

# **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?**

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*[On 23 June 2006, the United Nations Human Rights Council adopted the International Convention for the Protection of All Persons from Enforced Disappearance. The adoption of the Convention has been heralded as a significant achievement and an important step towards addressing the increasingly widespread and particularly grave phenomenon of enforced disappearance. In particular, it is hoped that the Convention will increase the accountability of individual perpetrators of acts of enforced disappearance by extending international criminal jurisdiction to these acts. This article examines the need for the new Convention by analysing the shortcomings of existing avenues for holding perpetrators of enforced disappearance responsible under international criminal law, and by identifying gaps in the criminalisation of enforced disappearances. The article then examines key provisions of the Convention in light of these existing gaps and shortcomings, and assesses the likely role and effectiveness of the new Convention in bringing individual perpetrators to justice.]*

## CONTENTS

- I Introduction
- II Nature and Prevalence of Enforced Disappearance
- III Shortcomings of the Current International Legal Framework in Holding Individuals Criminally Responsible
  - A Enforced Disappearance as a Crime against Humanity
    - 1 Criminalisation of Enforced Disappearance
    - 2 Shortcomings in Conceptualising Enforced Disappearance as a Crime against Humanity
  - B Enforced Disappearance as Torture
    - 1 When Will Enforced Disappearance Amount to Torture?
    - 2 Shortcomings in Conceptualising Enforced Disappearance as Torture
  - C Prevailing Gaps in Criminalisation
- IV Analysis of the *International Convention for the Protection of All Persons from Enforced Disappearance*
  - A The Need for and Advantages of Drafting a Separate Convention
  - B Criminalising Per Se Acts of Enforced Disappearance
  - C Definition of Enforced Disappearance
  - D Mechanisms for Holding Individuals Criminally Responsible
- V Conclusion

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Some men arrive. They force their way into a family's home ... They come at any time of the day or night, usually in plain clothes, sometimes in uniform, always carrying weapons. Giving no reasons, producing no arrest warrant, without saying who they are or on whose authority they are acting, they drag off one or more members of the family towards a car, using violence in the process if necessary.

Once the commotion is over, those left behind can only wonder.<sup>1</sup>

## I INTRODUCTION

Enforced disappearance has been labelled 'a particularly heinous violation of human rights'<sup>2</sup> and 'one of the gravest crimes that can be committed against a human being'.<sup>3</sup> The act of enforced disappearance typically involves the abduction, arrest or detention of an individual — usually a perceived political opponent — by members of a state-sponsored military group, and a deliberate denial by authorities of any knowledge of the victim's arrest, whereabouts, or condition: the individual effectively vanishes. Enforced disappearances are a 'doubly paralysing form of suffering'.<sup>4</sup> The victim is removed from the protection of the law, and is often subjected to torture and extrajudicial execution. In addition, the victim's family and friends are deliberately denied knowledge of the individual's arrest or detention, and are 'subjected to slow mental torture'<sup>5</sup> as they wait, often for years and sometimes forever, to be informed of the victim's fate. Enforced disappearances were used by the Nazi regime during World War II to deliberately spread terror throughout the population and to suppress dissent.<sup>6</sup> They were also employed extensively as a 'virulent form of state terrorism' by several governments in Latin America throughout the 1960s and 1970s.<sup>7</sup> Sadly, enforced disappearances have become

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<sup>1</sup> Independent Commission on International Humanitarian Issues, *Disappeared! Technique of Terror* (1986) 19.

<sup>2</sup> United Nations Working Group on Enforced and Involuntary Disappearances, *Fact Sheet No 6 (Rev 2), Enforced or Involuntary Disappearances* (2006) 1 <<http://www.ohchr.org/english/about/publications/docs/fs6.htm>> at 1 October 2006 ('*Fact Sheet No 6*').

<sup>3</sup> Dalmo Abreu Dallari, as quoted in Federico Andreu-Guzmán, 'The Draft International Convention on the Protection of All Persons from Forced Disappearance' (2001) 62–3 *International Commission of Jurists: The Review* 73, 75.

<sup>4</sup> *Fact Sheet No 6*, above n 2, 1.

<sup>5</sup> Independent Commission on International Humanitarian Issues, above n 1, 21.

<sup>6</sup> See *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10: Nuremberg, 19 October 1946 – 1 April 1949* (1951) vol 3, 75.

<sup>7</sup> Maureen Berman and Roger Clark, 'State Terrorism: Disappearances' (1982) 13 *Rutgers Law Journal* 531, 531.

‘a truly universal phenomenon’, believed to be occurring in approximately 90 countries, in all regions of the world and affecting tens of thousands of people.<sup>8</sup>

The United Nations Working Group on Enforced or Involuntary Disappearances (‘UN Working Group’)<sup>9</sup> claims that impunity is perhaps the most significant factor contributing to the phenomenon of enforced disappearance.<sup>10</sup> It recommends bringing individuals to justice for such acts as a crucial measure in helping to prevent their occurrence.<sup>11</sup> Despite this recognition, and despite international condemnation of enforced disappearances,<sup>12</sup> the proclamation of the UN *Declaration on the Protection of All Persons from Enforced Disappearance* in 1992,<sup>13</sup> and the ratification of a regional Inter-American convention,<sup>14</sup> enforced disappearances have not, to date, been the subject of a specific, binding, global instrument. Consequently, measures in international law for holding individuals criminally responsible for acts of enforced disappearance have been limited. However, since 1999 the UN Commission on Human Rights has been considering a *Draft International Convention on the Protection of All Persons from Enforced Disappearance*.<sup>15</sup> The final draft,<sup>16</sup> which was completed in September 2005,<sup>17</sup> has been heralded as ‘a

<sup>8</sup> UN Commission on Human Rights, *Civil and Political Rights, Including Questions of: Disappearances and Summary Executions*, UN ESCOR, 58<sup>th</sup> sess, Agenda Item 11, UN Doc E/CN.4/2002/71 (8 January 2002) [10] (‘*Working Group January 2002 Report*’). See also UN Commission on Human Rights, *Civil and Political Rights, Including the Questions of: Disappearances and Summary Executions: Question of Enforced or Involuntary Disappearances: Report of the Working Group on Enforced or Involuntary Disappearances*, UN ESCOR, 61<sup>st</sup> sess, Agenda Item 11(b), UN Doc E/CN.4/2005/65 (23 December 2004) [17] (‘*Working Group December 2004 Report*’). Since its inception in 1980, the UN Working Group has received over 50 000 cases of enforced disappearances, over 41 000 of which remain unresolved. It is likely that this figure under-represents the global extent of enforced disappearances as, in some political climates, individuals may be unwilling or unable to report cases of enforced disappearances: at [9].

<sup>9</sup> The UN Working Group on Enforced or Involuntary Disappearances was established by a Resolution of the UN Commission on Human Rights: *Question of Missing and Disappeared Persons*, UN ESCOR, 36<sup>th</sup> sess, 1563<sup>rd</sup> mtg, UN Doc E/CN.4/RES/1980/20 (29 February 1980).

<sup>10</sup> *Report of the Working Group on Enforced or Involuntary Disappearances*, UN ESCOR, 47<sup>th</sup> sess, Agenda Item 10(c), UN Doc E/CN.4/1991/25 (17 January 1991).

<sup>11</sup> UN Commission on Human Rights, *Working Group December 2004 Report*, above n 8, [375].

<sup>12</sup> As early as 1978, the UN General Assembly expressed its ‘deep concern’ over the ‘disappearance of persons as a result of excesses on the part of law enforcement and security authorities’: *Disappeared Persons*, GA Res 33/173, UN GAOR, 33<sup>rd</sup> sess, 90<sup>th</sup> plen mtg, UN Doc A/RES/33/173 (20 December 1978) 158.

<sup>13</sup> *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res 47/133, UN GAOR, 47<sup>th</sup> sess, 92<sup>nd</sup> plen mtg, Agenda Item 97(b), UN Doc A/RES/47/133 (12 February 1993) (‘*Enforced Disappearance Declaration*’).

<sup>14</sup> *Inter-American Convention on the Forced Disappearance of Persons*, adopted 9 June 1994, OAS Doc OEA/Ser.P/AG/Doc 3114/94 (entered into force 28 March 1996) (‘*OAS Convention*’).

<sup>15</sup> Andreu-Guzmán, above n 3, 81.

<sup>16</sup> *Draft International Convention for the Protection of All Persons from Enforced Disappearance*, UN ESCOR, 62<sup>nd</sup> sess, Agenda Item 11(b), Annex I, UN Doc E/CN.4/2006/57 (2 February 2006) (‘*Draft Convention*’).

<sup>17</sup> UN Working Group, ‘UN Working Group on Disappearances Welcomes Conclusion of Drafting of *Convention on Enforced Disappearance*’ (Press Release, 23 September 2005), available at <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/3DF9EB6C9C90CB7AC1257087006E85A9?opendocument>> at 1 October 2006.

significant victory for the human rights movement'<sup>18</sup> and as 'an extremely important development in the fight against forced disappearances'.<sup>19</sup> It has been adopted by the UN Human Rights Council, and is expected to be adopted by the General Assembly at its 61<sup>st</sup> session later this year, and to be opened subsequently for signature and ratification.<sup>20</sup> The recognition that enforced disappearances warrant a specific, binding, international convention is indeed a significant achievement and signals strong international condemnation of these acts. However, on a practical level, how effective is the *International Convention for the Protection of all Persons from Enforced Disappearance*<sup>21</sup> likely to be in enforcing the standards it sets? In particular, how will it add to the existing measures available for holding individuals criminally responsible for perpetrating acts of enforced disappearance?

This article will assess the need for and likely role of the new *Convention* in holding individuals criminally responsible for acts of enforced disappearance. First, the nature and prevalence of enforced disappearance will be outlined. Second, existing international legal mechanisms for holding individuals criminally responsible for enforced disappearance will be analysed in order to identify current gaps in the international legal regime and to assess the need for a separate convention.<sup>22</sup> Finally, the *Convention* itself will be examined in order to determine its likely effectiveness in filling existing gaps in protection and in extending the existing measures available for holding individuals criminally responsible for acts of enforced disappearance. This article will argue that the *Convention* expands and cements the international prohibition on enforced disappearance by including provisions which effectively criminalise acts of enforced disappearance in international law.

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<sup>18</sup> Human Rights Watch, 'Progress on "Disappearances" Pact Hailed: Wins and Losses as UN Session Ends' (Press Release, 26 April 2001) available at <<http://hrw.org/english/docs/2001/04/26/global1159.htm>> at 1 October 2006.

<sup>19</sup> Human Rights Watch, 'UN "Disappearances" Treaty a Major Advance: Countries Should Push for Treaty Worldwide Adoption and Ratification' (Press Release, 27 September 2005) available at <[http://hrw.org/english/docs/2005/09/26/global11785\\_txt.htm](http://hrw.org/english/docs/2005/09/26/global11785_txt.htm)> at 1 October 2006.

<sup>20</sup> UN Human Rights Council, 'Human Rights Council Adopts Texts for Protection from Enforced Disappearances, Rights of Indigenous People' (Press Release, 19 June 2006) available at <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/B20EBDAF668EA646C125719C006E90E8?opendocument>> at 1 October 2006; UN Working Group, 'United Nations Commission on Human Rights Working Group on Enforced or Involuntary Disappearances Calls on the International Community to Bring the *Draft Convention on Enforced Disappearance* to the General Assembly's 61<sup>st</sup> Session for Approval and Opening for Ratification' (Press Release, 3 March 2006), available at <<http://www.ohchr.org/english/issues/disappear/PressRelease%20Mar06.doc>> at 1 October 2006.

<sup>21</sup> UN Human Rights Council, 1<sup>st</sup> sess, Annex, Agenda Item 4, UN Doc A/HRC/1/L.2 (23 June 2006) ('*Enforced Disappearance Convention*').

<sup>22</sup> The focus will be on assessing the criminalisation of acts of enforced disappearance that do not necessarily arise in a situation amounting to armed conflict. Enforced disappearances have not been explicitly criminalised in international law relating to armed conflict. However, such disappearances may, in some circumstances, be considered 'grave breaches' of various provisions of the *Geneva Conventions*, thereby attracting international criminal jurisdiction: see generally UN Commission on Human Rights, *Working Group December 2004 Report*, above n 8, [53]–[64].

