HELLENIC REPUBLIC

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Observations by the Greek National Commission for Human Rights (GNCHR) on Greece's Initial Report on the Implementation of the International Convention for the protection of all Persons from Enforced Disappearance

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The Greek National Commission for Human Rights (GNCHR) is the independent advisory body to the Greek State on matters pertaining to human rights protection. It was established by Law 2667/1998 in accordance with the UN Paris Principles. Thirty-five institutions whose activities cover the field of human rights are currently represented in the GNCHR (independent authorities, departments of university-level educational institutions, workers' and disabled persons' confederations, NGOs, political parties and ministries).

TABLE OF CONTENTS

Observations by the Greek National Commission for Human Rights (GNCHR) on Greece's Initial Report on the Implementation of the International Convention for the protection of all Persons from Enforced Disappearance*

I. INTRODUCTORY REMARKS

The Ministry of Foreign Affairs submitted Greece's draft Initial Report (hereinafter draft Report) on the implementation of the International Convention for the protection of all Persons from Enforced Disappearance (hereinafter CPED) to the Greek National Commission for Human Rights (hereinafter GNCHR), Greece's *A status* National Human Rights Institution (hereinafter NHRI). Taking into account the key role NHRIs play in assisting the Committee on Enforced Disappearances (hereinafter CED) to fulfill its mission to promote and implement the CPED, as well as in encouraging and assisting the State party to meet its reporting obligations[1] and in accordance with its founding legislation (Article 1(6)(b), (e) and (f) of Law 2667/1998)[2], the GNCHR[3] submits the following Observations, with a view to contributing to the draft Report's enrichment by completing the image of the context and the conditions under which the CPED is implemented in Greece.

II. GENERAL OBSERVATIONS

The draft Report contains an extensive – 32 pages – presentation and evaluation of the implementation of the provisions of the CPED without limiting itself to a simple indication of the legislation and the relevant structures established for the protection of every right. The GNCHR considers that it should, at this point, recall the need to clearly describe the issues

* The present Observations were adopted by the GNCHR plenary on 29.11.2018. Rapporteurs: Professor Maria Gavouneli,1st Vice-President, GNCHR, Eva Tzavala, Legal Officer, GNCHR, Ioanna Pervou, Dr. Jur (AUTh), LLM (i) (cantab), LLM (DUTh), MBA (ACT), External Scientific Advisor.

[1] CED, The relationship of the Committee on Enforced Disappearances with National Human Rights Institutions, 28 October 2014, CED/C/6, par. 1-9.

[2] According to which: "The Commission shall in particular: (a) examine issues in connection with the protection of human rights put before it by the Government or the Conference of Presidents of Parliament or proposed to it by its members or non-governmental organizations; […] (e) deliver an opinion on reports which the country is to submit to international organizations on related matters; (f) maintain constant communication and work together with international organizations, similar organs of other countries, and national or international non-governmental organizations; […]".

[3] The GNCHR has in the past dealt with issues regarding enforced disappearances, while formulating for this purpose specific recommendations to the Greek competent Authorities. See, in particular, GNCHR, *Decision regarding the Potential Greek Involvement in CIA's Illegal Flights* (2007), available at: http://www.nchr.gr/images/English_Site/TROMOKRATIA/CIA_Flights%202007.pdf.

arising during the application of any legislation in practice as closely as possible to reality and to find solutions to the shortcomings of the protection framework.

1. The absence of a general provision on the existence of the right not to be subjected to enforced disappearance

Article 1 CPED proclaims an absolute prohibition of enforced disappearances. The stipulation of the right not to be subjected to enforced disappearance in Art. 1(1) of the CPED is considered fairly a noteworthy step towards the completion of the international human rights regime.[4] Yet, the fact that the right is not mentioned in any of the general universal human rights instruments (either the UDHR or the Covenants, which are usually referred to as the "International Bill of Human Rights") raises interpretive issues regarding their intrinsic cohesion, and challenges the right's potential comprehensive integration in the current regime.[5]

The same applies to domestic legal orders. CPED's member-states are obliged conventionally to make the necessary adjustments to their civil and penal codes in order to provide for particular provisions regarding the crime (or state practice) of enforced disappearance, the violators' punishment and the victims' compensation. In this regard, a systemic paradox arises. In domestic legislations there is no reference to the prohibition of disappearances, except for one state worldwide.[6] The absence of the right's reference shall not be considered a deficit, since CPED is integrated in national legal orders as soon as it is ratified. However, the input of the crime and its penalties in national legal instruments presupposes its connection to the state's constitutional order.

More specifically, the Greek State refers to constitutional provisions which serve as normative fundaments for enforced disappearance mentions primarily Arts 5(3) and 6 of the Greek Constitution. Secondarily, it makes an association with the prohibition of torture and the right

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[4] UN Doc E/CN.4/2002/71, paras 97-102; UN Doc E/CN.4/2004/59, para 170(a).

[5] Mary Ann Glendon, 'The Rule of Law in the Universal Declaration of Human Rights' (2004) 2 NwUInt'lHumRts 1, 6.

