

Putting in place processes and mechanisms to prevent and eradicate enforced disappearances around the world

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1 Introduction

On Monday 15 July 2013 the United Nations (UN) Working Group on Enforced or Involuntary Disappearances (Working Group) held a commemorative event at the opening of its 100th session at UN Headquarters in New York. The Working Group was established in 1980 and holds three sessions a year. It had by then held one hundred sessions over its thirty-three years of existence. At the event, it was noted that enforced disappearances are not a crime of the past; they remain a phenomenon that continues to affect all regions of the world. The Working Group called for new strategies to tackle enforced or involuntary disappearances and highlighted the impunity that prevails for this crime globally.

The on-going and large-scale practice of enforced disappearance occurs despite the efforts of families of disappeared persons, NGOs, states, regional human rights systems, the UN and others to address the scourge of disappearances.¹ The statistics reveal a disturbing global phenomenon of governments around the world disregarding human rights norms to oppress societal opposition.² While it is difficult to assess how many people have been disappeared in the recent past, the numbers run into hundreds of thousands.³

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¹McCrary 'The International Convention for the Protection of All Person from Enforced Disappearance' (2007) 7 *Human Rights Law Review* 545.

²Punyasena 'The façade of accountability: Disappearances in Sri Lanka' (2003) 23 *Boston College Third World Law Journal* 116.

³See Scovazzi and Citroni *The struggle against enforced disappearance and the 2007 United Nations Convention* (2007) 17.

From its inception in 1980, until 2013, the Working Group has been seized with some 54 000 individual cases of enforced disappearance. Approximately 10 000 of these cases have been resolved over the thirty-odd years.

For the victims and their families, enforced disappearances are particularly horrific as they ‘serve as a double form of torture, in which victims are kept ignorant of their own fates, while family members are deprived of knowing the whereabouts of their loved ones’.⁴

The ‘war on terror’ saw a significant increase in the practice of enforced disappearance around the world. The UN ‘Secret Detention Study’ demonstrated that the practice of secret detention was widespread, involved some sixty countries in various roles, and was reinvigorated by the ‘war on terror’.⁵ While such practices were believed to occur only in non-democratic and authoritarian states, which was largely the trend before 2001, after the events of 9/11 even democratic countries became involved in these practices.⁶ Therefore, the first half of the first decade of the twenty-first century saw a serious undermining of the very fabric of both international human rights law and the rule of law, which has had a further negative effect as other countries have begun to replicate certain of these practices.⁷ In this regard new patterns and problems connected to the ‘war on terror’ have emerged in the area of enforced disappearances.

The United States (US) has been directly responsible for enforced disappearances through the use of extraordinary rendition, ‘black sites’ or secret prisons, and improper registration of detainees in conflict zones, all of which amount to disappearances. Detainees have been held while information is withheld from their family and friends,⁸ and even from the International Committee of the Red Cross. Detainees have been taken to the Guantanamo Bay detention centre, transferred to secret CIA detention centres, and unlawfully transferred to secret detention venues in other countries.⁹

⁴Punyasena n 2 above 117.

⁵See ‘Interview with UN Working Group on Enforced or Involuntary Disappearances Chair-Rapporteur Jeremy Sarkin on the Secret Detention Study’ (2011) *Essex Human Rights Review* 57-67.

⁶As above.

⁷As above.

⁸Robins ‘A participatory approach to ethnographic research with victims of gross human rights violations: Studying families of the disappeared in postconflict Nepal’ in Ozerdem and Bowd (eds) *Participatory research methodologies in development and post disaster/conflict reconstruction* (2010) 181.

⁹Amnesty International ‘Pakistan: At least 485 victims of enforced disappearance’ (2007) November AI Index: UA 304/07.

In 2002, the UN Working Group on Arbitrary Detention (WGAD) launched an investigation into the prisoners held by the US in Guantanamo Bay.¹⁰ The group requested access to the prison, but this was denied. However, the US government did answer a list of questions that the WGAD submitted. In 2006, the WGAD used these responses to issue a report that the detainees at Guantanamo Bay were being held arbitrarily in violation of international law. Enforced disappearances, arbitrary detention, and summary executions are thus closely related, and it is only the actual facts of what happened which determine which crime was committed, or at what point a specific individual suffered what violation.

The growth of the practice during processes to counter terrorism aside, disappearances also occur around the world at an alarming rate. Thousands of people disappear each year, although for various reasons many cases are not reported to the international mechanisms and sometimes, not even noted domestically.

This article reviews the historical background to the crime of enforced disappearance, reviews its development in international law, and examines what needs to be done to prevent and eradicate the use of enforced disappearance around the world. The argument is that while enforced disappearance is seen by many as a crime of the past, it continues unabated and a lot more needs to be done to rout out the practice. The article makes a variety of suggestions on what can and should be done by a range of different actors at international, regional and domestic levels, to prevent disappearances occurring. It also makes suggestions about what should be done to assist those who have suffered the fate of being disappeared and their families.

2 Understanding what constitutes an enforced disappearance

Enforced disappearance typically involves the arrest or detention of an individual, usually a perceived or actual political opponent, by members of a state-sponsored military group. The individual is then either killed and his body secretly disposed of, or the government authorities deny of any knowledge of the victim's arrest, whereabouts or condition.

The first step in an enforced disappearance is often when an armed group of

¹⁰Genser and Winterkorn-Meikle 'The intersection of politics and international law: The United Nations Working Group on Arbitrary Detention in theory and in practice' (2008) 39 *Columbia Human Rights Law Review* 713.

people arrive at the home of their victim, driving unmarked vehicles¹¹ and wearing civilian clothes or military or police uniforms. On occasion they may even wear uniforms or clothing aimed at confusing the victim and neighbours into thinking that a rival faction is responsible for the abduction. The person is then either killed and the body disposed of in a place where it will not be found, or he or she is taken to an unknown location.

Enforced disappearances are, by their very nature, shrouded in secrecy. State authorities will often deny that the individuals are being held in their custody,¹² or the authorities may block access to information by labelling it ‘classified’ in the interest of state security.¹³ Since many of the acts are carried out in secret, facts remain shrouded in mystery and perpetrators can usually not be held accountable. Perpetrators may withhold information or dispose of the victim’s body in a way that ensures that his or her identity can never be established in order to escape reprisal since the statute of limitations, depending on the jurisdiction, may run out long before the facts can be established.

The crime of enforced disappearance is made up of four elements:

- the individual is deprived of his or her liberty;
- by state forces, or with the support or acquiescence of the state;
- which denies or refuses to acknowledge the fate or whereabouts of the individual;
- which, in turn, places the individual outside the protection of the law.¹⁴

The denial of the fate and knowledge of the whereabouts of the individual may continue for a period or even indefinitely. While the individual may have been captured and summarily executed shortly after having been taken, so long as the state refuses to acknowledge his or her detention or reveal his or her fate, the enforced disappearance legally speaking continues. The detained individual’s friends and family are kept in the dark and live in a state of fear, confusion and anxiety over what has happened to their loved one. For as long as information regarding the disappeared individual’s fate and whereabouts is withheld, the crime continues.¹⁵

¹¹Scovazzi and Citroni (n 3 above) 8.

¹²Berman and Clark ‘State terrorism: Disappearances’ (1982) 13(3) *Rutgers Law Review* 533.

