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Article

# Fighting Impunity of Enforced Disappearances through a Regional Model

*Cristina Genovese and Prof. H. van der Wilt\**

Abstract

Grievous moral opprobrium has often been the trigger justifying the recourse to individual criminal responsibility of perpetrators. The process of ‘justice cascade’ initiated by the Nuremberg trials should not come to a halt. Though the current measures of criminal justice enforcement within international tribunals and national courts prove to be necessary mechanisms, they are not always sufficient. Bringing forward the crime of enforced disappearance as an illustration of a phenomenon where impunity still holds its way, this article addresses the question of whether regional initiatives on international criminal law enforcement within Europe can complement the adjudicatory justice already administered at the international and national level.

## Introduction

*“Even today I think, maybe today, tomorrow, they will return my son to me [...] Every night he appears in my sleep and during the day I cry all the time [...] That is not a life anymore. For me everything came to a halt. I don’t live; I just walk over the earth.”*

Mother of Artur Akhmatkhanov, Russia<sup>1</sup>

Enforced disappearance has been labelled as one of the gravest violation of human rights.<sup>2</sup> Accordingly, the matter has been extensively dealt within the international

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<sup>1</sup> Amnesty International, ‘Voices of Victims: Testimonies of Victims from Enforced Disappearance’, November 2011, at <http://www.amnesty.org/en/library/asset/IOR51/009/2011/en/86b89482-147e-4b91-b35a-e324ef781485/ior510092011en.pdf> (accessed on 15 December 2013); See *Akhmatkhanovy v. Russia*, Decision of 22 July 2010, ECtHR App. No. 20147/07.

<sup>2</sup> Article 1, 1992 United Nations Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133 (hereinafter as “UN Declaration”); Preamble, 1994 Inter-American Convention on Forced Disappearance of Persons, OAS Treaty Series No. 68, 33 ILM 1429 (hereinafter as “IACED”); Parliamentary Assembly of the Council of Europe (hereinafter as

human rights system, holding states responsible for the commission of the violating acts. Human rights bodies have awarded the victims with compensation and satisfaction as forms of reparation to redress the damage caused.<sup>3</sup> However, one might wonder whether the mere holding of a state - an abstract entity - responsible for such horrendous acts can redeem the period of terror and anguish that victims have been living in. States are under the obligation to investigate the commission of the crime and prosecute the perpetrators due to the belief that national courts represent the most suitable fora in the punishment of violators. Nevertheless, the possible involvement of state authorities in the offence or loopholes present in the law can disrupt the proper functioning of the local judiciary, resulting in one of the main obstacles to justice's restoration: impunity. In the case where other states would claim jurisdiction over the matter on the basis of the universality principle, the lack of a valid legal basis under domestic law or political hurdles might hinder criminal proceedings.<sup>4</sup> Furthermore, non-state actors as, for example, private armed groups, rebel forces or private business companies, falling out of the jurisdiction of human rights bodies, have proved to be as capable as states in the commission of grievous offences.<sup>5</sup> Private entities engaging in criminal conduct fall under the penal system of the state, but what happens when the state itself is unable or unwilling to prosecute the perpetrators? The establishment of international tribunals and the International Criminal Court (ICC) has proved to be crucial in piercing the state veil in the pursuit of justice and convicting individuals responsible for the gravest offences.<sup>6</sup> The Rome Statute recognizes enforced disappearance as an international crime once its practice results in a crime against humanity, leaving aside those acts that are not a part of widespread or systematic attack.<sup>7</sup> Yet, which entity will be entitled to ensure justice to the victims when the offence does not fall under the chapeau of the Rome Statute's core crimes? Perpetrators of serious human rights violations might still be left unpunished due to the limited material and temporal jurisdiction of the ICC.

Given the importance currently advocated in favour of state cooperation, justice enforcement and the protection of human dignity, no justifications can be found for letting violators run free. In this light, the combat against impunity seems to require an alternative mechanism of reliance. This research brings to the fore regional initiatives as legitimate instruments able to complement criminal justice enforcement

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"PACE"), Resolution 1463 (2005), para 2; OHCHR, *Enforced or Involuntary Disappearances*, Fact Sheet No.6/Rev. 3, Geneva 2009, p.1, at: <http://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf> (accessed on 15 December 2013).

<sup>3</sup> According to one of the victim's mother in the case of *El Amparo v. Venezuela*, Decision of 18 January 1995, IACtHR Ser. C No. 19: "My son was not a cow, I don't want money, what I want is justice." cited by V. Krsticevic in Conference: 'Reparations in the Inter-American System: A Comparative Approach', *American University Law Review* 2007-1375, p. 1419.

<sup>4</sup> D. Akande & S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', *European Journal of International Law* 2010-4, p.816.

<sup>5</sup> PACE Report 12880 (2012), para. 65; See *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, Pre-T. Ch. II, 31 March 2010, paras. 90-92.

<sup>6</sup> E. Greppi, 'The Evolution of Individual Criminal Responsibility under International Law', *International Review of the Red Cross* 1999-835, pp. 531-553.

<sup>7</sup> Article 7 (2i), 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90 (hereinafter as "Rome Statute").

when both national and international bodies fail. Focusing on the Council of Europe (CoE), as one of the most developed regional models of human rights protection where impunity of enforced disappearance crimes, however, has still not reached an end, the authors promote the establishment of a new mechanism able to hold individuals criminally responsible for their acts. To this end, section II will put forward a concise map of the essence of enforced disappearance as a crime under international law. The offence has been selected among others on the basis of its complex and continuous nature and the grievous repercussions that it has on the victim himself and the society as a whole. In order to illustrate the possible difficulties that may be encountered in the pursuit of an effective prosecution of perpetrators, section III will address the gaps currently present both at the national and international instances of criminal enforcement, exposing a grey area as a possible safe haven for violators. On this basis, section IV will address the regionalisation of international criminal justice as a possible legal mechanism according to which the crime of enforced disappearance could be dealt within the European region. Extending the jurisdiction of the European Court of Human Rights (ECtHR) in the adjudication of criminal cases, as recently proposed within the judiciary system of the African Union, could be one possible way to tackle impunity of serious human rights violations. There is no 'one-size-fits-all' mechanism in existence able to solve all problems: the article should be understood as a first step, bringing forward suggestions on the basis of the current European human rights and criminal justice system that tackle the crime of enforced disappearance, not extending into the procedural aspects of each possible project, which certainly deserves its own extensive analysis in a separate academic work.

## I. Condemning Enforced Disappearances

Following Arendt: “[r]eal power begins where secrecy begins”.<sup>8</sup> The phenomenon of enforced disappearance encompasses the occurrence of different (but linked) criminal actions, ranging from the deprivation of liberty to torture and summary execution of an ‘unwanted’ person.<sup>9</sup> The commission of the act often follows a particular pattern supported by the existence of a practice or policy inferred or tolerated by the state, leading to a breach of trust and loss of faith by the population in the local administration of justice.<sup>10</sup> No type of record is habitually retained with regards to the missing individual, followed by a lack of investigations and clarification of the circumstances.<sup>11</sup> In case of death, no trace of the body tends to be left, often through brutal methods such as the *vuelos de la muerte* or the burning of the body’s

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<sup>8</sup> H. Arendt, *The Origin of Totalitarianism*, Cleveland/New York: Meridian Books – The World Publishing Company 1958, p. 403.

<sup>9</sup> *Velasquez Rodriguez v. Honduras*, Decision of 29 July 1988, IACtHR Ser. C. No.4, at 150, 155-158; T. Scovazzi & G. Citroni, *The struggle against enforced disappearance and the 2007 United Nations Convention*, Leiden: Martinus Nijhoff Publishers 2007, pp. 8-10, 267-284.

