

THE RIGHT TO A REMEDY FOR ENFORCED DISAPPEARANCES IN INDIA

**A LEGAL ANALYSIS OF
INTERNATIONAL AND DOMESTIC LAW
RELATING TO VICTIMS OF ENFORCED
DISAPPEARANCES**

APRIL 2014

IHRLC Working Paper Series No. 1

International
Human Rights
Law Clinic

BerkeleyLaw
UNIVERSITY OF CALIFORNIA

ACKNOWLEDGEMENTS

This Working Paper was prepared by students in the International Human Rights Law Clinic under the supervision of Laurel E. Fletcher, Clinical Professor of Law and Director, International Human Rights Law Clinic for the Project on Armed Conflict Resolution and People's Rights (ACRes), Center for Social Sector Leadership, Haas School of Business at the University of California, Berkeley. Angana Chatterji, Co-Chair of ACRes and Mallika Kaur, Director of Programs, ACRes provided helpful comments. Clinical Fellow Katrina Natale '15 gave invaluable editorial assistance. We thank Olivia Layug, Associate Administrator for Berkeley Law's clinical program for her help with production.

We would also like to thank Dean Sujit Choudhry and the individual donors to the International Human Rights Law Clinic without whom this work would not be possible.

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EXECUTIVE SUMMARY

This report analyzes the international legal framework regarding India's obligations to ensure the right to a remedy for enforced disappearances and other gross human rights violations. It offers Indian activists guidance in considering the role that international norms may play in developing an advocacy strategy to promote redress for victims of enforced disappearances and torture.

In several Indian states, individuals and their families have suffered from widespread human rights violations in the form of enforced disappearance, torture, and rape. These violations harm not only the direct victim, but also his or her next of kin. In addition, there are gendered impacts of these violations. For example, in instances in which the direct victim is the male breadwinner, his wife is left to struggle with the economic, psychological, and social distress as a result of the loss of her husband. Or, where a husband is tortured as part of the enforced disappearance and unable to resume his former livelihood activities, the surviving wife may suffer the burden of not being able to support the family economically due to lack of employment opportunities for women. Despite their widespread and devastating effects, enforced disappearances and other gross human rights violations in India have been met with a culture of impunity, lack of investigation, and wholly inadequate reparations. These shortcomings are also violations of India's international legal obligations to ensure victims access to effective remedies, which include the rights to truth, justice, and reparations, as well as guarantees of non-recurrence.

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

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

Thus, enforced disappearances are recognized as a human rights violation that includes three legal elements: (1) the deprivation of liberty, (2) with state involvement, and (3) state denial or concealment of the fate of the disappeared. Enforced disappearances are distinguishable from other human rights violations by the state's denial of knowledge or responsibility of the disappearance of the individual. Official concealment of the individual's detention leaves the families of the victim in a state of uncertainty about the fate of their loved one, causing anguish.

The practice of enforced disappearances is a global phenomenon that advocates largely date back to practices undertaken by Latin American dictatorships. At the international level, sustained attention to developing a legal framework to address enforced disappearances culminated in the drafting of a new international human rights treaty, the International Convention for the Protection of All Persons from Enforced Disappearances (CED), which entered into force in 2010. The CED provides a comprehensive framework that codifies enforced disappearance as a human rights violation and establishes states' obligations to respect, protect, and ensure the right of individuals to be free from it. The CED also provides a comprehensive remedy scheme that includes the rights to truth, justice, reparations, and guarantees of non-recurrence.

India has signed but not ratified the Convention. As a signatory to the treaty, India has accepted the international obligation not to act contrary to the object and purpose of the CED. In addition, by becoming party to other human rights treaties that address related human rights violations that occur in the course of an enforced disappearance, and as India is bound by norms of customary international law, India has undertaken certain obligations outside of the CED that protect individuals from enforced disappearances. For example, enforced disappearances often occur in conjunction with other human rights violations, such as arbitrary detention, extrajudicial execution, incommunicado detention, torture, or rape. These violations are prohibited under the International Covenant on Civil and Political Rights (ICCPR), a treaty to which India is a party. Beyond applying to the direct victim of an enforced

disappearance, enforced disappearances also violate the rights of the family of the direct victim, in particular the rights of surviving women family members.

The analysis of India's international legal obligations is further complicated because some Indian states arguably are in a state of armed conflict and, thus, international humanitarian law (the law of war), including its protections for enforced disappearances, is also triggered. Depending on the type of conflict—internal or international—distinct international legal norms apply to states' conduct. Beyond the type of conflict occurring, there is debate about the temporal relationship between human rights protections and international humanitarian protections. The majority view holds that fundamental human rights apply at all times, thus, simultaneously with humanitarian protections in times of conflict; under this view, India is obligated to guarantee human rights, including those related to enforced disappearances, at all times.

Once a violation has occurred, whether during time of peace or conflict, India is obligated to ensure that victims have access to a remedy. The right to a remedy is a well-established norm of international law; however, its substance continues to develop. An emerging view of the right to a remedy identifies four substantive components of the right to a remedy—the right to justice, the right to truth, the right to reparations, and guarantees of non-recurrence. The right to justice requires that states criminally prosecute perpetrators of gross human rights violations and serious violations of international humanitarian law. The right to truth requires that states adequately investigate serious human rights violations and provide individuals and communities with the results of its investigation. The right to reparations requires that states provide access to redress and compensation for violations. Guarantees of non-recurrence require that states take concrete measures to prevent similar violations from occurring in the future. The type of human rights violation determines the applicability of each of these four dimensions in satisfying the right to a remedy.

India has promulgated legislation that affect individuals' ability to access effective remedies for human rights violations, including the Armed Forces Special Powers Act, the National Human Rights Commission (created by the Protection of Human Rights Act), the Prevention of Terrorism Act, the Right to Information Act, the Prevention of Torture Bill, and the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill. Other legislation or legal institutions, including the Armed Forces Special Powers Act, the National Human Rights Commission, the Prevention of Terrorism Act, and the Prevention of Torture Bill, immunize from prosecution certain categories of state actors who commit abuses. Such bars on investigations and prosecutions compromise the rights of victims to truth and justice. Other laws and legal institutions, such as the Armed Forces Special Powers Act, the National Human Rights Commission, and the Right to Information Act, provide for important remedies under law, but where they exist, are not adequately enforced. Lawmakers have proposed legislation, like the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, that include further remedies for human rights violations, but these have not yet been enacted. As a consequence of weaknesses in legal norms as well as lack of their enforcement, India's domestic laws and policies regarding accountability for human rights violations fall short of the country's international legal obligations to ensure that victims may access effective and adequate remedies for such acts.

GLOSSARY

AFSPA – Armed Forces Special Powers Act

API – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

APII – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

CAT – UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CED – International Convention for the Protection of All Persons from Enforced Disappearance

CEDAW – Convention on the Elimination of All Forms of Discrimination against Women

CERD – International Convention on the Elimination of all Racial Discrimination

CRC – Convention on the Rights of the Child

Crimes Against Humanity – Crimes of a particularly egregious nature committed in the course of a systematic or widespread attack against civilians, with knowledge of the attack. Crimes against humanity may be prosecuted by states under domestic law or by the International Criminal Court for states that have ratified the Rome Statute.

Customary Law – Customary law exists independent of treaty law. Customary law is not formally codified but consists of conduct that states consistently practice out of a sense of legal obligation and which experts agree is crystallized as an accepted international norm. According to § 702 [Customary International Law of Human Rights] of the Third Restatement of the Foreign Relations Law of the United States, “[a] state violates customary international law if, as a matter of state policy, it practices, encourages or condones [] genocide; [] slavery or slave trade; [] the murder or causing the disappearances of individuals; [] torture or other cruel, inhuman, or degrading treatment or punishment; [] prolonged arbitrary detention; [] systematic racial discrimination; or [] a consistent pattern of violations of internationally recognized human rights.”

Grave Breaches – War crimes that are criminally punishable. Grave breaches are identified in the Geneva Conventions, which are treaties that apply only to times of international armed conflict. The International Committee of the Red Cross provides in Rule 158 of its commentary to Customary International Humanitarian Law that states have the duty to search for and extradite persons alleged to have committed grave breaches.

Gross Violations of Human Rights – Gross violations of human rights are especially egregious human rights abuses. While there is not a fixed catalog of acts that are considered gross violations of human rights, the following are generally considered as such: genocide; summary or arbitrary killing; disappearances; slavery and the slave trade; prolonged and arbitrary detention; torture or cruel, inhuman, or degrading treatment or punishment; crimes against humanity; apartheid and systematic racial and religious discrimination. Gross violations are addressed in human rights mechanisms, treaties, regional human rights systems, and customary international law.

Human Rights Committee (HRC) – Is a treaty-based body of independent experts tasked with monitoring the implementation of the ICCPR by its state parties through a process of periodic reporting by the state, and review and concluding observations by the committee. The HRC also issues written decisions on inter-state complaints and those brought by individuals against states that have consented to such jurisdiction, and issues general comments interpreting the content of the ICCPR or addressing thematic issues.

Human Rights Law – Human rights law recognizes fundamental, universal individual rights and establishes duties of the state to respect, protect, and ensure these rights. Human rights law protects human dignity in all circumstances, not just during times of war or armed conflict.

IAC – International Armed Conflict

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

ILC – International Law Commission

International Humanitarian Law (IHL) – The body of laws and customs that aims to limit the effects of armed conflict. These laws protect individuals who are not, or are no longer, engaged in hostilities. These laws also restrict the means and methods of warfare.

Jus Cogens – Norms that bind *all* states at *all* times. These norms exist separately from obligations states voluntarily assume under treaties.

NHRC – National Human Rights Commission

NIAC – Non-International Armed Conflict

Non-Derogability – Prohibits states from suspending their treaty obligations with respect to particular rights. Generally, these are fundamental rights about which there is consensus that they should not be abridged under any circumstances. That is, a state that is party to an applicable treaty has the duty to respect, protect, and ensure non-derogable rights *at all times*, including during times of emergency or armed conflict. The rights that

are non-derogable are specified in the particular treaty.

PCTV – Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill

PHRA – Protection of Human Rights Act

POTA – Prevention of Terrorism Act

PTB – Prevention of Torture Bill

RTI – Right to Information Act

Serious Violations of Humanitarian Law – Serious violations of humanitarian law are also known as war crimes or grave breaches.

Special Rapporteur (SR) – Special rapporteurs are independent human rights experts who report and advise the Human Rights Council on human rights from a thematic or country-specific perspective. The role of the Special rapporteur is to maintain an independent and competent perspective. They do not receive compensation for their service.

TADA – Terrorist and Disruptive Activities Prevention Act

Treaty Obligations – States that ratify a treaty are bound by its provisions. States that sign but do not ratify a treaty must not act contrary to the object and purpose of the treaty.

UDHR – Universal Declaration of Human Rights

WGEID – Working Group on Enforced or Involuntary Disappearances

INTRODUCTION

The practice of enforced disappearance has reached a global scale, and India is not immune to this human rights violation. Individuals and communities in several Indian states have been targeted for enforced disappearance and suffered injury as a consequence. Simultaneously, international law continues to develop norms to prevent, prohibit, and redress enforced disappearances. As a sovereign state in a global context, India has assumed some, but not all, of these international legal obligations. In order to assist advocates in developing strategies to promote redress for the victims of enforced disappearance, including women placed in the precarious position of losing their family breadwinners, this paper analyzes the international law applicable to enforced disappearances, examines Indian law in light of these international standards, and points to areas where advocates can use international legal standards to argue for reforms to Indian law and policy.

Several federal states in India, including Punjab and Jammu/Kashmir, have experienced armed conflict, though there is dispute over the legal characterization of these situations. In these states, and across India more broadly, advocates have documented cases of enforced disappearance carried out by state agents. Victims of enforced disappearances include those disappeared, mostly men, and their families who survive but struggle with the loss of a loved one and breadwinner.¹ This wide circle of victims is entitled to redress, including accountability and reparations, for violations of their human rights. The effects on women pose particular questions.²

¹ See THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 9 (Ruth Rubio-Marín ed., 2009) [hereinafter GENDER OF REPARATIONS] (“[P]arents, partners, spouses, and children of the disappeared, executed, or detained persons are often left emotionally desolate and economically destitute. This is especially true of partners and spouses who are left with the entire burden of raising a family without a breadwinner, often in societies where women lack income-generating skills, have little education, and may even be stigmatized for their involvement in activities outside the home.”).

² This paper adopts the definition of “women” developed by the Committee on the Elimination of all forms of Discrimination against Women. According to the Committee, the concept of “women” is broader than gender and sex, and intersects with other factors, including “sexual orientation and gender identity.” Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties Under Art. 2 of the Convention*, ¶ 18, U.N. Doc. CEDAW/C/2010/47/ GC.2, (Oct. 19, 2010) [hereinafter *CEDAW General Recommendation No. 28*].

This paper proceeds in eight parts. First, it places enforced disappearances in its historical context. Second, it discusses the development of the International Convention for the Protection of All Persons from Enforced Disappearance, a recent treaty that significantly shapes modern international law on enforced disappearances. Third, it examines the international human rights framework for enforced disappearances in India. Fourth, it discusses India's obligations under international humanitarian law, specialized law that applies during times of armed conflict. Fifth, it reviews the relationship between international human rights law and international humanitarian law, and explores the applicability of these bodies of law to enforced disappearances. Sixth, it examines the international right to a remedy and the various forms that remedies may take. Seventh, it analyzes Indian domestic law against the backdrop of India's international legal obligations. This analysis offers Indian activists guidance in considering the role that international norms may play in developing an advocacy strategy to promote redress for victims of enforced disappearances and torture. Part eight concludes.

ENFORCED DISAPPEARANCES IN INTERNATIONAL LAW

A. INTRODUCTION

In a typical case of enforced disappearance, an individual is abducted by unidentified State agents and is never heard of again. There is no arrest warrant, no judicial procedure and no transparency regarding the deprivation of liberty Although the family and friends struggle to obtain information from the authorities in charge, they are left in complete ignorance about the fate and whereabouts of the victim The uncertainty about the destiny of their loved ones causes severe suffering³ Enforced disappearance is in the majority of cases directed against men. Because the victims are often the breadwinners of the family and all resources are used in search for the

³ See TULLIO SCOVAZZI & GABRIELLA CITRONI, THE STRUGGLE AGAINST ENFORCED DISAPPEARANCE AND THE 2007 UNITED NATIONS CONVENTION 9 (2007) ("A state of severe psychological deterioration affects the family of the disappeared person: depression, anxiety, stress, even cases of suicide are the consequence of having been thrown into the unbearable situation of not knowing whether the loved one is dead or alive. The relatives cannot mourn the dead or elaborate the grief, as this would mean abandoning all hope and, somehow, metaphorically becoming the killer of the loved one. This is what psychologists call "frozen grief" which may lead to irreparable damage.") (citing to *Comerciantes v. Colombia*, Inter-Am. Ct. H.R. (July 29, 1988) (expert testimony of Dr. Carlos Martín Beristain)).

*victim, the families find themselves with serious economic difficulties During their deprivation of liberty, the disappeared are in most cases subjected to torture and subsequently killed The remains are then interred in unmarked mass graves or thrown into a river or the sea.*⁴

For decades, international bodies have condemned enforced disappearances, though they have relied on slightly different definitions of the phenomena. Numerous international bodies, including the UN General Assembly, the UN Human Rights Council, the Inter-American Court of Human Rights, and the European Court of Human Rights have repeatedly addressed enforced disappearances. Through resolutions, decisions, and conventions, these bodies have formalized international legal norms prohibiting this practice.⁵

Human rights advocates recently celebrated the adoption of the International Convention for the Protection of All Persons from Enforced Disappearances (CED). This multilateral treaty, which entered into force in 2010, establishes a legal framework of state obligations regarding enforced disappearances. The framework includes provisions designed to prevent enforced disappearances.⁶ It also provides a comprehensive structure for remedying enforced disappearances when such violations occur. India has signed but not ratified this treaty, which means that India is not obligated to comply with all provisions of the agreement. However, by signing the treaty, India has accepted a more limited obligation not to act contrary to the object and purpose of the treaty.⁷ The CED will be discussed in greater detail after examining the definition of enforced disappearance and the evolution of how human rights law has addressed this practice.

⁴ LISA OTT, ENFORCED DISAPPEARANCE IN INTERNATIONAL LAW 1-2 (2011).

⁵ SCOVAZZI & CITRONI, *supra* note 3, at 96, 246 (noting also that the Inter-American Court has called the prohibition of enforced disappearances binding under *jus cogens*).

⁶ International Convention for the Protection of All Persons from Enforced Disappearance art. 2, G.A. Res. 61/177 (2006), *reprinted in* 14 Int'l. Hum. Rts. Rep. 582 (2007), *entered into force* Dec. 23, 2010 [hereinafter CED] (Article 17 requires the state to legislate regulations that prevent enforced disappearances; article 18 provides the right for families to access information about the detained individual; article 25 outlines the state duty to prevent and punish enforced disappearances under criminal law).

⁷ *Vienna Convention on the Law of Treaties* art. 18, 1155 U.N.T.S. 331, *entered into force* Jan. 27, 1980 [hereinafter VCLT] (Article 18 of the Vienna Convention on the Law of Treaties (VCLT) provides that a state is "obliged to refrain from acts that would defeat the object and purpose" when the state has signed the treaty or expressed its consent to be bound).

B. DEFINITION AND HUMAN RIGHTS VIOLATIONS ASSOCIATED WITH ENFORCED DISAPPEARANCES

Enforced disappearances occur in a variety of contexts and are a “complex and cumulative violation.”⁸ They violate a variety of rights; therefore, understanding enforced disappearances solely in terms of the individual rights violated does not fully capture the nature of an enforced disappearance.⁹ Given these challenges, human rights advocates have struggled to arrive at a single definition for “enforced disappearance,” and the definition has evolved over time.¹⁰

The primary variation between definitions of enforced disappearance has concerned the responsibility of non-state actors and the inclusion of a subjective element.¹¹ States have debated whether the prohibition against enforced disappearances should be limited to include only disappearances *perpetrated* by the state and exclude cases in which the state acquiesces to a disappearance.¹² States have also debated whether a subjective element should be included, such as requiring the actor to have possessed a certain state of mind while committing the disappearance.¹³ Nevertheless, codification of the definition of the violation in the CED largely has settled these debates by providing that an enforced disappearance is:

⁸ Independent Expert Manfred Nowak, Rep. Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, Pursuant to Paragraph 11 of Comm’n Resolution 2001/46, ¶¶ 11-16, 70, submitted to the Comm’n on Human Rights, U.N. Doc. E/CN.4/2002/71 (Jan. 7, 2002) [hereinafter Nowak Report] (“[E]nforced disappearance is a very complex and cumulative violation of human rights and humanitarian law which involves violations of the right to personal liberty and security, the right to recognition as a person before the law and the right not to be subjected to inhuman and degrading treatment and at least a grave threat to the right to life. In addition, the disappeared person, by being intentionally removed from the protection of the law, is also deprived of other human rights, including the right to an effective remedy before a domestic authority and to the protection of family life.”).

⁹ SCOVAZZI & CITRONI, *supra* note 3, at 257 (citing to U.N. High Commissioner for Human Rights, Oral Presentation of the Report Submitted by Mr. Manfred Nowak, Independent Expert, on the international legal framework for the protection of persons from enforced disappearance, pursuant to ¶ 11 of Commission Resolution 2001/46 (Mar. 26, 2002)).

¹⁰ *See, e.g.*, OTT, *supra* note 4, at 1-2.

¹¹ *See* SCOVAZZI & CITRONI, *supra* note 3, at 260; Eur. Parl. Ass., *Enforced Disappearances*, Doc. No. 10679 at ¶¶ 4, 45, 60 (Sept. 19, 2005).

¹² *See, e.g.*, Eur. Parl. Ass., *Resolution 1463: Enforced Disappearances*, at ¶ 10 (Oct. 3, 2005) [hereinafter *Resolution 1463*] (arguing for the inclusion of non-state actors in the definition of enforced disappearances).

¹³ *See, e.g., id.* at ¶ 10 (arguing for the exclusion of a subjective element in the definition of enforced disappearances).

[the] deprivation of liberty by agents of the State or by persons . . . 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[.]¹⁴

Thus, there are three elements to an enforced disappearance: (1) the deprivation of liberty, (2) with state involvement, and (3) state denial or concealment of the fate of the disappeared. These elements are consistent with previously formulated definitions and formal descriptions.¹⁵ The definition is broad, as state involvement is required but the threshold is low, i.e. acquiescence, and there is no intent requirement.¹⁶

Although the CED provides a definition of enforced disappearance, the nature and interdependence of this violation with other human rights violations is illustrated by examining the relationship between enforced disappearances and four other types of violations.

1. Arbitrary Detention

Arbitrary detention is often implicated in the course of an enforced disappearance. Detention, or restriction of liberty, is arbitrary if “it does not comply with the legal requirements laid down for it or if no such requirements exist at all, thus leaving it to the authorities to detain persons at their own discretion.”¹⁷ Individuals are protected from arbitrary detention under Article 9 of the International Convention on Civil and Political Rights (ICCPR),¹⁸ a treaty that India has ratified. However, arbitrary detention is a derogable right. This means that India may suspend this obligation in times of public

¹⁴ CED, *supra* note 6, at art. 2.

¹⁵ See *Declaration on the Protection of All Persons from Enforced Disappearance* art. 7, G.A. Res. 47/133, U.N. GAOR, 47th Sess., Supp. No. 49 (Vol. 1), U.N. Doc. A/47/49, at 207 (Dec. 18, 1992) [hereinafter *1992 Declaration*] (describing enforced disappearances); Rep. of the Working Grp. on Enforced or Involuntary Disappearances, 11, U.N. Doc. A/HRC/7/2 (Jan. 10, 2008). ¶ 6; Rome Statute of the International Criminal Court art. 7, 2187 U.N.T.S. 3, *entered into force* July 1, 2002 [hereinafter *Rome Statute*].

¹⁶ CED, *supra* note 6, at art. 2.

¹⁷ Oliver Döll, *Detention, Arbitrary*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 3 (Mar. 2007).

¹⁸ International Covenant on Civil and Political Rights art. 9, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter *ICCPR*] (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”); see also Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at art. 8 (Dec. 10, 1948) [hereinafter *UDHR*] (“No one shall be subjected to arbitrary arrest, detention or exile.”).

emergency, subject to some limitations.¹⁹

Enforced disappearances require the deprivation of liberty, and this often takes the form of arbitrary detention.²⁰ However, enforced disappearances are a more severe type of violation because they involve state denial of its responsibility and concealment of the victim and the victim's fate.²¹ Notably, a situation may not be classified as an enforced disappearance if authorities either admit involvement or provide information about the fate of the disappeared.²² For example in Kashmir, the government sometimes recognizes the detention of a "terrorist;" the state's recognition of this act would preclude it from falling under the rubric of enforced disappearance.²³

2. Extrajudicial Executions

Extrajudicial executions often occur in the course of an enforced disappearance,²⁴ and are separately recognized as a severe human rights violation. Extrajudicial, summary, targeted, and arbitrary executions all refer to the same concept of killing someone

¹⁹ See ICCPR, *supra* note 18, at art. 4 ("In time of public emergency ... States Parties ... may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colo[r], sex, language, religion or social origin."). Derogations have been referred to as "extraordinary limitations" on the exercise of human rights, and they may only be used during serious crises requiring extraordinary measures. U.N. Office of the High Commissioner for Human Rights, *Chapter 16: The Administration of Justice During Times of Emergency*, in HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 813 (2003), available at <http://www.ohchr.org/Documents/Publications/training9chapter16en.pdf>. States are generally obliged to inform other state parties of such derogations, give reasons for the derogations, and set a date on which the derogation will expire. See Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001); see also *Human Rights Treaty Bodies – Glossary of Technical Terms Related to the Treaty Bodies*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/Pages/TBGlossary.aspx> (last visited Apr. 3, 2014) (defining "derogation").

²⁰ See OTT, *supra* note 4, at 32.

²¹ *Kurt v. Turkey*, Judgment, 1998-III Eur. Ct. H.R. ¶¶ 109, 117 (May 25, 1998); *Orhan v. Turkey*, Judgment, Eur. Ct. H.R. ¶ 354 (June 18, 2002) ("The acute anxiety which must be attributed to persons apparently held incommunicado and without official record and excluded from the requisite judicial guarantees, is an added and aggravated aspect of the issues arising under Article 5.").

²² See OTT, *supra* note 4, at 32 (citing to *Kurt v. Turkey*, *supra* note 21, at ¶¶ 109, 117; *Orhan v. Turkey*, *supra* note 21, at ¶ 354).

²³ See generally ANGANA P. CHATTERJI ET AL., INTERNATIONAL PEOPLE'S TRIBUNAL ON HUMAN RIGHTS AND JUSTICE IN INDIAN-ADMINISTERED KASHMIR (IPTK), BURIED EVIDENCE: UNKNOWN, UNMARKED, AND MASS GRAVES IN INDIAN-ADMINISTERED KASHMIR—A PRELIMINARY REPORT 14 n.26 (2009) ("Struggle, armed and nonviolent, is discouraged by dominant India as 'terrorism'/'anti-nationalism'").

²⁴ See OTT, *supra* note 4, at 32.

outside the protection of law.²⁵ General Comment 6 of the ICCPR recognizes the egregious nature of these killings and emphasizes the duty of the state to prevent such acts:

States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.²⁶

The Human Rights Committee (HRC), a body of independent experts of the UN, issues General Comments as part of its mandate to monitor the implementation of the ICCPR.²⁷ These General Comments provide an authoritative, but not binding, interpretation of the ICCPR.²⁸

The Special Rapporteur on extrajudicial, summary or arbitrary executions has also critiqued states' practice of extrajudicial executions as part of their anti-terrorist policies.²⁹ In 2012, this special rapporteur visited India and expressed his "concern" for

²⁵ See NIGEL RODLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 182 (2009) (defining extrajudicial executions as, "killings committed outside the judicial process by, or with, the consent of public officials, other than as necessary measures of law enforcement to protect life or as acts of armed conflict in conformity with the rules of international humanitarian law").

²⁶ Human Rights Committee, *CCPR General Comment No. 6 The Right to Life (Article 6)*, ¶ 3, (Apr. 30, 1982). All human rights treaty bodies interpret the content of their human rights provisions and publish general comments according to thematic issues. The HRC is comprised of eighteen independent experts who monitor and interpret the ICCPR. States must submit regular reports to the committee, which examines the reports and issues concerns and recommendations regarding its "concluding observations." For more details on the HRC's mandate, see *Human Rights Bodies: General Comments*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/treaty/comments.htm> (last visited Apr. 9, 2014) (providing information and access to the general comments of treaty bodies); *Human Rights Committee*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last visited Apr. 9, 2014) [hereinafter *Human Rights Committee*] (explaining the mandate of the HRC).