[6] Argentina is the only member-state to the Convention which has moved to a revision of its Constitution and has added respectively a prohibition against enforced disappearance as soon as it ratified the international instrument. Hence, this addendum is justified by the country's long suffering regarding disappearances during the second half of the 20th century and it is the exception to the rule.Even regional instruments, which are prior to the Convention do not provide for a right. The Inter-American Convention on disappearance adheres to a rationale which focuses on the offence of disappearance and does not stipulate a prohibition. This slightly divergent approach is of little practical significance, although there is a clear symbolic differentiation. The same applies mutatis mutandis to the 1992 Declaration, taking into account the aims that each legal instrument serves. IACFDP Arts I, IV; 1992 Declaration Art.1(1).

to receive legal protection (Arts 7(2) and 20 of the Greek Constitution respectively). However, all these associations are proved historically and through state practice not to be fully correct. In particular, one's right not to be deprived of their liberty is merely one of disappearance's constitutive elements, while there are several cases in international jurisprudence, where the victims were not arbitrarily deprived of their liberty.[7] To the contrary, they disappeared while imprisoned on legal grounds. In other words, the victim's deprivation of liberty is an element of the crime, forming part of its *actus reus*.

If deprivation of liberty, despite arbitrary, is not followed by concealment of the person's whereabouts, then it is not connected to the crime of enforced disappearance whatsoever.[8]

Moreover, the victim's subjection to torture, or other cruel inhuman or degrading treatment is not even part of the Convention's definitional scheme. There is a presumption that the victim will be subjected to mistreatment, exactly because it is under the absolute power of their captor. The connection of enforced disappearance to torture has long been sustained, practically because the phenomenon of enforced disappearance was on its peak when the Convention against Torture (CaT) was drafted.[9] At present, enforced disappearances do not involve in most cases the victim's torture or severe mistreatment, that is because the purpose is to fade their fate and not to cause severe pain. This misconception is also due to the fact that the archetype of the crime, as it has been practiced in the Americas from 1960s onwards, involved the victims' torturing or death.

In this framework, many have long been connecting disappearances to the right to life, considering them as a state practice which aims at reducing the number of dissidents. All the same, this rationale has been abandoned for quite a long time, both by theory and by jurisprudence, because: a) the disappeared might reappear, b) taking one's life was not the purpose with regards to disappeared children which were given for adoption.[10]

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[7] UNCHR, 'UNCHR, 'Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearances' (2005) UN Doc E/CN.4/2005/66, para 17, para 17.

[8] UNCHR, 'Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearances' (2004) UN Doc E/CN.4/2004/59, para 20.

[9] Theo van Boven, 'Categories of Rights' in Daniel Moeckli et al (eds), International Human Rights Law (OUP 2010) 184.

[10] The prohibition's dissociation from the prohibition against torture and the right to life is evident also by Art. 322B(1b)(2), where it is stipulated that severe bodily harm of the victim and loss of life are categorized among the aggravated cases of an enforced disappearance.

Finally, the most important connection of enforced disappearances with the Greek Constitutional legal order is the individual's ability to plea before courts and to receive legal protection. Although, access to courts does not appear as part, either of the right's, or of the crime's definition, it is mentioned as the outcome of the practice of enforced disappearance "which places the victim outside the protection of the law". In other words, when the three constitutive elements of the crime of enforced disappearance *actus reus* are examined cumulatively, one is able to observe that the practice aims at putting the person outside the realm of legal protection, since both himself/herself or their next of kin are not in a position to reach a state's authorities and judicial organs. As it has rightfully pointed out by the UN Working Group on Enforced or Involuntary Disappearance (UNWGEID) the practice aims at putting the person in a "legal limbo".[11]

It is primarily the right's connection with one's access to courts which has led international jurisprudence to proclaim the right as a peremptory human rights norm.[12]

The prohibition shall be generally set under the protective umbrella of the principle of human dignity, which is cornerstone in the Greek Constitution (Art. 2). The practice of enforced disappearance carries a series of dignitarian aspects, since it places the victim in their captors' absolute discretion. The victim is defenseless to any sort of mistreatment.[13] As such, it is closely connected to the individual's dignity and hence to Art. 2 of the Greek Constitution.

2. The notion of the "victim" and the absence of provisions regarding the right to truth

In CPED Art. 24(1) it is provided that "[f]or the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance". Following this provision, the relatives and next of kin of the victim of enforced disappearance are considered as direct victims of the crime. Additionally, Art. 24(2) CPED provides that all victims are entitled to seek and learn the truth regarding the

[11] UNWGEID, 'General Comment on the right to recognition as a person before the law in the context of enforced disappearances' <http://www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf> accessed 30 June 2013.
[12] Goiburú et al v Paraguay, Inter-American Court of Human Rights 22/09/2006, Ser.C/No.153, para 131.
[13] According to settled jurisprudence of the IACtHR, an enforced disappearance is a "pluri-offensive" right, because it involves "multiple violations of several rights". Radilla-Pacheco v Mexico, Inter-American Court of Human Rights Series C No 209 (23 November 2009) paras 139-140; Torres Millacura v Argentina, Inter-American Court of Human Rights Series C No 229 (26 August 2011) para 95.

disappearance that has taken place.[14] These two provisions are fairly considered a breakthrough, since the Convention against Disappearance is the first to extend the crime's *actus reus* to the relatives which are not directly inflicted by the disappearance and associates this widening to their right to know the truth regarding the disappeared's fate and whereabouts.