## II NATURE AND PREVALENCE OF ENFORCED DISAPPEARANCE

The first documented use of enforced disappearance was pursuant to the *Nacht und Nebel* (Night and Fog) Decree declared by the Nazi regime in 1941.<sup>23</sup> Under the Decree, perceived members of resistance movements in occupied territories were arrested and secretly transferred to Germany ‘in the blackness of night’.<sup>24</sup> The fundamental element of this procedure was to deny family members and the wider public any knowledge as to the whereabouts and eventual fate of the victim.<sup>25</sup> This was intended to have a deterrent effect on resistance activities by creating widespread fear and anxiety among relatives of ‘disappeared’ individuals and by intimidating the public.<sup>26</sup> Persons arrested and transferred to Germany were held incommunicado in cruel and inhuman conditions, prosecuted without due process, and were frequently sentenced to death and executed.<sup>27</sup> The procedures took place secretly and family members were rarely notified as to the individual’s fate.<sup>28</sup> It is thought that approximately 7000 persons were secretly arrested, transferred and likely executed under the Decree.<sup>29</sup>

Enforced disappearances were later used as ‘a systematic policy of State repression’ starting in Guatemala and Brazil in the 1960s and 1970s.<sup>30</sup> They came to be practised extensively throughout Latin America in the 1970s and 1980s, affecting tens of thousands of people.<sup>31</sup> Governments would routinely abduct people, hold them in clandestine prisons, subject them to torture and often execute them without trial. The bodies were frequently hidden or destroyed ‘to eliminate any material evidence of the crime and to ensure the impunity of those responsible’.<sup>32</sup> The practice of enforced disappearance was particularly widespread in Argentina, during the so-called ‘dirty war’. Argentina’s National Commission on Disappeared People, established in 1983, has recorded 8960 cases of enforced disappearance and estimates that the actual figure could be higher.<sup>33</sup> Disappearances were also prevalent in Chile,<sup>34</sup> Peru,<sup>35</sup> El Salvador,<sup>36</sup>

<sup>23</sup> *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10: Nuremberg, October 19 October 1946 – April 1949* (1951) vol 3, 75.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* 75–6. The Decree provided that ‘[e]fficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal’.

<sup>27</sup> *Ibid.* 75.

<sup>28</sup> *Ibid.*

<sup>29</sup> Amnesty International USA, *Disappearances: A Workbook* (1981) 2.

<sup>30</sup> UN Commission on Human Rights, *Working Group January 2002 Report*, above n 8, [8]. See also Amnesty International, *Getting Away with Murder: Political Killings and ‘Disappearances’ in the 1990s* (1993). From 1966–76 an estimated 20 000 people were victims of enforced disappearance and extrajudicial execution in Guatemala: at 13.

<sup>31</sup> See Jo M Pasqualucci, ‘The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System’ (1994) 12 *Boston University International Law Journal* 321, 326–9.

<sup>32</sup> *Velasquez Rodriguez v Honduras* [1988] Inter-Am Court HR (ser c) No 4 [157] (‘*Velasquez Rodriguez Case*’).

<sup>33</sup> Amnesty International, *Argentina: Investigation into Disappearances — A Step towards Settling Outstanding Debt from ‘Dirty War’* (1998) <<http://web.amnesty.org/library/Index/ENGAMR130101998?open&of=ENG-ARG>> at 1 October 2006.

Colombia,<sup>37</sup> Uruguay<sup>38</sup> and Honduras.<sup>39</sup> The broad objective in practicing enforced disappearances during this period was to dispose of political opponents secretly<sup>40</sup> while evading domestic and international legal obligations,<sup>41</sup> and to 'sow intimidation' into the fabric of society.<sup>42</sup>

The use of enforced disappearances was by no means limited to the Latin American region in the 1980s. In Iraq, for instance, Amnesty International estimates that approximately 100 000 Kurdish people were 'disappeared' under 'Operation Anfal', most during a four month period.<sup>43</sup> Disappearances also 'reached catastrophic proportions' in Sri Lanka in that decade, following the creation of a specialised police commando unit to respond to insurgents in the south.<sup>44</sup> In addition, Government forces used enforced disappearances to target 'Tamil separatists' in the north-eastern region of the country.<sup>45</sup>

Unfortunately, since the 1980s, the use of enforced disappearance has increased exponentially and has spread throughout all regions of the world.<sup>46</sup> According to the UN Working Group, enforced disappearances commonly occur today within states suffering from internal tensions or conflict, such as Nepal, Colombia, the Russian Federation and Sudan.<sup>47</sup> Acts of enforced disappearance have been particularly prevalent in Nepal and the Russian Federation, and

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<sup>34</sup> Americas Watch reported that during the first 18 months of the Pinochet regime, 'one in every ten Chilean families was affected by arrest, detention or exile': Americas Watch, *Chile since the Coup: Ten Years of Repression* (1983) 5.

<sup>35</sup> From 1983–93, Amnesty International compiled records of over 4300 victims of enforced disappearance in Peru, although this figure is considered to under-represent the true extent of enforced disappearances during this period: Amnesty International, *Getting Away with Murder*, above n 30, 14.

<sup>36</sup> The El Salvador Truth Commission 'received some 22 000 denunciations of gross violent crimes, including mainly complaints of extra-judicial executions, forced disappearances, and torture': Pasqualucci, above n 31, 328.

<sup>37</sup> The UN Working Group has received over 1000 cases of enforced disappearance from Colombia since its establishment in 1980: UN Commission on Human Rights, *Working Group December 2004 Report*, above n 8, 93. In 1993, Amnesty International reported that over 1500 people are believed to have 'disappeared' in Colombia since 1978: Amnesty International, *Getting Away with Murder*, above n 30, 36.

<sup>38</sup> The Peace Commission, established in Uruguay in 2000, has reported that 26 people were 'disappeared' during the country's military rule from 1973–85: see Amnesty International, *Report 2004: Uruguay* (2004) <<http://web.amnesty.org/report2004/ury-summary-eng>> at 1 October 2006.

<sup>39</sup> Between 100 and 150 persons were 'disappeared' in Honduras from 1981 to 1984: *Velasquez Rodriguez Case* [1988] Inter-Am Court HR (ser c) No 4 [147].

<sup>40</sup> Amnesty International, *Getting Away with Murder*, above n 30, 13.

<sup>41</sup> Berman and Clark, above n 7, 532.

<sup>42</sup> Pasqualucci, above n 31, 326.

<sup>43</sup> Amnesty International, *Getting Away with Murder*, above n 30, 14.

<sup>44</sup> *Ibid* 14–15.

<sup>45</sup> *Ibid*.

<sup>46</sup> UN Commission on Human Rights, *Working Group January 2002 Report*, above n 8, [10].

<sup>47</sup> UN Commission on Human Rights, *Working Group December 2004 Report*, above n 8, [8]. In addition, the repression of political opponents through the practice of enforced disappearance was found to be prevalent in Algeria, the Islamic Republic of Iran and the Philippines. The UN Working Group also notes that '[i]n some situations, due to probable underreporting, especially in Africa', it 'expects that large numbers of reports of disappearance arising from current conflicts could be submitted to it during the coming years': at [9].

provide a contemporary illustration of the nature of these acts and the context in which they occur. Human Rights Watch has reported that in Nepal, enforced disappearances have ‘reached crisis proportions’.<sup>48</sup> The use of enforced disappearances has arisen as a result of the ‘Nepalese people’s war’, declared in 1996 by the Communist Party of Nepal (Maoist) (‘CPN-M’). Instances of enforced disappearance have dramatically increased since 2001, when the Nepalese Government deployed the Nepalese Army to conduct counterinsurgency operations against Maoist insurgents.<sup>49</sup> Enforced disappearances have been ‘an integral part of Nepal’s counter-insurgency campaign’,<sup>50</sup> and have increasingly been practiced by members of the Nepalese Army<sup>51</sup> against perceived members of the CPN-M or affiliated groups.<sup>52</sup> Human Rights Watch has received reports of over 1200 people who have been ‘disappeared’ since 2000.<sup>53</sup> Enforced disappearances have been carried out with impunity, as civilian authorities have issued denials and have failed to hold any senior officers accountable.<sup>54</sup> In addition, Maoist insurgent forces have themselves perpetrated numerous enforced disappearances against perceived ‘informers’ or ‘enemies of the revolution’.<sup>55</sup>

In the Russian Federation, Human Rights Watch estimates that between 3000 and 5000 people have been ‘disappeared’ in Chechnya at the hands of Russian military units and ‘pro-Moscow Chechen forces’.<sup>56</sup> Individuals are targeted on account of their perceived affiliation with Chechen rebel fighters, are secretly taken into custody by state agents, and are often tortured and summarily executed.<sup>57</sup> A recently identified ‘trend’ in the practice of enforced disappearance has also occurred in the context of the ‘war on terror’. Amnesty International and Human Rights Watch have reported the use of enforced

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<sup>48</sup> Human Rights Watch, *Clear Culpability: ‘Disappearances’ by Security Forces in Nepal* (2005) 1, available at <<http://hrw.org/reports/2005/nepal0205/nepal0205.pdf>> at 1 October 2006.

<sup>49</sup> *Ibid* 24.

<sup>50</sup> *Ibid* 2.

<sup>51</sup> *Ibid* 25–6.

<sup>52</sup> *Ibid* 28. See also UN Commission on Human Rights, *Civil and Political Rights, Including the Questions of: Disappearances and Summary Executions: Question of Enforced or Involuntary Disappearances: Report of the Working Group on Enforced or Involuntary Disappearances*, UN ESCOR, 61<sup>st</sup> sess, Agenda Item 11(b), UN Doc E/CN.4/2005/65/Add.1 (28 January 2005) [27] (‘*Working Group January 2005 Report*’).

<sup>53</sup> Human Rights Watch, *Clear Culpability*, above n 48:

Since May 2000, Nepal’s National Human Rights Commission ... has received reports of 1234 cases of ‘disappearance’ perpetrated by security forces. Informal Sector Service Centre, a prominent human rights group that monitors the human rights situation all over the country, recorded 368 ‘disappearances’ in 2003 alone, and 1264 since the beginning of the conflict in 1996: at 2.

<sup>54</sup> *Ibid* 1.

<sup>55</sup> *Ibid* 3. See also UN Commission on Human Rights, *Working Group January 2005 Report*, above n 52, [29].

<sup>56</sup> Memorial Human Rights Centre, as quoted in Human Rights Watch, *Worse than a War: ‘Disappearances’ in Chechnya — A Crime against Humanity* (2005) 2, available at <<http://hrw.org/backgrounder/eca/chechnya0305/chechnya0305.pdf>> at 1 October 2006.

<sup>57</sup> *Ibid* 9–15.

disappearance by the US Government, with perceived members of terrorist organisations being arrested and apparently held in secret detention centres.<sup>58</sup>

### III SHORTCOMINGS OF THE CURRENT INTERNATIONAL LEGAL FRAMEWORK IN HOLDING INDIVIDUALS CRIMINALLY RESPONSIBLE

Enforced disappearance has been labelled a ‘multiple human rights violation’;<sup>59</sup> that is, an act of enforced disappearance can amount to a violation of several rights contained in the *International Covenant on Civil and Political Rights*,<sup>60</sup> or its regional counterparts.<sup>61</sup> The UN Human Rights Committee (‘HRC’),<sup>62</sup> the Inter-American Court of Human Rights (‘IACHR’)<sup>63</sup> and the European Court of Human Rights (‘ECHR’)<sup>64</sup> have found that an act of enforced disappearance can amount to a violation of: a person’s right to liberty and security, the right to life, the right to humane conditions of detention, and/or the right to freedom from torture, cruel inhuman or degrading treatment or punishment. These human rights instruments impose obligations on states with

<sup>58</sup> Amnesty International, *Torture and Secret Detention: Testimony of the ‘Disappeared’ in the ‘War on Terror’* (2005) <<http://web.amnesty.org/library/index/engamr511082005>> at 1 October 2006; Human Rights Watch, *The United States’ ‘Disappeared’: The CIA’s Long-Term ‘Ghost Detainees’* (2004) <<http://www.hrw.org/background/usa/us1004/us1004.pdf>> at 1 October 2006. See also UN Commission on Human Rights, *Working Group December 2004 Report*, above n 8, [358]–[359].

