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The Crime of Enforced Disappearance

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MARINA KUMSKOVA, JAN 3 2016

The Crime of Enforced Disappearance:

A Comparative Study of the Inter-American and the European Courts of Human Rights

Introduction

Between March 2002 and July 2004, eight individuals of Chechen origin were "arrested by groups of armed and masked men in a manner resembling a security operation" (ECtHR, 2013, para. 6). Pointing guns at the family members, the soldiers took men away in military carriers without any explanation. On April 28, 1991, Jeremías Osorio Rivera was officially detained by a military patrol when he went to the village of Nunumia to take part in a sports event (IACtHR, 2013, para. 68). He was accused of making a terrorist threat for carrying an officially registered gun.

These two cases of enforced disappearance have several things in common. Males were illegally abducted during an armed conflict and detained by armed men. The body of evidence suggests that the disappeared individuals were held in solitary confinement under mortifying circumstances for unidentified period of time, deprived legal assistance or any other contact with the outside world. In both cases, after the abduction of the individuals and in the absence of any information about their whereabouts, the domestic criminal justice systems in the two countries did not take any measures to provide remedies for determining the fate of the disappeared individuals. They also failed to safeguard the relatives' right of access to justice and right to know the truth through effective investigation and through holding accountable those responsible for the crimes.

The aforementioned cases are typical examples of the crime that is internationally known as "enforced disappearance." Martha Lot Vermeulen (2012) argues that "the essence of an enforced disappearance is the apprehension of a person by state agents, or at least through an act in which the state is involved, while at the same time the state denies this deprivation of liberty" (p. 2). There are various problems that arise when studying the crime of enforced disappearance, including the notion of this phenomenon, the identification of perpetrators, the need to protect the victims, the possible justifications for the crime, and the availability of potential remedies. In order to effectively validate and comparatively explore the concept of enforced disappearance as presented in*Aslakhanova and others v. Russia* and *Osorio Rivera and family members v. Peru*, the current study analyzes two cases before the regional human rights courts, namely the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR), and a wide breadth of documents and materials related to the topic with a view of political, historical, and circumstantial characteristics of enforced disappearance in each country.

Part I of the study notes the absence of a widely accepted definition of enforced disappearance. In the absence of a legal definition of enforced disappearance, the European legal system may unintentionally affect the gravity of the phenomenon by declining to find or finding excessive violations of important human rights over- or underestimating particular circumstances in each case. On the contrary, the definition adopted by the IACtHR within the framework of the Inter-American Convention contributes to a more specific legal framing of the practice.

Part II of the current research project examines criteria for admission of evidence and burden of proof set by the

ECtHR and the IACtHR. Both the IACtHR and the ECtHR demonstrate a relatively flexible approach to the admission of evidence avoiding strict rules that are traditionally used by the common-law Courts. Furthermore, an analysis of both cases shows that the burden of proof falls on States due to the existence of the systematic pattern of enforced disappearance.

Part III enumerates and analyzes the human rights violations which correspond to enforced disappearance as identified by the Inter-American and the European Courts. Among violations of several other rights, the crime of enforced disappearance most commonly represents a violation of the right to life, a violation of the right to be free from torture and cruel, inhuman, or degrading treatment, and a violation of the right to liberty and security of the person. The single-right approach exercised by the ECtHR allows the Court to identify the existence or the absence of a violation depending on particular circumstances of the case. This approach provides the Court with an opportunity to examine each case within its particular context precisely describing the scope of each right and the essence of each violation. On the contrary, the Inter-American Court applies the multiple-right approach demonstrating the nature of the crime of enforced disappearance and presenting the overlaps between different rights.

Part IV of the current study analyzes the gap between the Courts' judgments and the domestic implementation of such judgments. Since the ECtHR issues only declaratory judgments, no actions is required to be taken by the Member States. Unlike the ECtHR, the Inter-American Court issues decisions which include several paragraphs ordering States to take particular actions. While the judgment given by the IACtHR has resulted in legislative amendments and the emergence of special reparation policies in Peru, Russia has constantly failed to adopt any measures to prevent the recurrence of enforced disappearance or to provide the remedies beyond the financial compensation to the families of disappeared individuals.

Research Question

The study introduces the crime of enforced disappearances under the human rights framework and analyses its complex nature by applying comparative analysis of two cases related to this increasingly widespread and grave phenomenon, namely *Aslakhanova v. Russia* and *Rivera v. Peru*. Using cases before two regional human rights courts, the European Court of Human Rights and the Inter-American Court of Human Rights, this study seeks to identify the similarities and differences between these cases and assess whether or not existing legal institutions and processes provide sufficient protection against enforced disappearances. More specifically, this study examines whether and to what extent the Courts' evolving jurisprudence strengthens the obligations of states to investigate, prosecute, and punish the perpetrators, provide effective remedies to victims, and prevent the recurrence of enforced disappearances.

Methodology

The research for this project was carried out mainly through desktop research, making use of the materials at various libraries and academic databases in order to develop an interpretive argument centered on the concept of enforced disappearance. The methodology includes a study of the relevant literature published by the related NGOs and the United Nations along with the national legal documents and international treaties related to the issue of enforced disappearances. In addition, comparative analysis is used in this project as the main method in order to observe suggestive similarities and contrasts among the jurisdictions of the IACtHR and ECtHR.

The first method employed is content analysis of existing literature published by NGOs and textual interpretation of the UN documents and regional and international treaties. Content analysis contributes to a better understanding of the institutional structure of the Inter-American and the European systems for the protection of human rights. Additionally, textual interpretation of the treaties made it possible to analyze different provisions of the relevant treaties as they are commonly understood. Providing useful background information on the phenomenon of enforced disappearance and the experiences of victims, content analysis further enabled conceptualizing of the definition of this phenomenon, acknowledging systematic patterns of purposeful actions, and understanding how different historical backgrounds create different outcomes and make a variety of scenarios possible. These method assisted

not only in understanding of the case law of the two human rights bodies but also in evaluating local specifications that were used to answer aforementioned research questions.

The second method, comparative case-study of the jurisprudence of the IACtHR and the ECtHR, has a prominent place in this study. Although the institutional structure of the IACtHR and ECtHR are very similar and the normative provisions of the two conventions correspond in many regards, the environment in which the two systems developed is radically different. Since these two supervisory bodies have already dealt with enforced disappearance cases, the given judgments and their case law mentioned in these judgments may provide useful lessons for the interpretation and application of the existing legal institutions and processes. The decisions on*Aslakhanova v. Russia* and *Rivera v. Peru* were released at approximately the same time. Similarly, the narratives of both cases include significant similarities, including illegal abduction and detention, deliberate denial by authorities of any knowledge of the victim's whereabouts, and ineffective domestic criminal investigation. Extending beyond the comparison of similarities and differences between two cases and the Courts' jurisprudence, the project used these similarities and differences to explain why each Court fails or succeeds in preventing recurrence of the crime and punishing perpetrators.

At first glance, the rationale for a comparison between the IACtHR and the ECtHR might not be self-evident since these supervisory bodies operate in different arenas, have differences in nature, and operate according to different procedures. However, such comparison is defendable when taking into account that their respective treaties find their origins in the Universal Declaration of Human Rights; both Courts are the authoritative supervisory bodies of binding treaties that entail political and civil rights. The most common human rights, on the basis of which enforced disappearance cases are adjudicated, are essentially formulated in the same way. Their interpretation methods are similar. Additionally, the difference between their jurisprudence will assist in further understanding of how (if at all) different human rights courts strengthen the obligations of the States to investigate, prosecute, and punish the perpetrators, provide effective remedies to victims, and prevent the recurrence of enforced disappearances.

Literature Review

The crime of enforced disappearance is a complex phenomenon that falls under the framework of human rights law, international criminal law, and international humanitarian law. International humanitarian law is relevant to victims of enforced disappearances as they may belong to the broader category of "missing persons," those persons that remain unaccounted for in the context of, or as a consequence of, an armed conflict. Moreover, enforced disappearance is recognized as an international crime. Perpetrators of enforced disappearances have been judged and sentenced by international and national criminal courts and tribunals. Finally, one important aspect of an enforced disappearance is that many human rights are violated from the time of the abduction until the day when the State acknowledges the detention or releases information about the fate or whereabouts of the individual. Therefore, enforced disappearance constitutes a continuous multiple violation of human rights.

Acknowledged for the first time when Adolf Hitler issued "Nacht und Nebel Erlass" (the Night and Fog Decree) on December 7, 1941, the crime of enforced disappearance of persons re-emerged during the reign of the national security ideology of Latin American military dictatorships in the late 1960s, and have become a truly universal phenomenon today (Vitkauskaitė-Meurice, Žilinskas, 2010; Anderson, 2008). As of August, 2014, the number of cases under active consideration of the Working Group on Enforced or Involuntary Disappearances (WGEID) that have not yet been clarified, closed, or discontinued stands at 43,250 in a total of 88 States (UNGA, 2014).

Considered as "one of the worst human rights violations that can be committed," the crime of enforced disappearance includes the disappearance of the person without a trace (Nowak, 1996, p. 348). The disappeared person is often tortured and killed. Families of the victims do not have any information about whereabouts of their loved ones, sometimes indefinitely.

Historical background on how international human rights norms were built in relation to the crime of enforced disappearance:

The international community's recognition of enforced disappearance as a separate human rights violation was

defined most directly by international outrage at the politically-motivated violence in Latin America between the 1960s and 1980s, characterized by arrests, torture, execution and disappearances of political opponents of the military governments in those countries (Frey, 2009, p. 60). Without the pressure for international action, there may have never been the necessary consensus for a distinct norm against this gruesome practice.

World War II was succeeded by a period of universal human rights euphoria (Kyriakou, 2012, p. 27). In the aftermath of the war, the international community turned its attention to the promotion and respect of human rights. The Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant of Civil and Political Rights (ICCPR) symbolized a new era for international law with particular emphasis on human rights.

The first post-war instance that "missing persons" were considered to be a problem on the international level was in 1949 on the occasion of drafting of a legally binding instrument for the "legal status of persons missing as a result of events of war or other disturbances of peace" (Kyriakou, 2012, p.27). However, the work of the international organizations to develop a legal norm outlawing the practice of disappearance was motivated by the situation of instability in Latin America. Frey (2009) suggests that "the number of disappearances in Latin America shocked the international community into action and the intentionality and impunity with which governmental officials carried out enforced disappearances led to support for a call for a more specific legal framing of the practice as "a distinct form of human rights violation" (p. 60).

As a result of international human rights advocacy practices of many international organization, General Assembly Resolution 33/173 emerged focusing on the question of disappeared persons anonymously directed at Latin American countries. Later, in September, 1979 the UN Sub-Commission on the Prevention of Discrimination and Protections of minorities adopted an aggressive resolution calling for emergency international action to prevent further disappearances. As a result of this resolutions and further deliberations, the Working Group on Enforced or Involuntary Disappearances (WGEID) was created as a first mechanism to investigate, report, and recommend action regarding specific human rights issues (Frey, 2009, p. 62). The WGEID acknowledged that a wide range of human rights of victims and their families are denied by the act of enforced disappearance. The Working Group declared that the principal human rights denied by enforced disappearance included the right to liberty and security of the person, the right to humane conditions of detention, and the right to life.

Unfortunately, none of these procedures and operations can be deemed to bear the attributes of judicial body. Especially, Kyriakou (2012) suggests that the WGEID has avoided reaching any conclusions that could be perceived judgmental towards States (p. 45).

Prohibition of enforced disappearance:

According to the conventional human rights conception, the criminal prohibition of the crime of enforced disappearance evolved from human rights instruments and declarations created in response to disappearances perpetrated in Latin America (Ratner et al., 2009, p. 128). Ratner and colleagues (2009) argue that enforced disappearance was criminalized by the 1992 Declaration, the Inter-American Convention on Disappearance, the Rome Statute, and the 2007 Convention. Moreover, Von Hebel and Robinson (1999) claim that the delegations negotiating the Rome Statute were unaware of any precedent for the prosecution of enforced disappearance and were initially reluctant to include the offense as a crime against humanity, on par with murder, rape, and torture (p. 102). Conventional human rights conception suggests that the crime of enforced disappearance evolved primarily out of treaty law.

The current study argues that the crime that amounts to enforced disappearance has been criminalized under international law even before the emergence of the international and regional treaties in the beginning of 1990s. Finucane (2010) argues that "like rape, enforced disappearance is an offense whose underlying conduct was deemed criminal under the laws of war, before any explicit reference to the crime was codified" (p.172). Therefore, enforced disappearance was initially criminalized in the context of armed conflict. With emergence of international human rights treaties, its limited prohibition has subsequently been expanded to apply to additional contexts.

First case of enforced disappearance before regional human rights court:

In 1988, the first case of enforced disappearance reached an international tribunal, the Inter-American Court of Human Rights (IACtHR). *Velásquez Rodríguez v Honduras* (1988) was the first judgment on the issue that contributed to the end of the systemic State practices of disappearances and demonstrated the extent to which the international court had been able to enforce the rule of law. Under this case's jurisprudence, the first two requirements were set to consider the person to be enforcedly disappeared: "the person is presumed disappeared and the burden shifts to the State to prove otherwise" (Claude, 2010, p. 1). Moreover, the due diligence argument emerged in *Velásquez Rodríguez v. Honduras*. In this case, the Court decided that "an illegal act which violates human rights and which is initially not directly imputable to a State can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention" (IACtHR, 1988, para. 172). Therefore, the State's failure to prevent the disappearance, to investigate it, and to punish the perpetrators was a violation of the obligations included in the Inter-American Convention on Disappearance to ensure the full exercise of rights and freedoms in the Convention.