²⁷ *Id.*

²⁸ See *Glossary of Treaty Body, Terminology*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/treaty/glossary.htm> (last visited Apr. 9, 2014) (providing definition for "general comment" and noting that comments allow the treaty body to make suggestions, not binding rules).

²⁹ See Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Communications to and from Governments*, ¶¶ 1-2, delivered to the Human Rights Council, U.N. Doc. A/HRC/14/24/Add.1 (June 18, 2010). Special Rapporteurs are individual special procedures of the Human Rights Council; they are "independent human rights experts with mandates to report and advise on human rights from a thematic or country-specific perspective." *Special Procedures of the Human Rights Council*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> (last visited Nov. 15, 2014). The role of the Special Rapporteur is "to uphold independence, efficiency, competence and integrity through probity, impartiality, honesty

India's consistent practice of extrajudicial executions, some of which targeted "terrorists."³⁰ In his report on the visit, the special rapporteur also noted that certain extrajudicial executions in Jammu and Kashmir were also enforced disappearances because the state disclaimed responsibility and refused to provide information about the victim.³¹

3. Incommunicado Detention

Incommunicado detention often occurs in the course of an enforced disappearance. "Incommunicado detention" refers to detention that prohibits the detainee from having contact with the outside world.³² International treaties do not expressly prohibit incommunicado detention. However, the HRC has found that incommunicado detention is conducive to torture and may violate Article 7 of the ICCPR.³³ The HRC has also stated that "prolonged incommunicado detention may facilitate the perpetration of torture . . . and may in itself constitute [a form of cruel, inhuman or degrading treatment]."³⁴ Additionally, the Special Rapporteur on torture has commented that, "torture is most frequently practi[c]ed during incommunicado detention."³⁵

and good faith. *Id.* They are not United Nations staff members and do not receive financial remuneration. *Id.* The independent status of the mandate holders is crucial in order to be able to fulfill their functions in all impartiality. *Id.* A mandate-holder's tenure in a given function, whether it is a thematic or country mandate, is limited to a maximum of six years." *Id.*

³⁰ Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to India*, ¶¶1-33, delivered to the General Assembly, U.N. Doc. A/HRC/23/47/Add.1 (Apr. 26, 2013) (by Christof Heyns) [hereinafter Heyns].

³¹ *Id.*; see also OTT, *supra* note 4, at 32-33 ("If a deprivation of liberty is immediately or later followed by an extrajudicial execution, there is a case of enforced disappearance, since the execution is a mere consequence of the placement outside the protection of the law. When it is known that victims were secretly executed, their cases can be considered as cases of enforced disappearance as long as the authorities deny to be involved or to have any information on the fate of the victim or, in other words, do not take responsibility for the death. When the authorities do not deny the facts surrounding an execution and their involvement therein, there is no case of enforced disappearance.").

³² RODLEY & POLLARD, *supra* note 25, at 461.

³³ See Human Rights Committee, *Preliminary Observations of the Human Rights Committee: Peru*, ¶¶ 18, 24, U.N. Doc. CCPR/C/79/Add.67 (July 25, 1996); Human Rights Committee, *Views: Womah Mukong v. Cameroon*, U.N. Doc. CCPR/C/51/D/458/1991 (July 21, 1994); Human Rights Committee, *Views: El-Megreisi v. Libyan Arab Jamahiriya*, U.N. Doc. CCPR/C/50/D/440/1990 (Mar. 24, 1994) [hereinafter *El-Megreisi v. Libya*].

³⁴ Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, et. al., *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, 2-3, 19, delivered to the Human Rights Council, U.N. Doc. A/HRC/13/42 (Feb. 19, 2010).

³⁵ Special Rapporteur of the Commission on Human Rights, *Report of the Special Rapporteur on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 39(f), delivered to the General Assembly, U.N. Doc. A/56/156 (July 3, 2001).

Enforced disappearances often involve some degree of incommunicado detention, but incommunicado detention is not always enforced disappearance.³⁶ For example, police might jail a person and cut him or her off from all forms of communication with the outside world, disclaim knowledge of these circumstances, and refuse to reveal the jailed person's whereabouts; doing so would amount to an enforced disappearance. However, an incommunicado detention may not always occur as part of an enforced disappearance—if police cut off all communication between the jailed person and the outside world but reveal the jailed person's fate and whereabouts or claim responsibility for the fate of the jailed person, the detained individual has not suffered an enforced disappearance.

4. Crimes Against Humanity

Enforced disappearances may constitute a crime against humanity if carried out as part of a widespread or systematic attack against a civilian population.³⁷ However, India has resisted international criminal justice and is not party to the treaty that establishes international jurisdiction over crimes against humanity, the Rome Statute of the International Criminal Court (ICC).³⁸ India has opposed the ICC and specifically objected to the inclusion of enforced disappearances in the Rome Statute.³⁹ Thus, while some enforced disappearances in India may meet the international definition of a crime against humanity, there is no international or domestic enforcement mechanism for prosecuting such incidents in India.

³⁶ See SCOVAZZI & CITRONI, *supra* note 3, at 9 (characterizing incommunicado detention as “[t]he second stage of enforced disappearance”).

³⁷ Rome Statute, *supra* note 15.

³⁸ *Id.*

³⁹ See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court: Official Records, Vol. II, p. 148 ¶ 47 (June 15-17, 1998), available at http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf (“[India’s] delegation was not in favor of including enforced disappearance of persons in the list of crimes against humanity.”); Usha Ramanathan, *India and the ICC*, 3 J. INT’L CRIM. JUST. 627 (2005).

DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW OF ENFORCED DISAPPEARANCES

The first modern, widespread practice of enforced disappearance occurred during World War II.⁴⁰ Hitler used a variety of tools of terror, including enforced disappearances, to commit genocide against the Jewish population of Europe and to control political opposition to Nazism. Hitler understood that vanishing individuals and keeping their relatives uncertain about a victim's fate terrorized citizens. One scholar has summarized Hitler's use of enforced disappearances as follows:

[a] practice of enforced disappearance was . . . established as a measure against the civilian population to produce a deterrent effect . . . Hitler clearly understood that effective and lasting intimidation of a civilian population can only be achieved either by capital punishment or by measures which keep the victim's relatives and the population in general uncertainty as to his fate. He also understood that vanishing without trace may be even worse than dying.⁴¹

Starting in the 1960s, the practice of enforced disappearances spread throughout much of Latin America.⁴² During this period, the most common method of enforced disappearance involved agents implementing state policies to “fight members of insurgent movements and political opposition.”⁴³ Dictators encouraged enforced disappearances, regardless of domestic legislative limits on the practice, because disappearing opponents proved an effective way to exercise power.⁴⁴ State agents used enforced disappearances to “spread terror”⁴⁵ by targeting representatives of political parties, trade unionists, teachers, students, leaders of cultural groups, members of minority groups, and those identified as “threats, opponents, terrorists, or subversive” to national security.⁴⁶

⁴⁰ SCOVAZZI & CITRONI, *supra* note 3, at 2.

⁴¹ *Id.* at 5.

⁴² *Id.* at 2 (noting that the practice of enforced disappearances developed in Guatemala during the early sixties and then spread throughout the region during the seventies and eighties).

⁴³ *Id.* at 7.

⁴⁴ *Id.*

⁴⁵ *Id.* at 8 (“Society as a whole was forced to live in a climate of physical and psychological submission to the benefit of those who, while violating the most basic laws of human coexistence, enjoyed a condition of total impunity.”).

⁴⁶ *Id.*

In more recent times, Amnesty International has estimated that the total number of disappeared persons from 1970 to 2000 in Latin America, Asia, Africa and Europe is between 300,000 and 500,000.⁴⁷ States continue to use enforced disappearances to spread terror, deter insurgency, take land, and engage in “social cleansing” of their most vulnerable populations.⁴⁸

India has a long history of enforced disappearances. In Punjab between 1986 and 1992, the state used extremist tactics—including disappearances—to quell problems of militancy.⁴⁹ Additionally, Kashmir has been affected by enforced disappearances that have occurred in its ongoing conflict.⁵⁰ The Indian government has recognized the disappearance of 3,744 people nationwide from 2000 to 2003.⁵¹ Despite this admission, incidents of disappearance have mostly resulted in “uneasy silences” by the Indian government and judiciary,⁵² in violation of international law.

A. DEVELOPMENT OF NORMS AT THE UNITED NATIONS AND IN THE INTER-AMERICAN SYSTEM

Over the past several decades, the international legal community has responded to enforced disappearances. This section reviews the evolution of these responses. In 1978, the United Nations formally expressed its condemnation of enforced

⁴⁷ *Id.* at 2 (noting that the figure cannot be established with certainty due to the nature of the phenomenon).

⁴⁸ *See id.* (“[e]nforced disappearance ha[s] become a global problem not restricted to a specific region.”); Human Rights Council, *Summary Records of the 3rd Meeting*, ¶ 3, delivered to the General Assembly, U.N. Doc. A/HRC/2/SR.3 (Oct. 3, 2006).

⁴⁹ Ramanathan, *supra* note 39, at 630 (also referencing as part of India’s challenging history, “the violence and mayhem that was visited on the Muslims in Gujarat with the connivance of the State police, bureaucracy and political leadership.”).

⁵⁰ *See id.*; ASIAN FEDERATION AGAINST INVOLUNTARY DISAPPEARANCES, RECLAIMING STOLEN LIVES 31-58 (2008), available at <http://www.afad-online.org/resources/books/56-reclaiming-stolen-lives> (last visited Apr. 9, 2014) (outlining the history and pervasive practice of enforced disappearances in Jammu and Kashmir).

⁵¹ SCOVAZZI & CITRONI, *supra* note 3, at 66-67; *see also* Heyns, *supra* note 30, at ¶ 87 (noting that in Jammu and Kashmir, “[t]he Government has estimated that 4,000 people have gone missing, and claimed in exchanges with the Special Rapporteur that a large portion of those allegedly missing crossed the border to join armed groups in Pakistan. Other sources have estimated the number to be 5,000–10,000.”).

⁵² *See id.* at ¶ 67 (noting that, “[d]elay in judicial proceedings constitutes one of India’s most serious challenges and has clear implications for accountability. For example, lengthy and ineffective proceedings exist in Punjab where large-scale enforced disappearances and mass cremations occurred between the mid-1980s and 1990s. The lack of political will to address these disappearances is evident in a context where steps to ensure accountability have been reportedly inconclusive.”); Ramanathan, *supra* note 39, at 629-31; *see also* SCOVAZZI & CITRONI, *supra* note 3, at 67 (with respect to disappearances in Kashmir, “[s]ince 1990 several complaints have been presented to the courts in Kashmir but not a single case has been solved.”).

disappearances.⁵³ In its resolution on the issue, the General Assembly stated: “enforced disappearances often are the result of excesses on the part of law enforcement or security authorities or similar organizations, as well as of unlawful actions or widespread violence.”⁵⁴

Two years later, the United Nations established the Working Group on Enforced or Involuntary Disappearances (WGEID). Under its initial mandate, which is still operative, the WGEID seeks to assist families of disappeared individuals in ascertaining the fate and whereabouts of their missing family member(s).⁵⁵ To accomplish this directive, the WGEID accepts inquiries from families whose relatives have disappeared.⁵⁶ The WGEID accepts cases from anywhere in the world and individuals do not have to exhaust domestic remedies before submitting a request for assistance to the WGEID.⁵⁷ Rather than conduct its own investigation, the WGEID instead asks the domestic government to properly investigate the case and report back.⁵⁸ In other words, the WGEID coordinates between victims’ families and state governments to establish the fate and whereabouts of victims,⁵⁹ but the WGEID neither conducts the investigation nor determines state or criminal responsibility.⁶⁰ The WGEID has received more cases than it can address efficiently.⁶¹ The majority of cases on WGEID’s current backlog relate to Asian countries.⁶²

Regional human rights mechanisms also have ruled on the issue of enforced disappearances.⁶³ In particular, the Inter-American Court has led the way in

⁵³ See *Disappeared Persons*, G.A. Res. 33/173, U.N. Doc. A/RES/33/173 (Dec. 18, 1978).

⁵⁴ SCOVAZZI & CITRONI, *supra* note 3, at 246.

⁵⁵ See *Working Group on Enforced and Involuntary Disappearances: Mandate*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx> (last visited Apr. 9, 2014).

⁵⁶ See *id.*

⁵⁷ *Practical Information: the Working Group on Enforced or Involuntary Disappearance in a Nutshell*, 2, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS, available at http://www.ohchr.org/Documents/Issues/Disappearances/how_to_use_the_WGEID.pdf (last visited Apr. 9, 2014)

⁵⁸ See *id.*

⁵⁹ SCOVAZZI & CITRONI, *supra* note 3, at 247 (“The Working Group endeavors to establish a channel of communication between the families and the governments concerned in order to ensure that individual cases which families have brought to the Group’s attention are investigated with the objective of clarifying the whereabouts of disappeared persons.”).

⁶⁰ *Id.* at 95.

⁶¹ *Id.* at 65-66.

⁶² *Id.*

⁶³ *Id.* at 132-85 (reviewing the Inter-American Court of Human Rights case law on enforced disappearances); *id.* at

condemning, prohibiting, and punishing violations of enforced disappearances.⁶⁴ The Inter-American Court is the autonomous judicial organ of the regional human rights system in the Americas.⁶⁵ In 1988, the Inter-American Court first ruled on the issue of enforced disappearance.⁶⁶ Since then, the court has produced a substantial body of case law on the topic. Notably, in 2006, the Inter-American Court held the prohibition against enforced disappearances and the state obligations to investigate and punish those responsible as *jus cogens* norms.⁶⁷ Additionally, member states of the Organization of American States, the regional state association of which the Inter-American Court is the highest human rights tribunal, adopted a convention addressing enforced disappearances, which entered into force in 1996.⁶⁸

Outside of Latin America and Europe, which have regional human rights courts, there are limited opportunities for family members of the disappeared to seek international adjudication of human rights claims.⁶⁹ Where states have adopted the First Optional Protocol to the ICCPR, individuals can file petitions with the HRC, and allege violations of the rights enumerated in the ICCPR, such as the non-derogable rights to life and to be free from torture.⁷⁰ The committee, a body of independent experts, monitors the implementation of the ICCPR by states party to the convention.⁷¹ Beyond hearing

188-220 (reviewing the European Court of Human Rights case law on enforced disappearances).

⁶⁴ See, e.g., David Anderson, *Book Review of The Practice and Procedure of the Inter-American Court of Human Rights*, 100 AM. J. INT'L L. 1, 505 (2006) (remarking that the Inter-American Court's "reparation orders in the last decade have become the most sweeping and fully restorative of any international court"); SCOVAZZI & CITRONI, *supra* note 3, at 132 (stating the Inter-American Court of Human Rights has provided the "most significant contribution towards the development of substantive and procedural rules on the matter of enforced disappearance.").

⁶⁵ Organization of the American States (OAS), *Statute of the Inter-American Court* art. 1, Res. No. 448 (Oct. 1979), available at <http://www.corteidh.or.cr/index.php/en/about-us/estatuto>.

⁶⁶ See Velásquez Rodríguez v. Honduras, Merits, Inter-Am. Ct. H.R. (July 29, 1988). In the following year, 1989, the court continued to address cases of disappearance. See Godínez Cruz v. Honduras, Merits, Inter-Am. Ct. H.R. (Jan. 20, 1989); Fairén Garbí et al. v. Honduras, Merits, Inter-Am. Ct. H.R. (Mar. 15, 1989).

⁶⁷ Goiburú et al. v. Paraguay, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. ¶ 84 (Sept. 22, 2006), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_153_ing.pdf ("In brief, the Court finds that, as may be deduced from the preamble to the aforesaid Inter-American Convention, faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*.").

⁶⁸ Organization of the American States (OAS), *The Inter-American Convention on Forced Disappearance of Persons* (June 9, 1994); see also SCOVAZZI & CITRONI, *supra* note 3, at 253 ("The fact that the first international legally binding instrument on enforced disappearances was promoted by Latin American countries has a strong symbolic value [because of the Latin American history of widespread disappearances].").

⁶⁹ SCOVAZZI & CITRONI, *supra* note 3, at 96.

⁷⁰ Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force Mar. 23, 1976.

⁷¹ See *Human Rights Committee*, *supra* note 26.

individual claims from residents in states that have adopted the protocol, the HRC also reviews state reports and makes “concluding observations” on the state’s compliance with the ICCPR.⁷² The HRC is the only quasi-judicial international body that may consider cases of enforced disappearances for states outside of Latin America.⁷³

In 1992, the UN General Assembly adopted the UN Declaration for the Protection of All Persons from Enforced Disappearances (1992 Declaration). The 1992 Declaration recognized the non-derogable nature of state obligations regarding enforced disappearance.⁷⁴ Though not binding in itself, this resolution was particularly important in establishing a foundation for the CED; additionally, some scholars have asserted that its provisions represent binding customary law.⁷⁵

Since 1993, the WGEID has expanded its mandate to include annual reporting on states’ implementation of the 1992 Declaration.⁷⁶ More recently, the WGEID has also expressed its “grave concern” that anti-terrorist justifications for enforced disappearances are being put forward by many states.⁷⁷ Enforced disappearances may not be defended on national security grounds because of the non-derogable nature of the states’ obligation to respect, protect, and ensure that individuals are not subjected to this violation.⁷⁸ The WGEID has urged governments “to make available to families all information on the fate and whereabouts of any person who is arrested and detained, for

⁷² *Id.* (explaining the mandate of the Human Rights Committee).

⁷³ SCOVAZZI & CITRONI, *supra* note 3, at 96; *see, e.g.*, Human Rights Committee, *Views: Quinteros v. Uruguay*, 216, U.N. Doc. Supp. No. 40 (A/38/40) (July 21, 1983); Human Rights Committee, *Concluding Observations on Algeria*, U.N. Doc. CCPR/C/79/Add.95 (Aug. 18, 1998); Human Rights Committee, *Views: Bousroual v. Algeria*, U.N. Doc. CCPR/C/86/D/1085/2002 (Mar. 15, 2006); Human Rights Committee, *Views: Benaziza v. Algeria*, U.N. Doc. CCPR/C/99/D/1588/2007 (July 26, 2010); Human Rights Committee, *Views: Bashasha v. Libya*, U.N. Doc. CCPR/C/100/D/1776/2008 (Nov. 2, 2010).

⁷⁴ *1992 Declaration*, *supra* note 15, at art. 7. (“[n]o circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.”).

⁷⁵ *See* SCOVAZZI & CITRONI, *supra* note 3, at 99, 249; HUMAN RIGHTS WATCH, NEPAL’S OBLIGATIONS UNDER INTERNATIONAL LAW (Feb. 2005), *available at* <http://www.hrw.org/reports/2005/nepal0205/3.htm> (characterizing the 1992 Declaration as non-binding, but still offering “authoritative guidance”).

⁷⁶ SCOVAZZI & CITRONI, *supra* note 3, at 251 (“[I]n its annual reports the Working Group has repeatedly stressed that the obligation to implement the 1992 Declaration . . . [requires states to take legislative] and other preventative measures . . . in order to ensure that acts of disappearance will not occur in the future.”).

⁷⁷ U.N. Working Group on Enforced and Involuntary Disappearances, *Annual Report for 2005*, ¶¶ 22, 594-96, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/2006/56 (Dec. 27, 2005).

⁷⁸ *Id.*

whatever reason,” including for anti-terrorist actions.⁷⁹ In spite of the WGEID’s efforts to remind governments of their obligation to fully implement the 1992 Declaration, there has been little progress in this regard.⁸⁰

In 2001, as part of the lead up to drafting the CED, the UN Commission on Human Rights appointed Manfred Nowak as an independent expert to examine the existing international criminal and human rights frameworks for protecting people from enforced disappearance.⁸¹ In his examination, Nowak identified several gaps in the existing legal framework under international law, including the lack of a binding obligation on states to make enforced disappearance a crime under their domestic law⁸² and the lack of a coherent definition of “enforced disappearance.”⁸³ He also noted that effective domestic criminal justice systems must play a central role in deterring and preventing such disappearances.⁸⁴

The CED, which entered into force in 2010,⁸⁵ addressed some of these legal gaps. As a highly significant development in the evolution of international legal norms concerning enforced disappearances, the CED and its development will be discussed in greater detail in subsection B under the Development of International Human Rights Law of Enforced Disappearances section.

In more recent years, the WGEID has focused on the intersection of enforced disappearances and women’s rights.⁸⁶ In its commentary, the WGEID notes that enforced disappearances cause particular and disproportionate harm to women, on the economic, social, physical, and psychological levels.⁸⁷ The WGEID also has made

⁷⁹ *Id.*

⁸⁰ SCOVAZZI & CITRONI, *supra* note 3, at 260.

⁸¹ U.N. Comm’n on Human Rights, *Question of Enforced or Involuntary Disappearances*, ¶¶ 11-12, U.N. Doc. E/CN.4/2001/46 (Apr. 23, 2001).

⁸² Nowak Report, *supra* note 8, at ¶¶ 72-94.

⁸³ *Id.* at ¶¶ 73-74.

⁸⁴ *Id.* at ¶¶ 72-94.

⁸⁵ See CED, *supra* note 6.

⁸⁶ WGEID is preparing a study on the impact of enforced disappearances on victims’ families; Rep. of the Working Group on Enforced or Involuntary Disappearances, 27th Sess., ¶ 16, U.N. Doc. A/HRC/27/49 (Aug. 4, 2014); see also *UN Expert Group Launches One-Year Study on the Impacts of Enforced Disappearances on Victims’ Families*, U.N. OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS (Nov. 13, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13982&LangID=E>.

⁸⁷ U.N. Working Group on Enforced and Involuntary Disappearances, *Report*, ¶ 62, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/19/58/Rev.1 (Mar. 2, 2012) [hereinafter *WGEID 2012 Report*] (“Women are particularly

recommendations regarding the responsibility of states to address these impacts, for example by calling upon states to provide more than financial reparation to redress the complex harms women suffer as a result of enforced disappearances.⁸⁸

In addition, in October 2012, the WGEID convened a multi-stakeholder meeting with international experts on enforced disappearances and women's rights. The convening brought together representatives of communities that have been affected by enforced disappearances, government representatives, and representatives from national and international human rights organizations. Together, these experts explored "best practices and challenges to protect women from enforced disappearance and its impact."⁸⁹ At the meeting, the Deputy High Commissioner for Human Rights, Kyung-wha Kang noted the particular social and economic vulnerabilities that women face when male breadwinners are disappeared, and that politically active women are increasingly disappeared themselves.⁹⁰ The WGEID published select conclusions from the meeting and focused its annual report on reparations, including a gendered perspective on reparations that accounts for the particular harms suffered by women in certain types of

affected by enforced disappearances as the consequences at economic, social and psychological levels, are most often borne by them. If they are the victims of disappearance, they are particularly vulnerable to sexual and other forms of violence. In addition, as they are at the forefront of the struggle to resolve the disappearances of members of their families, they are subject to intimidation, persecution and reprisals.").

⁸⁸ *Id.* at ¶ 9 ("In most cases, the disappeared persons are men and were the family breadwinners and special social support should be provided to dependent women and children. The acceptance of financial support for members of the families should not be considered as a waiver of the right to integral reparation for the damage caused by the crime of enforced disappearance, in accordance with article 19 of the [1992] Declaration."). The Human Rights Council has also urged states to protect women from enforced disappearances and in the investigation process because of the vast vulnerabilities that women face. See Human Rights Council, *Res. 10/10: Enforced or Involuntary Disappearances*, 10th Session, ¶15(e)-(f), U.N. Doc. A/HRC/Res.10/10 (Mar. 26, 2009).

⁸⁹ See U.N. Office of the Commissioner for Human Rights, *Concept Note—20 Years of the Declaration: Looking Back and Looking Forward*, available at http://www.ohchr.org/Documents/Issues/Disappearances/ConceptNote_20yearDeclaration_en.pdf (last visited Feb. 24, 2015); see also *Protecting Women from the Impact of Enforced Disappearances*, U.N. OFFICE OF THE COMMISSIONER FOR HUMAN RIGHTS (Dec. 14, 2012), <http://www.ohchr.org/EN/NewsEvents/Pages/ProtectingWomenFromImpactOfEnforcedDisappearances.aspx> (noting that twenty years after the 1992 Declaration was implemented, "women continue to bear the consequences of the enforced disappearances of their loved ones").

⁹⁰ *Id.* ("In societies where gender-based discrimination in laws and policies hinders the full realization of the human rights of women and limits their autonomy and participation in aspects of public and political life, the social and economic impact of disappearances is felt more strongly and, in turn, renders women and their children more vulnerable to exploitation and social marginalization."); see also *Statement for the Opening of the WGEID 20th Anniversary of the Declaration on Enforced Disappearances, Delivered by the Deputy High Commissioner*, U.N. OFFICE OF THE COMMISSIONER FOR HUMAN RIGHTS (Oct. 30, 2012), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12717&LangID=E>.

human rights violations.⁹¹ On reparations, the WGEID made several recommendations, including that states should remove potential barriers to women’s claims for reparation, like threats, intimidation, or reprisals; use a “consultative process” where women can assert which forms of reparation are best suited to their particular situation; and account for individualized factors when deciding the appropriate type of reparation to provide women.⁹²

B. DEVELOPMENT AND CONTENT OF THE CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

In 1981, at the first international non-governmental colloquium on the issue of enforced disappearances, the idea emerged to draft an international convention against enforced disappearances⁹³ and by 1998, a draft had been circulated.⁹⁴ The final CED draft sought to address major gaps in international law, including those gaps identified by Nowak,⁹⁵ and create an international obligation to prohibit and redress the increase of enforced disappearances.⁹⁶ Several state delegates and non-governmental observers attended the meetings to draft the final CED text.⁹⁷

The CED grew out of a body of jurisprudence and scholarly work that had condemned enforced disappearances for decades. The CED entered into force in 2010,⁹⁸ and “[h]uman rights organizations and scholars welcomed [it] as an important step in the struggle against enforced disappearance[.]”⁹⁹

⁹¹ U.N. Working Group on Enforced and Involuntary Disappearances, *Report*, ¶¶ 14, 46, *delivered to the Human Rights Council*, U.N. Doc. A/HRC/22/45 (Jan. 28, 2013) [hereinafter *WGEID Report from January 2013*].

⁹² *Id.* at ¶ 67.

⁹³ SCOVAZZI & CITRONI, *supra* note 3, at 95.

⁹⁴ See U.N. Working Group on the Administration of Justice, *The Administration of Justice and Human Rights*, 21, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/Sub.2/1998/19 (Aug. 19, 1998).

⁹⁵ See Tanja Florath, *The Protection Against Enforced Disappearance* 17 (August 2011), *available at* http://www.academia.edu/3804193/The_Protection_Against_Enforced_Disappearance_in_Armed_Conflict (unpublished LLM dissertation from the Irish Centre for Human Rights).

⁹⁶ SCOVAZZI & CITRONI, *supra* note 3, at 255.