¹³Maogoto ‘Now you see, now you don’t: The state’s duty to punish disappearances and extra-judicial executions’ (2006) *Austin International Law Journal* 176.

¹⁴International Convention for the Protection of All Persons from Enforced Disappearance, GA res 61/77, art 1.1, UN Doc A/RES/61/77 (20 December 2006).

¹⁵See Sarkin ‘Enforced disappearance as continuing crimes and continuing human rights violations’ in McGonigle Leyh *et al* (eds) *The realization of human rights: When theory meets practice* (2013) 389.

Enforced disappearances often occur during political unrest and often form part of state policy. They are also often perpetrated to spread general fear, terror, intimidation and uncertainty throughout the society in question. They are therefore a tool by which to coerce the citizens of a state and to deter those who may be inclined to speak out against, or criticise, those in power. The act is a form of social repression, as fear of the unknown will surely deter any person from even thinking something that could draw the attention to those who may accuse him or her of being critical of the ruling regime.

For a repressive regime, an enforced disappearance serves a number of purposes. It allows dictators to dispose of an opponent without a lengthy political process and by not publicly killing an opponent, the regime decreases the risk of creating a martyr for its opponents. Enforced disappearance targets the family of the disappeared individual as well as the individual himself. The family is terrorised by having to live every day not knowing whether or not their loved one is dead or alive.¹⁶ It has been noted that ‘disappearing a person is the most blatant form of atrocity by deception, with the obvious intent to lie, hide, and conceal’.¹⁷ It is therefore vitally important that states investigate and prosecute those responsible for causing enforced disappearances to foster a sense of credibility and trust between citizenry and government.

One of the greatest problems of enforced disappearances is that many perpetrators are never brought to book and enjoy impunity. Since many of the acts are carried out secretly, facts do not become known and perpetrators cannot be held accountable. Additionally, impunity is often perpetuated by immunity or amnesty laws. As a result, in many regions the perpetrators continue to hold powerful positions, preventing the truth from coming out and denying victims a remedy.

3 The origins of the systematic use of enforced disappearance

The term ‘disappeared’ first emerged as a description of victims of state-sanctioned abductions coupled with the denial of the person’s detention in the mid-1960s. The term ‘disappeared’ or the word ‘disappearance’ comes from the Spanish term *desaparecido*, which was used to describe the victims of the practice employed by Guatemalan death squads who abducted and assassinated anti-government forces.¹⁸ The phrase ‘enforced disappearance’ comes from the Spanish *desaparacion forzada*, which was first used by Latin American NGOs around the same time.

¹⁶Berman and Clark n 12 above 532.

¹⁷Hayner *Unspeakable truths: Facing the challenge of truth commissions* (2002) 27.

¹⁸Berman and Clark n 12 above 531.

The origin of the use of enforced disappearance as a practice does, however, not stem from the Latin American experience. Although there were disappearances before 1941, Hitler's 'Night and Fog Decree' openly called for deportation and restricted information about those deported. While disappearances occurred during the Nazi era as people were sent to the gas chambers and killed in a variety of other ways, many other authoritarian regimes – such as Stalin's Russia – locked individuals in prisons without legal process or any notification to their families. The Night and Fog Decree explicitly restricted information on the fate and whereabouts of the victims as part of the policy.¹⁹ Under this Decree, thousands of perceived members of resistance movements in occupied territories, said to endanger German security, were arrested and secretly transferred to Germany.²⁰ The victims' families and the public at large were denied any information as to their fate or whereabouts. Victims were transferred to Germany where they were held incommunicado in inhumane conditions.²¹ Secret trials were held without due process. Victims could not introduce evidence, confront witnesses testifying against them, receive legal representation, or be informed of the charges against them. Often the victims were sentenced to death. By secretly transporting the individuals while keeping relatives and friends in the dark as to what had happened, Hitler intended to spread terror and suppress dissent. He believed the most effective deterrent to political opposition and resistance movements was through the imposition of the death penalty, or by secretly deporting the individuals in order to create a state of fear among relatives and friends. Wilhelm Keitel, Chief of High Command of German Armed Forces, was instructed to implement the Decree and explained its purpose by stating

... penal servitude or even a hard labor sentence for life will be regarded as a sign of weakness. An 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.²²

At the International Military Tribunal at Nuremberg the Nazi's use of enforced disappearances was condemned. The Tribunal observed that the Nazis used the legal process through the Decree to implement a governmentally organised

¹⁹Vranckx *A long road towards universal protection against enforced disappearance* International Peace Information Service (2007) 3.

²⁰Anderson '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 *Melbourne Journal of International Law* 248.

²¹As above.

²²Maogoto n 13 above 179 quoting the International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945 to 15 October 1946 vol 1 (1947-1949, Nuremberg, Germany) 273.

system of cruelty and injustice. The Nazis were seen to have ‘distorted and perverted legal equity’ by disavowing legal processes and safeguards in the execution of the Night and Fog Decree.²³

Subsequent to the Nazi experience, enforced disappearances became a rampant and systematic state practice in Latin America from the late 1960s until the early 1980s. The practice seemingly began in Guatemala and Brazil in the 1960s and early 1970s. Governments in Latin America would routinely abduct or arrest people, hold them in secret prisons, subject them to torture in order to extract information, and finally execute them without trial. The bodies would then frequently be hidden or destroyed in order to eliminate any evidence of the person’s detention.²⁴

The practice also occurred in other Latin American countries including Peru, El Salvador, Colombia, Uruguay and Honduras. Some 40 000 people disappeared in Guatemala while the National Commission for Truth and Reconciliation Report (Rettig Report) determined that over 2 500 people disappeared in Chile under the military rule of Augusto Pinochet. Between 1976 and 1983, thousands of Argentinian citizens disappeared under the military ‘junta’ operating at the time.²⁵ In El Salvador, there were reports of between 7 000 and 20 000 people who were victims of disappearances, torture, rape, and murder in the 1980s.²⁶

Disappearances have, however, not been limited to Latin America. The practice has occurred in at least ninety countries in all regions of the world. Following the Cold War, disappearances occurred in Azerbaijan, Georgia, Tajikistan, and the former Yugoslavia.²⁷ Amnesty International has estimated that over a four-month period during 1988 approximately 100 000 Kurdish people disappeared in Iraq under ‘Operation Anfal’.²⁸ In Sri Lanka, there has been widespread use of the practice, including allegations of massive numbers of disappearances at the end of the war in 2009. At least 17 000 Islamists disappeared in Syria in the late 1970s and early 1980s.²⁹ It has further been estimated that thousands of disappearances have occurred recently in Syria,³⁰ while in Algeria, thousands are

²³Maogoto n 13 above 181.

²⁴Anderson n 20 above 248.

²⁵Lewis *Guerrillas and generals: The dirty war in Argentina* (2002).

²⁶As above 39.

²⁷Maogoto n 13 above 182.

²⁸Anderson n 20 above 249.

²⁹Amnesty International ‘Enforced Disappearance Annual Report 2008’ <http://amnesty.org/en/enforced-disappearances/annual-report-2008>.