<sup>59</sup> UN Commission on Human Rights, *Working Group January 2002 Report*, above n 8, 4. The UN Working Group has stated that ‘a reading of the *Universal Declaration of Human Rights* ... shows that to a greater or lesser degree practically all basic human rights’ of a victim of enforced disappearance are violated: UN Commission on Human Rights, *Report of the Working Group on Enforced or Involuntary Disappearance*, UN ESCOR, 39<sup>th</sup> sess, Agenda Item 10(b), UN Doc E/CN.4/1983/14 (21 January 1983) [133] (‘*Working Group 1983 Report*’).

<sup>60</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’).

<sup>61</sup> *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘*European Convention on Human Rights*’).

<sup>62</sup> See *Bleier v Uruguay*, HRC, Communication No 30/1978, UN Doc CCPR/C/15/D/30/1978 (29 March 1982); *Sanjuan Arevalo v Colombia*, HRC, Communication No 181/1984, UN Doc CCPR/C/37/D/181/1984 (3 November 1989); *Mojica v Dominican Republic*, HRC, Communication No 449/1991, UN Doc CCPR/C/51/D/449/1991 (10 August 1994); *El-Megreisi v Libyan Arab Jamahiriya*, Communication No 440/1990, UN Doc CCPR/C/50/D/440/1990 (24 March 1994); *Sarma v Sri Lanka*, HRC, Communication No 950/2000, UN Doc CCPR/C/78/D/950/2000 (31 July 2003); *Celis Laureano v Peru*, HRC, Communication No 540/1993, UN Doc CCPR/C/56/D/540/1993 (16 April 1996).

<sup>63</sup> See *Velasquez Rodriguez Case* [1988] Inter-Am Court HR (ser c) No 4; *Godinez Cruz v Honduras* [1989] Inter-Am Court HR (ser c) No 8 (‘*Godinez Cruz Case*’); *Blake v Guatemala* [1998] Inter-Am Court HR (ser c) No 36 (‘*Blake Case*’); *Caballero Delgado and Santana v Colombia* [1995] Inter-Am Court HR (ser c) No 22 (‘*Caballero Delgado and Santana Case*’); *Castillo Páez v Peru* [1997] Inter-Am Court HR (ser c) No 34 (‘*Castillo Páez Case*’); *Juan Humberto Sanchez v Honduras* [2003] Inter-Am Court HR (ser c) No 99 (‘*Juan Humberto Sanchez Case*’).

<sup>64</sup> See *Kaya v Turkey* (2000) III Eur Court HR 149; *Cyprus v Turkey* (2001) III Eur Court HR 1; *Şeker v Turkey*, Application No 52390/99 (Unreported, European Court of Human Rights, 21 February 2006); *Çakıai v Turkey* (1999) IV Eur Court HR 583; *Ipek v Turkey* (2004) II Eur Court HR 1; *Gongadze v Ukraine*, Application No 34056/02 (Unreported, European Court of Human Rights, 8 November 2005); *Bazorkina v Russia*, Application No 69481/01 (Unreported, European Court of Human Rights, 27 July 2006).

respect to their citizens. However, although they impose a duty on the part of state governments to investigate acts of enforced disappearance and to prosecute individual offenders under domestic law,<sup>65</sup> human rights violations do not per se lead to the attribution of individual criminal responsibility under international law. Rather, a 'routine' human rights abuse is criminalised under international law where it is found to meet the threshold requirements of a crime against humanity, or where it falls within the definition of a human rights violation that has specifically been criminalised in an ad hoc international instrument such as the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* ('CAT').<sup>66</sup>

Therefore, whilst enforced disappearances are not currently the subject of a specific, binding, global instrument and have not been criminalised explicitly in international law,<sup>67</sup> there are several existing avenues by which individuals, in certain circumstances, may be held criminally responsible under international law for perpetrating such acts. These existing avenues will now be analysed in

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<sup>65</sup> International human rights bodies have routinely found that states have a duty to investigate and prosecute acts of enforced disappearance that violate human rights. In relation to the HRC, see: *Sarma v Sri Lanka*, HRC, Communication No 950/2000, UN Doc CCPR/C/78/D/950/2000 (31 July 2003) [8.10]–[8.11]; *Mojica v Dominican Republic*, HRC, Communication No 449/1991, UN Doc CCPR/C/51/D/449/1991 (10 August 1994) [7]; *Celis Laureano v Peru*, HRC, Communication No 540/1993, UN Doc CCPR/C/56/D/540/1993 (16 April 1996) [10]; *Sanjuan Arevalo v Colombia*, HRC, Communication No 181/1984, UN Doc CCPR/C/37/D/181/1984 (3 November 1989) [10]; *Avellanal v Peru*, HRC, Communication No 202/1986, UN Doc CCPR/C/34/D/202/1986 (28 October 1988) [8.3]; *Vicente et al v Colombia*, HRC, Communication No 612/1995, UN Doc CCPR/C/60/D/612/1995 (29 July 1997) [8.8]. In relation to the IACHR, see *Velasquez Rodriguez Case* [1988] Inter-Am Court HR (ser c) No 4 [172]; *Blake Case* [1998] Inter-Am Court HR (ser c) No 36 [97]; *Caballero Delgado and Santana Case* [1995] Inter-Am Court HR (ser c) No 22 [56]–[59]; *Castillo Páez Case* [1997] Inter-Am Court HR (ser c) No 34 [90]; and *Godinez Cruz Case* [1989] Inter-Am Court HR (ser c) No 8 [181]–[182]. In relation to the ECHR, see *Kaya v Turkey* (2000) III Eur Court HR 149, [105]; *Şeker v Turkey*, Application No 52390/99 (Unreported, European Court of Human Rights, 21 February 2006) [97]; *Ipek v Turkey* (2004) II Eur Court HR 1, [169]; *Gongadze v Ukraine*, Application No 34056/02 (Unreported, European Court of Human Rights, 8 November 2005) [175]; *Bazorkina v Russia*, Application No 69481/01 (Unreported, European Court of Human Rights, 27 July 2006) [117]–[119]; *Turkoglu v Turkey*, Application No 34506/97 (Unreported, European Court of Human Rights, 17 March 2005) [119]; *McKerr v United Kingdom* (2001) III Eur Court HR 475, [108]–[115]; *McCann v United Kingdom* (1995) 324 Eur Court HR (ser A) 1, [161].

<sup>66</sup> Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>67</sup> Enforced disappearances are explicitly criminalised in the regional jurisdiction of the Organization of American States pursuant to the *OAS Convention*, above n 14, art I(b). Article IV of the *OAS Convention* states that 'acts constituting the forced disappearance of persons shall be considered offences in every State Party', and requires state parties to exercise jurisdiction over acts of enforced disappearance where they occur within its jurisdiction; where the offender is a national of the state party; or where a national of the state party is the victim of an enforced disappearance. States must also establish their jurisdiction over acts of enforced disappearance 'where the alleged criminal is within its territory and that state sees fit to do so'. Enforced disappearances are defined in art II 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.

order to determine the existence of gaps in the criminalisation of enforced disappearance, and ultimately to assess the need for the *Convention* and to consider the suitability and likely effectiveness of its provisions.

### A *Enforced Disappearance as a Crime against Humanity*

Whilst enforced disappearance has not been criminalised explicitly under international law, the practice has been criminalised to the extent that it constitutes a crime against humanity. Thus, where an act of enforced disappearance meets the threshold requirements of a crime against humanity, the perpetrator may be held criminally responsible at international law. The modern notion of a crime against humanity was developed during the International Military Tribunal trials in Nuremberg.<sup>68</sup> Crimes against humanity were defined as ‘murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds’.<sup>69</sup> Whilst the Tribunal originally linked crimes against humanity to armed conflict, this connection has since been severed,<sup>70</sup> and crimes against humanity may now occur both in times of armed conflict and in times of peace.

#### 1 *Criminalisation of Enforced Disappearance*

Under the *Rome Statute of the International Criminal Court*,<sup>71</sup> enforced disappearance has been declared a crime against humanity ‘when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.<sup>72</sup> 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.<sup>73</sup>

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<sup>68</sup> Three crimes — crimes against the peace, war crimes and crimes against humanity — were identified by the *Charter of the International Military Tribunal*, annexed to the *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis*, opened for signature 8 August 1945, 82 UNTS 280, art 6(a)–(c) (entered into force 8 August 1945) (*‘Nuremberg Charter’*). However, crimes against humanity have a longer history: see Steven R Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2<sup>nd</sup> ed, 2001) 46; M Cherif Bassiouni, ‘Crimes against Humanity’ in M Cherif Bassiouni, *International Criminal Law: Volume I — Crimes* (2<sup>nd</sup> ed, 1998) 521, 524–42.

<sup>69</sup> *Nuremberg Charter*, above n 68, art 6(c).

<sup>70</sup> See Ratner and Abrams, above n 68, 50–8.

<sup>71</sup> Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) (*‘Rome Statute’*).

<sup>72</sup> *Ibid* art 7(1)(i).

<sup>73</sup> *Ibid* art 7(2)(i).

According to the International Law Commission, the inclusion of enforced disappearance in the *Rome Statute* as a crime against humanity<sup>74</sup> was due to ‘its extreme cruelty and gravity’.<sup>75</sup> Indeed, its inclusion appears to have furthered a general trend, both internationally and regionally, of recognising enforced disappearance as being capable of constituting a crime against humanity. This was recognised by the Organization of American States, which declared in several early resolutions that an enforced disappearance can amount to a crime against humanity.<sup>76</sup> The IACHR further stated, in 1988, that ‘[i]nternational practice and doctrine have often characterized disappearances as a crime against humanity, although there is no treaty in force which is applicable to the states parties to the *Convention* which uses this terminology’.<sup>77</sup> The Parliamentary Assembly of the Council of Europe has also recognised that enforced disappearance can amount to a crime against humanity.<sup>78</sup>

The UN General Assembly proclaimed in the *Enforced Disappearance Declaration* that ‘the systematic practice’ of enforced disappearance ‘is of the nature of a crime against humanity’.<sup>79</sup> Whilst the instrument is non-binding, it evidences international consensus to criminalise enforced disappearances that are found to amount to a crime against humanity. This characterisation has been confirmed by the UN General Assembly in a number of subsequent Resolutions.<sup>80</sup> Likewise, the *OAS Convention* contains a statement, in its preamble, that ‘the systematic practice of the forced disappearance of persons constitutes a crime against humanity’.<sup>81</sup> Interestingly, the classification of enforced disappearance as a crime against humanity was a contested issue during the drafting of both of these documents.<sup>82</sup> In the drafting of the *Enforced Disappearance Declaration*, some members of the Working Group ‘emphasized the distinction between an isolated case of forced disappearance and its systematic practice’,<sup>83</sup> and this approach was ultimately adopted.<sup>84</sup> The drafters of the *OAS Convention* also adopted an approach whereby a distinction was

<sup>74</sup> *Report of the International Law Commission on the Work of Its 48<sup>th</sup> session, 6 May – 26 July 1996*, UN GAOR, 51<sup>st</sup> sess, supp 10, UN Doc A/51/10 (23 October 1996) ch II, art 18(i).

<sup>75</sup> *Ibid* ch II, Commentary, [15]. See also Sir Nigel Rodley, *The Treatment of Prisoners under International Law* (2<sup>nd</sup> ed, 1999) 268.

<sup>76</sup> See General Assembly of the Organization of American States, *Annual Report of the Inter-American Commission on Human Rights*, OAS Doc AG/Res. 666 (XIII-0/83) (1983) [4]; General Assembly of the Organization of American States, *Annual Report of the Inter-American Commission on Human Rights*, OAS Doc AG/Res. 742 (XIV-0/84) (1984) [4].

<sup>77</sup> *Velasquez Rodriguez Case* [1988] Inter-Am Court HR (ser c) No 4 [153].

<sup>78</sup> Council of Europe Parliamentary Assembly, *Resolution 828 on Enforced Disappearances* (26 September 1984).

<sup>79</sup> *Enforced Disappearance Declaration*, above n 13, preamble.

<sup>80</sup> *Question of Enforced or Involuntary Disappearances*, GA Res 57/215, UN GAOR, 57<sup>th</sup> sess, 77<sup>th</sup> plen mtg, Agenda Item 109(b), UN Doc A/RES/57/215 (28 February 2003) 1; *Question of Enforced or Involuntary Disappearances*, GA Res 59/200, UN GAOR, 59<sup>th</sup> sess, 74<sup>th</sup> plen mtg, Agenda Item 105(b), UN Doc A/RES/59/200 (23 March 2005) 1.

<sup>81</sup> *OAS Convention*, above n 14.