⁹⁷ See Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance, *Report*, ¶ 6, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/2006/57 (Feb. 2, 2006) [hereinafter *2006 Report from Working Group to Draft CED*] (representatives from several groups attended CED drafting discussions, including representatives from the International Women’s Rights Action Watch, Families of Victims of Involuntary Disappearance, and the South Asia Human Rights Documentation Center).

⁹⁸ See CED, *supra* note 6.

⁹⁹ OTT, *supra* note 4, at 189.

Four notable contributions of the CED include the recognition of: (a) the non-derogable prohibition on enforced disappearance,¹⁰⁰ (b) an inclusive definition of the victim as “any individual who has suffered harm as the direct result of an enforced disappearance,”¹⁰¹ (c) the right to truth in cases of enforced disappearance,¹⁰² and (d) the obligation states to punish perpetrators of enforced disappearances.¹⁰³ Additionally, the CED provides for the establishment of the Committee on Enforced Disappearances (CED Committee) to examine state reports, possibly receive individual complaints, and institute an “emergency procedure” for contemporaneous instances of enforced disappearances.¹⁰⁴

The CED also obligates states to provide a comprehensive remedy structure for victims, families, and communities that suffer from enforced disappearances. The remedies afforded are designed to ensure the right to justice, truth, reparations, and to establish accountable institutions that prevent enforced disappearances from recurring. Table 1 below identifies the articles of the CED that relate to these four components of the right to remedy. The general right to a remedy, and greater detail on these dimensions are discussed below in the section entitled The Right to a Remedy.

¹⁰⁰ CED provides in Article 1, paragraph 1, “[n]o one shall be subjected to enforced disappearance,” and paragraph 2 provides for non-derogability, stating that, “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.” CED, *supra* note 6, at art. 1.

¹⁰¹ *Id.* at art. 24(1); *see also* ОТТ, *supra* note 4, at 268 (noting that “[p]aragraph 1 [of CED] has been received as a ‘highly innovative provision’ . . . Enforced disappearance does not only lead to severe suffering of the disappeared persons themselves but also of their families and friends who are left with uncertainty about the fate of their loved ones and are troubled by the indifferent attitude and inaction shown by the authorities.”).

¹⁰² CED, *supra* note 6, at art. 24.

¹⁰³ The Inter-American Court has noted that punishing those responsible for enforced disappearance has taken the form of a *jus cogens* norm. *See Goiburú et al. v. Paraguay*, *supra* note 67, at ¶ 84 (“the corresponding obligation to . . . punish those found to be responsible [has] acquired the character of *jus cogens*.”). Other international bodies have not formally adopted this perspective, and it may not represent the majority view.

¹⁰⁴ CED, *supra* note 6, at arts. 26-36.

Table 1: Right to Justice, Truth, and Reparations in the CED

Component	Related Articles
Right to Justice	<ul style="list-style-type: none"> • <u>Art. 6</u>: States must hold actors involved in an enforced disappearance (ED) criminally responsible • <u>Art. 7</u>: Requiring that an adequate penalty be attached to EDs • <u>Art. 10</u>: States must take into custody persons suspected of committing an ED • <u>Art. 13</u>: Preventing impunity from the commission of an ED • <u>Art. 14</u>: States must collaborate to bring about criminal prosecution for an ED • <u>Art. 25</u>: States must prevent and punish harms done to children through EDs
Right to Truth	<ul style="list-style-type: none"> • <u>Art. 12</u>: States must protect individuals' right to report EDs; and States must investigate whenever there are reasonable grounds for believing that an ED has occurred • <u>Art. 15</u>: States must assist in "locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains" • <u>Art. 18</u>: States must provide findings to surviving families of a disappeared person • <u>Art. 24(2)</u>: Provides for the victims' right to the truth • <u>Art. 25</u>: States must investigate when harm is done to children through acts of ED
Right to Reparation	<ul style="list-style-type: none"> • <u>Art. 21</u>: States must ensure that released individuals, who were previously deprived of liberty, be able to fully exercise their rights at the time of release • <u>Art. 24</u>: Provides for the right to reparation, including compensation and, as appropriate, restitution, rehabilitation, satisfaction, and guarantees of non-repetition
Guarantees of Non-Recurrence	<ul style="list-style-type: none"> • <u>Art. 17</u>: States must clarify their modalities of detention • <u>Art. 22</u>: States must punish conduct that impedes the fulfillment of their duties • <u>Art. 23</u>: States must train and educate personnel who may be involved in the detention of individuals • <u>Art. 25</u>: States must establish procedures that address wrongfully adopted children in cases of ED

C. CRITIQUES OF THE CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

While many human rights activists celebrate the implementation of the CED, some scholars have asserted concerns with the treaty, five of which are discussed here. First, the definition of enforced disappearance requires state involvement under the CED, and does not criminalize enforced disappearances perpetrated by non-state actors.¹⁰⁵ This fails to protect all those who are subjected to, or affected by, enforced disappearances perpetrated by non-state actors.

Second, the CED does not prohibit states from granting military tribunals jurisdiction to adjudicate claims of enforced disappearance.¹⁰⁶ Thus, a state could designate a military tribunal to fulfill its obligation to prosecute the crime of enforced disappearance.¹⁰⁷ Human rights advocates criticize this aspect of the convention because military tribunals tend to provide less rigorous scrutiny and are often partial towards the state.¹⁰⁸ The 1992 Declaration, which called for adjudication before “competent civil authorities,” employed language more favorable to victims because it suggests that *civilian* courts are the appropriate judicial authority to resolve enforced disappearance cases.¹⁰⁹

Third, the CED fails to address “amnesty laws, pardons and other similar measures conceived to evade responsibility for human rights violations.”¹¹⁰ Though laws that shield perpetrators from punishment frustrate the goals of the CED to punish wrongdoing, the convention does not explicitly prohibit such laws, which creates ambiguity about the strength and character of the state obligation to prohibit enforced disappearances. The 1992 Declaration, on the other hand, explicitly dictated that perpetrators of enforced disappearances “shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.”¹¹¹

¹⁰⁵ OTT, *supra* note 4, at 290.

¹⁰⁶ See CED, *supra* note 6, at art. 11(3) (vaguely identifying “competent, independent and impartial court[s] or tribunal[s]” as effective judicial measures).

¹⁰⁷ OTT, *supra* note 4, at 290; SCOVAZZI & CITRONI, *supra* note 3, at 320.

¹⁰⁸ OTT, *supra* note 4, at 290.

¹⁰⁹ See 1992 Declaration, *supra* note 15, at art. 14.

¹¹⁰ OTT, *supra* note 4, at 291.

¹¹¹ 1992 Declaration, *supra* note 15, at art. 18. The 1992 Declaration also provided that, with regards to pardon, “the extreme seriousness of acts of enforced disappearance shall be taken into account.” *Id.*

Though the 1992 Declaration does not represent binding law on states, advocates can still draw on its provisions as persuasive authority.¹¹²

Fourth, the CED does not allocate the burden of proof for cases of enforced disappearance. Given the secretive nature of enforced disappearances, it is often difficult or impossible for the next of kin to provide evidence sufficient to prove state responsibility.¹¹³ In addition, Article 20 of the CED creates significant exceptions to the general rule that information shall be made available to the victim's next of kin, thus making it even harder for family members to obtain evidence.¹¹⁴ The Article 20 exceptions contrast with the information-sharing provision of the 1992 Declaration, which simply stipulated that information be made available for victim's next of kin.¹¹⁵ Shifting the burden in favor of the claimants would alleviate this procedural injustice.¹¹⁶ However, the CED fails to specify the operation of the burden of proof, which may disadvantage victims.

Fifth, the CED allows states to impose statutes of limitation on claims of enforced disappearance, and fails to place clear limits on the state's ability to impose such statutes.¹¹⁷ Though the 1992 Declaration allowed states to impose statutes of limitation, it restricted their type. The 1992 Declaration required that statutes of limitation not begin to run until the establishment of the "fate and the whereabouts of persons who have

¹¹² See SCOVAZZI & CITRONI, *supra* note 3, at 249 (noting that the 1992 Declaration "provided a set of rules that all the States of the United Nations were called upon to apply as a minimum to prevent and suppress the practice [of enforced disappearances]").

¹¹³ OTT, *supra* note 4, at 292 ("The secret nature of enforced disappearance leads to the consequence that it is very difficult or even impossible for the next of kin . . . to provide any evidence . . . [so] it would be appropriate to shift the burden of proof in favor of the applicants.").

¹¹⁴ CED, *supra* note 6, at art. 20 ("Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in [A]rticle 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention.").

¹¹⁵ 1992 Declaration, *supra* note 15, at art. 10 ("Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.").

¹¹⁶ OTT, *supra* note 4, at 292.

¹¹⁷ CED, *supra* note 6, at art. 8.

disappeared.”¹¹⁸ The CED, however, lacks a similar provision.¹¹⁹ Rather, the CED merely requires states to take into account the “continuous nature” of enforced disappearances in their statutes of limitation.¹²⁰ Narrow interpretations of Article 8 could allow states to implement statutes of limitation that begin running, or even expire, before the establishment of the fate and whereabouts of victims, thus barring victims from judicial enforcement of their rights.¹²¹

D. INDIA AND THE CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

Despite these critiques, the CED largely advances the international legal framework to address enforced disappearance. As of June 2013, ninety-three states had signed the CED and forty had ratified the treaty.¹²² India is one of fifty-three states that has signed but not ratified the Convention,¹²³ meaning it is obligated not to act contrary to the object and purpose of the treaty, but not specifically bound by its provisions.¹²⁴ Generally, the treaty monitoring body clarifies the object and purpose of the treaty; however, as a new body, the CED Committee has not yet offered such guidance.¹²⁵ Once the committee provides this clarification, advocates will need to develop arguments to frame India’s compliance with the CED accordingly.

Though India has not ratified the CED, it did participate in its drafting. India favored a definition of enforced disappearance that included specific intent as the *mens rea* element.¹²⁶ India justified its position by asserting that the definition of enforced disappearance in the CED should parallel the definition found in the Rome Statute,¹²⁷

¹¹⁸ 1992 Declaration, *supra* note 15, at art. 17.

¹¹⁹ See CED, *supra* note 6, at art. 8.

¹²⁰ *Id.*

¹²¹ SCOVAZZI & CITRONI, *supra* note 3, at 313 (noting that this failure to include an explicit requirement “introduces an element of ambiguity and may allow restrictive interpretations”).

¹²² CED, *supra* note 6.

¹²³ *Id.*

¹²⁴ See VCLT, *supra* note 7, at art. 18.

¹²⁵ See *Committee on Enforced Disappearances*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/ced/Pages/CEDIndex.aspx> (last visited Apr. 14, 2014) (as of Apr. 14, 2014, the CED Committee had made only two statements (one from November 2012, and another from November 2013), and neither statement pertained to this discussion).

¹²⁶ 2006 Report from Working Group to Draft CED, *supra* note 97, at 49-50.

¹²⁷ Rome Statute, *supra* note 15, at art. 7(2)(l) (the definition of enforced disappearance in the Rome Statute includes the perpetrator’s intent to remove the victim from legal protection for a long time).

which reflects the common understanding that *mens rea* is required of every criminal act.¹²⁸ The drafters did not adopt India's suggestion and the final definition does not include a *mens rea* requirement. India also suggested that the proposed treaty would better function as an optional protocol to the ICCPR instead of a separate convention with its own monitoring body.¹²⁹ Again, the ultimate result did not reflect India's position.

India also made remarks that signaled its potential disagreement with ideas underlying the CED. For example, India asserted its freedom to deviate from the treaty definition when adopting legislation that criminalizes enforced disappearance,¹³⁰ critiqued the exclusion of non-state actors from the definition of enforced disappearance,¹³¹ and opposed provisions guaranteeing victims a right to a remedy.¹³²

INDIA'S OBLIGATIONS REGARDING ENFORCED DISAPPEARANCES UNDER INTERNATIONAL HUMAN RIGHTS LAW

India has undertaken certain international obligations with regard to enforced disappearances. Whereas the previous section examined the nature of enforced disappearance, this section addresses the particular obligations that India has undertaken with regard to two rights that are often, if not always, violated in the course of an enforced disappearance: the right to be free from enforced disappearance and the right to be free from torture.

¹²⁸ *2006 Report from Working Group to Draft CED*, *supra* note 97, at 49 (India asserted, "[t]he constructive ambiguity in the definition of enforced disappearance is not helpful, as it results in the creation of two different standards of proof for the same crime: one in this instrument and another in the Rome Statute. The missing elements of intent and knowledge in the definition will not help in easing the burden of proof, as *mens rea* is an essential element for the criminalization of any act. A proposition as to state of mind or knowledge is an essential ingredient of the definition of any crime and should have been included in the definition.").

¹²⁹ *Id.* at 50.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* (The Indian delegate stated, "[o]n the question of remedy and compensation, in a common-law system such as ours, there is no statutory right to remedy, but the judiciary at all levels, as well as the national human rights commission, regularly grants remedies and compensation to victims of human rights abuses.").

It should be noted that many other rights are often violated during an enforced disappearance, depending on its nature and factual circumstances involved. Rights commonly violated in the course of an enforced disappearance include the right to life,¹³³ the right to security of the person,¹³⁴ the right to recognition as a person before the law,¹³⁵ the right to privacy and family life,¹³⁶ and the right not to be arbitrarily deprived of one's liberty.¹³⁷ These are rights enshrined in the ICCPR, a treaty to which India is a party. However, a fuller discussion of the nature of India's duties with regard to these rights is beyond the scope of this paper.

A. RIGHT TO BE FREE FROM ENFORCED DISAPPEARANCES

The CED codifies the right of individuals to be free of enforced disappearances in all circumstances.¹³⁸ However, as India has signed but not ratified the convention, it is not fully bound by the provisions of the CED. As a signatory, India must not act contrary to the object and purpose of the CED, which would likely include the prohibition against enforced disappearance because it forms the central purpose of the CED.

In addition to these treaty norms, some scholars have asserted that the prohibition of enforced disappearances is a rule of customary international law.¹³⁹ Additionally, the Inter-American Court of Human Rights has recognized the right to be free from enforced disappearance as a *jus cogens* norm.¹⁴⁰ *Jus cogens* norms are generally recognized norms from which states cannot derogate.¹⁴¹ Other international tribunals have not explicitly interpreted the prohibition against enforced disappearances as a *jus cogens*, or

¹³³ ICCPR, *supra* note 18, at art. 6.

¹³⁴ *Id.* at art. 9.

¹³⁵ *Id.* at art. 16.

¹³⁶ *Id.* at art. 17.

¹³⁷ *Id.* at art. 6.

¹³⁸ *Id.* at arts. 1-2.

¹³⁹ See Nikolas Kyriakou, *The International Convention for the Protection of All Persons From Enforced Disappearance and Its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Rendition*, 13 MELB. J. INT'L L. 424 (2012) (analyzing the plethora of sources, and variety of methods that point towards the establishment of a customary rule prohibiting enforced disappearances); AMNESTY INTERNATIONAL, DENYING THE UNDENIABLE: ENFORCED DISAPPEARANCES IN PAKISTAN 8 (2008), available at <http://www.refworld.org/pdfid/48887e912.pdf> (asserting that even if Pakistan does not ratify CED, Pakistan "is still bound by the prohibition on enforced disappearances which is a rule of customary international law").

¹⁴⁰ *Goiburú et al. v. Paraguay*, *supra* note 67, at ¶ 84.

¹⁴¹ See *Derogation Clause* in BLACK'S LAW DICTIONARY (9th ed. 2009) (providing definition of "derogation clause").

even customary, norm. However, the Committee Against Torture has suggested that torture may include enforced disappearances and to this extent would be included in the *jus cogens* prohibition against torture.¹⁴²

B. RIGHT TO BE FREE FROM TORTURE

Torture often occurs in the course of an enforced disappearance.¹⁴³ The prohibition against torture is an accepted *jus cogens* norm.¹⁴⁴ As such, no state may escape its obligation to respect, protect, and ensure full enjoyment of this right. The Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) has codified this norm in great detail; India has signed, but has not yet ratified, the CAT.¹⁴⁵ The ICCPR also codifies the non-derogable right to be free from torture.¹⁴⁶ India has ratified the ICCPR and is thus bound to by this provision.¹⁴⁷ Accordingly, India is obligated to respect, protect, and ensure the prohibition of torture under treaty and as a *jus cogens* norm.

In order to establish torture under international law, two standards must be met. First, the action must rise to a certain threshold of severity.¹⁴⁸ This threshold relates to the level of pain or suffering, either mental or physical, that the perpetrator inflicts on the victim.¹⁴⁹ To measure the severity, courts often look to the duration of the mistreatment, and the victim's age and state of health.¹⁵⁰ Second, the infliction must be aimed at achieving purposes "such . . . as obtaining . . . information or a confession, punishing him . . . intimidating or coercing him . . . or for any reason based on discrimination of any

¹⁴² Committee Against Torture, *Concluding Observations on Spain*, ¶ 21, U.N. Doc. CAT/C/ESP/CO/5 (Dec. 9, 2009) (after accounting for the *jus cogens* prohibition of torture, the Committee Against Torture asserted that "acts of torture [] also include enforced disappearances").

¹⁴³ SCOVAZZI & CITRONI, *supra* note 3, at 58 ("As is well documented, disappearance is often a precursor to torture and even to extrajudicial execution.").

¹⁴⁴ The International Law Commission formally adopted this view in 2001. See Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, art. 26(5), U.N. Doc. Supp. No. 10 (A/56/10) chp.IV.E.1 (Nov. 2001) [hereinafter *ILC Draft Articles*].

¹⁴⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85, 113, *entered into force* June 26, 1987 [hereinafter CAT]. India signed CAT on Oct. 14, 1997. *Id.*

¹⁴⁶ ICCPR, *supra* note 18 at arts. 4, 7.

¹⁴⁷ India ratified the ICCPR on April 10, 1979. *Id.*

¹⁴⁸ CAT, *supra* note 145, at art. 1.

¹⁴⁹ *Id.*

¹⁵⁰ OTT, *supra* note 4, at 55.

kind.”¹⁵¹

International bodies have found that enforced disappearance can also constitute torture and/or cruel, inhuman and degrading treatment in the case of both direct and indirect victims.¹⁵² Some sources assert that all enforced disappearances inherently inflict torture or cruel, inhuman or degrading treatment on the direct victim.¹⁵³ The 1992 Declaration characterizes enforced disappearance as a violation of the prohibition on torture.¹⁵⁴ The WGEID has also stated “the very fact of being detained as a disappeared person, isolated from one’s family for a long period” is inhumane.¹⁵⁵

Both the jurisprudence and concluding observations of the HRC further reflects the view that enforced disappearances inherently constitute torture and/or cruel, inhuman, or degrading treatment.¹⁵⁶ In 1983, the HRC first recognized that a mother had suffered an ICCPR Article 7 violation (the prohibition against torture) as a result of her daughter’s enforced disappearance.¹⁵⁷ The committee emphasized that the daughter’s

¹⁵¹ CAT, *supra* note 145, at art. 1.

¹⁵² *E.g., El-Megreisi v. Libya*, *supra* note 33, at ¶ 5.4 (stating that “prolonged incommunicado detention in an unknown location” violated the individual’s right to humane, non-torturous treatment); Human Rights Committee, *Views: Laureano v. Peru*, ¶ 8.5, U.N. Doc. CCPR/C/56/D/540/1993 (Mar. 25, 1996) (holding that “the abduction and disappearance of the victim and the prevention of contact with her family and with the outside world constitute cruel and inhuman treatment”).

¹⁵³ *Cf. OTT*, *supra* note 4, at 54, 65 (“The analysis of the case law allows the conclusion that the general recognition of enforced disappearance as a violation of the right to humane treatment has not yet become international standard. Nevertheless, the wording of the UN Declaration as well as the case law for the Human Rights Committee and the Inter-American Court of Human Rights point in this direction.”).

¹⁵⁴ “Any act of enforced disappearance . . . constitutes a violation of . . . the right not to be subjected to torture.” *1992 Declaration*, *supra* note 15, at art.1(2).

¹⁵⁵ U.N. Working Group on Enforced and Involuntary Disappearances, *Annual Report for 1982*, ¶ 131, *delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/1983/14 (Jan. 21, 1983).

¹⁵⁶ Human Rights Committee, *Views: Sarma v. Sri Lanka*, ¶ 9.3, U.N. Doc. CCPR/C/78/D/950/2000 (July 16, 2003) (providing that “any act of disappearance constitutes a violation of many of the rights enshrined in the Covenant, including . . . the right not to be subjected to torture or cruel, inhuman or degrading treatment.”); *Views: Quinteros v. Uruguay*, *supra* note 73, at ¶ 14 (noting that the mother “has the right to know what happened to her [disappeared] daughter . . . [The mother] too is a victim of the violations of the [ICCPR].”); *Concluding Observations on Algeria*, *supra* note 73, at ¶ 10 (stating generally that “disappearances violate Article 7 with regard to the relatives of the disappeared”); *Views: Bousroual v. Algeria*, *supra* note 73, at ¶ 9.8; *Views: Benaziza v. Algeria*, *supra* note 73, at ¶ 9.6; *Views: Bashasha v. Libya*, *supra* note 73, at ¶ 7.5 (concluding that “the anguish and distress caused by the disappearance . . . to close family” is a violation of article 7); *see, e.g.,* Human Rights Committee, *Views: Mojica v. Dominican Republic*, ¶ 5.7, U.N. Doc. CCPR/C/51/D/449/1991 (Aug. 10, 1994) (stating that “the disappearance is inseparably lined to a treatment that amounts to a violation” of the right to humane treatment; *see also* OTT, *supra* note 4, at 88 (“The anguish and stress of not knowing what happened to a loved one may itself constitute ill-treatment, thus violating article 7 ICCPR.”)).

¹⁵⁷ *Views: Quinteros v. Uruguay*, *supra* note 73, at ¶ 14 ([the mother] too is a victim of the violations of the [ICCPR] . .

disappearance, followed by continuing uncertainty about her fate and whereabouts, caused the mother a degree of anguish and stress that rose to a violation of Article 7.¹⁵⁸ In explaining its reasoning, the HRC stated:

The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The [mother] has a right to know what has happened to her daughter. In these respects, [the mother] too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.¹⁵⁹

More than a decade later, the HRC made a more generalized statement in its concluding observations on Algeria's compliance with the ICCPR, finding "disappearances violate Article 7 with regard to the relatives of the disappeared."¹⁶⁰ After reviewing a state party's periodic reports on human rights conditions within its territory, the committee issues "concluding observations" explaining its concerns and recommendations.¹⁶¹ For this particular review of Algeria, the HRC based its conclusions on its "concern[] at the number of disappearances and at the failure of the State to respond adequately, or indeed at all, to such serious violations."¹⁶² The committee's statement recognized a pattern of disappearances, established by a "number of complaints by family members," and an "unsatisfactory" state response.¹⁶³

The HRC is not always consistent in finding that enforced disappearances violate Article 7 with respect to the relatives of the disappeared,¹⁶⁴ but it has produced a substantial body of jurisprudence that confirms the view that the torture of a victim violates not only the rights of the individual tortured but also the rights of that person's next of kin.¹⁶⁵

. in particular of Article 7").

¹⁵⁸ *Id.* The daughter's disappearance occurred in 1976, six years prior to this decision. *See id.* at ¶ 10.2.

¹⁵⁹ *Id.* at ¶ 14.

¹⁶⁰ *Concluding Observations on Algeria*, *supra* note 73, at ¶ 10.

¹⁶¹ *See* Human Rights Committee, *Introduction: Monitoring Civil and Political Rights*, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> (last visited Mar. 9, 2014) (explaining the process that the HRC uses to assess how states are implementing the rights in the ICCPR).

¹⁶² *Concluding Observations on Algeria*, *supra* note 73, at ¶ 10.

¹⁶³ *Id.*

¹⁶⁴ Human Rights Committee, *Views: Aber v. Algeria*, ¶¶ 3.2, 6.3, U.N. Doc. CCPR/C/90/D/1439/2005 (July 13, 2007).

¹⁶⁵ *See Views: Quinteros v. Uruguay*, *supra* note 73, at ¶ 14 (noting that the mother "has the right to know what happened to her [disappeared] daughter . . . [The mother] too is a victim of the violations of the [ICCPR]."); *Concluding Observations on Algeria*, *supra* note 73, at ¶ 10 (stating generally that "disappearances violate Article 7 with regard to the relatives of the disappeared"); *Views: Bousroual v. Algeria*, *supra* note 73, at ¶ 9.8; *Views: Benaziza*

Regional and specialized courts also have drawn similar conclusions. The Inter-American Court of Human Rights has consistently held that victims' families suffer human rights violations as a direct consequence of their relatives' enforced disappearance.¹⁶⁶ The European Court of Human Rights has found such violations when there exist special factors that increase the families' suffering.¹⁶⁷ In contexts where men are targets of enforced disappearance or torture, the European Court of Human Rights' recognition has important implications for the ability of the surviving family members, including women, to claim the right to a remedy as a result of direct violations against their kin.

Sexual violence that rises to the requisite level of severity might also be considered torture.¹⁶⁸ International bodies have recognized that rape and other forms of sexual violence may be used as a severe form of harm, and often is inflicted with the purpose of extracting information, intimidating, coercing, or punishing, thus fulfilling the legal elements of torture.¹⁶⁹ Two regional bodies have recognized rape as torture; the Inter-

v. *Algeria*, *supra* note 73, at ¶ 9.6; *Views: Bashasha v. Libya*, *supra* note 73, at ¶ 7.5 (concluding that “the anguish and distress caused by the disappearance . . . to close family” is a violation of article 7); *see also* *ОТТ*, *supra* note 4, at 88 (“The anguish and stress of not knowing what happened to a loved one may itself constitute ill-treatment, thus violating article 7 ICCPR.”).

¹⁶⁶ *See* *Blanco Romero v. Venezuela*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. ¶ 59 (Nov. 28, 2005) (stating that, “in cases that involve the forced disappearance of persons, the violation of the right to psychological and moral integrity of the victim’s next of kin is a direct consequence of the disappearance, which causes them, by the fact itself, serious suffering that is further aggravated by the State authorities’ continued refusal to provide information on the victim’s whereabouts or to open an effective investigation to find the truth”); *see also* *ОТТ*, *supra* note 4, at 90-92 (providing dozens of cases, and their varying considerations, where the Inter-American Court of Human Rights found that victims’ families suffered inhumane treatment from the disappearance of their relative).

¹⁶⁷ *Cakici v. Turkey*, Eur. Ct. H.R. ¶ 98 (July 8, 1999) (“the question whether a member of the family [of a disappeared person] is a victim [of the prohibition of torture and other inhuman or degrading treatment or punishment] will depend on the existence of special factors which give the suffering of the applicants a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation”); *see also* *ОТТ*, *supra* note 4, at 93-95 (identifying dozens of European Court of Human Rights cases, and their varying “special factors”).