³⁰7th Report of the UN Report of the independent international commission of inquiry on the Syrian Arab Republic – A/HRC/25/65 12 February 2014 available at <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>

said to have disappeared.³¹ In Chechnya, human rights groups estimate that thousands have been disappeared since 1999.³²

4 Enforced disappearance as a violation of human rights and international law

An enforced disappearance is described as ‘a grave and abominable offense against the inherent dignity of the human being’³³ and ‘one of the gravest crimes that can be committed against a human being’.³⁴ It has also been described as a ‘particularly heinous violation of human rights’,³⁵ a ‘grave and complex phenomenon’,³⁶ and an ‘offence to human dignity’.³⁷ It has further been argued that:

The phenomenon of forced disappearance [...] is the worst of all human rights violations. Indeed, it is a challenge to the very concept of such rights, the negation of the right of a human being to exist, to have an identity. Forced disappearance transforms the being into a non-being. It is the ultimate corruption, an abuse of power which allows the authorities to transform law and order into something derisory and to commit infamous crimes.³⁸

An enforced disappearance is recognised as an international crime and a wrongful act by international customary law, treaties, and jurisprudence. Because of its continuous and multi-offensive nature, as well as to the multiplicity of victims, enforced disappearance requires a *sui generis* regime and constitutes *per se* a violation of numerous human rights.³⁹ The prohibition of enforced disappearance and the corresponding obligation to investigate and punish those responsible, has attained the status of *ius cogens*.⁴⁰

³¹Human Rights Watch ‘Algeria: Amnesty law risks legalizing impunity for crimes against humanity’ 13 April 2005 http://www.hrw.org/en/news/2005/04/13/algeria-amnesty-law-risks-legalizing-impunity-crimes-against-humanity?print_

³²Human Rights Watch ‘Chechnya: “Disappearances” a crime against humanity’ 20 March 2005 <http://www.hrw.org/en/news/2005/03/20/chechnya-disappearances-crime-against-humanity>.

³³Preamble to the American Convention on Forced Disappearances 1994, par 3.

³⁴See Andreu-Guzmán ‘The Draft International Convention on the Protection of All Persons from Forced Disappearance’ (2001) 62(3) *International Commission of Jurists: The Review* 75.

³⁵Office of the High Commissioner for Human Rights (OHCHR) ‘Fact Sheet No 6 (Rev 2), Enforced or Involuntary Disappearances’ <http://www.ohchr.org/Documents/Publications/FactSheet6Rev.2en.pdf>

³⁶Quoted in Andreu-Guzmán n 34 above 75.

³⁷Article 1 of the Declaration on the Protection of All Persons from Enforced Disappearances GA res 47/133, UN Doc A/Res/47/133 (18 December 1992).

³⁸Andreu-Guzmán n 34 above 75.

³⁹See further on the problems associated with the doctrine in international law Pauwelyn ‘The concept of a “continuing violation” of an international obligation: Selected problems’ (1996) 66(1) *British Yearbook of International Law* 415.

⁴⁰See Sarkin ‘Why the prohibition of enforced disappearance has attained *jus cogens* status in international law’ (2012) 81 *Nordic Journal of International Law* 537.

Enforced disappearances deprive individuals of some of their most fundamental natural rights such as the right to liberty, due process, and the right to life. Enforced disappearances violate human rights embodied in the Universal Declaration of Human Rights, as well as rights in a host of other conventions, treaties and international customary norms, and the International Covenant on Civil and Political Rights (ICCPR).⁴¹ Acts of enforced disappearances are also prohibited under other international instruments, such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), as well as regional human rights treaties, such as the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and Peoples' Rights, and the Arab Charter on Human Rights. However, while all fail to contain a specific provision on the right not to disappear, other rights contained within those instruments have been read to include a prohibition against enforced disappearance.⁴² Disappearances may, however, also involve violations of the 'Standard Minimum Rules for the Treatment of Prisoners', the 'Code of Conduct for Law Enforcement Officials', the 'Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions' and the 'Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment'.⁴³ The fact that there was no specific international instrument that specifically prohibited enforced disappearance, saw the General Assembly believing it to be so important as to 'devise an instrument which characterizes all acts of enforced disappearance of persons as very serious offenses'.⁴⁴

In the landmark decision of *Velásquez-Rodríguez v Honduras*⁴⁵ in 1988 the Inter-American Court of Human Rights (IACHR) held that 'forced disappearance of human beings is multiple and continuous violation of many rights under the Convention that State Parties are obligated to respect and guarantee'. The court found that disappearances constitute a 'flagrant violation of the right to life' and a woeful disregard of human dignity.⁴⁶ The court found

⁴¹ Declaration for the Protection of all Persons from Enforced Disappearances UN Commission on Human Rights, *Declaration on the Protection of All Persons from Enforced Disappearance*, 28 February 1992, E/CN.4/RES/1992/29, available at: <http://www.refworld.org/docid/3b00f0b270.html> [accessed 4 March 2015]

⁴² Nowak 'UN Economic and Social Council: Civil and Political Rights, Including Questions of: Disappearances and Summary Executions' UN Doc E/CN.4/2002/71 Art 43 (8 January 2002).

⁴³ OHCHR 'Fact Sheet No 6' n 34 above.

⁴⁴ Preamble, Declaration on the Protection of all Persons From Enforced Disappearance n 40 above.

⁴⁵ *Velásquez-Rodríguez* case, Judgment of July 29, 1988, Inter-Am Ct HR (Ser C) No 4 (1988).

⁴⁶ Antkowiak 'Truth as right and remedy in international human rights experience' (2002) 23 *Michigan Journal of International Law* 987.

that article 1.1⁴⁷ of the Inter-American Convention (not the American Convention on Forced Disappearances) imposed a legal duty on states 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.’⁴⁸

The 1992 non-binding UN Declaration for the Protection of all Persons Against Enforced Disappearances, states that:

Any act of enforced disappearance is an offense to human dignity...[It is a] flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.⁴⁹

The Declaration further states that disappearances violate the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, and constitutes a grave threat to the right to life.⁵⁰

In 1999, Resolution 53/150 adopted by the UN General Assembly expressed concerns the issue that states still acted counter to the Declaration by continuing to practise enforced disappearance. The General Assembly believed that further steps would have to be taken to ensure that nations adhere to the Declaration. The Resolution called on nations specifically to address and recall clauses in the Declaration, such as the importance of taking legislative steps to address and prevent enforced disappearance; that a state of emergency cannot justify enforced disappearance; and to investigate and prosecute all disappearances. Further, the Resolution called on states to provide information on what measures had been taken to give effect to the Declaration, as well as what obstacles had been encountered, and to disseminate the text of the Declaration in their local languages. The Resolution called on the Working Group to identify problems in the realisation of the Declaration and to recommend ways to overcome those obstacles, and more specifically to address impunity.⁵¹

⁴⁷‘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, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition’.

⁴⁸*Velásquez-Rodríguez* n 45 above par 174.

⁴⁹Article 1.1, Declaration for the Protection of all Persons from Enforced Disappearances.

⁵⁰As above art 1.2.

⁵¹‘Question of Enforced or Involuntary Disappearance’ GA res 53/150 UN (10 March 1999).

The International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the Human Rights Council in June 2006 and by the General Assembly in December of that same year.⁵² The Convention was signed by 57 states in Paris on 6 February 2007.⁵³ By August 2013, 39 states had ratified, and 92 states had signed the Convention. Unfortunately, the 39 states that have ratified the treaty do not represent those countries, with the single exception of Mexico, where new cases of enforced disappearances are occurring. Additionally, only sixteen of the 39 states that have ratified the treaty have accepted the competence of the Committee on Enforced Disappearances (CED) to entertain individual complaints. Only fifteen states have accepted the Committee's jurisdiction as far as state complaints are concerned – of the sixteen states that accepted the state complaint competence section, only Japan did not accept the competence of the CED as far as individual complaints are concerned.

