



## HUMAN RIGHTS CLINIC

THE UNIVERSITY *of* TEXAS SCHOOL *of* LAW

To: United Nations Working Group on Enforced or Involuntary Disappearances

Submission From: University of Texas Human Rights Clinic

Re: 'Standards and public policies for an effective investigation of enforced disappearances'

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## I. Introduction

This report responds to the Working Group on Enforced or Involuntary Disappearances' call for contributions on the topic of “standards and public policies for an effective investigation of enforced disappearances” by providing a framework to evaluate the adequacy of existing legal definitions of the criminal acts related to the specific and widespread phenomenon of enforced disappearances. While these principles are reiterated in multiple international human rights treaties and bodies, this brief has focused its research on those bodies with the most experience in dealing with enforced disappearances, including the Working Group on Enforced and Involuntary Disappearances (hereinafter referred to as the WGEID or the Working Group) the United Nations Human Rights Committee and the Inter-American Court of Human Rights. This contribution focuses its research heavily on the case law of the Inter-American Court of Human Rights, as the European Court of Human Rights has followed the interpretations of the Inter-American Court in many cases regarding enforced disappearances.<sup>1</sup> This brief has been divided into several sections to organize the evaluation of various aspects necessary for an adequate legal framework to critically assess investigations into enforced disappearances. This brief will first address the necessity of domestic legislation creating an autonomous crime of enforced disappearance and what that framework should look like, then the duties imposed by standards and public policies of individual States and international human rights law to investigate, prosecute and punish enforced disappearances and the elements of an effective investigation, the measures of impunity that can impede the prosecution of enforced disappearance and the continuous nature of the crime of enforced disappearance, respectively.

The WGEID requested information on 10 aspects relating to standards and public policies in order to create a framework for effective investigations of enforced disappearances. For information on legislation on enforced disappearances and its criminalization please refer to Sections I, II and III of this submission. For information on obstacles and difficulties in the investigation and prosecution of enforced disappearances, please see Sections VII(G) and VII(E). For information on access to information in the context of investigations of enforced disappearances, please see Section VI(F). For information on the participation of victims in the investigation of enforced disappearances and the importance of their testimony and the experiences on the harassment of victims, witnesses, human rights defenders, lawyers, judges, prosecutors and other persons involved in the investigation, please refer to Section V(A)(7) of this brief. For information on standards of proof to be met in criminal cases of enforced disappearances, please see Sections II(A)(1) and Section III(C). For information on the importance of specialized prosecutorial units and independent forensic institutions for an effective investigation of enforced disappearances, please see Section VII(G)(2). For information on effective investigations and the right to truth, please see Section V. For some information on cooperation between states, please see Section V(C).

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<sup>1</sup> See European Court of Human Rights, *Case Law Research Reports: References to the Inter-American Court of Human Rights and Inter-American instruments in the case-law of the European Court of Human Rights* (1 November 2016).

## II. An Autonomous Crime of Enforced Disappearance Should be Codified in Domestic Legislation to Secure Proper Investigations

The WGEID request information on the criminalization of enforced disappearance. Enforced disappearance is a complex crime, as it exists as a “unique and consolidated act” that can be perpetuated through many forms of conduct and involves multiple human rights violations.<sup>2</sup> Therefore, a State must include an autonomous crime of enforced disappearance in the States’ domestic legislation and ensure that this autonomous crime encompasses all the elements of an enforced disappearance in order to investigate and identify the forms of conduct involved in each case.<sup>3</sup> The creation of this autonomous crime will also secure proper investigations by providing a legal framework. This section will discuss the necessity of an autonomous crime of enforced disappearance in domestic legislation, then the various requirements of legal standards for this autonomous crime and, finally, the elements that should be included in the criminalization of enforced disappearance as a codified crime.