¹⁶⁸ *See* Human Rights Committee, *General Comment 28: Equality of Rights Between Men and Women (Article 3)*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) [hereinafter *General Comment 28*]; *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-Am. Comm’n H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc.7 ¶ 157 (1996); *Aydin v. Turkey*, 25 Eur. Ct. H.R. 251, ¶ 83 (1988); *see also* *Redress for Rape: Using International Jurisprudence on Rape as a Form of Torture or Other Ill-Treatment*, REDRESS (Oct. 2013) [hereinafter *Redress for Rape*], available at [http://www.redress.org/downloads/publications/FINAL%20Rape%20as%20Torture%20\(1\).pdf](http://www.redress.org/downloads/publications/FINAL%20Rape%20as%20Torture%20(1).pdf) (providing an overview of the international legal framework for torture as it applies to rape).

¹⁶⁹ *See* *General Comment 28*, *supra* note 168, at ¶ 11; *Raquel Martí de Mejía v. Perú*, *supra* note 168, at ¶ 157; *Aydin v. Turkey*, *supra* note 168, at ¶ 83; *see also* *Redress for Rape*, *supra* note 168 (providing an overview of the international legal framework for torture as it applies to rape).

American Commission on Human Rights was the first to opine that rape may violate the prohibition against torture,¹⁷⁰ and the European Court of Human Rights followed suit.¹⁷¹ In particular circumstances, rape also may be a crime against humanity or a war crime.¹⁷² Rape that is inflicted as part of a widespread or systematic attack on a civilian population may be considered a crime against humanity, and rape used as a tactic of war may be considered a war crime.¹⁷³ International legal norms reflect the disapprobation of sexual violence and criminalize it as torture, enforced disappearance, and as international atrocity crimes.

Sexual violence has gendered impacts and it is important to note that international law recognizes that women as well as men may be the targets of sexual violence. For example, the Inter-American Commission's decision did not hinge on considerations of gender in its finding that rape rose to the level of torture. The Commission, in gender-neutral language, held that, "rape is a physical and mental abuse that is perpetrated as a result of an act of violence."¹⁷⁴ Though leading cases primarily address instances of female rape victims, the language of the courts is broad enough to apply the concept of "rape as torture" to male victims.

The Convention on the Elimination of Discrimination against Women (CEDAW), which India ratified on July 9, 1993,¹⁷⁵ is a human rights instrument that elaborates the human rights of women.¹⁷⁶ CEDAW does not contain a definition of "women," but the treaty

¹⁷⁰ See *Raquel Martí de Mejía v. Perú*, *supra* note 168, at ¶ 157 (acknowledging that rape may rise to the level of torture if it were "an intentional act through which physical and mental pain and suffering is inflicted on a person; [] committed with a purpose; and [] committed by a public official or by a private person acting at the instigation of the former").

¹⁷¹ See *Aydin v. Turkey*, *supra* note 168, at ¶ 83 (providing that "rape of a detainee by an official of the State must be considered an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim").

¹⁷² See Rome Statute, *supra* note 15 (enumerating "Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" as crimes against humanity); *id.* at art. 8(2)(b)(xxii) (enumerating rape as a war crime); see also Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, ¶¶ 342-46 (May 15, 2003) (detailing circumstances required for rape to be considered torture and a crime against humanity).

¹⁷³ *Id.*

¹⁷⁴ See *Raquel Martí de Mejía v. Perú*, *supra* note 168, at ¶ 158.

¹⁷⁵ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, entered into force Sept. 3, 1981 [hereinafter CEDAW].

¹⁷⁶ See *id.* at art. 2 ("States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women").

monitoring body, the Committee on the Elimination of Discrimination against Women (CEDAW committee), has interpreted the treaty to provide expansive protection against gender-based discrimination, which is “inextricably linked with other factors . . . such as race, ethnicity, religion or belief, health, status, age, class, caste, and sexual orientation and gender identity.”¹⁷⁷ Similarly, though CEDAW does not explicitly prohibit violence against women, the CEDAW committee’s comments have clarified that other articles within CEDAW prohibit such acts.¹⁷⁸ In its comments, the CEDAW committee reasoned that gender-based violence that disproportionately affects women is discrimination, and, further, that gender-based violence precludes women’s ability to enjoy their other rights, and, thus, is prohibited by CEDAW.¹⁷⁹ In addition, the Declaration on Elimination of Violence against Women, adopted by the UN General Assembly in 1993, explicitly prohibits physical, sexual, and psychological violence against women.¹⁸⁰ In sum,

¹⁷⁷ CEDAW General Recommendation No. 28, *supra* note 2, at ¶ 18; see also *Concepts and Definitions*, U.N. OFFICE OF THE SPECIAL ADVISER ON GENDER ISSUES AND ADVANCEMENT OF WOMEN, <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm> (last visited Mar. 1, 2014) (defining gender as, “the social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes are socially constructed and are learned through socialization processes. They are context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.”); *Gender Women and Health*, WORLD HEALTH ORGANIZATION, <http://www.who.int/gender/whatisgender/en/> (last visited Mar. 1, 2014) (gender “refers to the socially constructed roles, behavior[ur]s, activities, and attributes that a given society considers appropriate for men and women” while sex “refers to the biological and physiological characteristics that define men and women”).

¹⁷⁸ See, e.g., Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19*, ¶¶ 1, 6, U.N. Doc. A/47/38 (1992) [hereinafter CEDAW, *General Recommendation No. 19*] (providing that “[g]ender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men[ur]” and “[t]he Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”); Committee on the Elimination of Discrimination Against Women, *Views: A.T. v. Hungary*, ¶ 9.6, U.N. Doc. CEDAW/C/32/D/2/2003 (Jan. 26, 2005) (CEDAW Committee holding that CEDAW prohibits violence against women, including domestic violence, and requires states to duly investigate and punish perpetrators of such violence); Committee on the Elimination of Discrimination Against Women, *Views: V.K. v. Bulgaria*, ¶ 9, U.N. Doc. CEDAW/C/49/D/20/2008 (Aug. 17, 2011) (providing that “discrimination within the meaning of article 1 encompasses gender-based violence against women” and that state parties may be responsible for failing to diligently prevent, investigate, or punish acts of violence against women).

¹⁷⁹ See, e.g., CEDAW, *General Recommendation No. 19*, *supra* note 178.

¹⁸⁰ See Declaration on the Elimination of Violence against Women arts. 1-2, G.A. Res. 48/104, U.N. GAOR, 85th Plenary Meeting, U.N. Doc. A/RES/48/104 (Dec. 20, 1993). This Declaration, which is not binding, calls states to diligently prevent, investigate, and punish all acts of violence against women, including those perpetrated by non-

international law seeks to protect women from violence, including violence that rises to the level of torture, through both binding and non-binding instruments.

INDIA'S OBLIGATIONS REGARDING ENFORCED DISAPPEARANCES UNDER INTERNATIONAL HUMANITARIAN LAW

A. HISTORY OF INTERNATIONAL HUMANITARIAN LAW AND ENFORCED DISAPPEARANCES

Although international human rights law first explicitly addressed enforced disappearances in the 1960s, the criminalization of enforced disappearances also has a well-rooted history in the laws of war, known as international humanitarian law (IHL).¹⁸¹ IHL regulates war and armed conflict with the goal of minimizing human suffering attendant to these circumstances.¹⁸² Armed conflict is defined as “a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹⁸³ IHL doctrine has two principle functions. First, it restricts the methods and means of warfare that a party may use in conflict. Second, it requires belligerents¹⁸⁴ to protect persons or goods that may be affected during conflict.¹⁸⁵ Depending on the context, IHL may or may not condone belligerents performing acts associated with enforced disappearances. The nuances of these laws are discussed below.

state actors. *Id.* at art. 4.

¹⁸¹ International Humanitarian Law (IHL) is the body of laws and customs that limits the effects of armed conflict by protecting people who are not or are no longer engaged in hostilities and by restricting the means and methods of warfare. See Claudio M. Grossman, *Disappearances*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 1-2 (2008).

¹⁸² In applying laws of war, IHL counterbalances military necessity with principles of humanity, such as chivalry, see Hans-Peter Gasser & Daniel Thürer, *Humanitarian Law, International*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 3 (2011). The origin of IHL is based on chivalry and regulates war according to “fair play” between opposing parties. Conversely, human rights law aims to protect the relationship between unequal parties: the governed from the state. Human rights law protects dignity in all circumstances, not just during times of war or armed conflict. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 243 (2000).

¹⁸³ See Prosecutor v. Tadić, Decision on the Defen[s]e Motion for Interlocutory Appeal on Jurisdiction, ICTY Case No. IT-94-1-I, ¶ 70 (Oct. 2, 1995) [hereinafter *Tadić*]

¹⁸⁴ “Belligerent occupation” refers to a situation where one or more states—without permission—use military force to exercise effective control over another state. See Eyal Benvenisti, *Occupation, Belligerent*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (2009).

¹⁸⁵ See Gasser & Thürer, *supra* note 182, ¶ 3.

IHL allows the use of deadly force, but its use is limited by the principles of proportionality and distinction. The principle of proportionality provides that force may only be used to achieve a legitimate goal, and that force must be proportionate to the military importance of that goal.¹⁸⁶ In other words, force that creates loss or destruction excessive to military advantage is prohibited. The principle of distinction requires belligerents to distinguish between civilians and combatants in order to protect civilians and their property; attacks may be made only against military objectives.¹⁸⁷ In sum, by requiring parties to be distinguishable at all times and limiting the use of force to that which is necessary and proportionate, IHL is designed to minimize the harms caused by armed conflict.

In its effort to minimize harm, IHL protects civilians from unwarranted harm, including enforced disappearance. Enforced disappearances carried out during armed conflict have been referred to as “dirty war tactics,” and are often accompanied by torture, the denial of rights, and the summary execution of detainees.¹⁸⁸ Beginning with the Nuremburg Trials, IHL has recognized individual criminal liability for enforced disappearances that constitute war crimes and crimes against humanity.¹⁸⁹

Several federal states in India have extensive and complicated histories of armed conflict. Some states are classified as armed conflict zones; other states were once classified as armed conflict zones but the federal government has since declassified them; and others yet have never been classified, but might be considered, armed conflict zones. These situations are complicated further by the nature of the armed conflict—whether it is international or non-international in nature. In some Indian states, non-international armed struggle exists. States such as Jammu and Kashmir arguably have both non-international and cross-border international violence. Depending on the nature of the conflict and the other classification complications, different IHL protections may apply.

¹⁸⁶See *id.* at ¶ 28.

¹⁸⁷See *id.* at ¶ 32.

¹⁸⁸Alexander Murray, *Enforced Disappearance and Relatives’ Rights before the Inter-American and European Human Rights Courts*, 2 INT’L HUM. RTS. L. REV. 57, 58 (2013).

¹⁸⁹Brian Finucane, *Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War*, 35 YALE J. INT’L L. 171, 175 (2010); see Murray, *supra* note 188, at 59.

The Geneva Conventions of 1949 formally bifurcated armed conflict into international armed conflicts (IAC) and non-international armed conflicts (NIAC).¹⁹⁰ The bifurcation stems from a historical distinction. Traditionally, international law regulates relations between states.¹⁹¹ International armed conflict (IAC) is defined as “[a]ny difference arising between two States and leading to the intervention of armed forces . . . even if one party denies the existence of war.”¹⁹² The threshold for IAC is very low; there is no requirement for the length of conflict or the number of victims.

Non-international armed conflict (NIAC) is more difficult to define than IAC because there are many types of conflicts that may be considered non-international.¹⁹³ Additionally, the situation must meet two other criteria, which represent a higher threshold than that for IAC.¹⁹⁴ First, the non-state group must be minimally organized and identifiable.¹⁹⁵ Second, the conflict must meet a minimum threshold of intensity and duration.¹⁹⁶ To meet this threshold, the violence must be protracted or have a very high intensity.¹⁹⁷ At various points in time, Gujarat, Punjab, Manipur and even Jammu and Kashmir states arguably have been sites of non-international conflicts. However, the high threshold required to establish that an NIAC exists results in it being more difficult

¹⁹⁰ Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, 3, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS (Elizabeth Wilmshurst, ed., 2012), available at <http://ukcatalogue.oup.com/product/9780199657759.do> (follow “Chapter 1 (pdf)” hyperlink).

¹⁹¹ This bifurcation between IAC and NIAC began to develop after World War II when international law began to regulate relations within states. *Id.*

¹⁹² International armed conflict cannot exist between a State and a non-state actor. *The Geneva Conventions Commentary to art. 2*, INTERNATIONAL COMMITTEE OF THE RED CROSS, available at [http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=41229BA1D6F7E573C12563CD00519E4A_\(last visited Nov. 15, 2014\)](http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=41229BA1D6F7E573C12563CD00519E4A_(last%20visited%20Nov.%2015,%202014);); see generally, Special Rapporteur on Extrajudicial, Summary and Arbitrary Killings, *Study on Targeted Killings, delivered to the Human Rights Council*, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) [hereinafter *Study on Targeted Killings*].

¹⁹³ The various types of NIAC are the following: 1) State vs. one or more organized armed group (OAG), within one territory; 2) OAG against OAG, within one territory; 3) State vs. one or more OAG, with conflict spilling into territory of another state; 4) multinational non-State armed force vs. State, within one territory; 5) UN forces sent to stabilize a State against OAG, within one territory; 6) cross-border NIAC where non-state party operates from a neighboring state without permission; 7) multiple non-state affiliates against State, such as the War on Terror. Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT’L REV. RED CROSS 189, 193-95 (2011).

¹⁹⁴ *Study on Targeted Killings*, supra note 192, at ¶ 52.

¹⁹⁵ The group must be identifiable so IHL can compel it to follow the rules of war and distinguish between targets and civilians, *Study on Targeted Killings*, supra note 192, at ¶ 52; Prosecutor v. Delalic, ICTY Case No. IT-96-21-A, ¶ 184 (Nov. 16, 1998); Prosecutor v. Musema, ICTR-96-13, ¶ 248 (Jan. 27, 2000); Juan Carlos Abella v. Argentina, Case No. 11.137, Inter-Am. Comm’n H. R., Report No. 55/97, ¶ 152 (1997).

¹⁹⁶ *Study on Targeted Killings*, supra note 192, ¶ 52.

¹⁹⁷ *Tadić*, supra note 183, at ¶ 70.

to obtain IHL protections in these areas.¹⁹⁸ Thus, even if there is considerable violence in these areas, it may be difficult to successfully assert that NIAC protections apply.

Depending on the type of armed conflict, different IHL provisions are invoked.¹⁹⁹ The treaties that apply to IAC have two main functions. First, they elaborate rules protecting those who are not participating in hostilities.²⁰⁰ Second, they regulate the conduct of hostilities. The treaties that apply to NIAC, however, are more limited. In NIAC, the primary protection of non-participants is found in Common Article 3 to the Geneva Conventions.²⁰¹ This provision prohibits, at a minimum, the following:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.²⁰²

Common Article 3 is considered customary international law and thus its provisions bind India.²⁰³ Customary international law exists independently from treaty law and is a set of

¹⁹⁸ ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 86-87, 113 (2010). While the Additional Protocol II to the Geneva Conventions further developed and clarified the law governing NIAC, it also created a new and higher threshold under Article 1(1). *Id.* This Article is viewed as a regressive development because it “strengthen[s] the discretionary power of states to deny the Protocol’s applicability.” *Id.* Functionally, APII only applies to situations “at or near the level of a full-scale civil war.” *Id.* Notably, India has not signed APII.

¹⁹⁹ The entire Geneva Conventions I-IV of 1949, the preceding Hague Conventions of 1907, and the Additional Protocol I of 1977 guide IAC. Only Common Article 3 to the Geneva Conventions and Additional Protocol II of 1977 guide NIAC.

²⁰⁰ Akande, *supra* note 190, at ch. 3.

²⁰¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I), Oct. 21, 1950, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Conv. II), Oct. 21, 1950, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention relative to the Treatment of Prisoners of War (Geneva Conv. III), Oct. 21, 1950, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV), Oct. 21, 1950, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), Dec. 7, 1978, 1125 U.N.T.S. 3 [hereinafter API].

²⁰² Geneva Convention II, *supra* note 201, at art. 3.

²⁰³ See *Tadić*, *supra* note 183. The *Customary Law Study* also confirms, in a section entitled “Fundamental Guarantees,” that the prohibitions stipulated under Common Article 3 are binding under customary law. Pejic, *supra* note 193, at 206.

rules deriving from the “general practice accepted as law.”²⁰⁴ Notably, Common Article 3 only prohibits certain conduct; it does not set forth general standards to regulate hostilities.

Additional Protocol II to the Geneva Conventions (APII) and the Rome Statute of the ICC also regulate hostilities in NIAC. These instruments set more minimal standards, as compared to the elaborate regulatory scheme set out in the Geneva Conventions. India, however, has not ratified APII or the Rome Statute and, therefore, is not bound by these instruments.²⁰⁵ Some legal sources indicate that select provisions of APII and the Rome Statute are binding as customary law, but it is not clear whether these include duties to regulate the conduct of hostilities.²⁰⁶

In conclusion, the two types of armed conflicts—international and non-international—provide very different protections and regulations during hostilities. Individuals who are not directly participating in hostilities receive protections under both the IAC and NIAC regimes; however, IAC provides more elaborate protections for these individuals, especially if they directly participate in hostilities. This is particularly true in India, because the state has ratified Geneva Conventions I through IV.²⁰⁷ Because India has not signed Additional Protocol II or the Rome Statute of the ICC, very few protections exist for individuals involved in non-international hostilities on Indian territory.

²⁰⁴ *Customary International Humanitarian Law*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp> (last visited Nov. 15, 2014).

²⁰⁵ Akande, *supra* note 190, at ch. 3.

²⁰⁶ See *Tadić*, *supra* note 183 (considering it possible to prosecute perpetrators where States have not ratified APII and extending general principles of IAC to NIAC); Thilo Marauhn & Zacharie F Ntoubandi, *Armed Conflict, Non-International*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 22 (May 2011) (“In fact, the basic core of Additional Protocol II is reflected in Article 3 Common to the Geneva Conventions and is therefore part of customary law; namely the prohibition on violence towards persons taking no active part in hostilities, the taking of hostages, degrading treatment, and punishment without due process.”).

²⁰⁷ India has not signed the Additional Protocol I, which elaborates IAC protections and regulations stipulated in the Geneva Conventions.

B. PROTECTIONS FOR ENFORCED DISAPPEARANCES IN INTERNATIONAL HUMANITARIAN LAW

Additional Protocol I to the Geneva Conventions (API) elaborates protections for individuals involved in wars of liberation, and some of its provisions are widely applicable as customary international law. In particular, Article 75 of API provides fundamental guarantees for all persons who are “in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol.”²⁰⁸ This includes captured individuals who are formally denied prisoner of war status.²⁰⁹

API prohibits the following acts at all times, whether committed by civilian or military actors: murder, physical and mental torture, and humiliating or degrading treatment.²¹⁰ These fundamental guarantees offer a minimal level of protection, and the International Committee of the Red Cross considers them customary international law.²¹¹ Although enforced disappearances are not explicitly prohibited in Article 75 of API, the International Committee of the Red Cross argues that customary international law prohibits enforced disappearances in both IAC and NIAC because they “violate[], or threaten[] to violate, a range of customary rules of international humanitarian law,” including the prohibition of murder, torture, cruel or inhumane treatment, and the obligation to respect family life.²¹²

²⁰⁸ API, *supra* note 201, at art. 75(1).

²⁰⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter APII]; INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 867 (Zimmermann et. al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

²¹⁰ API, *supra* note 201, arts. 75(a)(i),(ii), 75(b). This list is not exhaustive.

²¹¹ 1 INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 307 (Henckaerts et al. eds., 2005) [hereinafter ICRC CUSTOMARY IHL] The International Committee of the Red Cross is an independent and neutral organization mandated “to provide humanitarian help for people affected by conflict and armed violence and to promote the laws that protect victims of war.” Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Dec. 31, 1998), available at <https://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm>. Known as the “guardian” of international humanitarian law, it functions to ensure that humanitarian law practices reflect the Geneva Conventions. *Id.*

²¹² 1 ICRC CUSTOMARY IHL, *supra* note 211, at 340. Customary IHL requires states to prevent disappearances, and “[t]he cumulative effect of these rules is that the phenomenon of ‘enforced disappearance’ is prohibited by international humanitarian law.” 1 *id.* at 340-341, available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule98 (last visited Nov. 15, 2014) (Rule 98: Enforced Disappearance).

During armed conflict, the state is responsible for violations of humanitarian law that are attributable to it.²¹³ When such violations occur, the state has the duty to investigate and prosecute when there is sufficient evidence to do so, reject amnesty claims, and offer remedy and reparation to victims and their family members.²¹⁴

Article 33 of API specifically requires states to trace missing persons of the adverse party. While helpful in theory, Article 33 presents several practical obstacles for victims of enforced disappearance. First, under Article 33, the state's duty is only invoked when the individual has been reported missing; therefore, the duty to investigate is not triggered if the individual missing has not been reported as such.²¹⁵ Second, the missing person must be a member of an adverse (foreign) party and, thus, states are not required to search for their own nationals. This is notable, because in non-international armed conflicts, most victims of enforced disappearance are state nationals suspected of supporting the opposition. Under article 33 of API, states bear no duty to search for these persons.²¹⁶ Third, neither Common Article 3 nor APII provide a duty to search for missing persons. In spite of these limitations, the International Committee of the Red Cross argues that the obligation to trace missing persons is binding regardless of the type of armed conflict,²¹⁷ which provides some support for the assertion that the state has a duty to search for missing persons, even during times of NIAC.

Some authorities take the position that enforced disappearances during IAC can be classified as grave breaches.²¹⁸ The Geneva Conventions created universal jurisdiction for grave breaches and made them punishable as war crimes.²¹⁹ Grave breaches are

²¹³ Violations are attributable to the state when they are a) committed by its organs, including armed forces; b) committed by persons or entities of governmental authority; c) committed by persons or groups acting on behalf of the government; and d) committed by private persons or groups which the government acknowledges and adopts as its own conduct. United Nations Human Rights Officer of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict*, 72, U.N. Doc. HR/PUB/11/01 (2011) [hereinafter *UNHCR International Legal Protection of Human Rights in Armed Conflict*].

²¹⁴ These duties are applicable in both human rights and humanitarian regimes. *Id.* at 81.

²¹⁵ APII, *supra* note 209; COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 209, at 351 ¶ 1229.

²¹⁶ Florath, *supra* note 95 at 30.

²¹⁷ 1 ICRC CUSTOMARY IHL, *supra* note 211, at 347.

²¹⁸ See generally *Tadić*, *supra* note 183 at ¶ 89 (explaining that aspects of enforced disappearances constitute grave breaches).

²¹⁹ Emily Crawford, *Armed Conflict, International*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶17 (2011).

specific acts prohibited in all four of the Geneva Conventions²²⁰ and include: (a) willful killing; (b) torture or inhuman treatment; (c) willfully causing great suffering or serious injury to body or health; and, (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.²²¹ Amnesty is impermissible for grave breaches, which means that the states have an obligation to identify, apprehend, and try or extradite for trial the person alleged to have committed such acts.²²²

The Geneva Conventions, which prohibit grave breaches, apply only to IAC; NIAC treaties do not have provisions addressing these violations. Thus, enforced disappearances that occur in NIAC are not be classified as grave breaches.²²³ As an additional barrier to the prosecution of those who violators IHL during times of NIAC, Article 6(5) of APII requires authorities, at the end of hostilities, to grant the broadest possible amnesty for those involved in the hostilities. Therefore, victims of enforced disappearance that occur during NIAC have far less legal recourse available to them than victims of the same act committed during IAC. In NIACs, state duties under international human rights law provide greater protections than humanitarian law.²²⁴

THE SCOPE AND APPLICATION OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW

International humanitarian law (IHL) and international human rights law both aim to protect the dignity and humanity of all people, but they differ in scope and application.²²⁵ IHL seeks to regulate conflict to minimize its harms. IHL does not apply during times of peace, as armed conflict triggers its application.²²⁶ In contrast, human rights law aims to

²²⁰ See Geneva Convention I, *supra* note 201; Geneva Convention II, *supra* note 201; Geneva Convention III, *supra* note 201; Geneva Convention IV, *supra* note 201.

²²¹ Geneva Convention I, *supra* note 201, at art. 50.

²²² Anja Seibert-Fohr, *Amnesties*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 10 (2010); see Geneva Convention I, *supra* note 201, at art. 51; Geneva Convention II, *supra* note 201, at art. 52; Geneva Convention III, *supra* note 201, at art.131; Geneva Convention IV, *supra* note 201, at art. 148; API, *supra* note 201, at art. 75(7).

²²³ *Tadić*, *supra* note 183, at ¶ 89.

²²⁴ Finucane, *supra* note 189, at 175; see Murray, *supra* note 188, at 59.

²²⁵ UNHCR *International Legal Protection of Human Rights in Armed Conflict*, *supra* note 213, at 1.

²²⁶ *Id.* at 33.

ensure universal, fundamental rights for individuals.²²⁷

The temporal relationship of these two fields is under debate. The majority view holds that IHL and international human rights law apply concurrently during times of armed conflict.²²⁸ The minority view holds that IHL applies exclusively in times of armed conflict, because it specifically regulates these circumstances and, thus, displaces human rights protections. The difference between these two views may not be readily apparent, as certain rights are protected certain acts prohibited under both regimes, like the prohibition against torture.²²⁹ However, in other circumstances, a right may be protected or an act prohibited exclusively within one regime.²³⁰ Under such circumstances, the applicable regime will directly affect the legal rights and protections available to individuals.

Under the majority view, IHL and international human rights law apply concurrently, meaning these legal regimes are considered “complementary sources of obligation.”²³¹ That is, during times of armed conflict, individuals are protected by international human rights law and IHL. For example, IHL and international human rights law each protect the right to a fair trial. Common Article 3 of the Geneva Conventions prohibits sentencing executions without a previous determination of guilt by a “regularly constituted court” that affords due process protections “recognized as indispensable by civilized peoples.”²³² Human rights law, through the ICCPR, details the right to a fair trial with great specificity, providing, among other protections, procedural guarantees for

²²⁷ See, e.g., *id.* at 1.

²²⁸ *Id.*

²²⁹ For example, the prohibition against torture and cruel, inhuman or degrading treatment is present in both IHL and human rights law. See Jacob Kellenberger, President of the International Committee of the Red Cross, *Address: International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence* 647 (Sept. 4, 2003), transcript available at http://www.icrc.org/eng/assets/files/other/irrc_851_kellenberger.pdf (stating, “[a]s regards torture and other forms of cruel, inhuman or degrading treatment or punishment, it hardly needs to be emphasized that such acts are prohibited under both international humanitarian law and other bodies of law in all circumstances, and are considered crimes under international law.”).