The International Convention for the Protection of All Persons from Enforced Disappearance defines an 'enforced disappearance' as

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁵⁴

The Convention demands that a member state shall 'ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation' and that reparation 'covers material and moral damages and, where appropriate, other forms of reparation such as: (a) restitution; (b) rehabilitation; (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition'.⁵⁵ The right to an effective remedy and the right of victims to receive adequate compensation are also recognised in the 1992 Declaration on the Protection of All Persons from Enforced Disappearances. Perpetrators and the state or state authorities which organise, acquiesce in, or tolerate such disappearances are also deemed liable under civil law.

⁵²Stevens 'The International Convention for the Protection of All Persons from Enforced Disappearance – A welcoming response to a worldwide phenomenon with limited relief' (2010) 73 *Journal of Contemporary Roman-Dutch Law* 368.

⁵³McCroly n 1 above 547.

⁵⁴Article 2.

⁵⁵As above, arts 24 (4) and 24(5).

Where there is a widespread practice of enforced disappearance, this can constitute a crime against humanity.⁵⁶ Article 7.1 of the Rome Statute of the International Criminal Court⁵⁷ includes enforced disappearance as a crime against humanity when it is committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. An enforced disappearance is defined as

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

The preambles to both the Declaration and the Inter-American Convention provide that the systematic practice of enforced disappearance is ‘of the nature of a crime against humanity’.

Therefore, jurisprudentially, at least in terms of international law over the last twenty years, there has been considerable progress in dealing with enforced disappearance. States have the duty to prosecute the perpetrators of enforced disappearances. Enforced disappearances may also constitute violations of other rights, particularly when women and children are involved. Women can become particularly vulnerable to human rights violations either by themselves being ‘disappeared’ or through the disappearance of their spouses. The economic hardships arising from the enforced disappearance of a spouse will generally impose serious economic burdens on a woman. Further, where the woman is the victim of an enforced disappearance, she may be vulnerable to sexual violence often resulting in children born during the captivity of their disappeared parents.⁵⁸

The right to family life and other economic, social and cultural rights may also be violated by an enforced disappearance. If the family’s main source of income has been disappeared it is often left in a desperate socio-economic situation where many rights embodied in the International Covenant on Economic, Social and Cultural Rights are violated.

⁵⁶As above, part I, art 5. The Rome Statute defines enforced disappearance much more broadly including the intent of the perpetrator and removal from the protection of the law for a prolonged period of time in art 7.2.i.

⁵⁷Rome Statute of the International Criminal Court (Rome Statute) (entered into force 1 July 2002) 2187 UNTS 90.

⁵⁸Sarkin ‘Integrating transitional justice and demobilisation, disarmament and reintegration: The need to achieve rehabilitation, reintegration and reconciliation for child soldiers and child victims of enforced disappearances’ in Derluyn *et al* (eds) *Remember: Rehabilitation and reintegration of war-affected children* (2012) 80.

5 The role of the United Nations in the process to eradicate enforced disappearances

The first United Nations response to the practice came on 13 February 1975, when the UN Commission on Human Rights called for specific efforts to trace ‘persons unaccounted for’ during the armed conflict in Cyprus. The Commission stressed the importance of informing the relatives of the fate of their missing family members.

On 16 December 1977, the UN Commission on Human Rights, along with the International Committee of the Red Cross, established a commission to investigate missing persons in Cyprus. At this point, these missing persons were not considered ‘disappeared persons’ because they were missing as a result of armed conflict, and at that time ‘disappeared persons’ were those who were missing as a result of state action not involving armed conflict.

On 21 November 1979, Felix Ermacora submitted a comprehensive report to the UN General Assembly assessing the practice of enforced disappearances.⁵⁹ Ermacora was mandated to study the question of missing and disappeared persons in Chile. He found that the systematic practice of enforced disappearances constituted a gross violation of human rights. Ermacora noted that Chile was responsible for at least 600 cases, and recommended that preventive measures be established such as a prohibition on secret places of detention, the maintenance of a central register, and the right of civilian judges to visit detention centres. Notably, Ermacora also recommended the establishment of a working group to focus on the problem.

At the United Nations’ 90th Plenary Meeting on 20 December 1978, the General Assembly adopted Resolution 33/173 on Disappeared Persons.⁶⁰ The Resolution noted that disappearances occurred throughout the world, and requested that the UN Commission on Human Rights consider the question of disappearances and make appropriate recommendations. The Resolution called on governments to search for persons and undertake speedy and impartial investigations aimed at holding those responsible accountable and ensuring that the human rights of those imprisoned, were respected.⁶¹

The United Nations Working Group on Enforced or Involuntary Disappearances (Working Group) was formed by the Commission on Human Rights on 20 February 1980 by Resolution 20 (XXXVI).

⁵⁹United Nations, General Assembly, Report of Mr Felix Ermacora on Disappeared Persons in Chile, A/34/583/Add.1, 21 November 1979, par 178.

⁶⁰‘Resolution on Disappeared Persons’ UN Doc A/Res/33/173, 20 December 1978.

⁶¹As above.

The 1992 Declaration on the Protection of All Persons from Enforced Disappearances elaborated on the mandate of the Working Group. Following the Declaration, the Working Group made a number of recommendations on how to improve the protection identified in the Declaration. Since 1993, the Working Group has reported on the implementation of the 1992 Declaration. The Working Group is the first thematic mechanism to have been set up within the framework of the United Nations Human Rights system to deal with a specific global human rights violation. Before the Working Group was established, working groups had been established to deal only with a specific situation involving a specific country or region.

Along with the Working Group, other the United Nations organs and agencies have worked to concretise the ideals and goals incorporated in the 1992 Declaration. The United Nations Department of Public Information has carried out activities to promote the Declaration as part of its overall communications strategy to publicise its work in the field of human rights.⁶²

A range of institutions within the United Nations, such as the Human Rights Committee, the Committee of Enforced Disappearance, and the Committee on Torture all have a role to play in the field of disappearances.

6 The role of regional systems in fighting the practice of enforced disappearance

Regional human rights systems began responding to specific cases of enforced disappearance in the early 1970s.⁶³ The Inter-American Commission on Human Rights responded in general terms to specific cases of disappearance in Chile after the coup of 11 September 1973.⁶⁴ In 1979, the OAS General Assembly declared that the ‘practice of disappearances is an affront to the conscience of the hemisphere’ and called upon the affected governments to put an immediate end to any practice that leads to disappearance of persons’.⁶⁵ In 1983 and 1984, the OAS General Assembly condemned disappearances and stated that their massive prevalence constitutes a crime against humanity. In 1994, the OAS General Assembly adopted the Inter-American Convention on Forced Disappearance of Persons, which was the first binding international document outlawing the practice.⁶⁶ This Convention entered into force in

⁶²General Assembly resolution 61/289 ‘Question of Enforced or Involuntary Disappearances: Report of the Secretary General’ 11 August 2006.

⁶³Nowak n 42 above.

⁶⁴As above.

⁶⁵As above.

⁶⁶Inter-American Convention on Forced Disappearance of Persons (1994) 33 *ILM* 1429, entered into force 28 March 1996.