### A. Ordinary Criminal Legislation is Inadequate to Prosecute Enforced Disappearances

#### 1. Prosecution of Enforced Disappearance Under Other Criminal Legislation Leaves Criminal Conduct Unpunished

If a separate crime of enforced disappearance is not codified in domestic criminal legislation, cases of enforced disappearances must be brought under various crimes that are codified, such as homicide, kidnapping, or assault, for the victims’ case to be brought to a domestic court. Because the crime of enforced disappearance will often include the violation of several rights and multiple forms of conduct – including the deprivation of liberty, involvement or acquiescence of the State in the deprivation of that liberty and the State’s concealment of the whereabouts of the victim - bringing an enforced disappearance to court under another charge will often leave several aspects of the crime unpunished. Article I of the Inter-American Convention on Forced Disappearance of Persons (hereinafter referred to as the Inter-American Convention) stipulates that the parties to the Convention agree to:

- a. Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees;
- b. To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories;
- c. To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearances of persons, and
- d. To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertake in this Convention.<sup>4</sup>

To comply with these regulations, party States must define the crime of enforced disappearance in their criminal codes or statutes.<sup>5</sup> The definition must be in line with Article II of the previously mentioned Convention, defines forced disappearance as:

The act of depriving a person or persons of his or their freedom, in whatever way, perpetuated by agents of the state or by persons or groups of persons acting with the authorization, support, or

<sup>2</sup> Working Group on Enforced and Involuntary Disappearances, General Comment on enforced disappearance as a continuous crime, U.N. Doc. A/HRC/16/48, para. 39 (26 January 2011).

<sup>3</sup> WGEID, General Comment on article 4 of the Declaration on the Protection of All Persons from Enforced Disappearance, U.N. Doc. E/CN.4/1996/38, para. 54 (15 January 1996).

<sup>4</sup> Inter-American Convention on Forced Disappearances of Persons art. 1, June 6,1994, 33 I.L.M.1429 [hereinafter ICFDP].

<sup>5</sup> *Gomez Palomino v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 136, para. 96 (2005).

acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.<sup>6</sup>

The lack of a codified, autonomous crime of enforced disappearance in a State's domestic legislation will create a situation where enforced disappearances must be investigated and prosecuted under other relevant crimes, such as homicide or abduction, which is "highly problematic in terms of the specific investigation" and can leave conduct and perpetrators unpunished.<sup>7</sup> In *Gelman v. Uruguay*, Uruguay's lack of a codified crime of enforced disappearance forced the crime to be brought to Uruguay's court under the charge of homicide.<sup>8</sup> The Inter-American Court of Human Rights (hereinafter the Inter-American Court or the Court) held that by bringing an enforced disappearance under the charge of homicide, the State had excluded several other crimes that accompanied the incident itself, such as torture, enforced disappearance, and theft of identity, which hindered the State's ability to carry out the State's international obligations to investigate, prosecute, and punish serious human rights violations.<sup>9</sup> The WGEID pointed out a similar concern in their visits to Mexico and Sri Lanka, noting that when these States had not criminalized the offense of enforced disappearance, these cases were often treated as charges of abuse of authority, unlawful aggravated deprivation of liberty, or various other codified crimes.<sup>10</sup> The WGEID stated that these offenses did not have the "necessary scope to encompass enforced disappearances or the severity of the penalty is inappropriate," which would keep a State from being able to fulfill their international obligations to produce accountability for serious human rights violations.<sup>11</sup> The Inter-American Court repeated a similar concern in *Cardenas Penas v. Bolivia*, where the Court held that "crimes such as unlawful deprivation of liberty do not satisfy the State's obligation to punish conduct that infringes numerous rights, such as the forced disappearance of persons."<sup>12</sup> Overall, the scope of the rights infringed in a crime of enforced disappearance requires the codification of a separate offense of enforced disappearance, as charging an enforced disappearance under any other criminal charge will hinder a State's ability to carry out their duties to investigate, prosecute, and punish the crime of enforced disappearance.