<sup>82</sup> Reed Brody and Felipe González, ‘*Nunca Más: An Analysis of International Instruments on “Disappearances”*’ (1997) 19 *Human Rights Quarterly* 365, 380–1.

<sup>83</sup> *Ibid* 381.

<sup>84</sup> The UN Working Group also reached a compromise and adopted the phrase ‘of the nature of a crime against humanity’: *Enforced Disappearance Declaration*, above n 13, preamble (emphasis added). See also Brody and González, above n 82, 381.

drawn between single and systematic acts of enforced disappearance, classifying only the latter as a crime against humanity.<sup>85</sup> This seems to cement the notion that the customary law rule classifying enforced disappearance as a crime against humanity requires that the act of enforced disappearance constitute part of a widespread or systematic attack.<sup>86</sup>

Thus, the inclusion of art 7(1)(i) in the *Rome Statute* has crystallised an emerging international customary rule criminalising the widespread or systematic practice of enforced disappearance as a crime against humanity.<sup>87</sup> However, the *Rome Statute* appears to diverge from this customary trend by extending its definition to include non-state actors — that is, persons acting with the ‘authorization, support or acquiescence’ of non-state political organisations.<sup>88</sup> This represents a departure from the position under the *Enforced Disappearance Declaration* and the *OAS Convention*, both of which limit the definition of enforced disappearance to an act committed by state-supported actors.<sup>89</sup> This could be a significant departure — while most acts of enforced disappearance appear to be perpetrated by state agents, a significant number are perpetrated by non-state actors, as exemplified above in relation to the situation in Nepal.<sup>90</sup> However, there may be a lack of political will to bring individual perpetrators connected to the state to account under domestic criminal provisions — an obstacle less likely to arise in the case of non-state perpetrators. In any case, harmonisation of the definitions of enforced disappearance as a crime against humanity will only assist in identifying the circumstances in which individuals may be held criminally responsible for these acts,<sup>91</sup> and will thereby promote greater certainty in the exercise of international criminal jurisdiction by the International Criminal Court (‘ICC’) and by individual states.

Particular legal consequences flow from classifying enforced disappearance as a crime against humanity. Where an act of enforced disappearance is found to amount to a crime against humanity pursuant to the *Rome Statute*, an individual may be held criminally responsible under the international jurisdiction of the ICC. However, the ICC is not a court of primary jurisdiction; it functions to complement existing domestic jurisdictions. In order to prosecute an individual under its jurisdiction, the ICC must be satisfied that a state with domestic jurisdiction over the act ‘is unwilling or unable genuinely to carry out the

<sup>85</sup> Brody and González, above n 82, 380.

<sup>86</sup> See below discussion in Part III(A)(2).

<sup>87</sup> Antonio Cassese, *International Criminal Law* (2003) 80.

<sup>88</sup> *Rome Statute*, above n 71, art 7(2)(i).

<sup>89</sup> The *Enforced Disappearance Declaration*, above n 13, defines ‘enforced disappearance’ in its preamble as an act whereby

persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government ... followed by a refusal to disclose the fate or whereabouts of the person concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law (emphasis added).

Under the *OAS Convention*, above n 14, ‘forced disappearances’ must be ‘perpetrated by agents of the state or by persons or groups of persons acting with the authorisation, support or acquiescence of the state’: art II.

<sup>90</sup> See above Part II.

<sup>91</sup> Andreu-Guzmán, above n 3, 85.

investigation or prosecution'.<sup>92</sup> Further, the Court's jurisdiction can only be initiated either at the instigation of an ICC prosecutor (through a request by a state party<sup>93</sup> or at the prosecutor's own initiative<sup>94</sup>) or on referral by the Security Council under Chapter VII of the *Charter of the United Nations*.<sup>95</sup> The act for which an individual is to be charged must have either occurred in the territory of a state party to the *Rome Statute*,<sup>96</sup> or the individual must be a national of a state party.<sup>97</sup>

In addition, where enforced disappearance amounts to a crime against humanity under customary international law, individuals may also be subject to universal jurisdiction. Under this principle, 'any State is empowered to bring to trial persons accused of international crimes, regardless of the place of commission of the crime, or the nationality of the author or of the victim'.<sup>98</sup> The rationale for the exercise of universal jurisdiction is that the relevant international crime is of such gravity that a state is able to prosecute 'on behalf of the whole international community'.<sup>99</sup> This principle was first applied to acts constituting crimes against humanity in the Israeli Supreme Court case of *Attorney-General of the State of Israel v Adolf Eichmann*.<sup>100</sup> It is now a generally accepted customary principle that states may exercise universal jurisdiction over individuals accused of committing crimes against humanity.<sup>101</sup> However, the customary principle is permissive, rather than mandatory.<sup>102</sup> Thus, states may exercise universal jurisdiction over crimes against humanity, but they are not required to do so.

It is also worth noting that there is an emerging customary rule that statutes of limitation are not applicable to crimes against humanity.<sup>103</sup> This has particular significance in the case of enforced disappearance, in which individuals are often 'disappeared' either for a prolonged period or indefinitely.

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<sup>92</sup> *Rome Statute*, above n 71, art 17(1)(a).

<sup>93</sup> *Ibid* arts 13(a), 14.

<sup>94</sup> *Ibid* arts 13(c), 15.

<sup>95</sup> *Ibid* art 13(b).

<sup>96</sup> *Ibid* art 12(2)(a).

<sup>97</sup> *Ibid* art 12(2)(b).

<sup>98</sup> Cassese, above n 87, 284.

<sup>99</sup> *Ibid*.

<sup>100</sup> 36 ILR (1962) 277. The Court held that 'there is full justification for applying here the principle of universal jurisdiction since the international character of "crimes against humanity" ... dealt with in this case is no longer in doubt': at 299. According to Cassese, it is 'extremely significant that no State concerned protested against [the] trial', thus contributing to an emerging customary norm of the permissive exercise of universal jurisdiction for crimes against humanity: Cassese, above n 87, 293.

<sup>101</sup> See *Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity*, GA Res 3074 (XXVIII), UN GAOR, 28<sup>th</sup> sess, 2187<sup>th</sup> plen mtg, UN Doc A/RES/3074(XXVIII) (3 December 1973); Bassiouni, above n 68, 237–42.

<sup>102</sup> See Rodley, above n 75, referring to an act of torture amounting to a crime against humanity in international customary law: there is 'no requirement of universal jurisdiction although there is probably no obstacle to any state's exercising such jurisdiction': at 125 (emphasis added).

<sup>103</sup> The *Rome Statute*, above n 71, art 29, provides that '[t]he crimes within the jurisdiction of the Court shall not be subject to any Statute of Limitations'. See also Cassese, above n 87, 316–19.

## 2 *Shortcomings in Conceptualising Enforced Disappearance as a Crime against Humanity*

As indicated in Part II above, an act of enforced disappearance per se does not constitute a crime against humanity. Several threshold elements must be met, which could, in practice, exclude many such acts from being defined as such. First, the enforced disappearance must be part of a ‘widespread or systematic attack’.<sup>104</sup> That is, the act of enforced disappearance must not be isolated or sporadic, but rather part of a broader attack or policy. However, if the perpetrator is involved in only one enforced disappearance, this may still constitute a crime against humanity where this forms part of a larger attack, provided that the larger attack is ‘widespread’ or ‘systematic’.<sup>105</sup> The term ‘widespread’ has been interpreted to mean ‘massive, frequent, largescale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims’.<sup>106</sup> ‘Systematic’ has been defined as ‘thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources’.<sup>107</sup> An attack will generally be found to be ‘systematic’ by the existence of ‘a political objective, a plan pursuant to which the attack is perpetrated or an ideology’.<sup>108</sup> However, the presence of a plan or policy is merely indicative, and need not be expressly declared in order for an attack to be considered ‘systematic’.<sup>109</sup>

Acts of enforced disappearance that are irregular, non-frequent or are not part of a larger attack are not criminalised as crimes against humanity. ‘Experience has shown that a large number of forced disappearances occur outside the framework of a widespread or systematic practice’.<sup>110</sup> Whilst past and contemporary examples suggest that some acts will indeed be directed towards groups such as a specific political organisation,<sup>111</sup> many acts of enforced disappearance are directed at individual political opponents, outside the context of a large-scale, frequent or highly organised policy.<sup>112</sup> Thus, although the intention and effect of even a single act of enforced disappearance may be to suppress dissent on a large scale, it may not be considered part of a ‘widespread or systematic’ attack in order to constitute a crime against humanity.

Secondly, in order to satisfy the requisite subjective element of a crime against humanity, an individual must not only possess the mens rea for the

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<sup>104</sup> *Prosecutor v Kordic and Cerkez*, (Trial Chamber) Case No IT-95-14/2 (26 February 2001) [178].

<sup>105</sup> *Ibid* [94].

<sup>106</sup> *Prosecutor v Akayesu*, (Trial Chamber) Case No ICTR-96-4-T (2 September 1998) [580].

<sup>107</sup> *Ibid*.

<sup>108</sup> *Prosecutor v Blaskic*, (Trial Chamber) Case No IT-95-14-T (3 March 2000) [203].

<sup>109</sup> *Ibid* [204].

<sup>110</sup> Andreu-Guzmán, above n 3, 79.

<sup>111</sup> For instance, in the Russian Federation and Nepal, some individual acts of enforced disappearance appear to form part of a wider state policy or plan directed toward suppressing perceived ‘insurgents’: see above Part II.

<sup>112</sup> See generally UN Commission on Human Rights, *Working Group December 2004 Report*, above n 8. Amnesty International has also expressed concern over the specific targeting of individual ‘human rights defenders’ in various countries: see Amnesty International, *Getting Away with Murder*, above n 30, 54–6.

specific act, but must also have ‘knowledge that the offences are part of a systematic policy or of widespread and large-scale abuses’.<sup>113</sup> Thus, where an individual commits an act of enforced disappearance without an appreciation of the overall policy, organised plan or large-scale pattern of abuses, he or she cannot be held criminally responsible for the act under international law. In practice, it may be difficult to show that individual perpetrators of enforced disappearance have knowledge of a wider policy or attack. For instance, they may be instructed to arrest a particular individual in secret for a specific purpose relating to that individual’s perceived political or military activities. Individual perpetrators may be deliberately denied knowledge of the broader context of an individual act of enforced disappearance, and may only be responsible for one phase of the disappearance ‘process’:

[An enforced disappearance may involve] the initial capture, the taking to a place of detention, possible removal from place to place of detention, possible interrogation during detention, final removal from the place of detention and eventual disposal of the body, the person having been deprived of life at some point in the process ... Theoretically all these phases could involve different personnel, with those involved in one phase not necessarily knowing about the other phases or those involved.<sup>114</sup>

The *Rome Statute*’s definition adds a further subjective element: the perpetrator must have the intention of removing the individual ‘from the protection of the law for a prolonged period’.<sup>115</sup> This subjective element may be difficult to substantiate in the case of enforced disappearance, as the individual perpetrator will ‘usually only intend to abduct the victim without leaving a trace in order to bring him (her) to a secret place for the purpose of interrogation, intimidation, torture or instant ... assassination’<sup>116</sup> and may not be aware of the intended fate of the victim at the time of the disappearance.

Thus, an enforced disappearance will likely only be characterised as a crime against humanity in ‘truly exceptional circumstances’,<sup>117</sup> and a broader definition is needed to cover other acts of enforced disappearance that do not meet the specific elements of a crime against humanity. This raises the question of whether and why international law should criminalise acts that are not ‘widespread or systematic’. That is, are isolated acts of enforced disappearance that occur within a state, outside the context of a large-scale or highly organised attack, of sufficient concern to the international community to warrant their separate criminalisation at international law? It is one thing to impose a duty on states to investigate and prosecute acts of enforced disappearance under international human rights law, or to hold individuals responsible for crimes against humanity. It is quite another to insist that isolated acts should form part of international criminal law. It is because of the particularly heinous nature of acts of enforced disappearance, the large-scale terror and political oppression that these acts cause, and the fact that they are typically either caused or tolerated

<sup>113</sup> Cassese, above n 87, 82 (emphasis omitted).

<sup>114</sup> Rodley, above n 75, 248.

<sup>115</sup> *Rome Statute*, above n 71, art 7(2)(i).

<sup>116</sup> UN Commission on Human Rights, *Working Group January 2002 Report*, above n 8, [74].