1996, and sixteen states have signed and thirteen ratified it.⁶⁷

The Preamble to the Inter-American Convention on Forced Disappearance of Persons calls upon the member states who sign the Convention to

[reaffirm] that the systematic practice of the forced disappearance of persons constitutes a crime against humanity; [and hopes] that this Convention may help to prevent, *punish*, and *eliminate* the forced disappearance of person in the Hemisphere and make a decisive contribution to the protection of human rights and the rule of law ... (emphasis added).

Article III of the Convention requires parties to incorporate the provisions of the Convention in their domestic laws, including article I(b) which provides that states should ‘punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories’.

The Inter-American Court of Human Rights (IACHR) has made a significant contribution in the development of procedural and substantive policies involving the adjudication of enforced disappearance. Since the late 1980s, the IACHR has delivered a number of judgments providing for reparations against states found to have engaged in enforced disappearance.⁶⁸ Reparations granted include: rescission of amnesty laws; directions not to enact amnesty laws to avoid responsibility; exhumation of remains for a proper burial at state expense; and compensation for victims’ families for the remains of victims that were violated and desecrated.

The European human rights system also took note of the practice. In 1984, the Parliamentary Assembly of the Council of Europe condemned enforced disappearances, and recognised that the practice of enforced disappearance was not restricted to Latin America, but a global phenomenon.⁶⁹ On 19 September 2005, the Parliamentary Assembly adopted a draft resolution outlawing enforced disappearances. The Assembly ‘unequivocally condemn[ed] enforced disappearance as a very serious human rights violation on par with torture and murder ...’.⁷⁰

⁶⁷Inter-American Convention on Forced Disappearance of Persons, Inter-American Commission on Human Rights <http://www.cidh.org/Basicos/English/Basic12.Disappearance%20Ratif.htm>.

⁶⁸See further Augusto, Antônio, and Cançado Trindade ‘Enforced disappearances of persons as a violation of *jus cogens*: The contribution of the jurisprudence of the inter-American Court of Human Rights’ (2012) 81(4) *Nordic Journal of International Law* 507.

⁶⁹Parliamentary Assembly, Council of Europe, Resolution 828 on Enforced Disappearances (1984).

⁷⁰Parliamentary Assembly, Council of Europe, Doc 10679, Enforced Disappearances (19 September 2005).

The European Court of Human Rights has dealt with enforced disappearances on many occasions, although the European Convention on Human Rights contains no specific provision on disappearances.

Currently, no instrument under the African human rights system deals specifically with enforced disappearance. However, these crimes have been dealt with by the African Commission on Human and Peoples' Rights in a number of cases.⁷¹

7 Action required to prevent the practice of enforced disappearance

There are many actors with a role to play in preventing disappearances including the international community; states; the UN and its various organs – including institutions such as the International Criminal Court (ICC),⁷² the International Committee of the Red Cross, the International Commission on Missing Persons; and regional, sub-regional, and domestic institutions including national human rights institutions (NHRIs). Civil society, which includes non-governmental organisations (NGOs) in all their different manifestations and on all levels, also have vital roles to play in this regard.

7.1 The role of the international community

More than one and a half billion people live in conflict-affected and fragile states.⁷³ Many of these states have endured long-term conflict. It is in these circumstances that enforced disappearances thrive. In this regard, the international community, in its widest sense, should have a much greater commitment and provide resources to deal with enforced disappearances wherever they occur. This should be a specific issue distinct from the general role played in societies wracked by conflict, as well as that of the international community in enhancing democracy around the world. Much greater pressure ought to be placed on societies where disappearances are taking place to establish independent and credible mechanisms to deal with these crimes.

Civil society, including NGOs at all levels, have critical roles to play. An

⁷¹Sarkin 'The African Commission on Human and Peoples' Rights and the future African Court of Justice and Human Rights: Comparative lessons from the European Court of Human Rights' (2011) 18(3) *South African Journal of International Affairs* 281-293.

⁷²Sarkin 'The role of the International Criminal Court in reducing massive human rights violations such as enforced disappearances in Africa: Towards developing transitional justice strategies' (2011) 11(1) *Studies in Ethnicity and Nationalism* 130-142.

⁷³Sarkin 'Is the Responsibility to Protect (R2P) an accepted norm of international law in the post-Libya era? How its third pillar (the Responsibility to Rebuild) ought to be applied' (2012) 1 *Groningen Journal of International Law* 30.

engaged and effective civil society is a very useful role player in a society where human rights violations have occurred. It is beneficial in ensuring the accountability of the state and state institutions. Civil society can act as a check and balance on state power, and is therefore critical to the effectiveness of the democracy. Civil society needs to be supported in many ways, including political support. Ensuring that civil society has the space to operate is fundamental to the promotion and protection of human rights.

There is a critical need to fund NGOs in regions and countries where disappearances have occurred. Many NGOs have shut down, or are on the brink of closing, for lack of funding – specifically in the area of human rights. While this is symptomatic of the global financial crisis, the long-term negative consequences will be enormous. Besides the fact that there will be fewer NGOs doing this work – already there are not many that focus exclusively on forced disappearance – there will be little scrutiny of state action if the NGOs themselves disappear. Rebuilding the NGO-sector dealing with these issues will be virtually impossible once these organisations have failed and their expertise been lost. Organisations deserving of funding in this regard, include the International Coalition Against Enforced Disappearances (ICAED), regional organisations such as the Asian Federation Against Disappearances (AFAD), and other NGOs in various regions. Africa has the most pressing need for support as there is no regional or sub-regional organisation, and few local NGOs.⁷⁴ Moreover, Africa has a massive problem with regard to underreporting of enforced disappearances.

7.2 *The role of international, regional and sub-regional institutions*

Institutions that have a role to play in dealing with enforced disappearances at all levels ought to be assisted to play a greater role. Some, such as the ICC, should prosecute cases of enforced disappearance more frequently and send a clear and strong message that disappearances will not be tolerated. While the court only deals with cases of enforced disappearance in the context of crimes against humanity, this type of case would focus the crime of enforced disappearance and act as a deterrent.

If the African Court on Justice and Human Rights is given criminal jurisdiction it should become a complementary institution to the ICC, rather than an opposing one. It should use its powers widely and effectively to dent the huge number of serious human rights violations committed in Africa. It

⁷⁴On historical issues in Africa see Sarkin 'Should reparations for massive human rights abuses perpetrated on African victims during colonial times be given?' in Vanfraechem *et al* (eds) *International handbook of victimology* (2014) 89.

should pursue African leaders who commit serious offences, which has become the standard for others in the region. Consequently, the court could become a major player in the fight against impunity.

Other institutions such as the UN Human Rights Committee, the Working Group and the UN Committee on Enforced Disappearance could play a greater role if they had more resources and additional staffing. Their capacity would also increase if the members were full-time. These mechanisms depend on state cooperation which in places where massive violations have occurred is often in short supply, even though state rhetoric seems to suggest otherwise. In this regard, a Human Rights Council resolution of March 2008 urged states, *inter alia*, to cooperate with the Working Group, respect the Declaration, and prevent enforced disappearances. It recognised and thanked states and governments who have cooperated and helped in the past, while requesting continued assistance in the future.⁷⁵ In practice, greater state cooperation would make the processes of dealing with these matters more effective. A means by which to secure real and effective cooperation should be found, and a tool to sanction states that do not cooperate, or whose cooperation is inadequate, ought to be implemented. While the Universal Periodic Review (UPR) process is useful to a degree, much more ought to be done to promote state compliance with human rights obligations. The Human Rights Council should, each year, examine the extent to which states are taking effective steps to implement measures related to enforced disappearances in addition to other serious human rights violations. Greater cooperation between institutions working on disappearances is needed, as is greater collaboration between these institutions and civil society institutions.