²³⁰ For example, the principle of distinction and the prohibition of indiscriminate attacks is mentioned only in IHL, whereas the right to food is only mentioned in human rights law. *Id.*

²³¹ UNHCR *International Legal Protection of Human Rights in Armed Conflict*, *supra* note 213, at 1.

²³² Geneva Convention III, *supra* note 201, at art. 3(d) (prohibiting “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”).

defendants in a criminal trial.²³³ If both legal regimes are applicable in times of armed conflict, the human rights standards of the ICCPR would complement and give meaning to the due process standards enshrined in Common Article 3's language of "indispensable guarantees."²³⁴

Where the two legal regimes directly conflict and are incompatible with each other,²³⁵ *lex specialis*²³⁶ applies and requires application of IHL because its provisions are more specific to times of armed conflict. The rights enshrined in IHL are also non-derogable, meaning they are minimum guarantees that cannot be abridged.²³⁷ The International Court of Justice adjudicated the question of how to interpret the protection that, in times of conflict, "no one shall be arbitrarily deprived of his life" and held that this right is guaranteed in times of peace and conflict.²³⁸ However, the term "arbitrary" is given different meanings under IHL and human rights law²³⁹ which led the ICJ to hold that the principle of *lex specialis* applies in interpreting the term "arbitrary detention" in armed conflict and, accordingly, its meaning under IHL prevailed.²⁴⁰

²³³ See ICCPR, *supra* note 18, at art. 14 (details include: how to deal with the press, the public, and publicity in the course of a trial (¶ 1); the presumption of innocence (¶ 2); several procedural guarantees for defendants in a criminal trial (¶ 3); accounting for youth defendants (¶ 4); the right to appeal (¶ 5); compensation guarantees for wrongfully convicted persons (¶ 6); and the right to be free from double jeopardy (¶ 7)).

²³⁴ See Kellenberger, *supra* note 229 (referring to this very scenario and stating, "[t]he fair trial standards of human rights law must be relied on to interpret and give specific content to the relevant provisions of common article 3. The mutually reinforcing nature of humanitarian and human rights law in the area of judicial guarantees is, moreover, confirmed by the wording of article 75 of Additional Protocol I of 1977 and article 6 of Additional Protocol II, which was clearly influenced by human rights law.").

²³⁵ ILC Draft Articles, *supra* note 144, at Commentary to Article 55 ("For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.").

²³⁶ *Lex specialis* is a widely accepted method for international legal interpretation requiring that priority be given to the more specific rule. See UNHCR *International Legal Protection of Human Rights in Armed Conflict*, *supra* note 213, at 59.

²³⁷ *Id.* at 58; see also Kellenberger, *supra* note 229 ("The exceptional circumstances of armed conflict by their very nature demand that no derogations from any of the obligations of the parties to a conflict be allowed if humanitarian law is to serve the purpose of protecting persons. Thus, in contrast to certain rules of human rights law, the totality of humanitarian law norms is non-derogable.").

²³⁸ See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8, 1996); see also Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 86 INT'L REV. RED CROSS 789, 796 (2004), available at http://www.icrc.org/eng/assets/files/other/irrc_856_heintze.pdf.

²³⁹ See Legality of the Threat or Use of Nuclear Weapons, *supra* note 238; see also Heintze, *supra* note 238.

²⁴⁰ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 238 at ¶ 926 ("the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities"); see also ICRC CUSTOMARY IHL, *supra* note 211, at 311-314, available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter32_rule89 (Rule 89: Violence to

It is also important to note that, under the majority view and during states of emergency that rise to the level of threatening the “life of the nation,” states may suspend derogable human rights regardless of whether the right directly conflicts with a provision in IHL.²⁴¹ Derogable rights are viewed as less fundamental and potentially too difficult for states to guarantee in times of emergency.²⁴² One such derogable right is the right to be free from unlawful interference with one’s privacy, family, home, or correspondence.²⁴³ Rights in treaties are assumed to be derogable unless accompanied by an express non-derogation clause.²⁴⁴ However, even when the high threshold for a state of emergency is met, *jus cogens* norms, non-derogable human rights, and IHL still bind states to fulfill basic obligations to protect fundamental rights.

Recent cases from the International Court of Justice²⁴⁵ and the European Court of Human Rights²⁴⁶ have accepted and affirmed the majority view that understands IHL and international human rights law as complementary. The HRC has also stated in General Comments 29 and 31²⁴⁷ that the ICCPR, a human rights treaty, applies during times of armed conflict. Similarly, the president of the International Committee of the Red Cross has asserted that IHL and other bodies of law, including international human rights law, apply during times of armed conflict.²⁴⁸ Additionally, some treaties have provisions relating to both IHL and international human rights law, which further affirm the interrelated nature of these two legal regimes and their dual application in times of

Life).

²⁴¹ See Human Rights Committee, *General Comment No. 29*, *supra* note 19, at ¶ 3.

²⁴² See ICCPR, *supra* note 18, at art. 4.

²⁴³ *Id.* at art. 17.

²⁴⁴ See BLACK’S LAW DICTIONARY, *supra* note 141. Examples of non-derogable rights include the right to life, the right to be free from torture, and the right to recognition as a person before the law. ICCPR, *supra* note 18, at arts. 4, 6, 7, 16.

²⁴⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 102-06 (July 9, 2004).

²⁴⁶ See, e.g., *Ergi v. Turkey*, App. No. 23818/94, Eur. Ct. H. R. 66/1997/850/1057, ¶ 82 (1998); *Engel v. The Netherlands*, 22 Eur. Ct. H. R. (ser. A), 22 (1976) (human rights court referring explicitly to IHL in making its judgment).

²⁴⁷ See *General Comment No. 29*, *supra* note 19, at ¶ 3.; Human Rights Committee, *General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) [hereinafter *General Comment No. 31*].

²⁴⁸ See Kellenberger, *supra* note 229 (stating, “[t]he decades that have passed since the Teheran Human Rights Conference have confirmed that comprehensive protection of individuals in armed conflict requires the application of international humanitarian law and of other bodies — including international human rights law, international refugee law, international criminal law and domestic law.”).

armed conflict.²⁴⁹

Under the minority view, which has fallen out of favor, only humanitarian law applies during times of armed conflict.²⁵⁰ Countries like the United States that have advocated this view argue that IHL displaces human rights law during times of armed conflict, and therefore human rights law need not be referenced.²⁵¹ This view is particularly problematic during times of NIAC, because IHL provides relatively little protection for individuals involved in NIAC. If human rights law does not fill in these gaps, then such individuals would be left with little protection from harm.²⁵²

THE RIGHT TO A REMEDY

A. OVERVIEW OF THE RIGHT TO A REMEDY IN INTERNATIONAL LAW

Once violence, injustice and lack of political and social equality come to an end, countries which have experienced situations of [non-international] armed conflicts and massive violations of human rights must face the question of the needs of the victims and the treatment of those responsible for past crimes. How can societies which have been destroyed, or at the very

²⁴⁹ See Convention on the Rights of the Child art. 38, Sept. 2, 1990, 2133 U.N.T.S. 161 [hereinafter CRC] (a human rights law treaty that also mentions states' obligations under IHL); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, A/RES/54/263 (Feb. 12, 2002) (articulating human rights obligations in times of conflict); European Convention on Human Rights and Fundamental Freedoms art. 41, Sept. 3, 1953, 213 U.N.T.S. 221 [hereinafter ECHR] (dealing with human rights norms in situations of war and emergencies).

²⁵⁰ See *UNHCR International Legal Protection of Human Rights in Armed Conflict*, *supra* note 213, at 5.

²⁵¹ John B. Bellinger, III, Legal Adviser, U.S. Department of State, *Opening Remarks, U.S. Meeting with U.N. Committee Against Torture* (May 5, 2006), available at <http://www.state.gov/drl/rls/68557.htm>; see also *Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay* (Mar. 10, 2006), available at <http://www.asil.org/pdfs/ilib0603212.pdf>; U.S. Dep't of State, *United States Written Response to Questions Asked by the Committee Against Torture* (May 8, 2006), available at <http://www.state.gov/documents/organization/68662.pdf>. The United States has repudiated this position with respect to the Convention Against Torture under President Obama. Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention Pursuant to the Optional Reporting Procedure, Third to Fifth Periodic Reports of States Parties due in 2011*, United States of America, CAT/C/USA/3-5 (Dec. 4, 2013).

²⁵² See Kellenberger, *supra* note 229 (noting the importance of applying the majority view: "First, there are significantly fewer treaty rules regulating internal armed conflicts than international armed conflicts, which means that comprehensive protection can only be achieved by recourse to customary humanitarian law, human rights and domestic law. This is quite evident in non-international armed conflicts governed only by article 3 common to the Geneva Conventions. While common article 3 functions as a safety net, providing basic rules on the treatment of persons not taking or no longer taking part in hostilities, it must, as already mentioned, be given specific content by application of other bodies of law in practice". If, under the minority view, no recourse may be had to human rights law, individuals receive the minimal "safety net" protections without much more.).

*least severely damaged, be rebuilt? How can justice be done and peace and reconciliation be re-established at the same time?*²⁵³

The right to a remedy for gross human rights violations, a well-established norm of international law, seeks to address this very question. Article 8 of the Universal Declaration of Human Rights (UDHR) provides a clear and authoritative source for the right to a remedy: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights guaranteed him by the constitution or law.”²⁵⁴ Other widely ratified human rights treaties also codify this right, including the ICCPR, the CED, the CAT, the Convention on the Elimination of all Racial Discrimination (CERD), and the Convention on the Rights of the Child (CRC).²⁵⁵ Regional bodies have also endorsed the right to a remedy in their charters.²⁵⁶ Upon review of these guarantees, in some circumstances—namely when the state is the perpetrator of a violation—the state must provide the remedy.²⁵⁷ In other circumstances—where the state was not a perpetrator—the state must still ensure that individuals can access a remedy for rights violations.²⁵⁸

India has ratified the ICCPR, the Geneva Conventions, CEDAW, CERD, and the CRC, which all contain provisions relating to the right to a remedy. India has undertaken the legal obligation to fulfill the provisions of the treaties it has ratified—including its obligation to provide the right to a remedy—though these obligations are subject to reservations. Notably, India submitted a reservation to the ICCPR, stating that its domestic law conflicts with some of the ICCPR’s provisions on arrest and detention.²⁵⁹

²⁵³ SCOVAZZI & CITRONI, *supra* note 3, at 72.

²⁵⁴ See UDHR, *supra* note 18, at art. 8. Though only a declaration, many provisions of the UDHR are seen as binding, authoritative sources of customary international law. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L COMP. L. 287, 340 (1995-96) (“[T]here would seem to be little argument that many provisions of the Declaration today do reflect customary law.”).

²⁵⁵ See, e.g., ICCPR, *supra* note 18 at arts. 2(3), 9(5), 14(6); CED, *supra* note 6, at art. 24; CAT, *supra* note 145, at art. 14; International Convention on the Elimination of All Forms of Racial Discrimination art. 6, G.A. Res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No.14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, *entered into force* Jan.4, 1969 [hereinafter CERD]; CRC, *supra* note 249, at art. 39.

²⁵⁶ See ECHR, *supra* note 249, at art. 13; American Convention on Human Rights arts. 25, O.A.S.T.S. No. 36, 1144 U.N.T.S. 1231, *entered into force* July 18, 1978 (Inter-American system’s codification of the right to a remedy); African [Banjul] Charter on Human and Peoples’ Rights arts. 7, 21, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, *entered into force* Oct. 21, 1986 (African system’s codification of the right to a remedy).

²⁵⁷ See *ILC Draft Articles*, *supra* note 144, at arts. 28-39.

²⁵⁸ See *General Comment No. 31*, *supra* note 247.

²⁵⁹ India’s reservation to the ICCPR states: “Government of the Republic of India takes the position that the provisions

India's constitution permits India to detain the following individuals without the authority of a magistrate: (1) enemy aliens, and (2) any person who is arrested or detained under a domestic law that provides for preventive detention.²⁶⁰ Additionally, India does not provide the right to compensation for victims of unlawful arrest or detention, which directly conflicts with Article 9 of the ICCPR and forms part of India's reservation.²⁶¹ However, India is still bound by the other provisions of the ICCPR, including its obligation to provide the right to a remedy for violations of the right to life, torture, and other protections guaranteed under the ICCPR.²⁶² Importantly, under the ICCPR, states must ensure access to a remedy through effective judicial, administrative, and/or legislative means.²⁶³

Various international bodies have interpreted the meaning of the right to a remedy. In 2001, the International Law Commission (ILC) did so in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles).²⁶⁴ The ILC submitted the draft articles to the General Assembly and may request that body to take additional action.²⁶⁵

of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India. Further under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State." See ICCPR, *supra* note 18.

²⁶⁰ INDIA CONST. arts. 22(3), 23(7).

²⁶¹ India's reservation to the ICCPR provides, "under the Indian Legal System, there is no enforceable right to compensation for persons claiming to be victims of unlawful arrest or detention against the State." See ICCPR, *supra* note 18.

²⁶² See *id.* at art. 2(3) (obliging states "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity[.]").

²⁶³ See *id.* at art. 2(3)(b) (providing that State parties must ensure individuals have access to "competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state" to enforce their right to a remedy).

²⁶⁴ *ILC Draft Articles*, *supra* note 144. The U.N. General Assembly established the ILC in 1948, and the ILC's recommendations and studies have been influential in achieving its purpose to "encourage the progressive development of international law and its codification." Establishment of the International Law Commission ¶ 1, G.A. Res. 2/174(III), GAOR, 2nd Sess., U.N. Doc. A/RES/2/174 (Nov. 21, 1947); see also Christopher Greenwood, *Sources of International Law: An Introduction*, U.N. AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, http://legal.un.org/avl/pdf/ls/Greenwood_outline.pdf (last visited Nov. 15, 2014) (noting the Draft Articles' importance in the realm of customary international law).

²⁶⁵ The ILC may recommend that the General Assembly (a) take no action because the report has already been published, (b) adopt the report by resolution, (c) recommend the draft to members with a view to the conclusion of a treaty, or (d) convene a conference to conclude a treaty. *ILC Draft Articles*, *supra* note 144, at art. 2. If desirable, the General Assembly can request the ILC to redraft or reconsider. *Id.*

The Draft Articles define state acts that fall under the jurisdiction of international law and articulate states' obligations for breaches of international duties.²⁶⁶ Relevant to this discussion, the Draft Articles require that states first cease the unlawful activity²⁶⁷ and then provide "full reparation" to victims of rights violations who are harmed on its territory.²⁶⁸ "Full reparation" requires the state to "wipe out all the consequences of the illegal act and reestablish the situation which would . . . have existed if that act had not been committed."²⁶⁹ The state must also institute one or more forms of reparation, such as cessation, restitution, compensation, satisfaction, interest, guarantees of non-repetition, or rehabilitation.²⁷⁰

In 2004, the HRC, which monitors and interprets the ICCPR, issued official guidelines interpreting the specific right to a remedy in the treaty.²⁷¹ Parties to the ICCPR, like India, look to comments by the committee in order to understand their treaty obligations.²⁷² The legal status of the HRC's general comments, along with those of the other UN treaty bodies, remains unsettled.²⁷³

²⁶⁶ See *id.* at arts. 1-2.

²⁶⁷ *Id.* at art. 30(a) (providing, "[t]he State responsible for the internationally wrongful act is under an obligation . . . [t]o cease the act, if it is continuing.").

²⁶⁸ *Id.* at art. 31(1) (providing, "[t]he State is under an obligation to make full reparation for the injury caused by an internationally wrongful act.").

²⁶⁹ *Id.* at Commentary to Art. 31, ¶ 3 (citing to *the Factory at Chorzów* case).

²⁷⁰ *Id.*; see also *id.* at art. 34 (citing to *the Factory at Chorzów* case) (providing for reparation forms of restitution, compensation, and satisfaction).

²⁷¹ See *General Comment No. 31*, *supra* note 247, at ¶ 7; see, e.g., Juan E. Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 259 (1997) (providing that the HRC has interpreted the ICCPR to ensure remedies by providing that, "blanket amnesty laws and pardons are inconsistent with the Covenant because they create "a climate of impunity" and deny the victims this "right to a remedy")

²⁷² See Human Rights Committee, *Working Methods: IX – General Comments/Recommendations*, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx> (the HRC stating their purpose in making comments and recommendations as, "[i]nterpreting the Covenant so that there can be no doubts about the scope and meaning of its articles has become an important function of the HRC. General comments are normally directed at States parties and usually elaborate the Committee's view of the content of the obligations assumed by States as party to the Convention.").

²⁷³ See Philip Alston, *The Historical Origins of 'General Comments' in Human Rights Law*, in THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY 764 (Laurence Boisson De Charzournes & Vera Gowlland-Debbas eds., 2001) (noting that some scholars and bodies view general comments as expressing treaty norms, others see them as equivalent to advisory opinions, and yet others are highly critical and afford general comments little to no weight in legal settings); cf. International Covenants on Human Rights ¶ 9, G.A. Res. 60/149, U.N. GAOR, 60th Sess., U.N. Doc. A/Res/60/149 (Dec. 16, 2005) (General Assembly merely 'taking note' of General Comments) with *Hirst v. United Kingdom (No.2)*, Application No. 74025/01, Eur. Ct. H.R. (June 10, 2005) (European Court for Human Rights applying a General Comment in its decision).

In its General Comment No. 31, the HRC interpreted the ICCPR as imposing numerous duties on states in the area of the right to a remedy.²⁷⁴ Among these duties, the committee identified the state duty to establish multi-layered infrastructure to redress violations.²⁷⁵ It also identified the state duty to ensure that individuals can access effective remedies to redress rights violations.²⁷⁶ In other words, the HRC noted that states must ensure the remedies are effective and appropriate in redressing violations, and include cessation of the violation, appropriate compensation, prevention of recurrence, and where appropriate, restitution, rehabilitation, measures of satisfaction, and prosecution of the perpetrators.²⁷⁷ Additionally, the HRC emphasized the importance of independent, impartial administrative mechanisms to ensure thorough and prompt investigation of alleged violations of the ICCPR.²⁷⁸ In naming these duties, the Committee emphasized the state obligation to comprehensively and effectively redress violations of the ICCPR.

In 2005, the UN General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles).²⁷⁹ Guidelines adopted by the General Assembly express international consensus on points of international law, but do not provide a legally binding source of law.

²⁷⁴ *General Comment No. 31, supra* note 247, at ¶ 7.

²⁷⁵ *Id.* (“Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.”).

²⁷⁶ *Id.* at ¶ 15 (“Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children.”).

²⁷⁷ *See id.* at ¶¶ 15-17.

²⁷⁸ *Id.* at ¶ 15 (“Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies . . . A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.”).

²⁷⁹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) [hereinafter Basic Principles].

The Basic Principles articulates “existing legal obligations” related to the state duties to provide remedy and reparation for victims of human rights and humanitarian violations.²⁸⁰ Importantly, the Basic Principles call upon states to criminalize and punish gross violations of human rights and serious violations of humanitarian law.²⁸¹ The Basic Principles outline a remedy scheme that requires states to provide victims access to: (a) effective judicial remedies, including the ability to make claims through impartial proceedings under domestic law; (b) reparations that are proportionate to the harm done; and (c) information pertaining to the violation.²⁸² Additionally, the Basic Principles affirm a broad expanded concept of the victim, recognizing victims as those who “individually or collectively[] have suffered harm . . . through acts or omissions that . . . constitute violations of . . . internationally recognized norms relating to human rights.”²⁸³ This broad circle of victims includes individuals *indirectly* affected by rights violations, and empowers them to access the right to a remedy.

The next section provides greater detail on the *type* of remedy the state must ensure that victims can access according to international standards. After discussing the substance of the right to a remedy, the final section in this part discusses the gendered dimensions and gender-sensitive approaches for implementing the right to a remedy.

B. THE SUBSTANCE OF THE RIGHT TO A REMEDY

The right to a remedy is well established, but the appropriate form of the remedy required may differ depending on the nature of the violation. In 2011, the HRC appointed a special rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (SR on Transitional Justice). The four components of special rapporteur’s mandate—justice, truth, reparation, and guarantees of non-recurrence—address the right to a remedy for gross violations of human rights and serious violations of international humanitarian law.²⁸⁴ These four components are

²⁸⁰ *Id.*

²⁸¹ *Id.* at ¶ 4

²⁸² *See, e.g., id.*

²⁸³ *Id.* at ¶ 8.

²⁸⁴ Human Rights Council, Resolution: Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, 2-3, U.N. Doc. A/HRC/RES/18/7 (Oct. 13, 2011).

discussed below.

1. The Right to Justice (State Duty to Prosecute)

Individuals have the right to justice and the state has a duty to investigate, prosecute, and adequately punish perpetrators found guilty of gross human rights violations.²⁸⁵ The Special Rapporteur on transitional justice has addressed the rationale underlying the recognition of the right to justice as a component of the right to remedy, stating that “[t]rying cases for human rights violations strengthens the rule of law” both directly and indirectly.²⁸⁶ He also has noted that only a fraction of “outrageous acts” that characterize gross human rights violations are ever investigated, and even fewer proceed to prosecution,²⁸⁷ yet he insists the benefits of prosecuting such violations are enormous.²⁸⁸ For example, criminal investigations and prosecutions can help to deter perpetrators from carrying out violations in the future by creating a transparent enforcement system. The right to justice, and the related state duty to prosecute, arises in three circumstances.

First, several treaties obligate states to criminally prosecute the perpetrators of serious human rights violations and violations of humanitarian law.²⁸⁹ The Genocide Convention,²⁹⁰ CAT,²⁹¹ and CED²⁹² obligate states to criminalize and prosecute the

²⁸⁵ Basic Principles, *supra* note 279.

²⁸⁶ Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *Report*, ¶ 41, *delivered to the General Assembly*, U.N Doc. A/68/345 (Aug. 23, 2013) (providing that “[g]uarantees of non-recurrence, unlike the other “pillars” of the mandate, truth, justice and reparation, is not a category that designates a measure or a set of measures, but a function that can be played by a variety of initiatives.”) [hereinafter *SR on Transitional Justice Report from August 2013*].

²⁸⁷ Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *Report*, ¶ 47, *delivered to the General Assembly*, U.N Doc. A/67/368 (Sept. 13, 2012).

²⁸⁸ *Id.* at ¶ 57 (“[C]riminal prosecutions in cases of [gross violations of human rights] give life to the principle of the sovereignty of law and of the related principle of equality. No one, regardless of rank or status, is above the law. Second, at a more practical level, given the complexities of criminal trials for systematic abuses, these processes help to develop transferable skills that contribute to strengthening the overall capacity of judicial systems.”).

²⁸⁹ These treaties generally require that states write the violation into their domestic criminal code and assign an adequate corresponding punishment for perpetrators. *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide arts. 4-5, 9, 78 U.N.T.S. 277 (1948), *entered into force* Jan. 12, 1951 [hereinafter *Genocide Convention*]; CAT, *supra* note 145, at arts. 4, 5, 7; CED, *supra* note 6 at arts. 3-7.

²⁹⁰ Genocide Convention, *supra* note 289 at arts. 4-5, 9.

²⁹¹ CAT, *supra* note 145, at arts. 4, 5, 7.

²⁹² CED, *supra* note 6, at arts. 3-7.

genocide, torture, and enforced disappearance, respectively.²⁹³ If state parties grant amnesty to perpetrators of the crimes that are the subject of these treaties, they are in breach of their treaty obligations.²⁹⁴ India is not a party to the CAT or the CED, but has ratified the Genocide Convention and is thus obligated to prosecute those responsible for genocide. As a party to the ICCPR, India is obligated to prosecute torture, which includes sexual violence against women that rises to the level of torture.

Second, crimes against humanity, including enforced disappearance, give rise to the right to justice.²⁹⁵ The Basic Principles call upon states to prosecute these violations, and the Rome Statute obligates state parties to do so.²⁹⁶ In the absence of action by the state party, the ICC gains jurisdiction over crimes against humanity.²⁹⁷ However, India has not signed the Rome Statute to the ICC, and is thus not bound by this treaty.

Third, grave breaches during times of international armed conflict can give rise to the state duty to prosecute. Grave breaches include willful killing, torture, inhuman treatment, and the unlawful confinement of civilians.²⁹⁸ Notably, the duty to prosecute for grave breaches arises in international armed conflict, but not non-international armed conflict. Although enforced disappearances are not explicitly mentioned in the Geneva Conventions, some acts that occur in the course of an enforced disappearance can trigger the state's duty to prosecute, as would be the case with grave breaches such as torture or inhuman treatment.²⁹⁹

²⁹³ See Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 43 (1996) (commenting that “[i]t is noteworthy, however, that these Conventions were all negotiated in the context of the cold war and by design apply only to a narrow range of situations.”).

²⁹⁴ See *id.* (“[w]hen these Conventions are applicable, the granting of amnesty to persons responsible for committing the crimes defined therein would constitute a breach of a treaty obligation for which there can be no excuse or exception.”).

²⁹⁵ See Rome Statute, *supra* note 15.

²⁹⁶ See *id.* at art. 17(1); Basic Principles, *supra* note 279, at ¶ 4 (providing that states have a duty to investigate, prosecute, and punish those responsible for gross violations of international human rights law).

²⁹⁷ Rome Statute, *supra* note 15, at arts. 5, 17(1)(1).

²⁹⁸ See Scharf, *supra* note 293, at 41, 43.

²⁹⁹ See *supra* at 43-45 (discussing grave breaches under international humanitarian law).

2. The Right to Truth (State Duty to Investigate)

The right to truth similarly arises in distinct circumstances, though these distinct circumstances are not clearly delineated.³⁰⁰ The CED is the first binding instrument to explicitly codify the right to truth, and states party to the convention are bound by the obligation to guarantee this right.³⁰¹ Under the CED, the victims' right to truth arises upon the occurrence of an enforced disappearance.³⁰² Aside from the CED, the right to truth is seen as an emerging norm applicable whenever "serious crimes have been committed," including enforced disappearances.³⁰³ In 2006, the Inter-American Court of Human Rights held that the duty to investigate enforced disappearances is a *jus cogens* norm of international law.³⁰⁴ However, other bodies have not echoed this perspective; rather, the right to truth is increasingly regarded as having persuasive, not binding, authority.

Once triggered, the right to truth requires the state to undertake a rigorous investigation to reveal to the victims and families "what really happened, why did it happen, and who is directly and indirectly responsible."³⁰⁵ It includes revealing the truth about the repressive structure that led to the commission of the crimes³⁰⁶ and determining the fate of every single victim whose case is known.³⁰⁷ Typically, these aims are achieved

³⁰⁰ See, e.g., Yasmin Naqvi, *The Right to Truth in International Law: Fact or Fiction?*, 88 INT'L REV. RED CROSS 245, 273 (June 2006) (asserting "it may be argued that the right to the truth stands somewhere on the threshold of a legal norm and a narrative device . . . [t]he truth about the right to the truth is still a matter to be agreed upon.").