However, there is a systemic difficulty to extend the crime's protective scope to the relatives as well, given that the Greek penal code does not allow for the offender to be punished for more than the crimes committed. On the other hand, the relatives and next of kin of the victim are entitled to compensation for the damages sustained and pecuniary compensation for moral distress and moral damages.[15]

The input of the respective provisions in the Greek civil and penal codes are attempting to follow the prerequisites of Art. 24 (1)(2) CPED, according to their strict taxonomy (*ratione materiae* and *ratione personae*). However, these provisions do not fully reflect the international obligations drawn by the Convention. Even if one concedes that the relatives are seen by the national legislator as indirect victims, thus entitled to all legal reparations, then these provisions do not show their distress while the disappearance lasts. Moreover, it does not take in consideration that disappearances target the victim's relatives in several occasions. Enforced disappearance as a state practice aims at infuriating the relatives too, by spreading a wide fear among them, so as not to act contrarily to the state's policies. Therefore, the psychological pain they suffer is not covered by the concept of moral distress.

Finally, despite the above observations, the Greek legislator omits to make any mention to the right to know the truth and equates it to one's access to administrative documents and the victim's file. Yet, this is a tiny aspect of the content encompassed by the right to the truth. In particular, the Convention provides for a system of sub-rights, whose existence follows the violation of the prohibition against disappearance. Truth is a secondary, procedural right which covers a wide spectrum of legal abilities and it is not exhausted with the relatives'

[14] UN Doc A/Res/35/193, preamble. The Convention does not aim at the perpetrators' punishment, or at the victims' reparation, or compensation; it rather focuses on retrieving truth, to further alleviate the victims' relatives. Consequently, its core is found on the concept of truth.

[15] HRCouncil, '12/12. Right to the Truth' (12 October 2009) UN Doc A/HRC/12/12, preamble. The HRCouncil in its preambulatory clauses states, inter alia, "[r]ecalling that a specific right to the truth may be characterized differently in some legal systems as the right to know or the right to be informed or freedom of information". The differentiation between the two rights is supported as well by the UN High Commissioner for Human Rights. CommHR, 'Study on the right to the truth' (8 February 2006) UN Doc E/CN.4/2006/91, para 12.

access to administrative documents. Moreover, the right to know the truth is directly related to the state's deliberate purpose to conceal the victim's fate.[16]

3. No reference to the so-called "modern" forms of enforced disappearance

Enforced disappearance is a complex state practice applied widely in the Americas during Cold War. This practice spiraled in Latin America as soon as WWII was over and lasted roughly until the 1990s. For this reason, initially it was thought to be a regional phenomenon which cost the lives of thousands of innocent people. Nevertheless, disappearances occurred sporadically in other places of the world where authoritarian or totalitarian regimes existed. For example, they were practiced systematically by the Marcos regime in Philippines, while the later reports of the UN refer to mass disappearances taking place in North Korea at present. All the same, the phenomenon of enforced disappearances is closely linked to the regional state practice of Latin American states, which is usually referred to as the "archetypical" form of enforced disappearance.

Evidently, this archetypical form of enforced disappearance cannot easily occur nowadays due to the shift on states' protection of national sovereignty and the methods used by their intelligence agencies (i.e. information gathering is not based solely on the suspect's interrogation, rather on the gathering of information about them).[17] Yet, enforced disappearance covers a wide spectrum of state practice, including techniques which emerged in the context of the "War on Terror" after 9/11. These techniques, such as extraordinary renditions, administrative detentions, secret or *incommunicado* detentions, are mostly practiced by western states which attempt to avail their liability under international human rights law. Thereat, the Convention is not covering only an abandoned state practice; to the contrary it is a valuable tool for novel techniques, fabricated by states to surpass their human rights obligations.[18]

In this context, the definition and notional understanding of enforced disappearance was remastered after the famous *El-Masri* case of the European Court of Human Rights. *El-Masri v FYROM* is a notorious judgment by the ECtHR, as the Court fit under the Convention's definition the victim's illegal abduction by American intelligent agencies, his subsequent

[16] Yasmin Naqvi, 'The Right to the Truth in International Law: Fact or Fiction?' (2006) 88 862 IRRC 245, 249.
[17] In Europe, enforced disappearances in their "traditional" form were practiced mostly in two troubled areas: a) southern eastern Turkey, where the Kurds were targeted, b) Chechnya, against "rebels" of the Russian state. All other cases brought before the European Court of Human Rights were single incidents.
[18] Gabriella Citroni & Tullio Scovazzi, 'Recent developments in International Law to combatEnforced Disappearances' 3 Revista Internacional de Direito e Cidadania (2009) 91-92.

move to secret detention facilities in Europe, and his final movement to detention facilities in FYROM. El-Masri's extraordinary rendition and its interpretation as an enforced disappearance marked a new era for the legal protection against such state practices.