7.3 *The role of the state*

The primary duty to deal with enforced disappearances falls on the state. There are a number of reasons for this, though primary among these must be that the state is invariably responsible for the disappearance. Disappearances occur on the territories of states, and thus states are in the best position to investigate and deal with them. States are also best placed to put mechanisms and processes in place to prevent forced disappearances. States must not only address the prevention of the enforced disappearance of specific individuals, they must also address the wider issues relating to the prevention of enforced disappearances. States should commission studies into this practice, if they are occurring in that specific state. These studies should be carried out by impartial and credible individuals. Resulting recommendations should be implemented and adequate resources be made available to effect the necessary reforms.

⁷⁵Human Rights Council res 7/12 (27 March 2008).

Vitally important to dealing effectively with the practice of enforced disappearances, is dealing with the political environment that fosters the practice. A state, therefore, needs to work to address and eliminate the political issues that allowed the disappearances to occur. This will ensure that similar events are not repeated. This is vital, not only in ensuring the future safety of victims, but also in preventing more people from becoming victims.

This means that states need to deal with conflict and violence. They must find ways of resolving the political and other issues at the root of the violence. They must also avoid protracted periods of emergency and broadly defined conflicts against vaguely conceived enemies which have tended to turn exceptional, temporary rules into the norm. In many contexts, intelligence agencies operate in a legal vacuum with no law, or no publicly available law, governing their actions. Although intelligence bodies are usually not authorised by legislation to detain persons, they often do so, sometimes for prolonged periods. In such situations, there are either no oversight and accountability mechanisms at all, or they are severely restricted, with limited powers, and hence ineffective. This both enables and capacitates enforced disappearance. Much more needs to be done to limit states from enacting legislation which allows them easily to derogate from their duty to protect human rights. More needs to be done to ensure and enforce state compliance with prohibitions against enforced disappearance and more effective oversight mechanisms are needed to ensure that an enabling environment that capacitates enforced disappearances is not easily established.

7.4 The need for political will at the domestic level to deal effectively with enforced disappearance

Currently, despite the presence of the various international tribunals and the ICC,⁷⁶ few who perpetrate enforced disappearances and other serious international crimes are brought to book. This is not a criticism of these institutions alone, as the majority of these crimes ought to be prosecuted before domestic courts. While domestic criminal justice systems need the resources and support to carry out such prosecutions,⁷⁷ what is most lacking is the domestic political will to enforce these norms. The international community could assist in this regard by setting benchmarks for achieving the necessary goals. At present states raise various excuses to explain away why these cases take so long to investigate, why they have insufficient resources

⁷⁶See Sarkin 'Enhancing the legitimacy, status and role of the International Criminal Court by using transitional justice or restorative justice strategies' (2011-12) 6(1) *Interdisciplinary Journal of Human Rights Law* 83 and Sarkin 'The role of the International Criminal Court' n 72 above.

⁷⁷See generally Seibert-Fohr *Prosecuting serious human rights violations* (2009).

to commit to such a project, that the evidence to prosecute successfully cannot be found for a variety of reasons, or that they do not have enough trained prosecutors, investigators, and judges to proceed with such cases. While capacity building can assist, more needs to be done by way of providing incentives for states to carry out such processes, and sanctions where they fail to do so. States can and should be held accountable for their failure to do what they have committed and are duty bound to do.

7.5 *Ratifying and implementing international treaties*

States should be encouraged to ratify and implement various international and regional treaties, most notably the ICCPR and the CAT. Given that the Optional Protocol to the CAT requires the setting up of monitoring systems covering all situations of deprivation of liberty, adherence to this international instrument will add a further layer of protection. States should also ratify the Optional Protocol and create independent national preventive mechanisms that are in compliance with the Paris Principles.⁷⁸ States should also ratify the International Convention for the Protection of All Persons from Enforced Disappearance. Other regional systems may wish to replicate the system put in place in the Americas, through the Inter-American Convention on Forced Disappearance of Persons.

In theory, ratifying treaties adds a layer of human rights protection as the state indicates its commitment to the treaty concerned, and undertakes to comply with the treaty, by putting mechanisms in place domestically. Treaties are, however, not always signed, acceded to or ratified because states wish to uphold the norms they embody,⁷⁹ but for a host of other reasons.⁸⁰ Even if a state signs, accedes to or ratifies a treaty for the right reasons, they often fail to properly assess what needs to be done domestically to bring their law into line with the treaty. As a result, the laws of the state are often out of sync with the obligations assumed by these states under the treaty, not to mention the obligations that they are obliged to sustain in the absence of their specific consent. States must, therefore, not simply sign or accede to international instruments without ensure that their domestic law incorporates the international norms found in these instruments.

⁷⁸Principles relating to the Status of National Institutions (The Paris Principles) adopted by General Assembly resolution 48/134 of 20 December 1993.

⁷⁹Oberdörster 'Why ratify? Lessons from treaty ratification campaigns' (2008) 61(2) *Vanderbilt Law Review* 681.

⁸⁰See Hathaway 'Why do countries commit to human rights treaties?' (2007) 51(4) *Journal of Conflict Resolution* 588-621; Simmons *Mobilizing for human rights: International law in domestic politics* (2009).

7.6 *Constitutionalising the right to protection against enforced disappearances*

Signature of or accession to a treaty by a state is only a first step in addressing enforced disappearances. In fact, on their own membership of treaties do little to impact on the human rights situation on the ground in the country concerned. To comply with the international obligation to not permit enforced disappearances, states need to incorporate the right not to be disappeared in their constitutions. A number of states have done this. For example, when Paraguay adopted its constitution in 1992, it included an article prohibiting enforced disappearances. Article 5 states that '[g]enocide, torture, the use of force to make people disappear, kidnapping and the homicide for political reasons are crimes that are not subject to terms of limitation'.⁸¹

7.7 *Putting in place a comprehensive and adequate legislative framework*

To deal with disappearances and prevent them from occurring, states need to put in place policies and a legislative framework which will address the problem – both proactively and *ex post facto*. This is a multi-faceted exercise. The law needs to deal with issues relating to the security services, and their control. It also calls for a training and disciplinary component, and a criminal law framework. Policy and laws to deal with investigation of and searching for the disappeared will also have to be in place. An important aspect is the identification of graves, which also demands clearly indications of who is in charge of exhumations, who may be involved in the process, and how these sites are to be controlled. The state needs to ensure that grave sites are not violated and that there are adequate criminal sanctions for those who violate the provisions. Criminal and civil law processes will, therefore, have to be integrated. For these reasons a law on missing or disappeared persons ought to be adopted in countries where such cases have occurred. This law should aim to improve the tracing process for people who have disappeared, to define who are disappeared or missing persons, to set up a central record data base to centralise available information, and to realise the social and other rights of family members of missing persons. The law should provide that state authorities are under a continuing obligation to trace and identify missing persons, and that families have the right to be informed of the fate, place of residence, or, in the case of death, the circumstances surrounding and cause of death, the location of burial, and to receive the remains of their missing relatives. The process of tracing a missing person should only terminate when the person has been found.