Definition of enforced disappearance:

The definition of enforced disappearance has been debated for a long time. Ott (2011) describes enforced disappearance as an act of abduction of a person "by unidentified State agents" without warrant and further judicial procedure, which is followed by the lack of further information about person's whereabouts (p.1). Both*Aslakhanova v. Russia* and *Rivera v. Peru* suggest that an individual becomes a victim of that crime due to political reasons, including participation in the movement and potential possessing of useful intelligence.

Although enforced disappearance is not a new practice, the exact definition of the crime is not agreed upon. The international and domestic legal instruments dealing with enforced disappearance contain different definitions or descriptions of the phenomenon.

When calls for a new legal norm first developed, the focus of human rights advocates has been on the immediate safety of the disappeared people. In this light, General Assembly resolution avoiding the definition of enforced disappearance only claims that "enforced disappearances [are] the result of excesses on the part of law enforcement or security authorities […], often while such persons are subject to detention" (Preamble).

As the cases of enforced disappearance continued to grow, it became apparent that the lack of access to meaningful legal recourse was central to the violation. Over time, the definition of enforced disappearance was changed in a manner to understand this crime as a human rights violation and promote the protection of all persons from enforced disappearances.

The Rome Statute, which is the only legal instrument signed by both Peru (in 2001) and Russia (in 2000) emphasizes the centrality of denial of legal recourse to the notion of enforced disappearance. Article 7 of the Rome Statute says:

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.

This definition raises several controversial questions. First, this definition uses the word "intention" requiring that perpetrators to have an intent to conduct the particular type of crime. Generally speaking, proving the intent in any case can pose difficulties for prosecution. In the case of enforced disappearances, which is characterized by the lack of evidence, it is even more complicated. Accordingly, there should be no requirement to prove that the perpetrator had specifically intended to deprive the victim of the protection of the law because the perpetrator usually benefits from having access to all available evidence. Second, there should be no "prolonged period of time" requirement. For example, when the period of time in which a person should already have been brought before a judicial authority for control of the lawfulness of his or her detention has elapsed, but the person has not in fact been brought before a

judicial authority, there can be no question that the person has been placed outside the protection of the law, even if the period has not been "prolonged."

The latest established definition is revealed in Article 2 of the 2007 Convention:

enforced disappearance is considered to be 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.

However, this definition is also unclear. It is not always understandable whether or not the perpetrators are necessarily State-related actors. That definition misses the fact that even if the person is forcibly disappeared by any other non-State actor, there is a responsibility of State to guard its citizens from the violation of their rights, including the right to life and the right to be free from inhumane treatment and punishment, by taking effective steps to implement the provisions of the human rights treaties in law and practice.

As a result, for the purpose of this study, enforced disappearance in order to be called so must consists of the following components:

- the arrest, detention, abduction or any other form of deprivation of liberty;
- the deprivation of liberty carried out by agents of the State or by non-State actors;
- the conduct follows by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
- the positioning of the person outside the protection of the law.

In cases when non-State actors conducted enforced disappearance, the State commits a crime if there is a failure to investigate promptly and effectively the criminal act committed by non-State actors.

In order to establish the nature of enforced disappearance and the responsibilities of States, a conceptual differentiation of enforced disappearance from other crimes often occurring in connection with enforced disappearance is required. Throughout the evolution of the definition provided by international conventions, the most normative change is the addition and emphasis on the denial of legal recourse as a constitutive element of an enforced disappearance.

Other crimes that should be differentiated from enforced disappearance:

Academics have also deliberated upon the issue of whether extraordinary rendition can be equated or paralleled to enforced disappearance. Horowitz and Cammarano (2013) defines extraordinary rendition as "the transfer—without legal process—of a detainee to the custody of a foreign government for purposes of detention and interrogation." Some scholars support the idea that "there may be a link between renditions and enforced disappearances" (Boon et al., 2010). Others argue that extraordinary rendition is a new form of enforced disappearance and that it must be confronted as such (Kyriakou, 2012). The seizure and transfer of individuals around the world, outside any legal procedures and safeguards, and their detention and interrogation in secret detention facilities can be considered as one of the forms of enforced disappearance when there is denial of State's responsibility for that act. However, not every case of extraordinary renditions can be equated to enforced disappearance because States often do not deny that practice.

Enforced disappearance is also closely related to other acts perpetrated in the context of deprivation of liberty. The Human Rights Committee and the ECtHR often used the term "incommunicado detention" in their case law on enforced disappearance (Ott, 2011, p. 31; Vermeulen, 2012, p. 172). Sunderland (2005) reveals that "incommunicado detention is generally understood as a situation of detention in which an individual is denied access to family members, an attorney, or an independent physician." Therefore, it is clear that most enforced disappearance cases involve unacknowledged (incommunicado) detention. However, that should be noted that not

every case of incommunicado detention must be understood as a crime of enforced disappearance, e.g. if the deprivation of liberty itself is lawful or if the fate's victim is revealed.

Enforced disappearance maybe also be considered as an aggravated form of arbitrary detention. Arbitrary detention is the arrest of an individual when there is no proper evidence that the person has violated a law. Again, as in two previous cases, enforced disappearance usually consist of arbitrary detention. However, it is not always the case that arbitrary detention amounts to enforced disappearance. In cases, when the authorities do not deny their involvement in the deprivation of liberty and provide information on the fate of detained person, enforced disappearance is not given.

Enforced disappearance as a continuous human rights violation:

Various international treaties and international, regional and domestic tribunals, have recognized that enforced disappearance is a continuous crime. For example, Article 17 §1 of the 1992 Declaration reveals that:

Acts constituting enforced disappearance shall be considered a continuing offense as long as perpetrators continue to conceal the fate and whereabouts of persons who have disappeared.

The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual. Therefore, enforced disappearance is not necessarily a part of larger pattern of purposeful actions. Instead, it can be any continuous act of a single involuntary disappearance.

The IACtHR and the ECtHR reiterate that enforced disappearance violates several human rights protected by the International Covenant on Civil and Political Rights, and its regional counterparts. The UN Human Rights Committee (HRC), the IACtHR, and the ECtHR have found that an act of enforced disappearance can amount to a violation of the following: the right to liberty and security, the right to life, the right to humane conditions of detention, the right to freedom from torture, cruel inhuman or degrading treatment or punishment, and the right to an effective remedy. According to the 2007 Convention, the victim has "the right to obtain reparation [that] covers material and moral damages and, where appropriate, other forms of reparation, such as restitution; rehabilitation, satisfaction, including restoration of dignity and reputation; guarantees of non-repetition" (CPED, 2007, Article 24). In this regard, many scholars support the use of the multiple-rights approach because it allows for the consideration of the specific circumstances surrounding the case of enforced disappearance (Ott, 2010; Anderson, 2008; Cloude, 2010). As stated by the Working Group on Enforced or Involuntary Disappearances (2013), "even though the conduct violates several rights […], an enforced disappearance is a unique and consolidated act, and not a combination of acts" (p. 3). However, it should be noted that the multiple-rights approach makes it more difficult to achieve consistency within the holdings of each Court due to the difference of circumstances in each case.

Torture in the context of enforced disappearance:

Many researchers differ in their opinion about whether torture is a part of the crime of enforced disappearance (Vitkauskaitė-Meurice, Žilinskas, 2010; Anderson, 2008; Lapitskaya, 2011; Amnesty International, 2011). Anderson (2008) reveals that the person removed from the protection of the law is often "subjected to torture and extrajudicial execution." *Velasquez Rodrigues v. Honduras* (1989) reveals that the situation when an individual is subjected to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person" (IACtHR, 1989, p. 197). Alternatively, Kyriakou (2012) argues that torture "should be qualified and understood as a separate human rights violation, which may come into play in factual sequence to the deprivation of liberty of a person" (p.14). Therefore, Kyriakou (2012) argues that torture should be considered as an aggravating factor in the context of enforced disappearance.

Victims of the crime of enforced disappearance:

Also considered as victims of the crime of enforced disappearance, the victim's family and friends are deliberately

denied knowledge of the individual's arrest or detention, and are subjected to slow mental torture as they wait, often for years and sometimes forever, to be informed of the victim's fate (Anderson, 2008, p. 2). Accordingly, their rights to be free from torture and the right to security are also violated. In support of this argument, Boss (2006) notes that "coping and grieving leads to symptoms such as depression and relational conflict" (p.165), which equates to mental torture.

Necessary remedies in the case of enforced disappearance:

In order to identify whether or not the States fulfill its responsibility provide an effective remedy, there should be a consensus about what the remedies would be helpful for victims' families. Robbins (2007) finds that the needs of families cannot be uniquely described; they vary depending on the social status, level of education, geographical location, and the time and circumstances of disappearance. The most often-mentioned types of families' responses included requests to know the truth about the fate of a disappeared person, to get access to body, to get economic support, to bring justice to perpetrators, and to establish a memorial.

Enforced disappearance as a crime against humanity:

Article 7 of the Rome Statute defines the crime against humanity as certain categories of crimes which are perpetrated "as a part of a widespread and systematic attack directed against a civilian population." According to the UN Commission on Human Rights (2004), "enforced disappearances commonly occur today within States suffering from internal tensions or conflict, such as Nepal, Colombia, the Russian Federation and Sudan" (p. 59). However, the belief that crimes against humanity are linked to armed conflict is not correct.

The concept of crimes against humanity was first developed in the Trial of the Major War Criminals, held in Nuremberg in 1945-1946 (Human Rights Watch, 2006, p. 35). According to the Nuremberg Charter (1949), crime against humanity is "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecution on political, racial or religious grounds." At this time, the crimes against humanity were directly linked to the context of armed conflict. However, the definition was changed over the years eliminating the so-called nexus requirement, which meant that crimes against humanity could be committed only in the context of international remed conflict (Human Rights Watch, 2006, p. 35). It is now generally recognized that crimes against humanity may also be committed in peacetime.

The 1992 Declaration on the Protection of All Persons from Enforced Disappearance (the 1992 Declaration) states that the "systematic practice [of enforced disappearances] is by its very nature a crime against humanity" (4th Preambular paragraph). Moreover, Article 18 of the 1996 International Law Commission draft Code of Crimes Against Peace and Security for Mankind and Article 5 of the 2007 Convention declare that any criminal act can be identified as a crime against humanity when committed in a systematic manner or on a large scale and instigated by a Government or any organization or group. Therefore, the crime of enforced disappearance can be considered as a crime against humanity if that has a systematic character in a particular country within/out the context of armed conflict.

Underreporting of enforced disappearance:

In spite of that large number of cases before the IACtHR and the ECtHR, underreporting remains a major problem and is due to various reasons, including but not limited to fear of reprisals, weak administration of justice, ineffectual reporting channels, institutionalized systems of impunity, poverty, illiteracy, language barriers, a practice of silence, and restrictions on the work of civil society. Impunity is perhaps the most significant factor contributing to the phenomenon of enforced disappearance. Human Rights Watch (2005a) claims that "the relatives of the disappeared have no redress and no hope of finding their loved ones; […] they are also increasingly reluctant to even report the 'disappearances' to the authorities, fearing for the safety of their remaining family members." There are many potential reasons for that. Some people might be afraid to cause the disappearance of other family members as a result of their actions; others may not believe in the effectiveness of the justice system neither at domestic nor at international level.

The human rights violation named "enforced disappearance" emerged in international discourse after World War II and was shaped by the narrative of the violations that had been carried out by Latin America military dictatorships in the 1960s and 1970s. Since that time, international community begun to acknowledge that a wide range of human rights of victims and their families are denied by the act of enforced disappearance. Today, it is widely understood that enforced disappearance violates many of the human rights enshrined in the general international human rights instruments. Both the IACtHR and the ECtHR are principal and autonomous bodies whose mission is to promote and protect human rights in the American and European hemispheres respectively. Moreover, Bertoni (2009) suggests that from the early stages to the most recent cases decided by both Courts, the impact of each Court's jurisprudence on that of the other Court has been significant (p. 348). While comparing and analyzing two cases before the regional Human Rights Courts, this project re-examines the definition and dimensions of the phenomenon. More specifically, the study provides the regional definitions and special characteristics assigned to the phenomenon of enforced disappearances within the jurisdiction of both Courts. While the majority of scholars argue that the multiple-rights approach is more effective, the study aims to determine positive aspects of the single-right approach exercised by the ECtHR. Finally, the study compares the rulings of both cases in order to understand what remedies are expected from the States and what remedies are actually provided by the States.

Part 1. The Concept of enforced disappearances

The IACtHR is often considered to be the "little sister" of the ECtHR (Cloude, 2010, p. 1). Both Courts are founded on the same assumption; human rights are "*attributes of the human being*" (OAS, 1995). As a result, the Courts' practice is dedicated to addressing the phenomenon of enforced disappearance among other violations of the rights guaranteed under the American Convention on Human Rights (the American Convention) and the European Convention on Human Rights (the European Convention). Both Courts can, through their judgments, force states to pay financial compensation to family members of disappeared person or encourage implementing further general measures, such as reforming domestic law.