When the offense of an enforced disappearance is not codified, it also becomes difficult to prove the enforced disappearance itself, which can amount to a violation of a State's duty to investigate, prosecute and punish enforced disappearances. The WGEID noted in its mission report on the Gambia that when an enforced disappearance is prosecuted under other crimes, this "creates a situation in which suspected perpetrators of enforced disappearances can be acquitted if the standards of proof for the other crimes of which they are accused are not met."<sup>13</sup> The WGEID reiterated this concern in its mission report on Turkey, finding the other offenses enforced disappearance was usually charged under, such as murder or torture, have strict legal standards of proof.<sup>14</sup> Victims bringing a case of enforced disappearance often will not have much information regarding the crime itself, as they are shielded from any information regarding the victims fate or whereabouts, so when the strict legal standards of these other crimes of homicide or torture cannot be met, the case will be terminated or alleged perpetrators will be acquitted.<sup>15</sup> Therefore, for a State to be able to comply with their obligations to thoroughly investigate, prosecute and punish the crime of enforced disappearance, enforced disappearance must be codified as a separate autonomous offense in domestic legislation to include all forms of conduct.

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<sup>6</sup> ICFDP, *supra* note 4, art. 2.

<sup>7</sup> WGEID, Country Visit to the Gambia Mission Report, U.N. Doc. A/HRC/39/46/Add.1, para. 30 (2018).

<sup>8</sup> *Gelman v. Uruguay*, Inter-Am. Ct. H.R. (Ser. C) No. 221, para 235 (2011).

<sup>9</sup> *Id.*

<sup>10</sup> WGEID, Country Visit to Mexico Mission Report, U.N. Doc. A/HRC/19/58/Add.2, para. 14 (2011); WGEID, Country Visit to Sri Lanka Mission Report U.N. Doc. A/HRC/33/51/Add.2, para. 15 (2016).

<sup>11</sup> *Id.*, para. 14.

<sup>12</sup> *Cardenas Penas v. Bolivia*, Inter-Am. Ct. H.R. (Ser. C) No. 217, para 200 (2010).

<sup>13</sup> WGEID, Country Visit to the Gambia, *supra* note 7, para. 30.

<sup>14</sup> WGEID, Country Visit to Turkey Mission Report, U.N. Doc. A/HRC/33/51/Add.1, para. 31 (2016).

<sup>15</sup> *Id.*

## 2. The Continuous Nature of an Enforced Disappearance Requires Investigation and Prosecution Under an Autonomous Crime

Enforced disappearance is a continuous crime, which begins from the moment the deprivation of liberty occurs and extends until the State acknowledges the detention or releases information regarding the fate of whereabouts of the disappeared person.<sup>16</sup> This is an important reason to include the crime of enforced disappearance as an autonomous offense in domestic legislation, for the offense of an enforced disappearance must take this continuous nature into account, or else the State would be unable to investigate, prosecute, and punish a great deal of these violations. The continuous nature of the offense is one that is that “comes from the very nature of the offense, in particular from the denial by the State to disclose what happened to the victim.”<sup>17</sup> Article 17 of the Declaration of All Persons from Enforced Disappearance (hereinafter the Declaration or the U.N. Declaration) states that acts constituting enforced disappearances should be treated as a continuing offense while the whereabouts of the disappeared persons are unknown and also provides some stipulations to guard against impunity.<sup>18</sup> The WGEID has supported this position, finding that the State’s autonomous crime of enforced disappearance must “expressly mention that enforced disappearance is a continuous crime to which amnesties or immunities cannot be applied,” and that enforced disappearance should be included in the definition of crimes against humanity to which a statute of limitations does not apply in order to effectively complete the criminal law framework for “preventing, investigating and punishing enforced disappearances.”<sup>19</sup>

In its visit to Turkey, the WGEID noted that because Turkey did not have a separate crime of enforced disappearance, the crimes that enforced disappearance were usually investigated or prosecuted under, such as murder, torture, or arbitrary deprivation of liberty, had a 20-year statute of limitations applied.<sup>20</sup> Additionally, although Turkey did not apply a statute of limitations to crimes against humanity, the crime of enforced disappearance was not included in Turkey’s definition of crimes against humanity, thereby offering no route to bring an enforced disappearance to court without avoiding a statute of limitations.<sup>21</sup> An autonomous crime of enforced disappearance must be codified in domestic legislation to reflect the continuous nature of an enforced disappearance appropriately.