⁸¹Constitution of Paraguay 1992, art 5 http://www.servat.unibe.ch/icl/pa00000_.html.

7.8 The need for independent criminal justice institutions and processes

Vital to dealing effectively and comprehensively with enforced disappearances, are independent criminal justice institutions and processes. The role of the prosecuting authority is critical. Decisions on prosecuting individuals accused of committing these crimes need to be made with as little political interference as possible. The person appointed as Attorney-General (or whatever the position in a particular country), ought to be as independent from the political process as possible, and inspire confidence that correct decisions are being taken. Far too often this is not the case. Critically, those who are responsible for decisions on prosecution need to have the political will to do so.

The courts need to be staffed by skilled, independent prosecutors and judges who are seen to make decisions that are both legitimate and credible. Processes of appointment must promote independence. Sufficient resources need to be provided to these institutions to allow them to be effective. An adequate number of individuals need to be appointed. They need to be given sufficient resources for training, materials, books, research, etcetera to allow them to operate effectively and independently.

7.9 Providing for enforceable and effective criminal law processes and sanctions

Very few cases of enforced disappearances are prosecuted around the world, and even fewer end in a conviction. In hardly any case is a perpetrator sentenced to a long period of imprisonment as demanded by international law as found in the Declaration and the Convention. To address this, states should enact legislation that criminalises enforced disappearance, from the person ordering the behaviour to the person carrying out the action, and all others involved. The Rapporteur on Enforced Disappearance to the Committee on Legal Affairs and Human Rights of the Council of Europe has noted that ‘the absence of appropriate provisions in many national criminal codes or their restrictive formulation makes the prosecution of perpetrators of enforced disappearance very difficult in practice’.⁸² Relatively speaking, very few states have codified enforced disappearance as a separate or autonomous criminal offence under their laws. States should criminalise this practice and ensure that

⁸²Council of Europe, Parliamentary Assembly ‘Enforced Disappearances, Report to the Committee on Legal Affairs and Human Rights’ Rapporteur Mr Christos Pourgourides (Report Pourgourides), Doc 10679 of 19 September 2005 pars 5 and 53. See also UN General Assembly, Doc A/61/289 of 11 August 2006 par 68; and Council of Europe Parliamentary Assembly ‘Enforced Disappearances’ Resolution 1463 of 3 October 2005 par 10.3.1.

anyone involved in the disappearance, no matter how small their role, ought to be held accountable. Punishments should reflect the seriousness of the crime as well as acting as a deterrent. Statutes of limitations should be enacted so as to not start running until the fate or whereabouts of the person is revealed.

7.10 *Dealing with impunity*

Impunity for crimes committed by state agents or under the cover of the state, not only entails the failure to punish the persons responsible for those crimes. An inseparable component of such impunity is the failure to carry out any investigation, the cover-up, and even the falsification of the facts to protect the persons responsible. There is no doubt that the discovery of the truth, which is the responsibility of independent persons, destroys that element which, while not useful in itself for eradicating impunity, fulfils at least a dual function. First, it is useful for society to learn, objectively, what happened in its midst, which translates into a sort of collective catharsis. And second, it contributes to creating a collective conscience as to the need to prevent a repetition of similar acts. It shows those who are capable of such acts that even though they may escape justice, they are not immune from being publicly recognised as the persons responsible for very grave attacks against other human beings. In this regard, even though these do not constitute punitive mechanisms, they may fulfil a preventive function.

7.11 *Recognising enforced disappearance as a continuous or continuing crime and continuing human rights violation*

Enforced disappearances are the prototypical continuing crime. The crime extends for so long as a state refuses to acknowledge the detention or to release information as to the fate and whereabouts of the individual.⁸³ Since the crime is on-going, states should not allow their statute of limitations for the crime to begin to run until the crime ceases. Thus, until information on the fate and whereabouts of the individual is released, no statute of limitations should apply.

The issue of an enforced disappearance being a continuing crime is also important as ordinarily tribunals will not have jurisdiction for crimes that occurred before the tribunal had jurisdiction or before a law was enacted prohibiting the acts. However, since enforced disappearance is a continuing crime, the crime extends past the date the tribunal became competent or the

⁸³See further Lafontaine 'No amnesty or statute of limitations for enforced disappearances: The Sandoval case before the Supreme Court of Chile' (2005) 3(2) *Journal of International Criminal Justice* 469.

law was enacted. Since the state violates the law past the critical date by not releasing information on the fate and whereabouts of the individual, the state can be held accountable.

7.12 Prohibiting secret places of detention

In all states, secret detention should be explicitly prohibited, along with all other forms of unofficial detention.⁸⁴ Detention records should be kept, including in times of armed conflict, as required by the Geneva Conventions, and should include the number of detainees, their nationality, and the legal basis on which they are being held, whether as prisoners of war or civilian internees. Inspections that take place often, and at irregular times, should take place at all places where people are held. These inspections must be undertaken by institutions independent of the state.

7.13 Establishing a national preventive mechanism

States can enhance the protection of their citizens from enforced disappearance by establishing a national preventative mechanism. A preventive mechanism is a group given the task of ensuring that individuals are protected from human rights violations. It can take many forms, and can be adapted from an existing mechanism, or can be a newly created group. National human rights commissions, ombudsmen, and public defender's offices, NGOs, independent inspectors, judicial offices, and community-based independent visitors can all serve the function of a preventive mechanism. These institutions should conform to the Paris Principles for NHRIs.

The mandate of the preventive mechanism must be wide and its powers extensive. It must be allowed access to all places of detention, including police stations, pre-trial centres, prisons, border police facilities, immigrant detention centres, security or intelligence service facilities, military detention centres, and places of administrative detention. Not only must the members have access to these detention centres, but they must also have unscheduled access to all areas of the centres at all times. The mechanism must also have access, to all records at all times. The preventive mechanism must also make recommendations to the state about how to make improvements better to protect against enforced disappearances.

7.14 Protecting the rights of those who are detained or placed in custody

Safeguards for persons deprived of their liberty should be fully respected. No

⁸⁴See 'Interview with UN Working Group' n 5 above 57.

undue restrictions on these safeguards under counter-terrorism or emergency legislation should be allowed. Effective *habeas corpus* reviews by independent judicial bodies are central to ensuring respect for the right to personal liberty. Domestic legislative frameworks should therefore allow any exceptions from *habeas corpus*, operating independently of the detaining authority and from the place and form of deprivation of liberty. The law should contain penalties for officials who do not comply with obligations to maintain up to date registers and who refuse to disclose relevant information to relatives or others seeking to find a person.

7.15 *Human rights education*

Human rights education processes are critically necessary in states around the world. These campaigns allow people to know their rights and to play a part in ensuring that human rights are respected. Public education initiatives that raise awareness of enforced disappearance and educate individuals on the rights of detained people should also be encouraged, if not supported, by the government.⁸⁵ Educating state officials and the general public on enforced disappearance is essential to promoting the monitoring of public officials, gaining the public's acceptance, ensuring justice for victims of enforced disappearance, promoting understanding of the negative consequences of enforced disappearance, increasing the number of citizens participating in governmental or NGO-processes involving enforced disappearance, and securing the accountability of officials for enforced disappearance policies and procedures.⁸⁶ Citizens should be sensitised an early age – from primary school where it should be part of the school curriculum – as to the importance of human rights in a society and what it means to be free from human rights violations.

