person.[374] In response to other requests by the applicants, such as ordering an investigation, the European Court finds it most appropriate 'to leave it to the respondent Government

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this Judgment, the Court has not imputed to Colombia a violation of the articles that provide for the fair administration of justice.'.

368 *Cepeda-Vargas v. Colombia* (2010), paras. 139 and 167.

369 *Villagrán-Morales et al. (The "Street Children") v. Guatemala* IACtHR (1999) para. 227. See also *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 144; *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005) para. 63. This obligation arises from Article 8 ACHR.

370 *Tiu-Tojín v. Guatemala* IACtHR (2008), para. 27 and chapter VII (reparations).

371 *Castillo-Páez v. Peru* IACtHR (1997), para. 90 and *Castillo-Páez v. Peru* IACtHR (1998), para. 105.

372 Article 41 ECHR reads: 'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

373 *Kurt v. Turkey* ECtHR (1998), paras. 174 and 175; *Bazorkina v. Russia* ECtHR (2006).

374 *Kukayev v. Russia* ECtHR (2007), para. 127; *Imakayeva v. Russia* ECtHR (2006), para. 213.

to choose the means to be used in the domestic legal order in order to discharge their legal obligation under Article 46 of the Convention'.[375]

The standards on the basis of which state responsibility can be determined that relate to compensation emanate from Articles 13 and 2 ECHR. Article 13 ECHR (the right to an effective remedy) clearly obliges states to provide compensation when it is established at the domestic level that state agents were behind a human rights violation. As the European Court has repeatedly held in enforced disappearance cases:

> Given the fundamental importance of the rights guaranteed by Articles 2 and 3 of the Convention, Article 13 requires, *in addition to the payment of compensation where appropriate*, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and infliction of treatment contrary to Article 3, including effective access for the complainant to the investigation procedure leading to the identification and punishment of those responsible.[376] [Emphasis added by the the author]

This citation only refers a duty to compensate, which technically means monetary compensation. A broader perception of this duty was presented in a more recent case concerning violations of the right to life on a massive scale. First of all, the European Court used the term 'reparation' rather than 'compensation' and, secondly, it formulated a *right* to reparation when state agents are at fault for a violation of the right to life.[377] As the European Court has mostly found violations of the right to life in enforced disappearance cases, it is logical to conclude that this right also applies when the state is implicated in an enforced disappearance. The case law on enforced disappearance does not further specify the form that either compensation or reparation should take. It is noteworthy that in 2005 the PACE of the Council of Europe adopted a Resolution on enforced disappearance specifically specifying similar forms of reparation as the Inter-American Court has developed over the years.[378] So far, however, this Resolution has not further inspired the European Court in setting out more specific forms of reparation.

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375 *Medova v. Russia* ECtHR (2009), para. 143 (The applicant had requested the Court to order an investigation into the disappearance of her husband). See also *Kukayev v. Russia* ECtHR (2007), para. 134. In exceptional cases outside the context of enforced disappearance cases, the ECtHR has ordered specific measures under Article 41, see *e.g. Assanidze v. Georgia* ECtHR [GC] 8 April 2004 (Appl. no. 71503/01), para. 203 (The Court considered that 'the respondent State must secure the applicant's release at the earliest possible date).

376 *Imakayeva v. Russia* ECtHR (2006), para. 193.

377 *Association 21 December 1989 a.o. v. Romania* ECtHR (2011), para. 144.

378 CoE, Resolution 1463 (2005), paras. 10.5.1-10.5.3:
10.5. the instrument should include a well-defined right to reparation covering:
10.5.1. restitution, that is, immediate release of the disappeared person if he or she is still alive, or the exhumation and identification of the body and the return of the mortal remains to the next of kin

8.7.3 Comparative remarks in light of the five main causes of victims' suffering

The previous subsections illustrated that the three supervisory bodies have approached the duty to compensate – or more broadly speaking, the duty to provide reparation – in distinct ways. While the Inter-American Court has closely monitored the type of substantive reparations, the European Court and HRC appear to leave it primarily to the state's discretion to decide how the situation is to be remedied on the national level.[379] The Inter-American Court requires compensation, rehabilitation, satisfaction and guarantees of non-repetition, which mirrors the Court's own reparation structure when it finds a violation of the ACHR rights at the international level. The Inter-American Court's elaborate regime is in line with the five main causes of victims' suffering as identified in Chapter 4 *infra*. Before recalling those, it must be recapitulated that both the disappeared person and the relatives are, and should be, considered victims. Hence, the state must provide reparations to both types of victims. Furthermore, consideration must be given to the fact that it is not always clear whether the person is alive or dead. This should also be taken into account when determining the forms of reparation.[380] Accordingly, the HRC's position that compensation should not depend on the issuing of death certificates can be commended. Defining the legal situation of the victims may nevertheless be relevant for the daily situation of the relatives when the fate of the disappeared person has not yet been clarified. In this respect, the solution offered by the ICRC's model law on enforced disappearance in humanitarian law can be recommended. This model law requires a state to issue

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for a decent burial, as well as rehabilitation, medical, psychological and social care at the expense of the government responsible;

10.5.2. satisfaction, that is an apology by the authorities, guarantees of not reoffending, the disclosure of all relevant facts following an in-depth investigation and the prosecution of the perpetrators;

10.5.3. compensation for material damage (including a realistic assessment of loss of income and maintenance of dependents, as well as legal costs), and an adequate sum for the mental and physical suffering of both the disappeared persons and their relatives;

[…].

379 The reason for this difference could be found in the text of the treaties. The text of Article 41 ECHR is more restrictive than the text of Article 63(1) ACHR, whereas the ICCPR does not stipulate any provision on the possibility for the HRC to order reparations. At the same time, the historical context in which the case law of the Inter-American Court has evolved differs greatly from that in which the European Court handed down its judgments in the initial years. The case law of the Inter-American Court developed in a context of massive and gross human rights violations, while the European Court has traditionally dealt with individual instances of violations of human rights.

380 UN Report by Nowak (2002), para. 85.

'certificates of absence' that define the legal status of the disappeared person and which should be considered proof in administrative and pension matters.[381]

The fifth main cause of victims' suffering brings to light several important considerations that should be taken into account when interpreting the duty to provide reparation. Chapter 4 subsection 5.5 *supra* demonstrated that a social supportive environment facilitates victims in coming to terms with that what happened. Measures of reparation, such as public apologies by the state and the restoration of the dignity of the disappeared person, should be carried out with the aim to create such an environment. Furthermore, the tremendous impact of an enforced disappearance in both psychological and physical terms warrants support programmes financed by the state. Finally, the disappeared person has often held an important financial position in the family. This position, together with his or her lost career opportunities, should be taken into account when determining the amount of compensation.

The restrictive approach taken by the European Court in ordering only pecuniary damages is clearly not in line with the experiences of victims.[382] The Inter-American Court's case law, however, appears to take on all of the issues described in the previous paragraph. This Court has paid careful attention to reparations, hearing the victims as well as experts on this specific issue. The function of public hearings appears to have enabled the Inter-American Court to attune the reparation measures distinctly to the needs of victims.[383] Whether the wide range of reparations ordered by the Court indicates that all such measures must be fulfilled at the domestic level in order to avoid responsibility on the basis of the duty to provide reparations is unclear. Importantly, however, the Inter-American Court does not appear to accept a trade-off between compensation and investigation proceedings that shed light on the truth about the fate or whereabouts of the disappeared person. The position of the HRC that compensation is one of the measures to remedy the unacceptable consequences of an amnesty law that is not in conformity with human rights law should be assessed carefully. While, on the one hand, compensation recognises the victims and can be seen as an acknowledgement by the state, it should not function as a gateway towards forgetting what happened and closing the violation without searching for the truth.

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381 ICRC, Model Law on the Missing: Principles for Legislating the Situation of Persons Missing as a Result of Armed Conflict or Internal Violence: Measures to prevent persons from going missing and to protect the rights and interests of the missing and their families, Article 8.

382 See *Medova v. Russia* ECtHR (2009), partly dissenting opinion of Judge Spielmann (arguing that an investigation into the disappearance of the victim should have been ordered by the Court under Article 41 ECHR).

383 *Serrano-Cruz Sisters v. El Salvador* IACtHR (2005), paras. 198 and 199. It must be noted that the reparation measures ordered by the Inter-American Court are also laid down to a great extent in the Van Boven/Bassiouni Principles, Principles 15-24. See also UN Report by Nowak (2002), paras. 85-90 (outlining different forms of reparation which are suitable for victims of enforced disappearance).

Despite lacking any specificity about the content of compensation and reparations in enforced disappearance cases, the HRC adds an important procedural aspect, namely that the compensation awarded should be proportionate to the gravity of the crime. Is it possible to deduce from the HRC's position that statutes of limitation apply to civil remedies? It is not as explicit as that. A clearer position appears to emerge in UN soft law and other UN bodies, which show the tendency that statutes of limitation should not apply to remedies for reparation.[384]

A last and practical point that was highlighted in Chapter 4 *infra* related to the flaws in the implementation policies of compensation programmes.[385] Safeguards such as independent bodies in charge of such programmes, no stringent requirements for accessing the remedies and widely publicising the availability such remedies[386] appear to be important in this respect.

8.8 Concluding remarks

The current chapter examined the way in which state authorities must react to complaints of enforced disappearance and must bring the perpetrators to justice. Chapter 2 *supra* raised several questions in this respect that pertained to the room for interpretation in the ICPPED. The current chapter strived to analyse the extent to which the case law of the supervisory bodies provide guidance in answering those questions. The case law clearly provides indications what a 'thorough' and 'effective' investigation entails. The obligation to investigate with the aim of discovering the whereabouts or fate of the disappeared person appears to be an obligation of result, in that this obligation should continue until it has been clarified what happened to the disappeared person. State officials should be punished, either disciplinarily or otherwise, when they hinder the investigation. The criteria set out seem to be in line with the five main causes of victims' suffering as defined in Chapter 4 *infra*. The case law on the duty to prosecute is more ambiguous, with the exception of the stance that the use of military courts is incompatible with their respective treaties.

This chapter sought to point out the gaps in the case law in light of the five main causes of victims' suffering and to provide possible solutions. One important aspect to highlight is the importance of assessing whether the investigations and criminal proceedings are not illusionary in practice because of omissions and failures by the state authorities. Furthermore, this chapter demonstrated that the right to know

384 UN Updated Set of Principles to Combat Impunity, Principle 23; *O.R., M.M., and M.S. v. Argentina* CAT (1989), para. 9 (The CAT observed that some victims of the Junta regime in Argentina could not file for compensation because the period of limitation had expired. And the Committee against Torture stated that it 'would welcome' the enactment of legislation that enabled the victims to obtain compensation).

385 See Chapter 4 subsection 3.3 *infra.*

386 See also UN Updated Set of Principles to Combat Impunity, Principle 33.

the truth contains two different aspects, namely the factual truth about the fate or whereabouts of the disappeared person and the truth about the circumstances of the enforced disappearance. Upon examining the case law, the first aspect appears to require obligations of result while the second obligation appears to be one of means. When there is an international dimension to the enforced disappearance or to bringing the perpetrators of the crime to justice, the case law of the three supervisory bodies do not set out concrete measures, with the exception of the Inter-American Court regarding extradition. When a state agent is under investigation for enforced disappearance or has been found guilty of such a crime, the three supervisory bodies make clear that disciplinary punishment is required, which is in line with the five main causes of victims' suffering. Additionally, criminal sanctions appear to be required.

Overall, it is clear that the duties to investigate an alleged enforced disappearance, to prosecute and punish the perpetrators and to compensate the victims must be treated separately and states have to comply with each one which is applicable to the violation.[387] A failure to comply with one of them may engage the responsibility of the state. While the case law of the three bodies generally respond to the five main causes of victims' suffering, this chapter demonstrated that several 'gaps' can profit from taking these five main causes into account.

387 Méndez (1997), p. 263.

Chapter 9
The Duty to Protect Individuals at Risk of Being Subjected to Disappearance by Private Individuals or Groups of Individuals

9.1 Introduction

Enforced disappearance is a human rights violation surrounded by many uncertainties. As indicated in previous chapters, one of the uncertainties that typically accompany this human rights violation is the identity of the perpetrators. It is often impossible to establish whether the state is implicated in the crime due to denials by the state, the lack of a proper investigation and the lack of evidence. Moreover, there are other forms of state involvement that are subtler than direct involvement, such as acquiescence, that are even more difficult to entangle. As seen in Chapter 6 *supra*, the HRC, the Inter-American Court and the European Court have taken into account the typical lack of evidence in enforced disappearance cases in their process of determining state responsibility. Still, there are instances in which there is insufficient evidence to accept the claim of the plaintiffs that state agents committed the enforced disappearance. In addition, there are situations where it is clear that non-state actors subjected someone to disappearance,[1] but the state remains inert in responding to the crime.[2] Do these situations leave the victims empty-handed? Not entirely. The duty to protect provides a tool to respond to such situations.[3] The relevance of the duty to protect is twofold for the purpose of the present study. First of all, Chapter 2 *supra* signalled that Article 3 ICPPED obliges States Parties to take 'appropriate measures' to investigate disappearances committed by non-state actors and to bring the perpetrators to justice.[4] Secondly, the case law of the three supervisory bodies indicates that state responsibility has been determined on the basis of a failure to take operational measures when a person is at risk of being disappeared by private individuals or groups of individuals.

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1 Throughout this chapter the term 'disappearance' is used to indicate either disappearances committed by non-state actors or disappearances committed by persons whose identity could not be established, which leaves doubts as to whether state agents were implicated in the crime.

2 The situation where non-state actors have effective control over a certain area of a state's territory is left out of the scope of this research. For a discussion of the UN treaty bodies in respect of those situations, see *e.g.* A. Edwards, *Violence against women under international human rights law* (Cambridge: Cambridge University Press 2011), pp. 246-249.

3 See generally Chapter 3 section 3 *supra*.

4 Article 3 ICPPED states: 'Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.'

Chapter 9

This chapter firstly makes a number of observations about the content of 'appropriate measures' as laid down in Article 3 ICPPED in relation to the case law of the HRC, the European Court and the Inter-American Court. Secondly, this chapter examines the scope and content of the duty to take preventive operational measures. This duty is not laid down as such in the ICPPED but is, nonetheless, an important aspect of the protection from enforced disappearance. In contrast to the previous chapters contained in Part II of this book, this second section starts with an examination of the case law of the European Court, after which an analysis of the Inter-American Court's case law follows. The HRC has not addressed disappearance cases in which it elaborated the duty to protect. Even though the HRC recognises this duty in general,[5] it is therefore not further included in the analysis.[6] This chapter concludes with a section that evaluates the findings of the analyses in light of the five main causes of victims' suffering as defined in Chapter 4 *supra*.[7]

5 See Chapter 3 *supra*. See also HRC, General Comment No. 31 [80] (2004), para. 8 (indicating that '[t]here may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.'); HRC, General Comment 6 (1994), para. 3 (stating that '[t]he Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces'); *Joaquín David Herrera Rubio et al. v. Colombia* HRC 2 November 1987 (Comm. no. 161/1983), paras. 10.2, 10.3 and 11 (The HRC concluded succinctly that, even though there was reason to believe that military personnel killed the author's parents, there was no conclusive evidence as to the identity of the perpetrators. Noting that the killing took place at a time when military counterinsurgency operations were frequent in the area concerned and that this area was subjected to stringent controls by the armed forces, the HRC found a violation of the right to life based on a failure to prevent the killings. In reaching this conclusion, the HRC recalled General Comment 6 and considered that the investigation into the killings was not adequate). See also Edwards (2011), pp. 239-241 (providing an overview of the scarce views of the HRC in relation to the freedom from torture or other ill-treatment and acts by non-state actors and demonstrating that the HRC's jurisprudence tends to refer to positive post-abuse measures such as the duty to investigate).

6 See Chapter 7 section 3 *supra* (discussing the duties of states in situations where a threat of being subjected to enforced disappearance comes from state agents).

7 The five main causes of victims' suffering are: (1) no trace of the disappeared person due to denials by the state authorities; (2) uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person; (3) *de facto* and *de jure* impunity; (4) an unsafe environment to carry out the search and other activities related to the enforced disappearance; and (5) obstacles for victims to continue their 'normal' life.

9.2 Appropriate measures to investigate crimes committed by non-state actors and to bring the perpetrators to justice

The duty to protect requires states to intervene in a situation where one person has encroached upon the human rights of another person, or when there is a risk that such an infringement will occur. In this respect, Chapter 8 *supra* illustrated that both the European Court and the Inter-American Court have repeatedly stated that the obligation to conduct an investigation also arises in situations where someone has been subjected to disappearance and murdered by non-state actors without any involvement of the state.[8] The same requirements of effectiveness, independence, promptness and expeditiousness, the involvement of the family and sufficient public scrutiny appear to apply to such cases.[9] Similarly, the obligations to bring the perpetrators to justice by means of a criminal process seem to apply to disappearances committed by non-state actors. It must be noted, however, that the Inter-American Court has stated that the obligations to investigate and prosecute are particularly stringent in cases where state agents are implicated in the crime.

Upon an analysis of the case law, there appears to be one essential aspect that is typically attributed to the obligation to investigate enforced disappearance cases (with state involvement), which is that this obligation lasts until the fate and whereabouts of the disappeared person are established. In addition, the right to know the truth seems to have developed in the context of the state being responsible for the violation of human rights. Still, in *Pueblo Bello Massacre v. Colombia*, a case in which it was not established that the state was implicated in the crimes themselves,[10] the Inter-American Court still afforded the right to know the truth to the victims and imposed an obligation on the state to take all necessary measures to establish the truth.[11] Importantly, in this case the state was still held responsible on the basis of a failure to prevent.

Another difference between enforced disappearance cases and the disappearance cases before the European Court in which the Court only found a violation of the ECHR on account of a failure to investigate is that the latter type of cases does not portray an obligation to compensate.[12] Upon examining the experiences of victims, it seems important, however, that the state provides effective civil remedies to which victims can avail themselves with the aim of obtaining compensation. It must be noted

8 See Chapter 8 section 4 *supra*.
9 *Tsechoyev v. Russia* ECtHR (2011), para. 145; *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), paras. 142-146.
10 See subsection 9.3.2 below (discussing this case in more detail).
11 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), paras. 143, 161, 171, 193 and 212.
12 See *e.g. Tsechoyev v. Russia* ECtHR (2011) and *Nesibe Haran v. Turkey* ECtHR (2005).

that such an obligation can be found in General Comment No. 31[80] on general state obligations issued by the HRC.[13]

In summary, the content of the duty to investigate and to bring the perpetrators to justice in cases of disappearances committed by non-state actors differ to some extent from such duties in enforced disappearance cases. The basis for the duty to provide civil remedies for obtaining compensation for such crimes is less broadly accepted.

9.3 The duty to take operational measures to protect

Having established in the previous section that states have to take action once non-state actors have subjected a person to disappearance, this section further explores the extent to which states have a duty to prevent such crimes. This duty has taken the form of the duty to take preventive operational measures. As a preliminary remark it must be noted that such duty is not necessarily self-evident. This duty not only concerns the relationship between individuals, which traditionally falls outside the scope of human rights law, but is also far-reaching because it focuses on the measures that should have been taken in a specific situation in order to prevent a possible infringement. Thereby, this duty requires states to act upon the possibility that a crime may potentially occur. Moreover, the doctrine of the obligation to take preventive operational measures is particularly controversial in enforced disappearance cases. The reason for this is that the measures that should have been taken have pertained to investigative measures, thereby arguably blurring the distinction between procedural violations (on the basis of a failure to investigate) and substantive violations (responsibility for the wrongdoing itself) of human rights.[14]

9.3.1 The European Court: the scope and content of the duty to take preventive operational measures in enforced disappearance cases

The duty to take preventive operational measures in the European system must be explored on the basis of the case *Osman v. the United Kingdom*. Even though the facts of this case did not pertain to an enforced disappearance, the test developed therein has been applied in enforced disappearance cases. In the *Osman Case*, a former teacher of a 15-year old boy killed the boy's father and injured the boy himself. Claiming a violation of Article 2 ECHR, the applicants (the 15-year old boy and his mother) alleged that during the months before the fatal attack, the police had been given sufficient information about the possible danger of them being victims of a criminal act by the teacher. Despite the availability of this information, the police

13 HRC, General Comment No. 31 [80] (2004), para. 8.

14 The distinction between procedural violations and substantive violations of the right to life was first introduced by the European Court, see *e.g. Varnava a.o. v. Turkey* ECtHR [GC] (2009), paras. 136-138.

had not taken any measures to protect the family against the attack. In response to the claim, the Court held that:

> Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities *to take preventive operational measures to protect* an individual whose life is at risk from the criminal acts of another individual.[15] [Emphasis added by the author]

In determining the scope of the obligation to take preventive operational measures, the Court recognised that the interpretation of this duty must not impose an 'impossible or disproportionate' burden on the authorities.[16] In this sense, it is not an obligation of result, in that states are to prevent every claimed risk to life from materialising. Rather, the test whether such an obligation exists is whether:

> [t]he authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[17]

Thus, a situation must comply with three criteria for such a duty to arise: (1) the authorities knew or should have known at the time of (2) a real and immediate risk to the life of an identified individual and (3) failed to take reasonable measures that could have been expected from them to avoid the said risk. How has the European Court applied this test in enforced disappearance cases? Firstly, this section analyses the scope and content of the duty to take preventive operational measures in three critical cases in which the Court determined state responsibility applying the Osman test. On the basis of this test, the European Court accepted the claims of a violation of the right to life of the disappeared person (Article 2 ECHR). Thereafter, this section highlights one important case in which the European Court rejected such a claim on the basis of the Osman test. Thirdly, this section discusses the difference between a violation of the procedural and the substantive aspect of the right to life. Lastly, it evaluates a possible duty to take preventive operational measures under the right to liberty.

15 *Osman v. the United Kingdom* ECtHR [GC] (1998), para. 115.
16 *Ibid*., para. 116.
17 *Ibid*.

9.3.1.1 Application of the Osman test in enforced disappearance cases

The first time that the Osman test was applied in an enforced disappearance case was in the case *Mahmut Kaya v. Turkey* in 2000.[18] In this case, a doctor suspected of aiding and abetting the PKK in Southeast Turkey was kidnapped, disappeared and murdered at the beginning of 1993. During that time there had been a significant number of killings of prominent Kurdish figures. Kaya belonged to the group at risk of being attacked. The European Court concluded that the perpetrators were possibly acting with the knowledge or acquiescence of state authorities. The European Court rejected the claim that the state was directly involved in the disappearance. Instead, it considered that the state should have been aware of this possibility and of the risk that Kaya was running. The European Court continued by recognising that the respondent state had a legal framework in place aimed at protecting the lives of its citizens. However, the European Court criticised the respondent state for not having adequately implemented this framework in that region at the time. According to the European Court, these defects had removed the protection to which Kaya was entitled by law.[19] Thus, even though it could not be established beyond reasonable doubt that state agents were behind the disappearance and killing of Kaya, the Court found a violation of Article 2 ECHR on the basis of a failure 'to take reasonable measures available to [the state] to prevent a real and immediate risk to the life of Hasan Kaya.'[20] After this case, the European Court again determined state responsibility based on the Osman test in *Koku v. Turkey*,[21] *Osmanoglü v. Turkey*,[22] and *Medova v. Russia.*[23] These three cases illustrate the scope and content of the obligation to take measures to prevent a real and imminent risk that a person is subjected to disappearance, as demonstrated in the following subsections.

9.3.1.1.1 The facts of the three cases

Before assessing the considerations of the European Court, it is useful to briefly describe the facts of the three cases in order to illustrate the context in which this Court made its findings.[24] In *Koku v. Turkey*, the applicant's brother, Koku, disappeared on 20 October 1994 in the town of Pörtürge in Southeast Turkey. His decapitated body was found six months later. According to the applicant, Koku had been a prominent

18 *Mahmut Kaya v. Turkey* ECtHR (2000).
19 *Ibid*., paras. 89-99.
20 *Ibid.*, para. 101.
21 *Koku v. Turkey* ECtHR (2005).
22 *Osmanoğlu v. Turkey* ECtHR (2008).
23 *Medova v. Russia* ECtHR (2009).
24 It must be noted that the facts of the three cases were disputed, in particular with respect to the involvement of state agents in the crime. The relevant nuances in the disputes are set out in this section, but were not the only disputed questions in the cases.

and active member of HADEP, a pro-Kurdish party in Turkey. In early 1994, he was arrested upon suspicion of membership of the PKK and was tortured in detention. Subsequently, he was released and acquitted of the charges. Nevertheless, due to his prominent position in the party, he continued to be harassed and threatened by the police and by the governor of the district. The applicant claimed that plain-clothes officers had abducted his brother on the street in the presence of his wife and one other witness. Subsequently, the state authorities denied that Koku had been taken into custody. Moreover, these authorities refused to undertake any meaningful investigation.[25] The applicant alleged that the state was involved in the disappearance of his brother. During the proceedings before the Court, the respondent state refuted the allegation of its involvement in the disappearance and alleged that the incident had connections with a private dispute.[26] In its evaluation of the facts, the Court observed that the evidence presented was insufficient to conclude beyond reasonable doubt that the perpetrators had been state agents.

In the second Turkish case, *Osmanoglü v. Turkey*, the son of the applicant had also disappeared in Southeast Turkey. He disappeared in 1996, after having been abducted outside his store by two men claiming to be police officers. The applicant alleged that his son had previously been threatened, detained and released by state authorities. The applicant had complained to the authorities but no apparent follow-up steps had been taken. A few months after the disappearance, a newspaper article gave details of a purported confession made by a former agent of the anti-terror intelligence branch of the gendarmerie describing the abduction and subsequent killing of the applicant's son.[27] The European Court, however, held that there was insufficient evidence to conclude direct state responsibility for the disappearance itself.

The facts of the third relevant case, *Medova v. Russia*, occurred in Russia. Based on the evidence presented, the European Court established that four armed men apprehended the applicant's husband, Medov, and another man in 2004 and forced them into a car.[28] The car was stopped at a military checkpoint at the border between the district of Chechnya and that of Sunzhenskiy. The four captors refused to identify themselves and all six men were taken to the Sunzhenskiy ROVD office.[29] At the ROVD office, the four captors identified themselves as FSB officers from Chechnya by showing identification papers and an authorisation to detain Medov. The officers contacted the Sunzhenskiy District Prosecutor's Office, which confirmed the validity of the identity documents and the lawfulness of the detention.[30] After this

25 *Koku v. Turkey* ECtHR (2005), paras. 12-41.
26 *Ibid*., paras. 42-58.
27 *Osmanoğlu v. Turkey* ECtHR (2008), paras. 15-17.
28 *Medova v. Russia* ECtHR (2009), para. 83.
29 *Ibid*., para. 84. A ROVD office is an office of the District Department of Internal Affairs.
30 *Ibid*., para. 98.

confirmation, the four captors and the two captives were released and subsequently disappeared. The applicant alleged that about three weeks after the disappearance of Medov, the FSB Department in Chechnya denied that the applicant's husband had been detained by their officers and stated that they did not have any knowledge of the incident or of the identity of the persons having claimed to be FSB officers.[31] Furthermore, the applicant alleged that the officers at the checkpoint had found her husband tied up in the boot of the car. She claimed, moreover, that the four captors were state agents based on, *inter alia*, their possession of FSB identity documents and the initial confirmation of these papers. She substantiated her allegation with four replies that she had received during the first few days after the disappearance of Medov. These replies confirmed that FSB officers from Chechnya detained him on 15 June 2004. The government contested the applicant's allegation and claimed that the identity documents had been forged. On the basis of the evidence available, the Court did not accept the applicant's claim that state authorities were the immediate perpetrators.

The facts of the cases described reveal striking similarities. In all cases, the applicants alleged that the state was directly involved in the disappearance of their family member. In the two Turkish cases, the disappeared persons had previously been abused or threatened by state agents, according to the applicants. In the Russian case, the state had been directly confronted with the perpetrators and the victims before they disappeared. In all cases, the relatives encountered the lack of an adequate investigation by the state authorities. Nevertheless, the European Court did not accept the claims that state agents were the direct perpetrators of the crimes.

9.3.1.1.2 The scope and content of the duty to take preventive operational measures

Having decided in the three cases described above that it could not be established beyond reasonable doubt that the perpetrators were state agents, the European Court applied the Osman test. By applying this test, the Court assessed whether the state had complied with its duty to protect the lives of the disappeared persons. Accordingly, the Court examined the three limbs of the Osman test: (1) the authorities knew or should have known at the time of (2) a real and immediate risk to the life of an identified individual and (3) failed to take reasonable measures that could have been expected from them to avoid the said risk. In all three cases, the European Court found a substantive violation of the right to life (Article 2 ECHR).[32] Thereby, the state was held responsible for the death of the disappeared persons.

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31 *Ibid*., para. 24.

32 *Osmanoğlu v. Turkey* ECtHR (2008), paras. 53 and 56; *Medova v. Russia* ECtHR (2009), paras. 88 and 90.

For analytical purposes, it is most logical to start with a discussion of the second limb of the Osman test. The real and immediate risk was assessed in the three cases on the basis of the circumstances, namely that a disappearance of a person was life-threatening in the region where the violation took place. In Turkey, this was the conflict situation in Southeast Turkey during the 1980s and 1990s. In respect of Turkey, the Court considered that 'on a number of occasions it has reached the conclusion that the disappearance of a person in south-east Turkey at the relevant time could be regarded as life-threatening.'[33] According to the Court:

> since approximately 1985, serious disturbances have occurred in the south-east of Turkey, involving armed conflict between the security forces and the members of the PKK. By 1996, the violence had claimed, according to the Government, the lives of 4,036 civilians and 3,884 members of the security forces. Since 1987, ten of the eleven provinces of south-eastern Turkey have been subject to emergency rule.[34]

Similarly, the Court regarded the disappearance of Medov in the course of the conflict in the Chechen Republic as life-threatening.[35] In addition to the context, the Court took into account the status of the victim in the *Koku Case* in order to determine the existence of a real and imminent risk; Koku, as chairman of the local HADEP branch, 'belonged to a category of persons who ran a particular risk of falling victim to a disappearance or murder.'[36] Yet, the Court clarified in the *Osmanoglü Case* that political status or a suspicion by the authorities was not decisive. In this case, the fact that there were no indications that the disappeared person was involved in PKK activities did not make the disappearance any less life-threatening. The Court took into consideration that 'the manner of his abduction shows many similarities with the disappearances of persons prior to the[m] being killed in south-east Turkey at around the relevant time which have been examined by the Court.'[37]

With respect to the first element of the Osman test, the Court considered that the authorities were aware, or should have been aware, of the real and immediate risk of the danger to the right to life of the victims. In the *Koku Case*, the Court found that the authorities had been aware of the abduction of Koku as of the day he disappeared due to the complaints by his relatives. Moreover, they were aware of the risks that such an active political figure faced following his disappearance. In the *Osmanoglü Case*, the Court took into account that the state authorities had previously threatened the applicant's son and that the authorities had been informed of the abduction the

33 *Osmanoğlu v. Turkey* ECtHR (2008), para. 57. See also *Akdeniz v. Turkey* ECtHR 31 May 2005 (Appl. no. 25165/94), para. 99; *Toğcu v. Turkey* ECtHR (2005), para. 112.
34 *Avşar v. Turkey* ECtHR (2001), para. 285.
35 *Medova v. Russia* ECtHR (2009), paras. 89, 90 and 97.
36 *Koku v. Turkey* ECtHR (2005), para. 131.
37 *Osmanoğlu v. Turkey* ECtHR (2008), para. 58.

following day.[38] In the *Medova Case*, the authorities should have been aware of the risk due to their encounter with the suspicious behaviour of the four captors. The Court recognised that the police officers at the ROVD office might not have been aware that there was an immediate threat to the life of the applicant's husband. This possible lack of awareness was in particular due to the identity check that resulted in confirmation that the four men were FSB officers. Nevertheless, the Court found that the officers at the ROVD office must have been alerted by the suspicious behaviour of the four captors, in particular the initial refusal to identify themselves.