The crime of enforced disappearance is not widely recognized by the domestic law in many countries. Kyriakou (2012) claims that "very few States have created a specific criminal offense of enforced disappearance (p. 57). However, the prohibition of enforced disappearance is indeed customary because the prohibition of torture and deprivation of liberty are also founded within the customary laws of many States. Accordingly, the duty to guard the citizens from violation of human rights in the course of enforced disappearance is also recognized by both States within their domestic laws. In this vein, the Constitution of the Russian Federation says that "fundamental human rights and freedoms are inalienable and shall be enjoyed by everyone since the day of birth" (Chapter 2, Article 17). Moreover, the Russian Code of Criminal Procedure, an investigator, prosecutor, or any other State actor has no right to infringe the constitutional rights and freedoms of the parties to criminal proceedings or to impede a citizen's access to justice (ECtHR, 2013, para. 51). Similarly, Article 1 of the Political Constitution of the Republic of Peru (1993) specifies that "the protection of the individual and respect for his dignity are the supreme goal of society and the government." Even though the crime of enforced disappearance itself is not openly discussed in any of domestic laws, there is a general agreement on the horrifying nature of human rights violations involved in the execution of enforced disappearance.

The Concept of Enforced Disappearance in the Inter-American System:

The Government of Peru accepted its obligation to guard its citizens from enforced disappearance far before the concept of enforced disappearances emerged in any international treaties. By ratifying the International Covenant on Civil and Political Rights in 1978, adopting the American Convention in 1969, and adopting the Convention against Torture and Other Cruel Inhuman or Degrading Treatment and Punishment in 1988, the Government of Peru undertook the obligation to investigate, prosecute, and punish those who violate the rights of the victims. Even though the definition of enforced disappearance was not included in any of these documents, the State enumerated its basic obligations to guard its citizens from the violation of their rights in unlawful settings.

The Political Constitution of Peru stands for ensuring "the defense of the human person and respect for his dignity" (Political Constitution of Peru, 1993, Article 1). In order to further implement provisions of the international treaties

that have been adopted by the Government of Peru, the IACtHR ordered Peru to modify its criminal code to adequately extend State's responsibility for the violation of human rights (Lynd, 2010). For example, in compliance with this order, the updated Peruvian Criminal Code says that "the public official who deprives a person of his or her liberty, ordering or executing actions that have as a result the disappearance of the person" may be subjected to a prison sentence for up to 15 years (Villa Stein, 2010). However, the notion of enforced disappearance is still to be included in the national laws.

The IACtHR was the first Human Rights Court to decide on the case of enforced disappearance in 1988. In *Velasquez Rodriguez v. Honduras*, the IACtHR made an effort to define the phenomenon of enforced disappearance as a continuous and multiple offense (IACtHR, 1988, para. 155). The definition contributed to a more specific legal framing of the practice within American hemisphere. The due diligence argument also emerged in *Velásquez Rodríguez v. Honduras.* The Court claimed that the State has responsibility not only to prevent the violation of human rights included in the course of enforced disappearance but also to respond to it (IACtHR, 1988, para. 179). Besides the rough definition of enforced disappearance and implicit the principle of due diligence, this case addressed the specifications of enforced disappearance and evoked the discussion about what methods should be adopted in order to prevent the recurrence of this crime.

In compliance with the case law initiated in *Velasquez Rodriguez v. Honduras,* the IACtHR deemed it wrong to consider the crime of enforced disappearance to be exhausted until "the establishment of the person's whereabouts or the identification of his remains" (IACtHR, 2013, para. 31). Therefore, the IACtHR reinforces that enforced disappearance is a continuous violation of human rights.

Even though the case law initiated in *Velasquez Rodriguez v. Honduras* contributed significantly to the understanding of the crime of enforced disappearance by international community, the first official attempt to define the crime is included in the Inter-American Convention (ratified by Peru in August 2, 2002). Article 2 of the Inter-American Convention argues that enforced disappearance is

an act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

The 2007 Convention (ratified by Peru in September 26, 2012) presents the crime of enforced disappearance as an act constituting of three elements, namely, the deprivation of liberty, the government involvement, and the denial of the deprivation of liberty. Similarly, the IACtHR said that "the perpetration of the disappearance begins with the deprivation of the person's liberty and the ensuing lack of information on his fate, and remains until the whereabouts of the disappeared person are known and the facts have been clarified" (IACtHR, 2013, para. 31). In addition to that, the 2007 Convention strengthens the State's duties in regards to the crime of enforced disappearance. In that vein, in *Rivera v. Peru*, the Court argued that "an investigation of an enforced disappearance to be conducted effectively and with due diligence" while "ensuring the rights of access to justice and to the truth" (IACtHR, 2013, para. 1, 182).

In *Rivera v. Peru*, the IACtHR recognized that the context of armed conflict intensifies a systematic practice of human rights violations, such as enforced disappearance of persons suspected of belonging to illegal armed groups (IACtHR, 2013, para. 53). Final judgment proclaimed that affiliation with illegal groups, such as the Peruvian Communist Party and the Túpac Amaru Revolutionary Movement, subjected people to enforced disappearance in the context of armed conflict (IACtHR, 2013, para. 53). However, there was no direct evidence mentioned in*Rivera v. Peru* proving that the crime of enforced disappearance must be directly related to the situation of armed conflict.

Finally, the 1992 Declaration reveals that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights, and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity" (Preambular). Similarly, the Preamble of the Inter-American Convention establishes that "the systematic practice of the forced disappearance of persons constitutes a crime

against humanity." However, it should be noted that the crime of enforced disappearance and crime against humanity in the form of enforced disappearance are not necessarily equated. In order to define any act of enforced disappearance as a crime against humanity, certain qualifications should be met. Namely, enforced disappearance must be a part of State policy, attacks must be directed against a civilian population, and the criminal act should be widespread or systematic (Vitkauskaitė-Meurice, Žilinskas, 2010, p. 200). In *Rivera v. Peru,* all these requirements were met. The Peruvian authorities admitted that State agents had detained Rivera and failed to effectively investigate his whereabouts and assist to the victim's family in their attempt to get access to justice. Accordingly, the *Rivera* case is not unique for Peru. As of 2010, there were over 15,000 unresolved cases of forced disappearances that occurred during Peru's armed conflict in the 1980s and 1990s (Lynd, 2010). This data clearly demonstrates the systematic character of the crime.

In sum, the legal definition of enforced disappearance within the scope of the Inter-American case law was first established in *Velasquez Rodriguez v. Honduras* and further developed by the Inter-American Convention. Today, the IACtHR defines enforced disappearance as a continuous, multiple offense that consists of the deprivation of an individual's freedom perpetrated by agents of the State that is followed by an absence of information about that person's whereabouts. Even though *Rivera v. Peru* exemplifies the crime of enforced disappearance in the context of armed conflict, the case does not imply the existence of this condition in every case. Finally, because enforced disappearance does not stand as a single criminal act, it can be considered a crime against humanity due to its systematic nature, as exemplified in *Rivera v. Peru*.

The Concept of Enforced Disappearance in the European System:

There are several Russian domestic criminal provisions that criminalize elements of the crime of enforced disappearance. Article 1069 of the Civil Code of the Russian Federation (relevant part adopted in 1995) provides that "a State agency or State official will be liable for damage caused to a citizen by their unlawful actions or failure to act" (ECtHR, 2013, para. 20). Moreover, Article 1070 of the Civil Code sets out the rules for the payment of damages to private persons for the unlawful actions of law-enforcement officers (ECtHR, 2013, para. 20). However, the State has never taken domestic obligations in terms of guarding its own citizens from the crime of enforced disappearance. Instead, there is a provision in the 1996 Russian Criminal Code, which says that "kidnapping is punishable by up to eight years' imprisonment" (Article 26). Subsequently, there is no adopted definition of the phenomenon within the scope of the Russian domestic law at this time.

Regionally, Russia has ratified the European Convention in 1998. This Convention enumerates the number of obligations of the State in terms of guarding human rights, including the right to life and the right to an effective remedy, among others. However, it does not include the notion of enforced disappearance. The ECtHR does not provide the exact definition of enforced disappearance within the scope of its practice as well. The only reference to a definition is found in *Kurt v. Turkey,* which says that "the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention" (ECtHR, 1998, para. 93). As a result, the case sets down the requirement for an effective investigation; however, it does not define the phenomenon.

Finally, Russia did not ratify the 2007 Convention. The most recent definition included in any international legal instrument signed or ratified by the Russian Federation is included in the Rome Statute. However, this definition has been widely criticized for its attempt to define enforced disappearance as one requiring the perpetrator to have the double intent to remove a person from the protection of the law and to do so for a prolonged period of time.

In *Aslakhanova v. Russia*, the ECtHR emphasized the need to develop the definition of enforced disappearance from defining its components as a starting point of creating an action plan that will address the problem of disappearances in the North Caucasus. "In view of the clear patterns and similarities in the occurrence of such events, it is vital to adopt a time-bound general strategy or action plan to elucidate a number of the questions that are common to all the cases where it is suspected that the abductions were carried out by State servicemen" (ECtHR, 2013, para. 232). The action plan, however, should include not only obtaining a clear definition of the phenomenon but also obtaining an evaluation of the adequacy of the existing legal definitions of the criminal acts leading to the specific and

widespread phenomenon of disappearances.

The absence of a regionally accepted definition for enforced disappearance has a remarkable influence on the methodology that the ECtHR uses while making decision on different cases. Clouds (2010) suggests that "in many cases, the Court refuses to find a violation of important rights such as right to be free from inhuman treatment and degrading punishment" (p. 9). Moreover, the lack of clear definition makes it impossible to determine the duty of Member States to guard the rights of their citizens and to punish perpetrators of the crime enforced disappearance.

While the Inter-American Court of Human Rights considers enforced disappearance to be a multiple and autonomous crime, the ECtHR sees the crime of enforced disappearances as a combination of several violations of protected rights (ECtHR, 2013, para. 64). This approach has its advantages and disadvantages. On one hand, considering the violations of each right separately allows for the examination of the circumstances of each case more deeply. On the other hand, many violations of the fundamental human rights can be overseen or underestimated under particular circumstances. In *Aslakhanova v. Russia*, the Court counts separate violations, namely, the violation of the Article 2 (double violation of the right to life), Article 3 (the right not to be subjected to torture or inhuman or degrading treatment or punishment), Article 5 (the right to liberty and security of person), Article 13 (right to obtain remedies), and Article 46 (supervising of the execution of remedies) of the Convention for the Protection of Human Rights and Fundamental Freedoms. However, it does not apply the violation of the Article 3 of the European Convention (right to be free from torture and other inhumane treatment) to every application included in the joint case due to the difference in circumstances of each case.

Accordingly, the 1992 Declaration states that "the systematic practice" of enforced disappearances constitutes the nature of a crime against humanity. In the context of the situation in Chechnya, the widespread and systematic patterns of purposeful actions are highlighted by many reports (HRW, 2005; Leach, 2008; Council of Europe, 2011). The available evidence shows that enforced disappearances in Chechnya are both widespread and systematic. Human Rights Watch (2005a) reveals that at least 2,090 people have "disappeared" since the Chechen War started in 1999; the perpetrators are unquestionably government agents who are ultimately subordinate to the Russian federal Ministry of Internal Affairs or the Ministry of Defense (p.6). The perpetrators are easy to determine in this case, keeping in mind that people who abducted the victims were able to go through many control stations without being stopped.

Currently, neither the Russian domestic law nor the scope of the ECtHR's jurisprudence have established the definition of enforced disappearances. There is, however, a consensus that the phenomenon of enforced disappearance in the North Caucasus constitutes the crime against humanity due to its systematic character. Additionally, the lack of the definition may be considered as a positive aspect of the Court's jurisprudence as it allows for a more flexible approach to the phenomenon.

Summary:

By refusing to define the phenomenon of enforced disappearance, the ECtHR keeps affecting the gravity of the phenomenon by declining to find violations of important human righthand over- or underestimating particular circumstances in each case. On the contrary, the definition adopted by the IACtHR within the framework of the Inter-American Convention contributes to a more specific legal framing of the practice.

Moreover, the IACtHR applied multiple rights approach, which helps to work systematically and constructively towards eradication of the phenomenon while determining enforced disappearance as a separate human rights violation. Differently, the single-right approach introduced by the ECtHR has its own benefits by providing the opportunity to investigate the scope of each violation.

Finally, both Courts agreed that enforced disappearance constitutes a crime against humanity because it is not only conducted within the context of armed conflict in both cases, but also presents a systematic and continuous pattern of purposeful actions.

Part II. Admission of evidence and burden of proof

According to the standard criminal law, for an act to be a crime, there must be a criminal act (*actus reus*), an intent to commit crime (*mens rea*), and concurrence of act and intent (Reid, 2013, pp. 29-43). In the crime of enforced disappearance, the criminal act includes the arrest/detention, or abduction of a person or a group of people, or the refusal to acknowledge the arrest, detention, or abduction of such person, and the failure to give information on the fate or whereabouts of such person or persons (ICC, 2011, p. 11). International Criminal Court (2011) also personalizes the perpetrator, stating that criminal act should be carried out with the authorization, support or acquiescence of a State or any political organization as part of a widespread or systematic attack directed against a civilian population. Additionally, the perpetrator must have intent to remove a person or persons from the protection of the law for a prolonged period of time; the perpetrator must be aware of the possible consequences of that criminal act (ICC, 2011, p. 12). Therefore, in order to prove all these elements, there should be evidence that the State actor has committed a particular act and had intent to do so.