7.16 *Establishing an institution to search for disappeared people*

In a state where there have been enforced disappearances, establishing a designated institution to investigate disappearances has many advantages. While many countries have institutions such as human rights commissions, having a specific institution skilled and tasked to deal with disappearances, or more widely those who have gone missing, can play a vital role in assisting families to establish the fate and whereabouts of their relatives who have been disappeared. The law should therefore provide for an independent institution

⁸⁵ African Commission on Human and Peoples' Rights 'Resolution on guidelines for measures for the prohibition and prevention of torture, cruel, inhuman or degrading treatment or punishment in Africa' (2008). <http://www.achpr.org/instruments/robben-island-guidelines-2008/>

⁸⁶ See Dias 'Human rights education as a strategy for development' in Andreopoulos and Claude (eds) *Human rights education for the twenty-first century* (1997) 52-53.

such as the Bosnia and Herzegovina Missing Persons Institute, to assume responsibility for tracing missing or disappeared persons and accelerating their identification process. This should include finding the missing, exhuming graves, examining and identifying human remains, and keeping them safe until they are handed over to the families. Processes should also be put in place to allow for the presumption of death in a timely and easy manner. There should also be processes governing property, inheritance, and remarriage.

7.17 Control and oversight of the security forces and laws governing their conduct

To reduce the risk of enforced disappearance, states must ensure that all officials are adequately trained. This includes law enforcement agencies, military personnel, medical personnel, public officials, and any person involved in the detention of individuals or those who may be involved in enforced disappearances. The goal of training state officials ought to be to prevent them from becoming involved in the practice. Training must include prevention and how effectively to investigate complaints. Officials need to be made aware of the illegality of enforced disappearance in all circumstances and why obeying an order to make a person disappear is illegal and may not be obeyed.

Steps need to be taken to ensure civilian oversight over the security services. Necessary measures must be put into place to allow complaints against individuals to be handled effectively and independently. In addition, any action by the intelligence services should be governed by law, which in turn, should be in conformity with international norms. To ensure accountability in intelligence cooperation, truly independent intelligence review and oversight mechanisms should be established and enhanced. Such mechanisms should have access to all information, including sensitive information. They should be mandated to undertake reviews and investigate on their own initiative, and to make public reports. Regular and comprehensive reviews ought to occur to ensure that disappearances are not permitted. Where transgressions are found, all those who have allowed them to occur ought to be disciplined and, where appropriate, prosecuted.

7.18 Transferring individuals from one country to another

Transfers, or the facilitation of transfers, by one state to the custody of authorities of another state must be carried out under judicial supervision and in line with international standards. The principle of non-refoulement of persons to countries where they would be at risk of torture or other inhuman, cruel or degrading treatment should be honoured.

7.19 *Integrating transitional justice processes and providing for the rights of victims*

Justice is an important component in dealing with enforced disappearances, but there are different types of justice, including restorative or transitional justice.⁸⁷ Over the last few decades, transitional justice has become an important part of the process used by countries moving to democracy. As transitions from repressive rule to democracy have occurred, dealing with past injustices has been a crucial test for the new democratic orders. This approach involves judicial and extra-judicial mechanisms, including prosecution promoting the right to truth, reparations, reconciliation, and ensuring non-repetition of human rights violations by adopting various strategies including law and institutional reform.⁸⁸ Transitional justice is made up of truth, justice, reconciliation, reparations, reforming institutions, and other steps to avoid non-repetition of violations. Non-repetition means that processes are put in place to ensure that what happened in the past is not repeated. This includes not only an inclusive constitutional framework, but a range of other measures including new or reformed law and institutions. Critical too, are processes of reconciliation. Included in this are means to develop reconciliation at all layers of a society. It means establishing memorials and other places of memory for all. It does not mean that every place must be celebrated by everyone, but that all have a place that they accept as theirs. Public holidays should also be those that are generally and widely accepted. Celebrating 30 August each year, the International Day of the Disappeared, is a holiday that should not be controversial, and may advance nation-building. So might other events specific to each particular society.

Developing a democracy and entrenching a human rights culture are important to ensure that a fractured and polarised past is not perpetuated. In this context, promoting democracy and the building of a human rights culture are critical elements in transitional justice.⁸⁹ Despite states advancing processes of transitional justice, this often remains rhetorical, and victims and their families, in general, obtain few avenues to receive redress.⁹⁰ While there are a few mechanisms for victims to approach at international level, such as the United Nations Working Group on Enforced and Involuntary Disappearances, in fact few families have the knowledge, expertise, or means to follow this route. In many places there are very few NGOs that can assist them with such

⁸⁷Sarkin n 58 above 77.

⁸⁸Sarkin and Sensibaugh 'Why achieving reconciliation in Iraq is possible: Suggestions for mechanisms and processes including a truth and reconciliation commission' (2008) 23 *Fletcher Journal of Human Security* 5.

⁸⁹Sarkin 'Enhancing the legitimacy' n 76 above 83.

⁹⁰See 'Interview with UN Working Group' n 5 above 57.

matters. For these reasons disappearances remain severely underreported. As a result of few options available, states should embark on processes of truth recovery. This is also an essential component in any attempt to achieve healing and reconciliation. Credible, legitimate, and country-specific truth and reconciliation commissions have been identified as useful mechanisms in this regard, and need to be established. This has not always been the case.

7.20 Providing reparations to victims

The issue of reparations fulfils at least three functions, most importantly, reparations enable victims to cope with the financial loss they have suffered; secondly, they allow for official acknowledgment of the past; and, finally, reparations deter future perpetrators from committing similar violations. There is also the dimension of dignity in the sense that those abused in the past believe that there should be some form of assistance to allow them to reclaim their dignity.

Reparations, symbolic or otherwise, can therefore serve as focal points in the grieving process. This can aid recovery by allowing individuals to focus exclusively on their grief. Reparation can encompass a variety of concepts including damages, redress, and restitution. Generally, however, few victims receive reparations, even though there are international rights in this regard. It is again at domestic level where victims ought to be able to obtain redress. Unfortunately, in very few places are victims actually able to secure effective remedies and achieve the goals of truth, justice and reparations.⁹¹

8 Conclusion

In the recent past, enforced disappearance has had an adverse impact on the lives of hundreds of thousands of individuals – affecting not only the individual who has disappeared but also the individual’s neighbours, family members, and friends. Today enforced disappearances are a global issue emerging around the world. They appear and reappear where the situation on the ground permits. All rights are affected, including civil and political rights; economic, social and cultural rights; the right to liberty; the right to be legally recognised as a person; the right to security; the right to be free from intimidation and fear; and the rights to, and of, the family.

Unfortunately, enforced disappearances will continue to be a problem as instability and emergency situations emerge as an endemic world problem. To call a halt to this practice much needs to be done – especially at the domestic level.

⁹¹As above.

Prevention is one of the keys to eradicating enforced disappearance and demands greater emphasis. Although this involves a multi-faceted approach, it is states that bear the major responsibility to deal with enforced disappearances. As this paper demonstrates, enforced disappearances rarely operate in a vacuum – many governments use enforced disappearances as an integral part of a systematic campaign of state terror against their own citizenry.⁹²

⁹²See Bushnell *et al* 'State organized terror: Tragedy of the modern state' in Bushnell *et al* (eds) *State organized terror: The case of violent internal repression* (1991) 3.