In relation to the last limb of the Osman test, *i.e.* the measures that the authorities should have taken, the European Court assessed in particular the investigative measures taken. The Court listed a number of failings in this respect. In the *Koku Case* and the *Osmanoglü Case* the steps that should have been taken related to checking custody records, visiting places of detention and taking witness statements from the applicant, from persons detained in relevant police stations and from police officers. In addition, the Court considered in the *Osmanoglü Case* that the authorities should have alerted all the checkpoints in the region. In the *Medova Case*, the European Court noted that the public prosecutor did not verify whether Medov's captors were indeed FSB officers from Chechnya and they did not request any written document confirming the validity of the operation from the Chechnyan authorities. They had only confirmed their identity over the telephone. The police officers had neither copied the identification papers nor logged the detention in any official record.[39] Despite the fact that they might not have been aware of the life-threatening circumstances at the moment of the abduction, the superficial steps taken did not reach the threshold protection required by the ECHR, in particular taking into account the alarming behaviour of the kidnappers.

The three cases above show that the assessment of the awareness of a real and immediate risk took into account several factors: the context in which the person disappeared, the profile of the victim and concrete indications such as previous threats. The complaints of relatives or other specific circumstances brought the risk to the attention of the state authorities. The reasonable steps that should have been taken mainly pertained to investigative steps, custody records and alerting checkpoints. Interestingly, *Osmanoglü v. Turkey* was decided by four votes to three on the issue of finding a substantive violation of the right to life, while the violations of the substantive aspect of the right to life in *Koku v. Turkey* and *Medova v. Russia* were decided unanimously.

38 *Ibid.*, para. 75.

39 *Medova v. Russia* ECtHR (2009), para. 99 (The government even denied at first that the six men had been detained in the ROVD office).

9.3.1.1.3 The dissenting opinion in *Osmanoglü v. Turkey*: two important observations

The judgment in the *Osmanoglü Case* prompted a strong dissenting opinion. The main points of critique by the dissenting judges touched upon two issues: 1) the distinction between the procedural aspect and the substantive aspect of the right to life and 2) the weight that must be given to the cooperation of the state in the proceedings before the European Court. The first point of criticism concerned the majority's view that the failure to take investigative steps not only violated the procedural aspect of Article 2 ECHR but also the substantive aspect of this article. In their view, 'the positive obligation of the State to protect the lives of persons under its jurisdiction and the obligation of the State to carry out an effective investigation in cases of disappearance are two different notions and should be treated as such'.[40] The three dissenting judges pointed out that this conclusion deviates from previous case law in which only a violation of the substantive aspect of the right to life had been found when the disappeared person was presumed dead following the detention by state officials.[41] In their view, such an advance in the case law should have been decided by the Grand Chamber of the European Court.

What is then the difference between a violation of the procedural limb and the substantive limb of Article 2 ECHR when both violations are based on a failure to take investigative steps? Admittedly, the measures that the authorities should have taken in the three disappearance cases discussed in the previous subsections related to the duty to investigate. Upon examination, this overlap of duties might, however, be justified by the specific nature of enforced disappearance. As demonstrated in Chapter 7 section 4 *supra*, an adequate investigation in the first few days after someone has disappeared is one of the most essential measures of prevention. Furthermore, it was not only the failure to investigate that led the European Court to find a substantive violation. The indications of previous threats as well as the context played an important role in defining the awareness of the risk of their lives being in danger. This situation should have prompted adequate action.

In respect of the context, the dissenting judges in the *Osmanoglü Case* argued that a violation of the substantive limb of Article 2 ECHR might have been justified in cases where the Court had established a widespread or systematic practice of abductions and killings. As Chapter 6 subsection 3.3 *supra* demonstrated, the existence of a systematic practice has been raised unsuccessfully in several cases against Turkey. The *Koku Case* is one example of such cases. The applicant argued that there was 'overwhelming and compelling evidence that in the mid-1990s acts of torture and

40 *Osmanoğlu v. Turkey* ECtHR (2008), dissenting opinion of Judges Türmen, Vajić and Steiner (arguing that the shift in case law made in this case should have been decided by the Grand Chamber).

41 *E.g. Timurtaş v. Turkey* ECtHR (2000), para. 85; *Akdeniz a.o. v. Turkey* ECtHR (2001), para. 89. See Chapter 5 subsection 2.3 *supra*.

inhuman treatment, disappearances and extra-judicial killings were widespread and systematic.'[42] The Court did not address this allegation, but nevertheless used the context for establishing a real and immediate risk. In particular, the Court noted 'from its previous judgments that there were large numbers of security forces in the south-east region pursuing the aim of establishing public order at the relevant time. They faced the difficult task of countering violent armed attacks carried out by the PKK and other groups.'[43] Even though there was an adequate legal framework in place, its implementation in respect of unlawful acts allegedly carried out by these security forces disclosed particular defects in the South-eastern region of Turkey. A serious shortcoming was the failure of the prosecutor to pursue complaints by individuals.[44] This defect together with several other structural defects in the implementation of the criminal law system had permitted or fostered impunity for actions of members of the security forces or of groups allegedly acting with their connivance or acquiescence.[45] This strong wording in the considerations of the majority may have had the same effect as the finding of a systematic or widespread practice.

Hence, it is clear that there is an important distinction between violations of the procedural and substantive aspects of rights such as the right to life. However, there are good reasons to assert that a failure to take immediate measures to investigate complaints of enforced disappearance in a life-threatening context may also fall foul of the standards required by the substantive aspect of the right to life. Such a conclusion holds true when the state authorities contributed to creating the life-threatening circumstances by, for instance, not having adequately implemented the legal system and could have taken measures to search for the person which could have prevented a risk to the right to life.

The second point of critique expressed by the dissenting judges was that the respondent state in the *Osmanoglü Case* had cooperated with the Court in the ECHR proceedings. In their view, this cooperation was one of the relevant differences why it was justified to find a substantive violation of Article 2 ECHR in *Koku v. Turkey*. In *Koku v. Turkey*, the Court found that the respondent state had failed to comply with its duty to cooperate by failing to submit several documents from the investigation files. This failure was one of the reasons why it was impossible for the European Court to establish the identity of the perpetrators. The Court found that the government had failed to comply with Article 38(1) ECHR and found that it could draw inferences from the conduct of the government in this respect.[46] The Court dealt with the failure

42 *Koku v. Turkey* ECtHR (2005), para. 98.
43 *Ibid.*, para. 136.
44 *Ibid*., para. 144; *Mahmut Kaya v. Turkey* ECtHR (2000), para. 96.
45 *Koku v. Turkey* ECtHR (2005), paras. 98-100.
46 *Ibid*., para. 109.

of the government to provide certain documents under Article 2 ECHR.[47] In contrast, the behaviour of the state in the case of *Osmanoglü v. Turkey* did not prompt the Court to find a violation of Article 38(1) ECHR. In the view of the Court, the state had cooperated with the Court by submitting the custody records.[48] The Court had requested copies of the entire domestic investigation file from the state. However, the only documents that the state submitted were copies 'of what they claimed were the custody records of Diyarbakır police headquarters […].' The name of the applicant's son did not appear in these records.[49] Given the sparse information provided, it seems reasonable that a rejection of the alleged violation of Article 38(1) ECHR did not affect the finding of a substantive violation of Article 2 ECHR.

The importance given by the dissenting judges to the cooperation of the state with the European Court under Article 38(1) ECHR does not seem self-evident at first glance in relation to the duty to take preventive measures. Cooperation with the Court, after all, occurs long after the disappearance commenced. Yet, there are two important links: on the one hand, the case files would have shed light on which actions had been taken by the state authorities and, on the other, the cooperation of the state with the Court's proceedings is an indication of the state's attitude towards clarifying the disappearance. In *Medova v. Russia*, the European Court also found a failure of the government to cooperate under Article 38(1) ECHR,[50] which appears to confirm these links.

Hence, while the dissenting judges touch upon important issues to be aware of, the majority reasoning holds when assessing the *Osmanoglü Case* carefully in light of the particularities of an enforced disappearance.

9.3.1.2 The limits of the Osman test in enforced disappearance cases

Having seen the successful application of the Osman test in the *Koku Case*, the *Osmanoglü Case* and the *Medova Case*, this subsection illustrates the limits to the application of this test using *Tsechoyev v. Russia*. In contrast to the first three cases, the application of the Osman test in the *Tsechoyev Case* led the Court to reject state responsibility based on the failure to prevent an identifiable risk to the life of the disappeared person.[51] The facts of this case occurred in Russia in the district of Ingushetia. In *Tsechoyev v. Russia*, the brother of the applicant was arrested on 23 October 1998. The way in which he was detained was disputed among the parties but the applicant alleged that the detention was illegal. The respondent state confirmed that state authorities detained the victim on that date in accordance with the law

47 *Ibid*., paras. 110-115.
48 *Osmanoğlu v. Turkey* ECtHR (2008), dissenting opinion of Judges Türmen, Vajić and Steiner.
49 *Ibid.*, paras. 43 and 44.
50 *Medova v. Russia* ECtHR (2009), paras. 76-81.
51 *Tsechoyev v. Russia* ECtHR (2011).

because he was suspected of being involved in a kidnapping.[52] The applicant was only allowed to visit his brother on 24 February 1999. During that meeting, his brother told him that he had been beaten and was forced to confess to the kidnapping. After that date, the applicant's brother was transferred to a second place of detention, without notifying his relatives. On 17 March 1999, the applicant's lawyer was allowed to visit his brother. The lawyer reported that his brother was in poor health without medical treatment.[53] On 23 August 1999, a group of four men wearing police uniforms arrived at the second place of detention. They identified themselves as officers of the district in which the applicant's brother had been initially detained and presented documents authorising his transfer back to the detention centre where he was previously held. Subsequently, they took him away. One day later, Tsechoyev's body was found with gunshots to the head.[54] The applicant alleged that the state authorities were implicated in the kidnapping and killing of his brother.[55] He argued, for instance, that the behaviour of the then investigating public prosecutor roused suspicion about his motivations to detain the applicant's brother. The Court dismissed this claim, stating that there was insufficient evidence because the applicant appeared to be relying solely on the 'informal connections' between the different authorities.

The Court specifically distinguished this case from the *Medova Case*. The Court noted that the kidnappers, who claimed to have the order to take Tsechoyev from one prison to another, had presented themselves as police officers. They had worn uniforms, had presented the correct papers at first glance and the staff of the detention centre had followed the routine procedure. It was only the subsequent investigation that established that these papers, the signatures and the stamps were forged. As a result, the Court accepted the authorities' obliviousness to the risk at the time of the transfer. While recognising that the murder of a person detained on criminal charges, and thus under the control of the state authorities, must raise a serious concern, the European Court accepted that at the time of the request for transfer there were no concrete indications that Tsechoyev's life was at a real and immediate risk. Hence, there was no foreseeable risk. The European Court did not discuss the context in which the enforced disappearance took place. It must be noted that the events took place just before the conflict in Chechnya had officially developed into a situation of internal conflict. Moreover, the European Court found that the investigation had complied with the requirements of an effective investigation, in particular during the first days after the body of the victim was discovered. The Court did not address explicitly the allegation that the body of the victim was found on territory that was allegedly 'under the jurisdiction' of the police forces. The allegations of the illegality and disputed

52 *Ibid*., paras. 7-17.
53 *Ibid*., paras. 18-21.
54 *Ibid*., paras. 22-24.
55 *Ibid*., para. 127.

circumstances of his arrest in the first place were not considered by the Court either. Despite the rejection of a failure of the duty to take preventive operational measures, the European Court found a violation of the procedural aspect of the right to life. This finding was based on the failure to pursue the leads into the possibility that state agents were implicated in the kidnapping of the applicant's brother.[56]

A last remark on the *Tsechoyev Case* concerns the cooperation with the European Court. The Court found the claim under Article 38(1) ECHR in the *Tsechoyev Case* to be manifestly ill-founded. This conclusion was based on the fact that the government had submitted 380 pages from the case file as well as additional information about the progress of the investigation.[57] The outcome of this case, therefore, appears to confirm that the extent to which respondent states cooperate with the Court affects the assessment of the Osman test.

9.3.1.3 Preventive operational measures and the right to liberty

The duty to take preventive operational measures as discussed in the previous paragraphs was considered in respect of the right to life. Consequently, 'the action which was expected from the domestic authorities was not to prevent the disappearance of the [disappeared person] but to take preventive operational measures to protect the life which was at risk from the criminal acts of other individuals.'[58] As demonstrated in Chapter 7 subsection 4.3 *supra*, the Court has repeatedly considered that Article 5 ECHR (the right to liberty) also generates an obligation to take prompt and effective measures to safeguard persons against the risk of disappearance. Such considerations were made, however, in cases where the authorities were found responsible for the enforced disappearance.[59] The Court found a factual basis to conclude the same in neither the *Koku Case* nor the *Osmanoglü Case*.[60] In the *Medova Case*, the Court did find a violation of the positive obligation under Article 5 ECHR in relation to failing to end the deprivation of liberty of Medov even though the state had been in a position to do so. The reason might have been that the authorities were more directly confronted with the enforced disappearance in the *Medova Case* than in the two Turkish cases.

56 *Ibid*., paras. 138-141.
57 *Ibid*., paras. 35 and 160.
58 *Koku v. Turkey* ECtHR (2005), para. 132; *Osmanoğlu v. Turkey* ECtHR (2008), paras. 76 and 77.
59 *E.g. Bazorkina v. Russia* ECtHR (2006), para. 148.
60 *Koku v. Turkey* ECtHR (2005), para. 175; *Osmanoğlu v. Turkey* ECtHR (2008), para. 102.

9.3.2 The Inter-American Court of Human Rights

The Inter-American Court has derived from the duty to guarantee (Article 1(1) ACHR) a duty to protect persons from crimes by non-state actors.[61] This duty includes taking measures to *prevent* criminal acts by non-state actors that would otherwise violate the human rights of other individuals.[62] Accordingly, the crimes of non-state actors may be imputable to the state 'because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.'[63] The scope of attributing responsibility to the state on the basis of this duty is determined by three components: (1) the awareness of (2) a situation of real and imminent danger and (3) the reasonable possibilities of preventing or avoiding that danger. In this respect, the Inter-American Court's approach clearly has echoes of the *Osman Case* handed down by the European Court.[64] According to these limits to the scope of the duty to protect, it is clear that not every conduct of an individual that violates the human rights of another is attributable to the state. Rather, the Inter-American Court determines state responsibility on a case-by-case basis taking into account the specific circumstances and the concrete application of the duties.[65] A leading example of how the Inter-American Court has assessed this duty to prevent can be found in the case *The Pueblo Bello Massacre v. Colombia*. This case illustrates clearly the scope and content of the duty to protect in terms of prevention in relation to individuals at risk of being subjected to disappearance by non-actors.[66] The following subsections explain the facts of the case, after which an analysis of the legal reasoning of the Inter-American Court follows.

9.3.2.1 The Pueblo Bello Massacre v. Colombia*: the facts of the case*

The *Pueblo Bello Case* pertained to a massacre carried out by paramilitaries in Colombia. This massacre was not an isolated event but was the result of a situation that came into existence in the early 1960s. Before going into the details of the case, it is helpful to briefly explain this context. During the 1960s, Colombia declared the nation to be in a state of emergency due to the organisation of several guerrilla groups. A conflict had emerged between the peasants, supported by the guerrilla movements

61 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 164. See generally Chapter 3 subsection 3.3 *supra*.
62 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 120.
63 *Ibid.* See also *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 172.
64 See subsection 9.3.1 above (explaining the Osman test).
65 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), para. 123; Melish & Aliverti (2006), p. 120.
66 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006). *Cf.* Chapter 6 section 4 *supra* (discussing the scope of the notion of acquiescence).

'FARC'[67] and 'ELN',[68] and large landowners. In order to combat the guerrilla groups, Act no. 48 (1968) was adopted according to which the defence of the nation would be organised. This Act enabled the creation of so-called 'self-defence groups'. These self-defence groups consisted of civilians who were allowed by the state to carry and own weapons in order to fight the guerrilla groups. The state also provided them with logistical support.[69] During the 1980s, many of these self-defence groups turned into criminal groups, usually known as paramilitaries. Consequently, the government issued several decrees between December 1986 and the year 1989 in order to re-estatablish public orderand to counter these criminal groups, even though the state had played an indispensable role in their creation. Measures taken consisted of the criminalisation of the use, trafficking and carrying of personal defence weapons and the creation of special armed forces to combat *inter alia* death squads and self-defence groups that were, according to the state, 'erronously known as paramilitary groups'. Also, several provisions of Act no. 48 (creating the self-defence groups) were suspended.[70] In addition, the promotion, financing, organisation, leading and execution of acts of these criminal groups as well as membership of such groups was criminalised.

However, in 1990 these measures had not resulted in the elimination of the self-defence groups, in particular not in the municipality to which Pueblo Bello belongs. In the 1960s, Pueblo Bello had become an important strategic point due to the establishment of a very profitable banana-production centre in the area. Consequently, this area became the backdrop for conflict between the guerrilla movements and paramilitary groups led by important landowners and ranchers, one of them being Fidel Castaño Gil.[71] During the period between 1988 and 1990, paramilitary groups carried out more than 20 massacres. Due to the violent tensions, the government established several military and police presence in this conflict area with the aim being to restore public order. This presence included two military installations around Pueblo Bello: a roadblock on the highway leading to San Pedro de Urabá, the most important access road, and a military base at San Pedro de Urabá.[72] The roadblock installed meant that when an armed strike was declared, the roadblocks in the zone operated from 6am to 6pm. After 6pm, the roads were closed to all vehicles.

The massacre in the *Pueblo Bello Case* occurred on 13 and 14 January 1990, when a group of heavily armed paramilitaries entered the Pueblo Bello village in a well-organised manner. According to witnesses, the paramilitaries wore civilian

67 'FARC' stands for *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo.*
68 'ELN' stands for *Ejército de Liberación Nacional*.
69 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), paras. 95(1) and (2).
70 *Ibid*., paras. 95(4)-(11).
71 *Ibid*., paras. 95(21)-(24).
72 *Ibid*., paras. 95(25)-(29).

clothing but also clothes exclusively belonging to the army. They mistreated the population and set fire to some of the villagers' property. They identified 43 men, tied and gagged them and forced them into two trucks.[73] Two of the victims were minors. The trucks left late in the evening. Subsequently, the captured men were tortured and beaten to death at a ranch of the landowner Fidel Castaño Gil.[74] Of the 43 victims, 37 men were still missing on the date of the judgment by the Inter-American Court. The bodies of the other seven men had been found with signs of brutal killings.[75] During the morning of 15 January 1990, several relatives went to the military base of San Pedro de Urabá to enquire about their abducted family members. A lieutenant told them that the trucks had not passed the roadblock and rudely dismissed them. One week later, the next of kin searched the military base, together with personnel from the Special Prosecutions Division, to confirm whether the captured men were there or not, but did not find them. The relatives received, however, envelopes with money from men in military uniforms a week after the massacre took place.[76]

In response to the massacre in Pueblo Bello, three domestic investigations were initiated with the aim of establishing whether army personnel were possibly implicated in the massacre. Firstly, at the end of January 1990, a military court opened preliminary investigations into the conduct of military troops at the time of the massacre. However, this court decided not to pursue criminal investigations due to the lack of evidence that the paramilitary troops left Pueblo Bello passing through the roadblocks. In August of that same year, the same military court decided to continue the investigation on the basis of new testimonies. Again however, in 1995, the military court decided not to institute criminal investigations despite several indications that the military allowed the two trucks to pass through the roadblocks.[77] Secondly, proceedings in the ordinary criminal courts were conducted against the paramilitaries allegedly implicated in the crime. During these proceedings, one member of the paramilitary group, Escobar Mejía, confessed and testified *inter alia* that the army collaborated in carrying out the crime. In 1997, six paramilitaries were convicted and sentenced.[78] In 1990, as a third response to the massacre, a disciplinary inquiry was commenced into the acts or omissions of the two commanders of the military base of San Pedro de Urabá and the Pueblo Bello roadblock at the relevant time.[79] The main indication to start such an investigation was the confession made

73 *Ibid*., paras. 95(30)-(35).
74 *Ibid*., paras. 95(36)-(41).
75 *Ibid*., para. 109.
76 *Ibid*., paras. 95(32)-(44).
77 *Ibid*., paras. 95(46)-(55).
78 *Ibid*., paras. 95(70)-(105).
79 *Ibid*., paras. 95(136) and 95(137). These inquiries were based on three witness testimonies, two of which could not be located later on in the proceedings. Only the testimony of Escobar Mejía was used in further proceedings.

by Escobar Mejía. This inquiry was not pursued. Another disciplinary inquiry was ordered in 1998 against a third army lieutenant but these inquiries also resulted in absolving him of liability because the testimony of Escobar Mejía was considered to be insufficient evidence.[80]

9.3.2.2 The Pueblo Bello Massacre v. Colombia*: a violation of the duty to prevent*

The Inter-American Commission argued that army personnel had directly taken part in the massacre, primarily basing itself on the testimony of one of the fathers of the victims, Mariano Martínez, and three written declarations by other relatives of victims of the massacre.[81] In the alternative, the Inter-American Commission argued that the respondent state could be held responsible for the massacre because there were probative elements that indicated the complicity of state agents by both act and omission. The probative elements consisted mainly of the testimonies of Escobar Mejía on the involvement of the armed forces that enabled the paramilitaries to carry out the massacre and on the route taken by the trucks through the roadblocks. In this respect, the Inter-American Commission argued that the criminal proceedings and the disciplinary proceedings established that the trucks had passed the roadblocks without the control of the army.[82] In addition, the Inter-American Commission alleged that there was a pattern of collaboration between the paramilitaries and the armed forces at the time of the events. This collaboration demonstrated a clear link between these paramilitary groups and the state.[83] Accordingly, the Commission claimed *inter alia* that the state was responsible for violations of Articles 4, 5, 7, 8 and 25 ACHR to the detriment of the 43 alleged victims by means of acquiescence and collaboration.[84] In addition, they alleged a violation of the obligations under Article 19 ACHR (rights of the child) to the detriment of the minors because the state agents not only failed to prevent the events from occurring but also failed to take action after the events by identifying and punishing those responsible.[85]

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80 *Ibid*., paras. 95(144)-(147).

81 *Ibid*., final submissions of the Inter-American Commission, available at www.corteidh.or.cr, para. 17(h).

82 *Ibid*., application of the Inter-American Commission, available at www.corteidh.or.cr, para. 28.

83 *Ibid*., para. 36 (referring to its own 1999 report on Colombia, a report of the former UN Human Rights Commission on Colombia in 2001 and a report by Human Rights Watch of 2000 on the relationship between the military and paramilitaries.) See also *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), final submissions of the Inter-American Commission, paras. 18-25 (referring to the judgment in the *Blake Case* and *The Massacre Mapiripán Case* in which the Inter-American Court found acquiescence of the state in crimes committed by respectively civil defence groups and paramilitaries).

84 *The Pueblo Bello Massacre v. Colombia* IACtHR (2006), paras. 96(c) and 97(a).

85 *Ibid*., para. 98.

Equally, the representatives of the victims argued state responsibility on the basis of acquiescence. Their main argument focussed on the systematic manner in which paramilitaries carried out killings and enforced disappearances. They argued that the state acquiesced to and sometimes participated in these crimes because it had the same incentive as the paramilitaries, namely combating guerrillas. For that reason, the state authorities did not carry out any meaningful investigation. The representatives pointed out that the crimes by the paramilitaries could simply just not have been committed without the support or collaboration of the military given their presence in the area.[86]

The respondent state denied any responsibility and raised various arguments rebutting the allegations. In relation to the general measures taken to combat the paramilitary groups, the respondent state highlighted the large number of legislative and judicial measures aimed at combating and eliminating these criminal groups, and punishing their criminal acts. As to the specific facts of the case, the respondent state used the outcomes of the disciplinary and criminal investigations at the domestic level, which did not establish a link between the acts of the paramilitary groups and state officials.[87] Accordingly, the state claimed that it could neither incur responsibility for the crimes nor for a failure to respond adequately to the crimes. While recognising that the army in the region did indeed have the obligation to provide security to the citizens of Pueblo Bello, the state argued that a condition for attributing state responsibility is that the state had created a legally unacceptable danger and this situation must have transpired into a violation of the obligation to protect. *In casu*, the army had not neglected their duty as there was insufficient evidence that they had been aware of the risk upon which they must have acted. In fact, the domestic proceedings had demonstrated the opposite. In particular, the inquiries had shown that there were different possible routes that the trucks could have taken so as to avoid the roadblocks. Also, there was insufficient evidence of any possible support or tolerance by state agents of the events. Lastly, the judicial authorities had investigated and prosecuted those responsible for the crimes.[88] As to the scope of the treaty obligations, the state argued that the situation on the ground compelled it to choose its priorities:

> taking into account financial constraints, and its real possibilities, which may become valid limitations to the enjoyment of a right when they respond to criteria of reasonability and proportionality. This is even more relevant in the case of the State's prevention obligation. In these cases, the State's obligation is one of means rather than results, which supposes an obligation of diligence in terms of taking reasonable precautions and care to avoid the violation of a right by third parties;[89]

86 *Ibid*., paras. 99(a)-(c).
87 *Ibid*., paras. 102(a)-(e).
88 *Ibid*., paras. 103(a)-(o).
89 *Ibid*., para. 103(i).

This appeal to reasonableness was put forward in order to demonstrate the point that the state could not prevent all violations of human rights by private individuals.

The Inter-American Court accepted the responsibility of the state in having failed to prevent the massacre and to protect the population in breach of the obligation to guarantee the rights set forth in Articles 4, 5 and 7 ACHR. In considering the alleged involvement of the state in the massacre, the Inter-American Court first commented upon the claim by the respondent state that it needs to choose priorities in locating its resources for the restoration of public order. While recognising the importance of the principle of proportionality, the Court considered that the application of this principle is not appropriate in the way the state alleged. As the security measures were taken with the aim of restoring public order and the paramilitaries were declared illegal, these measures should also have been directed towards protecting the population from crimes by those groups and not only towards combating the guerrilla groups.[90] Accordingly, a security campaign directed towards protecting citizens against attacks by the guerrillas did not dissolve the obligation of the state authorities to direct means to provide security against criminal actions by paramilitary groups. Even in an emergency zone, such an application of the principle is not in conformity with the ACHR.

In reply to the allegations that the state had been directly involved in the massacre, the Inter-American Court decided that there was insufficient evidence to conclude that soldiers had directly participated. The Court reasoned that this allegation had mainly been substantiated by the statement of Mariano Martínez, who testified that he had seen at least twelve militaries that were based at the military base of San Pedro de Urabá cooperating with the paramilitaries in the attack on the village on the night of 14 January 1990.[91] However, the Court found that his statement was neither corroborated by other testimonies nor by statements by any other person present at the time of the events in Pueblo Bello. This testimony could therefore not be regarded as decisive.[92] For some reason, the Court did not consider the testimony before the national courts of Mr. Mejía.

The second issue was whether the army knew or should have known about the risk that a massacre would ensue or was being carried out. The Inter-American Court found that there was no compelling evidence upon which to conclude that the state authorities had specific prior knowledge of the actual attack because there was no evidence that the citizens had complained of any prior threats. Moreover, the Court noted that it was not clear whether the paramilitaries had actually taken the main access road or an alternative route. However, the exact route of the trucks of the paramilitaries did not matter as such because the Court considered that:

90 *Ibid*., para. 134.
91 *Ibid*., para. 136.
92 *Ibid*., paras. 135 and 136.

> In brief, the mobilization of a considerable number of people in this zone, whatever route they took, reveals that the State had not adopted reasonable measures to control the available routes in the area.[93]

As such, the state incurred responsibility because it had not taken the necessary measures to protect the citizens of Pueblo Bello. In this case, the state authorities had not controlled all available routes. The reasoning behind this conclusion was that the mobilisation of 60 men in several trucks at a time when the circulation of vehicles was restricted near the village had been possible. In addition, the Inter-American Court considered that the state was aware of the general risk and danger that such an event could happen.[94] The Inter-American Court took into consideration the background of the conflict between the state, paramilitaries and the guerrilla groups. The Court recognised the measures adopted by the state to combat the paramilitary groups and in particular those measures that had been taken in the vicinity of Pueblo Bello. In spite of the numerous initiatives, the adopted measures had not, however, effectively reduced the danger that the state itself had created in the first place. The Court based this conclusion on the rationale and characteristics of the adopted laws, the intensity of the violence committed by the paramilitaries, either alone or with the acquiescence of the state, and the high rate of impunity of these acts. At the same time, the Court inferred from the measures adopted that the state had been aware of a specific danger in that region that could result in crimes being committed against the population.[95] The Court was of the opinion that the events could not have taken place had the authorities taken the necessary measures to protect the civilian population in the context of the current facts. Therefore, the acts of the paramilitaries could be attributable to the state to the extent that the state failed to protect the civilian population of Pueblo Bello.[96]

Hence, the *Pueblo Bello Case* demonstrates that the state's duty to protect against acts committed by non-state actors is limited to those situations in which the state knew or should have known of the existence of a real and immediate risk in respect of an identified individual or group and had a reasonable opportunity to avoid that risk.[97] Failing to act in such situations potentially leads to the international responsibility of the state. The facts of the case show, however, that knowledge of the risk may also be inferred from a broader context, which should have prompted an adequate response by the state. Accordingly, the Inter-American Court applied the due diligence standard for determining whether the state indeed incurred responsibility.

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93 *Ibid*., para. 138.
94 *Ibid*., paras. 139 and 140.
95 *Ibid*., paras. 125-130.
96 *Ibid*., paras. 139 and 140.
97 Rodríguez-Pinzón & Martin (2006), p. 156.

9.3.2.3 Acquiescence versus the duty to prevent

The reasoning of the Court in the *Pueblo Bello Case* appears to build on earlier case law, which the Court handed down in situations where the direct perpetrators were non-state actors. Earlier case law established that acts by non-state actors are imputable to the state in two situations.[98] Firstly, the state may incur responsibility for acts by non-state actors when there is an institutional relationship between those non-state actors and the state and they carry out functions of the state with the support of the state.[99] Secondly, the state may incur responsibility for acts by non-state actors when the state enabled those actors to commit the crimes by both acts and omissions.[100] These two situations led the Court to conclude that the state was responsible for the crimes based on the notion of acquiescence or support. The facts of the *Pueblo Bello Case* did not fall within these two categories because there was neither an institutional relationship any longer between the paramilitaries and the state nor sufficient evidence of direct participation in the course of the massacre. Consequently, the Inter-American Court used the duty to take protective measures in order to attribute responsibility to the state nonetheless.

