

THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE AND ITS CONTRIBUTIONS TO INTERNATIONAL HUMAN RIGHTS LAW, WITH SPECIFIC REFERENCE TO EXTRAORDINARY RENDITION

NIKOLAS KYRIAKOU*

The first Part of this article presents the major advances in international human rights law introduced by the International Convention for the Protection of All Persons from Enforced Disappearance ('CPED'). The second Part examines the legal nature of the United States's practice of extraordinary rendition with the intention of establishing when and under what conditions extraordinary rendition is an illustration of enforced disappearance, as defined in the CPED.

CONTENTS

I	Introduction	2
II	Enforced Disappearances in International Law.....	5
	A Customary Law	5
	1 Traditional School of Thought.....	7
	2 Mitigated Traditionalism	8
	3 A Modern Interpretation of Customary Law	15
	4 A 'Human Rights Method' of Custom Formation?	16
	5 Deconstructing Disappearances.....	17
	B Enforced Disappearance in <i>Jus Scriptum</i>	18
III	What is the Relationship between 'Extraordinary Rendition' and Enforced Disappearance?.....	21
IV	The <i>International Convention for the Protection of All Persons against Enforced Disappearance</i> : The Added Value	27
	A Non-Derogable Nature	28
	B <i>Non-Refoulement</i>	28
	C Jurisdiction	30
	D Universal Jurisdiction	31
	E Secret Detention	32
	F Victims and the Right to Truth	34
	G Monitoring Body.....	35
V	Concluding Remarks	36

* Nikolas Kyriakou holds a PhD from the European University Institute, Florence. The title of his thesis is *An Affront to the Conscience of Humanity: Enforced Disappearances in International Law*. From May to August 2010 he took an internship at the Inter-American Court of Human Rights. He wishes to thank Professor Martin Scheinin, Lauren Lindsay and the two anonymous referees for their comments on earlier drafts of this article. The usual disclaimer applies. Email: *Nikolas.Kyriakou@eui.eu*.

'This means that both states and insurrectionaries feel they have a moral justification for barbarism'.

— Eric Hobsbawm, *Globalisation, Democracy and Terrorism*¹

I INTRODUCTION

In 2007, the United Nations opened for signature the *International Convention for the Protection of All Persons from Enforced Disappearance* ('CPED').² The adoption of CPED was the culmination of an arduous effort, which was initiated in the early 1980s, undertaken mainly by non-government organisations ('NGOs') and relatives of persons who had been subjected to enforced disappearance.

Enforced disappearance is predominantly associated with the practice of human rights violations by Latin American totalitarian regimes of past decades. From the 1960s to 1990s, these regimes had launched an unprecedented attack against sections of their own societies under the cover of what had euphemistically been referred to as a 'subversive threat'.³

Historically, the first instance of the systematic practice of enforced disappearance by a state is attributed to the Nazis. Their infamous '*Nacht und Nebel*' decree⁴ provided for the secret transport of offenders, effectively political prisoners and members of national resistance movements, to Germany where '(a) the prisoners [would] vanish without leaving a trace, (b) no information [would] be given as to their whereabouts or their fate'.⁵ The practice was deployed with the purpose of spreading terror among civilian populations, deterring them from supporting or joining resistance movements and punishing resistance members.

This scheme of disappearances, as devised and executed by the Nazis, was directed without any discretion against civilians in the occupied territories and, unsurprisingly, without any due process of law. It was applied bluntly and on a massive scale against the population and its perpetrators did not bother to inquire

¹ Eric Hobsbawm, *Globalisation, Democracy and Terrorism* (Little Brown, 2007) 127.

² *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, UN Doc A/61/488 (entered into force 23 December 2010) ('CPED').

³ J Patrice McSherry, *Predatory States, Operation Condor and Covert War in Latin America* (Rowman and Littlefield, 2005) 1. See also Iain Guest, *Behind the Disappearances — Argentina's Dirty War against Human Rights and the United Nations* (University of Pennsylvania Press, 1990) 16–21.

⁴ Nuremberg Military Tribunals, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No 10: Nuremberg, October 1946 – April 1949* (United States Government Printing Office, 1951) vol 3, 75–8.

⁵ Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* (Martinus Nijhoff, 2007) 4. See also Office of the United States Chief of Counsel For Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (United States Government Printing Office, 1946) vol 7, 872–4; Brian Finucane, 'Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War' (2006) 35 *Yale Journal of International Law* 171, 175–6.

further into the details of each particular case.⁶ This was a characteristic inextricably linked to the dehumanising nature of the Nazi ideology. High-ranking officials, such as Field Marshal Wilhelm Keitel, were subsequently convicted during the Nuremberg trials on the grounds that they ordered enforced disappearances.⁷

The Second World War was succeeded by a period of universal human rights euphoria. In the aftermath of the war, the international community turned its attention to the respect and promotion of human rights. The *Universal Declaration of Human Rights* ('UDHR'),⁸ the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR'),⁹ and the *International Covenant on Civil and Political Rights* ('ICCPR')¹⁰ with its two *Optional Protocols*¹¹ heralded a new era for international law and still stand as the foundation for human rights in the world.

During the 1960s, while the aforementioned international documents were being negotiated, several Latin American countries were consumed by what proved to be three long, politically turbulent decades. Military juntas overthrew democratic governments in almost every country in the Southern Cone. Along with this came the regression of civil liberties, repression of civic and leftist movements and political parties, as well as flagrant and widespread violations of human rights.

In the darkest days of that period, the military regimes of Argentina, Chile, Uruguay, Paraguay, Bolivia, Brazil, Ecuador and Peru cooperated by sharing intelligence concerning political opponents as well as by seizing, torturing and executing these persons in one another's territory. This transnational cooperation was baptised 'Operation Condor' and was aimed at

destroying the subversive threat from the left and defend[ing] Western, Christian civilization ... [it embodied] a key strategic concept of Cold War national security doctrine: the concept of *hemispheric defense* defined by *ideological frontiers*, superseding the more limited doctrine of territorial defense.¹²

'Operation Condor' was a meticulously devised mechanism that utilised advanced telecommunications systems and computerised profiling databases, in order to identify potential regime opponents and exert pressure on citizens and

⁶ Kirsten Anderson, 'How Effective is the *International Convention for the Protection of All Persons from Enforced Disappearance* Likely to Be in Holding Individuals Criminally Responsible for All Acts of Enforced Disappearance?' (2006) 7 *Melbourne Journal of International Law* 245, 249: 'The procedures took place secretly and family members were rarely notified of an individual's fate. It is thought that approximately 7000 persons were secretly arrested, transferred and likely executed under the Decree'.

⁷ See generally Finucane, above n 5, 177–8.

⁸ *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A(III) (10 December 1948) ('UDHR').

⁹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹⁰ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 197 (entered into force 23 March 1976) ('ICCPR').

¹¹ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty*, opened for signature 15 December 1989, 1642 UNTS 414 (entered into force 11 July 1991).

¹² McSherry, above n 3, 1 (emphasis in original).

society. Its unique characteristics allowed for targeted and swift operations, mainly carried out through abductions, torture and eventual executions of individuals with absolute disregard for informing relatives of their fate. The scale of the abhorrent practice of enforced disappearance was of such intensity that it was characterised as ‘an affront to the conscience of the hemisphere’.¹³

It took years before the first case of enforced disappearance reached an international tribunal, the Inter-American Court of Human Rights (‘IACtHR’). *Velásquez Rodríguez v Honduras*¹⁴ is a celebrated judgment, not only for being the first judgment on the issue, but also for its judicial analysis of and approach to disappearances:

The phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted in an integral fashion ... [t]he forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obliged to respect and guarantee.¹⁵

A series of further judgments followed, as authoritarian regimes fell in these countries and further evidence surfaced about the *desaparecidos*.¹⁶ The practice, however, proliferated in every continent. In its most recent report, the UN Working Group on Enforced or Involuntary Disappearances (‘WGEID’) stated:

The total number of cases transmitted by the Working Group to Governments since its inception is 53 337. The number of cases under active consideration that have not yet been clarified, closed or discontinued stands at 42 633 in a total of 83 States.¹⁷

In its 2009 report, under the heading ‘Information regarding Enforced or Involuntary Disappearances in Specific Countries’, the WGEID referred to the case of an extraordinary rendition of a person by the United States.¹⁸

¹³ OAS GA Res 666, 12th sess, 7th plen mtg, OAS Doc AG/RES.666(XIII-O/83) (18 November 1983) 69 para 4; OAS GA Res 742, 14th sess, 8th plen mtg, OAS Doc AG/RES.742(XIV-O/84) (17 November 1984) 117 para 4.

¹⁴ [1988] Inter-Am Court HR (ser C) No 4 (*Velásquez-Rodríguez*).

¹⁵ *Ibid* [150], [155].

¹⁶ The Inter-American Court of Human Rights (‘IACtHR’) has, since *Velásquez-Rodríguez*, delivered 31 judgments in total on enforced disappearances. The latest judgment, *Gomes Lund v Brazil* [2010] Inter-Am Court HR (ser C) No 219, was handed down on 24 November 2010. *Goiburú v Paraguay* [2006] Inter-Am Court HR (ser C) No 153 (*‘Goiburú’*), related to an enforced disappearance carried out within the context of ‘Operation Condor’.

¹⁷ *Report of the Working Group on Enforced or Involuntary Disappearances*, Human Rights Council, 16th sess, Agenda Item 3, UN Doc A/HRC/16/48 (26 January 2011) 6 [8] (‘2011 Working Group Report’).

¹⁸ *Report of the Working Group on Enforced or Involuntary Disappearances*, Human Rights Council, 10th sess, Agenda Item 3, UN Doc A/HRC/10/9 (25 February 2009) 84 [424] (‘2009 Working Group Report’).

The US Government's response to this was cryptic:

While the Government of the United States is not in a position to comment on specific alleged intelligence activities, the Government would like to emphasize that the United States does not transport individuals from one country to another for the purpose of interrogation using torture. Furthermore, the United States has not transported individuals, and will not transport individuals to a country where the Government believes they will be tortured.¹⁹

Extraordinary rendition, as conducted by the Central Intelligence Agency ('CIA'), appears to be the latest mutation of enforced disappearance. From the information available it appears that the CIA had set up an apparatus, by which it collected information about suspected terrorists, abducted them, transferred them to one or more countries where they were detained without any legal process. In these countries, unregistered places of detention (also known as 'black sites') were in full operation. At these sites, 'enhanced interrogation techniques' — a euphemism for torture — were applied to individuals. It is difficult to believe that the hosting countries had no knowledge, actual or constructive, of this. For instance, Poland and Romania have been named as two of the hosting countries.²⁰ Despite the denial by the former country, it has been reported that indeed it was implicated in the CIA program.²¹

As indicated above, extraordinary rendition and enforced disappearance share common political and historical origins as a means for state authorities to disregard human rights. In the sections that follow, I will first discuss the customary law nature of the prohibition of enforced disappearance and provide an overview of relevant international instruments on enforced disappearances (Part II). Following this, I intend to present the contribution of the *CPED* to the overall advancement of universally protected human rights (Part III). Against the backdrop of this legal framework, the phenomenon of 'extraordinary renditions' will be examined in order to establish the links between it and enforced disappearance (Part IV).

II ENFORCED DISAPPEARANCES IN INTERNATIONAL LAW

A Customary Law

An analysis of the customary law dimension of the prohibition is warranted for two key reasons. First, despite their configuration as a 'self-contained' regime, human rights remain susceptible to principles and norms of general international law. Secondly, at the time of writing only 32 of the 91 signatories

¹⁹ Ibid 84 [425].

²⁰ Dick Marty, *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, (Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, 11 June 2007) 25 [112]–[122].

²¹ Andrew Rettman, 'Polish Media Uncover Evidence of CIA Prison', *EUobserver.com* (online), 15 April 2009 <<http://euobserver.com/22/27946>>.

have ratified the *CPED*.²² The pace of ratification has been slow and, compared to other instruments in the field of human rights, it does not enjoy the same degree of attention or level of ratification.²³ In connection to this, the significance of ascertaining the customary law prohibition on enforced disappearance is important as a norm to be invoked within international and domestic jurisdictions in the absence of binding treaty law.