<sup>10</sup> See e.g. IACtHR *Velasquez Rodriguez v. Honduras*, supra note 9, at 147 (b-d), 148; Scovazzi & Citroni 2007, supra note 9, pp. 7-8; PACE Resolution 1738 (2010), para. 8.

<sup>11</sup> See as landmark cases IACtHR *Velasquez Rodriguez v. Honduras*, supra note 9, at 124, 178; *Kurt v. Turkey*, Decision of 25 May 1998, ECtHR Reports 1998-III, no.74, at 124 -125, 128.

remains.<sup>12</sup> It is the particular nature of silence and concealment surrounding the phenomenon that renders the offence difficult to grasp for the purpose of criminal accountability.<sup>13</sup> The combination of these criminal conducts portrays enforced disappearance as the “perfect crime”.<sup>14</sup> Not only the context of unacknowledged and prolonged detention constitutes a grave breach of the right to personal liberty, exposing the victim to any kind of physical maltreatment, it also constitutes a deplorable attack on the moral integrity of the person.<sup>15</sup> This is aggravated by the lack of any judicial guarantees, leaving the victim defenceless and hence amounting to one of the most complex and grievous human rights violations affecting the true essence of human dignity.<sup>16</sup> The crime of enforced disappearance will qualify as a continuous offence “as long as perpetrators continue to conceal the fate and whereabouts of persons who have disappeared”.<sup>17</sup> In this case, despite some elements of the offence, such as acts of deprivation of liberty, might have been committed before the entry into force of the relevant legal provisions, no claims based on the non-retroactivity principle can be brought forward. This is because the crime has been recognised as an “unique and consolidated act”, making it possible for a legal institution to have jurisdiction over the phenomenon of enforced disappearance as a whole and not only over those acts committed after the entry into force of the relevant legal instrument.<sup>18</sup> In this line, the statute of limitations, as taken into account in the context of ordinary crimes, will be differently applied in the case of enforced disappearances and shall only commence when the offence ends.<sup>19</sup> Accordingly, notwithstanding the period of time that has elapsed since the beginning of the disappearance, the relatives of the victims will still be able to bring their claim to the competent body, allowing the prosecution of the alleged perpetrators and strengthening the fight against impunity.

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<sup>12</sup> See H. Verbitsky, *El Vuelo: Una Forma Cristiana de Muerte*, Buenos Aires: Espejo de la Argentina 1995; *Blake v. Guatemala*, Decision of 24 January 1998, IACtHR Ser. C. No. 36, at 31; IACtHR *Velasquez Rodriguez v. Honduras*, supra note 9, at 157.

<sup>13</sup> N. Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’, *California Law Review* 1990-2, p.455-456; ECtHR *Kurt v. Turkey*, supra note 11, at 125; Scovazzi & Citroni 2007, supra note 9, p.10; K. Anderson, ‘How effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Responsible for Acts of Enforced Disappearance?’, *Melbourne Journal of International Law* 2006-252, p. 267.

<sup>14</sup> Scovazzi & Citroni 2007, supra note 9, p.10.

<sup>15</sup> IACtHR *Velasquez Rodriguez v. Honduras*, supra note 9, at 156; OHCHR, Fact Sheet No.6/Rev. 3 (2009), supra note 2, p.1.

<sup>16</sup> Article 1(2) UN Declaration; WGEID, ‘General Comment on the Right to Recognition as a Person before the Law in the context of Enforced Disappearances’, paras 1-2, at: <http://www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf> (accessed on 15 December 2013); See IACtHR *Velasquez Rodriguez v. Honduras*, supra note 9, at 155, 158; IACtHR *Blake v. Guatemala*, supra note 11, at 66; ECtHR *Kurt v. Turkey*, supra note 11, at 123-125, 128.

<sup>17</sup> Article 17 (1) UN Declaration.

<sup>18</sup> UN Doc. A/HRC/16/48 (2011), ‘General Comment on Enforced Disappearance as a Continuous Crime’, para 39 (2-6)

<sup>19</sup> UN Doc. A/HRC/16/48/Add.3 (2010), paras. 55 (hereinafter as “WGEID Best Practices (2010)”), para 55; UN Doc. E/CN.4/2001/68 (2000), ‘General Comment on article 17 of the Declaration’, paras. 27-32.

Addressing the multiple felonies part of an enforced disappearance separately does not sufficiently represent the gravity and complexity that the overall phenomenon really entails.<sup>20</sup> Though the German Field-Marshal Keitel, leading figure of the *Nacht-und-Nebel Erlass* during the Hitler regime,<sup>21</sup> represents the first person condemned for acts pertaining to a crime of enforced disappearance, his conviction at the Nuremberg trials was based on an indictment for war crimes.<sup>22</sup> It was the widespread scale of disappearances in Latin America during the military dictatorships that shook the world regarding the commission of these atrocities.<sup>23</sup> The extreme seriousness and unique nature of the phenomenon have required its designation as a crime *sui generis*, falling beyond the existing domestic and international legal frameworks and calling for the enactment of specific legal measures.<sup>24</sup> With the purpose of preventing future occurrences of the crime and provide adequate redress to the victims, the imposition of individual criminal accountability on the perpetrators has been strongly advocated both at the international and national level.<sup>25</sup> It has been submitted that the “prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*.”<sup>26</sup> This would impose on every state an obligation *erga omnes* to not allow impunity of violators.<sup>27</sup> Nonetheless, as Sarkin argues: “as enforcement remains one of the biggest issues in the promotion and protection of human rights at domestic level, what this [qualification] means practically is uncertain.”<sup>28</sup>

The following sections demonstrate in what way the loopholes still present in international human rights and criminal instruments, such as the newly entered into force International Convention for the Protection of All Persons from Enforced

<sup>20</sup> Scovazzi & Citroni 2007, supra note 9, pp. 296-297; WGEID Best Practices (2010), supra note 19, para. 11.

<sup>21</sup> *Nacht und Nebel Erlass - Night and Fog Decree* in: Office of United States Chief of Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, Volume 7 Document No. L-90, pp. 873-874, at: [http://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Nazi\\_Vol-VII.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Nazi_Vol-VII.pdf) (accessed on 15 December 2013).

<sup>22</sup> UN Doc. E/CN.4/2002/71 (hereinafter as “Nowak Report (2002)”), para. 65; B. Finucane, ‘Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War’, *Yale Journal of International Law* 2010-1, p.175.

<sup>23</sup> Nowak Report (2002), supra note 22, para 65.

<sup>24</sup> UN Doc. E/CN.4/1996/38 (1995), para. 54; A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, Oxford: Oxford University Press 2009, p.176; WGEID Best Practices (2010), supra note 19, paras. 10-11; L. Ott, *Enforced Disappearance In International Law*, Cambridge: Intersentia 2011, p.158.

<sup>25</sup> Preamble and Articles 1, 3-4, UN Declaration; Article IV, ICAED; Articles 4, 7 ICED; Article 7(2i) Rome Statute; *Prosecutor v. Kupreskic et al.*, Trial Judgement, Case No. IT-95-16-T, T.Ch., 14 January 2000, para 566, confirmed in *Prosecutor v. Kvočka et al.*, Trial Judgment, Case No. IT-98-30/1-T, T. Ch., 2 November 2001, para. 208.

<sup>26</sup> *Goiburú et al. v. Paraguay*, Decision of 22 September 2006, IACtHR Ser.C No. 153, at 84; See A. A. C. Trindade, ‘Enforced Disappearances of Persons as a Violation of *Jus Cogens*: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights’, *Nordic Journal of International Law* 2012, pp. 507–536; J. Sarkin, Why the Prohibition of Enforced Disappearance has attained “Jus Cogens” Status in International Law’, *Nordic Journal of International Law* 2012-Special Issue, pp. 537-583.