Using this formula, Ott (2011) proposes the following allocation of elements of crime. There are two kinds of crime that are committed in the course of enforced disappearance: the deprivation of liberty and the refusal to provide information upon request. In that vein, Ott (2011) suggests that the offense shall be formulated so that the perpetrators who have contributed to the enforced disappearance are responsible for the crime of enforced disappearance (p. 204). Moreover, Ott (2011) argues that a perpetrator of that crime has to act with triple intent: intent with respect to his act of contribution, intent with respect to governmental involvement in his actions, and intent regarding the methodological context of enforced disappearance that he is contributing to (p. 205). Finally, the perpetrator does not have to have all three elements of intent; however, the perpetrator must foresee the possibility of their realization and consciously take this risk.

The context of the crime of forced disappearance implies that the perpetrator has an unfair advantage over the victim of the crime because evidence is often under the exclusive control of the perpetrator, who typically has intent to hide it (Human Rights Watch, 2003, p.11). As a consequence of this distinctive characteristic of disappearances, international human rights bodies have started accepting circumstantial and testimonial evidence like hearsay and the potentially biased testimonies of witnesses in cases of enforced disappearance. In this manner, international law allows establishing different evidentiary rules that allow a certain degree of flexibility.

The Inter-American System: admission of evidence, burden of proof

In majority of cases within the Inter-American System, the burden of proof shifts onto the State because it “holds all the evidence or has destroyed them” (Cloude, 2010, p.4). In *Velasquez Rodriguez v. Honduras*, the IACtHR adopted a two-step approach for resolving burden of proof issue. First, it should be proved that the pattern of enforced disappearances exists (IACtHR, 1988, para. 125). Second, the act of disappearance should be strictly linked to that practice (IACtHR, 1988, para. 126). In *Rivera v. Peru*, both of these requirements were met. The Court concluded that “no additional evidence [had been] needed in order to prove the disappearance in a specific case” (IACtHR, 2013, para. 106). According to the IACtHR, “a single disappearance could be part of such a practice, if it can be associated with a pattern of actions” (IACtHR, 2013, para. 151). Therefore, the IACtHR had its own interpretation of a pattern of enforced disappearance. Namely, any act that has been planned and selectively applied throughout a particular period of time can be considered as a part of the pattern of purposeful actions (IACtHR, 2013, para. 151). Even if the requirements listed in *Velasquez Rodriguez v. Honduras* would not be fulfilled, Jeremías Osorio Rivera was deprived of his freedom at the time when the state of emergency was declared and was officially arrested by the military officer who further claimed that Osorio Rivera was freed (IACtHR, 2013, para. 61). Without any doubt, the State was the leading actor in the disappearance.

In general, the IACtHR is not limited by the same formalities as domestic courts in the process of the admission of evidence. According to the Rules of the Procedure of the Inter-American Court of Human Rights (2000), “when the application has been admitted, the alleged victims, their next of kin or their duly accredited representatives may submit their requests, arguments and evidence, autonomously, throughout the proceeding” (Article 23). The Court accepts all documents presented by both parties and the Inter-American Commission on Human Rights (IACHR) at

the proper procedural opportunity if they were not contested or opposed and if their authenticity was not challenged (IACtHR, 2013, para. 38). Therefore, the rules of admission of evidence in the Inter-American Court system are based on common-law traditions; however, the standard of authenticity and admissibility is more flexible.

The Rules of Procedure (2000) require the IACtHR to hear "any person whose evidence, statement or opinion it deems to be relevant" and "to provide any evidence within their reach […] that may be useful" (Article 44.). Seemingly inadmissible evidence can be also admitted under the exception rules. In *Rivera v. Peru*, the Court stated that "the evidence provided outside the appropriate procedural occasions is not admissible, unless it complies with one of the exceptions established in the Article 57(2) of the Rules of Procedure: namely, *force majeure*[1], grave impediment, or if it refers to an event that occurred after the procedural moments indicated" (IACtHR, 2013, para. 41). However, pursuant to the Court's case law, the statements made by the presumed victims cannot be assessed in isolation. Instead, they must be evaluated together with the whole body of evidence in the proceedings because they can provide further information on the presumed violations and their consequences.

Several restrictions also apply to admission of evidence even within the flexible conditions. First, *Rivera v. Peru* revealed that "error [done] by the representatives should not be forwarded to the State, or affect the impartiality of an international litigation" (IACtHR, 2013, para. 42). Therefore, as the Court allowed the victim's family to submit hearsay and testimonies of the family members as evidences, it also used some reasons to exclude evidence that might be beneficial for State authorities. Additionally, information that had been copied textually or paraphrased from the contents of the different sources without these sources having been cited in the opinion was not considered as a part of the body of evidence due to its inauthenticity (IACtHR, 2013, para. 43).

In general, the Inter-American system's rules of the admission of evidence are less strict and more personalized in comparison to the civil and common law traditions. The evidence is being considered for admissibility within the context of the case. Any evidence is considered to be admissible if the Court concludes that it is useful and authentic. Moreover, any evidence provided outside the appropriate procedural occasions can also be admissible under several exception rules. However, the Court approaches the body of evidence presented by both parties in equally flexible matter.

The European System: admission of evidence, burden of proof

The Court has addressed a lot of cases concerning allegations of disappearances in the Russian Northern Caucasus, in particular Chechnya and Ingushetia. Scovazzi and Citroni (2007) claim that at least 2,090 people have disappeared in Chechnya since the First Chechen War started in 1999 (p.64). The ECtHR is faced with the task of establishing facts on which the parties disagree. According to the Court's settled case law, it is for the applicant to make a *prima facie* case[2] and to introduce appropriate evidence (ECtHR, 2013, para. 96). If the government fails to provide documents that enable the Court to establish the facts or provide convincing explanations of State's acts, the State has the responsibility to explain the rationale behind the committed act (ECtHR, 2013, para. 99). Therefore, burden of proof is linked to specific facts of the case.

In *Aslakhanova v. Russia*, the Court faced the difficulties associated with obtaining evidence. The *prima facie* requirement was reached primarily on the basis of witness statements, the applicants' submissions to the Court, and other evidence claiming the consequences of the presence of military or security personnel in the area. The Court relied on references to military vehicles and equipment; the unhindered passage of the abductors through military roadblocks; the characteristics of the conduct typical for security operations, such as the cordoning off of areas, checking of identity documents, questioning of residents and communication within a chain of command; and other relevant information about the special operations, such as media and NGO reports. Given the presence of these elements, the Court concluded that the related areas had been "within the exclusive control of the State authorities" (ECtHR, 2013, para. 97). Accordingly, all these circumstances complicated the process of obtaining direct evidence.

Even though the State questioned the validity of some evidence presented by the applicants, it "failed to produce any documents from the criminal investigation file or to otherwise discharge their burden of proof, for example, by providing a satisfactory and convincing explanation for the events in question" (ECtHR, 2012, para. 104). Therefore,

the burden of proof in *Aslakhanova v. Russia* fell on the State.

In *Aslakhanova v. Russia*, the Court applied "thorough scrutiny"[3] while determining admissibility of evidence (ECtHR, 2013, para. 95). In this context, the conduct of the parties when evidence were being obtained had to be taken into consideration (ECtHR, 2013, para. 95). Additionally, the Court argued that "thorough scrutiny" is required even if certain domestic proceedings and investigations have already taken place in order to further understand the essence of the violations and to determine the responsibility of the presumed perpetrator (ECtHR, 2013, para. 96).

In order to address the unique evidentiary problem in disappearance cases, the ECtHR developed a new legal category, "presumption of death." The development of this legal category accords with the character of disappearance, in which the body of the alleged victim may not be located, and specific evidence related to the detention of the individual is largely within the control of the government. The "presumption of death" doctrine was developed to respond to the clause created by the language of Article 2 of the European Convention, which concerns only the actual loss of life. However, the loss of life is very hard to prove due to the unavailability of the victim's body. *Aslakhanova v. Russia* stressed that the presumption of death may be reached only through examination of the circumstances of the case, in which "the lapse of time since the person was seen alive or heard from is a relevant element" (ECtHR, 2013, para. 100). The Court determined that if the person is missing for periods ranging from four and a half years to over ten years, he or she can be presumed dead (ECtHR, 2013, para. 102). In the aforementioned case, all victims were presumed dead in the absence of any reliable news about the disappeared persons for reasonable period of time.

In *Aslakhanova v. Russia*, the burden of proof fell on State and the applicants had the responsibility to provide enough amount of evidence proving that the crime of enforced disappearance actually had took place. However, the burden of proof does not necessarily always fall on the States because the burden of proof is linked to specific facts of the case. In *Aslakhanova v. Russia*, the State had to defend its motives or to disprove the evidence. The ECtHR applied the thorough scrutiny on admission of evidence making it more flexible while keeping required level of legitimacy due to the fact that the body of evidence had been under the supervision of the State. Finally, all direct victims of enforced disappearance were presumed dead since they were missing for the significant period of time. In general, once this presumption is established, there is an automatic violation of several articles of the European Convention.

Summary:

In both cases, the burden of proof could not rest on applicants because the state parties alone had an exclusive access to relevant information. However, both Courts claimed that this conclusion will not be applicable to every case of enforced disappearance. In this regards, both Courts have developed different approaches to resolving the burden of proof. The Inter-American Court adopted a two-step approach linking this crime to State practice. On the contrary, the European Court linked burden of proof to specific facts of each particular case.

In light of the nature of that crime, the IACtHR and the ECtHR demonstrate a relatively liberal approach to the admission of evidence, which includes the availability of exceptions, the lower standard of evidence (hearsays, etc.). Accordingly, both Courts avoid strict rules traditionally applicable in the Courts with common-law traditions.

Part III. The rights violated in disappearance cases in the Inter-American and European systems

In *Aslakhanova v. Russia*, the ECtHR claimed that "enforced disappearance is a distinct phenomenon, characterized by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has happened" (ECtHR, 2013, para. 122). Depending on circumstances, the abducted person might be deprived of all his/her rights. Among other violations, enforced disappearance most commonly represents a violation of the right to life; a violation of the right to be free from torture and cruel, inhuman or degrading treatment; and a violation of the right to liberty and security of the person, which are discussed in this part of the project. Additionally, being a notion frequently referred to with regard to the families of victims of enforced disappearances, the right to know the truth is a fundamental emerging principle of international human rights law;

therefore, the approaches of both Courts in regards to the violation of the right to know the truth are analyzed in this study. Finally, considering that the definition of victim is not limited to the disappeared person, the violation of the right to an effective remedy in regards to both the disappeared person and his or her family members is also examined.

1. The Right to Life:

The right to life is undoubtedly the most fundamental right because the ability of person to exercise any other rights depends on pre-existence of life itself. Taking into account the context of enforced disappearance, Burgorgue-Larsen and De Torres (2011) argue "the fact of having no news of the disappeared person for a considerable period of time, the fact of the persistent denial on the part of the authorities that they had abducted the person, and their refusal to carry out any investigation […] suggest that the person was eliminated after having been detained" (p. 315). This assumption is based on the idea that after the detention and interrogation of the disappeared person, the agents of the State or non-State actors would not set the interrogated person free due to his or her knowledge about the perpetrators and their intentions.

In this regard, the international and regional instruments, such as the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the American Convention and the European Convention, enshrined States' obligation to take certain steps to demonstrate that they are actively protecting the right of those within their territory, including obligations to legally protect life and to investigate death.

The interpretation of the right to life by the Inter-American Court:

The violation of the right to life is recognized in Article 4 of the American Convention on Human Rights (1969):

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

Since the beginning of its jurisprudence, the Inter-American Court adopted the view that the nature of enforced disappearance entailed *ipso facto*[4] a violation of Article 4 of the American Convention (Cloude, 2010, p. 10). In *Rivera v. Peru*, the Court claimed that "enforced disappearance has frequently included the execution of those detained, in secret and without any type of trial, followed by the concealment of the corpse in order to erase any material trace of the crime and to ensure the impunity of those who committed it" (IACtHR, 2013, p. 62). In the context of enforced disappearance, the victim is in an aggravated situation of vulnerability. This fact allowed the Court to conclude that Osorio Rivera had been deprived of his life.

The right to life also imposes certain obligations on States. In *Rivera v. Peru*, the Court argued that the duty to investigate "continues as long as there is uncertainty about the fate of the person who has disappeared" (IACtHR, 1989, p. 181). The Court also declared that "it is extremely important for the family to receive the body of a person who has been forcibly disappeared, because this allows them to bury him according to their beliefs, and to close the mourning process that they have experienced throughout all these years" (IACtHR, 2013, para. 251). The search conducted by the State authorities should be carried out "systematically and rigorously, with the appropriate and adequate human, technical and scientific resources" (IACtHR, 2013, para. 251). Moreover, the Court suggested that the duty to investigate continues as long as there is an uncertainty about the fate of disappeared person (IACtHR, 2013, para. 179). Therefore, in *Rivera v. Peru*, the Court found the violation of the duty to investigate the criminal act, which is "itself a violation of the obligation to protect the right to life under Article 1.1 of the American Convention" (OAS, 1969).

In sum, the IACtHR found not only the violation of the right to life that Osorio Rivera was entitled to under Article 4 of the American Convention but also the violation of the State's duty to protect the right to life under Article 1.1 of the American Convention.

The interpretation of the right to life by the European Court:

Article 2 of the European Convention (1950) says:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
3. in defense of any person from unlawful violence;
4. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
5. in action lawfully taken for the purpose of quelling a riot or insurrection.