The stark contrast between the lack of any reference by states to the customary nature of the prohibition while drafting the instrument on disappearances on the one hand, and the conviction of international human rights lawyers that the disappearances are customarily prohibited on the other, cannot be ignored.²⁴

To give but only one example, the US position as codified in the *Restatement (Third) of the Foreign Relations Law of the United States* ('Restatement'),²⁵ is rather revealing of the cursory manner in which the customary law dimension of enforced disappearance is dealt with. In § 702, the *Restatement* reads: '[a] state violates international law if, as a matter of state policy, it practises, encourages, or condones ... (c) the murder or causing the disappearance of individuals'.²⁶ In the explanatory notes that follow the catalogue of customary international law of human rights, disappearances do not appear even once. Another two difficulties become evident at a first glance. First, the *Restatement*'s validity is inherently confined solely to a US position on the matter, and secondly, it places a high premium on attributing customary law status to the listed human rights, that of their violation as a matter of state policy, thus excluding individual instances of enforced disappearance.²⁷ In addition, the *Restatement* has not escaped criticism for being overly broad,²⁸ narrow,²⁹ or ideologically charged with western (or American) values in listing the specific human rights as included in customary law, while excluding others.

Any analysis of customary law takes art 38 of the *Statute of the International Court of Justice* ('ICJ Statute') as a starting point. This provision constitutes a

²² For a full list, see United Nations, *International Convention for the Protection of All Persons from Enforced Disappearance*, United Nations Treaty Collection Databases <http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en>.

²³ See, eg, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT'), which entered into force less than 3 years after its adoption. By way of contrast, the *Convention on the Rights of Persons with Disabilities* was signed one week earlier than *CPED* and entered into force just over a year later: *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

²⁴ Hurst Hannum, 'The Status of the *Universal Declaration of Human Rights* in National and International Law' (1995) 25 *Georgia Journal of International and Comparative Law* 287, 343; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, 1989) 82.

²⁵ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987).

²⁶ *Ibid* § 702.

²⁷ Daniel T Murphy, 'The *Restatement (Third)*'s Human Rights Provisions: Nothing New, but Very Welcome' (1990) 24 *International Lawyer* 917, 921.

²⁸ Bruno Simma, 'International Human Rights and General International Law: A Comparative Analysis' [1993] 4 *Collected Courses of the Academy of European Law* 153, 219–20.

²⁹ Meron, *Human Rights and Humanitarian Norms as Customary Law*, above n 24, 99.

fundamental principle, of constitutional rank, within the edifice of international law. The International Court of Justice ('ICJ') is mandated to apply 'international custom, as evidence of a general practice accepted as law'.³⁰ Much ink has been spilt over the meaning of this provision, though its interpretative analysis has yielded little consensus. It would be beyond the scope of the present article to assume the Herculean task of rehearsing the arguments for and against each different strand of interpretation within international law on this issue. However, a brief recapitulation of the basic elements of each argument is provided, in order to set the backdrop of the current debates over the formation of customary law and examine the potential customary nature of the prohibition on enforced disappearance within this setting. The strands that will be examined in the following sections are the traditional (and a mitigated variation of this), the modern and the human rights methods of ascertaining custom formation.

1 *Traditional School of Thought*

Returning to art 38 of the *ICJ Statute*, Higgins aptly observed that before embarking on a discussion about custom formation, '[a]rticle 38 could more correctly have been phrased to read, "international custom as evidenced by a general practice accepted as law"'.³¹ Indeed, the traditional school of thought focuses primarily on state practice; a continuous, homogeneous and settled set of state acts whose content is informed by a belief of legal obligation, giving rise to a rule of customary law.³² Even with this clarification, it is still not clear what criteria should be used to determine which acts of state constitute state practice³³ or whether each and every act of a state understood as state practice by external observers should count. In addition, it is unclear how much time is necessary or sufficient for the formation of a customary rule.

Nor does the ICJ's jurisprudence resolve the issue. The ICJ's classical dictum was outlined in *North Sea Continental Shelf*,³⁴ where the court noted:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.³⁵

The tone changed in *Military and Paramilitary Activities in and against Nicaragua*,³⁶ where the ICJ placed weighted attention on *opinio juris* and on the probative value of UN General Assembly resolutions:

³⁰ *Statute of the International Court of Justice* art 38(1)(b).

³¹ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, 1994) 18 (emphasis in original).

³² Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1988) 12 *Australian Yearbook of International Law* 82, 90.

³³ Committee on the Formation of Customary Law, 'Report of the Committee on the Formation of Customary Law' [1988] *Proceedings of the American Branch of the International Law Association* 112.

³⁴ (*Federal Republic of Germany v Denmark*) (Merits) [1969] ICJ Rep 14.

³⁵ *Ibid* 44 [77].

³⁶ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14 ('Nicaragua').

The Court has however to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention. This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions.³⁷

An extreme traditionalist would take into consideration every state activity and equate it to ‘*usus*’.³⁸ Within the realm of this theory, the recurring instances of enforced disappearance perpetuated by states worldwide would allow no leeway for considering that a customary prohibition has developed over time. However, this is a highly artificial position as it is predicated on a strictly grammatical understanding of the term ‘state practice’, which it actually distorts. No unassailable normative conclusion derives from it and thus the issue merits a more nuanced approach. Schachter and others have also rejected this position: ‘[h]ence when violations of these strongly held basic rights of the person take place, they are to be regarded as violations, not as “state practice” that nullifies the legal force of the right’.³⁹ Indeed, if the absolutist stance of traditionalists was accepted, no human rights norm would ever attain customary law status, as the breadth and intensity of human rights violations by states would render this impossible. Thus, the very notion of custom would essentially be devoid of any actual content and consequence.

2 *Mitigated Traditionalism*

This brings into play a mitigated traditional approach, one which insists on the existence of the two elements (state practice and *opinio juris*). State practice must demonstrate a state’s conviction as to the legal connotation of its act at the time of its externalisation. At the same time, if other states do not acquiesce in conduct that deviates from the rule but seek to reverse the effect of this deviation or to compel the deviating state to conform to the international community’s understanding of the specific rule, then this upholds the rule.⁴⁰ It is evident that this view allows reliance on the moral underpinning of human rights, since human rights violations, as state acts contrary to international law, can be disregarded.

Once the legal ‘purity’ of state practice is understood as being supported by an affixed legal belief, the question arises — what constitutes state practice? Again, scholars are not unanimous on the subject. For various commentators,

³⁷ Ibid 99 [188].

³⁸ See, eg, Michael Akehurst, ‘Custom as a Source of International Law’ (1974) 47 *British Yearbook of International Law* 1; Anthony D’Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971) 87–98.

³⁹ Oscar Schachter, ‘International Law in Theory and Practice: General Course in Public International Law’ (1982) 178 *Collected Courses of the Hague Academy of International Law* 9, 336. See also Committee on the Formation of Customary Law, above n 33, 116. The International Court of Justice (‘ICJ’) also stated in *Nicaragua* [1986] ICJ Rep 14, 98 [186]:

If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

⁴⁰ Arthur Weisbord, ‘The Effect of Treaties and Other Formal International Acts on the Customary Law of Human Rights’ (1995) 25 *Georgia Journal of International and Comparative Law* 100, 103.

state practice corresponds to concrete acts bearing a material element. As van Hoof illustrates, '[s]tate-practice as the material element in the formation of custom is, it is worth emphasizing, material: it is composed of acts by States with regard to a particular person, ship, [or] defined area of territory'.⁴¹ Others sustain that state practice is composed of another two components: 'the *interest and concern* of the reacting state in the act committed by the acting state ... [and] ... [t]he *interaction* of the reacting and the acting state'.⁴² The latter view cannot accommodate diverging positions postulating that national legislation and decisions by national courts may be regarded as such practice, as well as the more controversial issue of the normative importance of resolutions of the UN General Assembly.⁴³ Brownlie epitomises the mainstream strand of academic scholarship on the matter by listing the following:

international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. Obviously the value of these sources varies and much depends on the circumstances.⁴⁴

Having in mind the above-mentioned description of the traditional approach, it is submitted that under the extreme traditionalist view, no rule of customary law prohibiting enforced disappearance can be established since state practice runs counter to any custom-creation rule. Under the framework of this approach, the perpetration of enforced disappearance has continued from 1960 until today. The latest report by the WGEID states:

The number of cases under active consideration that have not yet been clarified, closed or discontinued stands at 42 633 in a total of 83 States ... the Working Group transmitted 105 new cases of enforced disappearance to 22 Governments.⁴⁵

However, mitigated traditionalism allows for consideration of the existence of a customary rule. Recurring violations of human rights are not conclusive. What is legally important in this respect is the escalating response of the international community to enforced disappearance. The reaction of several states to the practice of enforced disappearance in Latin American countries took a dual form. At the bilateral level, many denounced and protested the breaches of human rights that amounted to the enforced disappearance of persons, be they their own nationals or not. At the multilateral level, the relevant UN material indicates that

⁴¹ G J H van Hoof, *Rethinking the Sources of International Law* (Kluwer Law, 1983) 108.

⁴² Anthony D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' (1995) 25 *Georgia Journal of International and Comparative Law* 47, 74 (emphasis in original).

⁴³ Proponents of their normative significance include Simma and Alston, above n 32, 90; Schachter, above n 39, 334; Meron, *Human Rights and Humanitarian Norms as Customary Law*, above n 24, 107, 113. For a discussion of other approaches, including a case-by-case consideration of whether a particular resolution expresses a consensus on a customary rule, see Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff, 2006) 368, 388–9. Cf Robert Y Jennings, 'The Identification of International Law' in Bin Cheng (ed), *International Law: Teaching and Practice* (Stevens and Sons, 1982) 19.

⁴⁴ Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 6.

⁴⁵ 2011 *Working Group Report*, UN Doc A/HRC/16/48, 6 [8], 8 [19].

the international community as a whole regarded the prohibition of enforced disappearance as a rule of customary law.

First, the phenomenon of enforced disappearance generated an avalanche of UN resolutions and concerted actions.⁴⁶ The common denominator of their subject-matter ranged from expressing concern over the practice of disappearances, urging for the establishment of investigatory bodies and calling for the clarification of the fate of the disappeared to establishing ad hoc mechanisms, such as country-specific mechanisms (as in the case of Chile)⁴⁷ or thematic procedures (such as WGEID).

Secondly, a repeated reference to the *UDHR* in the Preambles of these resolutions cannot pass unnoticed. Interestingly, the rights invoked in the Preambles are the ones concerning the right to life, liberty and security of person, freedom from torture, freedom from arbitrary arrest and detention, and the right to a fair trial.⁴⁸ This section of the article argues that linking enforced disappearance to *UDHR* provisions configures it as a separate human right (to which the *UDHR* extends its protection) and that concurrently this is an illustration of a customary law rule. State practice at the UN level is informed by a belief that there are various violations of human rights implicated in the occurrence of enforced disappearance.

Two milestones in the progressive development of a customary law prohibition may be discerned through the process of promulgation of UN resolutions. *Resolution 33/173* was the first instance in which the General Assembly moved away from the country-specific approach that prevailed up until 1978, instead approaching the phenomenon of disappearances as a universal and distinct issue. It mentioned the human rights referred to in the previous paragraph, citing both the *UDHR* and *ICCPR*.⁴⁹

Resolution 47/133 was the apex of the quasi-legislative function of the UN: the *Declaration on the Protection of All Persons from Enforced Disappearance* ('DPPED').⁵⁰ Again, reference was made to the *UDHR* and *ICCPR*, with explicit mention of the right of persons to recognition before the law.⁵¹ UN declarations bear a distinct normative value because they often spell out bodies of principles to be adhered to by states, employing language and terminology that is reminiscent of actual, hard-law, legal obligations.⁵² They often prove to be an intermediate, preparatory step toward drafting a legally binding instrument.

⁴⁶ For a summary, see José E Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005) 160.

⁴⁷ On 27 February 1975, the UN Commission on Human Rights resolved to establish a working group to study the situation in Chile: see *Report on the Thirty-First Session*, Commission on Human Rights, 31st sess, UN Doc E/CN.4/1179 (3 February – 7 March 1975) 66.

⁴⁸ *Protection of Human Rights in Chile*, GA Res 31/124, UN GAOR, 31st sess, 102nd plen mtg, UN Doc A/RES/31/124 (16 December 1976) Preamble; *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res 33/173, UN GAOR, 33rd sess, 90th plen mtg, UN Doc A/RES/33/173 (20 December 1978) ('Resolution 33/173').

⁴⁹ *Resolution 33/173*, UN Doc A/RES/33/173.

⁵⁰ *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res 47/133 UN GAOR, 47th sess, 92nd plen mtg, UN Doc A/RES/47/133 (18 December 1992) ('Resolution 47/133').

⁵¹ *Ibid* Preamble.