III. SPECIFIC OBSERVATIONS

Article 1(2): The prohibition of enforced disappearance as a non-derogable right

The Convention provides for a non-derogable right in Art. 1(2), using the standard international wording, according to which the prohibition against torture and other absolute rights are excluded from derogation. The Greek state also recognizes that the prohibition against disappearance is not subject to derogation in cases of war or when national security is at stake. However, it conditions the norm's non-derogability on the Constitution's prohibition to suspend Art. 5(3) under Art. 48. Enforced disappearance though, is non-derogable as such, and not due to its proximity to other non-derogable human rights. Early in 1980, the Human Rights Committee (HRC) mentioned that "while it is not separately mentioned in the list of non-derogable rights, in article 4 paragraph 2, this norm of general international law is not subject to derogation".[19]

The Inter-American Court of Human Rights (IACtHR) has moved a step further regarding non-derogability. In the case of *Goiburú et al v Paraguay*, it held that "the prohibition of [forced disappearance] is a non-derogable provision of international law [because] it is deemed to harm essential values and rights of the international community".[20] The Inter-American Court accepted that the right not to be subjected to enforced disappearance is itself a non-derogable rule, and not that the practice violates a series of rights from which no derogation is tolerated. From this point of view, both the HRC and the IACtHR point out the prohibition's originality.

Thereat, the connection of enforced disappearance to Art. 5(3) of the Greek Constitution, in order to establish non-derogability is not useful, taking in mind the steps taken by international jurisprudence.

[19] Yubraj Giri v Nepal, HRC (2011) UN Doc CCPR/C/101/D/1761/2008, para 7.9.
[20] UN Doc E/CN.4/2004/59, para 170(a); UN Doc E/CN.4/2003/71, para 26.

Article 2: The wording of the Greek Criminal Code

The most important aspect of the Convention's incorporation in the national legal order is the wording of the relevant provisions, added to the Greek Criminal Code to provide for a distinct crime of enforced disappearance. This is not only because the incorporation of the crime is the major obligation the Convention carries for member-states, but also because it is of utmost importance for the treatment of the violators and victims' vindication.

Art. 2 provides for a widely accepted definition of enforced disappearances, established for the first time in 1992. It is a working definition provided by NGOs which participated in the drafting of the Convention.[21] Albeit it's solid legal establishment and its wide acceptance, the definition of enforced disappearance has also attained criticism, given that it does not manifest the anguish, fear and maltreatment the disappeared and their relatives experience as long as the disappearance lasts.

With regards to the content of the definition and its integration in the Greek legal order, the definition comprises of three elements which form the crime's *actus reus*. These are the victim's deprivation of liberty (a), state complicity (b), and the subsequent concealment of the victim's fate or whereabouts (c).[22] As far as their interpretation is concerned, deprivation of liberty refers to any method shall end up in the victim's loss of liberty. The methods included in the definition are by way of example and their enumeration is non exhaustive. According to the term's historical interpretation they were mentioned to avoid an ambiguous definition, given that most states opted for clarity and specificity. Moreover, as mentioned above, deprivation of the victim's liberty shall take place either legally or illegally. Arbitrariness or illegality are not necessary conditions in order for the first element to be fulfilled, for otherwise the definition's protective scope would be dramatically limited.[23]

As far as the definition's third element is concerned, concealment of the victim's fate or whereabouts means the pertinent authorities' refusal to disclose information to the victim's relatives or next of kin. This element shall be read in conjunction with Arts 18 and 20 of the Convention, which proclaim to which information the relatives are entitled and the cases when the state might legally refuse to disclose information for reasons of national security.

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[21] UNCHR, 'Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearances' (2004) UN Doc E/CN.4/2004/59.

[22] UNHCHR 'Enforced or Involuntary Disappearances' (Geneva 2009) UN Doc Fact Sheet No.6/Rev.3, 6.

[23] Ioanna Pervou, "The Convention for the Protection of All Persons from Enforced Disappearance: Moving Human Rights Protection Ahead" 5(1) EJLS (2012) 134-135.

The latter evinces that disclosure of information knows exceptions, although it is a state's primary responsibility. In other words, Art. 2 is the rule, while Art. 20 shall be narrowly interpreted as the exception to it.

At this point it shall be highlighted that the cumulative interpretation of Arts. 2, 18 and 20 of the Convention guarantee the proper protection of the right to information (i.e. the relatives' right to access administrative records and the respective documentation, an aspect of the right to know the truth).