Interestingly, the arguments by the Inter-American Commission and the representatives that the state enabled the massacre to be carried out by omission and incurred responsibility based on the notion of acquiescence was not directly addressed. The allegation that there was a pattern of cooperation between the paramilitaries and the army was also not addressed. As a result, the question that remains is whether the notion of acquiescence could possibly extend to a mere failure to act. This question becomes even more relevant when recalling the *Velásquez-Rodríguez Case*. Albeit without explicitly mentioning the term 'acquiescence', the Inter-American Court stated in this case that the lack of a serious investigation into acts by private individuals means in a sense that the perpetrators are aided by the state, which in turn leads to international accountability.[101] At first glance, this statement seems to lower the threshold of acquiescence to including a failure to take post-crime action, because 'aiding' clearly includes acquiescence. The conclusion that a failure to investigate aids the perpetrators of the crime is particularly true for enforced disappearance cases; a prompt and thorough investigation after someone has disappeared is essential to bringing the crime to an end and preventing the crime from aggravating.

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98 See Chapter 6 subsection 4.1 *supra*.

99 *Blake v. Guatemala* IACtHR (1998), paras. 76 and 78 (In this case the civil patrols had an institutional relationship with the Army, were assisted and coordinated by the Ministry of National Defence, received funds and weapons, training and direct orders from the Army regarding their actions by decree).

100 *The Mapiripán Massacre v. Colombia* IACtHR (2005).

101 *Velásquez-Rodríguez v. Honduras* IACtHR (1988), para. 177.

The case *González et al. ('Cotton Field') v. Mexico* sheds light on the relationship between the failure to act and state responsibility for the disappearance itself. This case was not labelled as an enforced disappearance case as such, but the facts clearly revealed the characteristics of such a case. The facts of the case pertained to the disappearance, sexual abuse and murder of three young women in the city of Juaréz in Mexico in 2001. The crimes occurred in a context of extreme violence against women. According to the Court, 'an alarming number' of women had been murdered since 1993.[102] Most of these killings were carried out within a context of violence against women and some of them with a gender motive.[103] Generally, the response of the authorities to complaints by relatives was characterised by gross neglect, delays, and discriminatory attitudes towards the victims. The behaviour that the mothers and other relatives of the three young women encountered in this case after having complained to the authorities corresponded with this general practice.[104] Their complaints were met with value judgments on the behaviour of the three victims and prompted hardly any action, with the exception of some formal steps that had been taken to find them alive.[105]

Drawing on standards with respect to violence against women promulgated by other human rights bodies, the Inter-American Court took as a starting point that states should create an appropriate legal framework to combat violence against women. In addition, this framework should be effectively enforced. States must also draft and implement policies and practices aimed at preventing such crimes and directed towards an effective response to complaints thereof. The state should also adopt preventive measures in situations of a specific and identifiable risk that a particular woman may fall victim to violence.[106] *In casu*, The Inter-American Court took note of the several specific steps taken by the state in response to the widespread violence against women. At the same time, the Court cited various national and international reports that the prevention and response to the crimes had been ineffective and insufficient.[107] The Inter-American Court concluded that the disappearance, violence and murder of the three women corresponded with the characteristics of the general context of violence against women. The Court considered that the state was fully aware of the danger these three women were facing after their disappearance, but that it had failed to take any action to reduce the risk. In this respect, the state did not convince the Court that the implemented structural and legislative measures were

102 *González et al. ('Cotton Field') v. Mexico* IACtHR (2009), para. 121.
103 *Ibid*., para. 144.
104 *Ibid*., paras. 150, 153 and 154.
105 *Ibid*., para. 277.
106 *Ibid*., para. 258.
107 *Ibid*., para. 273.

sufficient and effective in preventing serious crimes against women at the time of the events.[108]

At the same time, the Court recalled that the accountability of the state does not extend to each and every act committed by non-state actors that violates the human rights of another person. Consequently, the Court applied the test of an awareness of an immediate and real risk and the reasonable possibilities to prevent that risk from materialising. Accordingly, the Inter-American Court distinguished two moments when the respondent state could have taken preventive measures: the first being the moment before the disappearance and the second moment being the moment before the discovery of the bodies. Regarding the first moment, the Court decided that the state was not aware of the real and immediate risk that the three victims would be in specific danger. Therefore, the state could not have been expected to take individual measures to prevent them from disappearing. Nevertheless, the Court was willing to attribute responsibility for the absence of a general policy which could have been initiated as a failure of the state's general obligation to prevent. In this respect, the context of violence, especially against young women from a poor background, heightened the vigilance with which the ACHR obligations had to be carried out. As to the second moment, the Court considered that an obligation of strict due diligence arises when women are reported missing in such circumstances. In this case, such due diligence was especially warranted in the search operations during the first hours and days. During those days, according to the Court, it is essential that police authorities take the necessary investigative steps to determine the whereabouts of the victims or the place where they may have been kept in captivity. To this end, adequate reporting procedures must have been in place with the possibility of effective action in response to such complaints.[109] The failure to comply with the obligation to take adequate and prompt measures in the face of the vulnerable position of the victims and the danger they were exposed to led the Court to conclude that the state did not demonstrate the required due diligence in preventing the deaths and abuses of the victims.[110] Accordingly, the Court found a violation of Articles 4, 5, and 7 ACHR in relation to Article 1(1) ACHR.[111] Clearly, the state incurred responsibility for the crimes themselves, as the Court continued to examine the procedural violations based on the duty to investigate in respect of these articles in the subsequent paragraphs of the judgment.

How does this case relate to the findings in the *Pueblo Bello Case* and the *Velásquez-Rodríguez Case*? This case appears to confirm that a failure to take investigation measures may lead to responsibility for the wrongdoing itself on

108 *Ibid*., para. 279.
109 *Ibid*., paras. 282 and 283.
110 *Ibid*., para. 284.
111 *Ibid*., para. 286.

condition that the state authorities should have been aware of the risks that such persons face after having disappeared. This awareness can be derived from a context in which it is known that disappeared persons are in a vulnerable position and face dangers to their right to life.

9.3.3 Comparative remarks on taking operational measures in light of the experiences of victims

The previous subsections demonstrated that the Inter-American Court and European Court have both extended the human rights protection of their treaties to situations in which the state failed to take reasonable measures to prevent an identifiable risk of a person or group of persons falling victim to a disappearance by non-state actors. Accordingly, both Courts seem to apply an 'identifiable risk' test to assess whether the state did all that it should have reasonably done to avoid that risk from materialising. How does their approach relate to the five main causes of victims' suffering?

Upon an examination of the application of the 'identifiable risk' test by the two Courts, there are striking similarities. In the assessment of whether the state knew or should have known of a real and immediate risk, both Courts examine whether there were prior indications that served as signs for the state upon which it should have decided to take action. Primarily, the European Court has looked at prior reported threats against the victim or at the behaviour of persons with which state authorities were confronted that should have aroused suspicion. Additionally, the context of the case seems to be of great importance. In this respect, it might not be accidental that the one case in which the European Court did not find a failure of the duty to prevent occurred in a context that was not labelled as life-threatening by the Court. Similarly, the facts of the *Pueblo Bello Case* enabled the Inter-American Court to consider the historical context and the role of the state in creating the paramilitary groups and its action to combat those groups. However, the Inter-American Court did not address the alleged pattern of interaction between the state and the paramilitaries, and the failure to respond to the crimes perpetrated by the paramilitaries. In both systems, the measures that the state should have taken consisted of investigative steps and diligent conduct by the state authorities in carrying out their duties when confronted with suspicious behaviour. In addition, the European Court has taken into account the repeated failure to adequately implement the criminal legal system.

One of the differences between the facts with which the two Courts were confronted is that the Inter-American Court could establish that the actual perpetrators were the paramilitaries. In contrast, it could not be established who the perpetrators were in the four judgments handed down by the European Court. This could be one of the reasons why the European Court attached weight to the extent to which the state cooperated with the European Court in submitting case files and information on the progress in the investigation.

Hence, the conditions for making determinations of state responsibility on the basis of a failure to take protective measures appear to be that there were concrete indications that should have prompted adequate measures within a context that called for particular vigilance. Such an application of the 'identifiable risk' test seems to be generally in line with the experiences of victims, in particular taking into account that there is hardly evidence where the person is and who the perpetrators are (the first main cause of victims' suffering), the usual uncooperative and offensive conduct, or complete inaction, on the part of the state authorities (the second main cause) and the *de facto* and *de jure* impunity (the third main cause). In cases where there are no concrete indications, the general context becomes more important. Aspects of the general context that should be looked at are: whether there are indications that a disappearance is life-threatening, whether the state had implemented the criminal law system and how the authorities investigated claims of relatives of victims that their loved one has disappeared. In light of the second main cause of victims' suffering and the prominent role that the state apparatus plays in clarifying what actually happened, it is to be commended that the extent to which the state is cooperating in international proceedings is also taken into account.

Neither the European Court nor the Inter-American Court has explicitly addressed the question whether a failure to take these reasonable steps to prevent an identifiable risk amounts to acquiescence. One could argue that their distinction between determining state responsibility based on the notion of acquiescence, on the one hand, and on the failure to prevent, on the other, indicates that the latter does not reach the threshold of acquiescence. Nevertheless, the European Court attributed state responsibility for the disappearance itself based on a failure to prevent by finding a violation of the substantive aspect of the right to life. Such a substantive violation clearly implies responsibility for the disappearance itself, in contrast to a violation of the procedural aspect. The stance of the Inter-American Court on this issue is more ambiguous. However, the recent *Cotton Field Case*, in which the Inter-American Court made a distinction between substantive and procedural violations of the ACHR rights, follows the European Court's approach with an important nuance. This judgment clearly explains the different moments when the state is able to take measures to prevent, namely the moment before the deprivation of liberty (preventing the disappearance altogether) and the moment after the deprivation of liberty (preventing the continuation of the crime).

In exploring the question whether solely inaction can lead to acquiescence, it is useful to turn to the Convention against Torture ('CAT') as the only other UN treaty that includes the term 'acquiescence', this time in the definition of torture.[112] In a case

112 The definition of torture as enshrined in Article 1 CAT states: 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person

where the police knew of an immediate risk and stood by and failed to protect the complainants and their property against attacks by a large group of individuals, the Committee against Torture held that:

> […], the Committee considers that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence" in the sense of article 16 of the Convention.[113]

One of the key components of the reasoning of the Committee against Torture was that the police officers witnessed the events that infringed the human rights of the victims unfold without adequately intervening.[114] A broader view was expressed in its general comment on the implementation of the CAT rights, in which the Committee against Torture stated:

> The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.[115]

This general comment implies that indifference or inaction by the state authorities in situations where they know or have reason to believe that non-state actors commit

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information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

113 *Dzemajl v. Yugoslavia* CAT 21 November 2002 (Comm. no. 161/00), para. 9.2.

114 *Cf. Besim Osmani v. Republic of Serbia* CAT 8 May 2009 (Comm. no. 261/2005), para. 10.5.

115 CAT, 'General Comment 2, Implementation of article 2 by States Parties' (23 November 2007) UN Doc. CAT/C/GC/2/CRP 1/Rev.4, para. 18.

torture or other acts of ill-treatment attracts state responsibility on the basis of the notion of acquiescence or of consent. Edwards regards this general comment as an important shift in the case law of CAT because it appears to suggest that 'failures to fulfil due diligence obligations would also satisfy the consent or acquiescence wording of Article 1 and 16 as a matter of course.'[116] However, Edwards also recognises that the Committee against Torture applies a stricter interpretation in its decisions, requiring '*actual* knowledge of a particular incident and actual refusal to act: a higher standard of proof than due diligence, which can be implicated by mere failures to act.'[117] Interestingly, the Committee against Torture used the word 'and' in its list of obligations that should be carried out with due diligence, *i.e.* 'due diligence to prevent, investigate, prosecute and punish'. It seems reasonable to conclude from this wording that a mere failure to, for instance, punish the perpetrators does not reach the threshold of acquiescence.

Another report that is relevant to recall here is the report of the Special Rapporteur on extrajudicial executions, who stated that:

> In most cases, an isolated private killing is a domestic crime and does not give rise to State responsibility. However, where there is pattern of killings and the Government's response (in terms either of prevention or of accountability) is inadequate, the responsibility of the State is engaged. Under human rights law, the State is not only prohibited from directly violating the right to life, but is also required to ensure the right to life, and must meet its due diligence obligations to take appropriate measures to deter, prevent, investigate, prosecute and punish perpetrators.[118]

While this passage does not substantiate the claim that inaction may amount to acquiescence, it does illustrate that the state's inaction in the face of a pattern of killings clearly engages the responsibility of the state.

Another subject-matter of human rights law, namely protection against domestic violence, confirms that omissions may amount to 'acquiescence'. The Special Rapporteur on Torture views state acquiescence as a broad notion. For instance, this broad notion of acquiescence in the context of domestic violence as torture or other ill-treatment was used, applying a due diligence test.[119] Accordingly, the Special Rapporteur extended the notion of complicity to include 'drafting and implementing

116 Edwards (2011), p. 250.
117 *Ibid.*, p. 251.
118 UNHRCouncil, 'Report of the Special Rapporteur on extrajudicial executions to the Human Rights Council' (20 May 2010) UN Doc. A/HRC/14/24, para. 46.
119 UNHRCouncil, 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' (15 January 2008) UN Doc. A/HRC/7/3 (hereinafter: 'Report of the Special Rapporteur on torture (2008)'), para. 68.

laws that may trap women in abusive circumstances.'[120] Furthermore, failing to provide adequate protection against any form of torture and ill-treatment in the home also falls under this notion.[121]

Thus, the views described in the previous paragraph show a tendency towards considering a failure of the duty to prevent an identifiable risk (pure omission) as acquiescence in the crime. Pure omission by failing to intervene or respond when state authorities witness human rights violations by non-state actors clearly falls within this notion. In addition, these views provide indications that systematic inaction in the face of a pattern of such crimes also reaches the threshold of acquiescence. Upon examination, such inaction generates a situation in which the rule of law and protection from crimes that violate human rights are undermined. Moreover, a general obligation to prevent human rights abuses by non-state actors includes combating impunity by challenging a culture of impunity in which crimes are tolerated.[122] On this basis, there would appear to be no reason why the term 'acquiescence' cannot be applied in the circumstances beyond those envisaged by the 'identifiable risk' test.[123] If one applies the approach developed by the UN bodies to enforced disappearance cases, there seems to be potential for the development of a concept of acquiescence that extends to a failure to investigate disappearances, when it cannot be proven that the state is behind the disappearance itself. This proposition is based on the fact that the measures that should have been taken by the state according to the 'identifiable risk' test predominantly consisted of investigation measures. This proposition leads to the conclusion that a lack of, or an unwillingness to carry out, a thorough investigation by a judge could qualify as 'acquiescence'. This proposition is in line with the experiences of victims. The indisposition and apathy in conducting an investigation is, after all, one of the major obstacles that relatives of disappeared persons have encountered in their search (the second main cause of victims' suffering).[124] Any disappearance, whether

120 *Ibid*., para. 46. *Cf. M.C. v. Bulgaria* ECtHR 4 December 2003 (Appl. no. 39272/98) (ruling that the existence of legislation in and of itself may violate the ECHR) and *Opuz v. Turkey* ECtHR 9 June 2009 (Appl. no. 33401/02), para. 155 (In this domestic violence case, the European Court also relied upon previous concrete indications of a threat. The Court found a violation of Articles 2 and 3 ECHR because of the failure to take protective measures as a response to repeated reports of the domestic violence to the police. In addition, the state did not have an adequate legal system in place to deter the domestic violence and for bringing the crime to an end).

121 UNHRCouncil, Report of Special Rapporteur on torture (2008), paras. 46 and 55.

122 See also K. Fortin, 'Rape as torture: An evaluation of the Committee against Torture's attitude to sexual violence' (2008) 4 *Utrecht law review* 3 pp. 145-162, at p. 156.

123 Fortin (2008), p. 157.

124 These obstacles have appeared in all enforced disappearance cases decided by the European Court. See also HRW, 'Who Will Tell Me What Happened to My Son? Russia's implementation of European Court of Human Rights Judgments on Chechnya' (27 September 2009) (hereinafter: 'Who Will Tell Me What Happened to My Son? (2009)'); AI, 'Russian Federation: What justice for Chechnya's disappeared?' (2007) EUR 46/026/2007.

committed by the state or by non-state actors, warrants an effective investigation in the initial few days and the role of the judiciary is of the utmost importance in this regard. Judges are mostly the only ones who are able to pierce the cloak of secrecy and to order or conduct investigations if the executive branch refuses to do so. At the same time, the case law shows that a mere failure to investigate claims of enforced disappearance, where it cannot be established that state authorities are the perpetrators of the crime, does not lead to responsibility for the disappearance itself.[125] Instead, such failure attracts responsibility based on the failure to fulfil the obligation to investigate, according to the Courts. Hence, it is possible to conclude that a state may incur responsibility for a failure to investigate only when there are additional factors that should have prompted action by the state in a specific case. Such factors may either be concrete indications of a specific risk to one person or the general context that should have prompted awareness and subsequent action on the part of the state. Moreover, it would be commended that a state incurs responsibility if it systematically fails to investigate patterns of disappearances by non-state actors. Also, recalling the findings in Chapter 7 *supra* (discussing the duty to prevent), it is commended that the efforts of the state to implement structural preventive measures, such as the training of security forces and police officers, are taken into account.

9.4 Concluding remarks

The effects on victims of enforced disappearance reveal similarities to those on victims of disappearances committed by non-state actors without any involvement of the state authorities. The fact that the disappeared person is under the complete control of the perpetrators and away from everything familiar is indeed common to both types of crimes. Furthermore, the persistent uncertainty for relatives is a common result. Moreover, the fact that relatives have to rely on the state authorities to clarify the whereabouts of the disappeared person is also inherent in both types of crimes. Lastly, relatives who inquire about the disappearance may also be at great risk of threats or being disappeared themselves, depending on the situation and the position of the perpetrators. On the other hand, the cruelty involved when the state authorities have organised the disappearance of the person in question, or know what has happened to him, but deny the act altogether, does not apply to disappearances committed by non-state actors.

It is possible to deduce from the analysis of the case law discussed in this chapter that a state may incur responsibility when a disappearance is committed by non-state actors in the following four situations:

125 *E.g. Tahsin Acar v. Turkey* ECtHR [GC] (2004).

- when there is a hierarchical or institutional link between the non-state actors who committed the crime and the state;
- when non-state actors committed the crime and state authorities participated actively in order to facilitate the commission of the crime;
- when the state allowed the crime to occur by failing to act when it was aware of a real and imminent danger that a specific person was at risk of falling victim to a disappearance and murder;
- when the state allowed the crime to continue by not investigating the disappearance in the face of complaints or in situations where the state should have known that a disappearance was being committed and the victim faced a real risk of being murdered.

While the first two categories clearly reach the threshold of the notion of acquiescence in the crime, this chapter demonstrated that it is controversial whether the last two categories would fall under this notion. Considering it as such would mean a very broad understanding of acquiescence which is not explicitly supported by the case law. However, it would be highly undesirable if the state could profit from the virtual impossibility to attain the standard of proof necessary to establish state involvement. Moreover, the state has a key role in the search for the disappeared person and thus in preventing the disappearance from aggravating. A broad understanding of 'acquiescence' including a failure of the duty to take preventive operational measures takes into account this difficult situation. That being said, a mere failure to investigate an isolated disappearance committed by non-state actors without any involvement of the state and without aggravating factors should not fall within the notion of acquiescence.

At the same time, positive obligations have resulted in an increased scrutiny of the conduct of the state and impose a stringent burden on the state. As a consequence, Leach reasons that 'the apparent readiness of international human rights mechanisms to impose increasing burdens on states by invoking positive obligations inevitably raises questions as to where the boundaries lie.'[126] This chapter argued that the 'identifiable risk' test is the adequate tool to limit the scope of positive obligations in enforced disappearance cases. Moreover, it is argued that a finding of a failure to take such protective measures as are necessary in a given situation may amount to acquiescence in the act.

Overall, a disappearance typically generates uncertainty as to the identity of the perpetrator. As such, the obligation to take preventive operational measures is of the utmost importance. It must be recognised, however, that the legal analysis for

126 P. Leach, 'Positive Obligations from Strasbourg - Where do the Boundaries Lie?' (2006) 15 *Interights Bulletin* 3 pp. 123-138, at p. 123.

attributing state responsibility must be motivated carefully and accurately due to this duty's far-reaching character.

Conclusion

Chapter 10
Conclusions and Recommendations

10.1 Introduction

The entry into force in 2010 of the International Convention for the Protection of All Persons from Enforced Disappearance ('ICPPED') marked an important milestone in the protection from enforced disappearance. Formerly disappeared persons, family members of disappeared persons, their associates and human rights experts had striven for this moment for over 30 years.[1] They have long turned to the international arena in their fight against this human rights violation in their search for justice. After all, justice has often proved to be illusionary at the national level as the very nature of enforced disappearance is designed to make recourse to domestic remedies virtually impossible.[2] In committing this crime, state authorities employ the whole state apparatus to conceal what happened to the disappeared person. As a result, the perpetrators usually enjoy rampant impunity. The ICPPED marks a milestone because it is the first international instrument to establish a non-derogable right not to be subjected to enforced disappearance. A coherent set of state obligations aims to ensure that States Parties to the ICPPED give effect to this right. As such, States Parties are not only obliged to refrain from being implicated in this crime, they also have to realise the right not to be subjected to enforced disappearance through prevention and an adequate response to alleged or committed violations of this right. The ICPPED is also a landmark Convention because of its unprecedented codification of a number of legal concepts, such as the concept of victim and the right to know the truth under international law.

The universal and binding character of the ICPPED provides a powerful tool to hold states accountable on the international level for enforced disappearance. The Committee on Enforced Disappearances ('CED'), being the monitoring body

1 Press release UN Working Group on Enforced or Involuntary Disappearances 'New Convention on Enforced Disappearance enters into force, but much remains to be done – UN expert body' (Geneva, 23 December 2010); Press release International Coalition against Enforced Disappearance 'The International Convention for the Protection of all Persons From Enforced Disappearances Enters Into Force on 23 December 2010' (25 November 2010). The International Coalition against Enforced Disappearances (ICAED) gathers organisations of families of disappeared persons and NGOs that work in a non-violent manner against the practice of enforced disappearances at the local, national and international level.

2 See Cançado Trindade (2007), p. 17 (illustrating the importance of international justice for victims of gross human rights violations and their relatives in recovering 'faith in human justice').

of the ICPPED, has several procedures at hand to determine state responsibility for this crime. In doing so, the CED can determine state responsibility (by virtue of the optional individual and inter-state complaint procedures) and, at the same time, demarcate state discretion in implementing these norms by setting clear standards. The present study argued that the interpretation and application of the ICPPED norms should be in line with and directly respond to the experiences of victims. Nevertheless, such an adapted interpretation should not undermine the judicial credibility of the CED. It is argued that such a balanced approach ultimately enhances the protection from enforced disappearance.

This concluding chapter elaborates the issues related to the process of determining state responsibility in order to formulate guiding recommendations to the CED on the interpretation and application of the ICPPED norms. As such, this chapter combines the parameters of this study as defined in Part I with the findings of Part II of this book. Firstly, this chapter recapitulates the parameters for the analytical framework. On the basis of this framework, the subsequent seven sections scrutinise the extent to which relevant case law provides guidance for the interpretation of the norms related to the determination of state responsibility under the ICPPED. The study relied mainly on the case law of the Human Rights Committee ('HRC'), of the Inter-American Court of Human Rights ('Inter-American Court') and of the European Court of Human Rights ('European Court'), hereinafter commonly referred to as 'the three supervisory bodies'. In general, it is argued throughout Part II that the case law provides useful guidance but does not always suffice in light of the five main causes of victims' suffering. Where relevant, this study turned, therefore, to other UN sources as a supplementary source of law within which the CED functions in order to substantiate arguments for choosing a different approach. In this concluding chapter, each section reiterates the point of the ICPPED under scrutiny, followed by the relevant conclusions of the comparative case-law analysis and recommendations in light of the experiences of victims. Thereafter, these sections are followed by an exploration of how the ICPPED relates to transnational enforced disappearances. The last and final section of this chapter sets out the main recommendations for the CED.

10.2 A VICTIM PERSPECTIVE TO THE DETERMINATION OF INTERNATIONAL STATE RESPONSIBILITY FOR ENFORCED DISAPPEARANCE: THE PARAMETERS OF THE RESEARCH

For the purpose of clarity, the following section briefly recapitulates the analytical framework that has been employed in this study as set out in the first part of this book. Chapter 2 discussed the norms in the ICPPED and illustrated that the ICPPED leaves ample leeway for the CED to interpret and apply its norms. It is argued in this study that the room for interpretation afforded by the norms may be regarded either as

strengths to be utilised to the fullest or potential weaknesses to be addressed in order to nevertheless provide adequate protection. Chapter 2 demonstrated that the room for interpretation and application relate to definitional issues, the prevention and the investigation of the crime, the prosecution and the punishment of the perpetrators, and the compensation of the victims.

Subsequently, Chapter 3 explained the typologies of state obligations in general human rights law and the duties according to which the HRC, the Inter-American Court and the European Court have determined state responsibility under their respective international instruments. This chapter concluded by identifying seven duties that provide the basis for a further examination of state responsibility, namely: the duties to respect, to prevent, to investigate, to prosecute, to punish, to compensate and to protect. This list seems to cover 'full protection' in the most concrete meaning and corresponds most closely to the norms enshrined in the ICPPED. It must also be acknowledged that these duties have common aspects. Consequently, this study discussed overlapping issues at times where it is most logical according to the case law of the three supervisory bodies.

The first part of the book also demonstrated the distinct effects on and experiences of the disappeared person and his or her relatives as a result of the enforced disappearance (Chapter 4). An examination of the relevant literature, case law and two in-depth interviews in this respect led to the identification of five main causes of victims' suffering. These five main causes are:

(1) no trace of the disappeared person due to denials by the state authorities;
(2) uncooperative and offensive conduct, or complete inaction, on the part of the state authorities in discovering the whereabouts or fate of the disappeared person;
(3) *de facto* and *de jure* impunity;
(4) an unsafe environment to carry out the search and other activities related to the enforced disappearance; and
(5) obstacles for victims to continue their 'normal' life.

These main causes are interrelated and mutually aggravating and, therefore, overlap to a certain extent, while still having their own distinct impact on victims. In addition, this study was conducted in the full cognisance that such generalisation cannot incorporate all the nuances and individual experiences of every victim. Moreover, the research done on the experiences of victims was limited due to budgetary restrictions and time constraints. It is commended that more research in different fields of science is dedicated to an expansion of this research, especially in geographical scope. Accordingly, each and every case warrants close attention to the specific experiences of the victims. Having recognised that, this study identified these five main causes of victims' suffering, which provided a useful model to conduct the present study.

A brief explanation of the implication of the five main causes found in Chapter 4 is helpful for understanding the phenomenon of enforced disappearance.

The impact on disappeared persons is characterised by extreme anguish and fear. Stories of formerly disappeared persons reveal that disappeared persons experience the constant mental torture of not knowing what will happen to them. They are away from everything that is familiar to them and are often subjected to physical torture. The absence of any legal guarantees, such as access to a lawyer or judge, certainly aggravates the situation. In fact, disappeared persons are at the complete mercy of the perpetrators. As practice shows, enforced disappearances often result in a violent death. When disappeared persons are released, their freedom is only limited; the fear, threats and the mental effects of having disappeared remain long after the disappearance itself.

Moreover, information coming from relatives and their organisations demonstrate that the adverse ramifications of an enforced disappearance on the relatives of the disappeared person are tremendous. Due to the uncertainty concerning the whereabouts or fate of their family member, relatives suffer constant anguish. They are burdened with inconclusive information for weeks, months or years. The search for their missing relative dominates their daily lives and is driven by feelings of guilt if they were to stop searching. There is, after all, a possibility that their disappeared relative is still alive. As a result of all these aspects, relatives of the disappeared person often suffer serious depression and physical health problems. Other attendant effects are social isolation and silence within the family that dominates the family dynamics. Children are reported to have experienced feelings of abandonment, marginalisation and prolonged stress.[3] The enduring uncertainty indefinitely delays the start of a mourning process. Furthermore, expressing grief in public is often impeded as a result of fear. The disappearance of a family member has a great impact on family life, with the economic situation of the family also likely to deteriorate. The disappeared person is often the breadwinner, leading to a gap in income. If the disappeared person was not contributing financially, the time and energy directed towards the search nonetheless has an adverse affect on the economic situation. The ongoing uncertainty comes to an end by learning the truth. Therefore, the truth mostly comes as a relief. Nevertheless, the cruelty of the truth often adds yet another dimension to the suffering of the relatives. In addition, in cases where the disappeared person has died and his or her remains have been found, relatives commonly have to

3 As explained in the introduction of this book (Chapter 1 *infra*), an important aspect of enforced disappearance is left outside the scope of this research. This aspect is the issue of children who have been adopted after their parents have been subjected to enforced disappearance and who have to deal with the consequences of finding out that their believed-to-be parents are not their biological parents. With this discovery, many of these adopted children also find out that their adoptive parents were part of the regime that orchestrated their biological parents' disappearance.

go through a painful process of identifying the remains. There have been cases where authorities have been utterly disrespectful and insensitive in this process.

The conduct of the state authorities plays a predominant role in the suffering of the relatives. Relatives have to face active hindrance in their search through threats and denials. Other obstructions are more implicit. Superficial investigations, formalistic replies to inquiries, and uncooperative responses to complaints impede a proper search for the disappeared person. Most of the time, the authorities fail to collect evidence. Instead, they usually conceal any relevant information. The lack of a proper investigation and the apparent unavailability of information, in turn, hamper access to important remedies. In fact, state authorities use enforced disappearance because this crime is designed to assure *de facto* and *de jure* impunity. Additionally, the lack of investigation also impedes the possibilities to obtain fair compensation.

Finally, it must be recognised that enforced disappearances, especially when practised on a large scale, have an effect on society as a whole. A spin-off effect of the obstructive attitude of the authorities is a serious distrust in the state institutions. Another reported consequence is a paralysing effect on civil society. Arguably, the lack of a meaningful investigation also deprives society as a whole of the historical truth. While 'society' as such is not included in the understanding of a victim for the purpose of this study, these effects have consequences for the disappeared persons and their relatives as well.

On the basis of the analytical framework established in Part I of the book, Part II examined the case law of the HRC, the Inter-American Court and the European Court with the purpose of evaluating to what extent they provide guidance for interpreting and applying the ICPPED norms. This analysis was conducted on the basis of the interpretation conundrums signalled in Chapter 2 and according to the seven state duties identified in Chapter 3. The findings were analysed in light of the five main causes of victims' suffering as defined in Chapter 4.

10.3 Definitional issues with respect to enforced disappearance

Before discussing the seven duties, Part II discussed in Chapter 5 a number of definitional issues laid down in the ICPPED, namely: the right not to be subjected to enforced disappearance; the continuous nature of enforced disappearance; the notion of a victim; and enforced disappearance as a crime against humanity. Although the ICCPR, the ECHR and the ACHR do not lay down such concepts, the case law of the three supervisory bodies can be helpful in clarifying the identified definitional issues. As a preliminary remark, it is helpful to note that the legal basis on which the supervisory bodies have done so (a multiple rights approach) differs from the legal basis provided in the ICPPED (an autonomous right not to be subjected to enforced

disappearance).[4] As a result, the standard of protection offered by the rights in the ICCPR, the ECHR and the ACHR needs to be 'translated' into the protection offered by one autonomous right not to be subjected to enforced disappearance.