<sup>117</sup> *Ibid.*

by the state, that per se acts of enforced disappearance are, or ought to be, of concern to the international community. Even individual acts of enforced disappearance are, by their very nature, designed to terrorise communities. The climate of terror created by a disappearance extends beyond the immediate family of the disappeared person, into the communities and collectivities to which that person belongs.<sup>118</sup> Enforced disappearances have been used to suppress political dissent and have assisted in maintaining oppressive political regimes and in threatening peace and security in entire regions.<sup>119</sup> Thus, even individual acts of enforced disappearance that occur outside the accepted framework of crimes against humanity should be subject to international criminalisation.

Currently, acts of enforced disappearance that fall short of constituting a crime against humanity are criminalised in the jurisdiction of the Organization of American States.<sup>120</sup> Such acts of enforced disappearance may also fall within the definition of ‘torture’ under the *CAT*, thus subjecting individual perpetrators to the international criminal jurisdiction for which it provides. The extent to which acts of enforced disappearance are criminalised under the *CAT* will be examined below.

### B *Enforced Disappearance as Torture*

Where an enforced disappearance falls within the definition of ‘torture’ pursuant to the *CAT*, the individual perpetrator may be held criminally responsible through the various mechanisms it contains. The *CAT* confers universal jurisdiction over alleged perpetrators of torture in art 5(2), which provides that a state may establish jurisdiction over offences amounting to torture ‘where the alleged offender is present in any territory under its jurisdiction’.<sup>121</sup> It also incorporates the principle of *aut dedere aut judicare*, which states that where an offender is present in the territory of a state party, the state must either prosecute or extradite the offender.<sup>122</sup>

#### 1 *When Will Enforced Disappearance Amount to Torture?*

Under the *CAT*, torture is defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the

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<sup>118</sup> Andreu-Guzmán, above n 3, 76. See also Ilias Bantekas and Susan Nash, *International Criminal Law* (2<sup>nd</sup> ed, 2003). The authors state that ‘[i]n the case of forced disappearances, one of the aims of the perpetrators is to terrorize or otherwise intimidate those close to the victim but also, in a significant number of cases, a larger segment of the population’: at 124.

<sup>119</sup> See above Part II.

<sup>120</sup> Pursuant to the *OAS Convention*, above n 14, art I(b).

<sup>121</sup> *CAT*, above n 66, art 5(2).

<sup>122</sup> *Ibid* art 7(1).

consent or acquiescence of a public official or other person acting in an official capacity.<sup>123</sup>

The *CAT* also prohibits ‘other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture’.<sup>124</sup> However, these acts have not been criminalised under the *CAT*, as they are not subject to universal jurisdiction or to an ‘extradite or prosecute’ duty, unlike acts of torture as defined in art 1. Therefore, in order to be criminalised under the *CAT*, an act of enforced disappearance must satisfy the definition of ‘torture’ as defined in art 1.

Acts amounting to physical or mental torture, as noted above, will often accompany an act of enforced disappearance, particularly in circumstances in which ‘disappeared’ individuals are subsequently kept in clandestine detention facilities. Acts of torture accompanying an enforced disappearance are often difficult to prove when a victim fails to reappear. However, international and regional human rights bodies, applying the relevant provisions that prohibit torture in international human rights law to cases of enforced disappearance, have at times shown a general willingness to imply torture from circumstantial evidence in the case of a ‘disappeared’ person, even where the exact nature of the acts found to amount to torture is not known.<sup>125</sup> However, will the act of enforced disappearance in and of itself amount to torture? The Committee against Torture, which monitors implementation of the *CAT*,<sup>126</sup> has not directly determined whether this is the case, although it has expressed concern over enforced disappearances in its review of state periodic reports.<sup>127</sup> This suggests that the Committee against Torture is willing to interpret acts of enforced disappearance as torture. However, this is not entirely clear, as acts of enforced disappearance are often *accompanied* by torture, which could explain the Committee against Torture’s concern with these acts.

Nonetheless, there are other indicators to suggest that enforced disappearance may amount to torture in international law. The UN Special Rapporteur on Torture, Sir Nigel Rodley, has stated that:

prolonged incommunicado detention in a secret place may amount to torture as described in article 1 of the *Convention against Torture*. The suffering endured by the disappeared persons, who are isolated from the outside world and denied any

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<sup>123</sup> Ibid art 1(1).

<sup>124</sup> Ibid art 16.

<sup>125</sup> *Velasquez Rodriguez Case* [1988] Inter-Am Court HR (ser c) No 4 [187]. The Court found that ‘although it has not been directly shown that Manfredo Velasquez was physically tortured, his kidnapping and imprisonment by governmental authorities, who have been shown to subject detainees to indignities, cruelty and torture’ constituted a violation, *inter alia*, of the right not to be subjected to ‘torture or to cruel inhuman or degrading treatment or punishment’ as per art 5(2) of the *American Convention on Human Rights*, above n 61. See also *Bleier v Uruguay*, HRC, Communication No 30/1978, UN Doc CCPR/C/15/D/30/1978 (29 March 1982) [14].

<sup>126</sup> *CAT*, above n 66, art 17.

<sup>127</sup> See Sir Nigel Rodley, *Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN GAOR, 56<sup>th</sup> sess, Agenda Item 132(a), UN Doc A/56/156 (3 July 2001) [11].

recourse to the protections of the law, and by their relatives doubtless increases as time goes by.<sup>128</sup>

The UN Working Group has also suggested that acts of enforced disappearance may constitute torture: ‘The very fact of being detained as a disappeared person, isolated from one’s family for a long period is certainly a violation of the right to humane conditions of detention and has been presented to the Group as torture.’<sup>129</sup> The *Enforced Disappearance Declaration* also provides that ‘any act of forced disappearance ... constitutes a violation of the rules of international law guaranteeing ... the right not to be subjected to torture and other cruel, inhuman or degrading treatment’.<sup>130</sup>

The jurisprudence of the HRC, the IACHR and the ECHR is useful in informing the definition of torture under the *CAT*. This jurisprudence indicates whether, and in which circumstances, acts of enforced disappearance are likely to fall within the definition of torture under art 1 of the *CAT*, to which international criminal responsibility attaches. However, relying on this jurisprudence to inform the definition of torture under the *CAT* is somewhat problematic, as the prohibitions against torture contained in art 7 of the *ICCPR* and its regional counterparts<sup>131</sup> form part of a collective prohibition against torture or cruel, inhuman or degrading treatment or punishment. The HRC has, at times, found that particular acts of enforced disappearance amount to a violation of art 7 of the *ICCPR*, which suggests that some acts of enforced disappearance may amount to torture pursuant to the *CAT*. However, the HRC has not *specifically* stated that acts of enforced disappearance will amount to torture, rather than cruel, inhuman or degrading treatment or punishment. Moreover, in some circumstances, the HRC has expressly stated that particular acts of enforced disappearance amount to cruel, inhuman or degrading treatment or punishment, but do not expressly amount to torture under art 7 of the *ICCPR*. As noted above, cruel, inhuman or degrading treatment is not criminalised under the *CAT*, and in order for an individual to be held criminally responsible for an enforced disappearance under the *CAT*, the act must be found to amount to torture.

In *El-Megreisi v Libyan Arab Jamahiriya*, the HRC found that the detained person ‘by being subject to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhuman treatment’.<sup>132</sup> The detainee had been held in detention for more than three years, was allowed one visit from his wife, and then was again detained in a secret location.<sup>133</sup> The HRC has also stated, in General Comments, that ‘a measure such as solitary confinement may, according to the circumstances, and especially when the

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<sup>128</sup> Ibid [14].

<sup>129</sup> UN Commissioner of Human Rights, *Working Group 1983 Report*, above n 59, [131].

<sup>130</sup> *Enforced Disappearance Declaration*, above n 13, art 1(2).

<sup>131</sup> *American Convention on Human Rights*, above n 61, art 5(2); *European Convention on Human Rights*, above n 61, art 3.

<sup>132</sup> *El-Megreisi v Libyan Arab Jamahiriya*, Communication No 440/1990, UN Doc CCPR/C/50/D/440/1990 (24 March 1994) [5.4].

<sup>133</sup> Ibid [2.1]–[2.4].

person is kept incommunicado' violate art 7,<sup>134</sup> and that '[p]rovisions should ... be made against incommunicado detention'.<sup>135</sup> Thus, the HRC will look to the impact or effect of an act of enforced disappearance on an individual victim, rather than to the act of enforced disappearance itself, in determining whether the act will amount to torture. The duration of detention appears to be a significant factor in this determination. The HRC found in *Mojica v Dominican Republic* that 'the disappearance of persons is inseparably linked to treatment that amounts to a violation of art 7'.<sup>136</sup> Thus the Committee seemed to suggest that an enforced disappearance ipso facto can amount to torture or to cruel, inhuman or degrading treatment or punishment. However, this is difficult to conclude with certainty, as the Committee in this case inferred that the disappearance was accompanied by independent acts of torture.<sup>137</sup>

The HRC has, at times, held that acts of enforced disappearance constitute cruel and inhuman treatment, but has not held that such acts also amount to torture. In *Celis Laureano v Peru*, the HRC found that the 'disappearance' of a 16 year old girl and the subsequent prevention of contact with her family amounted to 'cruel and inhuman treatment',<sup>138</sup> but was not explicitly found to amount to torture, thus complicating the question of whether acts of enforced disappearance per se are likely to amount to torture pursuant to the CAT. Similarly, in *Avellanal v Peru*, the HRC found that 'the abduction and disappearance of the victim and prevention of contact with her family and with the outside world constitute cruel and inhuman treatment',<sup>139</sup> but did not explicitly amount to torture. In the *Velasquez Rodriguez Case*, the IACHR found that an act of enforced disappearance amounted to 'cruel and inhuman treatment', without holding that it also constituted torture under the *American Convention on Human Rights*.<sup>140</sup>

The HRC has also held that an enforced disappearance may amount to torture or to cruel, inhuman or degrading treatment or punishment perpetrated against the family members of a 'disappeared' person. In *Quinteros v Uruguay*, the HRC found that the mother of a 'disappeared' person, who suffered 'anguish and stress ... by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts' was 'a victim of the violations' of art 7.<sup>141</sup> However, the ECHR has routinely found that while the mental distress caused by an enforced disappearance on family members of a 'disappeared' person can

<sup>134</sup> HRC, *General Comment No 7: Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)*, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI.GEN/1/Rev.7 (12 May 2004) 129, [2].

<sup>135</sup> HRC, *General Comment No 20: Replaces General Comment 7 concerning the Prohibition of Torture and Cruel Treatment or Punishment (Art 7)*, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI.GEN/1/Rev.7 (12 May 2004) 150, [11].

<sup>136</sup> HRC, Communication No 449/1991, UN Doc CCPR/C/51/D/449/1991 (10 August 1994) [5.7].

<sup>137</sup> Ibid.

<sup>138</sup> HRC, Communication No 540/1993, UN Doc CCPR/C/56/D/540/1993 (16 April 1996) [8.5].

<sup>139</sup> HRC, Communication No 202/1986, UN Doc CCPR/C/34/D/202/1986 (28 October 1988) [8.5].

<sup>140</sup> [1988] Inter-Am Court HR (ser c) No 4 [187].

<sup>141</sup> HRC, Communication No 107/1981, UN Doc CCPR/C/19/D/107/1981 (21 July 1983) [14].

amount to degrading or inhuman treatment in some circumstances, it does not necessarily amount to torture.<sup>142</sup>

International human rights law jurisprudence indicates that acts of enforced disappearance per se do not amount to torture, which is instructive in informing the definition of torture contained in the *CAT*. Rather, the particular circumstances of the enforced disappearance and the impact of these circumstances on the victim will be examined to determine whether an individual act of enforced disappearance will amount to torture. As indicated above, it is possible that an act of enforced disappearance may do so. However, this is by no means clear. In some cases it may be found that an act of enforced disappearance ipso facto may cause a sufficient degree of psychological suffering, both for the victim and family members, which amounts to torture. Where this suffering is intentionally 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' and for a prescribed purpose,<sup>143</sup> an act of enforced disappearance may be criminalised under the *CAT*. However, many acts of enforced disappearance may not constitute torture under the *CAT*, but instead will be considered to constitute cruel, inhuman or degrading treatment or punishment.