Regarding state complicity, an enforced disappearance shall be attributed to state actors, while disappearances practiced by non-state actors are place outside the definition's protective realm. It comes as a given, that state attribution and complicity fall under the provisions of General International Law regarding "Responsibility of States for Internationally Wrongful Acts".[24] From this point of view it is evident that the element of state complicity is fulfilled for acts, omissions, or even acquiescence of the state. Thereupon, even if the actual act is committed by non-state actors and the state is aware of this practice, then it might be held liable for the committed disappearance. Examples from the international practice are those of disappearances in Nigeria and Colombia. Consequently, there is a very low threshold with regards to this constitutive element. This is envisaged in Art. 322A (3b) of the Greek Criminal Code which makes particular reference to

> "[a] superior who exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance and failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution".

Therefore, the national legislator covers a wide range of cases where mere knowledge, omission or acquiescence of state officials might facilitate the crime's commission.

All in all, the explanation of the three constitutive elements of the crime's *actus reus*, shall be well established as time passes. The most intriguing part of Art. 2 definition is the last phrase of it "which places the victim outside the protection of the law".[25] This phrase has been the ground of contest among CPED's member-states and still is a point of controversy. According

[24] James Crawford, 'Human Rights and State Responsibility' (12thRaymond & Beverly Sackler Distinguished Lecture Series, Thomas J. Dodd Research Centre, University of Connecticut, 25 October 2006) para1<http://doddcenter.uconn.edu/dd/events/sackler/Crawford%20transcript.pdf> accessed on 3June 2012.
[25] Federico Andreu-Guzmán, 'The Draft International Convention on the Protection of All Persons from Forced Disappearance' (2001) 62-63 ICJ Review – Impunity, Crimes against Humanity and Forced Disappearance73, 79-80.

to the dominant view, the victim's placement outside legal protection is the aftermath of a disappearance, the mere consequence of the crime's constitutive elements, opposed to the view that it constitutes the crime's *mens rea*. That is, some states when integrating the Convention in their domestic legal order, provided for the violator's deceit to do so. Although this proposal seems sensible at first glance it downgrades the victim's protection to a point where it renders the Convention and any other national act useless. There are two reasons for this; first, enforced disappearance is a complex crime and thus a state practice which involves a series of state agents who commit particles of the crime only. As a result, it is impossible to prove that each and any who had committed acts constituting a disappearance aimed at placing the victim outside the legal realm. Second, if placing the victim outside the protection of the law was seen as the violator's wiliness then, the threshold of proof would be extremely high.

According to the above, the fact that the Greek state positively affirms that the constitutive elements of the crime are three (para 22) is an important guarantee for the protection against disappearance, provided that criminal courts and theory will abide by this view.

Article 4: Children as victims of enforced disappearance

The Greek Civil Code has been amended and a provision regarding disappeared children was added. According to the relevant article, the adoption of children who are victims of enforced disappearance shall be prohibited. However, this provision is fragmentary, since it does not explicitly mention the rationale behind the adoption of disappeared children. Thereat, the following observations are necessary.

First and foremost, historically the disappearance of children was designed so as to allow their imminent adoption. Yet, this practice appeared mostly in the Americas and since that time it is rare as far as disappearances practiced by states is concerned, while it remains popular to disappearances committed by individuals. Therefore, the connection between the disappearance of a child and its subsequent adoption shall be made clear. Second, in adjudicated cases of disappeared children international judicial organs did not presume that disappeared children were subjected to ill-treatment. Therefore, they did not adjudicate compensation for moral distress on the grounds of mistreatment, unless there was evidence

for the opposite.[26] Compensation is given for the separation from their family alone. Of course, there have been several cases where victims testified they received abominable treatment by the families that raised them. Third, the relatives of disappeared children are considered victims even in cases when they did not meet with the abducted. This observation refers to siblings of disappeared children who grew up in families where the trauma of disappearance was present. Even if they were not in a position to create family ties with the abducted, the fact that the family suffered from such a loss renders them victims of the practice.[27]

Article 6: Attempt to commit a disappearance

The Greek CC provides in Article 322A the penalties for attempts of enforced disappearance. The attempted crime receives a reduced penalty according to the general provisions of the Greek CC (Articles 42 and 83). According to these provisions the perpetrators receive half the penalty they would be sentenced with, if they had completed the crime. This provision is aligned with the central way of thinking that penetrates the entire CC. However, there are a few points of concern, since it is not easy to define when the crime of enforced disappearance is attempted and only completed. If the victim is deprived of their liberty with state complicity and no further concealment of their fate and whereabouts follows, then these provisions are irrelevant and the ones regarding arbitrary deprivation of liberty are in order. On the other end of the line, if the person is deprived of his/her liberty and there is subsequent concealment of their fate or whereabouts (and the prerequisite of state complicity is fulfilled) then the crime is completed irrespective of how long the victim will remain under their captor's authority.

From this perspective it seems almost impossible for the crime to appear as an attempted one, precisely due to its complex character. That is, if one of the three constitutive elements is not fulfilled, then other provisions of the Greek CC shall be applied. Moreover, this rationale cannot apply to cases where the perpetrators are many and the state has activated a mechanism of enforced disappearance. Therefore, this choice shall not be welcomed, as it might cause bewilderment as far as the complex character of the crime is concerned.