10.3.1 Towards an all-encompassing definition of enforced disappearance that captures the seriousness of the crime

The right not to be subjected to enforced disappearance is laid down in Article 1(1) ICPPED. One of the key questions is thus what constitutes an enforced disappearance? The ICPPED defines enforced disappearance in Article 2 as: (1) a deprivation of liberty (2) by state agents or by persons or groups of persons acting with the authorization, support or acquiescence of the state, (3) followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, (4) which places such a person outside the protection of the law. A comprehensive interpretation of these components is called for in order to enable the determination of state responsibility for this human rights violation. As observed in Chapter 2, the first two elements demonstrate the inclusive and exclusive character of the definition. The first element (deprivation of liberty) is formulated in general terms and, thereby, in an inclusive manner. The importance of a broad understanding of the 'deprivation of liberty' is underlined by the stories of victims, which shows that persons have disappeared in a vast array of circumstances. The majority of victims have disappeared after being arrested in an illegal manner. However, there are instances when persons have disappeared after having been convicted by a court. One can also think of the situation where a person disappears after having been interned in a mental hospital. It is positive that such situations are not *per se* excluded from the scope of the definition. On the other hand, the second element of the definition requires the state to be involved in one way or another in the commission of the crime. The definition thereby does not extend to similar crimes committed by non-state actors without any state involvement. Accordingly, the 'state' requirement demonstrates the exclusive character of the definition. Chapter 2 also concluded that a number of questions are raised as a result of the last two elements, the answers to which are determinant for the definition of enforced disappearance as illustrated in the following three subsections.

10.3.1.1 The meaning of 'fate or whereabouts'

For a proper understanding of what an enforced disappearance entails, the terminology 'the fate or whereabouts' of the disappeared person, the concealment of which is

4 The Inter-American Court has adjudicated enforced disappearances on the basis of the IACFD, which entails a definition of enforced disappearance, alongside its multiple rights approach.

part of the third element of the definition, necessitates further interpretation. The clarification of this terminology gives an indication as to what information should be available or communicated in order to avoid state responsibility for such a crime. In addition, such clarification is important in light of the continuous nature of the offence that dictates that an enforced disappearance only ends with the revelation of the person's fate or whereabouts, as further discussed in subsection 10.3.2 below. Ample room for the interpretation of these terms is left by the ICPPED since neither the text nor the *travaux préparatoires* provide any further indications of their meaning. Similarly, Chapter 5 showed that the three supervisory bodies have used this terminology without defining the terms precisely. Nonetheless, there seems to be a general consensus among the supervisory bodies that the terms 'fate' and 'whereabouts' cast light on what happened to the disappeared person. Their case law provides indications to conclude that at least information should be revealed on whether the person has been detained, the place of the detention and whether he or she is dead or alive. In the case of death, it is possible to deduce from the Inter-American Court's case law that 'fate' includes the location of the remains, their identification and their delivery to the relatives. This minimum information appears to be in line with the five main causes of victims' suffering because it prevents or ends the uncertainty and the denials, while at the same time providing the basis for legal protection and, if possible, establishing contact between the disappeared person and his or her relatives.[5] On the other hand, it must be recognised that such minimum information does not address all the causes of suffering. In particular, information on the perpetrators, on the disappeared person's state of health and on the circumstances of the enforced disappearance is important to end the suffering that is captured by the third and fifth main cause of victims' suffering (respectively, *de facto* and *de jure* impunity and obstacles to continue their 'normal' life). The absence of such information may mean that the disappeared person continues to be at risk of torture and that the perpetrators enjoy impunity. Accordingly, while not decisive for the definition of enforced disappearance, the need for such information should nevertheless guide the duties to investigate and prosecute that emanate from the right not to be subjected to enforced disappearance (see section 10.6 below).

10.3.1.2 Constructive use of the fourth element of the definition, 'placing the person outside the protection of the law'

The next ambiguity which has been examined relates to the last element of the ICPPED definition, *i.e.* 'placing the person outside the protection of the law'. During

5 It must be noted that these pieces of information are listed in Articles 17 and 18 ICPPED, governing the information on detainees that must principally be available to investigating authorities and relatives.

the drafting of the ICPPED, no consensus could be reached on the nature of this element. Is this element a constituent element of the definition or a consequence of the preceding three elements? The potential problem with considering it as a constituent element is twofold. Firstly, if this element were to be considered as a constituent element, it needs proof to evince an enforced disappearance. Chapter 5 demonstrated that the case law of the three supervisory bodies does not require relatives to prove that the person was outside the protection of the law. Relatives have to prove the deprivation of liberty by state agents after which the person disappeared. Seeing that most, if not all, evidence lies in the hands of the state authorities and the state is mostly unwilling to disclose all, if any, relevant information, it is already difficult for relatives to prove the involvement of the state, let alone its intention to remove someone from the protection of the law (the first and second main causes of suffering). Requiring such proof would place an impossible burden on relatives and it is commended that the CED follows the approach of the three supervisory bodies.

Secondly, the nature of the fourth element is relevant for the contemplation of situations that potentially could lead to one practically becoming a victim of this crime, yet because the law has been drafted to ensure that such crimes fall within the ambit of the law, they accordingly fall outside the definition laid down in the ICPPED.[6] As such, the question is whether, for a certain amount of time, the state authorities may deny the deprivation of liberty or refuse to provide information on the deprivation of liberty. The ICPPED stipulates the restriction of information on the basis of Article 18 ICPPED in conjunction with Article 20 ICPPED. The rationale is that for certain extremely serious criminal investigations, restrictions on information may be justified, even on the detention itself. The case law of the three supervisory bodies does not formulate a clear obligation to immediately notify relatives of a detention as such, unless the detained person is a minor as has been demonstrated in Chapter 7. At the same time, the European Court is of the view that every unacknowledged detention is a violation of the right to liberty. This would suggest that upon any inquiry by a relative, a detention may never be denied. In light of the main causes of victims' suffering, it is recommended that the minimum information on the fact that a person has been detained and on whether he or she is alive should be made available immediately upon request to relatives, who would otherwise fall within the notion of victim. Immediate acknowledgment prevents the detained person from being in a position in which he or she is at the complete mercy of the perpetrators and, at the same time, avoids the uncertainty and anguish for relatives.

6 Rice (2009), p. 43.

10.3.1.3 Enforced disappearance as a distinct human rights violation

Having set out all the elements of the definition in the previous paragraphs, one final definitional question remains unanswered yet is extremely relevant for determining state responsibility for enforced disappearance: is there a distinction between enforced disappearance, on the one hand, and unacknowledged detention or arbitrary killings, on the other?

Regarding the difference between enforced disappearance and unacknowledged detention, the ICPPED definition of enforced disappearance clearly mirrors the notion of unacknowledged detention in that it requires some form of deprivation of liberty, which the state authorities do not acknowledge or refuse to provide information thereon. Moreover, the ICPPED attaches no time indication, *e.g.* 'for a prolonged period of time', to the definition of enforced disappearance. Primarily, the absence of time is a positive feature in terms of prevention. As shown in Chapter 2, during the drafting of the ICPPED, it had been argued that the vigour of the ICPPED depends on intervention in the initial days subsequent to the alleged apprehension. When there is a fear of someone having been subjected to enforced disappearance, it is important that the CED under Article 31(4) ICPPED can urge the state to take interim measures in the first initial days after the arrest or detention.[7] Such intervention may prevent that an unacknowledged detention changes into an enforced disappearance. With hindsight, it is then for the CED to decide, on the basis of the evidence submitted, whether the state should incur responsibility for an enforced disappearance. Nevertheless, this study argues that it is undesirable that short periods of unacknowledged detention fall *ipso facto* within the ICPPED definition. The reason for this hesitation lies in upholding the serious nature of this crime which justifies the far-reaching legal consequences as laid down in the ICPPED. One of the particularly grave features of an enforced disappearance is the ongoing and prolonged situation of uncertainty, suffering and anguish.

Chapter 5 illustrates that the case law of the HRC, the Inter-American Court and the European Court does not provide a clear answer to the question whether there is indeed a difference between enforced disappearance and unacknowledged detention. In the application of the multiple rights approach, there is no need to draw a clear distinction between these two violations. In the overwhelming majority of cases before these bodies in which an enforced disappearance was alleged, the disappeared person had been missing for years and, often, was still missing at the time of the

7 Article 31(4) ICPPED reads: 'At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party will take such interim measures as may be necessary to avoid possible irreparable damage to the victims of the alleged violation. Where the Committee exercises its discretion, this does not imply a determination on admissibility or on the merits of the communication.'

consideration of the case. Clearly, in such cases unacknowledged detention was presumed as part of the enforced disappearance, unless there was evidence that the person had been executed upon arrest. In cases where the disappeared person had been released after shorter periods of unacknowledged detention, ranging from two days until 20 days or even three months, the European Court and the HRC commonly refer to an unacknowledged detention as a violation of the right to liberty or, in the case of the HRC, the right to respect for the inherent dignity of the human person. The term 'disappearance' was subsequently omitted in the consideration of such cases. It must be noted, however, that in such cases the complainants mostly did not allege an enforced disappearance either. Thus, in addition to the lack of a need for a clear distinction, the reason for such an omission might also lie in the wording used in the complaints. Nonetheless, the case law appears to support the fact that short periods of unacknowledged detention do not fall within the definition of enforced disappearance.

It is argued in this study that this distinction between enforced disappearance and unacknowledged detention becomes blurred when aggravating circumstances surround the unacknowledged detention. It is possible to assert that this distinction depends on aggravating factors. Aggravating factors may pertain to the length of time that a person is held in unacknowledged detention, secret detention, not being brought before a judge within the time period required,[8] arbitrary executions subsequent to the detention, torture practices during detention, or a pattern of enforced disappearances within which the detention takes place. For instance, when the person is released or brought before a judicial authority after three days of unacknowledged detention, it is arguable that such an act does not constitute the level of seriousness required of an enforced disappearance. As argued above, these factors can often only be determined with hindsight.

On the basis that it has been shown that enforced disappearance and unacknowledged detention overlap but that the latter does not always reach the threshold of severity required for an enforced disappearance, the distinction between enforced disappearance and arbitrary executions should now be dealt with. As the ICPPED definition of enforced disappearance does not relate to the final fate of the disappeared person, the question is what happens if the disappeared person is executed straight away? The case law of the three supervisory bodies indicates that the execution of a person after a certain amount of unacknowledged detention or soon after apprehension followed by denials or refusals may amount to an enforced disappearance. What is determinative is whether the execution is preceded or followed by a period of denials and refusals to provide information which leads to continuing uncertainty for relatives. It must be noted that the Inter-American Court

8 See Chapter 7 on determining state responsibility on the basis of the duty to prevent for the exact time frame within which a person must be brought before a judge.

has not always classified massacres as enforced disappearances, even when the remains of those killed have not been located. However, in light of the main causes of victims' suffering, it would be detrimental to exclude such situations from the scope of the definition of enforced disappearance. This conclusion is particularly in line with the experiences of victims when the situation portrays elements of the denial of or the refusal to acknowledge the detention (the first main cause), inaction by state agents (the second main cause) and impunity (the third main cause). Such a situation furthermore hampers the proper mourning process, which is clearly part of the fifth main cause of suffering. It is important to add, in accordance with the view of the Working Group on Enforced and Involuntary Disappearances ('UNWGEID'), that situations of legal detention followed by an arbitrary execution may amount to enforced disappearance when the condition of prolonged uncertainty caused by the behaviour of state agents is satisfied.[9]

10.3.2 The beginning and end of a continuous violation

The international community generally agrees that enforced disappearances are a continuous violation of human rights. In the ICPPED, this continuous nature is laid down in Article 8(1)(b) ICPPED on the application of statutes of limitation and follows from the obligation on States Parties to investigate until the fate of the disappeared person has been clarified (Article 24(6) ICPPED). In relation to these Articles, it is important to define when an enforced disappearance commences and when it ends. The scope of the competence of the CED also depends on these outcomes; Article 35 ICPPED establishes that the CED only has the competence to consider cases that commenced after the entry into force of the ICPPED for the State Party concerned. The HRC and the Inter-American Court have doctrinally confirmed the continuous nature of enforced disappearance, while the European Court has indicated that certain aspects of enforced disappearance, and obligations stemming therefrom, are continuous.

Upon analysis, it seems logical to conclude that there are two possible starting moments of an enforced disappearance: that of the actual disappearance of the person or the moment when relatives complain to the authorities and the authorities deny the detention or refuse to give information. For all three supervisory bodies, the starting point seems to be the date of the actual disappearance of the person. For instance, the HRC does not view the lack of an investigation as independent facts that confirm the enforced disappearance apart from the moment when the disappeared person is deprived of his or her liberty without any contact with the outside world. This conclusion has led to strong dissenting opinions within the HRC. Yet, the Inter-American Court and the European Court also seem to regard this point as the starting

9 UNWGEID, General Comment on article 10 of the Declaration (1996), para. 8.

point. From the perspective of the disappeared person and as indicated by the first main cause of victims' suffering (no trace of the disappeared person), this is indeed the starting point of the enforced disappearance. However, it must be recognised that this moment may not necessarily coincide with the time when relatives start their inquiry and, hence, when the state denies this deprivation of liberty or refuses to provide information thereon. Nevertheless, to deviate from the coherent view and to decide the starting point otherwise would be contrary to the interests of the disappeared person. The violation of the disappeared persons' rights does not depend on the actions of their relatives. For them, the enforced disappearance starts at the moment they are arrested or detained outside the protection of the law. In this respect, the element of denial or refusal by the state authorities materialises in not being able to have contact with the outside world. This interpretation of the starting moment is in line with a contextual interpretation of the ICPPED. The ICPPED definition of enforced disappearance begins with the deprivation of liberty, which is subsequently either denied or concerning which the authorities refuse to provide any information. In addition, the ICPPED requires state authorities to launch an *ex officio* investigation whenever there are reasons to believe that someone has disappeared. The start of an investigation must not depend on complaints by relatives or others who are concerned about the disappeared person (see subsection 10.6.1).

Having found that in principle the starting point is the actual disappearance of the victim, there seems to be one exception upon an analysis of the duty to prevent an identifiable risk that a person disappears at the hands of non-state actors in Chapter 9. There are certain instances when non-state actors are the actual perpetrators, but the state engages responsibility under certain conditions on the basis that it does not adequately respond to complaints about the disappearance. If this situation leads to acquiescence (see subsection 10.4.1 below), there are reasons to conclude that the starting point of the enforced disappearance is the moment when the relatives complain.

The moment when an enforced disappearance ends can be derived from Article 24(6) ICPPED, which stipulates the obligation to continue the investigation until the fate of the disappeared person has been clarified. Hence, clarification as to the fate of the disappeared person may be determinative. However, commentators have indicated that there is certainly room for ambiguity in this regard.[10] On the basis that the case law of the three supervisory bodies has shown that states are obliged to continue the investigation until the whereabouts or fate of the disappeared person is established, the end of an enforced disappearance should be the moment when the whereabouts or fate of the disappeared person is established and communicated to the relatives. As mentioned above in subsection 10.3.2, the meaning of these terms

10 Scovazzi & Citroni (2007), p. 313.

means more, however, than only information on whether the person is detained, the place of detention and whether he or she is dead or alive. For instance, in the case of death, the remains must be identified and delivered to the relatives. This conclusion is in line with the state of continuing uncertainty in which relatives find themselves. Consequently, it is also possible to conclude that declarations of death without any clarification of the whereabouts or fate of the person in question should not be considered as ending the violation.

The procedural consequence of the beginning and end of an enforced disappearance does not prevent that, according to Article 35 ICPPED, situations in which the actual disappearance commenced before the entry into force of the ICPPED for the State Party concerned are excluded from the competence of the CED. The wording of the ICPPED unfortunately leaves little room for interpretation in this respect. It is important to note, however, that the underlying rationale of this provision was not based on the nature of the enforced disappearance, but rather on the competence of the CED. Therefore, this limitation should not be interpreted as an argument against the continuous nature of enforced disappearance. Hence, the obligations laid down in the ICPPED are in force for States Parties, irrespective of the competence of the CED to consider them. Moreover, the continuous nature of enforced disappearance justifies the interpretation that the CED may consider individual cases that commenced after the entry into force of the ICPPED for a State Party, but before the recognition of the individual complaints procedure by the State Party.

10.3.3 A well-defined yet inclusive notion of the victim

Article 24(1) ICPPED lays down a broad understanding of the term 'victim', defining it as 'the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance'. This definition clearly recognises the ripple effect of an enforced disappearance, implying a whole range of persons who may be affected by the crime. As already described in section 10.2 above, the disappeared person suffers beyond imagination. In addition, this human rights violation has distinct adverse ramifications on the lives of persons close to him or her. Hence, the broad definition of the notion of victims in the ICPPED is consistent with the distinct impact of this crime. It is often argued that society as a whole suffers when enforced disappearances are committed. 'Any individual', however, excludes society as a defined victim, which has clear implications for the right to truth and reparations (see subsections 10.6.7 and 10.8 below).

The notion of a victim is linked to the harm suffered and such harm must directly result from the enforced disappearance. For the sake of transparency and credibility, it seems commendable to develop a set of factors according to which the CED will determine the scope of the notion of a victim. Also, the application of those factors will

limit the circle of victims to persons who are truly affected by enforced disappearance in a distinct way from other human rights violations. Such delineation is justified by the rights afforded to this group of persons in the ICPPED. The European Court has developed a helpful set of factors in this respect, while the HRC and the Inter-American Court more implicitly decide on the persons who are to be considered as victims. It is argued in this study (Chapter 5) that the factors developed by the European Court are generally apt, but need adaptation to the main causes of victims' suffering. It is argued that the following four factors result in a legally tenable notion of the term 'victim' that is neither too restrictive nor exclusive: (1) the family bond or specific circumstances that show a close relationship with the disappeared person; (2) the extent to which a person has been exposed to negative responses of the state authorities in the face of complaints and inquiries; (3) the degree of participation in the search for discovering the whereabouts or fate of the disappeared person; and (4) the effects on the well-being or family life of the person concerned.

Firstly, a close relationship to the disappeared person, and in particular family bonds, is a clear indicator for the harm suffered. The closer the relationship, the more evident the suffering will be. Secondly, a failure by state authorities to investigate well-founded claims of enforced disappearances generates continuing uncertainty and anguish about the whereabouts or fate of the person concerned. Such a failure not only facilitates the enforced disappearance, but also obstructs the discovery of the truth. In this sense, both a blatant refusal to investigate and serious flaws in investigations directly play a part in the harm suffered. The attitude of state authorities in the form of disrespect for the remains when the disappeared person has been executed also falls within this factor. Thirdly, the participation of the person concerned in the search is directly linked to the intensity of the harm he or she has suffered. Participation means being confronted with hostile or reluctant state responses. Threats to discourage the search are an extreme form of such adverse behaviour. While participation shows involvement in the case, it is important to realise that age, psychological trauma and fear can be reasons for not participating in the search. Also, the simple fact of having to divide tasks within a family may result in some family members participating, while others take care of regular family matters. Non-participation should therefore not automatically exclude persons from the notion of victim. The fourth factor, adverse effects on the well-being or family life of the person concerned, pertains to the economic, social or psychological consequences of the prolonged uncertainty and anguish. These consequences are a result of the efforts directed towards the search and the 'frozen grief' within a family.

The case law of the three supervisory bodies shows that parents, spouses or permanent companions, and children are presumed to fall within the notion of victims. Exceptional circumstances left aside, these family bonds do not require any further examination of the other three factors. Other persons need to demonstrate that

the other three factors apply to them as well. It must be noted that the Inter-American Court distinguishes between considering someone a victim of inhuman treatment and a victim who has been denied the right to a fair trial. The latter seems to require a lower threshold because relatives who were not considered as victims of inhuman treatment have been considered to be a victim of the violation of the right to a fair trial. Following this case law, one could argue that the harm caused as a result of the failure to bring the perpetrators to justice does not portray a direct link between the enforced disappearance and the suffering. However, such an argument is unnecessary to make as the distinction between these rights is not made in the ICPPED, nor is it necessary in light of the four factors to maintain such a distinction. Rather, being confronted with impunity or unfair trials may be included in considering the second and third factors.

A controversial issue arises when the enforced disappearance is of a relatively short duration. For instance, when the disappeared person is released after five days or when the remains of the disappeared person are found within a few days. This issue is intricate because the *prolonged* uncertainty and consequent anguish is one of the underlying elements that justify the broad notion of a victim. The European Court's solution in such situations is to conclude that the resultant suffering of relatives does not reach the threshold of severity of inhuman treatment, unless there were aggravating circumstances such as the impossibility to bury their loved one in an appropriate manner. Obviously, the four factors presume that the crime falls within the definition of enforced disappearance in the first place (see section 10.3.1 above), which also means that a certain time has elapsed or other aggravating circumstances come into play. When it concerns a relatively short period of time before the whereabouts or fate of the disappeared person was known, the four factors together should provide enough guidance to decide whether the harm suffered reached the threshold for a person to be considered a victim.

10.3.4 A clear and transparent definition of enforced disappearance as a crime against humanity

According to the ICPPED, the grave nature of enforced disappearance leads to the qualification of this crime as a crime against humanity when it is practised on a widespread or systematic scale.[11] Article 5 ICPPED refers to applicable international law rules for the definition of a widespread or systematic practice of enforced disappearances as a crime against humanity. Such a qualification attracts

11 It must be noted that it is not self-evident that enforced disappearance must be practised on a widespread or systematic scale in order to qualify as a crime against humanity; legal documents have been drafted in which one single case of enforced disappearance is qualified as a crime against humanity, see PACE Resolution 828 (1984) on Enforced Disappearances, paras. 12 and 13, available at assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta84/ERES828.htm.

the consequences provided for under applicable international law, such as the non-applicability of statutes of limitation. Besides the consequences that such a qualification attracts, situations of widespread or systematic practice also prompts the competence of the CED to bring the matter to the attention of the United Nations General Assembly under Article 33 ICPPED. Finally, such a practice may play a role in determining international state responsibility. Given the severity of such allegations, this study argues that the defining elements of a widespread or systematic practice must be clear and transparent.

Chapter 5 demonstrated that both the European Court and the Inter-American Court have identified similar elements of a widespread or systematic practice. These elements comprise (1) the repetition of similar acts and (2) official tolerance of those acts. In cases of enforced disappearance, repetition means that there must be a significant number of enforced disappearances committed in a specific period of time. These enforced disappearances must have something in common so as to be regarded as a pattern of events. For instance, the victims may belong to a specific group or the perpetrators belong to the same military or police authority. In this respect, the Inter-American Court has taken into account whether there was a particular *modus operandi* in which the perpetrators committed the enforced disappearances. The second element, official tolerance, takes the form of inaction by the state authorities to react to such crimes. Inaction consists of either having failed to prevent the crimes, even though the state authorities were aware of them, or of having failed to investigate and bring the perpetrators to justice. In this respect, it is noteworthy that according to the former European Commission on Human Rights, the determining factor is whether the authorities have been effective in bringing the repetition of acts to an end.

The elements of repetition and official tolerance seem to be in line with the experiences of victims. In particular, the interpretation of official tolerance corresponds with the fact that authorities are utterly unhelpful towards relatives in enforced disappearance cases (the second main cause of victims' suffering). Furthermore, inaction by the authorities facilitates not only the enforced disappearance itself, but also fosters impunity for this crime (the third main cause of victims' suffering). Moreover, as demonstrated in Chapter 8, impunity is also believed to create fertile ground for the repetition of human rights violations (the fourth main cause of victims' suffering). On the other hand, the minimum threshold of 'a significant number' should not be fixed in a way that poses an impossible burden on plaintiffs. When such practice is alleged, the CED should employ all its powers to obtain as much evidence as possible.

Lastly, it is argued in this study that the reference to applicable international law should not lead the CED to insert an element of intent. The most recent addition to the relevant international law is the Rome Statute of the ICC, which defines the crime of enforced disappearance as a crime against humanity when practised on a

systematic scale. This definition adds an element of intent to remove the victims from the protection of the law for a prolonged period of time. This element of intent is self-evident in an international criminal law instrument because it concerns individual criminal liability. However, it would be undesirable for the CED to adopt the view that for a systematic practice to occur within the framework of the ICPPED this element would also need to be proven. A rejection of such an element is important in view of the evidentiary difficulties that relatives face in evincing an enforced disappearance, let alone in proving intent on the part of the state. Moreover, as the chairman of the drafting committee of the ICPPED aptly noted, it is hard to imagine that there is no intent inherent in all the other three elements.[12]

10.4 Determining state responsibility for the enforced disappearance itself: a violation of the duty to respect

Having looked at the definition of enforced disappearance and related concepts that together illuminate what an enforced disappearance entails, this section highlights state responsibility for an enforced disappearance itself. It is argued in Chapter 6 that determining state responsibility warrants an inclusive elaboration of the possible forms of state involvement and an adapted approach to evidence. Before drawing conclusions in this respect, it is important to recall that the ICPPED defines this right as being absolute and non-derogable. The message is unmistakable: enforced disappearances are prohibited anywhere and in any circumstance. This message is important because enforced disappearance has proven to be employed in various contexts and to be committed with various degrees of state involvement.

10.4.1 Acquiescence as the minimum threshold for the 'state' requirement

The most clear-cut situation of a failure to respect the right not to be subjected to enforced disappearance occurs when state agents forcefully deprive someone of his or her liberty and this person subsequently disappears. One can think of the situation where the police or security forces kidnap a person and detain him or her in a secret detention centre. The question becomes more delicate when the direct perpetrators are non-state actors who may or may not enjoy some support from the state. Acts committed by non-state actors are not *ipso facto* excluded from the ICPPED. The notion of 'acquiescence' extends the definition of enforced disappearance to acts committed by such actors. When non-state actors are responsible for someone's disappearance with the support or acquiescence of the state, the act also falls within the ICPPED definition of enforced disappearance. When non-state actors operate without such support or acquiescence, the state does not incur responsibility for

12 IOWG Report E/CN.4/2006/57, para. 96.

this crime. On the basis that the verb 'to acquiesce' is defined as 'to accept tacitly or passively [or] to give implied consent to (an act)',[13] acquiescence marks the minimum threshold for attributing state responsibility for the enforced disappearance itself. Thus, when it cannot be established that state agents deprived the person of his or her liberty, it is essential for litigators to evince 'acquiescence' of state agents at the very least. As such, this notion marks the distinction between Article 2 ICPPED (the definition of enforced disappearance) and Article 3 ICPPED (acts similar to enforced disappearances save for the fact that these acts are committed without the involvement of the state).

The definition of the term 'acquiescence' cited in the previous paragraph implies that responsibility on the basis of this notion may be triggered by both acts and omissions. Accordingly, the question is what states should refrain from doing, or actively do, in order to avoid responsibility based on the notion of acquiescence. As the term acquiescence itself cannot be found in the ICCPR, the ACHR or the ECHR, it is argued in Chapter 6 that the three supervisory bodies have not developed a detailed doctrine on this notion in enforced disappearance cases. Nonetheless, they have occasionally used this legal notion as a basis for determining state responsibility. In particular, the Inter-American Court has developed a useful yardstick for attributing state responsibility based on the notion of acquiescence.[14] The Inter-American Court has used this notion in order to address crimes committed by paramilitary groups or other similar groups. A close connection between such groups and the state authorities constituted an essential element in attributing responsibility to the state. Such a connection was evinced on the basis of some form of command structure or institutional relationship. Also, support in terms of financial means, material support or training may imply such a connection. Thus, a strong institutional, functional or supporting link between the state and the non-state actors leads to the presumption of acquiescence. The Inter-American Court even decided that the fact that the respondent state, at the time of the events, had distanced itself from the non-state actors, such as paramilitaries, does not exonerate the state's responsibility. This is particularly the case when the state played a role in creating the paramilitary groups in the first place. As such, it is tenable that states are to refrain from providing such support to non-state actors, when they know or ought to know that the support would contribute to committing the crime of enforced disappearance. The use of acquiescence in the case law of the European Court is more obfuscated, but seems to confirm that state responsibility based on the term 'acquiescence' requires a strong link between the non-state actors and the state.

13 Black's Law Dictionary.

14 It must be noted that the term 'acquiescence' is enshrined in the definition of enforced disappearance in the IACFD.

Hence, the case law has shown that a clear case of acquiescence arises from either a strong institutional link between the state authorities and the non-state actors that have committed the crime or active participation that enabled the non-state actors to commit such crimes. In addition, there is a basis in the case law, albeit a more tenuous one, for extending the notion of acquiescence to cases where the state has failed to prevent crimes by non-state actors by virtue of an omission. Such an extension is based on the premise that states should not be able to turn a blind eye so that violations may ensue. In other words, the 'state' requirement should not absolve states from their responsibility in cases where they abjectly failed to take reasonable steps to prevent or respond to the crimes committed.[15]

As examined in Chapter 9, both the Inter-American Court and the European Court have used an 'identifiable risk' test for attributing responsibility for substantive violations of their convention rights based on a failure to take reasonable steps to prevent crimes that affect the human rights of the victims.[16] According to this test, three conditions need to be satisfied for the attribution of state responsibility: the state (1) knew, or should have known, about a (2) real and imminent risk of the crime and (3) failed to employ all measures in its power to prevent the crime from occurring. The way in which the European Court has applied this test to conclude state responsibility for a violation of the right to life in disappearance cases is illustrative in this respect. The European Court has applied this test when the identity of the perpetrators could not be established beyond reasonable doubt, but where allegations were made that state agents had indeed been involved.[17] In such cases, this Court concluded that a disappearance continues, and is likely to result in death (a real and imminent risk), when the state authorities fail either to instigate a meaningful investigation or to exercise their duties adequately (a failure to employ all measures in the state's power to prevent the crime from occurring) as soon as they were aware of the risk (knowledge). The European Court inferred knowledge of the risk from concrete indications such as previous threats to the victim and the profile of the victim in a more general context in which disappearances was a well-known phenomenon. The European Court attached particular weight to the life-threatening circumstances that such a general context generated. A final indicator that played a role was the inadequate implementation of the law-enforcement system that had resulted in a situation of impunity. Regarding the moment when the state authorities knew or should have known of the risk, it is

15 Rodríguez-Pinzón & Martin (2006), p. 210.

16 In the human rights discourse, the term 'due diligence' is often used to indicate that the state has to take reasonable steps to prevent non-state actors from committing crimes. However, this study adopts a broader understanding of 'due diligence' because this term has also been applied by the three supervisory bodies in cases where state agents were involved, or alleged to have been involved, as the perpetrators.

17 The European Court developed the 'identifiable risk' test outside the context of enforced disappearance cases, where the perpetrators of the crime were clearly private individuals.

obvious that the complaint of the relatives can be regarded as the crucial point in time, at the latest. In addition, the European Court marked the moment when state authorities were confronted with suspicious behaviour that should have alarmed them to question whether an enforced disappearance was occurring. The Inter-American Court extended the 'identifiable risk' test to situations where the authorities might not have been aware of the specific risk, but should have taken adequate measures to protect a group of persons at risk due to the awareness of a generally dangerous situation. The Court came to this conclusion, for instance, where the state had failed to take effective measures to disband paramilitaries, allowed them to enjoy impunity for their crimes and failed to take adequate measures to protect civilians from crimes committed by such groups.