⁵² United Nations Office of Legal Affairs, *Memorandum of Legal Service*, UN ESCOR, 34th sess, Supp No 8, UN Doc E/CN.4/L.610 (2 April 1962) [4]:

In addition, reference should be made to the abundant jurisprudence of the IACtHR,⁵³ the European Court of Human Rights ('ECtHR')⁵⁴ and the Human Rights Committee ('HRC')⁵⁵ on cases of enforced disappearance. As discussed below, this case law reveals points of convergence, as well as disparities.

Decisions and judgments by adjudicatory bodies also serve the purpose of ascertaining customary international law.⁵⁶ In *Godínez-Cruz v Honduras*,⁵⁷ the IACtHR found violations of three articles in the *American Convention on Human Rights*:⁵⁸ art 4 (right to life), art 5 (right to humane treatment), and art 7 (right to personal liberty). With regard to art 5, it must be noted that it protects, *inter alia*, the physical and moral integrity of the person and prohibits torture or cruel, inhuman, or degrading punishment or treatment.⁵⁹ The ECtHR has in most cases of enforced disappearances brought before it found violations of several articles

However, in view of the greater solemnity and significance of a 'declaration', it may be considered to import, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon states.

See also Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 104–5:

Resolutions may also encapsulate or express the opinion of states with regard to the interpretation of existing international law. In human rights declarations, this could be by the fleshing out of international law obligations (either under treaty law or general international law) or by categorisation of certain acts as human rights violations of one type or another ... An example of the second type of resolution is the *Declaration on the Protection of All Persons from Enforced Disappearance* adopted by consensus by the General Assembly.

Blaine Sloan, 'General Assembly Resolutions Revisited (Forty Years Later)' (1987) 58 *British Yearbook of International Law* 39; Christopher Joyner, 'UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm Creation' (1981) 11 *California Western International Law Journal* 445, 457, 464.

⁵³ See, eg, *Velásquez-Rodríguez* [1988] Inter-Am Court HR (ser C) No 4; *Godínez-Cruz v Honduras (Merits)* [1989] Inter-Am Court HR (ser C) No 3 ('*Godínez-Cruz*'); *Neira-Alegria v Peru (Merits)* [1994] Inter-Am Court HR (ser C) No 13.

⁵⁴ See, eg, *Kurt v Turkey* [1998] III Eur Court HR 1152; *Bazorkina v Russia* (European Court of Human Rights, Chamber, Application No 69481/01, 27 July 2006); *Varnava v Turkey* (European Court of Human Rights, Grand Chamber, Application Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009).

⁵⁵ See, eg, Human Rights Committee, *Views: Communication No R.7/30*, 37th sess, Supp No 40, UN Doc A/37/40 (29 March 1982) ('*Bleier v Uruguay*'); Human Rights Committee, *Decision: Communication 1422/2005*, 91st sess, UN Doc CCPR/C/91/D/1422/2005 (13 November 2007) ('*El Hassy v Libyan Arab Jamahiriya*').

⁵⁶ Alvarez, above n 46, 461:

Indeed, given the difficulty of finding the actual practice of states, as well as the inevitable selectivity of those state practices that are readily accessible, the opinions of international dispute settlers, increasingly available through the Internet, and, for members of the relevant [international organisations], in hard copy, may now be cited more often than this more traditional form of evidence of international law.

⁵⁷ *Godínez-Cruz* [1989] Inter-Am Court HR (ser C) No 3, [197].

⁵⁸ *American Convention on Human Rights*, signed 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).

⁵⁹ Ibid art 5.

of the *European Convention on Human Rights* ('ECHR'): ⁶⁰ art 2 (right to life), art 3 (prohibition of torture), art 5 (right to liberty and security) and art 13 (right to an effective remedy). ⁶¹ Finally, the common core of the HRC's pronouncements on cases of enforced disappearances, in relation to breaches of the *ICCPR*, ⁶² includes: art 2.3 (effective remedy), art 2 (right to life), art 7 (prohibition of torture) and art 9 (right to liberty and security). ⁶³

A common theme cutting across the distinct domains of the case law of these bodies is the right to liberty and security of the person and the prohibition on torture, which refers both to the material victim and their relatives. Interestingly, a point of convergence between the ECtHR and the HRC is their common approach to the lack of effective remedies available to the victims. ⁶⁴ A wide range of judicial and other protections are provided for in the *CPED*. Its provisions elaborate on the content of effective remedies and structure a set of secondary rules for this right. ⁶⁵ For the purposes of this article it suffices to identify the core principles of enforced disappearance, as discerned from the common juridical elements.

National legislation is deemed as yet another source of state practice, which, combined with other elements, may be conducive to custom formation. In this respect, it should be noted that the WGEID had conducted in 2006 a comparative study which revealed that 'outside of Latin America, very few States have created a specific criminal offence of enforced disappearance'. ⁶⁶ Furthermore, it appears that the prohibition of enforced disappearance in this specific region has found its way either into constitutional texts or national legislation of several states at a degree that is not matched in any other region of the world, ⁶⁷ which allows one to speak of a regional custom developed in Latin America. ⁶⁸

Finally, according to Meron, 'the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments' serves as an indicator for evincing

⁶⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009) ('European Convention on Human Rights').

⁶¹ See, eg, *Kurt v Turkey* [1998] III Eur Court HR 1152, [175]; *Bazorkina v Russia* (European Court of Human Rights, Chamber, Application No 69481/01, 27 July 2006) [181].

⁶² *ICCPR* art 12(1).

⁶³ See, eg, *El Hassy v Libyan Arab Jamahiriya*, UN Doc CCPR/C/91/D/1422/2005, 11 [7].

⁶⁴ *Ibid* 11 [8]–[9]; *Kurt v Turkey* [1998] III Eur Court HR 1152, [83].

⁶⁵ *CPED* art 8.

⁶⁶ *Report of the Working Group on Enforced or Involuntary Disappearances*, Human Rights Council, 4th sess, Agenda Item 2, UN Doc A/HRC/4/41 (25 January 2007) [48].

⁶⁷ See, eg, *Constitución 1994* (Argentina) art 43; *Constitución de 1991 Con Reformas Hasta 2005* (Colombia) art 12; *Constituciones de 1998* (Ecuador) art 23; *Constitución Política de 1992* (Paraguay) art 5; *Constitución de la República Bolivariana de Venezuela 1999* (Venezuela) art 45; *Relevant Legal Framework*, International Coalition against Enforced Disappearances (9 June 2012) <<http://www.icaed.org/the-convention/relevant-legal-framework>>.

⁶⁸ *Asylum Case (Colombia v Peru) (Judgment)* [1950] ICJ Rep 266, 276. See generally Mark Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, 2009) 33; Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, revised ed, 2005) 445.

customary human rights.⁶⁹ In the last 18 years, the prohibition on enforced disappearance has been cited in international instruments four times as a specific and autonomous human rights norm.⁷⁰ Despite existing differences these rights can be deemed to share a common denominator of considering enforced disappearance as arrest, detention and abduction (but not all forms of deprivation of liberty) by agents of state, followed by a refusal of acknowledgement of this act, thus impeding recourse to the applicable legal remedies and procedural guarantees (but not necessarily to the full protection of the law).

However, the matter is not yet settled. The actual content of a universally binding customary law rule remains to be ascertained on the basis of the foregoing discussion. UN resolutions can also be adduced to ascertain custom. The *UDHR* and the *ICCPR* are almost invariably invoked in the preambles of UN resolutions on human rights, while explicit references are made to the right to liberty and security, the right to life, the right to not be subjected to arbitrary arrest and detention, and the prohibition on torture.

Based on the previous presentation of the various sources, the following conclusions can be drawn on the customary law nature of the prohibition of enforced disappearance. First, the right to liberty and security of the person holds a central position in this regard as its transgression marks the factual starting point for the perpetration of an enforced disappearance. This right, in conjunction with the inclusion of freedom from arbitrary arrest and detention in UN resolutions and the minimum common core in the definitions found in international normative instruments, insinuates that not all deprivations of liberty that result in enforced disappearance are deemed to be legally significant. In other words, only an arbitrary arrest and detention leading to enforced disappearance seems to form part of a customary law rule.⁷¹ From a historical point of view this may well be explained by the fact that authoritarian regimes did not care much about observing formal legal prescriptions of their legal systems. Many times the protection of rights has been suspended by declaring a ‘state of emergency’, paving the way to mass deprivations of liberty, which were arbitrary and did not commence with a formal act of apprehension.⁷² This would explain the narrower formulation of ‘arbitrary arrest’ and not the all-encompassing notion of ‘deprivation of liberty, in whichever form’.⁷³ However, this is an artificial position, given the interpretation of art 9 of the *ICCPR*, which does not recognise any other form of deprivation of liberty

⁶⁹ Meron, *Human Rights and Humanitarian Norms as Customary Law*, above n 24, 94.

⁷⁰ These are: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(2) (‘Rome Statute’); *Resolution 47/133*, UN Doc A/RES/47/133, Preamble; *Inter-American Convention on Forced Disappearance of Persons*, adopted 9 June 1994, OAS Doc OEA/Ser.P/AG/Doc.3114/94 (entered into force 28 March 1996) Preamble; *CPED*.

⁷¹ By contrast, the *CPED* definition provides that all forms of deprivation of liberty are elements of enforced disappearance: *CPED* art 2.

⁷² Tullio Scovazzi, ‘Considerazioni in tema di segreto di Stato e gravi violazioni dei diritti umani’ in Gabriella Venturini and Stephanía Bariatti (eds), *Liber Fausto Pocar: Diritti Individuali e Giustizia Internazionale* (Guiffrè, 2009) vol 1, 885.

⁷³ See, eg, *UDHR*, UN Doc A/RES/217A(III), art 9; *CPED* art 2.

beyond arbitrary arrest and detention.⁷⁴ Accordingly, the dichotomy between the two sets of notions bears no legal significance.

Secondly, the refusal to acknowledge the deprivation of liberty, or by concealment of the fate or whereabouts of the disappeared person is directly linked with two other rights — the right to recognition everywhere as a person before the law and the right to a fair trial. Actual practice of disappearances by states reveals a pattern whereby disappeared persons are placed outside the protection of the law without being afforded the guarantees of law. An immediate consequence is the inability to make use of any administrative or judicial procedures in order to challenge the deprivation of liberty and vindicate their release. Numerous habeas corpus writs (or *amparo*)⁷⁵ had been filed in various jurisdictions with no genuine outcome, thus rendering ineffective and illusory any right prescribed by law.

Thirdly, the prohibition of torture could also be well founded on the customary law norm for disappearances, as the recurring reference to it illustrates. However, this should be qualified and understood as a distinct and potential human rights violation, which may come into play in factual sequence to the deprivation of liberty of a person. Torture while in detention, is not a necessary condition of the notion of enforced disappearance. It can, however, be considered through three different paths:

- 1 As an aggravating factor to an enforced disappearance, if a person is actually subjected to torture;
- 2 as a violation of a right ascribed to the relatives of a disappeared person for the anguish and distress they suffer; and
- 3 as a corollary of the detention conditions and/or its prolonged duration.

Notwithstanding this, torture must, strictly speaking, be considered separately from enforced disappearance and be deemed not to form part of its customary law prohibition.

Fourthly, actual practice has proven that a person so deprived of their liberty is placed in a life-threatening situation, which more often than not leads to loss of life. Statistical information from WGEID reports corroborates this assertion, as a great majority of disappeared persons never resurface again.⁷⁶ Enforced

⁷⁴ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N P Engel, 1993) 169.

⁷⁵ See Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (Cambridge University Press, 2009) 77, 163; Carlos Sánchez Mejorada, 'The Writ of Amparo — Mexican Procedure to Protect Human Rights' (1946) 243 *Annals of the American Academy of Political and Social Science* 107, 107:

The *amparo* procedure, typically Mexican, has a much broader scope and field of application than the Anglo-Saxon writ of *habeas corpus*, from which the idea of the procedure may have originated, since it protects men not only against illegal arrest but against violation of any human rights, and it is also a remedy to the encroachments of the Federal authorities on the jurisdiction of the states, or vice versa.

⁷⁶ 2009 *Working Group Report*, UN Doc A/HRC/10/9, annex 3. See also Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.9 (Vol.I) (27 May 2008) 177 [4] ('*Compilation of General Comments*'):

disappearance gives rise to a state obligation of a procedural character to investigate in a meaningful and conclusive manner the fate of that person.⁷⁷

Lastly, the customary rule does not appear to contain a requirement to prove a pattern of violations or systematic practice of enforced disappearance on the part of the state. This is inferred from the reaction of states to various instances of enforced disappearance, and not only to those revealing a state policy or the existence of a systematic or widespread violation of human rights. Similarly, the third paragraph of the *DPPED* Preamble reveals that states were mindful of the distinction, expressing that ‘in many countries, often in a persistent manner, enforced disappearances occur’ and that ‘the systematic practice of such acts is of the nature of a crime against humanity’.⁷⁸ Different legal consequences are attributed to the systematic or widespread practice of disappearances. Accordingly, we are allowed to conclude that sporadic, or even a single instance of enforced disappearance, suffices to breach the customary law prohibition.