<sup>27</sup> Sarkin 2012, supra note 26, pp. 541-543, 552; M.C. Bassiouni, ‘Internatinal Crimes: the Rationae Materiae of International Criminal Law’ in Bassiouni, *International Criminal Law, Volume I: Sources, Subjects and Contents*, 3rd ed., Leiden: Martinus Nijhoff Publishers 2008, pp. 172-177.

<sup>28</sup> Sarkin 2012, supra note 26, p.550.

Disappearance (ICED)<sup>29</sup> and the Rome Statute, may contribute to the furtherance of impunity, rendering the current system of legal enforcement insufficient in the fulfilment of each human rights and criminal instruments' ultimate objectives of justice and protection.

## II. The Pitfalls of Current National and International Criminal Justice

### II.1. The National Level: Fragile Hope of Reliance

National courts are often considered the most suitable fora to prosecute perpetrators, however, the effective enforcement of human rights protection still remains a difficult issue, particularly when the state takes part in the commission of the crime.<sup>30</sup> Though the principle of universal jurisdiction followed by the duty of *aut dedere aut judicare* have been considered as crucial legal measures in the fight against impunity of enforced disappearance cases,<sup>31</sup> the application of such stretched extraterritorial jurisdiction has its own downsides on the basis of possible political, legal and evidentiary hurdles.<sup>32</sup>

It has been submitted that the adoption of ICED partly fulfils the recognized gaps present in international law with regards to an effective individual criminal accountability of perpetrators.<sup>33</sup> In contrast to other human rights conventions, ICED comprises "the most detailed and elaborate list of criminal obligations".<sup>34</sup> Nonetheless, it must be recalled that the level of protection as promoted by the Convention, as of every treaty regime, depends on the will of the states.<sup>35</sup> Individual states are the ones interpreting and deciding the content of international law binding upon them. The failure to adequately incorporate relevant international norms within the domestic criminal system strongly hinders the success of prosecutions, especially when the unique nature of an enforced disappearance is not recognized.<sup>36</sup>

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<sup>29</sup> 2006 International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/61/177 (hereinafter as "ICED").

<sup>30</sup> A. Cassese, 'The Rationale for International Criminal Justice' in A. Cassese, *The Oxford Companion of International Criminal Justice*, Oxford: Oxford University Press 2009, pp. 123-125; Anderson 2006, supra note 13, pp. 267, 275; Sarkin 2012, supra note 26, pp.548-549.

<sup>31</sup> WGEID Best Practices (2010), supra note 19, para. 59.

<sup>32</sup> Cassese 2009, supra note 30, pp.123-125; D. Hoover, 'Universal jurisdiction not so universal: time to delegate to the International Criminal Court?', *Eyes on the International Criminal Court* 2011/2012-1, pp.89-98; Aim for Human Rights, *Using Law Against Enforced Disappearance*, 2009, pp.135-136

at [http://www.ediec.org/uploads/media/Using\\_Law\\_against\\_Enforced\\_Disappearances\\_English.pdf](http://www.ediec.org/uploads/media/Using_Law_against_Enforced_Disappearances_English.pdf) (accessed on 15 December 2013); K. Sikkink, *The Justice Cascade*, New York: Norton 2011, p. 123; See also M. Kirby, 'Universal Jurisdiction and Judicial Reluctance: A New Fourteen Points' in S. Macedo, *Universal Jurisdiction: National Courts And the Prosecution of Serious Crimes Under International Law*, Philadelphia: University of Pennsylvania Press 2004, pp. 240-260.

<sup>33</sup> Anderson 2006, supra note 13, pp.266-277.

<sup>34</sup> Seibert-Fohr 2009, supra note 24, p.176; See Articles 4, 6-8, 11,14-15 ICED.

<sup>35</sup> Sarkin 2012, supra note 26, pp. 548-549; A. Bianchi, 'State Responsibility and Criminal Liability of Individuals', p.22 and N. Boister, 'Treaty-Based Crimes' p.542 in A. Cassese, *The Oxford Companion of International Criminal Justice*, Oxford: Oxford University Press 2009.

<sup>36</sup> Sarkin 2012, supra note 26, p. 549; Aim for Human Rights 2009, supra note 32, pp.131-133.

With regards to the category of possible perpetrators, often only associated to state agents, Article 3 ICED comprises private individuals that have no link to the state as well. This provision, however, does not impose any responsibility on non-state actors and only addresses the duties of the states to primarily investigate the particular conduct.<sup>37</sup> Yet, it has been acknowledged that states are “no longer the sole subjects of international law”:<sup>38</sup> private entities might also be able to commit heinous crimes.<sup>39</sup> In this vein, additional thought should be given to the inclusion and direct criminalization of those non-state actors that are capable of violating basic human values, such as “self-styled rebel forces, private militias or even private business enterprises”, in the definition of the offence.<sup>40</sup>

Furthermore, individual prosecution at the national level might be barred due to a possible claim of immunities. The Working Group on the Enforced or Involuntary Disappearance of Persons has stressed that “no laws or decrees should be enacted or maintained which, in effect, immunize the perpetrators of disappearances from accountability.”<sup>41</sup> Nonetheless, ICED does not express any prohibition, weakening its object and purpose of ending impunity.<sup>42</sup> Considering the current status of international law, national courts are required to respect state officials’ personal immunities, even when being accused of international crimes, rendering their prosecution impossible before local courts.<sup>43</sup> In case of functional immunities, the situation differs. As in the *Pinochet case*, no immunity *rationae materiae* can be invoked, having recognized acts amounting to international crimes as not being part of the individual’s official functions.<sup>44</sup> The same applies to amnesties. Though amnesty laws have already been recognized as invalid when regarding enforced disappearance cases,<sup>45</sup> ICED remains silent on the matter and signifies “a retrograde step” to the current trend of international law in combating impunity of serious violations of human rights.<sup>46</sup> Yet, if the prohibition of enforced disappearance is assumed to be *jus cogens*,<sup>47</sup> the same understanding adopted by the ICTY in

<sup>37</sup> Article 3 ICED; Anderson 2006, supra note 13, p. 274; Ott 2011, supra note 24, p. 202; PACE Resolution 1868 (2012), para.6.2.1; PACE Report 12880 (2012), paras. 28, 65.

<sup>38</sup> UN Doc. E/CN.4/2005/66 (2005), para. 30.

<sup>39</sup> ICC *Situation in the Republic of Kenya*, supra note 5, paras. 90, 92; See e.g. UN Doc. E/CN.4/2005/65/Add.1 (2005), paras. 25, 29.

<sup>40</sup> PACE Report 12880 (2012), paras. 28, 65, 76; PACE Resolution 1463 (2005), para. 10.1.1; Scovazzi & Citroni 2007, supra note 9, pp.278-280; Nowak Report (2002), supra note 22, para. 73.

<sup>41</sup> UN Doc. E/CN.4/1994/26 (1993), para. 45 (g); WGEID Best Practices (2010), supra note 19, para. 47; In the same line, CoE Secretary General Report, SG/Inf (2006) 5, 28 February 2006, para. 71.

<sup>42</sup> PACE Report 12880 (2012), para. 68.

<sup>43</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, [2002] ICJ Rep., p.3, at 23, 25, paras 54-55, 58; See Akande & Shah 2010, supra note 4, pp.818-820.

<sup>44</sup> *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet (No.3)* [1999] 2 All ER 971; *R. v. Bow Street Stipendiary Magistrate and others, ex parte Pinochet (No.1)* [1998] 4 All ER 897; See Akande & Shah 2010, supra note 4, pp.825-82.