It must be noted that the understanding of such a failure to prevent as acquiescence is not explicitly endorsed by the case law of the three human rights bodies. In fact, Chapter 9 demonstrates that the Inter-American Court has clearly distinguished between state responsibility based on the notion of acquiescence (an institutional link or active participation in making the crime possible) and on the basis of the duty to prevent (pure omission). The evidence available to conclude acquiescence on the part of the state in the crimes committed by non-state actors would appear decisive in determining state responsibility on the basis of the one rather than the other. However, the finding of substantive violations means responsibility for the wrong committed, from which it seems logical to conclude that there is potential for those situations that pass the 'identifiable risk' test to amount to 'acquiescence' in the crime. The extension of 'acquiescence' to those situations is important in cases where there is insufficient evidence to prove a strong connection or active participation. The situation on the ground shows ample examples of states trying to avoid responsibility by concealing all evidence pointing to the identity of the perpetrators. This situation is not exceptional. In fact, it is often rather difficult to prove that the perpetrators were state agents due to the lack of information about the crime (the first and second main causes of victims' suffering). Therefore, the experiences of victims warrant a broad interpretation of the term 'acquiescence'. Consequently, there are good reasons to uphold that the notion of acquiescence should extend the definition of enforced disappearance to situations of a failure to comply with the duty to prevent when the identified conditions are met. In such circumstances, the state may incur international responsibility when its authorities failed to prevent the crime, in the sense that omissions allowed the crime to ensue. Accordingly, there is a potential to develop a concept of due diligence by the CED that takes into account the detailed norms laid down in the ICPPED on prevention and investigation.

Interestingly, the failure to employ all measures in the state's power was mostly found by the two regional bodies on the basis of a failure to initiate a prompt and adequate investigation to locate the disappeared person. As such, there is a strong

link between the duty to prevent and the duty to investigate.[18] In this respect, it is to be commended that the CED has taken the multiple violation approach into account. The 'identifiable risk' test is mostly applied by the regional Courts under the right to life rather than the right to liberty. The reason for this choice is that the authorities may not always be aware of the risk that a person would disappear but, according to the Courts, should have been aware of the dangers that such a disappeared person is faced with. Accordingly, a prompt and adequate reaction to a complaint of an alleged enforced disappearance prevents the crime from prolonging and aggravating.

Given the overlap between the duty to prevent and the duty to investigate, the subsequent question is whether a failure to investigate acts that are undoubtedly committed by private individuals also amounts to acquiescence. First of all, an affirmative answer to this question would contradict the very structure of the ICPPED. Such a conclusion would mean that a failure to comply with the duty to investigate as required by Article 3 ICPPED would bring such acts within the scope of Article 2 ICPPED. This would clearly be contradictory to the intention of the drafters of the ICPPED. Moreover, it is questionable whether such an expansion of the ICPPED would be conducive to victims. Furthermore, including kidnappings followed by an inadequate investigation may dilute the stigma attached to enforced disappearance. At the same time, where such a failure to investigate crimes committed by non-state actors is part of a general context described in the preceding paragraph, the outcome may be different.

In spite of this limitation and in order to respond to the experiences of victims, it is argued in this study that there should be a strong presumption of acquiescence when the state knew, or should have known, that there was a risk of a person 'being disappeared' by non-state actors, but failed to take reasonable action to prevent it. As such, the duty to prevent is closely linked to launching an investigation due to the vital importance of investigating steps in the first days after someone disappears. The general context, the efforts of the state in ending the crimes, the specific circumstances and the profile of the victim may contribute to distinguishing between Articles 2 and 3 ICPPED.

10.4.2 Proving state involvement: the importance of modified rules of evidence

Having set out the minimum standard of state involvement, the next question is how to evince state responsibility for specific cases on the international level? The ICPPED does not contain any provisions that govern rules of evidence.[19] The human rights instruments governing the proceedings followed by the HRC, the Inter-

18 The duty to investigate is further discussed in section 10.6 below.

19 At the moment of concluding this study, the Rules of Procedure for the CED had not yet been drafted.

American Court and the European Court provide only laconic guidelines on the rules of evidence. These succinct rules have provided the three supervisory bodies with great flexibility in their approach to evidence. As Chapter 6 demonstrated, the HRC, the Inter-American Court and the European Court have tailored the evidentiary rules to human rights proceedings generally and in particular to enforced disappearance cases. The legitimacy of this adjustment can be found in the powerful position of the state to control and access relevant evidence.

Before explaining the evidentiary approach recommended in this study, it is helpful to turn to the five main causes of victims' suffering. The approach to evidence is in particular relevant to enforced disappearance, since evidentiary rules govern the proceedings according to which the facts are verified and established. It is precisely at this fact-finding stage that evincing an enforced disappearance poses several crucial challenges. One of the most critical steps in the process of determining state responsibility is proving state involvement. The case law shows that the facts in this regard are almost always contested, with the exception where the state recognised facts that occurred under a prior regime. Mostly, relatives allege that the perpetrators were state agents, while the state strongly refutes this allegation. An often-heard argument of the state is that the disappeared person probably joined an opposition group. The uncooperative attitude of the investigating authorities and the secrecy surrounding the crime results in little evidence being available. In particular, direct evidence, such as official documents, forensic evidence and eyewitness testimonies, is virtually non-existent. The state is in a powerful position to conceal the evidence related to the crime, and the state will do so vigorously in order to escape accountability. At the same time, the approach to evidence is also linked to the credibility of the adjudicating body. Having credibility is likely to increase the degree of cooperation of states with human rights bodies.[20] Hence, human rights organs have to straddle the line between affording adequate protection to the victims and maintaining credibility in their approach to the attribution of state responsibility.

On the basis that the main causes of suffering have shown that relatives are in a difficult position to prove an enforced disappearance, it remains to be seen how the CED should approach evidentiary issues. Chapter 6 showed that the motivation of the HRC often lacks transparency, but the Inter-American Court has been explicit in its approach while the European Court lingers somewhere in between. Nevertheless, the approaches of the three supervisory bodies provide useful guidance in adapting the evidentiary rules and the application thereof to the main causes of victims' suffering. The following interplay between the admissibility of evidence, the burden of proof, the standard of proof and the evaluation of evidence is to be recommended to the CED.

20 McGoldrick (1994), p. 145; Young (2002), p. 207.

With respect of the admissibility of evidence, the unrestricted mandate of the CED should be used with the aim of obtaining as much information as possible and allowing a wide variety of evidence including circumstantial evidence such as hearsay and newspaper articles. Accordingly, each piece of evidence can be given the appropriate weight. There are good reasons to follow the criteria of the Inter-American Court that the source of the information and the manner in which it is obtained must be verifiable. As such, evidence that is obtained by illegal means, such as torture, can be filtered out. The information submitted should be complemented, where necessary and possible, through information gathered *proprio motu* by the CED. The second and third main causes of victims' suffering (uncooperative and offensive conduct, or complete inaction, on the part of the state authorities and impunity) require the CED to adopt an active stance in requesting information from the respondent state. Such an active stance also justifies drawing inferences if the respondent state is not willing to co-operate. Also, information gathered by the CED, if available, under all the monitoring procedures should be taken into account. As to the time-limits within which the evidence must be submitted, certain flexibility might be justified. However, it appears to be important to be consistent and clear so as not to unduly delay the proceedings.

With respect to the burden of proof, enforced disappearance cases are typical cases in which a shared burden is justified. Such a shared burden of proof is cemented in the case law of all three supervisory bodies. When the complainant has established a *prima facie* case, it is tenable that the burden of proof should shift to the state. If the state does not attempt to rebut the *prima facie* case, a default decision may ensue. Nevertheless, it is preferable that the CED establishes a standard that the complainant has to satisfy at any rate. It must be noted that this is not always beneficial for complainants, but it is important for the sake of credibility. Additionally, where there is substantial proof that state agents detained the disappeared person, but the state argues that he or she was released, it is up to the state to account for the disappearance or to give an explanation in this respect. This division of the burden of proof is in line with the obligation upon States Parties under Article 17 ICPPED to include information on the release of a person in the custody records.

On examination, the most tenable standard of proof for finding a violation of the ICPPED on the merits is that of the balance of probabilities. It must be recognised that the European Court has doctrinally applied the beyond reasonable doubt standard. The approach of the HRC and of the Inter-American Court, however, appears to be moving towards a balance of probability standard. In applying this standard of proof, it is important to recall the inclination of all three supervisory bodies to consider that the state must satisfy a higher standard of proof to counter the allegations of the complainant, when the state has more knowledge and sole access to evidence. At any rate, the case law shows that silence or general refutations in response to a complaint

are not sufficient to rebut the allegations. In this respect, the conduct of the state in the proceedings at the international level and the extent to which the state took efforts to investigate complaints at the domestic level have been taken into account by the supervisory bodies. In addition, the three supervisory bodies have considered facts as proven when either they are undisputed and uncontested and follow from the evidence presented or they are generally known facts.

An additional way to take into account the experiences of victims is to give due weight to circumstantial evidence, presumptions and inferences as a result of the complainant's difficulties in adducing evidence. In fact, presumptions and inferences are often the only way to legally prove an enforced disappearance. According to the Inter-American Court, such presumptions and inferences are acceptable as long as they do not comprise all of the evidence. As such, it is to be recommended to adhere to the Inter-American Court's approach that the finding of a systematic practice, proven beyond reasonable doubt, should enable the complainant to prove a particular enforced disappearance by means of indirect evidence and inferences. Referring to the defining elements of a systematic practice (subsection 10.3.4 above), it would surely be desirable to set a minimum threshold for proving 'a significant' number of enforced disappearances, which would not put an impossible burden on plaintiffs. Surely, this threshold depends on the facts and circumstances of the case. However, where the CED is repeatedly confronted with claims of enforced disappearances with respect to a State Party, it is important to realise that these cases are probably only the tip of the iceberg and further examination is warranted. Accordingly, findings of other (quasi-)adjudicating human rights bodies could be included in the body of evidence. Furthermore, it is arguable that an important factor for determining 'official tolerance' is the diligence of the criminal law enforcement agencies in dealing with complaints of enforced disappearances. Another factor could be, as purported by the former European Commission, the extent to which the state is successful in bringing the violations to an end. If the proof is not sufficient for establishing a systematic practice, the general context may still be important as corroborative evidence, as the European Court's case law has shown.

Besides commending the use of inferences and presumptions, it is argued in this study that the Inter-American Court's explicit approach that attributes high probative value to witness testimonies is also to be commended. One justified reservation should be that testimonies of witnesses with a direct interest in the case must be evaluated in light of all other evidence. They should not, however, be excluded from the body of evidence. The reason for this inclusion is that often relatives are the only ones who have witnessed the events. Finally, as one of the former judges at the Inter-American Court asserted, statements by co-detainees who heard something related to the disappearance, for example the screams of the disappeared person, should also be valued as direct evidence. The use of oral hearings and of on-site investigations by

the Inter-American Court and the European Court has been essential in assessing the credibility of the evidence, in particular of witnesses. In light of the fourth main cause of victims' suffering (unsafe environment), witnesses have been proven to make false statements under pressure to state authorities or have not dared to come forward as a witness at all. Also, such considerations should also be taken into account when assessing apparent discrepancies between witness statements. Such an assessment may be essential for the outcome of the case. The mandate of the CED to request on-site investigations when it 'receives reliable information indicating that a State Party is seriously violating the provisions of this Convention'[21] could be a useful tool in this respect. The general findings of such visits may give context to the position of witnesses.

In assessing whether the standard of proof has been satisfied, an explicit evaluation of the evidence and a duly reasoned conclusion gives credibility to the judgment and legitimacy to the adjudicating body.[22] Such explicit reasoning also demonstrates what kind of evidence satisfies the standard of proof. Because an enforced disappearance seems to be one of the exceptional human rights violations that necessitate a modified approach to enforced disappearance, the application of evidentiary rules and doctrines should be applied with vigilance and in a meticulous manner in order to maintain credibility. In this sense, it is of the utmost importance to provide consistency, transparency and clarity. In accordance with Article 26(6) ICPPED, the CED can do so in its Rules of Procedure. Alternatively, the CED can establish rules of evidence through developing doctrines to this end in its views.

10.5 The duty to prevent – A state apparatus that minimises the possibilities that persons are subjected to enforced disappearance

Chapter 2 demonstrated that the ICPPED lays down a detailed body of norms aimed at realising a coherent system that prevents enforced disappearance. The ICPPED is the first binding human rights instrument that explicitly prohibits any secret detention. Furthermore, this convention enshrines an elaborate regime on the safeguards when someone has been taken into custody. Chapter 2 also argued that an important area in which the CED has the possibility to attune the protection of the ICPPED to the experiences of victims is linked to the various restrictions on communication, information and supervision when a person is detained. In this respect, it must be recognised that the legal mechanisms designated to safeguard the liberty and integrity of persons are mostly ineffective due to the denial of and the secrecy surrounding

21 Article 33 ICPPED.
22 Ruiz Chiriboga (2010), p. 170.

the act.[23] While the existence of formal rules may not always guarantee that state agents obey such rules in practice, establishing such rules provides at least a basis for determining state responsibility if they do not. Additionally, it has been shown that the CED enjoys flexibility in providing nuance to other general measures aimed at curbing crimes by state agents, which is subsequently discussed in this section. Thirdly and finally, this section elaborates on the duty to take operational measures when persons receive threats from state agents.

10.5.1 Institutional safeguards surrounding arrest and detention

10.5.1.1 Conditions for the deprivation of liberty

In the majority of cases, an enforced disappearance starts with an illegal arrest. While the ICPPED does not define specific conditions under which an order for the deprivation of liberty may be given, the consideration at the start of Article 17(2) ICPPED is important to recall: a deprivation must be in compliance with other international obligations of States Parties in respect of the deprivation of liberty. Chapter 7 shows that there are clear obligations laid down in the ICCPR, the ECHR and the ACHR that the arrest must be in accordance with conditions set out in the law and carried out according to procedures prescribed by law. While the ECHR provides an exhaustive list of the purposes for which a person may be detained, the Inter-American Court more generally considers that such a deprivation cannot be arbitrary in the sense of being unreasonable, unforeseeable or non-proportional. Additionally, the persons detained must be informed of the reasons for their arrest and the detention should be amenable to prompt judicial scrutiny. The case law of the European Court, often cited by its regional counterpart, appears to set the general standard, being four days and six hours as the upper limit for the time within which a person must either be seen by a judge or released. According to the European Court's case law, this period may be extended to six days and fourteen hours in declared states of emergency under Article 15 ECHR on condition that a remedy is available to decide the lawfulness of the detention and the person has access to a lawyer. The Inter-American Court contemplates that for an arrest carried out without a court order, which is the case in most enforced disappearances, the person must be brought before a judge 'immediately'. Such urgency is important to prevent a person from 'being lost' in a network of places of detention and to prevent that he or she is subjected to other grave human rights violations such as torture. In this sense, it is recommended to follow the HRC which has required a medical examination upon arrest and at the end of the detention.

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23 See www.desaparecidos.org/fedefam/eng.html (last visited on 4 November 2011) and www.hrw.org/reports/2002/russchech02/chech0402-01.htm#P99_11353 (last visited on 4 November 2011).

10.5.1.2 Access to information about the whereabouts of detainees: custody records

The ICPPED is the first international human rights convention that explicitly prohibits secret detention. One aspect that derives from this prohibition is that all detainees should be entered in up-to-date registers to which judicial authorities or other competent investigating authorities should have immediate and unrestricted access. The ICPPED provides a detailed list of information that should be included in these records in Article 17 ICPPED. Unfortunately, the ICPPED neither obliges States Parties to centralise their custody records[24] nor to designate a central authority responsible for the accuracy and integrity of the custody records.[25] Moreover, the case law also does not support an obligation to centralise custody records. Nevertheless, the facts presented before the European Court have shown that decentralised custody records enable authorities to shield themselves from accountability as a result of misunderstandings between local jurisdictions. Hence, it is advisable that such an obligation is inferred by the CED from Article 17 ICPPED in relation to the object and purpose of the ICPPED. The lack of centralised custody records may cause considerable delays and complications that extend the uncertainty and suffering due to the enforced disappearance.

Custody records are also commonly the starting point for relatives searching for the disappeared person. It is precisely with respect to those persons that the ICPPED allows restrictions on accessing information in the custody records under Article 20 ICPPED. Given that these restrictions must be in compliance with the purpose and objectives of the ICPPED, it is reasonable to conclude that a detention should always be at the very least acknowledged upon an inquiry by a close relative who would otherwise fall within the ICPPED definition of a victim. Such a conclusion is in line with the incompatibility of unacknowledged detention with the ICCPR, the ACHR and the ECHR, as shown in Chapter 5.

Additionally, the main causes of victims' suffering warrant that the conditions that allow restrictions on further information on the detention should be carefully scrutinised. Firstly, the ICPPED lists specific grounds on the basis of which it is legitimate to restrict the relatives' right of access to information. These grounds are: the privacy or safety of the person, possible hindrance to a criminal investigation, and other 'equivalent reasons'. The reference to 'any other equivalent reasons' as the purpose of restricting information implies a broad scope within which national security could potentially fall. It would be detrimental to the experiences of victims if this ground were to fall within the last category. The reason behind excluding this

24 *Cf.* UN Report by Nowak (2002), para. 83 (putting forward an obligation to centralise the registers of all places of detention).

25 The 1998 Draft Convention entailed an innovative paragraph on the obligation to make a person responsible for the integrity and accuracy of the custody records. However, this norm was not pursued in the drafting process of the ICPPED.

ground is that enforced disappearances are often committed within the context of national security. As to the privacy of a prisoner as a ground for a restriction, while this ground may constitute a legitimate ground in normal detention circumstances, experiences of victims show that it is highly unlikely that the disappeared person does not wish his or her whereabouts to be disclosed. Scovazzi and Citroni rightly observe that upon abduction, most victims of enforced disappearance cry out their names and are not really concerned with their own privacy.[26]

Upon analysis, is seems logical to conclude that withholding information in the context of a criminal investigation should be conditioned by requiring evidence of the urgency and proportionality of withholding such information. Secondly, the ICPPED stipulates that restrictions on information to relatives are only permissible on condition that the person must be 'under the protection of the law'. This condition is in itself positive, unless domestic law allows for delays in the acknowledgment of the arrest or detention. It is therefore important that the ICPPED restricts such legislation that practically allows for an enforced disappearance to occur. The conditions set out in the previous paragraph furthermore require that the detention must be under judicial scrutiny and the detainee should have access to a lawyer (see subsections 10.5.1.3 and 10.5.1.4 below).

Given the great importance that the three supervisory bodies attach to custody records and the fact that there are no indications that restrictions on access to such records are foreseen in their case law, this supports the assertion that minimum information should always be available immediately: namely whether a person is dead or alive, the fact of detention and the location of that detention. Such a minimum level of primary information was not entirely rejected in the drafting process, but suggestions to this end were rather not pursued. In spite of the fact that it is argued in this study that detentions may never be denied to close relatives, an immediate obligation to notify relatives does not follow from the case law. Even though such an obligation to take proactive action to notify exists, state authorities seem to have more leeway in this respect, which nevertheless may not exceed a few days.

As a last remark, the ICPPED specifies that a 'judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party' (Article 17(3) ICPPED) should have access to the custody records. However, it is possible to argue that this article would allow the CED to undertake a visit to the State Party under Article 33 ICPPED, if such a visit could be agreed upon by the CED and the State Party.

26 Scovazzi & Citroni (2007), pp. 339 and 340.

10.5.1.3 Right to communicate with the outside world

The ICPPED stipulates a right to communicate *inter alia* with relatives and counsel, but this right can be restricted by conditions 'established by law' (Article 17(1)(d) ICPPED). As Chapter 2 showed, access to a lawyer is one of the basic legal safeguards to establish contact with detained persons and to prevent an enforced disappearance. Chapter 7 indicated that the HRC confirms that 72 hours without access to a lawyer breaches the ICCPR, whilst the European Court takes as a starting point that detainees should have access to a lawyer from the first moment of police interrogation. Admittedly, this right derived from the right to a fair trial by the European Court may also be restricted in exceptional circumstances as long as such a restriction is not detrimental to the fair rights of the detainee. It is recommended that the CED integrates this last condition.

Having established the importance of contact with the outside world, it is important to reiterate the position of many human rights authorities that *incommunicado* detention is problematic. An analysis of the jurisprudence does not firmly embed a prohibition of *incommunicado* detention per se, but such detention is only justified in exceptional circumstances and under strict conditions. Hence, it can be concluded that the provision of the ICPPED on such restrictions must also be interpreted as being exceptional and limited. At least, the CED should indicate a clear time-limit for the length of a legitimate restriction on the right to access to a lawyer or to communicate with a relative. The present case law does not provide consistent guidance as to the duration of such a time-limit. The Inter-American Court found that two days without being able to contact relatives constitutes a violation of the ACHR. However, it is reasonable to infer that this period should be as short as possible, normally within a matter of hours with exceptional restrictions possibly extending it to a matter of days. In addition, this provision is clearly not complied with when it effectively amounts to an enforced disappearance, which is the case when the person is not detained according the conditions set out by law and in compliance with international law.

10.5.1.4 Prompt and diligent action by the judiciary: habeas corpus *and access to places of detention*

The next ambiguity defined in Chapter 2 in relation to the ICPPED concerns the role of the judiciary. The availability of *habeas corpus* proceedings is one of the preconditions for a deprivation of liberty to be in compliance with the ICPPED. Article 17 ICPPED guarantees a non-derogable right of having the lawfulness of the detention examined. The pertinent role of an independent judiciary in preventing an enforced disappearance from prolongation is demonstrated by the fact that in the first few days after a person has allegedly been detained, an independent judge is the only person that potentially has the power and competence to locate the person

if that person is held in state custody, and furthermore to order his or her release. As access to custody records for judicial or other competent authorities cannot be restricted according to the ICPPED, while the information available to relatives may be restricted, the guarantee of *habeas corpus* becomes increasingly important. Moreover, the case law has shown that the public prosecutor or other investigating authorities mostly fail to take prompt and adequate action. Therefore, as the exigency of the situation of a suspected enforced disappearance is immense, such proceedings must be available to relatives shortly after the disappearance. The Inter-American Court has set clear effectiveness requirements in that such recourse must give results or responses to the violations of rights established in the ACHR. Furthermore, practical and formal impediments that prevent recourse to such remedies must be removed. It is recommended that the CED adopts these requirements. The first and second main causes of victims' suffering (no trace of the disappeared person and no cooperation by the state authorities in the search) warrant that States Parties should not be able to impose stringent or impossible requirements on the admissibility of a writ of *habeas corpus*, e.g. the place of detention where the person is held or the identity of the authority responsible for the detention. Moreover, it is relevant to recall the position of the Inter-American Court that the investigation must be diligent in that all necessary measures were taken, which means that silence by the executive branch as a response to inquiries should not automatically be accepted as a reason to declare the writ without merit. In this respect, the Inter-American Court's stance that information on actions by state agents that is classified as secret should be subject to judicial supervision is a significant development. The pertinent role of the judiciary justifies an emphasis on the independence and impartiality of judges from the executive branch. In this sense and in accordance with the case law of the European Court, there must be neither a hierarchical nor institutional dependency.

Must relatives attempt to avail themselves of such remedies before the state can be held responsible for the lack thereof? The only explicit view in this respect has been pronounced by the Inter-American Court. This Court has taken into account the general context in which the enforced disappearance took place; if the remedies were generally illusionary, there is no need for relatives to have availed themselves of such remedies, which may relate to the admissibility criteria of the exhaustion of domestic remedies (Article 31 ICPPED).

Having seen the important role of the judiciary in *habeas corpus* proceedings, the judiciary also has potentially an important role to play in access to places of detention. The ICPPED allows prior judicial authorisation before investigating authorities can enter certain places of detention (Article 17(2)(e) ICPPED). A compromise was made during the drafting process to include a guarantee that the judicial authority shall decide promptly on the matter, as laid down in Article 12(3)(b) ICPPED. In order to locate the disappeared person, it is of the utmost importance that the investigating

authorities have access to all places of detention. The European Court, for instance, in assessing due diligence in the investigation has taken into account whether the investigating authorities visited the places of detention where the disappeared person could potentially be in the first few days after the complaint by relatives. In addition, in view of the first main cause of victims' suffering (no trace of the disappeared person and denials by the state authorities), the term 'promptly' should be given an autonomous interpretation. This time indication should be understood to mean 'within hours'. Otherwise, such authorisation would seriously hamper the promptness of the investigation and detainees could easily be transferred to other places and could be hidden somewhere else, tortured or even executed.

10.5.2 General measures aimed at curbing the criminal behaviour of state agents

In addition to the safeguards surrounding arrest and detention discussed in the previous subsection, the ICPPED entails norms that are more generally aimed at the prevention of enforced disappearance. These norms coincide with, but do not cover all, the measures that are believed to curb state crime according to the criminological models described in Chapter 4. The aim of the criminological models discussed is to explain crimes committed by state agents and to identify measures that control or constrain such illegal behaviour. These models were discussed in the context of the fourth main cause of victims' suffering (an unsafe environment to carry out the search and other activities related to the enforced disappearance).

Firstly, these criminological models assert that the prospect of being investigated with the aim of prosecution is an important factor that contributes to curbing state crime. Accordingly, the criminological models propose that clear legal norms should be in place. The ICPPED clearly requires the criminalisation of enforced disappearance in domestic law in Article 4. This article does not further specify what elements the definition of the domestic crime must consist of. Chapter 7 has shown that the Inter-American Court and UNWGEID consider that such domestic definitions must at least entail the basic elements in the definitions laid down in, respectively, the IACFD and the DPPED. In particular, these bodies have attached importance to the fact that the crime of enforced disappearance is an autonomous offence. This line seems logical to follow for the CED. Similar to the discussion on the ICPPED definition of enforced disappearance (see subsection 10.3.1 above), it is for the CED to monitor that the domestic definition does not contravene the object and purpose of the ICPPED, by excluding certain forms of enforced disappearance. Interestingly, the UNWGEID has criticised the extension of domestic definitions to non-state actors as possible perpetrators because such an extension would dilute the responsibility of the state. Recognising this potential problem, it is at least commendable that the CED vigilantly monitors the application of the domestic definition. Lastly, it is important to

reiterate the continuous nature of enforced disappearance. Even though the ICPPED does not oblige States Parties to define the crime of enforced disappearance as a continuous offence in their domestic law, there are good reasons to assert that the interpretation of this crime as being continuous is beyond dispute. The three human rights bodies have repeatedly and consistently held that this crime is a continuous human rights violation and the ICPPED confirms this view in its provision related to statutes of limitation.[27]

In addition to creating legal norms prohibiting enforced disappearance, it can be deduced from the criminological models that effective enforcement is important. The case law of the regional Courts emphasises that a state must have a proper law enforcement system in place that can respond swiftly to complaints of enforced disappearance. Subsection 10.5.1 above and section 10.6 below discuss the powers, safeguards and means that must exist within that law enforcement system. Since relatives are often confronted with the alleged perpetrators, the suspension of state officials who are under investigation, as promulgated by the case law of the Inter-American Court and HRC, seems to meet this concern. Such an obligation could be read into Article 12(4) ICPPED.

Besides repressive measures, three additional constraints for criminal behaviour by state agents can be discerned from the criminological models: control procedures over conduct by state agents in the executive branch, codes of conduct for creating a culture of compliance with the law and freedom for civil society to exercise its 'watchdog' function. Neither the ICPPED nor the three supervisory bodies touch upon the structure and organisation of the executive branch and, as such, do not address the issue of control procedures. UN soft law only mentions civil control over the police and security forces. As demonstrated in Chapter 8, such civil control seems to be in line with the view of the three supervisory bodies on the incompatibility of the use of military courts to try gross human rights violations by such forces (see subsection 10.6.5 below). A positive contribution of the ICPPED is its obligation imposed upon States Parties to ensure that public officials who believe that an enforced disappearance has been committed or is being planned report 'to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy.' (Article 23(3) ICPPED). As enforced disappearance is designed to secure impunity and any interference with this purpose constitutes a threat to the perpetrators, it appears logical to conclude that such a reporting procedure must be surrounded by adequate safeguards. Adequate safeguards should include the independence and impartiality of the persons in charge of the reporting procedure.

Additionally, the criminological models demonstrate the importance of codes of conduct and creating a culture of compliance with the law. In this respect, the ICPPED

27 Statutes of limitation are discussed in subsection 10.6.4 below.

establishes an obligation to educate state officials on the content of this convention (Article 23 ICPPED). The purpose of such programmes must strive to prevent their involvement in enforced disappearances. Also, the programmes must aim to raise awareness about the importance of prevention and investigation. In addition, the ICPPED obliges states to include in their training the urgency with which complaints must be dealt with. The text of the ICPPED neither further specifies the nature of such training, nor the frequency with which it must be provided. The Inter-American Court and the Committee of Ministers of the Council of Europe, a body charged with the supervision of sentences by the European Court, have both stressed the importance of regular and comprehensive training at all levels on the ECHR and the European Court's case law. UN soft law attaches the label 'priority' to such training. As to the content of such training, the case law provides a foundation for including not only the provisions of the ICPPED but also updates on the output of the CED. Additionally, in light of the fourth main cause of victims' suffering, it is important that not only the norms in the ICPPED are addressed in the training but also, for instance, the way in which authorities must deal with complaints of enforced disappearances and the dangers accompanying such complaints. Also, in light of the first main cause of victims' suffering (no trace of the disappeared person) training in other violations such as torture or risks of arbitrary execution is also necessary. As training is included as one of the provisions of the ICPPED, state responsibility can be determined if they fail to provide comprehensive training programmes on a regular basis. Besides training as a measure to create a culture of compliance, the ICPPED does not address the desirability of codes of conduct. The case law does not address this issue either. Codes of conduct do not have legal status and aim to create and consolidate a culture of compliance with the rules. Still, serious breaches could have serious consequences under such codes. In this respect, the Van Boven/Bassiouni Principles urge states to promote the observance of codes of conduct and ethical norms in this respect. An obligation to draft adequate codes of conduct is not per se excluded from the scope of the ICPPED. Such codes could, for instance, be interpreted as being required as a basis for the implementing the obligation 'to take necessary measures to prevent and impose sanctions' (Article 22 ICPPED) for conduct such as obstructing remedies or a failure to record a detention in the custody records. In order to ensure the observance of codes of conduct, States Parties must create monitoring bodies within the existing state institutions.

Lastly, the criminological models attribute an important function to civil society as a watchdog for the accountability of state officials. The ICPPED provides for a right 'to form and participate freely in organizations and associations concerned with attempting to find out the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance' (Article 24(7)). This function has not been addressed in the case law of the three supervisory bodies.

One of the pillars of the effectiveness of such organisations is that they can convene and carry out their activities without threats or hindrances. Article 12(4) ICPPED (the obligation to take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation) could be interpreted as obliging states to investigate and sanction such behaviour of state agents. Another pillar of the functioning of such organisations is access to information, which is discussed in subsection 10.6.7 below.