When a case of enforced disappearance has previously been brought under crimes for which the statute of limitations has been applied, the State has an obligation to recognize the enforced disappearance and fulfill its duties to investigate, prosecute, and punish an enforced disappearance. In *Trujillo-Oroza v. Bolivia*, Bolivia’s Supreme Court held that although the previous criminal proceedings in the case had been extinguished due to the statute of limitations, since the crime had not been completed and the victim’s fate or whereabouts remained unknown, Bolivia had to issue a new decision on the merits of the case as an enforced disappearance.<sup>22</sup> In this case, the Inter-American Court observed that the constitutional judgment made a positive addition to the proceedings and that the State’s obligations in relation to enforced disappearance would subsist until they had been satisfied.<sup>23</sup>

If there is a domestic statute or rule of procedure that seems to not adequately respect the continuous nature of enforced disappearance, the WGEID recommends competent bodies to construe such provisions as narrowly as possible to ensure remedies are provided to victims and instigators are prosecuted (and punished, if appropriate).<sup>24</sup> Similarly, any sort of regulation that serves to limit the competence of bodies to deal with acts or omissions that occurred before the relevant legal instrument or the acceptance of the

<sup>16</sup> WGEID, General comment on enforced disappearance, *supra* note 2, para. 1.

<sup>17</sup> TULLO SCOVAZZI & GABRIELLA CITRONI, THE STRUGGLE AGAINST ENFORCED DISAPPEARANCE AND THE 2007 UNITED NATIONS CONVENTION 310, (2007).

<sup>18</sup> G.A. Res 47/133, Declaration on the Protection of All Persons from Enforced Disappearance art. 13 (Feb 12, 1993).

<sup>19</sup> WGEID, Country Visit to the Gambia, *supra* note 7, para. 32.

<sup>20</sup> WGEID, Country Visit to Turkey, *supra* note 14, para. 19.

<sup>21</sup> *Id.*

<sup>22</sup> *Trujillo-Oroza v. Bolivia*, Inter-Am Ct. H.R. (Ser. C) No. 92, para. 107 (2002).

<sup>23</sup> *Id.*, para. 108.

<sup>24</sup> General comment on enforced disappearance, *supra* note 2, para. 7.

institutions competence should be interpreted in way so as to create the least amount of impunity for a continuing enforced disappearance.<sup>25</sup>

The Inter-American Court has recognized the continuing nature of the offense since its first judgment on the issue.<sup>26</sup> Further, the Court specifically said in a recent case that “[d]ue to its permanent nature, while the fate or whereabouts of the victim remains unknown, the forced disappearance continues in execution.”<sup>27</sup> When the crime of enforced disappearance is investigated and prosecuted in domestic systems, the issue of *ex post facto* enforcement appears frequently. In *Chitay Nech et. Al v. Guatemala*, an enforced disappearance had been initiated before 1996, which is when Guatemala codified the crime of enforced disappearance in its domestic law.<sup>28</sup> The Court stated the enforced disappearance which was the subject of that case could be prosecuted under the new 1996 law without causing a retroactive application of a criminal law.<sup>29</sup> The reason being, of course, that the fate or whereabouts of the victim in that case had not been established by 1996.<sup>30</sup> But what if criminal proceedings for the circumstances of an enforced disappearance commenced under a different law such as kidnapping? The Court stated that “even in cases where criminal proceedings are pending for the commission of criminal offenses other than enforced disappearance, in which an order for a trial to commence has not been issued, if at the time the crime of enforced disappearance goes into force, the execution of the crime continues, the new law is applicable.”<sup>31</sup> If an enforced disappearance was being prosecuted under a law criminalizing kidnapping, it can be prosecuted under a law criminalizing enforced disappearances the minute it is passed.<sup>32</sup> This occurred in *Tin Tojin v. Guatemala*, where the criminal proceedings were begun for the crime of kidnapping or kidnapping.<sup>33</sup> The investigation was stagnate by the time the case was brought before the Inter-American Court, and the representatives of the victims asked that the Court order the State that “during the investigation proceedings, trial, and punishment of those responsible in [the] case, the definition of the crime be that of enforced disappearance.”<sup>34</sup> With regards to that request, the court stated that “if at the time the definition of the crime of enforced disappearance of persons enters into force in the domestic criminal law, the author maintains his criminal behavior, the new law is applicable.”<sup>35</sup> The highest courts of the majority of the States within the American continent have issued rulings consistent with this statement.<sup>36</sup>