<sup>45</sup> See *Barrios Altos v. Peru*, Decision of 14 March 2001, IACtHR Ser. C. 83, at 41-44, 51; Article 18 UN Declaration; UN Doc. E/CN.4/2006/56 (2005), para. 49 (2a,c,d); UN Doc. A/HRC/5/7 (2007), para. 20; WGEID Best Practices (2010), supra note 19, paras. 48-51.

<sup>46</sup> PACE Report 12880 (2012), para. 67; UN Doc. E/CN.4/2005/65 (2004), para. 43.

<sup>47</sup> IACtHR *Goiburú et al. v. Paraguay*, supra note 26, at 84; Sarkin 2012, supra note 26; Trindade



*Furundzija* with regards to the invalidity of amnesties in cases of torture should be taken into account.<sup>48</sup> Furthermore, based on the primary assumption that enforced disappearance comprises the involvement of state agents, military courts have been often set aside from the definition of “competent tribunals” due to their lack of impartiality.<sup>49</sup> Nevertheless, ICED only refers to a “competent, independent and impartial court or tribunal established by law” without specifically addressing the inapplicability of military tribunals and leaving it up, again, to state interpretation.<sup>50</sup>

This brings us to the conclusion that, though the national justice enforcement is - in principle - in compliance with the obligations imposed by ICED, the risk that the interests of justice are not fully achieved at the national level remains. The problem lies not only on the gaps left by legal instruments: it goes back to the nature of human rights obligations. In case the state fails in its duty to prosecute, human rights law sees such conduct as a violation of treaty obligations, not triggering the individual criminal accountability of the perpetrator *per se* and relying on the *bona fide* belief that the national system will be committed to remedy the breach and restore justice.<sup>51</sup> However, the states might not always fulfil such expectations. The failure to comply with the obligations stemming from a human right court’s judgement lets the alleged perpetrators go unpunished, constituting a remarkable affront to the victims, who find themselves in a dead-end within the path to justice.

## II.2. The International Level: Limited Room for Justice

Acts of enforced disappearance have often been perceived by the community as an excess of state power, justified by state agents on the ground of national security.<sup>52</sup> Though the state is legally entitled to ensure safety of its territory, its authority is not unrestricted: “[t]he State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action.”<sup>53</sup> The direct involvement of the state in the disappearance of an individual explains the reluctance in pursuing genuine investigations and the lack of effective prosecutions of perpetrators.<sup>54</sup> There might also be times, however, where the state will not be directly involved in the commission of the crimes but results to be too weak in the concrete dispensation of the administration of justice within its country. It is such unwillingness or inability to

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2012, *supra* note 26, pp. 507-536.

<sup>48</sup> See *Prosecutor v. Furundzija*, Trial Judgement, Case No. IT-95-17/1-T, T. Ch., 10 December 1998, para. 155.

<sup>49</sup> Article 16 (2), UN Declaration; Article IX, IACED; UN Doc. E/CN.4/2005/102/Add.1 (2005), Principle 29; WGEID Best Practices (2010), *supra* note 19, paras. 57-58; Nowak Report (2002), *supra* note 22, para. 82; *Pueblo Bello v. Colombia*, Decision of 25 November 2006, IACtHR Ser. C No. 140, at 193; *Incal v. Turkey*, Decision of 9 June 1998, ECtHR App.No. 22678/93, at 68, 72-73; International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations - A Practitioners Guide*, 2006, Practitioners Guide No. 2, p.174.

<sup>50</sup> See Article 11 ICED; PACE Report 12880 (2012), para 70; Ott 2011, *supra* note 24, p. 232.

<sup>51</sup> V. Dimitrijevi, ‘Dimensions of State Responsibility for Gross Violations of Human Rights and Fundamental Freedoms following the Introduction of Democratic Rule’, Netherlands Institute of Human Rights (SIM): Special 12, Maastricht 1992, p. 214.

<sup>52</sup> Scovazzi & Citroni 2007, *supra* note 9, p. 246; PACE Resolution 828 (1984), para. 2; UN Doc. Res. 33/173 (b) (1978).

<sup>53</sup> IACtHR *Velasquez Rodriguez v. Honduras*, *supra* note 9, para, 154.

<sup>54</sup> PACE Report 12880 (2012), para 57; Sarkin 2012, *supra* note 26, p. 549, with regards to political unwillingness of states to address enforced disappearance cases.

prosecute violators that will trigger the intervention of international bodies such as the ICC.<sup>55</sup> Nonetheless, if criminal justice enforcement does not seem to be fully accomplished by national courts, the current system of prosecution for acts of enforced disappearance on the international level does not represent the ideal alternative either.

Within the ambit of international criminal law, the ICC has jurisdiction over acts of enforced disappearance solely when they are perpetrated as part of a widespread or systematic attack, amounting to a crime against humanity.<sup>56</sup> Yet, it has been recognized that the crime often tends to occur outside the ambit of such contextual requirements.<sup>57</sup> The criteria, however, limit the ICC's jurisdictional reach, not able to redress all victims of enforced disappearance crimes. In addition, international crimes regulated in the Rome Statute have often been associated with the use of unlawful force by the state or state-like organizations towards the population.<sup>58</sup> Nonetheless, it must be acknowledged that the ICC itself has broadened such understanding by recognizing, within Article 7(2a) dealing with crimes against humanity, entities having no state-like structure or any link with the state as capable violators of basic human values, thereby falling under its jurisdiction.<sup>59</sup> In light of the ability of private entities to commit heinous crimes and the circumstances of secrecy that typically surround the particular offence, making it difficult to assert whether the offender acted with or without the state's involvement,<sup>60</sup> the new approach undertaken by the ICC might also be applied in enforced disappearances cases. This would broaden the ICC's range of prosecutions currently regulated by Article 7(2i) (specifically addressing only state officials or individuals having a link to the state or political organizations) to a wider understanding of possible perpetrators falling under its jurisdiction.

Nevertheless, the application of the ICC might be ultimately undermined by the higher degree of intent (*dolus specialis*) required by the Rome Statute for the prosecution of enforced disappearance's perpetrators. According to Article 7(2i), the offender must have had the intention to 'remove the victim from the protection of the law for an extended period of time'.<sup>61</sup> A heavy burden will lie on the prosecutor's shoulders for providing evidence that the perpetrator(s) had such particular intent at

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<sup>55</sup> Article 17, Rome Statute.

<sup>56</sup> See Article 7(2i), Rome Statute; ILC Report, UN Doc A/51/10 (1996), pp. 100 -111.

<sup>57</sup> WGEID Best Practices (2010), supra note 19, para. 16; Anderson 2006, supra note 13, p. 258; F. Andreu-Guzman, "The Draft International Convention on the Protection of All Persons from Forced Disappearance", in *Review of International Commission of Jurists*, issue on "Impunity, Crimes Against Humanity and Forced Disappearances", N.62-63, Geneva September 2001, p.5, online version at [http://www.icaed.org/fileadmin/user\\_upload/ArtFedericoENG.doc](http://www.icaed.org/fileadmin/user_upload/ArtFedericoENG.doc) (accessed on 15 December 2013).

<sup>58</sup> G. Werle, 'General Principles of International Criminal Law', p.55 in A. Cassese, *The Oxford Companion of International Criminal Justice*, Oxford: Oxford University Press 2009; Cassese 2009, supra note 30, p.124.

<sup>59</sup> ICC *Situation in the Republic of Kenya*, supra note 5, paras 90: "[T]he formal nature of a group and the level of its organization should not be the defining criterion. Instead [...], a distinction should be drawn on whether the group has the capabilities to perform acts which infringe on basic human values[.] Para 92: [O]rganizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population."