## 2 *Shortcomings in Conceptualising Enforced Disappearance as Torture*

Forcing the phenomenon of enforced disappearance to fit into existing frameworks which were not specifically designed to address the issue, such as that provided by the *CAT*, leads to gaps in the criminalisation of these acts. The jurisprudence of the HRC, the IACHR and the ECHR concerning whether acts of enforced disappearance will amount to torture in international human rights law is useful in illustrating some of these shortcomings. As discussed above, whilst such acts may amount to torture in some circumstances, the position is by no means clear.

In determining whether an act of enforced disappearance amounts to torture in international human rights law, human rights bodies have focused on the effects of such acts, rather than their nature. Using this approach to inform the definition of torture pursuant to the *CAT* demonstrates a fundamental shortcoming in relying on this instrument to criminalise enforced disappearance: the *CAT* does not criminalise the act of enforced disappearance *itself*. Rather, a particular act of enforced disappearance may be criminalised according to the *effect* of the disappearance on an individual. In examining whether the effect of an act of enforced disappearance amounts to torture, the focus appears to be on the duration of detention and the psychological suffering that this causes an individual, as explored above. This could serve to exclude many acts of enforced disappearance from being criminalised under the *CAT*, even though they may be particularly heinous. If, for example, a person is 'disappeared' and killed shortly

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<sup>142</sup> See, eg, *Kurt v Turkey* (1998) III Eur Court HR 1152, [134]; *Gongadze v Ukraine*, Application No 34056/02 (Unreported, European Court Human Rights, 8 November 2005) [186]; *Ipek v Turkey* (2004) II Eur Court HR 1, [181]–[183]; *Orhan v Turkey*, Application No 25656/94 (Unreported, European Court of Human Rights, 18 June 2002) [354].

<sup>143</sup> Pursuant to art 1 of the *CAT*, above n 66. A prescribed purpose is defined as obtaining information or confession, punishment or 'any reason based on discrimination of any kind'.

thereafter, it will not amount to torture, except, perhaps, where family members are deliberately denied knowledge of the victim's fate for a significant period of time, with the intention of creating severe psychological suffering. This has been demonstrated by the IACHR's failure to find that an enforced disappearance amounted to torture where there was only a short time lapse between capture and presumed death.<sup>144</sup>

Moreover, the effect of an act of enforced disappearance on a 'disappeared' person can be difficult to demonstrate, owing to the nature of enforced disappearances, after which an individual may never re-appear. The ECHR has, at times, stopped short of finding that acts of enforced disappearance amount to torture; because enforced disappearances are characterised by a lack of information, the psychological and physical impact on 'disappeared' persons 'can only be a matter of speculation'.<sup>145</sup> Criminalising enforced disappearance according to their effects, rather than by reference to the specific act itself, is therefore problematic. Also, the *CAT* only criminalises acts perpetrated by, or with the consent or acquiescence of, 'public officials', that is, state agents.<sup>146</sup> This excludes from criminality any acts of enforced disappearance perpetrated by wholly private actors, such as insurgent groups, or civilian 'death squads'.

Thus, the *CAT* may be a useful mechanism by which to hold individuals criminally responsible for acts of enforced disappearance in limited circumstances. However, it does not adequately respond to the unique act of enforced disappearance, but only to certain effects, including the suffering caused by prolonged incommunicado detention, which consequently leaves gaps in the criminalisation of per se acts of enforced disappearance.

### C *Prevailing Gaps in Criminalisation*

Applying existing international legal mechanisms to the unique phenomenon of enforced disappearance exposes gaps in the international framework criminalising these acts. An act of enforced disappearance is clearly criminalised where it reaches the level, and satisfies the specific elements, of a crime against humanity. Whether criminal responsibility attaches to isolated or per se acts of enforced disappearance is less clear. It is likely that only in certain circumstances will individual acts of enforced disappearance satisfy the threshold requirements of torture pursuant to the *CAT*. In view of the gravity of acts of enforced disappearance and the existing gaps in the criminalisation of these acts, there is an obvious need for a binding global instrument to criminalise enforced disappearance clearly and unequivocally and to provide measures designed to hold individuals responsible for its occurrence. This, it is hoped, will combat the impunity of individuals who perpetrate acts of enforced disappearance, and will in turn help to deter potential perpetrators.

<sup>144</sup> *Caballero Delgado and Santana Case* [1995] Inter-Am Court HR (ser c) No 22 [64].

<sup>145</sup> *Orhan v Turkey*, Application No 25656/94 (Unreported, European Court of Human Rights, 18 June 2002) [354]. See also *Çiçek v Turkey* (2001) I Eur Court HR 108, [154]; *Kurt v Turkey* (1998) III Eur Court HR 1152, [115].

<sup>146</sup> *CAT*, above n 66, art 1(1).

IV ANALYSIS OF THE *INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE*

The impetus for the drafting of a binding global instrument on enforced disappearance has largely arisen out of initiatives taken by relatives of ‘disappeared’ persons.<sup>147</sup> The first attempt at initiating the adoption of an international convention took place at a colloquium convened by the Human Rights Institute of the Paris Bar Association in 1981, during which three human rights NGOs presented proposed drafts.<sup>148</sup> For several years following the Paris colloquium, the focus shifted to the Latin American region, ‘generating intense activity at the regional NGO level and in the inter-American system’.<sup>149</sup> Nevertheless, the ultimate goal to create an international convention was retained.<sup>150</sup> Several draft conventions were prepared during the 1980s by Latin American-based NGOs, and these were the basis for the parallel development and adoption of the *Enforced Disappearance Declaration* in 1992 and the *OAS Convention* in 1994.<sup>151</sup> In August 1998, the Sub-Commission on the Administration of Justice adopted a draft convention,<sup>152</sup> and in April 2001, the Commission established a working group to elaborate a ‘legally binding normative instrument for the protection of all persons from enforced disappearance ... for consideration and adoption by the General Assembly’.<sup>153</sup> The final draft of the *Convention* was completed on 23 September 2005 and adopted by the Human Rights Council in June 2006. It will be transmitted to the General Assembly to be adopted and opened for signature and ratification later this year.<sup>154</sup> It is hoped that the *Convention* will substantially increase the level of protection afforded to persons from enforced disappearance.<sup>155</sup>

A *The Need for and Advantages of Drafting a Separate Convention*

The notion of drafting a separate convention to deal specifically with enforced disappearance has not been universally endorsed. Some parties have ‘question[ed] the usefulness of a purpose-built convention’,<sup>156</sup> arguing that acts

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<sup>147</sup> Independent Commission on International Humanitarian Issues, above n 1, 88.

<sup>148</sup> Ibid. See also UN Commission on Human Rights, *Working Group January 2002 Report*, above n 8, [43].

<sup>149</sup> Wilder Tayler, ‘Background to the Elaboration of the Draft *International Convention for the Protection of All Persons from Forced Disappearance*’ (2001) 62–3 *International Commission of Jurists: The Review* 63, 65.

<sup>150</sup> Ibid.

<sup>151</sup> UN Commission on Human Rights, *Working Group January 2002 Report*, above n 8, [43].

<sup>152</sup> Ibid.

<sup>153</sup> UN Commission on Human Rights, *Question of Enforced or Involuntary Disappearances*, CHR Res 2001/46, 57<sup>th</sup> sess, 73<sup>rd</sup> mtg, UN Doc CHR/Res/2001/46 (23 April 2001) [12].

<sup>154</sup> UN Working Group, ‘UN Working Group on Disappearances Welcomes Conclusion of Drafting of *Convention on Enforced Disappearance*’, above n 17; *Enforced Disappearance Convention*, above n 21.

<sup>155</sup> UN Commission on Human Rights, *Working Group January 2002 Report*, above n 8, [49].

<sup>156</sup> Independent Commission on International Humanitarian Issues, above n 1, 88. See also UN Commission on Human Rights, *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of all Persons From Enforced Disappearances*, 59<sup>th</sup> sess, Agenda Item 11(b), UN Doc E/CN.4/2003/71 (12 February 2003) [19] (*Working Group First Session Report*).

of enforced disappearance are already prohibited in international law, and that existing international legal mechanisms should be strengthened in order to respond effectively to such acts, rather than drafting ‘yet another convention’.<sup>157</sup> However, in terms of the criminalisation of enforced disappearances, there are, as analysed above, clear gaps in international law. The assertion of domestic jurisdiction over individual perpetrators could arguably be relied on to fill these gaps, particularly by reference to the duty to investigate and prosecute acts of enforced disappearance pursuant to the *ICCPR* and its regional counterparts.<sup>158</sup> However, experience has shown that states are usually unwilling to prosecute acts of enforced disappearance carried out by members of state organisations.<sup>159</sup> Indeed, the rationale behind the practice of enforced disappearances by states is, in part, to deny its responsibility for the disappearance of individuals, or even to deny that they have disappeared at all, thereby allowing individual perpetrators to avoid public accountability for the act.<sup>160</sup>

As discussed above, there is a danger in relying on existing measures aimed at addressing other acts in order to respond to the specific phenomenon of enforced disappearance.<sup>161</sup> Defining enforced disappearance as a distinct offence lends greater clarity to international law when seeking to hold individuals criminally responsible for such an act. Additionally, it facilitates characterisation of all such acts as international crimes, rather than allowing perpetrators to avoid prosecution under existing international criminal law. Finally, it allows for the adoption of international legal mechanisms by which to hold individuals criminally responsible for acts of enforced disappearance — mechanisms that can specifically respond to this unique phenomenon.

However, it must be questioned whether the international criminalisation of enforced disappearance through the ratification of a new convention will in practice result in increased accountability for perpetrators of such acts. In the present context, states largely tend to pursue their own ‘short-term interests’ and protect their nationals at the expense of the interests of the international community.<sup>162</sup> Given this tendency, is recourse to international justice mechanisms likely to lead to increased accountability of perpetrators and to minimisation of instances of enforced disappearance? Past attempts to prosecute alleged perpetrators for breaches of the *CAT*, for instance, have often failed due to political sensitivities or lack of political will, even where these acts have been

<sup>157</sup> UN Commission on Human Rights, *Working Group First Session Report*, above n 156. ‘Some delegations questioned whether it was worth elaborating a legally binding instrument on (enforced disappearances) ... in view of the instruments and mechanisms that already existed’: at [19].

<sup>158</sup> See above Part III.

<sup>159</sup> Amnesty International, *Getting Away with Murder*, above n 30, 81–9. In relation to enforced disappearances in the Russian Federation, see Human Rights Watch, *Worse than a War*, above n 56: ‘Not a single person has been held fully accountable for a “disappearance” since the conflict [in Chechnya] began in 1999’: at 16–19.

<sup>160</sup> Independent Commission on International Humanitarian Issues, above n 1, 14; Berman and Clark, above n 7, 532; Jackson Nyamuya Maogoto, ‘Now You See, Now You Don’t: The State’s Duty to Punish Disappearances and Extra-Judicial Executions’ [2002] *Australian International Law Journal* 176, 176.

<sup>161</sup> See above Part III.

<sup>162</sup> Cassese, above n 87, 446.

particularly large-scale and egregious. Even where states have used the *CAT* to arrest and detain foreign nationals for perpetrating acts of torture, state actions — such as the dismissal of charges in Senegal against Hissene Habre (the former dictator of Chad) and the release of the Peruvian Major Tomas Ricardo Anderson Kohatsu in the US — demonstrate that prosecutions are highly sensitive to political pressures.<sup>163</sup> In relation to these cases, Solomon argues that Habre was able to use contacts among the elites of Senegalese society to pressure the President of Senegal to remove charges against him, while Anderson Kohatsu's arrest appeared to threaten inter-state relations between Peru and the US.<sup>164</sup> Prosecutions for acts of enforced disappearance would be vulnerable to the same political sensitivities.

Nonetheless, the international criminalisation of enforced disappearance can provide 'a solid legal foundation' for prosecuting perpetrators before international institutions, as well as for national courts exercising universal jurisdiction.<sup>165</sup> Cassese argues that there is an emerging tendency in international law, evidenced in several recent trends,<sup>166</sup> 'to shift attention from the interstate to the inter-individual level and to react to gross breaches and atrocities more by attempting to prosecute and punish individuals rather than by invoking the responsibility of the State'; a development witnessed most recently in the area of terrorism.<sup>167</sup> In this context, states will come under increased public pressure to prosecute individual perpetrators of international crimes, and it is likely that this pressure will flow on to other areas of international criminal responsibility. In the context of this emerging trend, the presence of a solid legal foundation providing states with the ability to prosecute perpetrators of acts of enforced disappearance under international law could yield increased individual accountability for these acts. Particularly in circumstances in which individual perpetrators are present in a state with an independent judiciary and strong public awareness of, and support for, a particular individual's prosecution,<sup>168</sup> international criminalisation of enforced disappearance could provide the foundation, and perhaps the impetus, for bringing individuals to justice for acts of enforced disappearance. It is therefore important that such acts are specifically and unequivocally criminalised in international law, and that no gaps remain in this regime.