If a State has previously conducted an investigation on a case of enforced disappearance under a separate codified crime such as homicide, the continuous nature of enforced disappearance means that the State may avoid violating international human rights law by returning to the cases and correctly classifying them.<sup>37</sup> In *Vereda La Esperanza v. Columbia*, the Court held that although Columbia had initially tried a case of enforced disappearance under homicide, by introducing the concept of “flexible legality,” the Colombian Supreme Court of Justice allowed the prosecutor to requalify the criminal type imputed by the disappearance and therefore the new reclassified investigation under the penal figure of enforced disappearance meant that the State had not violated the Inter-American Convention in this regard.<sup>38</sup>

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<sup>25</sup> *Id.*, para. 8.

<sup>26</sup> SCOVAZZI, *supra* note 17, at 311.

<sup>27</sup> *Chitay Nech et. al. v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 212, para. 11 (2010).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Tin Tojin v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 190, para. 78 (2008).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*, para. 97.

<sup>36</sup> *Id.*

<sup>37</sup> *Vereda La Esperanza v. Colombia*, Inter-Am. Ct. H.R. (Ser C) No. 341, paras. 205–207 (2017). (Unofficial translation by University of Texas Human Rights Clinic).

<sup>38</sup> *Id.* at 206–207.



### 3. International Human Rights Law Requires an Autonomous Crime of Enforced Disappearance to be Codified in Domestic Legislation to Secure Proper Investigations

States are not only obligated to refrain from infringing on human rights, but international human rights law proscribes a duty onto States to protect those rights through an appropriate legislative framework.<sup>39</sup> For example, when the right to life is implicated, the duty of the State to protect the right to life by law “includes an obligation for State parties to adopt any appropriate laws or other measures in order to protect life.”<sup>40</sup> In addition, States have an obligation to enact a “protective legal framework which includes effective criminal prohibitions on all manifestations of violence or incitement to violence that are likely to result in a deprivation of life.”<sup>41</sup> The United Nations Human Rights Committee explicitly determined that enforced disappearances, as an extreme form of arbitrary detention, violate the right to personal liberty and personal security and are incompatible with the right to life.<sup>42</sup> Therefore, as enforced disappearances constitute a violation of these fundamental human rights, States have an obligation to enact an adequate legal framework that protects individuals from a violation of these rights. This legal framework must reflect the understanding that an enforced disappearance is an offense that involves multiple human rights violations, including the right to personal liberty, the right to personal integrity, the right to life and the right to recognition of legal persona, as well as multiple other rights that depend on the nature of the crime.<sup>43</sup> Therefore, an appropriate legal framework should be able to reflect the nature of the crime and all the human rights violations encompassed in a case of enforced disappearance. As part of this legal framework, international human rights law and bodies collectively agree that States should have a separate, autonomous offense of enforced disappearance in their appropriate legislation, which should reflect the elements of a crime of enforced disappearance as set by international human rights law and the multi-offensive nature of an enforced disappearance.<sup>44</sup> While a lack of this autonomous crime is not a *per se* violation of international human rights law, as States can still fulfill their duties to investigate, prosecute and punish enforced disappearances without an autonomous crime, including an autonomous crime is often extremely necessary to help a State fulfill their international obligations under human rights law.<sup>45</sup>