<sup>60</sup> Scovazzi & Citroni 2007, supra note 9, p.278; Nowak Report (2002), supra note 22, para. 73; PACE Report 10679 (2005), para. 46.

<sup>61</sup> Article 7(2i), Rome Statute.

the commission of the offence.<sup>62</sup> The executor of the deprivation of liberty - as the very first act of the crime - might not always know what the fate of the victim will be, especially when he is part of a hierarchical organized system where several different actors are involved.<sup>63</sup> Moreover, not all perpetrators would have the intention to remove the victim from the protection of the law 'for a prolonged period of time'. How long such a period is supposed to be has been left undefined, open to states' discretion and to a possible deterioration of protection.<sup>64</sup> In this line, an individual could easily plead innocence and walk away unpunished on the basis of his intent only to cause the disappearance for a limited time.<sup>65</sup> For these reasons, the ICC's jurisdiction will only be triggered in "truly exceptional circumstances", calling for a broader notion of enforced disappearance if a criminal law mechanism aims to effectively deter the occurrence of the act.<sup>66</sup> Furthermore, the Rome Statute is also silent with regards to the legality of amnesties, which could be recognized as barring prosecution initiated by the ICC. Though this would seem to go against its object and purpose of ending impunity of international crimes, provisions within the Rome Statute that could be interpreted as accepting amnesties have been recognised.<sup>67</sup>

As for serious human rights violations such as enforced disappearances, the pursuit of an effective criminal justice system, holding individuals criminally responsible for their acts, is an essential prerequisite that needs to be addressed. A grey zone is clearly present between the national and international level that does not guarantee appropriate redress to the victims and their loved ones. As the states are not always reliable fora for effective prosecutions and the ICC is only competent once offences reach the high threshold of the core crimes, the following question comes naturally to mind: within which legal framework would the rest of the enforced disappearance cases be most appropriately addressed?

### III. The Search for an Alternative Jurisdictional Level: Regionalising the Enforcement of International Criminal Law within Europe

"But there can be no peace without justice, no justice without law, and no meaningful law without a court to decide what is just and lawful under any given circumstance."<sup>68</sup>

<sup>62</sup> Nowak Report (2002), supra note 22, para. 74; Scovazzi & Citroni 2007, supra note 9, p.257; M. Wierda & T.Unger, 'Enforced Disappearances' in A. Cassese, *The Oxford Companion of International Criminal Justice*, Oxford: Oxford University Press 2009, p. 309.

<sup>63</sup> Nowak Report (2002), supra note 22, para. 74; PACE Report 10679 (2005), para.47.

<sup>64</sup> Scovazzi & Citroni 2007, supra note 9, p. 273; Andreu-Guzman 2001, supra note 57, pp.8-9.

<sup>65</sup> Scovazzi & Citroni 2007, supra note 9, p. 276.

<sup>66</sup> Nowak Report (2002), supra note 22, para 74; UN Doc. A/HRC/7/2 (2007), para. 26 (para 5).

<sup>67</sup> See Preamble, Articles 16-17, 53 Rome Statute; J. E. Alvarez, 'Alternatives to International Criminal Justice', in A. Cassese, *The Oxford Companion of International Criminal Justice*, Oxford: Oxford University Press 2009, p. 37; Dwight G. Newman, 'The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem', *American University International Law Review* 2005-2, pp.293-357.

<sup>68</sup> B. Ferencz, 'The Coming of International Law and Order', Whole Earth Papers No. 14, 1980, Global Education Associates, online version at: <http://www.benferencz.org/index.php?id=4&article=31> (accessed on 15 December 2013).

The words of Benjamin Ferencz, former prosecutor at the Nuremberg trials and strong supporter of the creation of an international criminal court, sum up the significance of an adjudicatory body's establishment. Regardless of the progress made at the international and national level that concerns criminal justice enforcement, perpetrators of serious crimes might still enjoy impunity.<sup>69</sup> As a response, the possibility to create new bodies of criminal justice enforcement has been acknowledged in instances where the ICC cannot deal with the situation.<sup>70</sup> International crimes are by definition affronts to individuals so heinous as to affect the community as a whole; however, the concrete repercussions derived from the commission of such acts are logically profound at the regional community where the crimes have taken place.<sup>71</sup> Though regional bodies have often been associated with the protection of human rights and furtherance of economical interests, their prominent role in the future promotion of justice has been recognised.<sup>72</sup>

A regional mechanism of criminal justice enforcement would embody a possible forum where perpetrators of grievous offences can be prosecuted on behalf of all the states that are part of the defined region, acting as a single identity and in line with the principles of impartiality and independence enshrined into an international institution.<sup>73</sup> Its main goal would be to narrow the impunity gap between international and national prosecutions, restraining the unpunished wrongful conduct of serious crimes either committed by states agents or by private entities that the state is unwilling to address or cannot effectively tackle alone; as Burke-White puts it, it would represent "a unique midpoint between the national state and the international system" providing "a hitherto unavailable means of balancing the benefits and dangers of both supranational and national enforcement."<sup>74</sup> As will be explained in the following paragraphs, enforced disappearance represents one of the most eligible crimes to be dealt within a regional justice enforcement body. The lacunae present within the international and national legal instruments surely justify the need of additional means able to effectively tackle the offence; yet, this is not the only incentive.

The furtive vanishing of an individual belongs to the true essence of enforced disappearance crimes but its consequences go beyond the life of the direct victim.<sup>75</sup> When no piece of evidence over the missing person is found, hope is all there is left. As hope dies last, the life of the victim's family and friends rests hanging in the balance of a feeling of wish and fear: the wish to meet their loved ones once again and the fear to have them lost forever without ever knowing what their fate was. The

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<sup>69</sup> Alvarez 2009, supra note 67, p.25.

<sup>70</sup> Cassese 2009, supra note 30, p.130; See e.g. N. Boister, 'International Tribunals for Transnational Crimes: Towards a Transnational Criminal Court?', *Criminal Law Forum* 2012-4, pp. 312-318 and 'Treaty Crimes, International Criminal Court?', *New Criminal Law Review* 2009-3, pp.341-365.

<sup>71</sup> W. Burke-White, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration', *Texas International Law Journal* 2003-4, p. 733.

<sup>72</sup> Idem, p. 749.

<sup>73</sup> See Cassese 2009, supra note 30, p.127.

<sup>74</sup> Burke-White 2003, supra note 71, p.730.

<sup>75</sup> K. Ambos and M.L.Böhm, 'La Desaparicion Forzada de Personas como Tipo Penal Autonomo: Analisis Comparativo-Internacional y propuesta legislativa' in K. Ambos et al, *Desapacion Forzada de Personan: Analisis Comparativo-Internacional*, Bogotá: Editorial Temis S.A. 2009, p.245.

assiduous waiting can last for days, turning into months, years or eternity.<sup>76</sup> It is here where the cruelty of the crime finds its roots. Human rights bodies have considered such status of extreme psychological suffering as amounting to degrading and inhumane treatment, recognizing the family of the missing person as victims of the crime itself.<sup>77</sup> The sense of impotence and frustration due to the poor or total lack of investigations by the state authorities and the feeling of insecurity, possibly aggravated by intimidation, harassment and indirect pressure to drop proceedings,<sup>78</sup> adds to the sorrow in which their lives are already enshrined.<sup>79</sup>

Relatives and friends of the disappeared are, however, not the only victims. The offence has often represented a weapon to spread terror and anxiety among the population, affecting the regional community at large.<sup>80</sup> Anderson explains that: “[e]nforced disappearances have been used to suppress political dissent and have assisted in maintaining oppressive political regimes and in threatening peace and security in entire regions”.<sup>81</sup> Living in the fray for years, no more hope tends to be left to see the missing individuals alive again: the last remaining desire worth holding onto rests on the finding of truth backed up by the punishment of perpetrators, not only in the name of the direct victims, but of the whole society. On these grounds, a regional body could represent the most suitable alternative to international and national justice systems, tackling the crime within the context in which it is perpetrated and giving the right sense of resolution to the community that has witnessed its horrendousness. The physical proximity of a justice enforcement mechanism to the crimes and the affected society results to be particularly important to promote restorative justice and judicial reconstruction.<sup>82</sup> The alleged supranational authority is believed to truly understand and respond to the social and political context of the states at stake, guaranteeing that their necessities and values are not forgotten.<sup>83</sup> It is here where a regional criminal court comes to be crucial as a forum of reconciliation where perpetrators do not go unpunished, and as a way of providing a historical-social account of truth to the community at large.