10.5.3 Preventive measures protecting against threats from state agents

Having seen the various institutional safeguards that States Parties to the ICPPED should create, it now remains to see what States Parties should do when persons are nonetheless threatened by state agents in either their search for the disappeared person or in being subjected to enforced disappearance themselves. The ICPPED only entails protective measures in respect of persons involved in the search for the disappeared person. Article 12(1) ICPPED states that '[a]ppropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.' The scope of this obligation is linked to the investigation into an enforced disappearance. While the case law of the three supervisory bodies clearly imposes such an obligation as well, only the Inter-American Court has clearly specified the measures to be taken. Such measures include far-reaching policing measures for the protection of witnesses and potential victims. Furthermore, the persons with respect to whom these measures must be taken should participate in the design of those measures to ensure that they meet their needs. Based on the second main cause of victims' suffering, it is recommended that the authorities planning and carrying out such measures must be independent from the ones implicated in the wrongdoing. Also, such measures should not only be formal measures but should be implemented with due diligence in practice.

As shown in Chapter 7, the three supervisory bodies clearly assert that states that condone threats prior to an enforced disappearance, by not responding adequately, breach their respective treaties. In such situations, the threats are not related to searching for a disappeared person. Such a basis for determining state responsibility is more difficult to link to a particular provision in the ICPPED. Nevertheless, it is possible to argue that a teleological interpretation of the ICPPED, taking into account the object and purpose of the ICPPED, extends the prohibition of enforced disappearance as laid down in Article 1(1) to the conduct of state authorities that creates a threatening situation. Such an interpretation concurs with the view of, for instance, the Inter-American Court, that threatening situations can by themselves violate their respective treaties.

10.6 The obligation to respond when the crime of enforced disappearance is committed: the duties to investigate and to prosecute

Having seen the various norms related to prevention and their desired interpretation and application, this section deals with the duties for the state to investigate possible enforced disappearances and to prosecute the perpetrators. The ICPPED devotes several articles to the investigation of enforced disappearances and the prosecution thereof. Hence, there is a clear obligation imposed upon States Parties to respond once a crime of enforced disappearance is committed. Chapter 2 demonstrated that there are several ambiguities in the text of the ICPPED, which provide the CED with the possibility to interpret and apply the norms in line with the main causes of victims' suffering.

The analysis of the case law of the three supervisory bodies illustrated that the investigation of enforced disappearance cases has three interrelated, complementary, functions. Firstly, an investigation is one of the most important tools for locating the disappeared person in the first initial days after the disappearance and, thereby, ending the violation. Secondly, an investigation casts light on the fate or whereabouts of the disappeared person after those initial days. Thirdly, a criminal investigation is a necessary step for the subsequent prosecution and punishment of the perpetrators and compensation for the victims. In this respect, Article 12 ICPPED (the right to report an enforced disappearance) is an essential provision from the perspective of victims, as it obliges States Parties to promptly investigate a complaint of enforced disappearance. Still, as Chapter 2 indicated, there are several issues that are unresolved in the ICPPED or that leave room for application by the CED.

10.6.1 Due diligence in the investigation

Article 12 ICPPED requires States Parties to examine any complaint of an enforced disappearance 'promptly' and 'impartially'. They are to launch, where necessary, 'without delay' a 'thorough and impartial' investigation into the alleged enforced disappearance (Article 12(1) ICPPED). It was argued in this study that these terms need further interpretation in light of the five main causes of victims' suffering. Moreover, the state has an *ex officio* obligation to investigate when no formal complaint is lodged, but when state authorities themselves learn about a possibility that an enforced disappearance has occurred (Article 12(2) ICPPED). Such a situation could, for instance, arise when someone inquires about the detention of a person rather than lodging a formal complaint. Such an *ex officio* investigation is also relevant in situations where a complaint is not recorded due to the lethargic attitude of the state authorities. As can be seen from the protective measures discussed in Chapter 7 *supra* and the duty to protect as discussed in Chapter 9 *supra*, authorities should start an

investigation when they know or should know that an enforced disappearance has taken place.

Chapter 8 analysed the detailed standards in the case law of the European Court and the Inter-American Court that are helpful for interpreting the meaning of 'promptly', 'thorough' and 'without delay'. The interpretation of these norms also touches upon the scope of the obligation to provide access to information about detainees and to places of detention, as discussed in the previous section on the duty to prevent. These terms must be interpreted in particular in light of the second main cause of victims' suffering. The accounts of relatives show that they are frequently hindered by the investigating authorities in their search for the disappeared person. They have been hindered by indolent conduct, no action at all or by obstructive behaviour. Such hindrances have, in turn, impeded their efforts in bringing the perpetrators to justice. The experiences of victims described in Chapter 4 have shown that relatives are commonly confronted with long and erratic delays due to conduct that basically amounts to 'passing the buck' from authority to authority. This lethargy materialises in referrals of jurisdiction, denials of the act and a decision to discontinue the search based on insufficient evidence. The case law confirms that pressure to cease the search and inadequate superficial investigations are sadly not the exception but rather the rule.

With respect to the term 'thorough', the three human rights bodies make clear that the authorities are to employ all available means to search for the disappeared person. The investigating authorities should pursue the investigation until the fate and whereabouts of the disappeared person are established. Furthermore, the investigation must have the purpose to locate the person or his or her remains, to discover the truth about the circumstances of the enforced disappearance and to bringing the perpetrators to justice. The terms 'promptly' and 'without delay' indicate a high degree of urgency. The three human rights bodies have determined that within the first few days after the disappearance has begun, several investigation steps need to have been taken. During this time frame, the state authorities are to collect and to secure relevant evidence, hear the complainant and other possible witnesses, visit detention centres, check custody records and follow all possible leads that are available to them. The case law has shown that in the investigation process the role of the public prosecutor is of great importance.[28] It is exactly in respect of this institution that the three supervisory bodies have found many flaws. As referrals of jurisdiction are one of the major causes for delays, clear regulations on the competences and jurisdiction of public prosecutors should be in place in order to avoid unnecessary delays in the investigation. In this respect, the ICPPED enshrines an important safeguard, namely it obliges States Parties to sanction behaviour that impedes the investigation

28 It must be noted that the judgments that the Inter-American Court and European Court have handed down concerning enforced disappearances are all in respect of civil law countries.

(Article 12(4) ICPPED). As relatives are particularly confronted with inaction, both acts and omissions should be penalised. In practice, this means that there must be a reporting procedure in place that is headed by an independent and impartial body. In addition, when an authority does not have the competence to investigate a case, he or she should notify the authority that is competent to investigate the case.

Additionally, where the investigation leads to the uncovering of the body or remains of the disappeared person, the States Parties to the ICPPED have the obligation to respect and return them (Article 24(3) ICPPED). This obligation is firmly embedded in the case law of the Inter-American Court. In a similar fashion, Chapter 5 showed that the European Court has considered that the inability to bury the remains of a disappeared person is an aggravating factor for the suffering of relatives. As argued in Chapter 4, the main causes of victims' suffering demonstrate that it is of the utmost importance that a proper consultation process is in place for the exhumation and identification of the remains. The identification of remains is a very sensitive issue and involves a great impact on the relatives.

The ICPPED recognises the international dimension of the phenomenon of enforced disappearance by requiring States Parties to cooperate with other states in assisting victims, discovering the whereabouts and fate of disappeared persons and bringing the perpetrators to justice (Articles 14 and 15 ICPPED). The formulation of this obligation is rather general. It is advisable that the CED complements the general wording with a more detailed list of what cooperation means in enforced disappearance cases. The five main causes of victims' suffering demonstrate important considerations that should be taken into account when interpreting and applying this obligation. Due to the problems typically associated with obtaining information and the uncooperative conduct of the state authorities (the first and second main causes of victims' suffering), witness accounts often comprise the only available evidence. However, witnesses have often been afraid to testify due to the fear of retaliation and sometimes have fled to other countries (the fourth main cause). Furthermore, in case of transnational enforced disappearances, evidence is required from various countries to complete the picture. Additionally, it is not uncommon that offenders of enforced disappearances choose to reside in another country (the third main cause). Based on the findings in Chapter 8, the list on international cooperation should include at least: identifying and locating possible witnesses; collecting testimonies under oath; providing access to investigation files and judicial decisions; the examination of places or sites of detention; the identification and exhumation of bodies; and the examination of gravesites. Where necessary, the protection of witnesses should be high on the list as an integral part of this obligation. Additionally, the Inter-American Court has read into the right of access to justice an obligation to request the extradition of perpetrators, when so warranted. This obligation could be read into the ICPPED on the basis of Articles 14 and 15 ICPPED in conjunction with Article 13 ICPPED

(the article on extradition). In light of these Articles, it seems logical to conclude that States Parties that receive a request should also cooperate with this request.

10.6.2 The investigation with the aim of prosecution

In relation to the purpose of an investigation to identify and prosecute the perpetrators, the ICPPED formulates an obligation for States Parties to 'submit a case to the competent authorities for the purpose of prosecution' (Article 11 ICPPED). This careful wording makes clear that the ICPPED does not grant victims a right to prosecution. At the same time, States Parties are to establish a broad notion of jurisdiction over crimes of enforced disappearance. The ICPPED obliges States Parties to establish jurisdiction on the basis of the universal principle when the alleged perpetrator is on their territory. The broad basis for establishing jurisdiction provided in the ICPPED is important from the perspective of the experiences of victims. Establishing jurisdiction to adjudicate the crime of enforced disappearance in accordance with the four principles mentioned in the ICPPED (Article 9 ICPPED) combats so-called safe havens for the perpetrators. Perpetrators cannot simply escape justice by moving to another country. Also, the experiences of victims show that perpetrators often cannot be tried in the country in which they committed the enforced disappearance due to either *de facto* or *de jure* impunity (the third main cause of victims' suffering).

As discussed in subsection 10.5.2 above, the crime of enforced disappearance must be an autonomous offence in domestic law. The importance of such an autonomous offence has been shown by examples in the case law of the three supervisory bodies where the complaints of enforced disappearance had been dealt with as, for example, the crime of kidnapping. The Inter-American Court has considered that such a qualification does not attend to the severe nature of an enforced disappearance and does not take into account the continuous nature of the crime. In this respect, it is helpful to recall the Inter-American Court's stance that the crime of enforced disappearance can be applied retroactively due to its continuous nature. Additionally, Article 6 ICPPED clarifies that not only the direct perpetrators but also the minds behind the crime must be held liable. The case law of the three supervisory bodies and the experiences of victims show that the obligation to hold the masterminds of the crime responsible is important, in particular where enforced disappearances have been committed as part of a systematic policy. This is in line not only with the third main cause of victims' suffering (*de facto* and *de jure* impunity), which leads to strong feelings of injustice if the masterminds of the crime continue to walk around freely, but is also in direct response to the fourth main cause. Letting the masterminds off the hook, after all, may well foster a repetition of the crimes. Fostering repetition, in turn, impairs the aim of creating a safe environment for relatives. In addition, due to the denials of the state authorities, an enforced disappearance may consist of various stages, such as the actual arrest, the detention, the refusal to provide information, and

often the execution of the disappeared person. The perpetrators may not always be aware of the enforced disappearance as a whole. These are considerations that need to be taken into account when assessing individual liability.

The HRC, the Inter-American Court and the European Court have determined that the obligation to investigate with the aim of prosecution must be effective in practice. Effective in this sense appears to mean that there is a prospect of success in bringing the perpetrators to justice. As the case law stands, this obligation is an obligation of means rather than result. Despite the means-oriented nature, the case law of the regional Courts reveals a tendency towards attaching importance to the outcomes of the proceedings as an indicator of the effectiveness of the proceedings. It is commended that the CED takes a similar approach in order to prevent illusionary and ineffective proceedings characterised by delays. Other indicators for effectiveness appear to be: whether the investigation process guaranteed sufficient public scrutiny, whether proceedings could be brought in the first place, whether an independent and impartial body conducted the proceedings within a reasonable time, and whether the adjudicating body evaluated the evidence in a diligent and thorough manner. These indicators have been applied in a nuanced manner as shown in the subsequent paragraphs.

10.6.3 Legal standing and victim participation

The next issue that has come forward in the experiences of victims is their frustration with not being involved in the investigation and in further proceedings. Victim participation in legal proceedings is a developing field to which thorough academic efforts are being dedicated.[29] Article 24 ICPPED obliges States Parties to inform victims about the progress and outcomes of investigations. As argued in Chapter 2, this article raises a number of ambiguities. First of all, the place of this obligation raises the question of at what stage this should be done. Is there an obligation to give such information already during the investigation when it is not yet established that the perpetrators are state agents or have acted with the involvement of such agents? Secondly, the way in which the victims must be informed according to the ICPPED is not precisely formulated. Subsection 10.6.1 above clarifies that victims must already be involved in the investigation from the very beginning, either as witnesses or as interested parties. While the Inter-American Court clarifies that victims must be able to participate in every stage of the proceedings, the European Court is less specific about the exact way in which victims or their relatives must be involved in the criminal proceedings. In this respect, it is important to note that the ICPPED neither explicitly endows victims with a right to have the perpetrators prosecuted, nor

29 For a recent study on victim participation in international criminal trials, see McGonigle Leyh (2011).

includes a provision on legal standing. Similarly, the European Court and the HRC clearly state that victims do not have a right to have the perpetrators prosecuted and punished. The Inter-American Court, on the other hand, has formulated an explicit right to have the perpetrators identified and prosecuted. One of the major problems that victims encounter is that prosecutors often discontinue the investigation or refuse to institute an investigation from the outset. The case law under scrutiny did not address remedies when prosecutors fail to institute proceedings. Still, taking into account the main causes of victims' suffering, and in particular, the uncooperative behaviour of investigating authorities, review procedures on decisions not to prosecute by public prosecutors should be read into the ICPPED. Accordingly, while the inclusion of a broad legal standing would have very far-reaching consequences in the domestic legal systems, a more modest obligation could be read into Article 11 ICPPED.

In addition, the case law makes clear that the provision of superficial information solely about the opening or closing of the investigation does not fulfil the obligation to inform relatives. As such, UN soft law specifically requires that this obligation entails the provision of *regular* updates on both procedural steps and the substantive outcomes of the investigation. The right to know the truth (see subsection 10.6.7 below) dictates that at the very least information must be given about progress related to the whereabouts or fate of the person, where relevant the exhumation and identification of the remains, the circumstances surrounding the enforced disappearance and the criminal steps taken to identify the perpetrators.

10.6.4 Limited room for legal impediments barring prosecution

The study has concentrated on two legal impediments in Chapter 8 that hamper the prospects for prosecuting the perpetrators of enforced disappearances, namely statutes of limitations and amnesties. The ICPPED deals with the former but omits any codification related to the latter procedural hurdle.

The rationale behind statutes of limitations is to secure legal certainty. Also, they function as a safeguard against ineffective trials due to evidentiary difficulties.[30] However, the question is whether the extreme gravity of enforced disappearance trumps these legal principles. According to the ICPPED, the duty to submit a case to the competent authorities for the purpose of prosecution may be subject to statutes of limitations (Article 8 ICPPED). An exception refers to the case where applicable international law decides otherwise for crimes against humanity. Indeed, applicable international law unequivocally establishes that limitation periods should not apply to crimes against humanity. Consequently, when the crime of enforced disappearance is committed as part of a systematic and widespread practice it may not be subject to limitation periods. In respect of single cases of enforced disappearance, the

30 Naqvi (2010), p. 376.

ICPPED attaches three conditions to the application of this exemption from liability. First, the term of limitation for criminal proceedings must be 'of long duration' and 'proportionate' to the seriousness of the crime. A long limitation period takes account of the practical and legal obstacles that victims commonly encounter in their search for justice. As such, obstructive behaviour, for example threats and denials, on the part of state authorities may hamper the seeking of justice (main causes 1 and 2 of victims' suffering). As a result, experiences of victims show that cases of enforced disappearance are only, if at all, resolved many years later. Furthermore, enforced disappearance is amongst one of the gravest offenses and breaches several non-derogable human rights of the disappeared person. This grave nature justifies the view that the limitation period must be analogues to the domestic limitation periods for torture or arbitrary execution. The second condition obliges that the limitation period commences from the moment when the enforced disappearance ends. In this respect, States Parties must take into account the continuous nature of this crime. The ICPPED does not further specify *when* an enforced disappearance ends. It is argued in subsection 10.3.2 above that the end of an enforced disappearance should be the moment when the whereabouts or fate of the disappeared person is established and communicated to the relatives.[31] Hence, the limitation period should not run before this moment. The third condition in the ICPPED obliges States Parties to ensure that victims have access to effective remedies during the term of limitation. The broad definition of victims enshrined in the ICPPED leads to the conclusion that both the disappeared person, if he or she is still alive, and his or her relatives must have access to effective remedies. This means that statutes of limitations must at the very least be stalled until it is clear whether the disappeared person is dead or alive. In addition, it is commended that the CED interprets 'effective remedies' in accordance with the criteria developed in the case law of the three human rights bodies. First and foremost, such a remedy must not only exist by law, but must also be practical in the sense that there is a reasonable prospect of success. In this sense, the remedies must comply with the criteria for a thorough and impartial investigation.[32] In addition and as shown in Chapter 8, the case law of the three human rights bodies makes clear that an effective remedy includes criminal law remedies besides possible administrative and civil remedies for compensation. Hence, the availability of civil remedies alone cannot satisfy this condition.

The compatibility of the second legal impediment, amnesty laws, with the ICPPED was a vexed question during the drafting process. NGOs and some delegations argued strongly for pronouncing the incompatibility of such legal impediments with the ICPPED. However, the political decision process did not allow for such a prohibition to be included. In the end, omitting this issue was felt to be

31 See also subsection 10.6.7 below on the right to know the truth.
32 See subsections 10.6.1 and 10.6.2 above.

the best solution to continue the drafting process. This absence allows considerable leeway for the CED to interpret the compatibility of amnesty laws with the ICPPED. As illustrated in Chapter 8, amnesties play a controversial role in transitional justice and have prompted a contentious and heated debate in academic literature. The three human rights bodies do not give a straightforward answer to the question whether all amnesties breach their respective treaties. In this respect, Vacqui argues that amnesties are often the result of a balancing act of political interests. As such, it serves the legitimacy of the ICPPED that it does not establish the *ipso facto* incompatibility of amnesties with this convention. Nevertheless, the CED will have to exercise close scrutiny on a case-by-case basis whether the state authorities have taken into account the interest of victims in this balancing act. When states deem such amnesties necessary, it is important that their compatibility with the ICPPED is assessed taking into account the experiences of victims. The first and second main causes of victims' suffering warrant that the state authorities continue the search for the disappeared person in order to establish his or her fate or whereabouts. Accordingly, full and accurate information should be disclosed to the relatives about the circumstances of the disappearance. The third main cause, together with the fourth main cause of suffering (unsafe environment), requires that other ways are explored to establish the liability of the perpetrators and to sanction them accordingly, including disciplinary sanctions. The fifth main cause (obstacles to continuing with 'normal' life) requires the availability of remedies for obtaining compensation and reparation. As such, it is important to recall that the duty to prosecute functions independently from the duty to investigate with the aim of locating the disappeared person.[33] At any rate, the three supervisory bodies have held that amnesties that amount to a general pattern aimed at the systematic prevention of the prosecution of crimes, and thus total impunity, breach their respective treaties. Self-amnesties and general amnesties seem to fall within this category, while individual amnesties may be permissible under certain circumstances. This conclusion seems to be in line with one of the purposes of the ICPPED, namely to eradicate impunity for enforced disappearance. At any rate, it is clear that the ICPPED was never intended to legalise impunity by means of allowing blanket or general amnesties.

10.6.5 The use of military courts in enforced disappearance cases

The obligation to launch an impartial investigation under Article 12 ICPPED raises the question whether the use of military courts in enforced disappearance cases is

33 IOWG Report E/CN.4/2004/59, para. 79 (The drafters did not explicitly reject the proposal that 'no measure may have the effect of preventing effective recourse to any remedy or the securing of reparation, or of interrupting the search for disappeared persons', and that 'the right to obtain accurate and full information on the fate of disappeared persons, in particular' must be 'guaranteed in all circumstances').

compatible with the ICPPED. The ICPPED is silent on the use of military courts to try military or police personnel for the crime of enforced disappearance. The divergent views during the drafting process of the ICPPED blocked an agreement on this issue. Instead, the ICPPED requires that suspects be tried by 'a competent, independent and impartial court or tribunal'. Scovazzi and Citroni argue that military tribunals do not fulfil the requirements of impartiality and independence as required by the ICPPED and should, therefore, be excluded from hearing enforced disappearance cases.[34] Indeed, the experiences of victims show that military tribunals have seriously hampered any meaningful investigation into enforced disappearance cases. Investigations and trials conducted by military courts have resulted in superficial investigations without any concrete result in the sense that they were capable of leading to the prosecution of the perpetrators. As a consequence, the three human rights bodies have emphasised the problematic nature of military courts in enforced disappearance cases based on the lack of impartiality of such tribunals. The European Court even considered that a military judge who makes up one of the panel of judges in a civil court triggers a justified fear of partiality. Accordingly, the requirements of an 'impartial investigation' and 'an impartial court' in the ICPPED should be interpreted as excluding military jurisdiction as the appropriate forum to try perpetrators of enforced disappearances. In addition, tribunals with a sitting judge belonging to the branch to which the suspected perpetrators also belong should be declared incompatible. Any other conclusion would be contrary to established human rights law and is likely to impair the elevation of the victims' suffering.

10.6.6 Evaluation of evidence in domestic courts

The ICPPED is silent on the issue of how domestic courts have to deal with evidence in their consideration of enforced disappearance cases. The only reference to evidence is found with respect to universal jurisdiction (Article 11(2) ICPPED). The rules on evidence in proceedings based on the universality principle must not diverge from the regular rules on evidence. The ICPPED does not further specify what such rules entail.

As a result of the four main causes taken together, domestic courts have to face the fact that in most enforced disappearance cases little evidence is available. Hence, they have to straddle the line between, on the one hand, doing justice to the victims and, on the other, adhering to the criminal procedural law rules that govern evidence. It is possible to argue that domestic courts must take into account the specific features of the crime of enforced disappearance and, in particular, the lack of evidence as a result of the secrecy surrounding the act. Such an approach could imply a less stringent standard of evidence or a shift in the burden of proof. An argument against

34 Scovazzi & Citroni (2007), p. 320.

adapting the approach to evidence is that it dilutes fair trial guarantees and the rule of law, both of which call for strict adherence to the rules of criminal procedure.

The European Court and the Inter-American Court have left evidentiary issues mainly within the discretion of the domestic courts, thereby not giving a clear answer to the question about the need to balance the victims' interest and the fair trial rights of the accused. Nevertheless, these two regional Courts have not been reticent in scrutinising the way in which domestic courts have applied the rules of evidence and have evaluated the evidence before them. They have done so in light of the assessment whether the proceedings as a whole were fair and adequate. Several useful guidelines in this respect can be discerned from, in particular, the case law of the Inter-American Court. The evidence must be evaluated as a whole. This means that corroborating evidence, such as newspaper articles or hearsay, may not be dismissed as having no evidentiary value. Thus, weight must be attributed to circumstantial evidence and the context in which the case occurred. In addition, dismissals of pieces of evidence must be based on sound and motivated grounds. For instance, testimonies of relatives cannot be dismissed on the basis of their interest in the outcome of the case. The experiences of victims also show that restricting the admissible evidence to written depositions and direct evidence impairs the victims in their attempt to bring the perpetrators to justice.

Thus, it is pertinent that the examination of criminal proceedings under the provisions of the ICPPED comprises a thorough assessment of how the domestic courts have dealt with evidence. The counterargument that the CED will adopt the position of a fourth instance court when it evaluates evidentiary issues is not tenable. Rather, the CED protects victims from superficial and politicised trials in which they do not have any prospect of success.

10.6.7 Different shades in the right to know the truth

The ICPPED is the first binding human rights instrument that codifies the right to know the truth. Victims have the right to know the truth about the circumstances of the crime, the progress and results of the investigation, and the fate of the disappeared person. The ICPPED establishes that States Parties are to take 'appropriate measures' in this regard (article 24 ICPPED). The terminology 'appropriate measures' implies a best-effort obligation. However, several aspects of the obligation to fulfil the right to know the truth should be interpreted as obligations of result.

The case law of the three human rights bodies links the truth to the investigation of the crime; they have interpreted the obligation to investigate as a continuous obligation to continue the search for the disappeared person as long as his whereabouts or fate is not clarified. Hence, 'appropriate measures' in relation to the whereabouts and fate of the disappeared person should be understood as an obligation of result. This corresponds with the case law of the three supervisory bodies that the continued

suffering of relatives on account of the uncertainty surrounding the whereabouts of the disappeared person amounts to inhuman treatment. Such measures tie in with the investigation aimed at locating the person, as clearly embedded in the ICPPED. The right to know the truth about the 'circumstances of the crime' raises the question whether the perpetrators must be identified. The Inter-American Court has clearly stated that the identity of the perpetrators must also be established, when it is clear that state agents committed the crime. The HRC has also mentioned the obligation to take measures that enable victims to know who was responsible for the human rights violation. In this respect, the process of prosecution contributes in its own way to realising the right to know the truth. However, the establishment of the identity of the perpetrators in criminal proceedings cannot be regarded as an obligation of result. Such an absolute obligation would be contrary to the interpretation of the ICPPED that victims do not have a specific right to prosecution. In light of the third and fourth main causes of suffering, the obligation to establish the identity of the perpetrators, in the sense whether they were state actors or non-state actors as well as individual identification, must be carried out with due diligence.

Another question that arises is whether the right to know the truth has a collective aspect or only an individual aspect about the specific enforced disappearance case. The Inter-American Court affords the right to know the truth to society as a whole, besides the victims and their relatives. The text of the ICPPED affords this right to victims as defined in the ICPPED, which includes a wide range of persons. However, it is argued in this study that the CED should demarcate boundaries concerning this concept, which does not include society as a whole. At the same time, the inclusion of guarantees of non-repetition in the ICPPED as part of the reparation to victims together with the duty to prevent could include the obligation to educate society about the 'historical truth' so as to prevent similar crimes in the future (see subsection 10.8 below).

In order to enjoy the right to know the truth, it can be important for relatives to be able to access official documentation that pertains to the circumstances of the enforced disappearance. Not only are official documents relevant to discover the truth, they are also essential in bringing the perpetrators to justice. Situations on the ground illustrate that official documents related to enforced disappearance are often classified as confidential. Should States Parties be obliged under the ICPPED to give clearance to access such classified information? In answering this question, it is helpful to turn to the case law of the Inter-American Court. The case law sets clear limitations on the classification of official documents as confidential. The premise that should be the starting point is that of maximum disclosure, which presumes that all information in the hands of the state is public and accessible. While it is in conformity with the ACHR to classify certain documents as confidential and thereby to limit their access, when they pertain to acts by state agents there should be a review

procedure before an independent judicial authority that has the competence to decide whether denying access to that information is lawful. When it is ruled unlawful, the information must be released within a reasonable time. At any rate, state authorities cannot resort to reasons such as official secrets or national security for denying access to judicial or administrative authorities that are investigating an alleged enforced disappearance. The burden of proof lies on the state to prove that it was necessary to classify the information. As pointed out in subsection 10.5.2 above, attention should also be paid to whom information must be accessible. While society as a whole cannot be considered as a victim, access to information must also be assessed in light of the function of civil society as a watchdog for the conduct of state authorities.

Lastly, the fourth main cause of victims' suffering warrants that an implied obligation is read into the right to know the truth. This implied obligation should be the duty to take measures to protect witnesses and other persons involved in their search for the truth. The intimidation of such persons has a particular adverse effect on finding the truth. Therefore, an elaborate and accessible protection scheme is necessary to offer protection to persons who are at risk.[35]

10.7 The duty to punish the perpetrators for the crime of enforced disappearance

After a state authority is found guilty of the crime of enforced disappearance, the ICPPED obliges States Parties to impose appropriate sanctions that take into account the extreme seriousness of this crime. The ICPPED does not clarify the forms of punishment that correspond to this crime. In view of the extreme gravity of the crime of enforced disappearance, the case law of the three supervisory bodies clearly requires criminal punishment. Indeed, punishment corresponds to restoring dignity for the victims; punishing the perpetrators is one form of satisfaction in an attempt to account for the horrendous wrong which was done. Punishing the perpetrators thereby enables formerly disappeared persons or relatives to pick up their lives again. In addition, a general consensus exists among the bodies that suspected state agents under investigation must be suspended and, once convicted, dismissed from their official position. Nothing in the ICPPED hints at an obligation to institute administrative or disciplinary measures against those implicated in an enforced disappearance, except for Article 12(4) ICPPED that requires punishment for hindering the investigation. In response to the fourth main cause of victims' suffering (unsafe environment), disciplinary sanctions are important, and even more so when criminal proceedings are barred.

In addition to the kind of punishment, a controversial issue during the drafting process was the issue of mitigating circumstances. On the one hand, reduced

35 See also subsection 10.5.1 above.

sentences indeed facilitate truth-finding. Yet, on the other, there is a danger that alleged perpetrators only contribute to the process as far as it enables them to escape punishment. In the end, the ICPPED provides for mitigating circumstances when a person has contributed to clarifying the truth surrounding an enforced disappearance. One of the fears expressed during the drafting process was that mitigating circumstances could potentially lead to pardons. This legal impediment was also a contentious issue. As with many of the contentious issues, the drafters solved this controversy by excluding any reference to it in the ICPPED. This omission was obviously a result of a political compromise. Should pardons be considered incompatible with the ICCPED? One could say that pardons usually do not obstruct truth-finding.[36] This legal impediment concerns the punishment of the perpetrators after the facts have been determined and might even facilitate the process of truth-finding. Nevertheless, given the gravity of the crime, the HRC has considered that state agents convicted of enforced disappearance should not be able to benefit from pardons. Its regional counterparts have not pronounced as clearly on this issue in enforced disappearance cases.

10.8 Determining state responsibility based on a failure to provide reparations to victims

A final step in responding once an enforced disappearance has been committed is the compensation of the victims for the wrong done. The ICPPED stipulates an elaborate right for victims to obtain reparation and prompt, fair and adequate compensation (Article 24 ICPPED). Such reparation covers at least material and moral damages and, where appropriate, other forms of reparation, such as restitution, rehabilitation, satisfaction and guarantees of non-repetition. As such, the ICPPED leaves States Parties with wide discretion to include both individual and symbolic reparation. The case law of the HRC and the European Court is far less elaborate on the right to compensation as this standard. They have mostly left it to the respondent state to decide the appropriate compensation and reparation. In contrast, the Inter-American Court has specified in detail all the forms of reparation after having found a violation. In fact, the case law of the Inter-American Court seems to have inspired the drafters of the ICPPED. In light of the fifth main cause of victims' suffering, important measures to be mentioned are monetary compensation that enables victims to recover lost opportunities due to having been forcibly disappeared or to the efforts put into the search. In addition, acknowledgement of the responsibility of the state and the public restoration of the dignity of the victims help to create a supportive environment

36 Naqvi (2010), pp. 375 and 376 (arguing that a domestic court must take into account the balance between the obligation to punish the perpetrators and the objectives that pardons aim to achieve such as truth-telling).

for victims to come to terms with the consequences of the enforced disappearance. Lastly, attention should be paid to the immense psychological and physical impact on the victims. In this respect, the psychological and social ramifications on children within a family of the disappeared person deserve special attention. Accordingly, victims should be able to participate in designing the reparation measures.