3 A Modern Interpretation of Customary Law

A different strand of theory advocates the re-conceptualisation of the classical tenets of customary international law. The static perception of state practice and *opinio juris* is challenged by this strand, which revisits the interplay of these two notions. A basic characteristic of the modern theory is that it moves away from the rigid reliance on state practice and places larger emphasis on *opinio juris*. Two of the basic streams within modern custom are the ‘sliding scale’ and the ‘instant custom’ approach.

‘Instant’ custom is a term coined by Cheng⁷⁹ and at first sight appears to be standing on a conceptual paradox: if custom necessitates uniform practice through a sufficient passage of time, then its instantaneous creation has no solid foundation. The latter form of creation may take place by the approval of norms by consensus or adjacent forms of expression of consent. This theory further asserts:

Not only is it unnecessary that the usage should be prolonged, but there need also be no usage at all in the sense of repeated practice, provided that the *opinio juris* of the states concerned can be clearly established. Consequently, international customary law has in reality only one constitutive element, the *opinio juris*.⁸⁰

In my view, such an approach fundamentally departs from the text of art 38 of the *ICJ Statute* and is debatable under general international law. Dispensing with state practice altogether and arguing solely on the premise that *opinio juris*

States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

⁷⁷ CPED arts 10, 12.

⁷⁸ Resolution 47/133, UN Doc A/RES/47/133, Preamble.

⁷⁹ Bin Cheng, ‘United Nations Resolutions on Outer Space: “Instant” International Customary Law?’ (1965) 5 *Indian Journal of International Law* 23.

⁸⁰ Ibid 36.

suffers from legal myopia.⁸¹ In essence, what is advanced here is a ‘doctrine of convenience’, which stands at the outer border of a *de lege ferenda* approach.

The ‘sliding scale’ construction is equally problematic. Kirgis, a proponent of the ‘sliding scale’, has suggested that the elements of custom can be viewed not as fixed and mutually exclusive, but rather as interchangeable along a sliding scale.⁸² Depending on the context, ‘consistent practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent’ and vice versa.⁸³ In the case of human rights, there is an inherent assumption ‘that international decision makers will substitute one element for the other, provided that the asserted restrictive rule seems reasonable’.⁸⁴ Under this theory, the customary law prohibition on enforced disappearance can be formed in the following way: the morally abominable character of the practice renders it one of the most serious violations of human rights. States have actively sought, and still seek, to reverse the customary law prohibition on enforced disappearance by outlawing any of its manifestations, by their adherence to international instruments and by condemning it in international fora and in their international relations. Taken to extremes, the ‘sliding scale’ allows for total disregard of state practice and exclusive reliance on *opinio juris*, thus coinciding with the precept of ‘instant’ custom. As with ‘instant’ custom, this method is equally untenable because it reinterprets customary law in such a way so as to provide the right answers.⁸⁵

4 A ‘Human Rights Method’ of Custom Formation?

A more structured theory towards the formation of customary law in the field of human rights has been put forward under the label of the ‘human rights method’, as outlined by Wouters.⁸⁶ This method takes state practice, usually in the form of transgressions of human rights, at face value by accepting that it can impede the formation of a customary rule. Hence, in order to circumvent the adverse effect of state practice it emphasises the normative importance of *opinio juris* over the former. Support for this doctrinal construction is deduced from the ICIJ’s *Nicaragua* judgment.⁸⁷

Human rights are characterised as ‘higher law’ norms, which in turn, justify deviation from the traditional framework of custom formation.⁸⁸ The human rights method is undeniably attractive not only for human rights lawyers, since it claims it can expand to include other norms beyond the realm of this particular

⁸¹ See also critique by Jason Beckett, *The End of Customary International Law? A Purposive Analysis of Structural Indeterminacy* (V D M, 2008) 115.

⁸² Frederic Kirgis, ‘Custom on a Sliding Scale’ (1987) 81 *American Journal of International Law* 146, 149.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Anthea Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 *American Journal of International Law* 757, 760.

⁸⁶ See Jan Wouters, ‘The Impact on the Process of the Formation of Customary International Law’ in Menno T Kamminga and Martin Scheinin (eds), *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009) 112.

⁸⁷ Ibid 112–14.

⁸⁸ Ibid 128–9.

field of law. Grounded on a dynamic and evolutional perception of customary law, it intends to re(de)fine one of the classical loci of international law.⁸⁹

Yet, it remains unpersuasive on a number of counts. To begin with, it seeks to delimit a separate domain of law by reversing the syllogism — the subject matter affects the methodological approach without persuasive reasons being forwarded. From the standpoint of general international law it is unsustainable since it disregards its unity and its set of doctrines common to all fields of specialised practice.⁹⁰ Stated differently, Wouters' endeavour is susceptible to the critique coming under the label 'human rightism'.⁹¹ By asserting the sanctity or superior force of a branch of law (in this case, human rights) authors subscribing to this method bend the rules of general international law so as to arrive at the desired result. The higher law nature afforded to human rights is similarly unfounded in international law and proposes a new hierarchical order that is disassociated with well-established notions, such as *jus cogens*. Furthermore, relying exclusively on *Nicaragua* is conveniently selective for this method. Therefore, the human rights method, even if it would facilitate the ascertainment of a customary rule, does not receive broad consensus and should be rejected.

5 Deconstructing Disappearances

This section proposes a different approach to the issue of the customary nature of the prohibition. This consists of a two-stage process: first, enforced disappearance is conceptually deconstructed to other human rights violations, which constitute its functional components; then, their inclusion in the realm of customary law is argued for on the basis of the *UDHR* and the normative force of the *ICCPR*. In this way, the centre of attention shifts from the classic debate over the rules of formation of customary law to the already attained status of customary law of human rights that are actually implicated in the prohibition of enforced disappearance.

Enforced disappearance is *per definitionem* an assault upon the physical and moral integrity of the individual. As a consequence of the deprivation of liberty and the subsequent refusal to inquire into the whereabouts or fate of a disappeared person, that person is placed outside the protection of the law. Through carving out an extra-legal space, perpetrators arguably seek to annihilate a person's integrity and dignity. In such a situation no human rights may be exercised by a disappeared person, thus rendering disappearances an all-encompassing human rights violation. Nevertheless, one should differentiate between the constituent components of an enforced disappearance and its ramifications. The view advanced here is that enforced disappearance infringes upon a core set of rights: as a result of the enforced disappearance, the person is stripped of these rights or finds themselves in a situation where the exercise of these rights is hindered or denied.

⁸⁹ Ibid 128.

⁹⁰ Thomas Skouteris, *The Notion of Progress in International Law Discourse* (T M C Asser Press, 2010) 145.

⁹¹ Alain Pellet, ‘‘Human Rightism’’ and International Law’ (2000) 10 *Italian Yearbook of International Law* 3, 4.

In listing this core set of rights, the following rights should be included: the prohibition of arbitrary arrest and detention, the right to life and the right to recognition as a person before the law. An enforced disappearance can be analysed relative to these concomitant human rights.

At the second stage of this process, the *UDHR* is taken as the legal point of reference. Although originally intended to serve only as a moral standard of aspirational character, the *UDHR* through the decades has progressed to a different status under international law. Nowadays, many scholars accept that the rights enshrined in the *UDHR* have entered the ambit of customary international law.⁹² This said, it should be stressed that the scope of these rights under customary law remains to be ascertained. Articles 3, 6 and 9 of the *UDHR* correspond to the three rights referred to in the previous paragraph.⁹³ It is submitted that enforced disappearance derives its customary law nature from the three respective articles endowed with the attribute of customary law. The *ICCPR* counterpart to the norms enshrined in the three aforementioned *UDHR* provisions are arts 6, 9 and 16, the first and the last being non-derogable by virtue of art 4(2).⁹⁴ In its *General Comment No 29*,⁹⁵ the HRC stated:

In those provisions of the *Covenant* that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below. ... The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.⁹⁶

Thus, the customary law nature for the prohibition of enforced disappearance is reconfigured through the standing of other constitutive human rights, which are violated through them.⁹⁷

B *Enforced Disappearance in Jus Scriptum*

There are currently only four existing international legal instruments on enforced disappearance. These are the *DPPED*,⁹⁸ the *Inter-American Convention*

⁹² Hannum, above n 24, 323.

⁹³ *UDHR*, UN Doc A/RES/217A(III), arts 3, 6, 9, providing, respectively, for the right to life; to liberty and security; to recognition as a person before the law.

⁹⁴ Lepard argues that the non-derogable character of the *ICCPR* articles listed in art 4(2) vests them with the attribute of customary international law: Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010) 335.

⁹⁵ *Compilation of General Comments*, UN Doc HRI/GEN/1/Rev.9 (Vol.I).

⁹⁶ Ibid [238].

⁹⁷ See Antonio Cassese, *International Criminal Law* (Oxford University Press, 2nd ed, 2008) 113.

It may be noted that with respect to this crime the *ICC Statute* has not codified existing customary law but contributed to the crystallization of a nascent rule, evolved primarily out of treaty law (that is, the numerous treaties on human rights prohibiting various acts falling under this heading), as well as the case law of the Inter-American Commission and Court of Human Rights, in addition to a number of UN General Assembly Resolutions. These various strands have been instrumental in the gradual formation of a customary rule prohibiting enforced disappearance of persons.

on Forced Disappearances of Persons,⁹⁹ art 7 of the *Rome Statute of the International Criminal Court* ('*Rome Statute*')¹⁰⁰ and the recently adopted *CPED*.

Three major setbacks must be highlighted with regard to this state of affairs. The first is that the *DPPED*, as an instrument of the UN General Assembly, has no legally binding effect by definition. The second problem is that the *Inter-American Convention on Forced Disappearances of Persons* is a regional instrument and can only be adhered to by a limited number of countries. The third issue is that the *Rome Statute* provision on enforced disappearance provides for a slightly different definition of enforced disappearance and relates only to the aspect of enforced disappearance as a crime against humanity.

In this regard, the *CPED* features as the most pertinent instrument. It has a long history of negotiation with the involvement of all major stakeholders and it provides a response to the gaps in the international legal regime.¹⁰¹ Its definition codifies the one in customary law and is to be taken into consideration as an evolution of the definition found in the *DPPED*. One of its main accomplishments is that it broadens the definition of enforced disappearance with respect to that found in the *Rome Statute*. More concretely, art 7(2)(i) of the *Rome Statute* provides that

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

Its counterpart in the *CPED*, art 2, stipulates that

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

The definition in the *CPED* has considerable advantages over that found in the *Rome Statute*. First, it provides a blanket reference to any form of deprivation of liberty, thereby excluding any likelihood of legalistic manipulation of the term with the aim of carving out an exception. Secondly, read together with art 3 of the *CPED*, it covers both state and non-state actors, while avoiding the blurred notion of ‘political organization’. Thirdly, it omits reference to the mens rea of the perpetrators, which is usually extremely difficult to prove and does not set an insurmountable threshold for the time element, as this is described as ‘prolonged period of time’ in the *Rome Statute*. Finally, as a crime against humanity, the

⁹⁸ Resolution 47/133, UN Doc A/RES/47/133.

⁹⁹ *Inter-American Convention on Forced Disappearance of Persons*, OAS Doc OEA/Ser.P/AG/Doc.3114/94.

¹⁰⁰ *Rome Statute* art 7.