³⁰¹ See OTT, *supra* note 4, at 269 ("the [CED] is the first international legally binding human rights instrument to enshrine this right").

³⁰² CED, *supra* note 6, at art. 24(2).

³⁰³ See Naqvi, *supra* note 300, at 267 ("Cumulatively, the effect of these decisions, taken together with the widespread practice of instituting mechanisms to discover the truth in countries where serious crimes have been committed, as well as some national legislation and the constant reiteration of the importance of knowing the truth by international and national organs, suggests the emergence of something approaching a customary right (though with differing contours)"); see also Working Group on Enforced or Involuntary Disappearances, *Report*, ¶ 39, delivered to the Human Rights Council, U.N. Doc. A/HRC/16/48 (Jan. 26, 2011) (making a general comment on the right to truth in relation to enforced disappearances and marking historically the recognition of the right to truth for enforced disappearances as emerging as early as 1981); U.N. High Commissioner for Human Rights, *Report: Study on the Right to Truth*, ¶¶55, 60, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) (recognizing the right to truth as "inalienable and autonomous" and asserting that "[a]mnesties or similar measures and restrictions to the right to seek information must never be used to limit, deny or impair the right to the truth").

³⁰⁴ *Goiburú et al. v. Paraguay*, *supra* note 67, at ¶ 84 ("...the corresponding obligation to investigate . . . [has] acquired the character of *jus cogens*").

³⁰⁵ Juan E Méndez & Francisco J. Bariffi, *Truth, Right to, International Protection*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 4 (Jan. 2011).

³⁰⁶ *Id.*

³⁰⁷ See, e.g., SCOVAZZI & CITRONI, *supra* note 3, at 75 (discussing the formation of CONADEP in Argentina, which had the "mandate to investigate the thousands who disappeared during the junta rule").

through the establishment of “extrajudicial commissions of inquiry” and include measures to preserve archives that help to tell the broader story of enforced disappearances.³⁰⁸ Additionally, states must afford the opportunity for judicial truth telling, where victims are heard by a state entity, though not necessarily in a criminal tribunal.³⁰⁹

India has signed the CED, which signals the country’s recognition of the right to truth as an international norm. Additionally, as a signatory, the international law of treaties dictates that India must not act contrary to the object and purpose of the CED. Arguably, this prohibition may require that India not obstruct individuals’ access to the truth concerning enforced disappearances. All this said, India has not ratified the CED and, as a result, is not legally bound by this treaty to guarantee the right to truth. India does have certain domestic frameworks in place that might help to guarantee the right to truth; these are elaborated upon in subsection B of the section entitled Relevant Domestic Law Protections which follows. Notably, however, the Indian government has systematically failed to investigate claims of enforced disappearances.³¹⁰ For example, when victims attempt to challenge unlawful detention through a constitutional habeas petition, judicial delays and procedural obstacles frustrate these claims and deny victims the right to truth, in spite of the protective legislative provisions that exist in Indian law to guarantee this remedy.³¹¹

3. The Right to Reparations (State Duty to Redress and Compensate)

The right to reparation is a well-established norm in international human rights law and international humanitarian law.³¹² International law scholars generally recognize seven

³⁰⁸ Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *Question of the Impunity of Perpetrators of Human Rights (Civil and Political)*, ¶ 18, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997).

³⁰⁹ See Naqvi, *supra* note 300, at 269-72.

³¹⁰ ALLARD K. LOWENSTEIN, INTERNATIONAL HUMAN RIGHTS CLINIC AT YALE LAW SCHOOL, THE MYTH OF NORMALCY: IMPUNITY AND THE JUDICIARY IN KASHMIR 7 (2009), available at http://www.law.yale.edu/documents/pdf/Intellectual_Life/Kashmir_MythofNormalcy.pdf [hereinafter THE MYTH OF NORMALCY]; see also SCOVAZZI & CITRONI, *supra* note 3, at 67 (noting that the Indian government has admitted that 3,744 people have disappeared in Kashmir, yet “[s]ince 1990 several complaints have been presented to the courts in Kashmir but not a single case has been solved.”).

³¹¹ THE MYTH OF NORMALCY, *supra* note 310, at 25-38.

³¹² See Basic Principles, *supra* note 279.

categories of reparation: cessation, restitution, compensation,³¹³ satisfaction,³¹⁴ interest,³¹⁵ guarantees of non-repetition,³¹⁶ and rehabilitation.³¹⁷

Generally, the categories of cessation and restitution are frequent forms of reparation.³¹⁸ Cessation requires the state to stop committing human rights violations. Restitution involves the state restoring the victim to the circumstances she would have been in, had the violation not occurred. Others forms complement cessation and restitution to repair the victim's injury.³¹⁹

4. Guarantee of Non-Recurrence

Traditionally, guarantees of non-recurrence have been considered a category of reparations.³²⁰ However, some experts in international human rights law suggest that “[g]uarantees of non-recurrence, unlike the other “pillars” of the mandate, truth, justice and reparation, is not a category that designates a measure or a set of measures, but a function that can be played by a variety of initiatives.”³²¹ In part, some experts

³¹³ “Compensation” means to compensate for any financially assessable damages that the State caused. Dinah Shelton, *Reparations*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 25 (2009). For a discussion of looking beyond economic compensation to more holistic compensation, see Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 400 (2007-08) (arguing for a remedy structure that focuses less on economic compensation and more on equitable, non-monetary, and forward-looking remedies).

³¹⁴ “Satisfaction” includes incalculable damages to redress moral or legal injury—for example, an acknowledgement of the breach, an expression of regret, or an apology. Shelton, *supra* note 313, at ¶ 28. See also Antkowiak, *supra* note 313, at 373-74 (providing several examples of satisfaction and citing particular cases where courts granted satisfaction to the victim such as “revers[ing] criminal convictions, grant[ing] retrials, nullify[ing] death sentences, expung[ing] criminal records, and cancel[ing] fines imposed”).

³¹⁵ “Interest” is granted on a case-by-case basis, and awarded only to ensure full reparation. Shelton, *supra* note 313, at ¶ 26.

³¹⁶ “Guarantees of non-repetition” generally involve a promise (more than a mere statement) not to repeat the violation; often this requires states to take preventative measures to avoid repetition. *Id.* at ¶ 27. See Antkowiak, *supra* note 313, at 362 (noting the diversity of forms that this category can assume, including “the establishment of effective civilian control over state security forces and human rights educational and training programs”).

³¹⁷ “Rehabilitation” provides for mental and psychological care, and legal and social services. Dinah Shelton, *Human Rights Remedies*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 9 (2006). See Antkowiak, *supra* note 313, at 375-77 (2007-08) (providing an overview of the Inter-American Court's approach to providing rehabilitation as a remedy, which has included “the establishment of special education and vocational assistance programs for former detainees,” “scholarships for higher education,” and provisioning future necessary medical and mental care from state facilities).

³¹⁸ Shelton, *supra* note 313 at ¶¶ 22-23; see also Antkowiak, *supra* note 313 at 372-75 (detailing the dimensions of cessation, such as releasing an individual who was arbitrarily detained, and restitution, such as recovering the missing corpse).

³¹⁹ Shelton, *supra* note 313 at ¶¶ 22-23.

³²⁰ See *Basic Principles*, *supra* note 280, at art. 23.

³²¹ *SR on Transitional Justice Report from August 2013*, *supra* note 286, at ¶ 53 (providing that “[g]uarantees of non-

recommend setting apart guarantees of non-recurrence from reparations on the basis that these guarantees secure prevention of harm, instead of seeking to repair injury that has already occurred.³²² Under its current treaty obligations that incorporate a right to a remedy, such as the ICCPR, India is bound to provide guarantees of non-recurrence.

Experts have described the guarantee of non-recurrence as having four prongs: (1) disarmament, demobilization, and reintegration of former combatants;³²³ (2) institutional reform;³²⁴ (3) security sector reform;³²⁵ and (4) lustration/vetting.³²⁶ These prongs demonstrate the wide-ranging forms that guarantees of non-recurrence may take.³²⁷ At times, the duty to guarantee non-recurrence may be fulfilled as a byproduct of a state fulfilling its other remedial obligations. For example, under the CED, a state must ensure victims access to institutions where they can be heard. Thus, a state might reform its

recurrence, unlike the other “pillars” of the mandate, truth, justice and reparation, is not a category that designates a measure or a set of measures, but a function that can be played by a variety of initiatives.”).

³²² See Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *supra* note 308, at ¶ 16.

³²³ The United Nations has commented on this as it applies to post-conflict peace consolidation. See U.N. PEACEKEEPING, *Issues: Disarmament, Demobilization and Reintegration*,

<http://www.un.org/en/peacekeeping/issues/ddr.shtml>; see also U.N. Secretary-General, *General and Complete Disarmament: Consolidation of Peace Through Practical Disarmament Measures: Report of the Secretary-General*, U.N. Doc. A/52/289 (Aug. 19, 1997).

³²⁴ CED, which India is not a party to, requires states to provide guarantee non-recurrence by reforming domestic institutions, for example by requiring the state to clarify their modalities of detention (Art. 17), punish conduct that impedes the states’ ability to fulfill their treaty duties (Art. 22), train and educate personnel who detain individuals (Art. 23), and establish robust procedures to address wrongfully adopted children in cases of enforced disappearance (Art. 25). See CED, *supra* note 6.

³²⁵ See Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *supra* note 308, at ¶ 55. Security Sector Reform (SSR) represents a newer movement that developed in the nineties and seeks to ensure “the development of effective, efficient, affordable and accountable security institutions.” U.N. PEACEKEEPING, *Issues: Security Sector Reform*, <http://www.un.org/en/peacekeeping/issues/security.shtml> (last visited Apr. 14, 2014).

³²⁶ See Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *supra* note 308, at ¶¶ 43, 54. Lustration and vetting serve to assess individuals’ “suitability for public employment The end result of such procedures may be to exclude or purge officials of prior regimes and/or human rights violators from public office.” FIONNUALA NÍ AOLÁIN ET AL., *ON THE FRONT LINES: GENDER, WAR, AND THE POST-CONFLICT PROCESS* 192 (2011); see also *Dealing With the Past: Conceptual Framework*, SWISSPEACE, <http://www.swisspeace.ch/topics/dealing-with-the-past/about.html> (last visited Apr. 14, 2014) (Swisspeace is an associated Institute of the University of Basel and member of the Swiss Academy of Humanities and Social Sciences).

³²⁷ See Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *supra* note 308, at ¶ 56 (noting that “more gradual measures [] may be taken to prevent recurrence (or occurrence) of abuses within the security and justice sectors. These include the expansion of legal identity through birth or civil registration, reduction in the reliance on confessions as the sole source of evidence for convictions, improvements in violence reduction (in particular for the most serious crimes, such as homicides and rapes) and improvement in the resolution under due process of violent crimes. These measures have universal relevance across countries at different levels of development, and have the important quality of being rights-based measures that also contribute to other developmental goals.”).

institutions in the process of fulfilling its obligations under the right to truth, but this action also fulfills part of its duty to guarantee non-recurrence.

C. GENDER AND THE RIGHT TO A REMEDY

As detailed above, numerous sources inform the emerging framework regarding the duty of states to provide individuals with access to an adequate remedy. Beyond the four components already discussed, several scholars and international bodies have asserted that gender must also be accounted for in assessing transitional justice measures, including reparations programs.³²⁸ Though these sources do not directly reference to the right to a remedy or its four components, a gender-sensitive perspective on transitional justice offers another lens through which the effectiveness of remedies can be analyzed. The term “gender-sensitive” appears in scholarship on gender and transitional justice.³²⁹ This section will broadly discuss scholars’ views on gender and transitional justice, and note several examples where a gender-sensitive perspective might inform the four components of the right to a remedy.

1. Gender and Transitional Justice

A gender-sensitive perspective on transitional justice recognizes that men and women suffer distinct harms in times of conflict and its aftermath, and have different needs and roles in the transitional justice process that follows conflict.³³⁰ On the whole, scholars have noted that transitional justice mechanisms have largely failed to account for the

³²⁸ See GENDER OF REPARATIONS, *supra* note 1 (making a gender-sensitive analysis of reparations programs with the idea that gender-sensitive reparations programs are more effective and also help advance states towards more inclusive, egalitarian societies); WGEID Report from January 2013, *supra* note 91, at ¶ 67 (recommending a gender-sensitive perspective for reparations programs that address enforced disappearances).

³²⁹ See THE WORLD BANK, GENDER, JUSTICE, AND TRUTH COMMISSIONS ix (2006); VASUKI NESIAH ET AL., INT’L CENTER FOR TRANSITIONAL JUSTICE, TRUTH COMMISSIONS AND GENDER: PRINCIPLES, POLICIES, AND PROCEDURES 19 (2006); Fionnuala Ní Aoláin & Catherine Turner, *Gender, Truth & Transition*, 16 UCLA Women’s L.J. 229, 239 (2007) (omitting the hyphen, but still using the phrase “gender sensitive”).

³³⁰ See, e.g., GENDER OF REPARATIONS, *supra* note 1, at 2-3 (“it is common knowledge that in most cases women play a crucial role in the follow-up of violence -- searching for victims or their remains, trying to reconstitute families and communities, carrying on the tasks of memory, and demanding justice”); THE WORLD BANK, *supra* note 329, at 1 (describing the gendered effects of conflict and post-conflict reconstruction, and advocating that states adopt a gender-sensitive approach in transitional justice measures to recognize these differences and “extend justice . . . into the realm of development”); S.C. Res. 1325, preamble, S/RES/1325 (Oct. 31, 2000) (The UN Security Council Resolution 1325 on Women, Peace, and Security reflects the need to account for the gendered effects of conflict and the gendered dimensions of peace-building processes that follow times of conflict).

gendered dimensions of conflict and its aftermath, much to society's detriment.³³¹

Despite a history of failing to implement gender-sensitive measures, scholars note that in the process of repairing harms, states have the opportunity to transform institutions and culture to elevate the status of marginalized groups, including women, through the implementation of gender-sensitive transitional justice measures.³³²

2. Potential Gender-Sensitive Remedial Mechanisms

As previously noted, the legal sources discussed in this do not address the right to a remedy as it relates to gender, and instead have focused on gender as it relates to transitional justice more broadly; however, applying this scholarship to the right to a remedy is illuminating. Legal scholar Vasuki Nesiah analyzes the intersection of gender with transitional justice mechanisms, but has not explicitly identified the links between gender and states' obligations under the right to a remedy. Nonetheless, Nesiah's case studies and research provide the raw material for such an analysis. Indeed, many of the transitional justice mechanisms that she identifies could map onto the right to a remedy framework. The remainder of this section draws examples from Nesiah's scholarship and applies her findings, recommendations, and case studies to the four component parts of the right to a remedy framework.

First, in a gender-sensitive approach to the right to justice, the state might prioritize the investigation and prosecution of rights violations committed against women,³³³ such as

³³¹ See Ní Aoláin & Turner, *supra* note 329, at 232 (finding that many transitional justice schemes have failed to adequately address women's needs and instead have maintained "procedural limitations and structural biases" that have always diminished women's opportunities for advancement); NESIAH ET AL., *supra* note 329, at 3 (noting that transitional justice measures have largely failed to address the "distinct and complex injuries women have suffered" as a result of political violence).

³³² See GENDER OF REPARATIONS, *supra* note 1, at 6 (noting the "transformative potential of reparations, namely, the potential to subvert, instead of reinforce, preexisting structural gender inequalities and thereby to contribute, however minimally, to the consolidation of more inclusive democratic regimes"); NESIAH ET AL., *supra* note 329, at 3 ("Political transitions can provide an extraordinary window of opportunity for enhancing women's access to justice, reclaiming public space, and building momentum for fundamental reform.").

³³³ See *id.* at 40 (noting that a transitional justice measure could include prioritizing cases that remedy human rights violations against women: "to the extent that patterns of gendered human rights crimes have been a significant dimension in a country's human rights history, the commission may want to recommend that these crimes be prioritized, not only to provide redress for the women affected, but because of the long-term impact such prosecutions will have in providing official recognition of the significance of enhancing women's access to justice and addressing future impunity for crimes against women").

cases of rape or torture against women, or other human rights violations that disproportionately affect women.

Second, states might implement gender-sensitive programming through truth commissions as one means to fulfil their obligation to guarantee the right to truth. Some have already done so by conducting thematic hearings that place women at the center of truth-telling discourse.³³⁴ As opposed to the traditional, individualized hearings that truth commissions often host for men and women, thematic hearings can focus on the experiences of women or invite only women to provide testimony.³³⁵ Such thematic hearings welcome women into the truth telling discourse, and while honoring each individual's experience. Such hearings also have the potential to highlight broader, gendered patterns of abuse and resistance.³³⁶ Thematic hearings on the impact of conflict on women can be designed to include expert testimony on the gendered impacts of mass violence and peace-building.³³⁷ Gendered patterns of violations and harm identified through thematic hearings and other truth telling mechanisms can also contribute to the development of more holistic and complex remedies that better address women's experiences of human rights violations.³³⁸

Third, states also might put legal and policy frameworks in place that seek to dismantle legal and structural barriers that prevent women from accessing reparations by prioritizing reparations for human rights violations that disproportionately affect women; recognizing the full spectrum of human rights violations that have taken place and the harms that results from them; and defining the term "victim" broadly to include the direct victim's next-of-kin. For example, some states have adopted a gender-sensitive

³³⁴ *Id.* at 27 (noting that in Timor-Leste, the truth commission "convened a series of community-based discussions on the human rights record . . . and almost 10 percent of these talks had exclusively female participation. This complemented national gender hearings that highlighted key aspects of women's experiences[.]").

³³⁵ *See id.* at 26-29.

³³⁶ *See id.* at 26.

³³⁷ *See id.* at 27 (noting that in Peru's thematic truth commission, expert testimony "highlighted the impact of rape and forced pregnancy in contexts where abortion was prohibited—issues that were too controversial for the [Truth Commission's] Final Report").

³³⁸ *See, e.g., id.* at 29 (noting that thematic truth-telling hearings may (1) increase visibility, education, and awareness of women's rights issues; (2) record women's human rights violations; (3) promote greater accountability and respect for human rights; (4) strengthen and provide tools for lobbying efforts to advance women's status and rights; (5) mobilize and build campaigns centered on women's rights; and (6) empower women and showcase their strength).

reparations strategies³³⁹ by creating targeted reparations for human rights violations that disproportionately affect women in times of conflict, such as forced pregnancy, coerced sterilization, and displacement.³⁴⁰

In addition, a gender-sensitive approach to reparations could include a broad definition of victim that includes relatives and dependents of direct victims.³⁴¹ Such a broad definition may allow more women to assert their right to reparations, since women often suffer as the indirect victims of human rights violations. Further, states might implement reparations programs that seek to ensure that women have access and control over the reparations received.³⁴² Without such targeted measures, reparations may be available but inapplicable, ineffective, or inaccessible for women. For example, if men control familial finances, either due to legal or cultural norms, women may not benefit from reparations programs that provide families a lump sum of cash. Nesiha has suggested that a gender-sensitive reparations program would take notice of such norms and proceed in ways that allow women access to reparations—possibly by providing small, periodic sums of money that women are more likely to control, changing norms or laws to facilitate women’s access to reparations,³⁴³ or by providing non-monetary reparations such as healthcare, education, and psychosocial services.³⁴⁴

Finally, with regard to guarantees of non-recurrence, there is potential to develop a gender-sensitive approach.³⁴⁵ For example, reforms to the justice system increasing

³³⁹ See *id.* at 34 (providing that Timor-Leste, Peru, and Morocco have incorporated specific policy directives that account for considerations of gender in reparations); *id.* at 37 (listing numerous methods that provide a gender-sensitive approach to reparations, such as “establishing inclusive definitions of rape,” “supplementing individual reparations with collective measures that recognize the systemic, collective patterns of abuse against women,” “defining “dependents” in ways that include same-sex partners and customary marriages,” and “disseminating information about the reparations programs and how women and those in socially marginalized communities can access them”).

³⁴⁰ See *id.* at 34.

³⁴¹ See *id.*

³⁴² See *id.* at 34-36 (exploring the nuances of successfully providing women reparation in countries where, due to gender inequalities, women may not have held title to property and may not control familial finances).

³⁴³ See, e.g., *id.* at 38 (noting that in India, “prohibitions against issuing life insurance claims in the absence of death certificates has made it particularly difficult for spouses of the disappeared to collect reparations; again this impacts a group that is overwhelmingly female,” and providing that other states, sensitive to this issue, “have recommended issuance of a “forcibly disappeared” certificate that could operate as a de facto death certificate for purposes of reparations and insurance”).

³⁴⁴ See *id.* at 34-36.

³⁴⁵ See *id.* at 39 (recommending that remedy programs “be formulated in terms of sustainable, long-term impact with

accessibility for women and prosecuting sexual violence can provide lasting, deterrent effects,³⁴⁶ changes in the laws that affect women’s status and rights might also contribute to non-recurrence. In addition, remedy programs can call for heightened awareness of gender issues and record the history of women’s resistance—both of which may help alleviate the socioeconomic hardships that make women more vulnerable to human rights violations, and, in turn, contribute to non-recurrence in the future.³⁴⁷

RELEVANT DOMESTIC LAW PROTECTIONS

A. INTRODUCTION

As provided above, under international law, the right to a remedy includes a comprehensive set of state obligations, of which India has assumed some, but not all.³⁴⁸ The right to justice obligates India to prosecute perpetrators of genocide and individuals who commit grave breaches during times of international armed conflict. For the right to truth, as a state that has signed but not ratified the CED, India arguably should not frustrate mechanisms that facilitate an individuals’ ability to access the truth about enforced disappearances. Additionally, persuasive sources increasingly recognize the right to truth, and advocates can point to such non-binding legal authority as part of their advocacy strategy in India. Concerning the right to reparation, India must end the violations of rights set out in the treaties to which it is a party, including the ICCPR³⁴⁹ and CERD,³⁵⁰ and provide redress that aims to wholly restore the harmed individual. India also has a duty to provide guarantees of non-recurrence that effectively prevent future

adequate consideration of how women’s needs are addressed even when the truth commission closes its doors”).

³⁴⁶ See *id.* at 40 (noting that a transitional justice measure could include prioritizing cases that remedy human rights violations against women).

³⁴⁷ See *id.* at 39-40 (providing that in Timor-Leste, the transitional justice program called for the recording of women’s history during the conflict, which was “particularly significant given that most official histories have elided women’s history and their contributions to national political developments”).

³⁴⁸ For the purposes of our discussion, we have assumed that India has completed these steps for the treaties it has ratified, including the Genocide Convention, the Geneva Conventions, and the ICCPR.

³⁴⁹ See *General Comment No. 31*, *supra* note 247, at ¶ 15-16 (interpreting ICCPR art. 2(3), which guarantees the right to a remedy to include appropriate reparation).

³⁵⁰ CERD *supra* note 255, at art. 6 (requiring that states ensure access to “just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination”).

violations of the human rights norms established in these treaties..

This section analyzes the extent to which India's domestic law is consistent with the country's obligations under international human rights and international humanitarian law. Although the right to a remedy, as guaranteed in the ICCPR, encompasses judicial, administrative, and legislative remedies, this paper focuses exclusively on Indian *legislative* remedies and analyzes the extent to which these comport with international norms. Though judicial and administrative remedies are also important, they fall outside the scope of this paper.

Because India is a dualist country,³⁵¹ international treaties do not automatically become law until Parliament legislates the provisions into binding legal obligations enforceable by municipal courts.³⁵² The discussion in this section begins with an examination of the Indian Constitution and the human rights conferred therein. It then examines six domestic instruments that affect the individual's right to a remedy for enforced disappearances in India. Finally, through an analysis of the weaknesses in India's legal structure and enforcement mechanisms, the paper argues that India fails to fulfill its international legal obligations to guarantee the right to a remedy for enforced disappearances.

The Constitution of India, adopted in 1950, provides a comprehensive legal framework for human rights enforcement. Part III of the Constitution on Fundamental Rights provides justiciable civil and political rights, including the right to equality and freedom from discrimination.³⁵³ Part IV of the Constitution on the Directive Principles of State Policy outlines social, economic and cultural rights that are non-justiciable and serve as guidelines to frame laws.³⁵⁴ The Supreme Court has interpreted these non-justiciable

³⁵¹ Pierre-Marie Dupuy, *International Law and Domestic (Municipal) Law*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 2 (2011). Dualism is the theory that international law and municipal law are separate, independent legal orders that require special provisions to function together; this differs from monism, which is a theory combining international law and municipal law into one legal order. *Id.* at ¶¶ 4-18.

³⁵² See S.K. Verma, *National Attitudes Towards International Humanitarian Law in South Asia*, in INTERNATIONAL HUMANITARIAN LAW IN SOUTH ASIA 52 (V.S. Mani ed., 2007).

³⁵³ Special Rapporteur on the Situation of Human Rights Defenders, *Mission to India*, ¶ 13, delivered to the Human Rights Council, U.N. Doc., A/HRC/19/55/Add.1 (Feb. 6, 2012) (by Margaret Sekaggya) [hereinafter Sekaggya].

³⁵⁴*Id.* at ¶ 10.

rights, for example, interpreting the right to life in Article 21 of the Constitution to guarantee the right to life with dignity. The Constitution also provides individuals with the right to file a claim with the highest court of the land when a justiciable rights violation of the Constitution or another law, has occurred.³⁵⁵

In 1994, India adopted the Protection of Human Rights Act (PHRA), which defines “human rights” as “the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.”³⁵⁶ While international treaties are not self-executing and do not entitle individuals to bring international legal claims in domestic courts, under this Act, India is expected to “foster respect for international treaties.”³⁵⁷

India has passed several pieces of legislation that may be used by victims of enforced disappearances to access their international right to a remedy. These domestic laws include the Right to Information Act, the Prevention of Torture Bill, and the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill. Together, these acts protect the right to truth and the right to justice by enabling individuals to request that the state provide information and investigate violations. India also created the National Human Rights Commission through the PHRA, which, as discussed below, protects the right to a remedy in a variety of ways. At the same time, India has passed several restrictive acts—such as the Armed Forces Special Powers Act and the Prevention of Terrorism Act—that curtail the right to a remedy by creating a widespread system of impunity for human rights violations. These laws are discussed in greater detail to follow.

³⁵⁵ INDIA CONST. art. 32 (a similar provision exists for the States and their High Courts under Article 226); *see also* Office of the High Commissioner of Human Rights, *Summary: India*, ¶ 21, U.N. Doc., A/HRC/WG.6/13/IND/1 (Mar. 12, 2012) [hereinafter *OHCHR Summary*].

³⁵⁶ Sekaggya, *supra* note 353, at ¶ 11.

³⁵⁷ *Id.* at ¶ 25 (*citing* INDIA CONST. art. 51(c)). This Act may provide grounds for individuals to domestically claim international legal violations, but this discussion is beyond the scope of the paper.