A regional body with a limited number of member states, closer connected with the local society, would undermine criticism based on grounds of selectivity of cases,<sup>84</sup> as the ICC has often been accused of with regards to its focus on the prosecution of

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<sup>76</sup> OHCHR, Fact Sheet No.6/Rev. 3 (2009), supra note 2, p.1.

<sup>77</sup> Nowak Report (2002), supra note 22, para 77, 95; PACE Report 12880 (2012), para 39; See, among others: IACtHR *Blake v. Guatemala*, supra note 12, at 114-116; ECtHR *Kurt v. Turkey*, supra note 11, at 133-134; *Cyprus v. Turkey*, Decision of 10 May 2001, ECtHR Appl. No. 25781/94, at 156-157.

<sup>78</sup> See e.g. PACE Report 12276 para 27; *Akdivar and Others v Turkey*, Decision of 16 September 1996, ECtHR Reports 1996-IV, at 105; ECtHR *Kurt v. Turkey*, supra note 11, at 158 -165.

<sup>79</sup> See IACtHR *Blake v. Guatemala*, supra note 12, at 114; ECtHR *Kurt v. Turkey*, supra note 11, at 133-134; ECtHR *Cyprus v Turkey*, supra note 77, at 156-157.

<sup>80</sup> Ambos & Böhm 2009, supra note 75, p.245; Scovazzi & Citroni 2007, supra note 9, p. 8; Nowak Report (2002), supra note 22, para. 95; Andreu-Guzman 2001, supra note 57, p.3; OHCHR, Fact Sheet No.6/Rev. 3 (2009), supra note 2, p.2; Roht-Arriaza 1990, supra note 13, p.455.

<sup>81</sup> Anderson 2006, supra note 13, p. 260 (with further citations).

<sup>82</sup> Burke-White 2003, supra note 71, pp. 734-736.

<sup>83</sup> R. Burchill, ‘International Criminal Tribunals at the Regional Level: Lessons from International Human Rights Law’, *New Zealand Yearbook of International Law* 2007-3, p.39; Burke-White 2003, supra note 71, pp. 736-738.

<sup>84</sup> See Burchill 2007, supra note 83, p.38.

African individuals.<sup>85</sup> Giving proper voice to victims and witnesses and letting them actively participate in proceedings of the regional court could facilitate discovery of the truth and bring accountability of the perpetrators more promptly. By not letting the victims and the society as a whole to suffer in silence and by making them participate in the justice restoration's process, regionalism can be perceived as enhancing "the democratization of international law".<sup>86</sup> This may boost a greater sense of legitimacy and enhance the predisposition of the states to enforce the law, not seeing the alleged tribunal as a "foreign agent".<sup>87</sup> A regional court would experience less political manipulation and discords, making extraditions and prosecutions less cumbersome.<sup>88</sup> Often, the disappeared person might represent the breadwinner of the family and all the resources might be spent on the search, leading to further hurdles in overcoming of the situation.<sup>89</sup> At the regional level, however, judicial resources would be more readily available and adapted to the legal traditions of the region,<sup>90</sup> resulting in better access both, financially and time-wise, for the individuals.<sup>91</sup> Being in line with the development of regional needs, the body could stimulate drafting of the relevant norms at the international level as well, filling the recognised gaps currently present in the regulation of enforced disappearances.<sup>92</sup>

The main obstacle on the way to concrete realisation rests on the issue of state sovereignty, already identified as one of the reasons for weakening the effective work of current international criminal justice system.<sup>93</sup> However, the process in which an integrated European regional community has gradually taken shape in the aftermath of the World War II shows how states can concretely set aside self-interest claims for the sake of peace, rule of law, protection of human rights, combat against crime and economic stability. At the European level, no substantial enforcement measure in criminal matters exists, leaving the principal duty to effectively deal with the particular context up to the member states. The European Court of Justice and the ECtHR have surely become strong judicial mechanisms currently active in the region; however, they do not go beyond the adjudication of alleged violations of states' treaty obligations and the monitoring of local authorities in the execution of judgments.

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body has been preferred above the EU on the basis of its broader jurisdictional scope, specifically covering those countries where the crime of enforced disappearance still remains an occurring practice and a major concern to the community, as in Russia and Turkey, which are not covered by the EU adjudicating system as being non-member states. Though the ECtHR has been perceived as

<sup>85</sup> See ICC Forum, Current Question on Africa: 'Is the International Criminal Court (ICC) targeting Africa inappropriately?', Topic for March 2013 – July 2013 at: <http://iccforum.com/africa> (accessed on 15 December 2013).

<sup>86</sup> Burke-White 2003, supra note 71, p.737; UN Doc. A/47/277-S24111 (1992), para. 64.

<sup>87</sup> Burke-White 2003, supra note 71, p. 736; Burchill 2007, supra note 83, p. 39.

<sup>88</sup> Burke-White 2003, supra note 71, pp.741-743.

<sup>89</sup> OHCHR, Fact Sheet No.6/Rev. 3 (2009), supra note 2, pp.2-4.

<sup>90</sup> Burke-White 2003, supra note 71, pp. 739-741.

<sup>91</sup> Idem, pp. 738-739.

<sup>92</sup> Idem, p. 758; Burchill 2007, supra note 83, p.41; S. Freeland, 'The Internationalization of Justice - A Case for the Universal Application of International Criminal Law Norms', *Zealand Yearbook of International Law* 2007-4, pp. 59, 65.

<sup>93</sup> A. Cassese, *International Criminal Law*, Oxford: Oxford University Press 2003, p.446.

incorporating the “Conscience of Europe”,<sup>94</sup> protecting the rights and freedoms of the regional community from wrongful state behaviour, cases of state inaction still remain, hindering the CoE’s objective of human rights’ furtherance.<sup>95</sup>

#### IV. 1. Criminal Justice Enforcement within the Council of Europe

The Parliamentary Assembly of the CoE (PACE) has recognized how impunity is a particular consequence often linked to cases of enforced disappearance and how the CoE’s prioritises its eradication.<sup>96</sup> The ECtHR protects the victims by relying on the breach of multiple provisions enshrined within the European Convention on Human Rights (ECHR).<sup>97</sup> The state, in addition to holding a duty to not interfere with the enjoyment of the individuals’ rights, also has the obligation to ensure the protection and fulfilment of such rights by undertaking particular positive measures within its local justice system.<sup>98</sup> Accordingly, the ECtHR repeatedly stressed that, in cases of enforced disappearance, states are under the obligation to conduct effective and prompt investigations into the whereabouts of the individual, as so enshrined in the procedural limbs of Articles 2, 3 and 5 read in conjunction with Article 1 and 13 ECHR. In the case where the right to life and the prohibition to torture have been violated, such investigation should be “capable of leading to the identification and punishment of those responsible”.<sup>99</sup>

Also, the CoE is a body fully in accordance with the nature of a classical human rights regime. As affirmed by Marty:

“The Court’s judgments [...] do not ‘punish’ the states found to have violated the Convention or indeed the officials who actually committed the acts in question. The Court limits itself to finding any violations of the Convention and, where applicable, to establishing compensation for pecuniary and non-pecuniary damage suffered by the applicants.”<sup>100</sup>

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<sup>94</sup> See Council of Europe, Anniversary Book: *The Conscience of Europe: 50 Years of the European Court of Human Rights*, online version at [http://www.echr.coe.int/Pages/home.aspx?p=echrpublications%2Fother#n1365061878230\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=echrpublications%2Fother#n1365061878230_pointer) (accessed on 15 December 2013).