¹⁰¹ Manfred Nowak, *Civil and Political Rights, Including Questions of Disappearances and Summary Executions*, UN ESCOR, 58th sess, Agenda Item 11, UN Doc E/CN.4/2002/71 (8 January 2002) [30] ('Civil and Political Rights').

crime in the *Rome Statute* must be framed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.¹⁰² Contrary to this, the *CPED* also criminalises single violations of the prohibition of enforced disappearance.¹⁰³

Nevertheless, the *CPED* definition is not free of ambiguities. There is already an ongoing discussion concerning whether this definition has three or four elements, a question which can have noteworthy repercussions on the legal plane. Anderson maintains that ‘there are three definite constitutive elements ... deprivation of liberty; by or with the support or acquiescence of a state agent; and a refusal to acknowledge that deprivation of liberty’.¹⁰⁴ A different approach is suggested by McCrory who considers that these elements

are essentially fourfold, (i) detention/deprivation of liberty, (ii) carried out by agents of the State or with State acquiescence; (iii) followed by a refusal to acknowledge the detention, or a concealment of the fate of the disappeared person; and (iv) placement of the disappeared outside the protection of the law.¹⁰⁵

Rodley and Pollard believe that such an approach may be workable if it is open to each state — when legislating in its national law — to codify the element of ‘outside the protection of the law’ as either an objective question of the detainee’s actual situation, or as a subjective enquiry into the intent of the perpetrators.¹⁰⁶ However, they propose that the text

be read as prohibiting the unacknowledged detention or refusal to clarify the fate or whereabouts of the person in circumstances which place the person outside the protection of the law. This would mean that the placing of the person outside the protection of the law would be an independent, objective element of the definition.¹⁰⁷

This last element of placement of the individual outside the protection of the law relates to the issue of whether the affected individual can have access to legal recourse, which must be of a practical and effective nature, and not a theoretical and illusory option. It is hard to imagine instances where the perpetrators of enforced disappearance would provide such access to legal recourse since this would annihilate the purposes for which they had perpetrated the enforced disappearance and would expose them to judicial investigation and scrutiny. Further, an inability to have access to, and make use of, legal mechanisms follows as a factual consequence of a person being abducted and secretly detained. It would be absurd to have an additional requirement of there being an intention on behalf of the perpetrator to remove the individual from the protection of the law since such a factor is implicit in the whole notion of enforced disappearance. An additional point is that this definition should be read in light of the working definition used by the WGEID and the *DPPED*, which

¹⁰² Ibid art 7(1).

¹⁰³ *CPED* arts 3, 7.

¹⁰⁴ Anderson, above n 6, 272.

¹⁰⁵ Susan McCrory, ‘The International Convention for the Protection of All Persons from Enforced Disappearance’ (2007) 7 *Human Rights Law Review* 545, 550.

¹⁰⁶ Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law* (Oxford University Press, 3rd ed, 2009) 336–8.

¹⁰⁷ Ibid 337 (emphasis altered).

points in the direction of accepting the proposition of the existence of solely three elements.¹⁰⁸

One may already identify the similarities between the constitutive elements of enforced disappearance (as defined in *CPED*) and the practice of extraordinary rendition. As Weissbrodt and Berquist note: ‘As is the case with state-sponsored disappearances, extraordinary rendition appears to be a practice in which perpetrators attempt to avoid legal and moral constraints by denying their involvement in the abuses’.¹⁰⁹ However, a more cautious and nuanced analysis is necessary to explore their relation in full.

III WHAT IS THE RELATIONSHIP BETWEEN ‘EXTRAORDINARY RENDITION’ AND ENFORCED DISAPPEARANCE?

‘Extraordinary rendition’ is included in the long list of practices used in the ‘war against terror’ and its legality is highly contentious.¹¹⁰ It is an idiomatic term, which does not meet with general agreement as to the act(s) it describes. An important reason behind this failure to agree is that the term is not intended to be a rigid legal definition. Nevertheless, it has been employed to describe a program run by the CIA in discharging its counterterrorism tactics. Its components are the abduction or unlawful seizure, transfer, secret detention and possible torture of an individual outside any legal process or oversight.¹¹¹

Similar methods applied by the US in the past, with increasing frequency from 1970 onwards, came under the cloak of irregular rendition and sought to bring criminal fugitives to justice.¹¹² However, these should be differentiated mainly on the basis of their purpose and object. In the case of irregular rendition, the US sought to bring criminals to face justice in a court of law, a condition that is rarely the case in instances of extraordinary rendition.¹¹³ The overall legal framework is also markedly distinct as the ‘war on terror’ hinges on aspects of international humanitarian law and international human rights law that are otherwise not applicable in the case of irregular rendition.¹¹⁴

¹⁰⁸ *Report of the Working Group on Enforced or Involuntary Disappearances*, Commission on Human Rights, 52nd sess, Agenda Item 8(c), UN Doc E/CN.4/1996/38 (15 January 1996) [55].

¹⁰⁹ David Weissbrodt and Amy Berquist, ‘Extraordinary Rendition, a Human Rights Analysis’ (2006) 19 *Harvard Human Rights Journal* 123, 127.

¹¹⁰ See, eg, Jillian Button, ‘Spirited Away (Into a Legal Black Hole?): The Challenge of Invoking State Responsibility for Extraordinary Rendition’ (2007) 19 *Florida Journal of International Law* 531, 553.

¹¹¹ See generally Juan Santos Vara, ‘Extraordinary Renditions: The Interstate Transfer of Terrorist Suspects without Human Rights Limits’ in Michael J Glennon and Serge Sur (eds), *Terrorism and International Law* (Martinus Nijhoff, 2008) 556.

¹¹² See generally Ethan Nadelmann, ‘The Evolution of United States Involvement in the International Rendition of Fugitive Criminals’ (1993) 25 *New York University Journal of International Law and Politics* 813.

¹¹³ Santos Vara, above n 111.

¹¹⁴ Button, above n 110, 545.

'Extraordinary rendition' has been a recurring theme in public discourse and academic writing in the past decade.¹¹⁵ It has been a hotly debated matter in global politics, human rights' reports and US politics and, furthermore, has attracted UN attention through a recent joint study of several 'special procedures'.¹¹⁶ In short, the volume of the material that has been generated is colossal.

The press and NGOs have maintained a prominent role in unveiling factual elements of this program.¹¹⁷ Numerous reports have activated several mechanisms within international organisations, such as the Council of Europe ('CoE') and the European Union ('EU'). These organisations have engaged their organs or set up ad hoc committees to look into the matter.¹¹⁸ A considerable number of reports, opinions, memoranda and recommendations have been produced which have reconstructed, although through mainly circumstantial evidence, the operation of the CIA program.¹¹⁹

In this regard, the CoE has generated the most comprehensive analysis. Dick Marty, a member of the CoE's parliamentary assembly, was mandated to conduct a parliamentary investigation into this program. The two reports prepared by Marty compiled a considerable amount of information from former

¹¹⁵ See, eg, Santos Vara, above n 111; Button, above n 110; John Parry, 'The Shape of Modern Torture: Extraordinary Rendition and Ghost Detainees' (2005) 6 *Melbourne Journal of International Law* 516; Naureen Shah, 'Knocking on the Torturer's Door: Confronting International Complicity in the US Rendition Program' (2007) 38 *Columbia Human Rights Law Review* 581; Amnesty International, 'Below the Radar: Secret Flights to Torture and "Disappearance"' (Report No AMR 51/051/2006, Amnesty International, 5 April 2006) 23; Francesco Messineo, '"Extraordinary Renditions"' and State Obligations to Criminalize and Prosecute Torture in the light of the *Abu Omar* Case in Italy' (2009) 7 *Journal of International Criminal Justice* 1023.

¹¹⁶ *Joint Study on Global Practices in relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN GAOR, 13th sess, Agenda Item 3, UN Doc A/HRC/13/42 (20 May 2010).

¹¹⁷ One of the journalists involved in their investigation has received a Pulitzer price on a series of her reports on the CIA's program: Dana Priest, 'CIA Holds Terror Suspects on Secret Prisons', *The Washington Post* (online), 2 November 2005 <<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>>.

¹¹⁸ See Monica Hakimi, 'The Council of Europe Addresses CIA Rendition and Detention Program' (2007) 101 *American Journal of International Law* 442; European Commission for Democracy through Law (Venice Commission), *Opinion on the International Legal Obligations of Council of Europe Member States in respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion No 363/2005, 66th plen sess, Doc No CDL-AD(2006)009 (17–18 March 2006).

¹¹⁹ See *European Parliament Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners* (2006/2200(INI)) [2007] OJ C 287E/309; *European Parliament Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Adopted Midway Through the Work of the Temporary Committee* (2006/2007(INI)) [2006] OJ C 303E/833; Dick Marty, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, (Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, 12 June 2006); Dick Marty, *Alleged Secret Detentions in Council of Europe Member States: Information Memorandum II*, (Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, 22 January 2006); Marty, *Secret Detentions*, above n 20; EU Network of Independent Experts on Fundamental Rights, 'The Human Rights Responsibilities of the EU Member States in the Context of the CIA Activities in Europe (Extraordinary Renditions)' (Opinion No 3-2006, 25 May 2006).

detrainees, flight schedule information by national authorities and Eurocontrol, replies from governments and interviews with former and acting officials on both sides of the Atlantic.¹²⁰ The CoE resolutions based on these reports concluded that ‘the United States ha[d] progressively woven a clandestine “spider-web” of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture’¹²¹ and that there was a ‘high degree of probability that such secret detention centers ... ha[d] existed for some years in these two countries [Poland and Romania]’.¹²² In addition, individuals detained in those places were subjected to torture, inhuman and degrading treatment and that, overall, there was a varying degree of involvement by other CoE member states.¹²³

Notwithstanding the findings of these two reports, it was acknowledged by their drafter that there was a lack of hard evidence as to the details of abduction and methods of interrogation.¹²⁴ The identification of state officials of European states who had knowledge of the program (and its ensuing human rights violations such as enforced disappearance, incommunicado detention and torture) and who had collaborated with CIA was also not forthcoming. It is clear, however, that without official acknowledgment and bona fide cooperation from the other side of the Atlantic, much will remain unknown.

As suggested above, ‘extraordinary rendition’ is a generic term. Affixing the adjective ‘extraordinary’ appears to provide a legal gloss to this form of rendition. However, a closer examination of its components points in the opposite direction. Several working definitions have been proposed for extraordinary rendition. Santos Vara proposes that it should be

understood as the forcible abduction abroad of a suspected terrorist from the territory of one State, carried out with or without the consent of the territorial State, and the transfer of the detainee to a third country where there is a reasonable risk of being tortured or subjected to cruel, inhuman or degrading treatment. Consequently, the main feature of this kind of renditions is the risk of suffering torture or other cruel, inhuman or degrading abuses, regardless of whether the victims are eventually subjected to them.¹²⁵

Others have suggested that it

is the transfer of an individual, with the involvement of the United States or its agents to a foreign state in circumstances that make it more likely than not that the

¹²⁰ Marty, *Secret Detentions*, above n 20; Marty, *Alleged Secret Detentions and Unlawful Inter-State Transfers*, above n 119; Marty, *Alleged Secret Detentions in Council of Europe Member States*, above n 119.

¹²¹ *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, Resolution 1507, Parliamentary Assembly of the Council of Europe, 17th sitting (27 June 2006) [5].

¹²² *Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report*, Resolution 1562, Parliamentary Assembly of the Council of Europe, 23rd sitting (27 June 2007) [2]. See also Marty, *Secret Detentions*, above n 20.

¹²³ See Marty, *Secret Detentions*, above n 20.

¹²⁴ Marty, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees*, above n 119, 1.

¹²⁵ Santos Vara, above n 111, 556.

individual will be subjected to torture or cruel, inhuman, or degrading treatment.¹²⁶

Button understands extraordinary rendition in a rather rudimentary fashion, since she refers to the

transfer of terror suspects by US security forces to third states known to engage in torture, where they are surrendered to local security forces. The purported purpose ... is to enable the United States to subject terrorism suspects to the more 'effective' modes of interrogation practiced by receiving states.¹²⁷

These three attempts to construct a definition do incorporate crucial elements of extraordinary rendition. However, taken in isolation, they do not provide for a full account of the phenomenon. The first definition proposed by Santos Vara provides for a detailed description of every stage and every actor involved in extraordinary rendition. The elements are: (i) forcible abduction; (ii) transfer of a detainee; (iii) arbitrary detention; and (iv) risk of torture. The actors are: (i) the captor state; (ii) the state in whose territory the abduction takes place; and (iii) the state to which the detainee is transferred and where torture may be perpetrated. The Achilles' heel of this definition is the excessive emphasis placed on the risk of suffering torture.

It is obvious that torture could be a main stage in the string of acts comprising extraordinary rendition and related human rights violations. However, torture lies at the end of this string and an almost exclusive focus on it does not provide for a proper assessment; one must not lose sight of the other illegalities occurring. Further, the definition fails to take into account a broader array of potential victims, namely the detainee's relatives who are not informed about his or her fate.