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<sup>163</sup> See Aaron Solomon, 'The Politics of Prosecutions under the *Convention against Torture*' (2001) 2 *Chicago Journal of International Law* 309.

<sup>164</sup> *Ibid* 312.

<sup>165</sup> Ratner and Abrams, above n 68, 119, referring to prosecutions of acts of torture pursuant to the *CAT*.

<sup>166</sup> See Cassese, above n 87, 446–50.

<sup>167</sup> *Ibid* 447.

<sup>168</sup> Solomon, above n 163, 313. Solomon's analysis of the Pinochet trial, the political motivations behind the dismissal of charges against Habre in Senegal, and the release of Anderson Kohatsu in the US, leads him to suggest that an 'independent judiciary', 'uncontested' access to a state's court system, and 'strong public pressure' appear to be determinants of successful prosecutions of international crimes under universal jurisdiction: at 313.

### B *Criminalising Per Se Acts of Enforced Disappearance*

The *Enforced Disappearance Convention* prohibits per se acts of enforced disappearance<sup>169</sup> and holds individuals responsible under international law for *individual* acts of enforced disappearance.<sup>170</sup> Therefore, pursuant to the *Convention*, enforced disappearances need not reach the level of a crime against humanity, be accompanied by other acts, or fall within the definitions of existing human rights violations (such as torture) in order to be prohibited. This extension of the international prohibition on enforced disappearance is perhaps the most significant aspect of the *Convention*. Coupled with the provisions regarding enforcement mechanisms, in effect art 1(1) holds individuals criminally responsible under international law for an individual per se act of enforced disappearance, thereby addressing shortcomings of the existing categories of international crimes, as they are applied to enforced disappearance.

Article 1(2) of the *Convention*, which is based on a similar provision contained in the *Enforced Disappearance Declaration*<sup>171</sup> and the *CAT*,<sup>172</sup> extends the application of the prohibition on enforced disappearance to all situations and contexts, including during domestic or international armed conflict, other internal tensions, and in times of peace. It provides: ‘No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.’<sup>173</sup> Article 1(2) prohibits any justification for acts of enforced disappearance, which ensures that states are not able to derogate from the provisions of the *Convention* on grounds such as ‘national security’.

The *Convention* does, however, maintain a distinction between per se acts of enforced disappearance and those acts amounting to a crime against humanity. Article 5 provides: ‘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.’<sup>174</sup> The purpose of this article therefore appears to be to affirm existing customary international law and art 7(1)(i) of the *Rome Statute*. Throughout the drafting of the *Convention*, some delegations expressed concern over the inclusion and wording of art 5. The US delegation, for instance, proposed that the article should be removed and placed in the preamble, as it was not operative and could be interpreted as imposing a requirement on states to criminalise enforced disappearance as a crime against humanity in its domestic criminal laws.<sup>175</sup> Other delegations expressed concern that art 5 did not

<sup>169</sup> Article 1(1) of the *Convention*, above n 21, provides that ‘[n]o one shall be subjected to enforced disappearance’.

<sup>170</sup> *Ibid* arts 9–11. See below Part IV(D).

<sup>171</sup> *Enforced Disappearance Declaration*, above n 13, art 7.

<sup>172</sup> *CAT*, above n 66, art 2(2).

<sup>173</sup> *Enforced Disappearance Convention*, above n 21, art 1(2).

<sup>174</sup> *Ibid*.

<sup>175</sup> See UN Commission on Human Rights, *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, UN ESCOR, 62<sup>nd</sup> sess, Agenda Item 11(b), UN Doc E/CN.4/2006/57 (2 February 2006) [104] (‘*Working Group Fifth Session Report*’).

correspond to the definition of a crime against humanity in international law, and could thereby weaken existing international law.<sup>176</sup> However, the UN Working Group rejected this formulation, maintaining that art 5 was 'neutral' and would preserve existing international law, rather than weaken it.<sup>177</sup> In addition, the UN Working Group found that the provision did not impose an obligation on states to amend domestic criminal legislation.<sup>178</sup> It was thought that the article should be included, as it 'pointed out that enforced disappearances amounting to crimes against humanity were subject to a different legal regime'.<sup>179</sup>

Thus, it appears that whilst the *Convention* does attempt to consolidate the criminalisation of enforced disappearance in whatever context or form it is committed, the UN Working Group wished to at least point out that an act of enforced disappearance amounting to a crime against humanity is subject to a different (or at least additional) legal regime. However, the operative effect of art 5 does appear to be unclear. The *Convention* extends universal jurisdiction to all acts of enforced disappearance, not just those amounting to a crime against humanity.<sup>180</sup> The only other source of jurisdiction available for an act of enforced disappearance amounting to a crime against humanity is the *Rome Statute*.<sup>181</sup> Thus, the only legal effect of art 5 appears to be to affirm the jurisdiction of the ICC over acts of enforced disappearance that constitute crimes against humanity. However, acts of enforced disappearance that could be found to amount to crimes against humanity could also be prosecuted under the relevant operative provisions of the *Convention*. That is, a state could use the *Convention's* provisions mandating the exercise of universal jurisdiction over per se acts of enforced disappearance<sup>182</sup> to prosecute an individual for a particular act or acts of enforced disappearance, even where this act may be found to amount to a crime against humanity, without having to demonstrate the additional elements of a crime against humanity. As a result, the *Convention* appears to merely affirm the existing international criminalisation of enforced disappearances that amount to crimes against humanity, without limiting the ability of states to use the *Convention* as the legal basis for prosecuting individuals for acts of enforced disappearance, whether or not they constitute a crime against humanity. The *Convention* also appears to have maintained this distinction in order to facilitate preventative action through the UN General

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<sup>176</sup> Ibid [105].

<sup>177</sup> Ibid [106].

<sup>178</sup> Ibid.

<sup>179</sup> UN Commission on Human Rights, *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, UN ESCOR, 60<sup>th</sup> sess, Agenda Item 11(b), UN Doc E/CN.4/2004/59 (23 February 2004) [45] ('*Working Group Second Session Report*').

<sup>180</sup> *Enforced Disappearance Convention*, above n 21, art 9(2).

<sup>181</sup> *Rome Statute*, above n 71, art 7(1)(i).

<sup>182</sup> See below Part IV(D).

Assembly in circumstances in which it is apparent that an act of enforced disappearance has risen to the level of a crime against humanity.<sup>183</sup>

### C *Definition of Enforced Disappearance*

The act of enforced disappearance is defined in art 2 of the *Convention* as

the arrest, detention, abduction or other form of deprivation of liberty committed 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.<sup>184</sup>

The UN Working Group considered adding a temporal element and some delegations suggested inserting the phrase ‘for a prolonged period of time’, in light of ‘[t]he need to allow a certain amount of time to elapse between arrest and notification of the detention’.<sup>185</sup> However, this was rejected as other delegations maintained that an enforced disappearance could occur from the moment of arrest, and the definition should confer on the affected persons and relevant monitoring bodies the ability to intervene as soon as the deprivation of liberty commences, rather than requiring that they wait for an imprecise period of time to elapse.<sup>186</sup> In addition, the possibility of incorporating an element of intent into the requirement to remove the ‘disappeared’ person from the protection of the law was discussed during the drafting of the *Convention*. However, this proposal was met with opposition, mainly on the grounds that ‘[a]dding a further criterion by which intention must be demonstrated would merely make proof more difficult’,<sup>187</sup> and that domestic criminal law always provided for general mens rea, which should suffice.<sup>188</sup> The inclusion of a subjective element connected with this part of the definition would, in effect, have limited the scope of the *Convention*. As noted above, enforced disappearances often operate as a procedure, with different persons responsible for different phases. An individual who abducts a person, deliberately causing them to ‘disappear’, and who then passes them on to another individual involved in the ‘disappearance’ process, may not have the specific intention of removing the person from the protection of the law for a specified period.

<sup>183</sup> Article 34 of the *Convention* provides that where the Committee on Enforced Disappearances, established under art 26 of the *Draft Convention*, ‘receives information which appears to it to contain well-founded indications that enforced disappearance is being practiced on a widespread or systematic basis in the territory under the jurisdiction of a State Party, it may, after seeking from the State Party concerned all relevant information of the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations’.

<sup>184</sup> *Enforced Disappearance Convention*, above n 21.

<sup>185</sup> UN Commission on Human Rights, *Working Group Second Session Report*, above n 179, [22].

<sup>186</sup> *Ibid* [23].

<sup>187</sup> See UN Commission on Human Rights, *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, UN ESCOR, 61<sup>st</sup> sess, Agenda Item 11(b), UN Doc E/CN.4/2005/66 (10 March 2005) [25] (*‘Working Group Third and Fourth Sessions Report’*).

<sup>188</sup> *Ibid*.

There are three definite constitutive elements of an enforced disappearance pursuant to the above definition in the *Convention*: deprivation of liberty; by or with the support or acquiescence of a state agent; and a refusal to acknowledge that deprivation of liberty. These elements are rather unremarkable, and are included in definitions contained in the *Enforced Disappearance Declaration*<sup>189</sup> and the *OAS Convention*<sup>190</sup> as well as the working definition utilised by the UN Working Group.<sup>191</sup> However, there is concern over the significance of the definition's reference to placing the individual 'outside the protection of the law':<sup>192</sup> does this phrase amount to a separate element of enforced disappearance? There was some discussion regarding this issue during the drafting of the *Convention*, namely, 'whether removal from the protection of the law was a consequence or part of the definition of enforced disappearance'.<sup>193</sup> Some delegations, including those of China, Egypt and the United Kingdom, expressed the view that placing a person outside the protection of the law constituted a fourth element of the offence. The UK delegation stated that this element would be satisfied where a person is deprived of his or her liberty in a situation not covered by domestic rules relating to deprivation of liberty or detention, or where these rules were not in accordance with international law.<sup>194</sup> On the other hand, some delegations argued that this section of the definition should be removed from art 2 as '[r]emoval from the protection of the law was simply a consequence of disappearance and not part of the definition in its own right'.<sup>195</sup> The Argentine delegation, for instance, stated that the phrase could not be construed as an additional element, as removal of a person from the protection of the law was inherent in an enforced disappearance, and a consequence resulting from the cumulative effect of the other three elements: deprivation of liberty, state responsibility and a refusal to acknowledge the whereabouts or fate of the 'disappeared person'.<sup>196</sup>

Ultimately, the UN Working Group adopted the above definition, noting that it would make for 'constructive ambiguity'.<sup>197</sup> Legislators would have the option of interpreting whether placing a person outside the protection of the law was an

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<sup>189</sup> Above n 13, preamble.

<sup>190</sup> Above n 14, art II.

<sup>191</sup> UN Working Group, *General Comment on Article 4 of the Declaration*, UN ESCOR, 52<sup>nd</sup> sess, Agenda Item 8(c), UN Doc E/CN.4/1996/38 (15 January 1996).

<sup>192</sup> Associations of Families of the Disappeared, *Joint Statement on the Occasion of the Adoption of the International Convention for the Protection of All Persons from Enforced Disappearances* (Press Release, 23 September 2005) <[http://www.khulumani.net/component?option=com\\_docman/task/doc\\_view/gid.8/Itemid.113/](http://www.khulumani.net/component?option=com_docman/task/doc_view/gid.8/Itemid.113/)> at 1 October 2006.

<sup>193</sup> See UN Commission on Human Rights, *Working Group Third and Fourth Sessions Report*, above n 187, [23].

<sup>194</sup> HRC, *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, UN ESCOR, 62<sup>nd</sup> sess, Agenda Item 11(b), UN Doc E/CN.4/2006/57 (2 February 2006) [92].

<sup>195</sup> See UN Commission on Human Rights, *Working Group Third and Fourth Sessions Report*, above n 187, [23].

<sup>196</sup> See UN Commission on Human Rights, *Working Group Fifth Session Report*, above n 175, [91].