Considering the context of enforced disappearances in Chechnya, the conditions of detention are expected to be life-threatening. On numerous occasions, the Court has ruled that a missing person could be presumed dead in the course of enforced disappearance (ex.: *Bazorkina v. Russia, Togcu v. Turkey, Akkum v. Turkey*) (ECtHR, 2013, para. 102). Similarly, in *Aslakhanova v. Russia*, the Court ruled that the abducted person may be considered presumably dead in the absence of any reliable news about him or her for a period ranging from four and a half years to over ten years (ECtHR, 2013, para. 102).

Similarly to the jurisprudence of the Inter-American Court, the European Court stated that "the ongoing failure to provide the requisite investigation will be regarded as a continuing violation of the right to life" (ECtHR, 2013, para. 199). Within the context of enforced disappearance, the State violated the essential duty to investigate and secure the effective implementation of the domestic laws designed to protect the right to life and to ensure the State's accountability for deaths occurring under its responsibility.

Overall, in *Aslakhanova v. Russia*, the ECtHR found the violation of the right to life in relation to eight disappeared persons under Article 2 of the American Convention and the violation of the State's duty to protect the right to life under Article 2.

Summary:

In their rulings, both Courts agreed that the right to life of the disappeared person had been violated because the practice of enforced disappearance often involves secret execution of the abducted person without trial. Moreover, both Courts directly linked a lack of effective investigation and the failure of the States' duty to protect the life of citizens with a violation of the right to life.

However, both Courts had different views regarding whether or not the disappeared person can be presumed dead. The ECtHR suggested that when the State provides no reasonable explanation for person's disappearance, he or she must be presumed dead. Conversely, the IACtHR only suggested the possibility of death depending on circumstances of each case.

2. The right to be free from torture and other cruel, inhuman, or degrading treatment:

Article 1 of the Convention Against Torture (1984) defines torture as

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

Considering that enforced disappearance often entails the absence of a corpse, it is hard to determine whether or not a person was subjected to torture. The Working Group on Enforced or Involuntary Disappearances acknowledges that "the very fact of being unlawfully detained and isolated from the family for a long period is certainly a violation of

the right of the detained person to humane conditions of detention and can be considered as torture" (UNGA, 2001, p. 4). In addition to the provisions in the European and American Conventions, the prohibition of torture and other inhuman or degrading treatment or punishment is embodied in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention for the Prevention of Torture and Inhuman Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture.

Treatment that amounts to torture can be experienced not only by the abducted person but also by his or her family members. In this vein, the 2007 Convention goes further while defining the concept of "victim" of enforced disappearance. According to Article 24 of the 2007 Convention, "victim" means the abducted person and any individual who has suffered harm as the direct result of an enforced disappearance (UNGA, 2006). This definition covers both direct and indirect victims. Therefore, while considering whether or not the crime of enforced disappearance implies the violation of the right to be free from torture, the circumstances in which both the abducted person and his or her relatives occurred are to be analyzed.

The interpretation of the right to be free from torture and other cruel, inhuman or degrading treatment by the Inter-American Court:

The violation of the right to be free from torture and other cruel, inhuman, or degrading treatment is recognized in Article 5 of the American Convention. Article 5 states that "every person has the right to have his physical, mental, and moral integrity respected" (IACHR, 1994). The Inter-American Court is very liberal on that manner holding that "the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and moral integrity of the person" (*Velasquez Rodrigues v. Honduras*, 1988, p. 197). Ott (2011) points out that "the Inter-American Court has found [the violation of the right to be free from torture and other cruel, inhuman or degrading treatment], regardless whether there was enough evidence to prove particular acts of torture" (p. 62). Therefore, the Court implies that any case of enforced disappearance amounts to a violation of the Article 5 of the American Convention.

In *Rivera v. Peru*, the Court found that the disappearance of Osorio Rivera had taken place in the context of a pattern of selective enforced disappearances placing him under the risk of suffering irreparable harm to his personal integrity and his life (IACtHR, 2013, para. 168). Based on the body of evidence, the Court concluded that the presumed victim had been deprived of food, had been covered by a hood during transportation, and his face had been hit during the domestic investigation (IACtHR, 2013, para. 161). Therefore, the Court found it reasonable to presume that Osorio Rivera suffered undignified treatment while he had been in the custody of the State.

According to Cloude (2010), the IACtHR is demonstrating an increasing willingness to consider the suffering of the victim's immediate relatives as coming within the scope of Article 5 of the American Convention (p. 11). Similarly, the Court concluded in *Rivera v. Peru* that ihe violation of the right of the victims' next of kin to mental and moral integrity is a direct result of [the crime of enforced disappearance,] which causes them severe suffering owing to the act itself" (IACtHR, 2012, para. 227). Therefore, the violation of the right to be free from torture and other cruel, inhuman or degrading treatment applied not only to Osorio Rivera but also to the members of his family.

Overall, the Court considered that the treatment of Osorio Rivera represents the violation of his right to personal integrity and the right not to be subjected to torture or any other ill-treatment. Additionally, the Court ruled that victim's family had also been subjected to torture.

The interpretation of the right to be free from torture and other cruel, inhuman or degrading treatment by the European Court:

Article 3 of the European Convention says that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment" (Council of Europe, 1950). Even though the detention of a person in the context of the crime of enforced disappearance amounts to torture under particular circumstances, such as the provision of heating, ventilation, lighting, food and water, and medical treatment, the European Court does not always find that enforced disappearance constitutes violation of Article 3 of the European Convention.

In order to establish whether or not one particular case of enforced disappearance includes the violation of the right to be free from torture and other cruel, inhuman or degrading treatment, the Court requires thorough investigation of all available evidence in this case. In *Aslakhanova v. Russia*, the Court said that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions (ECtHR, 2013, para. 145). Therefore, profound investigation of each particular crime is required in order to determine whether or not the person was subjected to torture or illegal treatment.

In *Aslakhanova v. Russia*, the amount of evidence presented before the investigation allowed the Court to qualify the crime as a violation of right not to be subjected to torture and ill-treatment in one of five joint applications.

Akhmed Shidayev had been detained with his father and released on 30 October 2002 (ECtHR, 2013, para. 18). His testimonies revealed that he had been subjected to "beatings with machine gun butts and batons, cigarette burns to his skin, deprivation of food and water, and detention in a pit for five days" (ECtHR, 2013, para. 138). Moreover, the applicant had heard his relatives and neighbors being subjected to beatings, and crying for help (ECtHR, 2013, para. 138). As a result, in the final judgment, the Court noted that the mere fact of being held incommunicado in unacknowledged detention, witnessing the ill-treatment of his father and neighbors, caused Akhmed Shidayev considerable anguish and distress (ECtHR, 2013, para. 142). In view of all the known circumstances of the present case, the treatment of Akhmed Shidayev reached the threshold of inhuman and degrading treatment.

According to the Court's final judgment, the violation of the right not to be subjected to torture of victims' families also took place. The Court reiterated that "the family members of the disappeared men [had been] accorded the status of victims in the proceedings" (ECtHR, 2013, para. 38). Moreover, the Court assumed that "the domestic investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests" (ECtHR, 2013, para. 121). Considering that the domestic investigation had not taken any steps to obtain additional information about the circumstances of the crime, the Court found that "the applicants, who are close relatives of the disappeared men, must be considered victims of a violation of Article 3 of the Convention, on account of the distress and anguish which they suffered, and continue to suffer, as a result of their inability to ascertain the fate of their family members and of the manner in which their complaints have been dealt with" (ECtHR, 2013, para. 131).

Overall, the ECtHR emphasized the need for thorough investigation in order to determine whether a person was subjected to torture or any other forms of ill-treatment. Within the European human rights system, there is no automatic agreement on the violation of the right to be free from torture and other cruel, inhuman or degrading treatment. Similar to the decision made in *Rivera v. Peru* by the IACtHR, the ECtHR considered the family members' right to be free from torture and other cruel, inhuman, or degrading treatment violated stating that the amount of distress they had suffered can amount to torture.

Summary:

Both the ECtHR and the IACtHR, while applying the relevant provisions that prohibit torture in international human rights law (the Convention Against Torture, the Inter-American Convention to Prevent and Punish Torture, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) to the analyzed cases of enforced disappearance, demonstrated a general agreement to imply torture from circumstantial evidence. However, the ECtHR used much stricter approach to the consideration of the body of evidence and claimed a violation of the right to be free from torture and other cruel, inhuman, or degrading treatment only in one of five joint applications.

Additionally, the Courts complied in regards to the violation of the right to be free from torture and other cruel, inhuman, or degrading treatment concerning the family members of the disappeared person. Both Courts argued that family members of the victim had been subjected to slow mental torture because they had no information about their relatives. This treatment is in breach of Article 3 of the European Convention and Article 5 of the American Convention.

3. The Right to Liberty and Security of Person:

Ott (2011) suggests that "the right to liberty and security of person has been violated in the great majority of cases of enforced disappearance treated by the different monitoring bodies" (p. 43). Even though the Human Rights Committee argues that the aspect of security of person has its own content, which applies independently from situations of deprivation of liberty, both the IACtHR and the ECtHR refer to the right to liberty and security of person, which guarantees the "freedom of bodily movement in the narrowest sense" (Ott, 2011. p. 44). This right may solely be interfered with or violated by the "forceful detention of a person at a certain, narrowly bounded location" (Ott, 2011, p. 44). For a detention to be lawful, the grounds for detention must not only be legitimate under domestic law but also under international law (Ott, 2011, p. 45). Individuals who have been deprived of their liberty must be informed immediately about the reasons for their detention. Additionally, they have a right of *habeas corpus*, i.e. the right to take the proceedings to a court to review the lawfulness of the detention. Finally, those individuals who have been wrongly detained have a right to compensation for wrongful imprisonment (Council of Europe, 1950, Art. 5; OAS, 1969, Art. 7). Therefore, a violation of the right to liberty and security implies a violation of freedoms and rights of a person as well as a violation of several obligations of the States.

The interpretation of the right to liberty and security of person by the Inter-American Court:

Article 7 of the American Convention on Human Rights declares that "every person has the right to personal liberty and security" (OAS, 1969). The Inter-American Court endorses the view that the right to liberty and security is the human right denied by the very fact of enforced disappearances. When analyzing a presumption of enforced disappearance, it should be kept in mind that the deprivation of liberty should only be understood as "the start of the constitution of a complex violation that is prolonged over time until the victim's fate and the whereabouts are known" (IACtHR, 2013, para. 125). Therefore, the IACtHR is of the view that enforced disappearance begins with the deprivation of the person's liberty and the ensuing lack of information about his or her fate.

In *Rivera v. Peru*, the State argued that Jeremías Osorio Rivera was deprived of his liberty because he was presumably *in flagrant delicto*[5] (IACtHR, 2013, para. 103). Under Article 279 of the Peruvian Criminal Code, this deprivation of liberty allows justified suspension of personal liberty. As noted in the Court's decision, Jeremías Osorio Rivera was deprived of his liberty after an explosion had occurred in the peasant community of Nunumia (IACtHR, 2013, para. 118). In this regard, the Court emphasized that the protection of a victim from enforced disappearance must be effective upon the act of either legitimate or illegitimate deprivation of liberty (IACtHR, 2013, para. 125). The detention of disappeared persons is considered to be an initial step of the enforced disappearance that might be legitimate and illegitimate depending on the circumstances of each case.

Similarly, the Inter-American Court clarified that the right to *habeas corpus* (Article 7.6 of the American Convention) is of paramount importance in disappearance cases (IACtHR, 2013, para. 120). Its function is essential to respect the right to personal integrity and to prevent disappearances. According to *Rivera v. Peru*, each person has the right to have recourse to a competent judge or Court to decide the legality of his detention or *habeas corpus*" (OAS, 1969, Art. 7; IACtHR, 2013, para. 120). Therefore, the freedom from the arbitrary deprivation of liberty is an essential right that cannot be suspended.

Overall, in *Rivera v. Peru*, the IACtHR considered the violation of the right to liberty and security as an integral part of the crime. Moreover, the violation of this right can be initially both legitimate and illegitimate. Respect to personal integrity always includes providing an access to the right to *habeas corpus*, which is an essential right provided by the American Convention.

The interpretation of the right to liberty and security of person by the European Court:

Serving a similar function as Article 7 of the Inter-American Convention, Article 5 of the European Convention aims at preventing persons from arbitrary detention declaring that "everyone has the right to liberty and security of person" (Council of Europe, 1950). Additionally, Article 5 of the European Convention lists the possible reasons of lawful arrest, such as "the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in

order to secure the fulfillment of any obligation prescribed by law"; "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants"; and many others (Council of Europe, 1950, Art. 5). Therefore, in the European system, it is clearly stated what types of arrest are considered to be lawful. In order for a deprivation of liberty to be considered unlawful, the arrest should fall in one of the aforementioned categories.

The ECtHR has found on many occasions that unacknowledged detention is a complete negation of the guarantees contained in Article 5 and discloses a particularly grave violation of its provisions (ECtHR, 2013, para. 100). Similarly, the body of evidence in *Aslakhanova v. Russia* indicated that the applicants' relatives had been detained by State agents, apparently without any legal grounds or acknowledgement of such detention (ECtHR, 2013, para. 134). These circumstances constituted a particularly grave violation of the right to liberty and security of persons enshrined in Article 5 of the Convention. Therefore, basing its decisions on the lack of the legal grounds for arrest, the Court recognized the violation of the right to liberty and security in *Aslakhanova v. Russia*.