The second definition is also flawed for similar reasons. It does not take into account the initial step of extraordinary rendition, that of the deprivation of liberty of an individual. Rather it starts with the transfer of a person. Furthermore, it adopts the 'more likely than not' threshold of the risk of being subjected to torture, which is a US construction of the law.¹²⁸ This interpretation

¹²⁶ 'Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions"' (Report, Committee on International Human Rights of the Association of the Bar of the City of New York and Center for Human Rights and Global Justice, New York University School of Law, 2004) 4 <<http://www.chrgj.org/docs/TortureByProxy.pdf>>.

¹²⁷ Button, above n 110, 533.

¹²⁸ John Yoo, 'Transferring Terrorists' (2004) 79 *Notre Dame Law Review* 1183, 1228 (citations omitted):

First, the United States expressed the understanding that the phrase 'substantial grounds for believing that he would be in danger of being subjected to torture' in Article 3 means that 'it is more likely than not that he would tortured'. As a condition of the United States' consent to the treaty, this understanding substantively limits the obligation under Article 3 of the treaty to the stated interpretation.

Council of Europe, *CIA above the Law? Secret Detentions and Unlawful Inter-State Transfers of Detainees in Europe* (Council of Europe, 2008) 104, where John Bellinger (Legal Adviser to the Secretary of State) explained:

Similarly the Senate of the United States and our courts for more than ten years have taken a position that the words 'substantive grounds' means 'more likely than not'. If we transfer a person from one point outside the United States to another point outside the United States then, as a policy matter, if we think there are substantial grounds to believe that the individual will be tortured or mistreated, we follow the same rules.

differs significantly from the standards set by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT')¹²⁹ and the *ICCPR*, as well as the interpretation given to them by treaty bodies.¹³⁰ Article 3(1) of the *CAT* requires 'substantial grounds for believing that he would be in danger of being subjected to torture', which sets a less stringent threshold than the one forwarded by the definition under consideration. In the same vein, the HRC's *General Comment No 31* requires the existence of 'substantial grounds for believing that there is a real risk of irreparable harm'.¹³¹

The definition by Button equally takes no notice of the deprivation of liberty element and limits the scope of perpetrators to US and foreign security forces rather than employing the more inclusive term of 'agents'. Again, torture features as the predominant human rights violation.

I am of the opinion that the first of the definitions examined accurately describes the practice, on the condition that torture is understood as a separate, subsequent factual event and as a human rights violation interlinked to previous actions. Torture is not the sole corollary of extraordinary rendition. Deprivation of life may also follow, with or without torture taking place. Consequently, a distinction should be made between the rationale behind extraordinary rendition and the constitutive elements and subsequent possible outcomes. This rationale is twofold: (i) to detain a potentially dangerous suspect and avert his or her participation in an attack; and (ii) to extract intelligence information from him or her. The constitutive elements are: (i) any form of deprivation of liberty; (ii) arbitrary and incommunicado detention; (iii) no access to any form of judicial process or review. Depending on the particular circumstances, the possible outcomes are torture, deprivation of life or a combination of the two. Based on these, extraordinary rendition has two forms, a narrow one, comprised of the first three elements, and a broad one that includes all the above.

Academics have taken up the issue of whether extraordinary rendition can be equated or paralleled to enforced disappearance. Some support the idea that 'there may be a link between renditions and enforced disappearances',¹³² or that the definition of enforced disappearance as prescribed in the *CPED* 'is consistent with the elements of extraordinary rendition',¹³³ or that

the enforced disappearance of the victim is an important element in the practice of extraordinary rendition which is characterized by secrecy in the capture

¹²⁹ *CAT*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

¹³⁰ Committee against Torture, *Summary Record of the First Part (Public) of the 424th Meeting*, 24th sess, 424th mtg, UN Doc CAT/C/SR424 (9 February 2001) [17]:

However, according to the United States interpretation of that article, the person claiming that he should not be expelled must demonstrate that it was 'more likely than not that he would be tortured' ... That was not the Committee's interpretation of the phrase 'substantial grounds for believing that he would be in danger of being subjected to torture' in article 3. It held that something less than probability could, in certain circumstances, constitute a real risk.

¹³¹ Human Rights Committee, *General Comment No 31 [80]: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, 80th sess, 2187th mtg, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004, adopted 29 March 2004).

¹³² EU Network of Independent Experts on Fundamental Rights, above n 119, 6.

¹³³ Weissbrodt and Berquist, above n 109, 160.

procedures, the establishment of secret detention centres and the long lasting failure by the States involved to tell the truth.¹³⁴

Paust has argued that the secret detention and processing of various detainees engaged in by the executive branch after 9/11 and over the last five years fits within the definition of forced disappearance of persons, which is absolutely proscribed by international law in all circumstances.¹³⁵ In a less absolute manner, Santos Vara has maintained that these violations of international law ‘could even lead to enforced disappearance when the final fate of the victims is unknown’.¹³⁶

For the present author, extraordinary rendition shares several identical constitutive elements with enforced disappearance. These are the deprivation of liberty, the engagement, in whatever form, of state agents and the refusal to acknowledge this deprivation. The aforementioned have as a factual consequence the placing of the victims of the two practices outside the protection of the law. There is a part of what constitutes extraordinary rendition that still remains uncovered by enforced disappearance. This is the intent on the part of perpetrators to apply the ‘enhanced interrogation techniques’ in order to extract intelligence information. Torture (while disappeared) is the second main potential component of extraordinary rendition.

Broadly speaking, there are two main categories of persons subjected to extraordinary rendition. The first includes those Guantanamo detainees whose names have eventually been released. Although some of them may have been captured legally, for example in the battlefield, their subsequent unacknowledged detention and transfer places them in the realm of enforced disappearance and their possible subjection to torture in the realm of extraordinary rendition.¹³⁷ However, the aforementioned acknowledgment of their detention, such as in the case of ‘high value detainees’,¹³⁸ puts the violation of the prohibition of enforced disappearance to an end and brings to the fore other human rights violations, such as the violation of the right to liberty and security, the right not to be subjected to torture or cruel, inhuman or degrading treatment, the right to be treated with humanity and with respect for one’s inherent dignity, and the right of access to a court. Similar considerations apply for the limited cases that have reached US courts.¹³⁹

The second category relates to those who have been victims of extraordinary rendition and still remain unaccounted for. These individuals continue to be victims of enforced disappearance. From the moment one of the constitutive elements ceases to exist, either as a result of being set free or through an acknowledgment of their detention being made, then enforced disappearance comes to an end. In summary, it is submitted that extraordinary rendition *stricto*

¹³⁴ Scovazzi and Citroni, above n 5, 56.

¹³⁵ Jordan Paust, ‘Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Detention, Domestic Spying and Claims to Unchecked Executive Power’ (2007) 2 *Utah Law Review* 345, 368–9.

¹³⁶ Santos Vara, above n 111, 556.

¹³⁷ Ibid.

¹³⁸ International Committee of the Red Cross, ‘ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody’ (Report, International Committee of the Red Cross, February 2007).

¹³⁹ See, eg, *Gherebi v Bush*, 352 F Supp 3d 1278 (9th Cir, 2003).

sensu is equated to enforced disappearance and is, in its broader sense, the aggregate result of enforced disappearance and torture.

It is true that current scholarship is oriented towards searching for answers to violations perpetrated through extraordinary rendition in the mainstream international instruments such as the *ICCPR*, *CAT*, *ECHR*, the *Convention relating to the Status of Refugees*¹⁴⁰ and the *Geneva Conventions*.¹⁴¹ This is understandable, since solutions must be identified within the existing and applicable legal instruments. In this regard, scholars have reserved a prominent role to the *CAT* in their search for legal answers to the problems posed by enforced disappearances of this type.¹⁴² Torture figures here as a proxy notion between enforced disappearance and extraordinary rendition. In the following Part, those provisions of the *CPED* that are most pertinent to extraordinary rendition are discussed.

IV THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS AGAINST ENFORCED DISAPPEARANCE: THE ADDED VALUE

One of the significant advancements of the *CPED* lies not only in coining a new and legally binding definition, but also in setting up a comprehensive legal framework, which deals with all aspects of enforced disappearance, including those of the nature of the violation, the individual criminal responsibility, the victims' rights and the right to truth. In this section, I will examine the relevant provisions of the *CPED* and discuss how they may interrelate with extraordinary rendition.

This discussion will employ the *CAT* as the main comparator for two reasons. First, it has been one of the fundamental instrument relied upon in scholarship in analysing extraordinary rendition. Secondly, the *CPED* is, to a considerable extent, modelled after it. In this Part, I will also scrutinise some of the US arguments, which contend that extraordinary rendition is not an unlawful practice.

¹⁴⁰ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

¹⁴¹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively, 'Geneva Conventions'). For examples of scholarship see Beth Henderson, 'From Justice to Torture: The Dramatic Evolution of US-Sponsored Renditions' (2006) 20 *Temple International and Comparative Law Journal* 189; Parry, above n 115; Shah, above n 115; Matteo Winkler, 'When "Extraordinary" Means Illegal, International Law and European Reaction to the United States Rendition Program' (2008) 30 *Loyola of Los Angeles International and Comparative Law Review* 33; Amnesty International, *United States of America: Below the Radar, Secret Flights to Torture and "Disappearance"* (Report No AMR 51/051/2006, Amnesty International, 5 April 2006).

¹⁴² See, eg, Shah, above n 115, 601–4.

A Non-Derogable Nature

Article 1 of *CPED* provides:

- (1) No one shall be subject to enforced disappearance.
- (2) No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

This is a central article in the *CPED*. It establishes unequivocally the non-derogable nature of the prohibition. The *jus cogens* nature of the prohibition is confirmed both in theory¹⁴³ and through the IACtHR's jurisprudence¹⁴⁴ and cannot be treated as only a matter of academic interest or as merely serving the taxonomy of international human rights law. It has paramount importance in rejecting the US argument which paves the way for the practice of extraordinary rendition. The US position asserts international human rights law is not applicable to extraordinary rendition. Satterthwaite has summarised the US position along the following lines:

The legal vacuum is constructed as follows: because the transfers occur as part of an armed conflict, we must look to humanitarian law for any relevant rules concerning transfers. Al Qaeda members, however, are unprivileged combatants, and thus unprotected by rules found in the *Geneva Conventions* concerning the transfer of prisoners of war or other protected persons. Finally, the argument concludes, the rules of human rights law do not apply either, because humanitarian law operates as *lex specialis* to oust such rules from application. For this reason, suspected terrorists may be informally transferred from place to place without those transfers being unlawful, because no law applies.¹⁴⁵

The *CPED* casts aside this argument and specifies explicitly, neither war nor any other exceptional circumstance can justify enforced disappearance and, to the degree that they are identical, extraordinary rendition. Certainly, this language is reminiscent of the *CAT* stipulation in art 2(2).¹⁴⁶ The added value of the *CPED* over the *CAT* is that it extends to the chronologically preceding stage to torture, as well as to other elements concurrent to torture such as the arbitrary and incommunicado detention and the lack of any judicial recourse for the victim(s).

B Non-Refoulement

John Yoo, former official at the US Department of Justice, had described the US stance on the applicability of the *CAT* in relation to extraordinary rendition.

¹⁴³ Paust, above n 135, 256.

¹⁴⁴ 'The prohibition of the forced disappearance of persons and the corresponding obligations to investigate and punish those responsible has attained the status of *jus cogens*': *Goiburú* [2006] Inter-Am Court HR (ser C) No 153.

¹⁴⁵ Margaret Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law' (2007) 75 *George Washington Law Review* 1333, 1400.

¹⁴⁶ *CAT* art 2(2) reads: 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'.

The argument he advanced is based on the reservations made by the US to art 3 of the *CAT*,¹⁴⁷ which refers to the *non-refoulement* obligation:

First, the United States expressed the understanding that the phrase ‘substantial grounds for believing that he would be in danger of being subjected to torture’ in Article 3 means that ‘it is more likely than not that he would be tortured’. As a condition of the United States’ consent to the treaty, this understanding substantively limits the obligations under Article 3 of the treaty to the stated interpretation.¹⁴⁸

The counterpart provision in the *CPED* appears to broaden the *non-refoulement* protection and to deal more effectively with the aforementioned line of argument. Indeed, art 16 of the *CPED* is drafted in the same language as art 3 of the *CAT*, with the additional term of ‘surrender’ of persons being added to the other instances of expulsion, return and extradition.¹⁴⁹ The meaning of the word ‘surrender’ is to be interpreted in good faith and in accordance with its ordinary meaning in light of the treaty’s object and purpose.¹⁵⁰ The ordinary meaning of ‘surrender’ is defined as ‘the giving up of something into the possession or power of another who has or is held to have a claim to it; especially of combatants, a town’.¹⁵¹ In essence, the *CPED* prohibits any form of physical handing over of an individual, which may subsequently lead to torture. Even if the US position were to be accepted, enforced disappearance would still remain a human rights violation, irrespective of where it took place. The only requirement needed would be the involvement of US state agents in an enforced disappearance to trigger the application of the *CPED*. Thus, the US argument is circumvented. It is also a reason why enforced disappearance cannot be perceived and understood solely as torture.