In the case of *Ticona v. Bolivia*, there was no specific legal definition of enforced disappearance in Bolivian law at the time proceedings were initiated.<sup>46</sup> However, the Court did not find a violation of the American Convention on Human Rights (American Convention). It instead found that “the Bolivian legislation provided criminal rules leading to the effective observance of the guarantees established in the Convention with respect to the individual rights to life, humane treatment and personal liberty, according to the provisions of the Criminal Code in force in the year 1983” (which was when the proceedings concerning the enforced disappearance at hand were initiated).<sup>47</sup> As such, the Court stated that a “lack of legal definition of the autonomous crime of enforced disappearance” is not a *pro-se* violation of the obligation as long as the absence of such a definition has not “hindered the effective development of the criminal procedure.”<sup>48</sup> The Bolivian State in that case ratified the Inter-American Convention on May 5, 1999, and it entered into force on June 5<sup>th</sup> of the same year.<sup>49</sup> The obligation to define the crime of enforced disappearance was imposed on the State from that moment forward, but Bolivia did not explicitly incorporate the crime until January 18, 2006.<sup>50</sup> When Bolivia was before the Court again on August 9, 2004, the Court found that Bolivia had

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<sup>39</sup> Human Rights Committee, General Comment on article 6 of the International Covenant on Civil and Political Rights, on this right to life, U.N. Doc. CCPR/C/GC/36, para. 18 (2018).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 20.

<sup>42</sup> *Id.* at 57.

<sup>43</sup> *Terrones Silva et al. v. Peru*, Inter-Am. Ct. H.R. (Ser C) No. 360, para 172 (2018). (Unofficial translation by University of Texas Human Rights Clinic).

<sup>44</sup> Inter-American Convention, *supra* note 4, art IV; Declaration on Protection of All Persons *supra* note 18, art. 4; *See* Silva, No. 360, para. 172.

<sup>45</sup> *Ticona Estrada et al. v. Bolivia*, Inter-Am. Ct. H.R (Ser. C) No. 199, para 104.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at para. 105.

<sup>50</sup> *Id.*

complied with the American Convention even though it had not yet explicitly incorporated the crime of enforced disappearance in its legislation.<sup>51</sup>

### III. Requirements for a Comprehensive Legal Framework for a Crime of Enforced Disappearance

#### A. A Comprehensive Legal Framework for Enforced Disappearances is Necessary to Investigate, Prosecute, and Punish Enforced Disappearances

A State's domestic legislation regarding enforced disappearances should be centralized within the federal government in a general law that regulates all aspects of enforced disappearance and the division of power within a State utilizing a Federal system can create several problems in handling enforced disappearances.<sup>52</sup> In the WGEID's visit to Mexico, the WGEID found that because Mexico had an autonomous offense of enforced disappearance both in Mexico's Federal Criminal Code and in the criminal legislation of eight of Mexico's thirty-one states, this created a lack of coordination, both horizontal and vertical, among Government authorities in the prevention, investigation, and search for disappeared persons.<sup>53</sup> This lack of coordination namely came from the division of power between Mexico's Federal and state governments, so the identity of the alleged perpetrator typically determined whether the enforced disappearance would be handled by the Federal or the state governments in Mexico.<sup>54</sup> This structure also created different levels of protections within Mexico depending on the state, different definitions between the states regarding the elements of an enforced disappearance and the penalties between jurisdictions.<sup>55</sup> Therefore, a State should utilize a general law that regulates all aspects of enforced disappearance in order to increase coordination within a Federal government system in handling cases of enforced disappearances.<sup>56</sup>