<sup>95</sup> PACE Report 12811 (2012), para. 26; PACE Report 12455 (2010), para. 211.

<sup>96</sup> PACE Resolution 1675 (2009), paras. 5.1, 6; See also Council of Europe, H/Inf (2011) 7 (hereinafter as “CoE Guidelines against Impunity (2011)”).

<sup>97</sup> The rights conventionally violated in enforced disappearance cases comprise Articles 1-3, 5-6(1), 8, 13, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (hereafter as ECHR); PACE Report 10679 (2005), para 31.

<sup>98</sup> CoE Guidelines against Impunity (2011), supra note 96, pp. 23-25, 27-29; See e.g. *McCann and Others v. the United Kingdom*, Decision of 18 December 1996, ECtHR Series A No. 324, at 161; *Osman v. United Kingdom*, Decision of 28 October 1998, ECtHR App. No. 23452/94, at 115-116; *Oneryildiz v. Turkey*, Decision of 30 November 2004, ECtHR App. No. 48939/99, at 91-96.

<sup>99</sup> ECtHR *Kurt v. Turkey*, supra note 11, at 124, 139-140; *Orhan v. Turkey*, Decision of 18 June 2002, ECtHR Appl. No. 25656/94, at 334-336, 367-369, 384; CoE Guidelines against Impunity (2011), supra note 96, pp. 60-62; PACE Report 12880 (2012), para. 53; PACE Report 12455 (2010), para 190.

<sup>100</sup> PACE Report 12276 (2010) para. 28; See Article 41 ECHR.

The measures adopted by the Committee of Ministers, as the supervisory body of the ECtHR's judgments execution,<sup>101</sup> are not binding and the system in place still heavily relies on the states' primary discretion, providing no certainty that individual accountability will concretely take place at the national level.<sup>102</sup> The ineffective enforceability of judgments by Russia with regards to disappearances in Northern Caucasus brings this problem to the fore and currently represents "the most serious and most delicate situation" within the Council of Europe.<sup>103</sup> In this vein, it has been recognised that the massive human rights violation taking place in the area are "not an exclusively [though primarily] Russian problem, but one which concerns the whole European community [...]".<sup>104</sup> Though investigations have been carried out, ultimately identifying the alleged perpetrators, no appropriate enforcement action has followed, enhancing only the climate of impunity that is already present.<sup>105</sup> Notwithstanding the number of judgments rendered by the ECtHR with regards to the pattern of enforced disappearances committed under the jurisdiction of Russia and the willingness showed by the state in the resolution of cases, complaints continue to be filed, underlying the progress that still needs to be achieved in the pursuit of justice.<sup>106</sup> The context of impunity is not limited to the Northern Caucasus area, affecting other regions within Russia and beyond.<sup>107</sup>

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<sup>101</sup> Article 46 (2) ECHR.

<sup>102</sup> A. Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts', *American Journal of International Law* 2013-1, p.24; PACE Report 12811 (2012), para. 25; PACE Report 12880 (2012) para. 60.

<sup>103</sup> PACE Resolution 1738 (2010), paras. 4 (4.1-4.2),7-8; PACE Report 12276 (2010), para. 32; PACE Report 13018 (2012) paras. 35, 407; PACE Report 12455 (2010), paras. 108-111, 126-127; Committee of Ministers, Doc. CM/Del/Dec (2011)1115 *Khashiyev Group v. Russian Federation*, Decision of 6 July 2005, ECtHR Appl. No. 57942/00 and Interim Resolution Doc. CM/ResDH(2011)292 (1128th meeting, November 2011); PACE Resolution 1787 (2011), para. 7.7; Commissioner for Human Rights, Report CommDH(2011)21; See also Human Rights Watch, 'Who Will Tell Me What Happened to My Son?': Russia's Implementation of European Court of Human Rights Judgments on Chechnya', 2009, pp. 4-6, at <http://www.hrw.org/node/85743/section/5> (accessed on 15 December 2013); P. Leach, The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights, *European Human Rights Law Review* 2008-6, pp. 758-759.

<sup>104</sup> PACE Report 12276 (2010), para. 46.

<sup>105</sup> *Idem.* para 32; PACE Report 13018 (2012), para. 407.

<sup>106</sup> In 2009 Russia established a Special Investigative Unit to investigate the violations brought forward by the ECtHR and a Special Supervising Unit, checking upon its work; See CM/Inf/DH(2010)26, 27 May 2010; PACE Report 12455 (2010), para.126-127; PACE Report 13018 (2012), paras. 35-36, 386-388, 407; See, for example, the latest cases against Russia with regards to enforced disappearances: *Bopayeva and others v. Russia*, Decision of 7 November 2013, ECtHR App. No. 40799/06; *Tovbulatova and others v. Russia*, Decision of 31 October 2013, ECtHR App. No. 26960/06, 27926/06, 6371/09, 6382/09.

<sup>107</sup> According to Mr. Pourgourides in PACE Report 12455, para. 211: "it is simply unacceptable – for states belonging to a European Organisation which considers itself the 'Conscience of Europe' – not to take immediate and strong measures following deaths or ill-treatment suffered at the hands of law enforcement officials; the importance of eradicating impunity cannot be overstated, not only in the North Caucasus region of the Russian Federation [...]. Failure to implement judgments of the Court in such instances gravely undermines the value of the protection system established by the Convention"; See PACE Report 13018 (2012), para. 411; PACE Report 12880 (2012), paras. 3, 5-18; PACE Resolution 1675 (2009), para. 5.1; With regards to Turkey see PACE Report 12455 Addendum (2010), paras 15-17, 20, 23; J. Chevalier-Watts, 'The Phenomena of Enforced Disappearances in Turkey and Chechnya: Strasbourg's Noble Cause?', *Human Rights Review*



In order to boost the protective system of the ECtHR with regards to enforced disappearance, PACE has advocated the enactment of a “European Convention against Enforced Disappearance”, taking into account the lacunae still present within the ICED.<sup>108</sup> Yet, it is submitted that such an additional instrument would not represent the best legal instrument to end impunity of acts either. Its adoption would certainly have a strong symbolic power in fight against the offence and would address cases of disappearance according to their autonomous status comprising non-state actors; nevertheless, the same problems of possible inaction or non-enforceability of the ECtHR judgments would ultimately come to the fore.

#### **IV.1.a. Extending the Jurisdiction of the European Court of Human Rights to Criminal Cases**

Impunity not only causes the recurrence of crimes, as it has been recognised in cases of enforced disappearance, it also imposes on victims a further burden of grief. It is in the name of bringing justice to victims and stabilisation of the rule of law in national justice system that effective measures must be taken. PACE has recognized that “[t]he full and speedy execution of the Court’s judgments in cases of impunity is the key to fighting this scourge in Council of Europe member states”,<sup>109</sup> however, how can the battle against impunity be won *in concreto* when states are unwilling or unable to fulfil their obligations?