Article 16 of the *CPED* offers broader protection than the *CAT* from yet another standpoint. It requires consideration of ‘serious violations of international humanitarian law’ in addition to examining whether there is a ‘consistent pattern of gross, flagrant or mass violations of human rights’, an expression also found in art 3 of the *CAT*. This is very important in view of the fact that, as previously mentioned, the US position attempts to create a legal vacuum by excluding the application of humanitarian law. Article 16(1) of the

¹⁴⁷ ‘No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’: *CAT* art 3.

¹⁴⁸ Yoo, above n 128, 1228. Along the same line of argument, see the comments of John Bellinger, quoted in Marty, *Alleged Secret Detentions and Unlawful Inter-State Transfers*, above n 119, [272]:

The obligation under Article 3 of the Convention against Torture requires a country not to return, expel, or *refouler* an individual. For more than a decade, the position of the US Government, and our courts, has been that all of those terms refer to returns from, or transfers out from the United States.

¹⁴⁹ ‘No State Party shall expel, return (‘refouler’), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance’: *CPED* art 16(1).

¹⁵⁰ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31.

¹⁵¹ John A Simpson and E S C Weiner, *The Oxford English Dictionary* (Clarendon Press, 2nd ed, 1989) vol XVII, 304.

CPED is sufficiently precise to prevent the exclusion of the relevant legal framework.

C Jurisdiction

The issue of jurisdiction is a highly contentious matter. A further US argument concerning the non-applicability of human rights treaties (and especially the *CAT*) is that of extraterritoriality. More specifically,

the *Convention* is generally inapplicable to transfers effected in the context of the current armed conflict because it has no extraterritorial effect (except in the case of extradition) and, hence, cannot apply to al Qaeda and Taliban prisoners detained *outside* of US territory at Guantanamo Bay or in Afghanistan.¹⁵²

It is submitted that the definition of enforced disappearances in the *CPED*, combined with art 9 of the same convention, will endow human rights proponents with a counterargument to this US stance. The latter requires state parties to take the necessary measures to establish their competence to exercise jurisdiction over the offence of enforced disappearance in the following three cases: first, when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state; secondly, when the alleged offender is one of its nationals; and thirdly, when the disappeared person is one of its nationals and the state party considers it appropriate.

Extraordinary renditions are planned and executed pursuant to the CIA program. Its agents, or persons acting under its authority, participate in whole or in part in the performance of the program.¹⁵³ It has also been found that CIA has provided logistical and material support, for example, by creating ‘front companies’ which owned or leased airplanes used to transfer individuals.¹⁵⁴ That the US is implicated in perpetrating enforced disappearance is clear, in that its acts fall foul of all three substantive elements of the offence of enforced disappearance: deprivation of liberty; authorisation, support or acquiescence of the state; and refusal to acknowledge or concealment of the fate of the victims.

Article 9(1)(b) of the *CPED* is also essential since it requires a state to establish jurisdiction where an alleged offender is one of its nationals. In such a case, extraterritoriality would have no bearing on the legal discourse since jurisdiction over US perpetrators would be established *ratione personae*. This interpretation of the *CPED* goes far to counter the US position, which has hidden behind a legal sophistry up to now. Evading responsibility for extraordinary rendition is premised on the argument that torture is carried out by agents of another state, and not by those of the US.¹⁵⁵ In this manner, the US sustained the argument that the identical provision found in the *CAT* was not applicable since the alleged offender was not a US official, and therefore jurisdiction could not be established.¹⁵⁶ By contrast, the *CPED* pierces this veil of ‘legality’ and succeeds in founding jurisdiction over perpetrators of US nationality.

¹⁵² Yoo, above n 128, 1229 (emphasis in original).

¹⁵³ Hakimi, above n 118.

¹⁵⁴ Amnesty International, above n 141, 23.

¹⁵⁵ Yoo, above n 128.

¹⁵⁶ Ibid.

Another aspect in which the *CPED* is complementary to the *CAT*, thereby cementing the protection of the individual, is that of the scope of persons covered. Whereas the *CAT* refers in art 1(1) to ‘public officials or other persons acting in an official capacity’, the *CPED* broadens the category of persons by mentioning in art 2, ‘persons or groups of persons acting with the authorization, support or acquiescence of the State’. In this regard, the *CPED* broadens the number of persons who may find themselves within its realm, encompassing not only those who operate as officials of the state, but also individuals who act with the authorisation, support or acquiescence of the state. These three modes of state involvement are very broad and appear to encompass all possible action — active or passive and with different levels of knowledge on the state’s part. In short, outsourcing parts of the practice of extraordinary rendition does not exonerate the state from observing its human rights obligations. In the particular circumstances of the US-led program, this brings to an end the discussions as to the lack of any US involvement from the point in time when a person deprived of his or her liberty is handed over to a foreign authority. Enlarging the category of those persons who are connected to the offence of enforced disappearance leads to a connection being established with the responsible states and to creating additional occasions on which jurisdiction may be exercised.

D *Universal Jurisdiction*

The importance of universal jurisdiction cannot be overstated. Its significance was stressed by Nowak who emphasised that universal jurisdiction would constitute the most effective measure of deterring the practice of enforced disappearance where the cases were clearly defined.¹⁵⁷ The nature of the universal jurisdiction found in art 9(2) of the *CPED* is, however, contested. For her part, Anderson considers that its nature is mandatory, thereby criminalising enforced disappearance under international law, and leading to state exercise of jurisdiction over relevant offenders.¹⁵⁸ Scovazzi and Citroni take a more conservative approach. In their view ‘no provision in the 2007 *Convention* addresses the question of the so-called universal jurisdiction intended in its most radical meaning’, art 9(2) of the *CPED* ‘allows for a sort of universal jurisdiction at least in cases where the alleged perpetrator is in the territory of a State Party’.¹⁵⁹

The nature of the prescribed jurisdiction is directly linked to which legal steps may be taken with regard to perpetrators. Were art 9(2) of the *CPED* considered as establishing universal jurisdiction, then no safe havens would be available to perpetrators. Relying on *travaux préparatoires* for guidance, one finds the following provision in art 6(1)(b) of the draft *CPED*:

When the alleged perpetrator or the other alleged participants in the offence of forced disappearance or the other acts referred to in article 2 of this *Convention* are in the territory of the State Party, irrespective of the nationality of the alleged perpetrator or the other alleged participants, or of the nationality of the

¹⁵⁷ Nowak, *Civil and Political Rights*, UN Doc E/CN.4/2002/71, [96].

¹⁵⁸ Anderson, above n 6, 276.

¹⁵⁹ Scovazzi and Citroni, above n 5, 301.

disappeared person, or of the place or territory where the offence took place unless the State extradites them or transfers them to an international criminal tribunal.¹⁶⁰

This wording leaves no ambiguity as to the establishment of universal jurisdiction. The WGEID had stated that this provision was ‘drafted in a much clearer manner than in comparable treaties, including the *Convention against Torture*’.¹⁶¹ However, this provision was not maintained in the final version of the draft *CPED*, and this fact may be evidence against universal jurisdiction.

Article 9(2) of the *CPED* is drafted in almost identical language to art 5(2) of the *CAT*.¹⁶² Guidance can be found in the *CAT*’s interpretation as to the nature of this jurisdiction. In their highly commendable commentary of the *CAT*, Nowak and McArthur observe that it ‘is the first human rights treaty incorporating the principle of universal jurisdiction as an international obligation of all States parties without any precondition other than the presence of the alleged torturer’¹⁶³ and ‘that States parties have a legal obligation to take the necessary legislative, executive and judicial measures to establish universal jurisdiction over the offence of torture’.¹⁶⁴

Although the explicit language of the draft *CPED* was not followed, one may discern from the comparative interpretation of the two provisions found in the *CAT* and *CPED* that universal jurisdiction is established. To conclude, it is argued that the hermeneutic proposition put forward by Scovazzi and Citroni is untenable, both because it remains unqualified in their writings and because the adoption *mutatis mutandis* of the *CAT*’s interpretation of the identical provision suggests this.

E *Secret Detention*

Article 17 of the *CPED* is an exceptionally detailed article. It prohibits the holding of an individual in secret detention and requires states to abide by a series of positive obligations.¹⁶⁵ It is the first time that the prohibition of secret

¹⁶⁰ Sessional Working Group on the Administration of Justice, *Report of the Sessional Working Group on the Administration of Justice*, UN ESCOR, 50th sess, Agenda Item 9, UN Doc E/CN.4/Sub.2/1998/19 (19 August 1998).

¹⁶¹ *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions: Report of the Working Group on Enforced or Involuntary Disappearances*, Commission on Human Rights, 57th sess, Agenda Item 11(b), UN Doc E/CN.4/2001/68 (18 December 2000).

¹⁶² *CAT* art 5(2) reads:

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

¹⁶³ Manfred Nowak and Elizabeth McArthur (eds), *The United Nations Convention against Torture: A Commentary* (Oxford University Press, 2008) 316 (emphasis altered).

¹⁶⁴ *Ibid* 317.

¹⁶⁵ *CPED* art 17 reads:

- 1 No one shall be held in secret detention.
- 2 Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation,
 - (a) Establish the conditions under which orders of deprivation of liberty may be given;

detention is promulgated in unequivocal terms in a binding international human rights instrument.

The *ICCPR* includes a provision that is similar. Article 10(1) of the *ICCPR* requires that, '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. The *ICCPR* does not provide, *prima facie*, for a prohibition on secret detention. Instead, it relates mainly to humane conditions of detention and obliges states to 'provide detainees and prisoners with a minimum of services to satisfy their basic needs (food, clothing, medical care, sanitary facilities, communication, light, opportunity to move about, privacy, etc)'.¹⁶⁶

A passing reference to secret detention is found in *General Comment No 21* of the HRC:

To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places *officially recognized as places of detention* and for their names and places of detention, as well as for the names of persons

-
- (b) Indicate those authorities authorized to order the deprivation of liberty;
 - (c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
 - (d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;
 - (e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;
 - (f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.
- 3 Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum,
- (a) The identity of the person deprived of liberty;
 - (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
 - (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
 - (d) The authority responsible for supervising the deprivation of liberty;
 - (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
 - (f) Elements relating to the state of health of the person deprived of liberty;
 - (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
 - (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

¹⁶⁶ Nowak, above n 74, 188–9.

responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends. To the same effect, the time and place of all interrogations should be recorded, together with the names of all those present and this information should also be available for purposes of judicial or administrative proceedings. Provisions should also be made against incommunicado detention.¹⁶⁷

Incommunicado and secret detention must be conceptually disentangled. Incommunicado detention is when an individual is held without any communication with the outside world and finds themselves in a situation where not even their closest relatives know of their place of detention. By contrast, detention in a secret location goes beyond incommunicado detention because neither is the location of detention formally designated as an official detention facility nor is it known to the relatives of the detainee. In both instances it is possible that even the detainee himself or herself does not know where he or she is being detained.

The case of *El-Megreisi v Libyan Arab Jamahiriya* is illustrative of the above.¹⁶⁸ In this case the HRC found that the author was ‘detained incommunicado for more than three years ... when he was allowed a visit by his wife, and that after that date he has again been detained incommunicado and in a secret location’.¹⁶⁹ The distinction made between the two is apparent in this case.

Prohibiting secret detention and setting up a detailed scheme of a state’s obligations with regard to persons deprived of their liberty is particularly relevant to the position of those states involved in maintaining or making use of secret detentions around the globe. Article 17 of the *CPED* offers a clear legal response to the so-called black sites or other similar premises that have been used for the detention of individuals. The *CPED* provides, in a legally binding manner, the requisite level of protection that had previously only been attained through an expansive interpretation of the *ICCPR*. It is here that a further instance of the *CPED*’s added value to human rights protection is demonstrated.

F Victims and the Right to Truth

The *CPED*’s definition of ‘victim’ reflects the jurisprudential evolution of the notion, especially through the case law of the IACtHR.¹⁷⁰ Article 24 of the *CPED* defines a victim as not only the person who is subjected to enforced disappearance, but also as any other individual that has suffered harm as the direct result of an enforced disappearance. This provision is more inclusive than that contained in the *CAT* because it explicitly includes the material victim as well as other persons, not necessarily relatives, who can credibly claim that they have suffered harm. Broadening the list of persons that can be considered as victims serves the purpose of affording to them rights and extended protection.