On the other hand, the provision of Art. 322A (3) CC which equates the penalty of superiors who order the commission of a disappearance, to that of the perpetrator is to the correct

26 Gelman v Uruguay, Inter-American Court of Human Rights Series C No 221 (24 February 2011) para 133. Contreras et al v El Salvador, Inter-American Court of Human Rights Series C No 232 (31 August 2011) para 122.
27 Mónica Feria Tinta, The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of the Child, Protecting the Most Vulnerable at the Edge (Martinus Nijhoff 2008).

direction, since it takes in consideration how states design enforced disappearance mechanisms.

Article 8: The crime's continuous nature

The continuous nature of the crime of enforced disappearance practically means that the crime ceases to exist only when there is a specific answer regarding the victim's fate and whereabouts. Most often, this happens either by the positive affirmation of the victim's death, or, in rare circumstances with the victim's reappearance. The continuous nature of the crime, albeit a given at first sight, has been long doubted in practice.[28]

This happens precisely because the victim of an enforced disappearance disappears under life threatening conditions in the majority of cases. When the state develops a disappearance mechanism with the view to intimidate both the disappeared and their next of kin, then deprivation of liberty does not take place covertly. To the contrary, state agents openly take the victim from its usual environment. This description falls under the archetypical form of enforced disappearance, while it applies to the cases of repeated disappearances in Turkey and Chechnya. For this reason, the European Court of Human Rights (ECtHR) has adjudicated that when the victim disappears under life-threatening conditions that the state is liable under the right to life; a view which had conditioned mistakenly and for many years disappearance on the right to life.[29]

The crime's continuous character bears to significant results. First, it manifests the relatives' and next of kin anguish and infuriation regarding the disappeared, no matter how many years have passed, from the moment the disappearance has taken place. Thereat, the continuous character of the crime signifies that concealment of one's fate or whereabouts is cardinal for the moral distress caused to the victim's relatives, as the state does not allow them to either hope for the victim's return, or mourn for a definite loss. This is the substantial point regarding continuity. From a judicial perspective, if the crime was not characterized continuous, effectively it would guarantee the perpetrators' impunity. Given that most disappearance cases are not resolved, and the relatives never receive sufficient information about the victim's whereabouts, even the longest limitation period provided would not suffice for them to initiate judicial proceedings.

[28] García Lucero et al v Chile, Inter-American Court of Human Rights Series C No 267 (28 August 2013) para 57.
[29] Baysayeva v Russia, App no 74237/01 (ECtHR 5 April 2007) para 119; Imakayeva v Russia, App No 7615/02 (ECtHR 9 November 2006) para 141.

The fact that the limitation period commences on the date the unlawful situation ceases, has given birth to momentous verdicts. The ECtHR took the opportunity and found its jurisdiction *ratione temporis*, so as to adjudicate a case related to the massacre of Katyn (*Janowiec et al v Russia*), while most importantly it dealt with the *Cyprus v Turkey*[30] case, and awarded compensation for the missing persons of the 1974 invasion. In both situations the Court presumed that the disappeared were dead (evidence derived from their corpses) and awarded compensation to their next of kin for their disappearance.

In this regard, it appears as a *sine qua non* that the national legal order attests the continuous character of the crime, given the European precedent as well.

Finally, the national legislator introduced Art. 322C(4) CC, which provides that the limitation period of the crime is suspended when the crime is committed under a state of unlawful authority. The rationale behind this addendum is that "the crime of enforced disappearance is mostly committed under oppressive regimes and in the context of abnormal situations affecting the institutions of the State". This observation, although it does not fall outside the concept of disappearance, it politicizes the crime.[31] Although, the report expressly mentions that "an enforced disappearance may not be considered as a political crime" (see para 77), it connects the practice to political turbulence. This view also disregards other forms of disappearance and seems to take in mind only the archetypical, when disappearances arose under totalitarian and authoritarian regime. Nevertheless, given that a similar provision on the punishment of torture exists (see para 53), it is matter of typical taxonomy of the Greek CC.

Article 17: The protection of personal safety, issues arising regarding detention

According to the Convention, secret detention is absolutely prohibited, while the same applies under the national legal order and the pertinent constitutional provisions. At this point, there are two initial observations to be made. First, secret detention is slightly different from unacknowledged detention, although they are used interchangeably in many occasions in international theory. By "secret" one means that the exact location of the detention is unknown, or that the detention facility is not officially registered. On the other hand, a unacknowledged detention is when state officials deny to release information regarding the

[30] Janowiec et al v Russia, App nos 55508/07, 29520/09 (ECtHR 21 October 2013) para 169; Cyprus v Turkey, App No 25781/94 (ECtHR 10 May 2001).
[31] Jan Egeland, 'Political "Disappearances" – A Challenge for Humanitarian Law' (1982) 51 NordiskTidsskriftInt'lRet 189.