The duty to compensate should be independent of outcomes of criminal proceedings. This premise is supported by the case law of the three supervisory bodies that stress that the duty to compensate is a separate duty that needs to be fulfilled. Upon examining the main causes of victims' suffering, compensation should not be dependent on the prior issuing of death certificates. Chapter 4 illustrated that in some countries a death certificate, which declares the disappeared person dead, is needed to access bank accounts, to inherit property and to obtain compensation. Women in particular are in a vulnerable position in some countries when their husband has disappeared. On the other hand, death certificates also mean an acceptance of the death of the disappeared person. It thereby implies consent to discontinue the search. This turns out to be an enormous dilemma for relatives. The solution found within humanitarian law to issue 'certificates of absence' seems a sensible solution to solve this dilemma. The ICPPED only addresses administrative measures in terms of the legal situation of the disappeared person and his or her relatives in Article 24(6) ICPPED. Adequate measures could alleviate the relatives' daily struggle to survive by means of, for instance, the issuing of a certificate of absence/missing, as has been suggested by the ICRC. Finally, the experiences of victims described in Chapter 4 demonstrated that the remedy of obtaining compensation and reparation should abide by adequate guarantees, such as an independent body that deals with the petitions, which ensure the fair and diligent distribution of compensation.

10.9 The standard related to the duty to protect against acts committed by non-state actors

The seventh and final duty discussed in the course of this study is the duty to protect individuals from being subjected to disappearance by another individual. As a preliminary remark, it is important to stress that the investigation required by Article 12 ICPPED is vital from a legal perspective for determining whether an enforced disappearance is at stake and, thus, whether the obligations enshrined in the ICPPED apply. When the investigation leads to the conclusion that the state is not involved, either directly or indirectly, in the crime, the obligations laid down in Article 3 ICPPED apply. In this article, the ICPPED places obligations on States Parties when crimes similar to enforced disappearance have been committed without any state involvement. States Parties are to take 'appropriate measures' to investigate and to bring the perpetrators of such crimes to justice. The rationale behind including a

separate article seems to have been the exclusion of such acts from the protection of subsequent provisions in the ICPPED. This means that, for instance, witness protection would not apply in such cases. Furthermore, the drafters changed the wording 'necessary measures' to 'appropriate measures'. According to the drafters, this change indicates a less burdensome obligation. However, there are good reasons to assert that the term 'appropriate measures' in Article 3 ICPPED should not be interpreted as meaning a lower standard for the diligence of the investigation. This view is supported by the case law of the three supervisory bodies. At least, the case law does not substantiate the argument that less stringent requirements apply to the investigation process of crimes committed by non-state actors than to an investigation into alleged crimes perpetrated by state actors. Hence, the standards for the investigation both apply to enforced disappearances as well as to similar acts that are committed by non-state actors without the involvement of the state. The one aspect that is questionable is whether the investigation must also continue until the fate or whereabouts of the victim are discovered. The continuing nature of the investigation is formulated in the article on the rights of victims (Article 24 ICPPED). This choice of placement could be interpreted as implying that the continuous nature only applies to cases where it is proven beyond reasonable doubt that state agents were implicated in the crime.

The wording of Article 3 ICPPED does not focus on the concern raised by an independent expert during the drafting process, who indicated that the future instrument should '[e]nsure that disappearances carried out by non-State actors were taken into account in the context not only of the State's obligation to criminalise their acts, but also of the obligation to protect the rights of victims, such as the right to the truth, the right to a remedy and the right to reparation'.[37] In investigating the crime and bringing the perpetrators to justice, however, there are good reasons to conclude from the case law of the Inter-American Court and the European Court that these efforts should also be directed towards establishing the truth.

10.10 Is the ICPPED apt for protection from transnational disappearances?

The case law on the basis of which the present study is based has dealt with enforced disappearances committed by one state, or at least, where it could be established that the respondent state deprived the person of liberty and subsequently denied the detention. Additionally, the standards in the ICPPED seem to concentrate on this kind of enforced disappearance. In this respect, the concern raised during the drafting process by the delegates of Cuba is worth mentioning. In their view, the ICPPED did not address situations where states aid and abet enforced disappearance in other

37 IOWG Report E/CN.4/2004/59, para. 170(d).

states.[38] An example of such transnational enforced disappearances is the phenomenon of extraordinary renditions. While transnational enforced disappearances have not been part of the analysis conducted in the present study, it will not be long before this type of enforced disappearance will be dealt with by human rights bodies.[39] In fact, extraordinary renditions seem to be a prominent form of enforced disappearance nowadays. At the same time, the absolute and non-derogable nature of the right not to be subjected to enforced disappearance signals a strong message that internal disturbances in a country or the fight against terrorism cannot justify the use of enforced disappearance. Accordingly, it is important to make several remarks on the basis of the findings of this study.

Obviously, transnational enforced disappearances require cooperation between a number of states; at least two states are implicated in the crime. However, the degree of involvement may vary significantly. Some states participate actively, with others are involved in a more passive capacity. For example, a state may allow other states to use its facilities, such as airports, to transfer detainees. When a state does not actively deprive the person of his or her liberty, it may still incur responsibility for supporting the crime or acquiescing to it. It can be argued that the same test applies to transnational enforced disappearances as for state action in respect of non-state actors. Providing support to other states that enables enforced disappearances to occur could then lead to the presumption of acquiescence when the state knew or should have known that such support contributed to the commission of the crime. Such behaviour means consenting implicitly to a real and immediate risk that an enforced disappearance is committed, which could potentially lead to responsibility based on the notion of acquiescence. This is contrary to the overall aim of the ICPPED to prevent enforced disappearance. In this sense, states are to investigate what is happening in order to prevent the crime from occurring. Therefore, it is tenable that a state's failure to investigate what is happening on its territory (and thereby, for instance, allowing illegal transfers) may incur responsibility under the ICPPED based on the notion of acquiescence.[40]

10.11 Guiding recommendations to the Committee on Enforced Disappearances

In order to ensure that the ICPPED realises its full potential, this study proposes recommendations for the interpretation and application of the norms in the ICPPED.

38 IOWG Report E/CN.4/2006/57, para. 116.

39 www.soros.org/initiatives/justice/litigation (last visited on 27 October 2011) (The cases *El-Masri v. Macedonia* and *Al-Nashiri v. Poland* concerning European involvement in extraordinary renditions are pending before the European Court.)

40 Paust (2008), p. 258.

The proposed interpretation and application focuses on making determinations of state responsibility under the ICPPED in a way that is in line with the experiences of victims, *i.e.* the five main causes of victims' suffering as defined in this study. These recommendations are predominantly based on a comparative analysis of the case law of the HRC, of the Inter-American Court and of the European Court. Additionally, this study turned to other UN standards, such as soft law guidelines, when the case law revealed gaps according to the five main causes of victims' suffering. It is useful to reiterate that neither the ICCPR, nor the ACHR nor the ECHR lay down a definition of enforced disappearance. As a result, the HRC, the European Court and the Inter-American Court have employed a multiple rights approach when dealing with enforced disappearance cases. At the same time, the ICPPED lacks any reference to other human rights. The common denominator for comparison is therefore the set of state obligations that emanates from the different rights. As a result, it is important that the protection provided by one autonomous right *enhances* rather than weakens the protection that the multiple rights approach offers. At the same time, the interpretation of the ICPPED should serve the credibility of the CED and the protection offered by the ICPPED. Accordingly, this study recommends that:

1) **The term 'fate or whereabouts' in the definition of enforced disappearance (Article 2 ICPPED) should at the very least include information on whether the person has been detained, the place of detention and whether he or she is dead or alive. In the case of death, 'fate' should mean the location of the mortal remains, their identification and, if possible, their delivery to the relatives.**[41] The interpretation of the terms 'fate or whereabouts' is crucial because the concealment of such information is one of the elements of the definition in Article 2 ICPPED. The case law of the three supervisory bodies does not provide clear guidance on the interpretation of this terminology. However, the lack of the information mentioned is the main source of victims' suffering. The proposed interpretation means that the violation only ends when these pieces of information are communicated to the victims.

2) **The last element of the definition of enforced disappearance (Article 2 ICPPED), *i.e.* placing the person outside the protection of the law, should be interpreted as a consequence of the first three elements.**[42] The importance

41 See Chapter 5 section 3. Article 2 ICCPED entails the definition of enforced disappearance and reads: 'For the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.'

42 See Chapter 5 section 3.

of interpreting the last element as a consequence of the first three constituent elements, rather than as a constituent element in itself, is twofold. Firstly, in accordance with the current case law, this element should not require separate proof by victims in order to evince state responsibility. Secondly, considering it as a constituent element could potentially lead to allowing situations where a person practically becomes a victim of this crime, yet because the law has been drafted to ensure that such situations are legal, they fall outside the protection of the ICPPED. Such a conclusion would be highly detrimental to the protection afforded to victims.

3) **The relationship between enforced disappearance and other human rights violations, such as short periods of unacknowledged detention and arbitrary executions, should be clarified.**[43] Firstly, unacknowledged detention and enforced disappearance are closely related human rights violations. The ICPPED does not entail a time requirement, such as 'for a prolonged period of time', before an unacknowledged detention falls within the definition of enforced disappearance. The case law of the three supervisory bodies does not provide a clear answer to the question whether there is a difference between the two. In general, the case law provides support to conclude that short periods of unacknowledged detention do not amount to enforced disappearance. Indeed, in order to uphold the serious stigma attached to enforced disappearance, short periods of unacknowledged detention should fall outside the ICPPED definition, unless aggravating circumstances prevail. Aggravating factors may pertain to: the length of time that a person is held in unacknowledged detention, secret detention, not being brought before a judge within the time period required, arbitrary executions subsequent to detention, torture practices during detention, or a pattern of enforced disappearance within which the detention takes place. Because it is often only possible to establish the course of events with hindsight, the CED should use the absence of time in the definition to intervene as soon as there are indications of a possible enforced disappearance. Secondly, enforced disappearance is closely interrelated with arbitrary executions. These violations often go hand in hand. When a person has been killed, the criterion whether the situation amounts to an enforced disappearance should be whether the execution is either preceded or followed by a period of denials or refusals by state agents to provide information.

43 *Ibid*.

4) **The minimum threshold of the notion of acquiescence in the definition of enforced disappearance (Article 2 ICPPED) should be marked by situations where the state failed to take reasonable measures to prevent an identifiable risk of enforced disappearance from materialising.**[44] The ICPPED definition of enforced disappearance requires state involvement in the crime. The delineation for the 'state' requirement in this definition by means of the interpretation of the notion of acquiescence is important. This term appears to mark the distinction between this human rights violation, on the one hand, and Article 3 ICPPED (similar crimes committed by non-state actors), on the other. The Inter-American Court and the European Court have attributed state responsibility for substantial violations on the basis of the duty to prevent in accordance with this 'identifiable risk' test. These Courts do not necessarily classify this as 'acquiescence', but it is argued in this study that a finding of a substantial violation implies responsibility for the wrong committed. Accordingly, such behaviour should fall within the term 'acquiescence'. If the CED were to adopt such an understanding, the ICPPED would be able to respond to the situation in which non-state actors are able to commit disappearances because the state turns a blind eye to the events.

5) **The scope of the notion of victims should be determined according to the following four factors: (1) the family bond or specific circumstances that show a close relationship with the disappeared person; (2) the extent to which a person has been exposed to negative responses of the state authorities in the face of complaints and inquiries; (3) the degree of participation in the search for discovering the whereabouts or fate of the disappeared person; and (4) the effects on the well-being or family life of the person concerned.**[45] The ICPPED embodies a broad notion of victim in Article 24(1) ICPPED defining a 'victim' as 'the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance'. The phrase 'harm as a direct result of an enforced disappearance' should be determined according to these four factors. These four factors correspond closely to the factors developed by the European Court, but take into account the impact on the family as a whole.

6) **The obligation to criminalise enforced disappearance in domestic law (Article 4 ICPPED) should be interpreted as the obligation to create an autonomous and continuous crime.**[46] The importance of such an autonomous definition lies in the fact that fragmenting the crime in separate criminal offences does not capture the serious nature of enforced disappearance. Such

44 See Chapter 6 section 4 and Chapter 9 section 3.
45 See Chapter 5 section 4.
46 See Chapter 5 section 5 and Chapter 7 section 5.

fragmentation may result in impossible requirements for the type of evidence needed to prove a case or in unjustified short periods of limitations. In fact, the importance of a continuous crime finds its roots in the application of statutes of limitations: such limitation periods should only commence when the violation ends. In this respect, the violation should be considered to end when the fate or whereabouts of the disappeared person is established. Additionally, the domestic offence should comprise the constituent elements of the ICPPED definition of enforced disappearance.

7) **The definition of enforced disappearance as a crime against humanity (Article 5 ICPPED) should be interpreted in accordance with the criteria set by the Inter-American Court and the European Court. These criteria comprise (1) the repetition of similar acts and (2) official tolerance of those acts.**[47] Repetition of similar acts means that there must be a significant number of interrelated crimes and, according to the Inter-American Court, these crimes must reveal a *modus operandi*. The understanding of 'official tolerance' should be broad in the sense of assessing whether the authorities have been effective in bringing the repetition of acts to an end. In the case of enforced disappearance, the assessment of whether the state authorities acted diligently must include whether state authorities adequately investigated the complaints and brought the perpetrators to justice. In addition, the factor that the CED should take into account is whether the state authorities have taken measures to prevent the repetition of crimes from continuing. The element of *intending* to place a person outside the protection of the law – as required by the Rome Statute – should not be a criterion for establishing a systematic practice under the ICPPED.

8) **In making determinations of state responsibility under the ICPPED, the CED should draft and apply transparent rules of evidence that take into account the evidentiary difficulties inherent in enforced disappearance by allowing circumstantial evidence and presumptions.**[48] One of the most critical steps in the process of determining state responsibility is proving state involvement. The facts are almost always disputed, with the exception of situations where the state acknowledges responsibility for the facts but argues that it has adequately remedied the situation. The evidentiary rules should take into account the powerful position of the state to conceal most, if not all, evidence. Also, it is important to realise that victims depend largely on the investigation by the state authorities to obtain clarification of the facts. The three human rights bodies have each in their own way adapted the evidentiary doctrines to the particularities of

47 See Chapter 5 section 6 and Chapter 6 section 3.
48 See Chapter 6 section 3.

enforced disappearance. Drawing on their practice, the following approaches and rules should be applied. The CED should employ an active stance in obtaining as much information as possible and should admit a wide range of sources, such as hearsay, newspaper articles and information from other UN bodies. The burden of proof should not rest solely on the plaintiff. When the plaintiff has established a *prima facie* case, the burden of proof should shift to the state to disprove the allegations. General refutations by the state should not suffice and complete silence on the part of the state may justify that the CED issues a default decision. When the state has not investigated the crime or refuses to submit the case files to the CED, inferences and presumptions should be drawn. The standard of proof that the CED should adhere to is that of a balance of probabilities, which allows for circumstantial evidence and presumptions. For instance, when plaintiffs are able to prove a systematic practice of enforced disappearance beyond reasonable doubt, the plaintiffs should be able to prove the individual case through indirect evidence. At the same time, the assessment of evidence by the CED should be explicit and reasoned in order to maintain the credibility of the CED. Lastly, it is of the utmost importance that possibilities to assess the credibility of witnesses are explored.

9) **The restrictions that are permissible on access to information on detainees and on the right of detainees to communicate with the outside world (Article 17 ICPPED) should be interpreted and applied in a restrictive manner.**[49] Access to information on detainees places an important emphasis on adequate and up-to-date custody records, as required by Article 17 ICPPED. Even though not supported explicitly by the case law of the three supervisory bodies, it is argued in this study that from this requirement and the object and purpose of the ICPPED, the obligation to keep such records should be interpreted as including the obligation to centralise these records. The permissible restrictions on the access of relatives to the information in custody records should never include restrictions on whether the person is detained and whether he or she is alive. Such minimum information should always be made available immediately to persons who would otherwise potentially fall within the notion of a victim as stipulated by Article 24(1) ICPPED. In addition, restrictions on information should only be considered to be in compliance with the ICPPED when the person is detained within the protection of the law. This condition means *inter alia* being arrested with an arrest warrant and having access to a judge within, at most, four days and six hours. Similarly, restrictions on detainees' right to communicate should only be allowed in exceptional circumstances and when the person concerned is

49 See Chapter 7 section 4.

detained in accordance with the law. In those exceptional situations where such restrictions are applied, the burden of proof should be on the state authorities to submit evidence that such restrictions were prompted by the urgency of the situation and proportionate to the interest of the victims.

10) **The CED should assess whether the judiciary acted diligently in *habeas corpus* proceedings and promptly in proceedings to obtain access to places of detention (Article 17 ICPPED).**[50] *Habeas corpus* proceedings are one of the few legal means through which it is possible to locate detained persons. The judiciary should therefore be obliged not to accept the silence of the state or general denials of detention and should employ an active stance in locating the person concerned. The term 'promptly' to indicate that the judicial authorities must give authorisation to access places of detention without delay should be given an autonomous meaning and should mean 'within hours'. If interpreted otherwise, the possibility increases that the disappeared person will be transferred to other places.

11) **The CED should expand on general measures aimed at curbing the criminal behaviour of state agents, such as thorough and regular training of officials (Article 23 ICPPED), adequate codes of conduct (read into Article 22 ICPPED) and possibilities for civil society to exercise its watchdog function (implied in Article 24(7) alone or in conjunction with Article 12(4) ICPPED).**[51] One of the purposes of the ICPPED is to prevent state agents from subjecting someone to enforced disappearance in the first place. It is argued in Chapter 4 that measures to curb such behaviour are not only important to prevent possible future victims, but also have an important function to create a safe environment for relatives and survivors. They are often at great risk of being subjected to enforced disappearance also or yet again. Training programmes must have high priority, must be regularly offered and should be mandatory for all branches of the executive power and the judiciary. The content should not only cover the norms in the ICPPED but also the subsequent interpretation of these norms by the CED. Additionally, such programmes should be aimed at preventing enforced disappearance and at responding adequately to complaints about this crime. In this respect, it is important that the training covers all possible aspects of the phenomenon of enforced disappearance, including possible torture, killings and threats. Besides providing training, it is argued in this study that States Parties should be obliged to draft apposite codes of conduct aimed at the prevention of enforced disappearance. A proper organ within the existing institutional structure

50 See Chapter 7 section 4 and Chapter 8 section 4.
51 See Chapter 7 section 5.

should be assigned with the task of controlling compliance with these codes of conduct and sanctioning those state agents who failed to observe them. The third and final measure to curb crimes by state agents is the scrutiny of their behaviour by civil society. Civil society should be able to carry out its function unhindered and without practical obstacles. State agents who actively hinder the activities of such organisations should be punished in an appropriate manner through, for instance, disciplinary sanctions. Another implication of being able to carry out their activities unhindered is that civil society should also be able to access official documentation related to enforced disappearances (see recommendation 15 below).

12) **The ICPPED should be interpreted so that persons threatened by state agents, as well as relatives or witnesses who are threatened because of their involvement in the search for their disappeared person, enjoy adequate protection (Articles 1(1) and 12 ICPPED).**[52] On the basis of Article 1(1) ICPPED States Parties should be held responsible when they fail to take action when they know, or should have known, about threats by state agents to persons that result in a fear of being subjected to enforced disappearance. Moreover, the case law of the three supervisory bodies shows that, at the very least, state authorities should investigate promptly and thoroughly any complaints of threatening behaviour by their state agents and take action accordingly. The interpretation of Article 12(1) ICPPED should include standards for witness protection schemes, including, for instance, far-reaching policing measures. Furthermore, the persons with respect to whom these measures must be taken should participate in the design of those measures to ensure that they meet their needs. Upon examination, it is important that the authorities, who are planning and carrying out such measures, are independent from the ones allegedly implicated in the threats. Lastly, the monitoring of such measures by the CED should not only concentrate on the formal measures but also on the question whether they were implemented with due diligence in practice**.**

13) **The duty to investigate complaints of enforced disappearance as stipulated by Article 12 ICPPED should be interpreted and applied using the 'effective' standard as put forward by the Inter-American Court and the European Court.**[53] A prompt and thorough investigation into complaints of enforced disappearance is one of the essential steps to prevent the enforced disappearance from prolonging. However, this is not the only justification for attaching great importance to this duty. In fact, the investigation must not only have the purpose

52 See Chapter 7 section 3.
53 See Chapter 8 sections 3 and 4.

of locating the person or his or her remains, but also of discovering the truth about the circumstances of the enforced disappearance and bringing the perpetrators to justice. The three human rights bodies make it clear that the authorities are to employ all available means to search for the disappeared person. Furthermore, the investigating authorities should pursue the investigation until the fate or whereabouts of the person in question are established. The case law of the three human rights bodies reveal that within the first few days after the disappearance has commenced, several investigation steps need to have been taken. During this time frame, the state authorities must have collected and secured relevant evidence, heard the complainant and other possible witnesses, visited detention centres, checked custody records and followed all possible leads that were available to them. In addition, it is to be commended that clear regulations on the competences and jurisdictions of public prosecutors are in place in order to avoid unnecessary delays in the investigation because referrals of jurisdiction are one of the major causes of such delays. In this respect, the ICPPED enshrines an important safeguard, namely it obliges States Parties to sanction behaviour by state authorities that impedes the investigation (Article 12(4) ICPPED). As relatives are particularly confronted with inaction, both acts and omissions should be penalised. In practice, this means that there must be a reporting procedure in place that is headed by an independent and impartial body. Another safeguard in this respect is that if the authority to which the complaint is lodged does not have the competence to investigate the case, it should notify the authority that is competent to do so.

Additionally, the obligation on States Parties to cooperate in locating the disappeared person and bringing the perpetrators to justice as promulgated by the ICPPED (Articles 14 and 15 ICPPED) should include at least cooperation in: identifying and locating possible witnesses; collecting testimonies under oath; providing access to investigation files and judicial decisions; the examination of places or sites of detention; the identification and exhumation of bodies; and the examination of gravesites. Where necessary, the protection of witnesses should be high on the list as an integral part of this obligation. It is to be commended that the CED follows the Inter-American Court in that States Parties are obliged to request extradition when the situation so demands.

Lastly, where the investigation leads to the uncovering of the remains of the disappeared person, the States Parties to the ICPPED have the obligation to respect and return them (Article 24 ICPPED). In this process, it is important that an adequate consultation process is in place that supports the relatives.

14) **The criteria to assess whether the process of prosecuting the alleged perpetrators is in compliance with the ICPPED (Articles 9 and 11 ICPPED) must be clear and transparent.**[54] While the duty to prosecute seems to be an obligation of means, the Inter-American Court has considered the outcomes of investigations and of trials as indicators of the effectiveness of the investigation and prosecution. Other indicators that can be discerned from the analysed case law are: whether the investigation process guaranteed sufficient public scrutiny, whether proceedings could be brought in the first place, whether an independent and impartial body conducted the proceedings within a reasonable time, and whether the adjudicating body evaluated the evidence in a diligent and thorough manner. In respect of the latter, experiences of victims show that evidence in trials have often been evaluated in such a manner as to diminish its probative value. Consequently, the CED should critically assess how the domestic courts have evaluated evidence in the adjudication of enforced disappearance cases. Finally, the use of military courts in enforced disappearance cases should not be considered as being compatible with the ICPPED.

15) **The right to know the truth (Article 24 ICPPED) should be interpreted as entailing, at the very least, two distinct components. Firstly, the obligation to discover the fate or whereabouts of the disappeared person should be interpreted as an obligation of result. Secondly, the truth about the circumstances of the enforced disappearance, such as the identity of the perpetrators, should be interpreted as an obligation of means.**[55] According to the ICPPED, persons considered as 'victims' under the ICPPED have the right to know the truth about the circumstances of the crime, the progress and results of the investigation, and the fate of the disappeared person. States Parties are to take 'appropriate measures' in order to realise this right. The right to know the truth has been recognised in limited circumstances by the three supervisory bodies. One of the questions is whether this right generates obligations of result or of means. The right to know the truth about the fate or whereabouts of the disappeared person should be considered as an obligation of result. The case law of the three supervisory bodies seems to support such an understanding by obliging states to continue the search for the disappeared person as long as his or her whereabouts or fate is not clarified. The case law also shows a tendency towards obliging states to take measures that enable the victims to know the identity of the perpetrators. The assessment of the question whether the state authorities satisfied this obligation focuses on the efforts of the state authorities rather than the outcomes. Another aspect of the right to know the truth is access

54 See Chapter 8 section 6.
55 See Chapter 8 section 5.

to official documentation that sheds light on possible human rights violations. When such access is denied, there should be a review procedure before an independent judicial authority that has the competence to decide whether the denial of access to that information is lawful. When the denied access is ruled unlawful, the information must be released within a reasonable time. In proceedings before the CED, the burden of proof should lie on the state to prove the necessity and proportionality of withholding the requested information.

16) **Only limited amnesties should be considered as being in compliance with the ICPPED. Before the CED considers such limited amnesty laws to be compatible with the ICPPED, it should examine carefully how the interests of the victims, such as the right to know the truth and the accountability of the perpetrators, have been guaranteed.**[56] The compatibility of amnesty laws with human rights law is a controversial issue. Often, amnesties are the result of a balancing act of political interests. As such, it serves the legitimacy of the ICPPED that it does prohibit amnesties *ipso facto*. Nevertheless, the CED will have to exercise close scrutiny on a case-by-case basis whether the state authorities have taken into account the interest of victims in this balancing act. As such, amnesties should go hand in hand with measures to disclose complete and accurate information to the relatives about the enforced disappearance. Additionally, other ways should be explored to hold the perpetrators accountable and to sanction them accordingly, for instance disciplinary sanctions. Moreover, remedies for obtaining compensation and reparation must be available. Despite the case-by-case approach, general amnesties should not be permissible under the ICPPED.

17) **The duty to punish under the ICPPED should include, besides possible criminal punishment, administrative or disciplinary sanctions against the perpetrators so that they are not able to continue in their function as public officials (read into Article 12 ICPPED). Where mitigating circumstances are applied in criminal proceedings, the CED should assess whether the interests of the victims have been adequately protected (Article 7 ICPPED).**[57] Upon examining the experiences of victims, one can conclude that it is important that not only criminal sanctions but also disciplinary measures are instituted against the perpetrators. With respect to criminal punishment, the ICPPED allows mitigating circumstances when a person has contributed to clarifying the truth concerning an enforced disappearance. On the one hand, reduced sentences may indeed facilitate truth-finding. But, on the other hand,

56 See Chapter 8 section 6.
57 See Chapter 8 section 6.

there is a danger that alleged perpetrators only contribute in the process as far as it enables them to escape punishment. Also, the concern has been raised that mitigating circumstances may practically lead to granting pardons. The ICPPED does not explicitly prohibit granting pardons, but upon an examination of the experiences of victims, it is of the utmost importance that the perpetrators are not able to walk around freely without having been held accountable. Hence, one of the additional conditions that should accompany the application of mitigating circumstances is that there is a certain form of accountability of the perpetrators.

18) **The right to reparation (Article 24 ICPPED) should lead the CED to assess whether compensation schemes have been implemented in an adequate and fair manner. Furthermore, eligibility for reparation should not depend on the issuing of death certificates in respect of the disappeared person.**[58] The ICPPED lays down an extensive right to obtain reparation. Important measures to mention are monetary compensation that enables victims to recover lost opportunities due to having been forcibly disappeared or to the efforts put into the search. In addition, acknowledgement of the responsibility of the state and public restoration of the dignity of the victims help to create a supportive environment for victims to come to terms with the consequences of the enforced disappearance. Lastly, attention should be paid to the immense psychological and physical impact on the victims. In this respect, victims should be able to participate in designing the reparation measures. Adequate measures could alleviate the relatives' daily struggle to survive by means of, for instance, the issuing of a certificate of absence/missing, as has been suggested by the ICRC in order for relatives to be able to access bank accounts and, where relevant, to be able to receive pensions.

19) **The obligation to take 'appropriate' measures to investigate crimes similar to enforced disappearance but committed by non-state actors without any involvement of the state and to bring the perpetrators to justice (Article 3 ICPPED) should not lower the standards related to a thorough and prompt investigation.**[59] Article 3 ICPPED obliges States Parties to take appropriate measures to investigate such crimes and to bring the perpetrators to justice. The case law does not substantiate the argument that less stringent requirements apply to the investigation process for crimes committed by non-state actors than to an investigation into alleged crimes perpetrated by state actors. Hence, the standards for the investigation both apply to enforced disappearances as well as to similar acts that are committed by non-state actors without the involvement of

58 See Chapter 8 section 7.
59 See Chapter 8 section 4 and Chapter 9 section 2.

the state. Additionally, the case law supports the conclusion that such perpetrators must be held liable under criminal law. The one aspect concerning which it is questionable whether it applies is the continuous nature of the investigation until the fate or whereabouts of the victim are discovered. Similarly, it is questionable that the right to know the truth applies to victims of this kind of crime. Upon examining the experiences of victims, one can conclude that these two requirements should apply, or at least that the state should do all that is within its powers to satisfy these requirements. Similarly, States Parties should provide effective civil remedies in order for victims to hold the perpetrators liable for compensation.

Samenvatting

Introductie

Op 23 december 2010 is het Internationaal Verdrag inzake de bescherming van alle personen tegen gedwongen verdwijning ('IVBPGV' of 'Verdrag') inwerking getreden. Dit is een mijlpaal waarvoor velen zich met onuitputtelijke inspanning hebben ingezet, onder wie voormalige slachtoffers van gedwongen verdwijning, familieleden van verdwenen personen en hun organisaties en mensenrechtenexperts. Het Verdrag heeft als doel om enerzijds te voorkomen dat staten gedwongen verdwijningen plegen en anderzijds de straffeloosheid van gevallen van deze mensenrechtenschending tegen te gaan.

Het belang van dit internationale instrument is groot. Gedwongen verdwijning is een ernstige mensenrechtenschending waarbij verscheidene niet-opschortbare rechten in het geding zijn. Niet alleen wordt een persoon opgepakt door of met medewerking van de staat, ook is de kans groot op marteling en willekeurige executie. Omdat de staat zijn betrokkenheid bij deze vrijheidsontneming ontkent of weigert daarover informatie te verschaffen, leven familieleden van de verdwenen persoon in een voortdurende staat van onzekerheid, bezorgdheid en angst. De ontkenning en geheimhouding leiden er dan ook toe dat een gedwongen verdwijning een brede kring van personen tot slachtoffer maakt. Daarnaast vergroot deze geheimhouding en ontkenning de kans dat de daders ongestraft blijven. De ernst van het misdrijf gedwongen verdwijning heeft staten er niet van kunnen weerhouden om dit misdrijf te plegen. In 2010 behandelde de *Working Group on Enforced and Involuntary Disappearances* van de Verenigde Naties ('VN') meldingen van gedwongen verdwijning met betrekking tot meer dan 94 landen. Behalve het feit dat gedwongen verdwijning een zeer ernstige mensenrechtenschending is, is het ook een schending waarvoor het vaststellen van staatsaansprakelijkheid complex is. Het gebrek aan bewijsmateriaal, de verschillende fasen van gedwongen verdwijning en de verscheidenheid aan mogelijk betrokken daders maken dat deze schending vele facetten heeft en uitzonderlijk ondoorzichtig is.