¹⁶⁷ *Compilation of General Comments*, UN Doc HRI/GEN/1/Rev.9 (Vol.I), 201 [11] (emphasis added).

¹⁶⁸ Human Rights Committee, *Views: Communication No 440/1990*, 50th sess, UN Doc CCPR/C/50/D/440/1990 (24 March 1994) (‘*El-Megreisi v Libyan Arab Jamahiriya*’).

¹⁶⁹ *Ibid* [5.4].

¹⁷⁰ *Mapiripán Massacre v Colombia* [2005] Inter-Am Court HR (ser C) No 122, [146]; *Ituango Massacres v Colombia* [2006] Inter-Am Court HR (ser C) No 148, [262].

In the same *CPED* article, victims' rights to restitution, rehabilitation, satisfaction and guarantees of non-repetition are provided for, thus displacing the responsibility of the state solely on a state-individual basis to a more collective obligation which is owed to a circle of persons related to the actual victim. This collective dimension is the normative foundation of the second paragraph of the *CPED* art 24, which establishes the right to truth:

Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.¹⁷¹

This provision brings into being the 'right to truth' by introducing it in an international human rights treaty for the first time.¹⁷² The origin of the right, along with its contested existence in customary international law, is beyond the scope of this article. Suffice it to say that the 'right to truth' is not related solely to providing the prescribed information in *CPED* art 24(2) but is also to be understood as an obligation of the state towards society to acknowledge the wrongdoings and to disclose all relevant information regarding disappearances.

G Monitoring Body

The Committee on Enforced Disappearances ('Committee') is an autonomous monitoring body set up by art 26 of the *CPED*. It comprises ten independent experts, serving in their personal capacities. Special provision is made to map the Committee in the overall UN treaty monitoring regime. The Committee consults in particular with the HRC, in order to ensure consistency of their respective work.

One of the most innovative elements of the *CPED* is art 34.¹⁷³ The Committee, pursuant to art 34, may urgently bring a matter to the attention of the UN General Assembly, if well-founded indications that enforced disappearance is being practiced on a widespread or systematic basis can be shown to exist. This possibility is unparalleled in the area of human rights law. Compared to the traditional competencies of treaty bodies, the Committee is endowed with an additional area of competency. The Committee may expose publicly — and thus exert pressure upon states practising disappearances on this scale, while at the

¹⁷¹ *CPED* art 24(2).

¹⁷² Diana Orentlicher, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Commission on Human Rights, 61st sess, Agenda Item 17, UN Doc E/CN.4/2005/102/Add.1 (8 February 2005); Office of the United Nations High Commissioner for Human Rights, *Promotion and Protection of Human Rights: Study on the Right to the Truth*, Commission on Human Rights, 62nd sess, Agenda Item 17, UN Doc E/CN.4/2006/91 (8 February 2006); Working Group on Enforced or Involuntary Disappearances, 'General Comment on the Right to the Truth in relation to Enforced Disappearances' (General Comment, July 2010) <http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf>.

¹⁷³ *CPED* art 34 reads:

If the Committee 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 on 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.

same time avoiding the time-consuming procedures of either exhausting domestic remedies or seeking the protection of an international court or tribunal. Especially with regard to the International Criminal Court, this has the additional benefit of dealing effectively with its complementary function. In relation to situations created by extraordinary renditions of the kind professed by the US, this would increase the options available to the international community when confronted with these human rights violations. The Committee is institutionally endowed with such attributes and could draw significantly on past experience of other treaty bodies so that it could avoid the institutional impasse observed in the past. In this way, it could be a useful tool in confronting extraordinary rendition at the UN level.

V CONCLUDING REMARKS

This article has dealt with two central issues. First, presenting the main features of the *CPED* and secondly, examining how this instrument provides a response to the practice of extraordinary rendition. Enforced disappearance is a complex phenomenon and includes multiple violations of human rights. These may vary depending on the circumstances surrounding disappearances. Notwithstanding this, enforced disappearance cannot be reduced to the aggregate result of these violations. In the *CPED*, the prohibition of enforced disappearance has been framed as an autonomous human right.

A former director of the CIA's Counterterrorism Center has stated: '[a]ll I want to say is that there was "before" 9/11 and "after" 9/11. After 9/11 the gloves came off'.¹⁷⁴ Extraordinary rendition is a practice that fits squarely within this acknowledgment, which metaphorically admits that there are few, if any, moral and legal barriers in the 'war on terror'. Pursuant to the preceding analysis, extraordinary rendition can be analysed and confronted as enforced disappearance, if they have the following substantive elements in common: deprivation of liberty, state involvement and refusal to acknowledge the deprivation. The findings of the various committees and reports prove that a considerable and increasing number of individuals have been subjected to this egregious practice.

In the aftermath of the election of Barack Obama to the presidency of the US, there was optimism that the practice of extraordinary rendition would come to an end and that Guantanamo would close down. A positive step towards achieving these goals was made through the issuance of three executive orders by President Obama, soon after his coming to office.¹⁷⁵ Together with scepticism as to the adequacy of these executive orders,¹⁷⁶ it must be noted that extraordinary

¹⁷⁴ Andrew Rawnsley, 'The Greatest Moral Failure of Tony Blair's Premiership', *The Guardian* (online), 8 February 2009 <<http://www.guardian.co.uk/commentisfree/2009/feb/08/tony-blair-human-rights-torture>>.

¹⁷⁵ President of the United States of America, *Ensuring Lawful Interrogations*, Executive Order 13491, 22 January 2009; President of the United States of America, *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities*, Executive Order 13492, 22 January 2009; President of the United States of America, *Review of Detention Policy Options*, Executive Order 13493, 22 January 2009.

¹⁷⁶ Mathias Vermeulen, 'Don't Ask, Don't Tell: Renditions under the Obama Administration' in Manfred Nowak and Roland Schmidt (eds), *Extraordinary Renditions and the Protection of Human Rights* (Ludwig Boltzmann Institute of Human Rights, 2010) vol 20, 63, 63–7.

rendition is still conducted by the current administration, though with lower intensity.¹⁷⁷ The alarming news, however, comes from two different sources. First, the US Congress has passed a bill providing for: detention without trial until the end of the hostilities; military custody of detainees; and a national security waiver that gives a free hand to the executive to extend detention indefinitely without judicial or parliamentary oversight.¹⁷⁸ Secondly, the policy has shifted from enforced disappearance to targeted killings giving rise to possible new human rights violations.

This article has highlighted the legal consequences of enforced disappearance. *De lege lata*, state responsibility for enforced disappearance may be invoked to the extent that an enforced disappearance amounts to torture. The snapshot given of the case law of international bodies demonstrates that this may not always be the case because of the lack of well-established criteria in this regard. The current applicable legal framework comprising the *IICCPR*, *CAT* and, depending on the legal route a victim may choose, the ECtHR. With the ECtHR, this could take the form of an application against a member state of the CoE. The first hurdle to be surmounted would be to establish that a victim has been within a state's jurisdiction. If a case reaches the ECtHR, then it should be expected that it would be as important as the judgments in *Loizidou v Turkey*,¹⁷⁹ *Banković v Belgium*¹⁸⁰ and *Behrami v France*.¹⁸¹

Individual responsibility is a second category of available solutions. Again, the prerequisite that an enforced disappearance reaches the 'torture threshold' is necessary to trigger the relevant *CAT* provision, which allows prosecution through universal jurisdiction. This has not remained a mere option on paper; an attempt, albeit unsuccessful, to indict six former US officials for providing legal advice which essentially allowed torture practices was made in Spain.¹⁸² A second investigation, again in Spain, on torture allegations in Guantanamo is still underway at the time of writing.¹⁸³ Even the well-documented case of the enforced disappearance of Abu Omar in Italy initially fell to a successfully invoked defence of state secrecy.¹⁸⁴ In Germany, an action by an individual that

¹⁷⁷ United States Department of Justice, 'Accused Al Shabaab Leader Charged with Providing Material Support to Al Shabaab and Al Qaeda in the Arabian Peninsula' (Media Release, 5 July 2011) <<http://www.justice.gov/usaio/nys/pressreleases/July11/warsameindictment.pr.pdf>>.

¹⁷⁸ *National Defense Authorization Act for Fiscal Year 2012*, Pub L No 112-81, 125 Stat 1298.

¹⁷⁹ [1996] VI Eur Court HR 2216.

¹⁸⁰ [2001] XII Eur Court HR 335.

¹⁸¹ (2007) 45 EHRR SE 10.

¹⁸² 'Spain Rejects US "Torture" Probe', *BBC News* (online), 16 April 2009 <<http://news.bbc.co.uk/2/hi/europe/8002262.stm>>.

¹⁸³ Giles Tremlett, 'Spanish Court Opens Investigation of Guantánamo Torture Allegations', *The Guardian* (online), 29 April 2009 <<http://www.guardian.co.uk/world/2009/apr/29/spain-court-guantanamo-detainees-torture>>.

¹⁸⁴ Scovazzi, above n 72; Mathias Vermeulen, 'Italy, Constitutional Court Recognizes Wide Discretion by the Government on State Secrets' on Mathias Vermeulen, *The Lift: Legal Issues in the Fight against Terrorism* (30 April 2009) <<http://legalift.wordpress.com/2009/04/30/italy-constitutional-court-recognizes-wide-discretion-by-the-government-on-state-secrets>>; Amnesty International, 'Italy: The *Abu Omar* Case' (Media Briefing, 4 November 2009) <<http://www.amnesty.org/en/library/info/EUR30/012/2009/en>>; Francesco Messineo, '"Extraordinary Renditions" and State Obligations to Criminalize and Prosecute Torture in the light of the *Abu Omar* Case in Italy' (2009) 7 *Journal of International Criminal Justice* 1023.

sought to oblige the German Government to request the extradition of the alleged perpetrators of an extraordinary rendition was recently rejected.¹⁸⁵

An interesting option that was not explored in this article is that of filing a civil action. *Filártiga v Peña-Irala*¹⁸⁶ is a prominent example. However, one has to be mindful of the inherent difficulties of lodging a case of this type mainly because of the difficulty of identifying perpetrators of extraordinary rendition. From a more general standpoint, access to justice by individuals in domestic fora presents an attractive prospect for two main reasons: first, in the event that these domestic recourses prove successful then a remedy to human rights violations is anticipated, coupled with a thorough and effective investigation; secondly, even if such remedies are not available, the process of exhausting domestic remedies may open the way for applications to be made to competent international courts. Considering the involvement of CoE member states to the extraordinary rendition saga, one should expect interesting times of litigation before the ECtHR in the future.¹⁸⁷

De lege ferenda, the CPED offers a wide array of legal solutions. It brings within the ambit of the protection of human rights law all instances of extraordinary rendition, regardless of whether they could be considered as torture or not. It is also more encompassing in that it may be used against all individuals who act with the authorisation, support or acquiescence of the state. This places a bar on outsourcing extraordinary rendition to private individuals or other entities. It also fills in certain gaps of the current international protection of human rights, especially with regard to the *CAT*.

More importantly, the CPED introduces a new right, which in the framework of the debate over extraordinary rendition attains special significance — the right to truth. The bearers of the right are the material victims and those who have suffered harm from their enforced disappearance. However, the moral foundation of the right seems to relate to every one of us — our societies are owed the truth of what has happened.

¹⁸⁵ Peter Wilkitzki, ‘German Government Not Obligated to Seek Extradition of CIA Agents for “Extraordinary Rendition”’ (2011) 9 *Journal of International Criminal Justice* 1117, 1117.

¹⁸⁶ 630 F 2d 876 (2nd Cir, 1980).

¹⁸⁷ On 8 October 2010, the ECtHR communicated a statement of facts for the case of Khaled El-Masri against the former Yugoslav Republic of Macedonia, which relates to the applicant’s alleged handing over to a ‘special CIA rendition team’: Khaled El-Masri, ‘Statement of Facts’, Submission in *El-Masri v Former Yugoslav Republic of Macedonia*, Application No 39630/09, 20 July 2009 <<http://cmiskp.echr.coe.int/>>. On 16 May 2012, the ECtHR Grand Chamber held a hearing on the case: see European Court of Human Rights, ‘Grand Chamber Hearing concerning Alleged Secret Rendition of a Man Suspected of Terrorist Ties’ (Press Release, No ECHR 215(2012), 16 May 2012) <<http://cmiskp.echr.coe.int/>>.