Holding the state responsible for impunity violations has proved to be insufficient when the state is unwilling or not in the position to restore the situation and comply with its duties appropriately. It is here that the extension of the ECtHR’s jurisdiction to international criminal matters might represent a possibility worth of consideration – as a ‘safeguard clause’- complementing the already-existing criminal justice systems currently present at the national and international level when both of them fail. The establishment of a chamber dealing with international criminal law within a human rights system is backed up by the recent events in Africa: a proposal for broadening the jurisdiction of the African Court of Justice and Human Rights to criminal cases has been brought forward and remains currently under consideration.<sup>110</sup> Likewise, in accordance with the CoE’s aim to achieve “greater unity between its members”, pursued by the “maintenance and further realization of human rights”<sup>111</sup>, the drafting of a protocol could entitle the ECtHR to deal with individual accountability of flagrant human rights violations, calling upon the intervention of an upper body representing the regional community.<sup>112</sup> The mechanism would be entitled to

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2010-4, pp.469-489.

<sup>108</sup> PACE Report 12880 (2012), para. 76; PACE Resolution 1868 (2012), para. 9.3.1; PACE Recommendation 1995 (2012), para. 4;

<sup>109</sup> PACE Resolution 1675 (2009), para 8.

<sup>110</sup> African Court’s on Human and Peoples’ Rights: Jurisdiction, available at <http://www.african-court.org/en/index.php/about-the-court/jurisdiction> (accessed on 15 December 2013); Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, May 17, 2012, OAU Doc. Exp/Min/IV/Rev.7, at <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf> (accessed on 15 December 2013).

<sup>111</sup> Preamble, ECHR.

<sup>112</sup> See the Council of Europe Anniversary Book: *The Conscience of Europe: 50 Years of the European Court of Human Rights*, online version at

promptly counteract cases of enforced disappearance when a claim has come to its attention and provide to the victims faster access to proceedings, possibly requiring different admissibility's criteria.<sup>113</sup> This is particularly important in cases of enforced disappearances where the prolonged and unacknowledged detention significantly exposes the individual to an aggravated physical and mental violence, supplemented by the anguish of the relatives waiting for the return of their loved ones.<sup>114</sup>

The alleged new chamber would not only be able to pierce the state's veil that is shielding perpetrators from criminal prosecution but would also be entitled to operate in conjunction with the ECtHR, addressing state responsibility when the state has failed to fulfil its obligations (e.g. duty to investigate and prosecute). The extensive jurisprudence of the ECtHR and the work of the Committee of Ministers with regards to enforced disappearance cases would be able to enhance the prompt resolutions of cases and avoid double efforts in the gathering of evidence.<sup>115</sup> Individual and state responsibility could work on a complementary basis,<sup>116</sup> without alleviating the state from its obligations. Such a mechanism would show how seriously states should regard their duty to ensure the full enjoyment of the individuals' protected rights and their responsibility to execute ECtHR's judgments in cases of breach, amounting to an incentive to fulfil their duties in order not to face state accountability. In addition, it would also bring individual justice to the victims, restoring the lost sense of security in their own national system due to the fact that some perpetrators are left unpunished and the deterrence of future related offences within society.<sup>117</sup> These represent typical objectives of justice that often only an effective criminal justice system is able to ensure.<sup>118</sup>

## V. Conclusion

An alternative system of international criminal justice enforcement has proved to be necessary. Regardless of the positive development that international human rights law, as advocated by ICED and the ECtHR, has brought into the field of criminal law, the occurrence of enforced disappearances has still not reached an end. Being primarily oriented towards the regulation of states' behaviour, human rights law can

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[http://www.echr.coe.int/Pages/home.aspx?p=echrpublications%2Fother#n1365061878230\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=echrpublications%2Fother#n1365061878230_pointer) (accessed on 15 December 2013).

<sup>113</sup> See Art.35(1) ECHR.

<sup>114</sup> See, PACE Report 12880 (2012), para. 57; IACtHR *Velasquez Rodriguez v. Honduras*, supra note 9, at 187; IACtHR *Blake v. Guatemala*, supra note 12, at 114-116; ECtHR *Kurt v. Turkey*, supra note 11, at 123, 133.

<sup>115</sup> See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Judgment of 26 February 2007, [2007] ICJ Rep., p.43, at 129-98, 166, paras 206-230, 296, where the ICJ, dealing with an inter-state complaint, took into account the findings of the International Criminal Tribunal for the former Yugoslavia, a criminal chamber addressing individual criminal responsibility.

<sup>116</sup> Bianchi 2009, supra note 35, pp.18, 21, 24.

<sup>117</sup> In accordance with one of the punishment's rationales: expressivism; see M. A. Drumbl, *Atrocity, Punishment, and International Law*, New York: Cambridge University Press 2007, pp. 12, 171-175.

<sup>118</sup> See R. Cryer *et al*, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press 2007, pp.17-36; C. J.M. Safferling, "Can Criminal Prosecution be the Answer to massive Human Rights Violations?", *German Law Journal* 2004-12, pp.1469-1488.

only impose duties on the states and not individual persons. Whether such international obligations will effectively be complied with, however, is only a matter of speculation and hope. In cases where the state fails in its duty to punish the alleged criminals, it will face responsibility under the international law, however, not necessarily leading to the prosecution of the individual perpetrator, letting him go unpunished. As a result, the ICC steps in to take over the unfinished business of states and act as the Ancient Roman Goddess *Justitia*, representing impartiality and independency in the restoration of justice. Yet, due to its limited jurisdictional reach, its application cannot always be secured.

Considering the prospect of safe havens left to violators by the possible inactivity of the local penal system and the inapplicability of the ICC in the majority of the cases, the need for an alternative level of criminal justice enforcement comes to the fore. In this vein, the article has focused on the benefits that regionalism might entail as an additional legitimate forum of relief not only for the direct victims of crimes, who will finally witness the prosecution of their perpetrators, but for the regional society at large. This is particularly relevant when the heinous nature of an offence, as in the case of enforced disappearance, tends to disturb the stability of the whole community, stimulating a continuous feeling of insecurity and distrust in the state's effective protection and justice enforcement's system. Every regional area claims its own history and social practice: the closer the states would feel to each other on the grounds of politics, culture and the combat of shared crimes, the greater the possibility of a consensus among them may exist in the establishment of common measures. At the European level, the CoE, with its related institutions, has proven to be fundamental in the enforcement of human rights' protection closer to the victims. Nonetheless, the lack of a robust enforcement system that guarantees action by the states and their incomplete implementation of the ECtHR's judgments severely limits the effectiveness of the human rights body. It is on these grounds that the article suggests the extension of the ECtHR's jurisdiction to criminal matters as a possible alternative to the implementation of international criminal justice enforcement, filling the gaps left at the primary levels of jurisdiction. By enhancing visibility of the crime of enforced disappearance and the measures taken in this regard in the name of a regional community instead of one state, such an instrument could succeed in the so desired deterrent effect of future violations and enhance citizens' confidence in the system.

Having in mind the constant development of the current criminal enforcement system it is difficult to predict how the proliferation of additional instruments, dealing with criminal matters, may be the most feasible for the effective grasp of justice. Nonetheless, no reasons are present for not looking to the future of a deeper European integration from a positive perspective, working on ambitious but not impossible goals. Taking into account the limited number of CoE member states, their close connection due to a common heritage of cultural values, politics, legal traditions, commitment to democracy and human rights,<sup>119</sup> the upsurge of a European criminal justice enforcement system should not be considered as utopian. This would not only develop a better understanding of the concepts of international law: it would function as a bridge contributing towards narrowing the gap between

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<sup>119</sup> Preamble, ECHR.

international justice, often perceived as an abstract idyllic notion, and the concrete needs of the society.