De voorliggende studie beoogt bij te dragen aan een beter begrip van de bescherming tegen gedwongen verdwijning in het algemeen. Meer in het bijzonder tracht deze studie een uitleg en een toepassing van het IVBPGV te vinden die aansluit bij de specifieke eigenschappen van deze mensenrechtenschending.

Het IVBPGV: een consoliderend en vernieuwend verdrag

Velen beschouwen het IVBPGV als een overwinning in de strijd tegen gedwongen verdwijningen omdat dit Verdrag recht doet aan de ernst en de complexiteit van deze schending. Hier zijn verscheidene redenen voor. Het Verdrag heeft een belangrijke symbolische waarde. Het juridisch bindende en universele karakter van het Verdrag geeft namelijk de duidelijke boodschap af dat gedwongen verdwijningen, waar ook ter wereld, verboden zijn. Deze symboolwerking wordt versterkt doordat het Verdrag een systematische of wijdverbreide praktijk van gedwongen verdwijningen kwalificeert als een misdaad tegen de menselijkheid. Bovendien is het Verdrag consoliderend en vernieuwend in een drietal belangrijke opzichten.

Ten eerste legt het Verdrag een absoluut en niet-opschortbaar recht vast voor ieder individu om geen slachtoffer te worden van een gedwongen verdwijning. Daarnaast is in het Verdrag een aantal nevenrechten geformuleerd waaronder het recht de waarheid te kennen omtrent de omstandigheden van de gedwongen verdwijning en omtrent de ontwikkelingen van het onderzoek ernaar, en het recht op schadeloosstelling en schadevergoeding. Het begrip 'slachtoffer' is in het Verdrag breed gedefinieerd, zodat deze rechten niet alleen de verdwenen persoon zelf, maar ook diens familieleden toekomen.

Ten tweede zijn de verplichtingen waaraan Verdragspartijen zich verbinden gedetailleerd in het IVBPGV opgenomen. Deze verplichtingen behelzen onder andere het codificeren van het misdrijf gedwongen verdwijning in de nationale rechtsorde, het vervolgen of uitleveren van vermoedelijke daders, het starten van een onderzoek zodra er een melding van een gedwongen verdwijning is gedaan of er aanwijzingen zijn dat een dergelijke misdrijf is gepleegd, het in de wet vastleggen van waarborgen rondom vrijheidsontneming en invrijheidstelling na gevangenschap en het straffen van hinderend gedrag van overheidsfunctionarissen.

Ten derde kent het Verdrag een breed scala aan bevoegdheden toe aan het Comité voor gedwongen verdwijningen ('Comité') dat toeziet op de naleving en tenuitvoerlegging van het Verdrag in de Verdragstaten. Het optionele individueel klachtrecht en de rapportageprocedure geven het Comité de meer gebruikelijke mogelijkheid om staatsaansprakelijkheid voor gedwongen verdwijning vast te stellen. Eén van de innovatieve procedures is de bevoegdheid van het Comité om, op basis van gefundeerde aanwijzingen voor een systematische praktijk van gedwongen verdwijningen, de kwestie onder de aandacht te brengen van de Algemene Vergadering van de VN.

De onderzoeksvraag van de studie

Het uitgangspunt van dit boek is dat de procedure om staatsaansprakelijkheid vast te stellen onder het IVBPGV in lijn gebracht moet worden met de ervaringen van (eerdere) slachtoffers. De onderzoeksvraag van deze studie is als volgt geformuleerd:

'Hoe zou staatsaansprakelijkheid moeten worden vastgesteld onder het IVBPGV op een zodanige manier dat de te bieden bescherming in lijn is met ervaringen van slachtoffers en recht doet aan deze ervaringen?' Tegelijkertijd houdt de benadering van deze studie rekening met de wenselijkheid dat de uitleg en toepassing van het IVBPGV de geloofwaardigheid van het Comité en de bescherming van het IVBPGV moeten dienen. De aanname is dat een uitgebalanceerde benadering de bescherming die dit Verdrag kan bieden, optimaliseert.

Deze studie benadert de onderzoeksvraag vanuit een rechtsvergelijkende analyse van de internationale jurisprudentie inzake gedwongen verdwijning. Mensenrechtenorganen zoals het VN-Mensenrechtencomité ('Mensenrechtencomité'), het Europees Hof voor de Rechten van de Mens ('EHRM') en het Inter-Amerikaans Hof voor de Rechten van de Mens ('IAHRM') hebben al een uitgebreid raster van normen gecreëerd op basis waarvan staten zijn veroordeeld voor gedwongen verdwijning. De voorliggende studie richt zich op de jurisprudentie van deze drie mensenrechtenorganen en, waar nodig, vult deze aan met *soft law* die is ontwikkeld of nog in ontwikkeling is binnen de VN. Vervolgens evalueert de studie de bevindingen van deze analyse in het kader van de ervaringen van slachtoffers. Dit resulteert in aanbevelingen voor de uitleg en toepassing van het IVBPGV door het Comité.

Het kader van de onderhavige studie

Het boek bestaat uit twee delen. Deel I van dit boek zet het kader van het onderzoek uiteen aan de hand van drie hoofdstukken. Het eerste hoofdstuk identificeert de leemtes in het IVBPGV die tot nadere interpretatie of toepassing nopen.

Het tweede hoofdstuk behandelt de gemeenschappelijke noemer voor de vergelijking van de jurisprudentie van het Mensenrechtencomité, het EHRM en het IAHRM met de bescherming die het IVBPGV biedt. Deze vergelijking is niet vanzelfsprekend, omdat de geanalyseerde jurisprudentie haar grondslag vindt in drie verschillende mensenrechtenverdragen die, in tegenstelling tot het IVBPGV, niet expliciet het recht vastleggen om geen slachtoffer te worden van gedwongen verdwijning. Daarom is in de jurisprudentie inzake gedwongen verdwijning door de betreffende rechtsprekende organen gekozen voor een benadering van een meervoudige schending van mensenrechten zoals het recht op leven en het recht op vrijheid. Het is belangrijk om in ogenschouw te nemen dat de rechtsgrondslag van deze verdragen verschilt van die van het IVBPGV. Niettemin zijn de statenverplichtingen die uit de verschillende rechten voortvloeien gelijksoortig van aard. Deze studie identificeert zeven statenverplichtingen die een vergelijking mogelijk maken. Deze zijn: de verplichtingen om niemand bloot te stellen aan gedwongen verdwijning (*to respect*), om misdrijven van gedwongen verdwijning te voorkomen (*to prevent*), een onderzoek ernaar in te stellen (*to investigate*), de (vermoedelijke) daders te vervolgen (*to prosecute*) en te straffen (*to punish*), de slachtoffers schadeloosstelling toe te kennen

(*to provide reparation*) en personen te beschermen tegen eenzelfde soort misdrijven maar dan gepleegd door niet-statelijke actoren (*to protect*).

Het derde en laatste hoofdstuk van dit eerste deel beschrijft ervaringen en leed van slachtoffers van gedwongen verdwijning, zowel van voormalige slachtoffers van deze mensenrechtenschending als van familieleden van verdwenen personen. Vervolgens extraheert de voorliggende studie uit deze beschrijving vijf hoofdoorzaken van het aangedane leed. Deze geven invulling aan de terminologie 'ervaringen van slachtoffers' met het doel de onderzoeksvraag te kunnen beantwoorden. Deze hoofdoorzaken zijn: (1) de verdwenen persoon is spoorloos vanwege de weigering van de staat om de vrijheidsontneming te erkennen of informatie te onthullen; (2) een passieve houding of een dwarsliggen van de autoriteiten om de verdwenen persoon op te sporen of zijn of haar lot op te helderen; (3) *de facto* of *de jure* straffeloosheid; (4) een onveilige omgeving om zoekactiviteiten naar de verdwenen persoon te ontplooien en activiteiten rondom de gedwongen verdwijning uit te voeren; en (5) obstakels voor slachtoffers om hun 'normale leven' weer op te pakken nadat een gedwongen verdwijning is gepleegd. De studie gaat ook in op de maatregelen die een staat kan nemen om deze oorzaken te voorkomen of weg te nemen.

In deel II van dit boek staat de jurisprudentie van het Mensenrechtencomité, het IAHRM en het EHRM centraal. Dit deel onderzoekt aan de hand van de zeven statenverplichtingen in hoeverre de jurisprudentie kan en zou moeten bijdragen aan het vullen van de leemtes in het IVBPGV die in deel I zijn geïdentificeerd.

Definities inzake het fenomeen gedwongen verdwijning

Voorafgaand aan de bespreking van de zeven verplichtingen behandelt deel II een aantal punten inzake de definitie van gedwongen verdwijning. Deze studie gaat uit van de veronderstelling dat een duidelijke afbakening van de reikwijdte van de definitie van gedwongen verdwijning wenselijk is. Het Verdrag definieert 'gedwongen verdwijning' als een vrijheidsontneming door of met machtiging van de staat, steun of bewilliging, gevolgd door een weigering om die vrijheidsontneming te erkennen of om informatie te geven omtrent het feit, de verblijfplaats of het lot van de verdwenen persoon. Het effect hiervan is dat deze persoon buiten de bescherming van de wet wordt geplaatst. Deze studie doet een viertal aanbevelingen met betrekking tot de invulling van de definitie van gedwongen verdwijning op basis van de geanalyseerde jurisprudentie gecombineerd met de ervaringen van slachtoffers. Allereerst moeten, om de ernst van dit misdrijf te waarborgen, korte periodes van niet-erkende vrijheidsontneming niet systematisch vallen onder de definitie van gedwongen verdwijning. Tevens zou 'informatie omtrent het feit' in ieder geval antwoord moeten geven op de vraag of de verdwenen persoon is opgepakt door de staat, wat zijn of haar verblijfplaats is en of hij of zij nog in leven is. Als de persoon is geëxecuteerd moeten familieleden informatie over de locatie van het stoffelijk overschot en, waar

mogelijk, beschikking over het stoffelijk overschot krijgen. Ten derde moet het feit dat de persoon buiten de bescherming van de wet wordt geplaatst als een consequentie van het misdrijf in plaats van een element van de delictsomschrijving worden beschouwd. Als vierde aanbeveling bepleit deze studie dat de ondergrens van de betrokkenheid van de staat, gemarkeerd door de term 'bewilliging', een brede uitleg moet krijgen. De geanalyseerde jurisprudentie doelt met het begrip 'bewilliging' primair op actieve medewerking van de staat. Niettemin bevat de jurisprudentie ook duidelijke aanknopingspunten dat het niet nemen van passende maatregelen door de betrokken staat ter voorkoming dat het identificeerbare risico dat een bepaald persoon loopt om slachtoffer te worden van gedwongen verdwijning zich verwezenlijkt, kwalificeert als 'bewilliging'. De ruimere opvatting van het begrip bewilliging wordt onderschreven door de huidige ontwikkelingen binnen de VN met betrekking tot andere mensenrechten. Deze opvatting voorkomt dat de staat oogluikend toe kan laten dat het misdrijf van gedwongen verdwijning wordt gepleegd. Wel verzet een contextuele uitleg van het Verdrag zich tegen een te ruime uitleg van dit begrip: het puur en alleen nalaten te onderzoeken of te vervolgen van niet-statelijke actoren valt niet onder de definitie van gedwongen verdwijning.

Als de gedwongen verdwijning op systematische of wijdverbreide schaal wordt gepleegd kwalificeert dit misdrijf volgens het Verdrag als een misdaad tegen de menselijkheid. De EHRM- en IAHRM-kaders bieden duidelijke criteria om een dergelijke praktijk vast te stellen. Die criteria komen neer op het bestaan van een patroon van herhaalde misdrijven van gedwongen verdwijning en het gedogen door de staat hiervan. Een toepassing van deze criteria door het Comité is aan te bevelen.

In de bovenstaande paragrafen is reeds gesproken over het begrip 'slachtoffer'. In deze studie rijst vanzelfsprekend de vraag wie er zou moeten worden aangeduid met deze term. Het Verdrag geeft een ruime opvatting van het begrip 'slachtoffer', namelijk: eenieder die 'rechtstreeks ten gevolge van een gedwongen verdwijning nadeel ondervonden heeft'. Op basis van de jurisprudentie en de ervaringen van slachtoffers onderscheidt deze studie een viertal factoren die nadere invulling zouden moeten geven aan dit begrip: (1) de familieband of een door omstandigheden hecht gebleken relatie van iemand met de verdwenen persoon; (2) de mate waarin iemand is blootgesteld aan afwijzend of bedreigend handelen van de staat wanneer een melding van gedwongen verdwijning is gemaakt; (3) de betrokkenheid van iemand bij de zoektocht naar de verdwenen persoon; en (4) het effect van de gedwongen verdwijning op de gezondheid en het privéleven van de persoon zelf of van zijn of haar familie.

De onthoudingsverplichting: het verbod op het plegen van gedwongen verdwijning

Na de cruciale punten inzake de definitie van gedwongen verdwijning in kaart te hebben gebracht, richt het boek zich op de verplichting die op Verdragstaten rust om geen inbreuk te maken op het recht niet slachtoffer te worden van gedwongen verdwijning. De bespreking van deze verplichting gaat ten eerste in op de verschillende vormen van de betrokkenheid van de staat en, in het bijzonder, de reikwijdte van het begrip 'bewilliging', zoals hiervoor besproken. Daarnaast behandelt deze studie de manier waarop het Mensenrechtencomité, het IAHRM en het EHRM met bewijsregels zijn omgegaan om de betrokkenheid van de staat vast te stellen. Doorgaans betwist de verwerende staat de aantijgingen van gedwongen verdwijning door te ontkennen dat de persoon in haar handen is. Tevens is het slachtoffer zelf in de meeste gevallen niet in staat om te getuigen, want verdwenen, en is ander direct bewijsmateriaal vaak niet voorhanden. Daarnaast beschikt alleen de staat over het weinige of enige bewijsmateriaal en geeft dit niet vrij. De analyse van de jurisprudentie leidt tot een aantal aanbevelingen, waarvan de volgende drie de hoofdpunten raken.

Ten eerste zou het Comité duidelijke en transparante regels moeten vaststellen omtrent de bewijslast en de bewijsstandaard. Deze regels moeten de inherent nadelige bewijspositie van klagers in acht nemen. Dit betekent dat voldoende zwaarwegende, duidelijke en overeenstemmende aanwijzingen of gelijkwaardige niet weerlegde feitelijke vermoedens voldoende bewijs zouden moeten zijn om een *prima facie* zaak aan te voeren. Het is dan vervolgens aan de staat om deze *prima facie* zaak met specifieke inlichtingen en bewijsmateriaal te weerleggen. Een dergelijke bewijslastverdeling kan ook worden aangenomen wanneer vast komt te staan dat sprake is van een systematische praktijk van gedwongen verdwijning, en vervolgens de klager het individuele geval met indirect bewijs aan deze praktijk kan koppelen. Voor de geloofwaardigheid van het Comité is van belang dat het een duidelijke en expliciete motivering van de beoordeling en weging van het bewijs geeft. Ten slotte is van belang dat het Comité naar manieren zoekt om de geloofwaardigheid van getuigen te toetsen, aangezien getuigenverklaringen vaak een centrale rol in deze procedures spelen.

De positieve verplichting om gedwongen verdwijning te voorkomen

Behalve dat Verdragspartijen het verbod op gedwongen verdwijning dienen te respecteren, zijn zij gebonden aan een aantal verplichtingen ten aanzien van de preventie van deze mensenrechtenschending. In deel II van deze studie wordt gekeken naar waarborgen rondom de detentie van personen zoals informatie over gevangenen en hun recht om te communiceren met familieleden en hun raadsman. Het betreft waarborgen ter voorkoming dat iemand in een net van geheime gevangenschap verstrikt raakt. Deze studie onderzoekt hoe de beperkingen op toegang tot informatie, die het

Verdrag toestaat, uitgelegd zouden moeten worden. Hetzelfde geldt voor het recht van gedetineerden om te communiceren met de buitenwereld. Volgens het Verdrag mag informatie en communicatie alleen worden beperkt als de arrestatie en gevangenschap rechtmatig is uitgevoerd. De bestaande jurisprudentie en tendensen binnen de VN wijzen bijvoorbeeld uit dat de norm hierbij is dat een gedetineerde in ieder geval binnen vier dagen en zes uur toegang tot een rechter moet krijgen en onverwijld contact met een advocaat mag hebben. Het EHRM heeft gesteld dat dit contact in principe mogelijk moet zijn vanaf het moment van het eerste politieverhoor. Met behulp van de bestaande jurisprudentie en VN-*soft law,* gecombineerd met de ervaringen van slachtoffers, doet deze studie de aanbeveling dat de staat aan familieleden en andere personen die anders binnen het slachtofferbegrip van het IVBPGV zouden vallen, altijd antwoord moet geven op de vraag of een persoon door of met medewerking van de staat is gedetineerd en op de vraag of de persoon levend is of is geëxecuteerd. Een aanvullende aanbeveling is dat als de staat de toegestane beperkingen op de toegang tot informatie toch oplegt, zij moet bewijzen dat, gezien de urgentie van de situatie, deze maatregelen in verhouding staan tot het belang van de slachtoffers.

De studie behandelt tevens een ander punt met betrekking tot detentiewaarborgen, namelijk de mogelijkheid om een rechter te vragen de rechtmatigheid van een detentie te toetsen. Deze rechtsfiguur is vaak het enige middel om door een onafhankelijke persoon te laten uitzoeken of degene die verdwenen is, zich in de handen van de staat bevindt. De studie komt tot de aanbeveling dat het Comité strikt moet toetsen of rechters zorgvuldig, prompt en doortastend hebben gehandeld om de verdwenen persoon te lokaliseren.

Bij de bespreking van de verplichting om te voorkomen dat overheidsfunctionarissen het misdrijf gedwongen verdwijning plegen, wordt ook een criminologisch perspectief betrokken. De gebruikte modellen uit de criminologie worden in detail besproken in deel I van het boek wanneer de maatregelen uiteen worden gezet die bijdragen aan het voorkomen of wegnemen van de oorzaken van het leed van slachtoffers. Deze modellen zijn gericht op het verklaren van misdaad die van staatswege is gepleegd. Zij tonen verscheidene maatregelen aan die een afschrikkende werking hebben op vertegenwoordigers van de staat om misdrijven te plegen. Drie zijn in het bijzonder van belang voor deze studie: wetten die gedwongen verdwijning strafbaar maken, een adequate wetshandhaving en gedragscodes en training van wetshandhavingsfunctionarissen en rechterlijke ambtenaren. Ten slotte laten deze modellen zien dat non-gouvernementele en maatschappelijke organisaties ('Ngo's') een goede waakhondfunctie hebben om misstanden binnen de overheid aan de kaak te stellen en op deze manier bij te dragen aan het afschrikken van dit soort misdrijven. Het Verdrag verplicht deze maatregelen of biedt ruimte om deze maatregelen af te leiden uit haar bepalingen. De verplichting om het misdrijf van gedwongen verdwijning strafbaar te stellen in het nationale strafrecht is expliciet in het Verdrag neergelegd. Op

basis van de jurisprudentie van het IAHRM en de ervaringen van slachtoffers komt onderhavige studie tot de conclusie dat deze verplichting betekent dat de strafbaarstelling een autonoom delict vereist met een ononderbroken karakter. Daarnaast moet de delictsomschrijving in overeenstemming zijn met de definitie in het Verdrag. Gedragscodes, bijvoorbeeld omtrent het verwerken van meldingen van gedwongen verdwijning en de omgang met informatie gegeven door familieleden van vermoedelijke slachtoffers, komen niet als zodanig in het Verdrag of in de jurisprudentie voor. Toch laat het onderhavige onderzoek zien dat zij goed in te passen zijn in de uitleg van een aantal bepalingen in het Verdrag. Met betrekking tot de rol van Ngo's bespreekt deze studie de maatregelen die zouden moeten worden getroffen ten aanzien van staatsfunctionarissen die activiteiten van Ngo's hinderen en de toegang belemmeren tot informatie en inlichtingen over het misdrijf.

Het laatste punt ten aanzien van preventie waaraan dit onderzoek aandacht besteedt, betreft de veiligheid van familieleden, getuigen en andere betrokkenen zoals raadsmannen van slachtoffers. Uit de jurisprudentie blijkt dat staten wel degelijk aansprakelijk gesteld kunnen worden wanneer ze geen bescherming bieden bij meldingen van intimidatie of bedreiging door staatsfunctionarissen of wanneer ze zelfs sancties opleggen aan melders of andere betrokken personen. Het Verdrag verbiedt dergelijk gedrag van de staat expliciet. Het IAHRM is nuttig gebleken voor zijn hantering van een vergaande toetsing van de vraag of de geboden getuigenbescherming of bescherming van familieleden in overleg met de betreffende personen is gebeurd. Op grond van de ervaringen van slachtoffers is het belangrijk dat de onafhankelijkheid van de uitvoerende ambtenaren ten opzichte van de vermeende daders is gegarandeerd.

De positieve verplichting om een onderzoek in te stellen

Mocht het toch zo zijn dat een melding van een gedwongen verdwijning wordt gemaakt, dan verplicht het IVBPGV Verdragspartijen om onverwijld deze melding te bestuderen en, waar nodig, een onderzoek in te stellen. Dit onderzoek moet onverwijld gestart worden, grondig zijn en onpartijdig worden uitgevoerd. De onderhavige studie gaat na hoe aan deze criteria invulling zou moeten worden gegeven. De geanalyseerde jurisprudentie vereist bijvoorbeeld dat alle beschikbare middelen worden ingezet om de verdwenen persoon te lokaliseren. Tevens mag het onderzoek niet worden gestaakt totdat de verblijfplaats of het lot van de verdwenen persoon is opgehelderd. Dit betekent ook dat een aantal cruciale stappen moet zijn gezet in de eerste paar dagen nadat de autoriteiten op de hoogte zijn gesteld of behoren te weten van een mogelijke verdwijning. Deze stappen omvatten onder andere het horen van de klager en andere mogelijke getuigen, het bezoeken van mogelijke detentiecentra en het checken van de gevangenisregisters. Het IVBPGV wijdt ook twee bepalingen aan internationale samenwerking. De studie kijkt, aan de hand van de bestaande

jurisprudentie en VN-*soft law,* naar een mogelijke invulling van de verplichting om op internationaal niveau samen te werken.

Mocht het ingestelde onderzoek uiteindelijk leiden tot de conclusie dat de verdwenen persoon niet meer in leven is, dan stelt het Verdrag de verplichting dat het stoffelijk overschot op adequate wijze bij de familieleden terechtkomt. Op grond van de ervaringen van slachtoffers concludeert de studie onder andere dat het identificatieproces omringd moet zijn met waarborgen en dat het in nauw overleg met de familieleden moet worden uitgevoerd.

De positieve verplichting om de vermoedelijke daders te vervolgen

Als een onderzoek leidt tot aanwijzingen dat een of meerdere overheidsfunctionaris(sen) mogelijk betrokken zijn bij het misdrijf van gedwongen verdwijning, dan rust er op Verdragspartijen de verplichting om deze persoon of personen te vervolgen. Politiek gevoelige kwesties zijn buiten het Verdrag gebleven, omdat hierover bij het opstellen ervan geen consensus kon worden bereikt. Het Verdrag rept bijvoorbeeld niet over de vraag in hoeverre rechtsfiguren zoals amnestie- of gratieverlening in overeenstemming met het Verdrag zijn. Ook schort het in het Verdrag aan een duidelijke positiebepaling ten aanzien van de geschiktheid van militaire tribunalen als bevoegd forum om gedwongen verdwijningzaken te behandelen. Uit de rechtsvergelijking van de jurisprudentie blijkt dat de verplichting om te vervolgen een inspanningsverplichting is. Bij het toetsen of aan deze verplichting is voldaan wordt gekeken naar de effectiviteit van de strafrechtelijke procedures. Het IAHRM weegt daarbij de resultaten van het strafrechtelijk onderzoek en de eventuele daaraan verbonden vervolging mee als indicatoren voor de effectiviteit. Andere indicatoren die uit de jurisprudentie kunnen worden afgeleid zijn: of de strafrechtelijke procedures voldoende openbaar en controleerbaar zijn; of de mogelijkheid om een onderzoek in te stellen überhaupt aanwezig is; of de strafrechtelijke procedures door een onafhankelijk en onpartijdig orgaan binnen een redelijke termijn zijn afgerond; en of de rechter het bewijs op een zorgvuldige manier heeft gewogen. De laatstgenoemde indicator is van belang omdat ervaringen van slachtoffers leren dat het dikwijls onzuivere en onzorgvuldige bewijswaarderingen zijn die tot *de facto* straffeloosheid leiden. Het is aan te bevelen dat het Comité een gelijksoortige toets hanteert. De onderhavige studie doet een tweetal aanvullende aanbevelingen. Ten eerste zouden militaire tribunalen geen bevoegdheid moeten hebben over het misdrijf gedwongen verdwijning. Ten tweede zouden algemene amnestiewetten niet in overeenstemming moeten worden geacht met het IVBPGV. Dergelijke rechtsfiguren die beperkte reikwijdte hebben zouden onder bepaalde omstandigheden moeten worden toegestaan mits aan de voorwaarde is voldaan dat de belangen van slachtoffers zijn gerespecteerd. Denk hierbij onder andere aan het recht om de waarheid te kennen en enige vorm van aansprakelijkheid van de daders.

Zoals in de vorige paragraaf is aangegeven, is het recht om de waarheid te kennen een belangrijk recht voor slachtoffers. Dit recht is dan ook neergelegd in het Verdrag. Ook in de jurisprudentie wordt in toenemende mate geaccepteerd dat slachtoffers van gedwongen verdwijning het recht hebben om de waarheid te kennen. Deze studie concludeert dat het van belang is voor de invulling van dit recht om onderscheid te maken tussen enerzijds het opsporen van de verdwenen persoon of het onthullen van zijn of haar lot en anderzijds het onthullen van de waarheid omtrent de omstandigheden van de gedwongen verdwijning zoals de identiteit van de daders. Het eerste aspect zou een resultaatsverplichting moeten zijn, terwijl het tweede aspect een inspanningsverplichting zou moeten zijn. De bestaande jurisprudentie biedt tevens aanknopingspunten om te concluderen dat aan het recht om de waarheid te kennen ook een recht op toegang tot informatie kleeft. Mocht dergelijke toegang zijn geweigerd door de staat dan moet er, volgens het IAHRM, een duidelijke en onafhankelijk procedure zijn om deze beslissing tot weigering te toetsen. Daarnaast zou in internationale procedures de bewijslast bij de staat moeten liggen om aan te tonen dat de weigering noodzakelijk was en in verhouding stond met het belang van het slachtoffer.

De positieve verplichting om de daders te straffen en de slachtoffers schadeloos te stellen

Als een overheidsfunctionaris schuldig is bevonden aan het misdrijf gedwongen verdwijning, dan verplicht het Verdrag de betrokken staat om deze functionaris een passende straf op te leggen en de slachtoffers te compenseren. Op grond van aanknopingspunten in de jurisprudentie en aan de hand van de ervaringen van slachtoffers concludeert de studie dat de straf niet alleen strafrechtelijk maar ook administratief van aard moet zijn. Het is belangrijk dat de eventuele daders niet in functie blijven. Ook gaat de studie in op de mogelijkheid die het Verdrag aan de staat biedt om verzachtende omstandigheden te overwegen. Deze rechtsfiguur kan wel degelijk helpen om de waarheid boven tafel te krijgen, maar het zou niet moeten leiden tot de situatie dat de daders vrijuit gaan zonder enige verantwoording af te leggen. Het recht op schadeloosstelling zou moeten leiden tot een toetsing of de compensatieregeling is uitgevoerd op een eerlijke en zuivere manier. Ook mag het uitgeven van een overlijdensakte van de verdwenen persoon niet een voorwaarde zijn die is verbonden aan het toekennen van schadevergoeding. Het is wel aan te raden dat aktes van afwezigheid aan familieleden het recht geven op pensioen en toegang tot bankrekeningen, mocht dat nodig zijn.

De positieve verplichting om bescherming te bieden tegen misdrijven gepleegd door niet-statelijke actoren

Als laatste gaat het boek in op de verplichting die op Verdragspartijen rust om een onderzoek in te stellen als een verdwijning wordt gemeld maar de vermoedelijke daders individuen zijn die zonder betrokkenheid van de staat hebben gehandeld. De jurisprudentie laat zien dat de maatstaven waaraan het onderzoek in dergelijke gevallen moet voldoen gelijk moeten zijn aan de criteria voor het onderzoek naar een gedwongen verdwijning. Het is echter niet eenduidig aan te geven of het recht om de waarheid te kennen en de voortdurende verplichting om te onderzoeken van toepassing zijn op dit soort situaties. Deze twee kwesties zouden in ieder geval inspanningsverplichtingen met zich mee moeten brengen. Als laatste is van belang dat slachtoffers ook in dit soort situaties de mogelijkheid hebben om schadevergoeding van de daders te vorderen.

Tot slot

Concluderend valt op te merken dat de bescherming tegen gedwongen verdwijning een snel ontwikkelend rechtsgebied is. Deze studie tracht de verschillende rechtsprekende mensenrechteninstanties samen te brengen zodat zij elkaar kunnen inspireren en versterken. Het einde van dit onderzoek betekent echter niet dat de jurisprudentie stilstaat. Nieuwe ontwikkelingen zullen altijd weer in het licht van de ervaringen van slachtoffers moeten worden bezien. Daarnaast moet in ogenschouw worden genomen dat de onderhavige studie de ervaringen van slachtoffers in een model heeft gegoten. Elke zaak en elke ervaring zal uniek en specifiek zijn, vooral omdat gedwongen verdwijning helaas in vele verschillende contexten en culturen voorkomt. Het is daarom van belang om elke zaak opnieuw zorgvuldig te bekijken en om te handelen in lijn met de ervaringen van de personen die met de nadelige gevolgen van een gedwongen verdwijning worden geconfronteerd.

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Curriculum Vitae

Marthe Lot Vermeulen was born in Utrecht on 6 August 1979. She attended the Christelijk Gymnasium in Utrecht in 1992 followed by the United World College in New Mexico, U.S.A., from 1996 to 1998, where she obtained her International Baccalaureate Diploma. In 2001, she graduated *cum laude* from University College Utrecht with a Bachelor degree in Social Sciences. In 2003 she obtained her LL.M degree in International Human Rights Law, with distinction, from the University of Essex. After having received her Masters degree, Marthe Lot interned at two London-based human rights NGOs, Redress and the Aire Centre. She then returned to the Netherlands, and became executive secretary of the Dutch section of the International Commission of Jurists (NJCM) and managing editor of its academic journal NJCM-*Bulletin*. She also worked for Aim for Human Rights as project officer for the project 'Human Rights and Anti-Terrorism Legislation'. At the same time, Prof. Jenny Goldschmidt and Marthe Lot successfully applied for a grant of the Netherlands Organisation for Scientific Research (NWO) to conduct PhD research on the protection from enforced disappearance. She started working at the Netherlands Institute of Human Rights (SIM) in 2006 as a PhD candidate. Alongside her academic research, she was a co-lecturer of the course Comparative Human Rights Law at the University of Utrecht and supervised students participating in the Law Clinical Programme on Conflict, Human Rights and International Justice. She was also a visiting lecturer at Ghent University and the University of Essex. In addition, she held a Visiting Professional position at the Inter-American Court of Human Rights and a significant part of her research was conducted in Argentina. In 2010, she obtained her LL.B in Dutch law (*cum laude*).

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