detention of an individual.[32] They might either deny the detention itself, or accept its existence but refuse to release information on grounds of national security. A secret detention is by definition unacknowledged, but the same condition does not function vice versa.[33]

Following this observation, the Conventional scheme provides for a system of secondary rights which follow the main prohibition of Art. 1(1). In this framework, the prohibition of secret detention acts as a preventive tool, so as to eliminate the possibility and enforced disappearance occurs. Although, secret detention is not a prerequisite for the occurrence of a disappearance, nevertheless it is a factor whose existence jeopardizes the victim's fate and increases the possibility of a disappearance. Thereat, the prohibition of secret detention is a preventive measure against disappearances.[34] The ECtHR has also attested this rule in its judgments. More specifically, when it holds states responsible for violations of the ECHR, which amount to a disappearance, it bases its verdict on the respondent state's failure to take all necessary measures so as to prevent, or to investigate a reported disappearance thereafter.[35]

The Convention provides for distinct state obligation regarding the treatment of detainees. In this form it fills an important gap in the international human rights law regime regarding the rights of detainees. The quest for an international legal instrument on the rights of detainees is perennial. Yet, states seem reluctant to proceed to the drafting of such an instrument, since the domain of detention is considered as part of their domain preservé; and because to this there is wide divergence in national legal systems on detention rules.[36]

In this context, the Greek legislator sets a very strict temporal framework from the time an individual is arrested until a warrant of detention is issued (para 96). The Greek legal order deploys a very analytical scheme on when a detention shall be considered illegal, and it provides for specific detention limits in order to protect the detainee from an indefinite time period, before they are brought before their natural judge. The critical point when a disappearance might take place lies between one's arrest and the issuance of a detention warrant. This time frame is very short and strict, following international legal requirements.

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[32] UN Doc A/HRC/13/42 (26 January 2010) para 223.
[33] Gabriella Citroni, 'When Is It Enough? Enforced Disappearance and the "Temporal Element"(2011-2012) 9 DroitsFondamentaux 1, 8.
[34] Al Nashiri & Husayn (Abu Zubaydah) v Poland, App nos 28761/11, 7511/13 (ECtHR 24 July 2014); Abu Zubaydah v Lithuania, App no 46454/11 (lodged 14 July 2011).
[35] Mahmut Kaya v Turkey, App No 22535/93 (European Commission of Human Rights Report 23 October 1998) paras 342-343.
[36] Nigel Rodley, Treatment of Prisoners under International Law (2nd edn, OUP 1999) 333-334.

National detention rules provide for the treatment of foreign citizens too. The national legislator prohibits absolutely the arbitrary detention for them as well, the perils they face in the meantime of administrative detention and their administrative expulsion are aggravated compared to nationals detained. This is precisely because the period of their detention might be prolonged for so long as their removal procedure is in progress, with an upper maximum limit of eighteen months (see para 108). During this period, apart from a disappearance, mistreatment is more likely to occur, especially when their number is huge.[37] Finally, the report itself mentions that foreign detainees are entitled to an adequate detention and decent living conditions, something which is severely and repeatedly violated under the current situation.[38]

Articles 18, 19 and 20: Access to information and the protection of personal data

It is already mentioned that Arts 18 to 20 shall be interpreted under the light of Art. 2 of the Convention and most certainly the third constitutive element of the definition therein. Arts 18 to 20 form part of the right to information (which shall not be blurred with one's right to know the truth as already pointed out). Art. 18(1) sets the rule regarding everyone's access to information. According to the Convention, right holders are both the detainee and their relatives, or counsel. Art. 20, on the other hand, functions as its limitation clause and provides those occasions when information shall not be released, either for reasons of national security, or for the protection of the subject. Interestingly enough, Art. 20 has occupied a large part of the Convention's negotiations. States were divided roughly to two sides.[39] Some states proclaimed that in cases when sovereignty or national security are at stake, authorities might be able to deny access to information which is considered valuable to them; whereas the rest observed this clause as the legitimization of human rights violations which in effect would result in a prolonged detention or even worse in an enforced disappearance. Public interest has time and again served as a legal element in order to restrain human rights. This view is not the

[37] Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary (2nd rev edn, NP Engel, Publisher 2005) 306.

[38] The GNCHR has repeatedly dealt with detention conditions of migrants. In 2011, the GNCHR has endorsed an extensive report regarding *The detention conditions of migrants in police stations and detention centers* (available at http://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/astynomika_kratitiria_apofasi.pdf) and has issued an *Evaluation of the findings of an autopsy conducted by the National Commission for Human Rights and the Ombudsman at the detention centers for foreigners in the Evros region* (available at http://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/porisma_evrou_2011.pdf). In 2016, the GNCHR has addressed the issue of detention of asylum seekers in its Report on *The living condtions of migtants and refugees in the reception and accommodation centers* (available at http://www.nchr.gr/images/pdf/apofaseis/prosfuges_metanastes/kentra_filoxenias_autopsia.pdf).