B. INDIA'S LEGAL FRAMEWORK REGARDING THE RIGHT TO A REMEDY FOR ENFORCED DISAPPEARANCES

This section describes and assesses India's current domestic legal regime in the area of remedies for enforced disappearances. The laws and entities analyzed in this section include: (a) the Armed Forces Special Powers Act; (b) the National Human Rights Commission; (c) the Prevention of Terrorism Act; (d) the Right to Information Act; (e) the Prevention of Torture Bill; and (f) the Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill.

1. Armed Forces Special Powers Act

Enacted in 1958, AFSPA "regulates instances of use of special powers by the Armed Forces in so-called 'disturbed areas' of the country."³⁵⁸ A disturbed area refers to an area affected by conflict that exists for a "limited duration" and is "dangerous to the extent that the use of armed force is deemed necessary."³⁵⁹ The Supreme Court has ordered the periodic review of "disturbed area" determinations every six months, but in practice these periodic reviews rarely occur.³⁶⁰ Currently, the following areas are classified as disturbed areas: Manipur, Assam, Arunachal Pradesh, Meghalaya, Mizoram, Nagaland, Tripura, and Jammu and Kashmir.³⁶¹ AFSPA does not apply in times of armed conflict or in times of "undisturbed" peace.

AFSPA permits the Indian armed forces to use lethal force, and the law prohibits individuals from bringing a judicial action against officers alleged to have used excessive force or to have abused their powers under the act. In other words, AFSPA immunizes state agents from public or private prosecution, thereby preventing victims from

³⁵⁸ Heyns, *supra* note 30, at ¶ 24; *see also id.* at ¶ 21 (discussing that AFSPA applies to Manipur, Assam, Arunachal Pradesh, Meghalaya, Mizoram, Nagaland and Tripura, and revealing that the Jammu and Kashmir Armed Forces (Special Powers) Act is almost identical to AFSPA, and was enacted by the respective state in 1990).

³⁵⁹ *Id.* at ¶ 21; *see also* The Disturbed Areas (Special Courts) Act (DAA), No. 77 of 1976 (India) (the DAA allows the Indian government to use unrestricted powers in "disturbed areas" to arrest and detain opponents to the state; under § 3, an area is considered disturbed when the State is satisfied the area is or was "excessive disturbance of peace and tranquility, by reason of differences or disputes between members of different religious, racial, language or regional groups or castes or communities"). Based on their purposes and allowances, the AFSPA and DAA are closely linked.

³⁶⁰ *Naga People's Movement of Human Rights v. Union of India*, A.I.R. 1998 S.C. 431 (Nov. 27, 1997); *see Heyns, supra* note 30, at ¶ 25.

³⁶¹ *Id.* at ¶ 21.

accessing their right to a remedy for enforced disappearances in most circumstances.³⁶² Section four of AFSPA enables an officer to fire at—and cause the death of—a person acting against a law, so long as the officer deems such use of force necessary to maintain public order and gives due warning to the target of his fire.³⁶³ According to the Special Rapporteur on extrajudicial, summary or arbitrary executions (SR on Extrajudicial Killings), section four violates the “international standards on use of force.”³⁶⁴ Section six of AFSPA also poses vexing problems by prohibiting the prosecution of members of the armed forces unless the government grants “sanction” (permission)³⁶⁵ to prosecute the military official.³⁶⁶ Notably, only forty-four applications for sanction have been brought to the authorities, none of which were granted.³⁶⁷

The SR on Extrajudicial Killings has stated that the powers granted under AFSPA are broader than those allowed under states of emergency, and the suspension of individuals’ rights may constitute a suspension of the right to life.³⁶⁸ Moreover, the Special Rapporteur has stated that India should repeal or substantially amend AFSPA so that individuals may hold the government accountable for enforced disappearances.³⁶⁹ Not only has the Special Rapporteur recommended that AFSPA be repealed, but Indian domestic bodies—such as the 2004 Indian Government special committee, the Second Administrative Reforms Commission, and the National Human Rights Committee—have called for its repeal.³⁷⁰

The Indian state defends AFSPA. Officials have stated that the Act “provides necessary powers, legal support and protection to the Armed Forces for carrying out proactive operation[s] against the terrorists in a highly hostile environment.”³⁷¹ Additionally, in 1997

³⁶² *Id.* at ¶ 92.

³⁶³ *Id.* at ¶ 22. The Indian Criminal Procedure Code § 41 similarly gives enforcement officials the ability to use “all means necessary” to arrest an individual who forcibly resists. *Id.* at ¶ 10.

³⁶⁴ Sekaggya, *supra* note 353.

³⁶⁵ In reviewing the literature on Indian domestic law, the word “sanction” consistently refers to “permission.” In this circumstance, and for the rest of this Section, “sanction” aligns with the terminology used in literature on Indian domestic law and does not connote criminal punishment.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at ¶ 23.

³⁶⁸ *Id.* at ¶ 27.

³⁶⁹ *Id.* at ¶ 100.

³⁷⁰ *Id.* at ¶ 25.

³⁷¹ *OHCHR Summary, supra* note 355, at ¶ 25.

the Supreme Court of India ruled in favor of AFSPA's constitutionality and upheld all its provisions.³⁷² While the Court outlined precise guidelines for using lethal force under AFSPA, the Special Rapporteur believes these guidelines do not conform to prevailing international standards.³⁷³

2. The National Human Rights Commission

The National Human Rights Commission (NHRC) plays an important role in guaranteeing respect for human rights in India. Created in 1993 under the PHRA, the NHRC is a permanent, autonomous public institution with an annual budget of about 40 million rupees (\$600,000 USD). The NHRC employs a staff of 350 that conducts research and investigations to protect and promote human rights.³⁷⁴ In conducting investigations, the NHRC staff may "utili[z]e the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government . . ."³⁷⁵ Additionally, the NHRC has issued several important guidelines, including the Guidelines on Encounter Deaths.³⁷⁶ This particular guideline was issued in 1997, and it identifies steps for police to take when they initiate lethal action against civilians suspected of particular crimes without due process of law.³⁷⁷ In 2010, the NHRC issued a formal letter to the Chief of Ministers criticizing Indian states for noncompliance with the guideline.³⁷⁸ Thus, the NHRC can be seen as one example of how India is implementing its obligations under the ICCPR to establish a domestic legal infrastructure to prevent and redress human rights

³⁷² *Naga People's Movement of Human Rights v. Union of India*, *supra* note 360, at ¶ 79 (8).

³⁷³ Heyns, *supra* note 30, at ¶ 26.

³⁷⁴ See The Protection of Human Rights Act, § 12, No. 10 of 1994 (India) (§12 of the Human Rights Act lists the different functions of NHRC, which includes the power to (a) inquire into complaints of human rights violations, (b) intervene with proceedings pending before court, (c) visit jail, . . . and (f) study treaties to make recommendations for effective implementation).

³⁷⁵ *Id.* at § 14(1).

³⁷⁶ Heyns, *supra* note 30, at ¶ 18 ("The Guidelines require that (a) police officers record information about an encounter and a FIR must be registered; (b) encounter cases should be investigated by an independent investigating agency; (c) a magisterial inquiry must be undertaken in instances where deaths have occurred and compensation is awarded to the dependents of the deceased; and (d) disciplinary action should be taken against delinquent police officers and no out-of-turn promotions should be made.").

³⁷⁷ Letter from National Human Rights Commission to Chief Ministers regarding the Procedure to be Followed in Deaths in Police Encounters, ¶ 33-34 (Mar. 29, 1997), *available at* <http://nhrc.nic.in/Documents/CasesOfEncounterDeaths.pdf>.

³⁷⁸ Letter from National Human Rights Commission to the Chief Minister, 1 (May 12, 2010), *available at* <http://nhrc.nic.in/documents/Death%20During%20the%20course%20of%20Police%20Action.pdf>.

violations.³⁷⁹

While the NHRC has been pivotal in protecting the right to life in India,³⁸⁰ it has been criticized for taking an overly “legalistic and deferential approach.”³⁸¹ The SR on Extrajudicial Killings investigated the functioning of the NHRC and found several shortcomings. First, he concluded that the Commission’s effectiveness is limited by its mandate, which restricts its investigative powers to complaints filed within one year of the incident, a circumstance which he found may create obstacles for those who want to expose past violations.³⁸² Second, he identified a lack of clarity about the extent to which NHRC may examine human rights violations by members of the armed forces.³⁸³ Section 19 of the PHRA enables the Commission to request reports from the central government and make recommendations about its findings. However, the Commission is not expressly authorized to investigate members of the armed forces for human rights violations.³⁸⁴ As a result of these findings, the SR on Extrajudicial Killings recommended that the statute of limitations be extended and that Section 19 be amended to expressly authorize this investigatory power.³⁸⁵

3. The Prevention of Terrorism Act

In response to several terrorist attacks that occurred in India and around the world at the turn of the last century, the Indian Parliament passed the Prevention of Terrorism Act (POTA) in 2002. According to its proponents, this anti-terrorism legislation aimed to increase national security without compromising individual liberty.³⁸⁶ The Act defined “terrorist acts” and granted authorities power to restrict individual liberties while investigating such acts. POTA was considered an improvement over its predecessor—

³⁷⁹ *General Comment No. 31, supra* note 247, at ¶ 7 (“Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures to fulfill their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.”).

³⁸⁰ Heyns, *supra* note 30, at ¶ 88.

³⁸¹ *Id.* (noting that, in particular, the NHRC has been unwilling to take a stand against court decisions).

³⁸² *Id.* at ¶ 89.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.* at ¶ 120.

³⁸⁶ Swati Pandey, *Law and Counterterrorism: The Prevention of Terrorism Act in a Strategic Dimension*, 4 INST. OF PEACE & CONFLICT STUD. RES. PAPERS 1, 1 (2004) [hereinafter *Law & Counterterrorism*].

the Terrorist and Disruptive Activities Act (TADA)³⁸⁷—because the scope of POTA was limited to terrorist activities and it provided some procedural safeguards. Importantly, under POTA, only Superintendents of Police were permitted to investigate cases, and an officer of higher rank had to approve the investigations.³⁸⁸

In 2004, Parliament repealed the POTA, which had been criticized for curtailing individual liberties for several reasons. First, the definition of “terrorist activities” was vague and officers were entitled to loosely interpret “involvement” and “terrorist acts.” Second, Section 7 allowed officers to seize all property of those accused of POTA offenses, thus impoverishing individuals and family members accused under the Act.³⁸⁹ Third, no system existed to monitor and verify the validity of charges made against the accused. Without adequate controls, state authorities violated the rights of individuals by applying an overbroad definition of “terrorist activity.”³⁹⁰ For example, possessing an unlicensed firearm and causing “significant damage to any property” could be considered a terrorist act under POTA. Although the law narrowed the scope of the TADA, it still permitted the government to abuse its authority.

4. The Unlawful Activities Prevention Act

Just before the Indian Parliament repealed POTA in 2004, legislators incorporated its major provisions into another piece of security legislation, the Unlawful Activities Prevention Act (UAPA). Originally adopted in 1967, UAPA gave the central government power to ban unlawful organizations.³⁹¹ The records of parliamentary debates preceding its passage reveal that legislators intended to provide the central government power to control secessionist organizations.³⁹² With the 2004 amendments,

³⁸⁷ See *id.* at 3-4 (discussing that the TADA was the first anti-terrorism legislation that defined and provided regulations to curtail terrorist activities; Parliament enacted TADA in 1985, but allowed it to elapse in 1995 because it had disastrous effects and spurred severe human rights violations; and officers often invoked “disruptive activities clause” against protestors, students, and bootleggers who could have been charged and received reduced punishments under the Criminal Procedure Code).

³⁸⁸ See The Prevention of Terrorism Act, § 2(6)(7), No. 15 of 2002 (India); see also *Law & Counterterrorism*, *supra* note 386, at 12.

³⁸⁹ *Id.* at 12.

³⁹⁰ See generally, *id.* at 9.

³⁹¹ COORDINATION OF DEMOCRATIC RIGHTS ORGANIZATION (CDRO), THE TERROR OF LAW: UAPA AND THE MYTH OF NATIONAL SECURITY 21 (2012) [hereinafter CDRO].

³⁹² See *id.* at 21-22; see also The Unlawful Activities Prevention Act, Statement of Objects and Reasons, No. 37 of

the UAPA became India's primary anti-terrorism legislation.³⁹³ The 1967 act banned "unlawful associations" and the 2004 amendment expanded the law to include "terrorist activity" within the ambit of the act.³⁹⁴ Subsequent amendment in 2008 further strengthened government powers to curtail civil liberties in the aftermath of the Mumbai terrorist attacks.³⁹⁵

In its present state, the UAPA defines "unlawful association" as a person who carries out activities that threaten the internal security or territorial integrity of India.³⁹⁶ The terms "internal security" and "territorial integrity" have not been defined, which makes their consistent application difficult. An "unlawful activity" is defined as any act that supports or propagates secession or disrupts the security and integrity of India.³⁹⁷ Such an act does not have to be violent; it can be verbal, oral, or visual in nature. Furthermore, the central government holds the power to declare any association unlawful.³⁹⁸ Such an order is final once a special government tribunal—created under the act—has confirmed the order.³⁹⁹ The 2008 amendment also allows police officers to arrest suspected the UAPA violators without a warrant,⁴⁰⁰ and a person accused of an offense under the UAPA can be kept in detention for up to 180 days without bail.⁴⁰¹ All offences under the

1967 (India); The Unlawful Activities (Prevention) Amendment Act, 2004, §3, No. 29 of 2004 (India).

³⁹³ Ravi Nair, *The Unlawful Activities (Prevention) Amendment Act, 2008: Repeating Past Mistakes*, 44 *ECON. & POL. WKLY.* 10 (2009).

³⁹⁴ The Unlawful Activities (Prevention) Amendment Act, *supra* note 392, at §2.

³⁹⁵ A.G. Noorani, *India: A Security State*, 44 *ECON. & POL. WKLY.* 13, 13-15 (2009).

³⁹⁶ The Unlawful Activities Prevention Act 1967, §2(p), No. 37 of 1967 (India) ("'unlawful association' means any association (i) which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity; or (ii) which has for its object any activity which is punishable under section 153A or section 153B of the Indian Penal Code (45 of 1860), or which encourages or aids persons to undertake any such activity, or of which the members undertake any such activity[,] and where §153 of the Indian Penal Code concerns acts prejudicial to national harmony and §153B of the Indian Penal Code addresses conduct prejudicial to national integration).

³⁹⁷ *Id.* at §2(o) ("'unlawful activity' in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise), (i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or (iii) which causes or is intended to cause disaffection against India.").

³⁹⁸ The Unlawful Activities (Prevention) Amendment Act, *supra* note 392, at §3.

³⁹⁹ *Id.* at §4-5.

⁴⁰⁰ *Id.* at §43A- B.

⁴⁰¹ *Id.* at §43D(2).

act have been made cognizable criminal offences.⁴⁰² Trials under the UAPA are conducted in camera and the judge can withhold the names of witnesses.⁴⁰³

The UAPA's provisions weaken the rights of the accused. Section 43(e) of the UAPA provides that, for persons being prosecuted for terrorism, guilt is presumed if arms or explosive material are recovered from the accused person's possession.⁴⁰⁴ In contrast, under POTA, if law enforcement recovered arms from the accused or found fingerprints of the accused at the terrorist site, courts were limited to merely drawing an adverse inference against the accused. The UAPA further compromises the rights of the accused by turning the presumption of innocence on its head. Under the UAPA, Indian courts are to presume that the accused is guilty, unless he is able prove otherwise. This mandatory presumption against the accused violates the fundamental principle of criminal law that an accused is presumed innocent until proven guilty.⁴⁰⁵

A major Indian civil society organization, Coordination of Democratic Rights (CDR), has criticized the government for its enforcement of the Act. CDR claims the definitions of "unlawful activity" and "unlawful association" are vague and give overly broad powers to the executive to quell political dissent.⁴⁰⁶ Commentators have also opined that the UAPA has enabled the police to institute a policy of detaining people for an indefinite time and has undermined the rule of law in India.⁴⁰⁷ CDR further claims that the lack of police and prosecutorial oversight, as well as the immunity provided government officials,⁴⁰⁸ fosters the misuse and abuse of police authority under the act.⁴⁰⁹ Another civil society report documents that government authorities have used the UAPA to target minorities, tribal groups, members of oppressed groups, and political activists.⁴¹⁰

⁴⁰² *Id.* at §14.

⁴⁰³ *Id.* at §44.

⁴⁰⁴ *Id.* at §43E.

⁴⁰⁵ Manoj Mate & Adnan Naseenullah, *State Security and Elite Capture: The Implementation of Anti-Terror Legislation in India*, 9 J. HUM. RTS., 262, 275 (2010).

⁴⁰⁶ CDRO, *supra* note 391, at 29.

⁴⁰⁷ Editorial, *Laws Without Accountability*, 43 ECON. & POL. WKLY. 5 (2008).

⁴⁰⁸ The Code of Criminal Procedure, §197, No. 2 of 1974 (India).

⁴⁰⁹ CDRO, *supra* note 391, at 6.

⁴¹⁰ JAMIA TEACHERS SOLIDARITY FORUM (JTSF), GUILT BY ASSOCIATION: UAPA CASES FROM MADHYA PRADESH 8 (2013).

Reparations are not available under the UAPA for those claiming that government officials abused their legal authority. The provisions of the POTA, which contained a provision for punishment and compensation for malicious prosecution, were not included in the 2004 amendments to the UAPA. As a result, victims wrongfully prosecuted and/or subjected to illegal, incommunicado detention under the UAPA, are not eligible to receive reparation.

5. The Right to Information Act

In 2005, India's parliament enacted the Right to Information Act (RTI) to give citizens access to information controlled by public authorities, including notes, draft documents, government records, and virtually any other document.⁴¹¹ Additionally, the RTI formalized the right to petition the Supreme Court as a fundamental right under Articles 32 and 226 of the Constitution.⁴¹² Both articles promote government transparency and increase accountability.⁴¹³ RTI activists have emerged and begun to successfully use the law to expose human rights violations, poor governance, and corrupt officials.⁴¹⁴ By providing citizens the right to obtain government information, India has taken an important step toward promoting the right to truth for victims of enforced disappearances and fulfilling its obligation under Article 19 of the ICCPR to ensure the "freedom to seek, receive and impart information of all kinds."⁴¹⁵

While RTI was a major achievement, its implementation has produced concerns about the violence associated with RTI filings.⁴¹⁶ There have been several reports of RTI activists having been targeted for killing, because they sought to expose human rights violations and corruption within the government through RTI requests.⁴¹⁷ In 2010, there were as many as ten killings where the targeted individuals had filed RTI requests.⁴¹⁸

⁴¹¹ Working Group on the Universal Periodic Review, *Report on India*, ¶ 135, U.N. Doc., A/HRC/21/10 (July 9, 2012).

⁴¹² *Id.*

⁴¹³ Sekaggya, *supra* note 353, at ¶ 13.

⁴¹⁴ *Id.* at ¶ 93.

⁴¹⁵ ICCPR, *supra* note 18, at art. 19(2).

⁴¹⁶ Sekaggya, *supra* note 353, at ¶ 28 (the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, stated that she was "alarmed" by these reports).

⁴¹⁷ *Id.* at ¶ 93.

⁴¹⁸ *Id.* at ¶ 94.

Many of the assailants were unidentifiable.⁴¹⁹ If individuals cannot safely exercise their right to information under the RTI, then the act will be a meaningful advance toward India's fulfilment of its obligation to provide individuals access to the truth in cases of enforced disappearance.

6. The Prevention of Torture Bill

In 2010, the lower house of India's parliament passed the Prevention of Torture Bill (PTB) and it now awaits passage by the upper house before it becomes law. The preamble of the PTB states that it aims "to provide punishment for torture inflicted by public servants."⁴²⁰ The PTB defines torture and gives victims the right to file claims so long as their claims fall within the statute of limitations.⁴²¹ The bill was designed by proponents to support ratification of CAT,⁴²² which India signed but has not yet ratified. If passed by parliament, the PTB will be the first law in India providing a domestic legal framework aimed at addressing torture.⁴²³

The PTB has been widely criticized for failing to accurately reflect the provisions of CAT. The bill is only 500 words and legislators created it within only a few hours, leading many to believe the PTB is too skeletal to provide an adequate legal framework to address torture.⁴²⁴ For example, the definition of torture reflects CAT in its simplest form, but it does not enumerate some of the most common forms of torture in India.⁴²⁵ Additionally, under the PBT's provisions, victims must file claims within six months of the alleged incident,⁴²⁶ which may not reflect a reasonable timeline for torture survivors to come forward. Moreover, because India signed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and torture may be a crime against humanity, the PTB's statutory limitation could be argued to violate the

⁴¹⁹ *Id.*

⁴²⁰ ASIAN HUMAN RIGHTS COMMISSION, INDIA'S PREVENTION OF TORTURE BILL REQUIRES A THOROUGH REVIEW (2010).

⁴²¹ *Id.*

⁴²² Sekaggya, *supra* note 353, at ¶ 14.

⁴²³ ASIAN HUMAN RIGHTS COMMISSION, *supra* note 420.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

Convention's object and purpose.⁴²⁷ Last, and most importantly, the PTB does not criminalize torture and, thus, it does not provide a mechanism to investigate or protect witnesses.⁴²⁸ Despite its shortcomings, the SR on Extrajudicial Killings has suggested that the bill be passed as soon as possible to pave the way for CAT ratification.⁴²⁹

7. The Prevention of Communal and Targeted Violence Bill

The Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill (PCTV) of 2011 is a comprehensive piece of legislation that was cleared by the Indian government's cabinet in 2013 for introduction to parliament. It addresses state responses and remedies for situations of communal and targeted violence.⁴³⁰ The PCTV defines communal and targeted violence as (a) any spontaneous or planned action that results in injury to a person or harm to his or her property, (b) action that was deliberately directed because of his or her membership to any group, and (c) action that destroys the secular fabric of the country.⁴³¹

a) Definition of victim

Under international law, a victim is defined as person who individually or collectively suffers harm, whether physical, mental, emotional or economic, through acts or omissions of the state that result in gross violations of international human rights norms or violations of the criminal laws of the state, including, where appropriate, the family members and dependents of direct victims.⁴³² Under these definitions, family members can be indirect victims and most human rights instruments and treaty interpretations provide for compensation to direct and indirect victims.⁴³³ International standards also

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ Heyns, *supra* note 30, at ¶ 99.

⁴³⁰ Communal Violence and Targeted Violence Bill, § 5 (2011) (India).

⁴³¹ *Id.* at § 3(c).

⁴³² Basic Principles, *supra* note 279 at art. 8; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res 40/34, Annex, U.N. GAOR, 40th Sess. Supp. No. 34, U.N. Doc. A/RES/40/34, arts. 1 and 2 (Nov. 29, 1985) [hereinafter Principles of Justice]; *see also* INTERNATIONAL COMMISSION OF JURISTS (ICJ), THE RIGHT TO A REMEDY AND TO REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS - A PRACTITIONERS GUIDE No. 2 32 (2006) [hereinafter ICJ RIGHT TO A REMEDY].

⁴³³ 1992 Declaration, *supra* note 15; Working Group on Enforced or Involuntary Disappearances, *General Comment on Art. 19 of the Declaration on the Protection of All Persons from Enforced Disappearances*, U.N. Doc.

recognize the harm suffered by a group or community as a result of violations, and vulnerable groups affected have qualified as victims.⁴³⁴

Under the PCTV, a victim is someone who suffers physical, mental, psychological or monetary harms or harm to his or her property because of the commission of any offence identified in the proposed legislation. The PCTV's definition of "victim" includes indirect victims to the extent that they are relatives, legal guardians, or legal heirs of the direct victim.⁴³⁵ Indirect victims may also include members of religious or linguistic minorities in any state of India or any person belonging to a "scheduled caste" or "tribe."⁴³⁶ As with international law, an individual must establish that she has suffered harm as a consequence of the crime in order to claim of victim status under the PCTV.

b) The PCTV and the right to a remedy in international law

Under international law, every person has a right to remedy, including reparations, for gross human rights violations. Human rights violations that are widespread and systematic in nature are considered gross violations.⁴³⁷ Experts have opined that gross human rights violations include, at the very least, genocide, summary and arbitrary executions, torture, disappearances, arbitrary and prolonged detention, systematic discrimination, and violations of economic social and cultural rights that are gross and systematic in scope and nature.⁴³⁸ The PCTV addresses violence targeted at a particular minority that is widespread or systematic in character. Hence, the PCTV, if

E/CN.4/RES/2003/38 (1998); *see also* Human Rights Committee, *Almeida de Quinteros et al v. Uruguay*, ¶¶ 14, 16, U.N. Doc. CCPR/C/OP/2/1981 (1983); Human Rights Committee, *Celis Laureano v. Peru*, ¶ 10, U.N. Doc. CCPR/C/56/D/540/1993 (1996); Human Rights Committee, *Sarma v. Sri Lanka*, ¶ 11, U.N. Doc. CCPR/C/78/D/950/2000 (2003); Human Rights Committee, *Coronel et al. v. Colombia*, ¶ 10, U.N. Doc. CCPR/C/76/D/778/1997 (2003).

⁴³⁴ Office of High Commissioner for Human Rights, *Rule of Law: Tools for Post Conflict States*, U.N. Doc. HR/PUB/06/3 (2006).

⁴³⁵ Communal Violence and Targeted Violence Bill, *supra* note 430, at §3(j).

⁴³⁶ *Id.* at §3(e).

⁴³⁷ Editorial Committee, Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Maastricht, NETHERLANDS INSTITUTE OF HUMAN RIGHTS, UTRECHT, part 10 (Mar. 11-15, 1992) [hereinafter Maastricht Seminar]; Independent Expert Stanislav Chernichenko for the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Working Paper on Definition of Gross and Large-Scale Violations of Human Rights as an International Crime*, ¶¶ 14-15, submitted to the Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1993/10 and Corr.1 (Aug. 11, 1993) [hereinafter *Stanislav Working Paper*].

⁴³⁸ *Id.*; Maastricht Seminar, *supra* note 437.

passed, can be a tool for India to respect, protect and fulfill human rights by providing a right to remedy to minority victims of gross human rights violations.

Under international law, the state has a duty to create broad awareness about the availability of remedies. Such remedy must also be prompt and effective, which implies practical and real access to justice in the event of violations.⁴³⁹ Such remedies requires the state to guarantee an investigation into alleged human rights violations⁴⁴⁰ conducted by independent authorities⁴⁴¹ and victims' access to legal assistance.⁴⁴² Investigating authorities must also have the power to oblige victims and witnesses to appear before the authorities and to submit documents.⁴⁴³ Investigations must be public and victims should have access to the proceedings.⁴⁴⁴

⁴³⁹ ICJ RIGHT TO A REMEDY, *supra* note 432, at 46; *General Comment No. 31, supra* note 247; Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87, ¶ 24, Inter-Am. Ct. H. R. (ser. A) No. 9 (Oct. 6, 1987); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle C, African Union Doc. DOC/OS (XXX) 247 [hereinafter African Fair Trial Principles]; Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, ¶ 61, Communication 155/96, 30th Ordinary Session (Oct. 2001) (African Commission considered that the State had to ensure 'legal remedies'); *Airey v. Ireland*, 32, ¶ 33, 32 Eur. Ct. H. R. (ser. A) (1979).