In *Aslakhanova v. Russia*, the Court did not consider the deprivation of the right to access the judge to challenge the lawfulness of person's detention or the right of *habeas corpus.* Cloude (2010) suggests that the European Court only focuses on two specific positive obligations of the States, namely, the obligation to take effective measures to safeguard against people's disappearance while in custody, and the obligation to investigate if that crime has happened (p. 14). Concentrating on the State's responsibilities in terms of the violation of the right to liberty, the Court did not mention the right of *habeas corpus* that provides the perfect legal remedy against arbitrary deprivation of liberty.

Overall, there are particular conditions under which the ECtHR considers detention to be unlawful; accordingly, only unlawful detention constitutes the violation of the Article 5 of the European Convention. In *Aslakhanova v. Russia*, the Court concentrated on the State's responsibilities in terms of the violation of the right to liberty leaving out the considerations about the right of *habeas corpus*.

Summary:

In sum, both Courts recognized the violation of the integrated right to liberty and security in the analyzed cases. If the Inter-American Court saw the violation of this right as an initial stage of the criminal act, the European system considered the violation of the right to liberty and security of the person separately from other violations. Accordingly, Article 5 of the European Convention lists the possible legitimate reasons of detention in details. When the detention does not fall into one of these categories, the Court finds violation of the right to liberty and security of persons. On the contrary, the Inter-American Convention considers particular circumstances of the case in order to determine the violation of the right to liberty and security. Differently from the ECtHR, the Inter-American Court primarily emphasized the right to access a judge and *habeas corpus* in *Rivera v. Peru.* The European Court, on the other hand, focused on the importance of State's obligations to prevent and investigate disappearances and did not mention the right of *habeas corpus* in relation to the disappeared person in *Aslakhanova v. Russia.*

4. The right to know the truth:

The right to know the truth or the right to know is a notion frequently referred to with regard to the families of victims of enforced disappearances. The right to know is the right of the victim's family to know the truth about the circumstances of disappearance and to know the location of his or her whereabouts. The existence of the right to know the truth has been identified by the WGEID since 1981 (Ott, 2011, p. 111). Before the 2007 Convention, the international instruments on human rights do not specifically refer to that concept. Pasqualucci claimed that "although the most widely ratified international human rights treaties do not explicitly provide for a right to know the truth, such a right may be considered to arise from the states' conventional duty to ensure human rights" (1994, p. 330). In the *Velásquez Rodríguez* case, the Court interpreted article 1 (1) of the American Convention as entailing a duty for states to investigate violations and "to identify those responsible" (IACtHR, 1988, para. 55). Since Velásquez Rodríguez, the IACtHR has repeatedly ruled, according to article 1 (1) of the Convention, that the duty of the state is to investigate, identify and punish those responsible for human rights crimes (Dyckman, 2007, p. 49).

Finally, the 2007 Convention officially established the existence of this right declaring that "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" (UNGA, 2006, Art. 24(2)). Traditionally, the right to know the truth within the context of enforced disappearance means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s). However, the right to know the truth also refers not to the right of disappeared persons to know their location and allegations against them.

The interpretation of the right to know the truth by the Inter-American Court:

The recognition of the right to know the truth has been encouraged within the Inter-American system as a reaction against amnesty and, in general, impunity legislations in some Latin American countries for the lack of determination of the whereabouts and fate of the victims of enforced disappearances (Cloude, 2010, p. 16). In 1999, the IACHR and the State of Argentina reached a friendly settlement in the case of *Carmen Aguiar de Lapaco v. Argentina* establishing that the right to know the truth is not the subject to statutes of limitations. This agreement "required the government to award exclusive competence to the federal courts to continue the trials for truth" and was therefore seen as an official obligation on the State to pursue judicial investigations into the fate of the disappeared persons (Dyckman, 2007, p. 57). Initially developed as a component of the right to justice, the right to know the truth was officially established in *Carmen Aguiar de Lapaco v. Argentina* to uncover the truth about massive human rights violations, including enforced disappearances during the "truth trials."

In general, the IACtHR considers the right to know the truth as both a collective and an individual right. Usually, the collective dimension of the right to know the truth is demonstrated through establishment of truth commissions or other truth finding mechanisms. In Peru, the Truth and Reconciliation Commission that was established in 2001 and was focused on the massacres, "forced disappearances", human rights violations, terrorist attacks, and violence against women during the internal conflict in Peru, abuses that were committed by Shining Path (Sendero Luminoso) and Túpac Amaru Revolutionary Movement (MRTA), as well as by the military forces of Peru (Truth and Reconciliation Commission, 2003). Accordingly, in *Rivera v. Peru,* the Court requested the State to organize a public act to acknowledge its international responsibility for the facts of this case; to adopt the necessary measures to reform its criminal laws, within a reasonable time, in order to define the offense of enforced disappearance of persons in a way that is compatible with the relevant international parameters; to implement, within a reasonable time, permanent programs on human rights and international humanitarian law in the training schools of the Armed Forces; to publish the official summary of this Judgment prepared by the Court, once, in a national newspaper with widespread circulation; etc (IACtHR, 2013, para. 260, 264, 271, 274).

The individual approach to this right includes understanding of the right to know the truth as the right of the relatives to know whereabouts of the disappeared person and to know about every step of the criminal act. In that vein, the Court requested the State to provide family members of a disappeared person with the opportunity to exercise the right to know the truth highlighting the responsibility of the State "to investigate and punish those responsible, as appropriate; to establish the truth of what happened; to locate the victims' whereabouts and advise the family members, and also to provide fair and adequate reparation, as appropriate" (IACtHR, 2013, para. 176). Therefore, the Court reaffirmed the duty of the States to conduct effective investigation and provide information about the investigation process to the family members of the disappeared person.

In *Rivera v. Peru,* the Court analyzed whether the State had conducted the criminal investigations with due diligence and within a reasonable time, and whether these investigations had constituted effective remedies to fulfill the right to know the truth. Consequently, the Court ruled that "the State [had] still not satisfied the right of the family members to know the truth, which is subsumed in the right of the victim or his family members to obtain clarification of the violations and the corresponding responsibilities from the competent organs of the State, by the investigation and prosecution established in Articles 8 and 25(1) of the Convention" (IACtHR, 2013, para. 220).

Overall, the Inter-American system was the first to establish that the right to know the truth is not the subject to statutes of limitations and that there is an official obligation of the State to pursue judicial investigations into the fate

of the disappeared persons. Understanding of the right to know the truth in its collective and individual dimensions, the Court reaffirmed the duty of the State not only to conduct effective investigation and provide information about the investigation process to the family members of the disappeared person but also to shed light on obscure practices of the past.

The interpretation of the right to know the truth by the European Court:

Since, the ECtHR has never referred to the right to know the truth explicitly, its case law suggests that the content of the right to the truth is fulfilled by the obligation to investigate the events that led to human rights violations in general. Antkowiak (2001) suggests that "the legal concept of a positive duty on States to investigate possible human rights violations is a recent development in the case law of the European Court of Human Rights (ECHR), emerging in decisions over the last few years in cases against Turkey (p. 982).

The ECtHR did not mention the right to know the truth in *Aslakhanova v. Russia*. However, language used in the judgment suggests that the aspects protected by the right to know the truth are included in the right to an effective remedy guaranteed in Article 13 of the European Convention, the right to liberty and security guaranteed in Article 5, the right to be free from torture and other cruel, inhuman or degrading treatment guaranteed in Article 3 of the European Convention, and the right to life guaranteed in Article 2.

The fact that relatives of the disappeared persons had been granted victim status allowed them to obtain the right to receive remedies in form of effective investigation and determining whereabouts of the disappeared persons. The Court noted the suffering of the relatives of the victims of disappearances, who continue to remain in agonizing uncertainty as to the fate and the circumstances of the presumed deaths of their family members (ECtHR, 2013, para. 223). This suffering was caused by the ineffective investigation that had failed "to ensure public scrutiny by informing the next of kin of the important investigative steps and by granting them access to the results of the investigation" (ECtHR, 2013, para. 122). Therefore, the right to know the truth is indirectly included into the area of State's responsibilities to provide information to the relatives about the effective investigation.

Unfortunately, there is a minimal fulfillment of the collective dimension of the right to know the truth. In Aslakhanova v. Russia, the Court suggested that "a number of urgent and result-oriented measures appear inevitable in order to put an end, or at the very least to alleviate the continuing violation of [human rights] resulting from the disappearances that have occurred in the Northern Caucasus since 1999 (ECtHR, 2013, para. 238). However, Human Rights Watch (2011) suggests that "Russia has taken a number of steps in the context of the Committee of Ministers' supervision, but none of these measures have led to good faith implementation of any judgments on cases from Chechnya" (p. 6). For example, Russian authorities have restricted the Prosecutor General's Office on both federal and regional levels and created two investigative units within the Chechen Prosecutor's Office devoted to the re-examination of investigative and criminal case files following the European Court judgments (Council of Europe, 2007, p. 2). However, these changes have not lead to any substantive improvements in the conduct of investigations (HRW, 2011, p. 6). Accordingly, there is no established truth commissions or other truth finding mechanisms. Therefore, there is no duty imposed on the State to put in place an appropriate truth finding mechanisms or to improve the current processes.

In sum, in *Aslakhanova v. Russia,* the content of the right to know the truth was fulfilled by the obligation to effectively investigate the events that led to human rights violations in order to provide the family members the information about the whereabouts of the disappeared person. However, the Court did impose no duty on the State to address the collective dimensions of the right to know the truth. In this particular case, the right to know the truth was related to the right to life, the right not to be tortured, the right of the victim or the next to kin to obtain clarification of the facts through the effective investigation and prosecution, and the right to receive an effective remedy imposed through Articles 2, 3, 5, and 13 of the European Convention.

Summary:

Both Courts' interpretations of the right to know the truth included the right to proceed with an effective investigation

of the facts and to confront the perpetrators. However, the Inter-American Court encompassed more than a mere obligation to investigate and prosecute on the part of the state. In the IACtHR's case law, satisfaction of the collective dimension of the right to the truth demands procedural elucidation of the most comprehensive historical truth possible, which includes judicial determination of patterns of joint behavior and of the individual behavior of all the people who were involved in such actions. Indeed, the concept of the right to know the truth in the case of *Rivera v. Peru* clearly exemplified the central role of victims in criminal proceedings and contributes to restoring the social order. On the contrary, the ECtHR only indirectly implied the right to know the truth through establishing the duty of the State to investigate the case and to provide access to information for relatives of the disappeared person.

5. The right to an effective remedy:

The notion of the right to an effective remedy has broad meaning since it requires an effective remedy for violations of all rights recognized by the constitution or laws of the State concerned or by the American or European Convention. In other words, every right needs a remedy to be enforceable. It is the government's obligation to provide such remedies and ensure their efficiency. The word "remedy" contains two separate concepts. In the first sense, remedy is a process by which arguable claims of human rights violations are heard and decided. The second notion of remedies refers to the outcome of the proceedings: the relief afforded the successful claimant. Therefore, this study compares and analyzes the process of receiving remedies, the remedies provided by the State during the domestic investigation, and the results of both cases before the regional courts.

The interpretation of the right to an effective remedy by the Inter-American Court:

Article 25 of the American Convention provides that "everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal" (OAS, 1969). According to the IACtHR, "more than 20 years after the [presumed] victim's enforced disappearance, and with the entire truth about the events still not known, the domestic criminal proceedings ha[d] not provided an effective remedy to determine the fate of the [presumed] victim, or to ensure the rights of access to justice and to the truth through the investigation and eventual punishment of those responsible" (IACtHR, 2013, para. 1). Moreover, the Commission and the Court agreed that "the investigations and proceedings under the military system of justice are neither appropriate nor effective remedies to respond to human rights violations" (IACtHR, 2013, para. 17). Accordingly, the situation in Peru at the moment of conflict did not constitute solid ground for providing access of citizens to the right to an effective remedy. Therefore, the State has also violated its duty under Article 63(1) of the American Convention to provide adequate reparations.

While analyzing the domestic investigations that had taken place throughout the process of obtaining domestic remedies, the Court found many violations of the procedure, such as the violation of the guarantee of an ordinary judge in relation to the investigation of the enforced disappearance of Osorio Rivera by the military jurisdiction; the lack of serious, effective and exhaustive manner investigation; and the lack of compliance with the obligation of due diligence and thoroughness (IACtHR, 2013, para. 186, 191, 196). In order for the proceedings to be properly conducted, "all the necessary means must [had been] used to promptly take those measures and make those inquiries that are essential and appropriate in order to clarify the fate of the victims and to identify those responsible for their enforced disappearance" (IACtHR, 2013, para. 182).

Additionally, the Court indicated that "investigations must [had been] conducted within a reasonable time in order to clarify the facts and punish all those responsible for the violation of human rights" (IACtHR, 2013, para. 200). The concept of reasonable time had been determined while considering "(a) the complexity of the matter; (b) the procedural activity of the interested party; (c) the conduct of the judicial authorities, and (d) the effects that the delay in the proceeding may have on the legal situation of the victim" (IACtHR, 2013, para. 201). Taking into consideration the continuing nature of the act of enforced disappearance, the failure to elucidate Rivera's whereabouts, the failure to determine responsibilities, and the alleged denial of justice constituted the violation of the right to an effective remedy. Over and above the foregoing, the Court considered that the criminal proceedings, as a whole, had exceeded the time that could be considered reasonable in order to conduct serious, diligent and exhaustive investigations into the facts relating to the enforced disappearance of Osorio Rivera. Thus, the family of the presumed victim was denied access to any domestic effective remedies.