[39] UN Doc E/CN.4/2006/57, paras 16-29.

result of scaremongering; first, because it is common for states to curtail human rights and civil liberties under the fear of terrorist attacks,[40] and second if we are to interpret the present Convention under the light of the very strict legal system on personal data which is implemented nowadays in Europe (the same applies vice versa with regards to Art. 19 as well).

All in all, negotiations, the conventional scheme, as well as subsequent interpretation manifest that Art. 20 shall be narrowly interpreted since it is the exception to the rule of Art. 18 and Art. 2 in turn. Adversely, Art. 18 provides for a direct right which stems from Art. 2; this means that it shall be restrained only in exceptional circumstances.

As far as the content of the right to information is concerned, it is a procedural right. In the Greek legal order it has both constitutional and legal grounds. According to para 111 of the state report, the corresponding provisions are Art. 10(3) of the Constitution and Art. 5 of the Code of Administrative Procedure. However, it would be more precise if the right was also based on Art. 20(2) of the Constitution (the right to be heard before administrative authorities). Art. 20(2) is analyzed in three distinct rights under the Code of Administrative Procedure: namely, the right to access official documents, the right to be heard before a negative administrative decision is issued and the right to a justified decision (Arts 5, 6 & 17 respectively). The above are procedural rights guaranteed in every occasion, under the veil of good administration.

Article 24: Reparation

The Greek legal order provides for compensation for material and / or moral damage from both the state and the perpetrator alongside. These provisions go hand in hand with the state's European legal tradition. Thereat, there are full and sufficient, bearing in mind the existing legal framework. However, the Convention provides for a range of reparative rights, which are not exhausted in monetary compensation.[41] This provision is strongly influenced by the legal traditions of states which have suffered long from systematic disappearances, and where healing the trauma is more important than a monetary compensation. There are two cardinal observations at this point; first, that compensation does not fulfill the state's obligations particularly in case the victim reappears. There a set of measures shall be taken so at to enable

[40] Jeremy Waldron, 'Security and Liberty: The Image of Balance' 11 The Journal of Political Philosophy (2002) 191-192.
[41] Such as restitution, rehabilitation and satisfaction and guarantees of non-repetition.

the victim to integrate in the society again (rehabilitation). Second, that each case shall be dealt individually and reparation shall be deemed individually.[42] Finally, it shall be highlighted that the award of compensation to the relatives of the victim, when adjudicated, does not in any event deprive them of the status of victim.[43]

IV. CONCLUDING REMARKS

The initial report by the Greek state explains in full, the legislative measures adopted, to guarantee compliance with the responsibilities set by the Convention. In this framework, it shall be noted that the adjustments made in the Greek CC are very positive, given that they do not hinder the effective punishment of enforced disappearances, given that criminal theory and jurisprudence do not deviate from this course of thinking. The stipulation of the crime and the effective punishment of the perpetrators are at the time being the most important guarantee the national legal order might offer to potential victims of disappearances, given that the correlative human rights prohibition is not stipulated as such.

Apart from legal issues arising by the ratification of CPED, there are also current political and practical issues which arise and shall be addressed. The first and most important is emphasis to new methods that fall under the definition of a disappearance and occur time and again in western democracies. If the Convention is read in isolation from these developments, then it will be of little or no importance for the Greek state, given that it is most unlikely for an "archetypical" disappearance to take place nowadays under a well-established political regime. However, extraordinary renditions and detentions with elements of arbitrariness are a phenomenon on rise. Thus, there shall be reference and concrete analysis on how the provisions set forth by the national legislator may sufficiently be applied to the aforementioned methods. This is of utmost importance, taking in mind the latest jurisprudence of the ECtHR (cases El Masri and Al-Nashiri), where methods amounting to enforced disappearance have been found to be practiced by Southern Eastern Europe states.

Finally, state reports shall address allegations of enforced disappearances. Paragraphs 129 and 134 mention that "[n]o crime of enforced disappearance has been found to have been committed in Greece so far" and that "the police authorities so far have not had to deal with such cases". Although the above statement is accurate, it is historically proven that states who

[42] Heidy Rombouts T Stef Vandeginste, 'Reparation for Victims of Gross and Systematic Human Rights Violations: The Notion of Victim' (2000-2003) 89 ThirdWorldLegalStud 89;
[43] Skendžić & Krznarić v Croatia, App no 16212/08 (ECtHR 20 January 2011) para 96.

practice enforced disappearance, never admit it. This point of concern has brought a standstill to the adoption of the Convention for many years. Jurisprudence though, managed to surpass it by reversing the burden of proof when an applicant brings a disappearance claim to international courts. This reversal was immediate for the IACtHR and progressive for the ECtHR.[44] In this regard, all allegations against a state for practicing or participating in an enforced disappearance shall be addressed and overturned by the state itself.

[44] The EctHR initially did not reverse the burden of proof. As a result, applicants had to prove their relative's disappearance, although they had no access to official records and documentation.