<sup>197</sup> See UN Commission on Human Rights, *Working Group Third and Fourth Sessions Report*, above n 187, [23].

additional element or a consequence of the crime.<sup>198</sup> However, it is doubtful that the requirement that a person be deliberately removed from the protection of the law will be adopted in future interpretations of the *Convention*. As incorporating an element of intent in the removal of a person from the protection of the law was rejected by the UN Working Group, it is unlikely that this should operate as a separate element of the offence. It would appear that the unacknowledged abduction, arrest or detention of a person *necessarily* removes that person from ‘the protection of the law’. This is illustrated by the interpretation offered by the Associations of Families of the Disappeared:

We are convinced that this characteristic of the definition should be interpreted as a consequence of the other constitutive elements of the crime of enforced disappearance (the deprivation of liberty and the denial of information) and not as an additional element in the definition. There can be no hypothesis of enforced disappearance that does not *ipso facto* exclude a person from the protection of the law.<sup>199</sup>

It is also indicative that the UN Working Group uses a working definition of enforced disappearance based on the *Enforced Disappearance Declaration*, which also provides that an enforced disappearance places the victim ‘outside the protection of the law’, and that the UN Working Group does not treat this phrase as amounting to a separate constitutive element.<sup>200</sup> Thus, it is unlikely that this phrase will constitute a separate element in the *Convention’s* definition of enforced disappearance. However, explicitly allowing states constructive ambiguity in interpreting the definition does provide some scope for adding this phrase as a fourth element to the definition of enforced disappearance in domestic law.

There has also been concern over the retention of a definition of enforced disappearance that is restricted in its application to state agents only. The definition codified in the *Convention* ‘includes both agents of the State as well as “indirect State agents”’, that is, private agents who act with the authorisation, support or acquiescence of the state.<sup>201</sup> However, it does not extend to wholly private acts of enforced disappearance. The possibility of extending the definition in art 2 to include non-state actors was raised throughout the drafting process, with some delegations supporting a definition that would extend international criminal responsibility for enforced disappearances to non-state agents.<sup>202</sup> It was argued that the *Convention* ‘must take account of the situation on the ground and of the fact that states were no longer the sole subjects of international law’.<sup>203</sup> However, many delegations objected to this idea,

<sup>198</sup> See UN Commission on Human Rights, *Working Group Fifth Session Report*, above n 175, [93].

<sup>199</sup> Associations of Families of the Disappeared, above n 192.

<sup>200</sup> UN Commission on Human Rights, *Working Group Third and Fourth Sessions Report*, above n 187, [55].

<sup>201</sup> Andreu-Guzmán, above n 3, 82.

<sup>202</sup> UN Commission on Human Rights, *Working Group Third and Fourth Sessions Report*, above n 187, [29]–[30]; UN Commission on Human Rights, *Working Group Second Session Report*, above n 179, [35].

<sup>203</sup> See UN Commission on Human Rights, *Working Group Third and Fourth Sessions Report*, above n 187, [30].

apparently concerned that extending the application of the instrument to non-state actors would help exonerate states of their primary responsibility to respond to acts of enforced disappearance. At the UN Working Group's third and fourth sessions,

[n]umerous delegations pointed out that a reference in the instrument to acts by non-State actors ought not under any circumstances exonerate the State from responsibility ... The proposal to expand the definition ... to cover non-State actors would rob the future instrument of its force and change its nature. The definition of disappearance would then be too broad and might cover acts such as abduction that were already punishable under national law.<sup>204</sup>

Given such concerns, it seems that the debate about whether to include non-state actors in the definition of enforced disappearance is indicative of the often uneasy reconciliation of international human rights law (with its emphasis on state responsibility) and international criminal law (which is based on individual responsibility).<sup>205</sup>

The debate continued into the fifth and final session of the UN Working Group.<sup>206</sup> Ultimately, the delegations reached a compromise. It appears that the issue was partially resolved by adding art 3, which places an obligation on states to investigate enforced disappearances 'committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice'.<sup>207</sup> Thus, the *Convention* provides specifically for state responsibility over acts of enforced disappearance perpetrated by non-state actors, but does not extend international criminality to acts of enforced disappearances by non-state actors.

As a result, non-state actors will be held criminally responsible in international law only for acts of enforced disappearance that reach the level of a crime against humanity, and not for acts of enforced disappearance per se. This restriction is unfortunate as, in some contexts, non-state actors perpetrate numerous acts of enforced disappearance:

The experience in many States, such as Colombia, shows that enforced disappearances are committed by government officials, indirect State actors such as members of death squads or so-called self-defence forces, guerrilla movements and paramilitary groups fighting the Government, as well as by members of organized criminal gangs, often in relation to drug-related offences.<sup>208</sup>

The definition leaves a lacuna in the international criminalisation of per se acts of enforced disappearance committed by these non-state agents, which is troubling, considering the problems inevitably encountered in defining acts of enforced disappearance as a crime against humanity, as outlined above.<sup>209</sup> In consideration of the particularly heinous nature of even an isolated act of

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<sup>204</sup> Ibid [31].

<sup>205</sup> See Steven R Ratner, 'The Schizophrenias of International Criminal Law' (1998) 33 *Texas International Law Journal* 237, 251.

<sup>206</sup> See UN Commission on Human Rights, *Working Group Fifth Session Report*, above n 175, [12]–[15].

<sup>207</sup> *Enforced Disappearance Convention*, above n 21, art 3.

<sup>208</sup> UN Commission on Human Rights, *Working Group January 2002 Report*, above n 8, [73].

<sup>209</sup> See above Part III(A).

enforced disappearance, and the inability or unwillingness on the part of some states to prosecute these acts, perhaps international criminal mechanisms for holding non-state actors responsible for enforced disappearances should be available.

#### D *Mechanisms for Holding Individuals Criminally Responsible*

The *Convention* provides for international criminal jurisdiction over enforced disappearances in several provisions. To begin with, it relies on the primacy of domestic jurisdiction in holding individuals responsible for acts of enforced disappearance. It places an obligation on each state party to criminalise enforced disappearance in its domestic law<sup>210</sup> and to assert its jurisdiction over acts of enforced disappearance: where the offence is committed in any territory under its jurisdiction; where the alleged perpetrator is one of its nationals; or where the ‘disappeared’ is one of its nationals and the state party considers it ‘appropriate’.<sup>211</sup> It is evident that the drafters intended to affirm the primary role of individual states to prosecute alleged perpetrators for acts of enforced disappearance:

Some participants said that it was always preferable for the victims to hold trials in States where the enforced disappearance had occurred. The jurisdiction of other States was provided for only as an additional possibility. States should therefore be encouraged to take steps at the internal level with a view to investigation and prosecution.<sup>212</sup>

Prosecuting alleged perpetrators of enforced disappearance in the domestic jurisdiction in which the offence occurs is indeed preferable if this is possible, and so long as the perpetrator is assured a fair trial. Domestic trials are more likely to facilitate ready access to evidence, including witnesses. In addition, domestic trials can promote a sense of ownership of the accountability process in societies in which enforced disappearances occur; although such acts should be of concern to all humankind, ‘it is ultimately the people of a state — past, present and future — who remain most affected’.<sup>213</sup>

However, as indicated above, states are often unwilling to prosecute persons for acts of enforced disappearance. Whilst the *Convention* asserts the primacy of domestic jurisdiction in criminalising enforced disappearance, it does not rely solely on this jurisdiction. It provides that a state must establish jurisdiction over an alleged perpetrator, where the perpetrator is merely present in its territory, unless it extradites or surrenders the offender to another state or an international criminal tribunal. Article 9(2) provides:

Each State Party *shall* likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance where the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in

<sup>210</sup> Article 4 of the *Convention*, above n 21, provides that ‘[e]ach State Party shall take necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law’.

<sup>211</sup> Ibid art 9(1)(a)–(c).

<sup>212</sup> UN Commission on Human Rights, *Working Group First Session Report*, above n 156, [59].

<sup>213</sup> Ratner and Abrams, above n 68, 343.

accordance with its international legal obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.<sup>214</sup>

Thus, the *Convention* clearly provides for mandatory universal jurisdiction. This is significant because under customary international law relating to the criminalisation of enforced disappearances as a crime against humanity, universal jurisdiction is permissive, rather than mandatory. Nowak, while examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, commented that ‘universal jurisdiction in clearly defined individual cases of enforced disappearance, with appropriate punishment, will constitute the most effective measure to deter the practice of enforced disappearance in the future’.<sup>215</sup>

Universal jurisdiction depends on a perpetrator voluntarily entering the territory of a state that is able and politically motivated (or not opposed, due to political sensitivities) to prosecute the particular defendant.<sup>216</sup> Nonetheless, the principle of universal jurisdiction codified in the *Convention* effectively criminalises enforced disappearance per se under international law, and may lead states to exercise jurisdiction over perpetrators of enforced disappearance; an option not otherwise available for those acts that do not constitute a crime against humanity or amount to torture. This could be preferable to relying on an international tribunal to prosecute enforced disappearances as ‘juridical norms of protection of the individual are much more effective when they are integrated into domestic law’.<sup>217</sup>

In addition, art 11(1) imposes a duty to either prosecute or extradite an alleged perpetrator, on similar terms as that contained in the *CAT*. It provides:

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

Article 13 provides the legal basis for extradition between states parties, in the absence of an existing agreement, and removes political immunity for perpetrators of enforced disappearance. The duty to prosecute or extradite works together with the principle of universal jurisdiction to prevent states from operating as ‘safe havens’ for perpetrators.<sup>218</sup>

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<sup>214</sup> *Enforced Disappearance Convention*, above n 21 (emphasis added). At the fifth and final session of the Working Group, the US delegation said that ‘it would not consider itself bound’ by art 9(2) ‘under any circumstances’: UN Commission on Human Rights, *Working Group Fifth Session Report*, above n 175, [117].

<sup>215</sup> UN Commission on Human Rights, *Working Group January 2002 Report*, above n 8, [96].

<sup>216</sup> Ratner and Abrams, above n 68, 341.

<sup>217</sup> Dallari, as quoted in Andreu-Guzmán, above n 3, 87.

<sup>218</sup> UN Commission on Human Rights, *Working Group First Session Report*, above n 156. During the drafting of the *Convention*, ‘[t]he principle of *aut dedere aut judicare* was raised, the idea being to eliminate access to sanctuaries for the perpetrators of enforced disappearances’: at [65].

Thus, the *Convention* seeks to ensure that domestic courts are primarily responsible for prosecuting acts of enforced disappearance. All states are obliged first to criminalise and prosecute acts of enforced disappearance that occur within their territory, by their nationals, or in circumstances in which one of their nationals is a victim of enforced disappearance, and it is appropriate to exert its jurisdiction. Next, where a state is unwilling or unable to prosecute, it is obliged to extradite an offender to another state that will prosecute the offender using the principle of universal jurisdiction. This framework significantly expands the scope of international criminal law in its application to enforced disappearances.

## V CONCLUSION

Acts of enforced disappearance subject persons to psychological suffering, deliberately deny them knowledge of their fate, and usually result in their secret torture and death. Family members also suffer the psychological torment of being denied any knowledge of the fate of their loved ones and may never be given access to this information. For communities and nations, even a seemingly isolated act of enforced disappearance targeting a particular individual can cause widespread terror, suppress political dissent, and ultimately assist in maintaining oppressive political regimes. Enforced disappearances are deliberately executed such as to ensure the impunity of those who commit them, and it is this impunity that has helped perpetuate and exacerbate instances of enforced disappearance. It is therefore of the utmost importance for the international community to ensure that individual perpetrators are effectively brought to justice for committing acts of enforced disappearance.

Currently, individuals may be held criminally responsible in international law where particular acts of enforced disappearance fit within the framework and definition of existing crimes, notably, where they can be characterised as either a crime against humanity, or as torture pursuant to the *CAT*. This has left gaps in the legal redress afforded to victims of enforced disappearance.

The drafting of a specific, binding and normative instrument on enforced disappearances provides the international community with a chance to close the existing gaps in the criminalisation of these acts. To a large degree, the *Convention* succeeds in doing so. It criminalises per se acts of enforced disappearance perpetrated or supported by state agents, and provides mechanisms to ensure individual criminal responsibility for these acts. However, in restricting international criminalisation to enforced disappearances perpetrated or supported by state agents, the *Convention* enshrines an existing gap by allowing non-state agents to evade international criminal responsibility for acts of enforced disappearance that do not amount to torture or a crime against humanity.