Overall, the circumstances of *Rivera v. Peru* demonstrated that the relatives of the victim had been deprived of any domestic remedies in terms of identifying the fate of disappeared person, getting access to information about the effective investigation, etc. Considering that the State had failed its obligations to provide an effective remedy, the Court assigned it to fulfill several duties before the victim's family including providing financial and social support, improving criminal justice system in order to province recurrence of that crime, investigating and finding the remains of Osorio Rivera.

The interpretation of the right to an effective remedy by the European Court:

Article 13 of the European Convention declares that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity" (Council of Europe, 1950). This is one of the key provisions underlying the European Convention's human rights protection system, along with the requirements of Article 1 on the obligation to respect human rights and Article 46 on the execution of judgments of the European Court of Human Rights.

The ECtHR pays particular attention on the effectiveness of domestic remedies because the right to an effective remedy reflects the fundamental role of national judicial systems for the European Convention system. When the final judgment on *Aslakhanova v. Russia* was released by the ECtHR, the domestic investigation was still pending and was ineffective as it was previously mentioned. The investigation must be effective. In order to achieve the standard of effectiveness, an independent person must be in charge of the investigation. The person must be capable of ascertaining the circumstances in which the incident took place and of leading to a determination of whether the force used was or was not justified in the circumstances, and to the identification and punishment of those responsible (ECtHR, 2013, para. 121). In *Aslakhanova v. Russia*, the domestic investigation was considered ineffective for many reasons (ECtHR, 2013, para. 123):

delays in the opening of the proceedings and in the taking of essential steps; lengthy periods of inactivity; failure to take vital investigative steps, especially those aimed at the identification and questioning of the military and security officers who could have witnessed or participated in the abduction; failure to involve the military prosecutors even where there was sufficient evidence of the servicemen's involvement in the crimes; inability to trace the vehicles, their provenance and passage through military roadblocks; belated granting of victim status to the relatives; and failure to ensure public scrutiny by informing the next of kin of the important investigative steps and by granting them access to the results of the investigation.

Accordingly, when the investigation is ineffective, this ineffectiveness undermines the effectiveness of other remedies, including the newly initiated investigation, the renewed legislative proposals were requested from the State. The Court required the State to pay the applicants the pecuniary and non-pecuniary damage, and the cost and expenses associated with the judicial procedures within three months from the date on which the judgment would become final.

Similarly to the decision made in *Rivera v. Peru*, the Court noted that the victims' relatives had been deprived of any domestic remedies. Considering that the State had failed its obligations to provide an effective remedy, the Court assigned it to pay monetary compensation to each family depending on particular circumstance of each one of five joint cases. There were no additional requirements for reforms and other remedies in the list of reparations requested by the ECtHR.

Summary:

The right to an effective remedy is considered differently by each regional Court within respective national and situational contexts. An effective investigation is the first basic remedy considered by each Court. In general, the effectiveness of investigation is considered by both Courts using different standards to determining what constitutes effective investigation and what remedies should be provided. Accordingly, reparations requested by each Court were very different. The IACtHR assigned the State to provide scholarships, publish articles, submit reports to the

IACHR about the investigation, establish whereabouts of the person, and other additional reparations. On the contrary, the ECtHR required the State to pay only monetary compensations.

Conclusion

Enforced disappearance is generally categorized as multiple violations of the rights of disappeared persons and their relatives. Throughout the study, many similarities and differences were noted in the Courts' approaches to establishing the violation of each right. The biggest difference is the system that had been used by each Court while approaching the crime of enforced disappearance. The European Court considered a violation of every single right as a separate violation precisely describing the scope of each right and the essence of the violation. On the contrary, the Inter-American Court applied the multiple-right approach demonstrating the contextual nature of the crime and presenting the overlaps between different rights (e.g.: right to know the truth and the right to an effective remedy).

Implying that the right to life is the most fundamental right, as its enjoyment is the condition for the enjoyment of all other rights, both Courts found the violation of the right to life within the specific contexts. However, the comparison suggests that the violation of the right to life should not necessarily be implied in every enforced disappearance case because the body of available evidence does not always demonstrate the violation of the right to life of disappeared person. Moreover, the Courts were of different view on whether the disappeared person may be considered dead. The ECtHR claimed that if the State fails to provide reasonable explanation about why an individual has been taken into custody, that person must be presumed dead. On the contrary, the IACtHR suggested the possibility of death depending on circumstances. Finally, both Courts agreed that the lack of effective investigation constitutes the violation of the States' duty to protect the lives of their citizens.

Considering that, in most instances, enforced disappearance entails the absence of a corpse, it is extremely hard to determine whether or not a person was subjected to torture, and whether the person can be presumed dead. In that vein, both Courts demonstrated a general agreement to imply torture from circumstantial evidence in each case. Therefore, a violation of the right to be free from torture does not necessarily take place in every single case. For example, in *Aslakhanova v. Russia*, the amount of evidence presented before the investigation allowed the Court to qualify the crime as a violation of right to be free from torture and ill-treatment in one of five joint applications. Moreover, the IACtHR and the ECtHR complied in regards to the violation of the right to be free from torture and other cruel, inhuman, or degrading treatment concerning the family members of the disappeared person because of their increased exposure to slow mental torture connected to the lack of information about their relatives.

The right to liberty and security was considered to be violated by both Courts in the analyzed cases of enforced disappearances. Neither the IACtHR nor the ECtHR qualified the right to security and the right to liberty as independent rights of a person. However, the Courts differed in their approaches to the requirement of lawful/unlawful detention, the access to the right of *habeas corpus*, and the essence of the right to liberty and security. If the IACtHR saw the violation of this right as an initial stage of the criminal act[6], the ECtHR considered the violation of the right to liberty and security separately from other violations. Additionally, the ECtHR determined what kind of detention is considered to be lawful or unlawful. On the contrary, the IACtHR had no fixed requirements on that matter. Lastly, while the European Court focused on the importance of State obligations to prevent and investigate disappearances, the Inter-American Court primarily emphasized the right to access a judge and *habeas corpus.*

The notion of the right to an effective remedy has a broad meaning since it requires an effective remedy for violations of all rights recognized by the constitution or laws of the State concerned or by the American or European Convention. Accordingly, there are different interpretations of the right to an effective remedy. Considering effective investigation as the first basic remedy, both Courts demonstrated different approaches to what constitutes the effective domestic investigation. In *Aslakhanova v. Russia*, the investigation was considered to be ineffective because it was never completed; there was a decent body of evidence included in the case to prove that continuing investigation was not effective. On the contrary, investigation that took place in Peru had been completed. However, the Court stressed that completed investigation cannot always be considered effective. Therefore, the standard of effectiveness/ineffectiveness is to be considered depending on circumstances of each single case. Accordingly, in order to be considered as an effective remedy, investigation should fit the standard of "effectiveness." In order to

provide an effective remedy, the Human Right Courts requested States to comply with the Courts' judgments. However, reparations requested by each Court were very different. If the IACtHR assigned the State to provide scholarships, publish articles, submit reports to the IACHR about the investigation, establish whereabouts of the person in addition to monetary compensations, the ECtHR required the State to pay only monetary compensations.

The international instruments on human rights do not specifically refer to the right to know the truth. Similarly, the IACtHR and the ECtHR differed in their approaches to the right to know the truth in the context of enforced disappearance. The ECtHR only indirectly implied the duty of the State to provide the opportunities for its citizens to exercise the right to know the truth through establishing the duty of the State to investigate the case and to provide access to information for relatives of a disappeared person. Therefore, the right to know the truth in the European system constitutes a particular aspect of other human rights. On the contrary, the IACtHR had the view that the right to know the truth constitutes an independent human right. Accordingly, the Court considered the right to know the truth to be not only part of the right to an effective remedy but also as a separate right to determine the historical truth that cannot be undermined by the statutes of limitations.

Part IV. The execution of the ECtHR and the IACtHR's judgments.

The ECtHR and the IACtHR are charged with adjudicating most human rights complaints in the European and American hemispheres respectively. The ECtHR is a subsidiary organization of the Council of Europe, which includes all European countries except Belarus. Its primary judicial mechanism is the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention), which is widely considered to be "one of the strongest international human rights treaties in force" (Abdel-Monem, 2005, p. 9). Similarly, the Inter-American Court of Human Rights (IACtHR) is the judicial organ of the Inter-American human rights system, whose jurisprudence is based on principles underlined in the American Convention on Human Rights (the American Convention). Currently, twenty-three Member States have ratified the American Convention and accepted the Court's jurisdiction in accordance with its Article 62. Both Courts are obligated to protect many human rights including those violated in the process of enforced disappearance, namely, the right to be free from torture, the right to life, the right to liberty and security, the right to know the truth, and the right to an effective remedy.

The processes of the establishing a judgment are specific for each Court. When both Courts received an application, they review it and subsequently issue a judgment. Usually, if the Court finds that the State violated several articles of the respective Convention, it recalls "an inherent duty of Member States to provide reparations" (Ress, 2004, p. 14). Accordingly, the European State "undertake[s] to abide by the final judgment of the Court in any case to which they are parties" (Council of Europe, 1950, Art. 46). Similarly, Article 66 of the American Convention recommends countries to recognize the binding character of the Convention (OAS, 1969).

The European Court issues declaratory judgements only. Therefore, it can only rule on whether an individual has had his or her rights violated by a State. The Court recommends (does not require) preventative actions to the participating Member States. Hawkins and Jacoby (2010) claim that "the Court does not overrule the decisions of domestic Courts, invalidate national laws, or even make specific orders for legislative reforms" (p. 53). Therefore, when the Court finds that a certain Member State has committed a violation and the applicant sustained damages as a result of this violation, the Court awards the applicant monetary damages, which may include compensatory and pecuniary damages, attorney's fees and other costs. On the other hand, the decisions made by the IACtHR are "final and binding on the parties to the dispute" (Shelton, 1994, p. 338). Unlike the ECtHR, the Inter-American Court issues several forms of jurisprudence, including decisions and judgments, advisory opinions, and reports on compliance with opinions. Each reparation decision includes several paragraphs ordering States to take a particular actions (Hawkins, Jacoby, 2010, p. 46).

As a result of these differences, countries have different ways of implementing the judgments. One interesting development is that the States within the Inter-American system "have increasingly admitted the violations before the Court and taken partial or full responsibility for their action" (Hawkins, Jacoby, 2010, p. 46). Hawkins and Jacoby (2010) also found that the compliance with payments in both system is significantly high in both systems (p. 84). However, the cases within the European jurisdiction are harder to analyze in terms of implementing particular reforms

since it is rare for the Court to make specific orders.

One of the most important findings of the study conducted by Hawkins and Jacoby (2010) is that "strategic actors might easily […] adjust compliance levels as necessary" (p. 84). As a result, national authorities in both systems may choose their own level of compliance with the judgment which can be adjusted as domestic preferences shift over time.

Judgments passed by both Courts are important to the advancement of human rights in both regions. The extent to which both judicial bodies are able to force a State to bring perpetrators to justice and prevent the recurrence of human rights violations is of paramount importance in further monitoring and ensuring implementation of human rights guarantees around the world. Considering that additional variables that has the potential impact on the implementation of the judgments were not analyzed for the purpose of this study, the execution of judgments is analyzed based on the potential of both legal institutions to influence State's behavior and the States' preferred level of compliance with the judgments.

The execution of the IACtHR's judgment by Peru:

Peru signed the American Convention on July 12, 1978 declaring that its recognition of the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the Convention as binding (IACHR, 2015). According to the IACtHR's rules, the applicant is required to submit a petition against the State only when he or she has exhausted domestic remedies. After "the restoration of democracy and the decision of the State to invalidate the effects of the 1995 Amnesty Laws that impeded an investigation into certain crimes committed between 1980 and 1995", the investigations into the disappearance of Jeremías Osorio were reopened (OAS, 2012). Accordingly, "the reparation of the harm caused by the violation of an international obligation" was to be identified requiring, whenever possible, full restitution, which consists in "the reinstatement of the previous situation" (IACtHR, 2013, para. 236). Accordingly, the Court was able to grant different measures of reparation, in order to redress the harm comprehensively. Measures of reparation include pecuniary compensation, measures of restitution, rehabilitation and satisfaction, and guarantees of non-repetition.

As a result, the Court found that the State of Peru had been responsible for the enforced disappearance of Jeremías Osorio Rivera and, consequently, for the violation of his rights to personal liberty, personal integrity, life, and juridical personality as recognized in Articles 7, 5(1), 5(2), 4(1) and 3 of the American Convention on Human Rights, in relation to the obligation to respect and to ensure these rights, contained in Article 1(1) of this instrument, as well as in relation to Article I(a) of the Inter-American Convention on Forced Disappearance of Persons. Besides the monetary compensation, the Court assigned Peru to investigate the facts of the case: to identify, prosecute, and punish those responsible and determine the whereabouts of the victim; provide the guarantees of non-repetition; publicly present the judgment; and acknowledge international responsibilities.