⁴⁴⁰ *General Comment No. 31, supra* note 247, at ¶8; *Velásquez Rodríguez v. Honduras, supra* note 66, at ¶ 172; *Pedro Peredo Valderrama v. Mexico*, ¶ 41, Case 11.103, Inter-Am. Comm'n H. R., Report No. 42/00 (2000); *Maria Da Penha Maia Fernandes v. Brazil*, ¶ 37, Case 12.051, Inter-Am. Comm'n H. R., Report No. 54/01, OEA/Ser.L/V/II.111 (2001); *Report on the Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination*, ¶ 131, Inter-Am. Comm'n H. R., OEA/Ser.L/V/II.117 Doc. 44 (2003); *Ergi v. Turkey, supra* note 246, at ¶ 82; *see also* *Tanrikulu v. Turkey*, ¶ 103, App. No. 23763/94, 1999-IV Eur. Ct. H.R. 488 (1999); *Demiray v. Turkey*, ¶ 50, App. No. 27308/95, 2000-XII Eur. Ct. H. R., (2000).

⁴⁴¹ *General Comment No. 31, supra* note 247, at ¶ 15; *Keenan v. the United Kingdom*, Judgment on the Merits and Satisfaction, ¶ 122, 2001-III Eur. Ct. H. R. 242 (Apr. 3, 2001); *Judicial Guarantees in States of Emergency Advisory Opinion*, Inter-Am. Ct. H. R. (ser. A) No. 9, ¶ 24 (1987).

⁴⁴² Human Rights Committee, *Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant*, ¶ 14, U.N. Doc. CCPR/CO/82/POL (2004); *Airey v. Ireland, supra* note 439, at ¶ 33; African Fair Trial Principles, *supra* note 439, at Principle H; ECHR, *supra* note 249, at art. 47.

⁴⁴³ *1992 Declaration, supra* note 15, at art. 13(2); UN Principles on Extra-legal Executions, Principle 10, G.A. Res. 44/159, U.N. Doc. A/RES/44/159 (Dec. 15, 1989); Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Principle 3(a), G.A. Res. 55/89, U.N. Doc. A/RES/55/89 (Dec. 4, 2000); Amnesty International et al. v. Sudan, ¶ 51, Comm. No. 48/90, 50/91, 52/91, 89/93 (2000); *Hugh Jordan v. United Kingdom*, ¶ 127, App. No. 24746/94, 2001-III Eur. Ct. H. R. (May 4, 2001); *McKerr v. United Kingdom*, ¶ 124, App. No. 28883/95, 2001-III Eur. Ct. H.R. (2001).

⁴⁴⁴ *Id.* at ¶ 147; *Hugh Jordan v. United Kingdom, supra* note 443, at ¶ 133; *Kelly v. United Kingdom*, ¶ 127, App. No. 30054/96, 2001-III Eur. Ct. H. R. (May 4, 2001); *Caracazo v. Venezuela, Reparation, Judgment*, ¶ 115, Inter-Am. Ct. H. R. (ser. C) No.95 (2002).

c) The PCTV and the right to justice

The PCTV provides a range of measures designed to guarantee prompt and effective remedy. The proposed legislation calls for the establishment of institutional and special mechanisms at the national and state levels, including a National Authority for Communal Harmony, Justice and Reparation;⁴⁴⁵ state Authorities for Communal, Harmony, Justice and Reparation⁴⁴⁶ that have the duty to ensure the timely and effective investigation and prosecution of offences under the PCTV;⁴⁴⁷ appointment of a Human Rights Defender For Justice and Reparations to ensure that the right to relief, reparation, compensation and restitution is easily accessible to the victims;⁴⁴⁸ judicial inquiry to examine the role of public servants;⁴⁴⁹ appointment of special public prosecutors;⁴⁵⁰ appointment of designated judges for offences triable under the PCTV;⁴⁵¹ and state assessment committees.⁴⁵² If the legislation is enacted, all state and national committees would be required to include a member of a non-governmental human rights group, whose participation is intended to ensure greater independence to the committees. Furthermore, public servants are subject to prosecution for dereliction of duty under the proposed legislation.⁴⁵³

The PCTV affords victims specific rights and protections concerning the investigation of violations recognized under the proposed legislation. For example, under the PCTV, a translated true copy of the first information report must be provided to the victim or informant within seven days⁴⁵⁴ and, in case the victim or informant feels that the information has not been accurately recorded or he or she does not get a copy of the report, he or she can lodge their complaint direct with the superintendent of police or deputy superintendent of police who, if satisfied there is a violation of the PCTV, may

⁴⁴⁵ Communal Violence and Targeted Violence Bill, *supra* note 430, at § 21.

⁴⁴⁶ *Id.* at § 44.

⁴⁴⁷ *Id.* at § 53(i).

⁴⁴⁸ *Id.* at § 56.

⁴⁴⁹ *Id.* at § 72.

⁴⁵⁰ *Id.* at § 78.

⁴⁵¹ *Id.* at § 79.

⁴⁵² *Id.* at § 95.

⁴⁵³ *Id.* at § 13, 14, 15, 77.

⁴⁵⁴ *Id.* at § 59.

himself undertake or order an investigation be undertaken.⁴⁵⁵ Where a victim believes that the investigating agencies are not functioning in an impartial, unbiased, and timely manner, the proposed legislation provides that the victim may approach national or state authorities, which can issue directions to the state government for properly conducting the investigation, or order a re-investigation.⁴⁵⁶

Where victims of communal or targeted violence are resettled in a relief camp, the police have a duty to visit the camp within seven days to conduct investigations into the circumstances and cause of the victims' displacement.⁴⁵⁷ Offences under the PCTV can only be investigated by a police officer of the rank of senior inspector or above.⁴⁵⁸ Furthermore, under the proposed legislation, victims or informants are entitled to record statements in front of the metropolitan magistrate or judicial magistrate even if the magistrate does not have territorial jurisdiction in the matter, and such statements can be sent to the national or state authority for necessary action.⁴⁵⁹

In offences resulting in physical injury under the PCTV, a medical examination of the victim is required to be conducted within two days by at least two registered medical practitioners. In the case of a death, a post-mortem must be conducted in the presence of a representative of the victim by a board consisting of three medical practitioners and must be recorded by video, a copy of which shall be attached to the medical report that has to be submitted to the investigating agency within forty-eight hours of completion.⁴⁶⁰ The proposed legislation also requires that all medical, hospital and police records pertaining to offences under the act are to be preserved,⁴⁶¹ that all investigating agencies under the act are given the power to issue summons for the production of witnesses and documents, and that all court proceedings are recorded by video.⁴⁶²

⁴⁵⁵ *Id.* at § 60.

⁴⁵⁶ *Id.* at § 71.

⁴⁵⁷ *Id.* at § 61.

⁴⁵⁸ *Id.* at § 62.

⁴⁵⁹ *Id.* at § 64.

⁴⁶⁰ *Id.* at § 65.

⁴⁶¹ *Id.* at § 68.

⁴⁶² *Id.* at § 88.

The victim of violations under the PCTV also enjoys rights and protections related to the trial and prosecution of violations. At trial, protection must be provided to victims, and they have the right to timely notice of any court proceedings as well as the right to be heard at any proceedings.⁴⁶³ Moreover, if the central government determines that a fair or impartial trial is not possible within the federal state, it can appoint additional designated judges to try the matter outside the original state.⁴⁶⁴

d) The PCTV and the right to truth

The right to truth is an emerging norm that applies to human rights violations in general.⁴⁶⁵ The right is held by individuals as well as being a collective right of the society to know the truth regarding human rights violations so that they can be addressed and the proper functioning of democratic institutions can be ensured.⁴⁶⁶ In comparison to the wealth of provisions on the right to justice, the PCTV contains few provisions relating to the right to truth. The proposed legislation would require state governments to establish a single window system in relief camps to provide information regarding the whereabouts of missing persons to their relatives, friends, and family members.⁴⁶⁷ In addition, section 113 of the proposed legislation establishes that state and central governments have a duty to search for bodies of those killed and disappeared and provide assistance in identification and reburial of the same.⁴⁶⁸

⁴⁶³ *Id.* at § 86.

⁴⁶⁴ *Id.* at § 79(2).

⁴⁶⁵ *Kurt v. Turkey*, *supra* note 21, at ¶ 174.

⁴⁶⁶ Ignacio Ellacuría S.J. et al. v. El Salvador, ¶ 224, Case 10.488, Inter-Am. Comm'n H.R. Report No. 136/99, OEA Ser.L/V/II.106, Doc. 3 rev (1999); *see also* Lucio Parada Cea et al. v. El Salvador, ¶ 148, Case 10.480, Inter-Am. Comm'n H.R. Report No. 1/99, OEA/Ser.L/V/II.95 Doc. 7 rev. at 531 (1998); *Bámaca Velásquez v. Guatemala*, Submission of the Commission to the Inter-American Court, Judgment, ¶ 197, Inter-Am. Ct. H.R. (ser. C) No. 91 (Feb. 22, 2002).

⁴⁶⁷ Communal Violence and Targeted Violence Bill, *supra* note 430, at § 94(h).

⁴⁶⁸ *Id.* at § 113(b).

e) The PCTV and the right to reparations, including guarantees of non-recurrence, restitution, and compensation

International law requires that a remedy be effective⁴⁶⁹ and include measures for cessation, restitution, compensation, and prevention of a recurrence of the violation. Cessation involves a guarantee of non-recurrence,⁴⁷⁰ and guarantees of non-recurrence aim to prevent future violations.⁴⁷¹ Such guarantees can involve protection of human rights defenders, human rights training, protection of media persons and human rights advocates.⁴⁷² Section 113 of the PCTV provides for measures of non-recurrence by requiring state officials to take steps to end the violence; memorialize the incidents; protect legal, media and human rights personnel; and provide human rights training.⁴⁷³

The right to restitution and compensation are well established in international treaties.⁴⁷⁴ Restitution seeks to reverse the effect of the violations and establish the status quo ante⁴⁷⁵ and can include restoration of identity, family life, citizenship, return to the place of residence, restoration of employment and the return of property.⁴⁷⁶ Under the PCTV, state governments are required to take steps to ensure safety of life, liberty and property of affected persons.⁴⁷⁷ For example, the proposed legislation requires that single window systems be established in relief camps to complete all administrative formalities regarding restoration of identity documents,⁴⁷⁸ and that the state government must replace all identity documents within three months.⁴⁷⁹ The PCTV further stipulates that the state must resettle victims either in their existing locations or in new locations, and it

⁴⁶⁹ *General Comment No. 31, supra* note 247, ¶ 15; *Judicial Guarantees in States of Emergency Advisory Opinion, supra* note 441, ¶ 24; *Silver .v the United Kingdom*, ¶ 113, 61 Eur. Ct. H. R. (ser. A) (1983); *African Fair Trial Principles, supra* note 439, at Principle C (a).

⁴⁷⁰ *LaGrand Case (Germany v. the United States)*, ¶ 123, 2001 I.C.J. 514 (June 27, 2001).

⁴⁷¹ ICJ RIGHT TO A REMEDY, *supra* note 432, at 97.

⁴⁷² *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, supra* note 439, at ¶ 57, 61.

⁴⁷³ *Communal Violence and Targeted Violence Bill, supra* note 430, at § 113 (a), (d), and (e).

⁴⁷⁴ ICCPR, *supra* note 18, at art. 9 (5); *African Charter on Human and People's Rights* art. 63, Nov. 21, 1986, 1520 U.N.T.S. 217 [hereinafter *African Charter*]; *CAT, supra* note 145, at art. 14; *API, supra* note 201, at art. 91; *Rome Statute, supra* note 15, at art. 75.

⁴⁷⁵ *African Charter, supra* note 474, at art. 63 (1); *ECHR, supra* note 249, at art. 41; *Rome Statute, supra* note 15, at art. 75; *Principles of Justice, supra* note 432, at Principles 8-10.

⁴⁷⁶ *Basic Principles, supra* note 279, at Principle 19.

⁴⁷⁷ *Communal Violence and Targeted Violence Bill, supra* note 430, at § 92.

⁴⁷⁸ *Id.* at § 94(c).

⁴⁷⁹ *Id.* at § 94(d).

requires the state to restore victims' employment, places of worship, civic amenities, and community structures to their original conditions.⁴⁸⁰ Under the proposed legislation, the state governments also have a duty to establish conditions and provide the means for the victims' voluntary "return to their place of ordinary residence or livelihood in safety and with dignity, protected against any threat, intimidation or attack to their life, liberty or property"⁴⁸¹

International law provides that compensation should be paid for physical or mental harm; lost opportunities, including employment, education, and social benefits; material damages; loss of earnings, including loss of earning potential; moral damages; cost of legal experts; and cost of treatment for medical issues and psychological counseling.⁴⁸² Courts have used varying standards to compensate economic losses.

Schedule IV of the PCTV provides guidance on the calculation of compensation for victims under the law. In cases of immovable property where a person's house is destroyed, compensation is calculated as the value of the property at the time of communal violence, adjusted to inflation.⁴⁸³ Schedule IV is silent on the provision of compensation for destruction of movable property, forced displacement, and occupation of shops or loss of opportunity. A comprehensive scheme is provided under Schedule IV for physical harm, including death and disablement, grievous hurt, criminal trespass, kidnapping, rape, other forms of sexual violence, mental harassment, depression, and psychological harm. Compensation must also be provided for injury to public property, private property, bodily harm or death, moral injury, material injury, or psychological injury. In addition, the state is required to provide legal, medical, psychological assistance, and social services to victims.⁴⁸⁴ There are provisions for community-based

⁴⁸⁰ *Id.* at § 99(2).

⁴⁸¹ *Id.* at § 100.

⁴⁸² *Basic Principles*, *supra* note 279, at Principle 20; *CAT*, *supra* note 145, at art. 14; *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, art.16 (4) and (5), Sept. 5, 1991, 28 ILM 1382 (1989); *Rome Statute*, *supra* note 15, at art. 75(1); *1992 Declaration*, *supra* note 15, art. 19; *Principles of Justice*, *supra* note 432, at Principle 12; *Declaration on Human Rights Defenders* art. 9(2), G.A. Res. 53/144, U.N. Doc. A/RES/53/144 (Mar. 8, 1999); *African Charter*, *supra* note 474, at art. 63 (1); *Inter-American Convention to Prevent and Punish Torture* art.9, Feb. 28, 1987, OAS/Ser.L/V/I.4 Rev. 9 (2003); *ECHR*, *supra* note 249, at art.41 (3); *Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights* art. 21(2), 27(1), Jan. 1, 2004, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

⁴⁸³ *Communal Violence and Targeted Violence Bill*, *supra* note 430, at Schedule IV.

⁴⁸⁴ *Id.* at § 104.

rehabilitation of women and orphans that include life-long psychological counseling, provisions for alternative employment, soft loans, tools for employment, and means of livelihood.⁴⁸⁵

Though not yet enacted in law, on the whole, the PCTV is a comprehensive draft consistent with international standards on the right to remedy for victims of gross human rights violations. The Bill recognizes identity-based targeted violence as a distinct category of criminal offence. It contains provisions to hold officials who do not perform their duties before, during, and after an incident of communal violence accountable for their failure to do so. It also creates monitoring and compliance mechanisms in the form of the National and State Authorities for Communal Harmony, Justice and Reparation.

In sum, the PCTV contains measures to advance all four aspects of the right to a remedy: justice, truth, reparations, and guarantees of non-recurrence, but is silent on the collective, societal right to truth after an incident of communal violence.⁴⁸⁶ In India, there has been a practice of establishing ad hoc commissions following incidences of communal violence. Future policy formulations should consider proposing that the central government systematically form an independent commission after every incident of communal and targeted violence with the aim of producing an official report and identifying the root causes of the incident. This report could be submitted to parliament for discussion and the consideration of initiatives targeting the reduction of such incidences. Such measures would promote the collective right to truth and are consistent with international human rights standards. However, there will be significant challenges to passing the bill in Parliament given the current political climate.

C. EVALUATION OF INDIA'S LEGAL FRAMEWORK REGARDING THE RIGHT TO A REMEDY FOR ENFORCED DISAPPEARANCES

Although a number of India's domestic laws discussed in the preceding section intend to protect individual rights and restrict arbitrary or abusive uses of power by government officials, weaknesses persist in practice. First, weaknesses in the legal regime create a

⁴⁸⁵ *Id.* at § 99(2).

⁴⁸⁶ *Ignacio Ellacuría S.J. et al. v. El Salvador*, *supra* note 466, at ¶ 224; *Lucio Parada Cea et al. v. El Salvador*, *supra* note 466, at ¶ 148; *Bámaca Velásquez v. Guatemala*, *supra* note 466, at ¶ 197.

system of *de jure* impunity that denies victims their right to a remedy under law. Second, those laws that do provide for remedy often go unenforced by the Indian state, creating *de facto* impunity. This section discusses the *de jure* and *de facto* limitations on the right to remedy for victims of human rights violations in India.

1. Legal Weaknesses

India's domestic laws do not consistently promote accountability for human rights violations and some stand in direct conflict with international standards concerning the right to remedy. Although the AFSPA has been found constitutional, it creates a system of *de jure* impunity because officers cannot be prosecuted without the government's explicit permission.⁴⁸⁷ Examples of such *de jure* impunity send a strong message to victims of enforced disappearances that the state stands with the alleged perpetrators of these violations and indifferent to the violation of their rights.⁴⁸⁸ The SR on Extrajudicial Killings has declared impunity and other obstacles to accountability to be India's central problem in combating extrajudicial executions.⁴⁸⁹ The ICCPR protects the individual's right to a competent judicial authority,⁴⁹⁰ yet the AFSPA contradicts India's treaty obligations by failing to provide access to justice to victims of enforced disappearances.

Although the NHRC functions in part to investigate and report on human rights violations, including the widespread system of impunity for such violations, its mandate prevents it from addressing cases that occur outside the one year statute of limitations. Additionally, the NHRC may not expressly investigate members of the armed forces, which restricts its ability to address human rights violations committed under the AFSPA.

The POTA enables officials to label a broad range of behavior as "terrorist activity" without government oversight. Under such a broad definition of "terrorist activity," many individuals receive harsher punishment under the POTA than they would be subject to

⁴⁸⁷ See HUMAN RIGHTS WATCH, "EVERYONE LIVES IN FEAR": PATTERNS OF IMPUNITY IN JAMMU AND KASHMIR 27 (2006), available at <http://www.hrw.org/reports/2006/india0906/india0906web.pdf>. For purposes of reminder, "sanction" refers to "permission," it does not connote criminal punishment.

⁴⁸⁸ *Id.*; Heyns, *supra* note 30, at ¶ 23.

⁴⁸⁹ *Id.* at ¶ 92.

⁴⁹⁰ ICCPR, *supra* note 18, at art. 2(3)(b).

under the Penal Code.

The failure of the PTB to reflect the provisions of CAT also stunts the legal framework supporting the right to a remedy for enforced disappearances. The PTB does not create a minimum sentence for those guilty of torture, and victims must file complaints within a six-month statute of limitation; thus, perpetrators may be inadequately punished and it is likely that only a small proportion of victims be able to access justice or benefit from an effective remedy. Like the AFSPA, the PTB also creates *de jure* impunity by protecting public servants from prosecution unless expressly approved by the government.

2. Enforcement Weaknesses

Exacerbating the existing weaknesses in the legal framework, government officials do not adequately enforce laws on the books that are intended to protect human rights and guarantee the victims' right to remedy. Thus, individuals are not sufficiently protected by domestic laws and do not have legal recourse when violations occur.

Further, the general lack of cooperation from India's security forces⁴⁹¹ prevents victims from ascertaining the truth, achieving justice, and, ultimately, accessing adequate remedies. Courts rarely make inquiries into human rights abuses even though they possess the power to order investigations by special investigative teams.⁴⁹² AFSPA and POTA create a system in which access to justice is conditioned on the government's acquiescence the investigation and prosecution of its own agents. Under this "impunity unless sanctioned" regime, many requests for authorization to prosecute are never formally denied by the Indian government, but instead allowed to pend for years without a decision. To date, a sanction to prosecute requested under AFSPA have never been granted.⁴⁹³

⁴⁹¹ THE MYTH OF NORMALCY, *supra* note 310, at 12.

⁴⁹² *Id.* at 13, note 49.

⁴⁹³ Heyns, *supra* note 30, at ¶ 23. For a detailed analysis of *de facto* impunity in Kashmir, see THE MYTH OF NORMALCY, *supra* note 310.

Currently, NHRC does not have an adequate method to enforce compliance with its guidelines or recommendations. If given such power, the Commission could play an important part in guaranteeing effective remedies for victims of enforced disappearances.

D. ASSESSMENT OF DOMESTIC FRAMEWORK

While India's domestic framework guarantees certain aspects of the right to a remedy for enforced disappearances, it neglects others. First, this section will assess the adequacy of India's domestic policy to protect the rights of victims of enforced disappearances, using the framework of the Special Rapporteur on Transitional Justice. Second, this section will situate India's domestic laws providing remedies for enforced disappearances within the larger context of international law.

India most clearly provides for the right to truth, an emerging right that India will be obligated to guarantee if it ratifies CED. Though fraught with limitations and concerns, as discussed above, RTI provides access to information controlled by public authorities and, thus, at least theoretically enables Indian citizens to acquire information about past disappearances. Additionally, NHRC is an independent body that conducts research and issues guidelines concerning enforced disappearances, addressing the right to truth outside of the individual inquiry process. However, the Commission's work likely fails to completely fulfill the right to truth, because the NHRC may not be capable of rigorously investigating "what really happened, why did it happen, and who is directly and indirectly responsible."⁴⁹⁴

The right to justice, arising for India under the CED, the CAT, the Genocide Convention, and the Geneva Conventions, is also protected in part by NHRC, because the Commission has authority to investigate violations of human rights. However, NHRC does not have jurisdiction to prosecute cases and thus may not punish guilty perpetrators. While PTB provides for criminal punishment of torture violations and PCTV criminalizes communal and targeted violence, neither law has been adopted by

⁴⁹⁴ Méndez & Bariffi, *supra* note 305, at ¶ 4.

Parliament. Given these limitations, India falls short of its international obligations to investigate, prosecute, and adequately punish perpetrators guilty of enforced disappearances. India is best equipped to address the first component of the right to justice adequate investigation, though the state's capacity even in this area suffers limitations.

As it exists today, India does not offer victims of enforced disappearances adequate access to reparations. If passed, PCTV will provide a relatively robust compensation and reparation scheme for victims of communal and targeted violence. However, nothing currently exists to address the seven categories of reparations: cessation, restitution, compensation,⁴⁹⁵ satisfaction,⁴⁹⁶ interest,⁴⁹⁷ guarantees of non-repetition,⁴⁹⁸ and rehabilitation for victims of enforced disappearances. Additionally, Article 9 of India's Constitution prevents compensation for unlawful arrests and detentions.⁴⁹⁹ Thus, India's domestic legal framework conflicts with widely recognized international norms regarding the right to reparation.

Finally, NHRC indirectly addresses the right to non-recurrence⁵⁰⁰ by monitoring human rights violations. However, the commission is not able to investigate military officials who violate human rights. Additionally, AFSPA effectively exempts military officials from prosecution, which renders the justice process ineffective and weakens deterrence and, therefore, undermines India's ability to fulfill its obligation to guarantee non-recurrence and access to justice.

The Special Rapporteur on extrajudicial killings has made additional conclusions about India's compliance with its international legal obligations. This Special Rapporteur investigated the status of extrajudicial killings in India in 2012 which resulting in his

⁴⁹⁵ "Compensation" means to compensate for any financially assessable damages that the State caused. Shelton, *supra* note 313, at ¶ 25.

⁴⁹⁶ "Satisfaction" includes incalculable damages, to redress moral or legal injury (for example, an acknowledgement of the breach, an expression of regret, or an apology). *Id.* at ¶ 28.

⁴⁹⁷ "Interest" is granted on a case-by-case basis, and awarded only to ensure full reparation. *Id.* at ¶ 26.

⁴⁹⁸ "Guarantees of non-repetition" generally involve a promise (more than a mere statement) not to repeat the violation. Often this requires states to take preventative measures to avoid repetition. *Id.* at ¶ 27.

⁴⁹⁹ See INDIA CONST.

⁵⁰⁰ See *supra* at 59-61 (discussing the guarantee of non-recurrence).

calling for India to ratify several relevant treaties⁵⁰¹ that would broaden the scope of the international obligations binding India. If India ratifies additional treaties, international norms should play a more prominent role in shaping its policy and practice with regard to providing remedy to victims of enforced disappearances. Providing individuals with an opportunity to bring claims for violations under treaties, such as through the ratification of the Optional Protocol of the ICCPR, also would also advance the right to a remedy for enforced disappearances in India.

Indian domestic law allows impunity for enforced disappearances in states such as Gujarat, Manipur, Jammu and Kashmir, and Punjab. Although victims possess certain entitlements in the area of the right to truth, *de facto* and *de jure* immunity minimizes victims' access to the right to justice. In addition, agents of the state are rarely held accountable for their acts through other forms of sanction (e.g. removal from office). In law and practice, India does not satisfy the right to non-recurrence, as those responsible for enforced disappearances are permitted to remain in their posts and the state has not put in place policies or processes aimed at reforming the institutions implicated in these violations. Furthermore, the state has made no provisions to grant victims of enforced disappearances access to reparations. On the whole, India's legal framework in the area of the right to a remedy for victims of enforced disappearance is weak and requires reform in order for India to meet its obligations under international law.

CONCLUSION

The international legal framework applicable to right to remedy for enforced disappearance offers advocates for domestic reform in India important guidance and support. India has assumed obligations under international law that require the state to guarantee the right to a remedy for this serious human rights violations, including enforced disappearances. The contemporary understanding of the right to a remedy encompasses the rights to justice, truth, reparation, and guarantees of non-recurrence. Furthermore, remedies provided by the state must be effective in order to comport with

⁵⁰¹ Heyns, *supra* note 30, at ¶ 97-98 (he included the following treaties: (a) CAT, (b) CED, (c) both Optional Protocols to the ICCPR, (d) the Optional Protocol to CEDAW, (e) Rome Statute of the ICC, and (f) the two Optional Protocols to Geneva Conventions).

international law. Measured against these standards, India's domestic laws and practice are not consistent with international law and human rights standards. By identifying both the applicable standards and shortcoming of the Indian state in the area of the right to remedy, this paper provides human rights advocates with a tool to aid their efforts to ensure that India ensures victims are able to exercise their right to a full and effective remedy for enforced disappearances.