Peru has failed to implement the entire scope of the recommendations given by the IACHR and IACtHR on previous cases demonstrating that the judicial and criminal justice systems require further improvement. However, the government of Peru has attempted to comply with the recommendations given by the IACHR and the IACtHR. For example, Peru implemented Law 28592 creating the Single Registry of Victims, which includes the persons whose rights were impaired during the period of political violence in Peru from 1980 to 2000. On October 30, 2006 the Ombudsman granted a Forced Disappearance Hearing certificate to Mr. Jeremías Osorio Rivera (IACHR, 2012, p. 3). He was also officially recognized as a victim by the Council of Reparations of Peru in its session of August 13, 2011 (IACHR, 2012, p. 3). The widow and daughters of Mr. Osorio Rivera have access to integral reparations programs created by the State in 2006 such as education, health care, insertion in the labor market, as well as direct economic benefits (IACHR, 2012, p. 3).

Moreover, the Peruvian authorities provide various academic activities and training courses for judges and prosecutors on the investigation of serious human rights violations carried out under an agreement with the International Committee of the Red Cross, various universities, and non-governmental organizations specialized in human rights and international humanitarian law (IACHR, 2012, p. 3). The search for, and identification of, remains of

victims of enforced disappearances and of the missing are important components of the Peruvian reparations policy. The International Center for Transitional Justice (2013) claims that from 2002 to April 2012, the remains of 2,109 victims were recovered and, of which, 1,074 were identified and returned to their families (p. 31).

Even though work still remains to be done, the State demonstrates its commitment to providing justice to the families of people who were forcibly disappeared in the conflict in Peru between 1980 and 2000. It is not atypical for countries facing a history of massive human rights violations to implement reparations. The implementation of reparations for a significant number of communities, the policy of providing documentation for a massive number of people and adding them to the civil registry, and the registration of victims by the Reparations Council are signs of the willingness of Peru to abide by the judgments and policies recommended and assigned by the IACHR and the IACtHR.

The execution of the ECtHR's judgment by Russia:

By ratifying the European Convention on Human Rights on May 5, 1998, Russia became a member of the Council of Europe and was submitted to the compulsory jurisdiction of the ECtHR (Lapitskaya, 2011, p. 3, 19). The ECtHR is charged with adjudicating most human rights complaints in Europe (Lapitskaya, 2011, p. 2). In order to submit a case to the ECtHR, the applicant is required to submit a petition against the State only when the applicant has exhausted domestic remedies and submit evidence to prove violations of any rights guaranteed by the European Convention.

Recognizing the Court's importance to the advancement of human rights in Russia, many citizens started to file complaints against the State since it had ratified the European Convention. Today, the ECtHR is one of the main mechanisms to address the prevalent human rights abuses in the territory of the country. In 2014, out of 69,900 petitions pending before the ECtHR, 14.3 percent were complaints against Russia (ECtHR, 2015, p. 167). Accordingly, since 2001, the Court has found Russia repeatedly liable for violations of the articles on protection of life, the prohibition against torture and inhuman treatment, and many others.

In *Aslakhanova v. Russia*, the Court recognized several violations: Article 2 of the European Convention regarding Russia's failure to effectively investigate the disappearance of the applicants' eight relatives; Article 3 of the European Convention in respect of the applicants, on account of their relatives' disappearance and the authorities' response to their suffering; Article 5 of the Convention in respect of the applicants' disappeared relatives; Article 3 of the Convention in respect of Akhmed Shidayev, on account of inhuman and degrading treatment inflicted upon him between 25 and 30 October 2002, and the failure to effectively investigate this allegation; Article 5 of the Convention in respect of Akhmed Shidayev, on account of his illegal detention between 25 and 30 October 2002; and Article 13 in conjunction with Articles 2 and 3 of the Convention. In this regard, the Court holds that Russia must pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44§2 of the Convention, plus any tax that may be chargeable, to be converted into Russian roubles at the rate applicable at the date of settlement, save in cases of the payment in respect of costs and expenses (ECtHR, 2013, p. 63).

The Court awarded the applicants monetary damages, which included compensatory and pecuniary damages, attorney's fees and other costs. In addition, the Court provided some guidance on certain measures that have to be taken, as a matter of urgency, to address these systemic failures. These measures fall into two principal groups, including the situation of the victim's families and the effectiveness of the investigation.

To address the victims' families, a key proposal of the Court was to establish a single, sufficiently high-level body responsible for solving disappearances in the region, which would enjoy unrestricted access to all relevant information, work on the basis of partnership with the families, and compile a unified database of disappearances (ECtHR, 2013, para. 224). In addition, the Court stated that greater resources should be allocated to the forensic and scientific work necessary for the investigations (ECtHR, 2013, para. 226).

In order to address the effectiveness of the investigation, the Court argued that insufficient evidence resulting from a delay during the investigation cannot absolve the State from making "the requisite investigative efforts." A preference for a "politically-sensitive" approach to avoid drawing attention to the circumstances of the disappearances should have no bearing on the application of the Convention. While the Court recognized the problem of illegal militant

groups facing the Russian Federation, it also considered accountability with regards to anti-terrorist and security services without compromising the legitimate need to combat terrorism (ECtHR, 2013, para. 231). The Court noted that investigations should be prompt, independent, under public scrutiny, and lead to a determination of whether the death was caused unlawfully; if so, those responsible should be identified and punished accordingly (ECtHR, 2013, para. 229-230). In view of the similar patterns surrounding the cases, the Court determined that it would be vital to develop a general strategy to help elucidate a number of questions common to the cases as well as to review the adequacy of current existing legal definitions of relevant criminal acts (ECtHR, 2013, para. 232).

In general, this ruling is not the first one against Russia. In fact, Russia pays within the given amount of time. Lapitskaya (2011) cites that "as of December 31, 2009, Russia made 26 percent of all payments on time, 20 percent of all payments were submitted late; and 54 percent of payments were pending for 'control of payment'" (p. 5). However, ever since Russia's accession to the Council of Europe and its consequent submission to the compulsory jurisdiction of the European Court of Human Rights, Russia has failed to take any affirmative steps towards any earnest embrace of the principles embodied in the European Convention. Therefore, the "prompt payment of 'just satisfaction'"[7] to victims does not prevent an increasing number of judgments from being issued against Russia, which signals a sign of respect for the European Court's judgments that does not have any deterrent effect for the State. Russia has failed to implement any substantive changes to redress the wrongs inflicted on the applicants and ensure that similar human rights violations will not be committed in the future.

There are several ways in which Russian authorities limit the access of the applicants to the ECtHR. According to Lapitskaya (2011), "one of the most egregious ways Russian authorities […] limit access to the ECHR is by intimidating applicants, their human rights attorneys and other human rights activists" (p. 503). In 2007, the Parliamentary Assembly of the Council of Europe issued a report that expressed concerns about the coercive and intimidating practices exercised by Russian authorities in order to prevent the applicants and their representatives from filing a complaint against them (Lapitskaya, 2011, p. 504). Additionally, Human Rights Watch (2005) claims that people in Chechnya "are also increasingly reluctant to talk to human rights workers or journalists, fearing further persecution" (p.4). The involvement of State actors in the assassinations of human rights activists like Anna Politkovskaja and Natalya Estemirova is also claimed by the vast the majority of international and non-governmental activists (Lapitskaya, 2011; Human Rights Watch, 2005; Smith, 2011). In general, the Russian government possesses several techniques that are utilized simultaneously to silence anyone it perceives to be a political threat. Basically, no one is allowed to hold either economic or political power but the Russian government itself.

Unfortunately, the ECtHR does very little to force Russia to comply with its judgments. However, Lapitskaya (2011) suggests that "the ECtHR is essentially the only international legal institution that continuously condemns human rights violations on the part of the Russian government in its judgments against Russia" (p. 15). The ECtHR is not powerless against Russia. For example, increasing isolation within the ECtHR community drive the State Duma to ratify the Protocol No. 14 to the European Convention in 2009 (Savenko, 2006, p.1). There are more actions that can be undertaken by the European community in order to prevent human rights violations in Russia as required by the ECtHR judgments. Some options include suspension of voting rights in the Council of Europe, lodging an interstate compliant against Russia for failure to provide measures pursuant to the ECtHR judgments, and many others.

In sum, the cases of enforced disappearance in Chechnya exemplify the problems connected with participation of the Russian government in the ECtHR. The *Aslakhanova* judgment represents another concrete step given by the ECtHR towards holding the Russian government accountable for addressing the legacy of impunity in the North Caucasus. However, the compliance with the judgments of the ECtHR demonstrates the unwillingness of Russian authorities to go further than fulfilling the monetary compensation requirements.

Summary:

While the judgments given by the IACtHR and the IACHR have resulted in legislative amendments and providing special reparation policies in Peru, Russia has continuously failed to adopt the necessary measures to ensure that no similar violations take place in the future or that violators are adequately deterred. Moreover, Russia not only does not appear to be uninterested in proving reparation to the victim's families, it also violated the human rights of the

victim's families by preventing them to submit further application to the Court through intimidation and coercion. At the moment, the ECtHR is essentially the only international legal institution that continuously condemns human rights violations on the part of the Russian government and its military forces in Chechnya. However, the ECtHR power against Russia has been undermined because it does not exercise any tools to force the State to implement substantive changes that could work towards eradication of human rights violations in the context of armed conflict. On the contrary, the IACtHR and the IACHR are able to influence the execution of judgments while using the monitoring tools and rapporteurship.

Concluding Remarks

Enforced disappearance is particularly a grave violation of human rights. In a typical case of enforced disappearance, an individual is abducted by unidentified State or non-State agents and disappeared without a trace. There is no arrest warrant, no judicial procedure and no transparency regarding the deprivation of liberty. The lack of a widely accepted definition of enforced disappearance and, more so, the lack of a definition of the phenomenon within the European legal system prevents further establishing the nature of enforced disappearance and determining basic obligations and duties of the States. The existence of the legal instrument within the American hemisphere that defines enforced disappearance facilitated the adoption of concrete measures to address specifics of this type of crime. Therefore, the definition of enforced disappearance is of paramount importance in determining the obligations of the State and preventing the crime of enforced disappearance.

This study also highlights the fact that the nature of enforced disappearance poses serious challenges in terms of access to the body of evidence in both the IACtHR and the ECtHR because the State usually enjoys the full access to evidence and strives to conceal them from public access, and does not express any attempts to cooperate with the Court. That fact influenced both Courts to adopt the flexible standard of the admission of evidence.

The endorsement of the multiple rights approach by the IACtHR further embraces the complexity of the phenomenon. As a result, the Court automatically found the violation of the right to life, the right to liberty and security, the right to an effective remedy, and other important rights, such as the right to the truth and the right to be free from torture and other inhumane and degrading punishment. Differently, the European Court proceeds with analyzing violations of each individual right on its own. In general, it assists the Court to examine in more details the scope of each right and the essence of violation within particular circumstances. In A*slakhanova v. Russia*, that approach lead to the fact that the violation of the right to be free from torture was considered to be violated in only one out of eight joint applications in the case.

Finally, the final judgments given within both systems significantly differ from each other not only by their substance but also by the way they are implemented domestically. If the European Court usually provides declaratory judgment, which does not require further policy changes, the judgments issued by the IACtHR are detailed and explains specifically each policy change that is required to be implemented in the country. Moreover, the character of judgments has the potential to influence its implementation. While the judgment given by the IACtHR and the IACHR have resulted in legislative amendments and the provision of special reparation policies in Peru, Russia has continuously failed to adopt any necessary measures to prevent recurrence of similar human rights violations in the future. Moreover, not only does Russia appear to be uninterested in providing reparation to victims' families, it seemingly limits the access of victims' family members to their rights established in the European Convention by intimidation and coercion. At the moment, the ECtHR is the only international legal human rights institution that continuously condemns violations on the part of the Russian government and its military forces in Chechnya. However, so far, the ECtHR's power over Russia is undermined because it does not use any tools to force the State to implement substantive changes that could assist in eliminating human rights violations committed by the State. On the contrary, the IACtHR and the IACHR are able to influence the execution of judgments while using the monitoring tools, rapporteurship, etc.

Limitations

The methodology chosen for this research project implies several limitations. Content analysis used in order to

provide the understanding of the institutional design of two human rights bodies and to evaluate national contexts is a purely descriptive method. It describes the content of used sources, but may not reveal the underlying motives for the observed pattern. Additionally, the secondary sources used in the research project might be influenced by biases and personal views of the authors. Also, the reports of the non-governmental organizations may not be an accurate reflection of reality because such organizations have the potential to criticize the work of the governmental authorities.

There are also a number of limitations and constraints associated with comparative design of the study. The comparative method generates no solution for the problem due the small number of analyzed cases. Limited number of analyzed cases demonstrates the preliminary character of this research project and the lack of ability to develop general propositions and theories. However, the preliminary results of this study present the hypothesis for further exploration in a more in-depth study of institutional design and jurisprudence of both Human Rights Courts.

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Endnotes

[1] Meaning under the influence of "superior force".

[2] Meaning to have sufficient amount of evidence to establish a fact or raise a presumption unless disproved or rebutted (Aim for Human Rights, 2009, p.53).

[3] an effective, independent, and impartial review on the merits of the claim (Baldinger, 2015, p. 496)

[4] Meaning "by the fact itself."

[5] Meaning that a criminal has been caught in the act of committing an offense

[6] Meaning that violation of that right always follows out of the notion of the crime of enforced disappearance.

[7] "just satisfaction" includes pecuniary and non-pecuniary damages or costs and expenses, including attorney's fee (Lapitskaya, 2011, p. 4).

Written by: Marina Kumskova
Written at: John Jay College of Criminal Justice
Written for: George Andreopoulos
Date written: September 2015