#### B. The Elements of a Crime of Enforced Disappearance Must be in Conjunction with Each Other

The autonomous crime of enforced disappearance is comprised of three elements, which will be discussed in detail later in this section. It is vital that the elements in the definition of an enforced disappearance are read in conjunction with each other, or else the law will not allow the State to fulfill its international obligations in accordance with international human rights law.<sup>57</sup> In *Portugal v. Panama*, Panama's definition of the offense of forced disappearances established that the offense occurred (1) when someone is unlawfully deprived of their personal liberty **or** (2) when there is a refusal to provide information on the whereabouts of persons detained unlawfully, but not in both.<sup>58</sup> The Inter-American Court held that this definition constituted a violation of Articles II and III of the Inter-American Convention because the Convention and international norms required that both elements: the deprivation of liberty (unlawfully or lawfully) and the refusal to provide information in that regard, be present in a State's definition of the autonomous crime of enforced disappearance to avoid confusion.<sup>59</sup>

The WGEID has also asserted that an enforced disappearance, while complex, should still be considered a unique and consolidated act.<sup>60</sup> That is to say, even if some parts of the violation that make up the whole

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<sup>51</sup> *Id.*

<sup>52</sup> WGEID, Country Visit to Mexico, *supra* note 9, para. 12.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 13.

<sup>56</sup> *Id.* at 12.

<sup>57</sup> *Heliodoro-Portugal v. Panama*, Inter-Am. Ct. H.R. (Ser C) No. 186, para 196–97 (2008).

<sup>58</sup> *Id.* at 196.

<sup>59</sup> *Id.* at 196–97.

<sup>60</sup> General Comment on Enforced Disappearances as a Continuous Crime, *supra* note 2, para. 2.

crime of enforced disappearance are fully completed before there is an entry into force of the relevant national or international instrument used to address the crime, the continuation of other parts allow the matter to be dealt with in a wholistic manner.<sup>61</sup> Enforced disappearance should not be dealt with in a fragmented way.<sup>62</sup> So if part of a disappearance continues after the entry into force or acceptance of the jurisdiction, this gives the institution in question the competence and jurisdiction to consider the act of enforced disappearance as a whole.<sup>63</sup>

### C. A Crime of Enforced Disappearance Cannot Include Unnecessary Statutory Complications

Additional statutory complications in the definition of forced disappearances are also incompatible with international human rights law, because these complications impede a State's ability to carry out its international obligations with regards to human rights violations. The Inter-American Court held that the additional requirement in Peru's codified crime of enforced disappearance that the enforced disappearance be "duly proven" was a violation of the Inter-American Convention because it prevented the State from fully complying with its international obligations.<sup>64</sup> This requirement was complicated by the ambiguous construction of this added phrase, as it was "not possible to know whether such 'due proof' must precede the criminal report or complaint and, secondly, it is not clear therein who should produce such proof either."<sup>65</sup> Because of the clandestine nature of enforced disappearances, the State must comply with its international obligations in good faith and provide all the information necessary to fulfill the State's obligations.<sup>66</sup> Therefore, the Inter-American Court held that any attempt to shift the burden of proof onto the victims or next of kin constituted a violation of International Human Rights law.<sup>67</sup> Following this reasoning, any definition of enforced disappearances must not include any statutory complications that could harm the international obligations of a State in regards to enforced disappearances, including an attempt to shift the burden of proof onto the victims or next of kin.

### D. An Autonomous Crime of Enforced Disappearance Beyond Crimes Against Humanity Must be Included in Domestic Legislation

According to international human rights law instruments and bodies, enforced disappearances can constitute a crime against humanity when "committed in a certain context," which make it possible to differentiate a common crime of enforced disappearance from an enforced disappearance as a crime against humanity.<sup>68</sup> The characterization of an enforced disappearance as a crime against humanity will be discussed in further detail later in the brief, but for now it must be noted that any domestic legislation regarding enforced disappearance must include enforced disappearance as an autonomous crime, regardless of whether the enforced disappearance was conducted in the context of crimes against humanity.

While many domestic State laws will provide a general prohibition on crimes against humanity and prevent impunity for such crimes, the WGEID advocates for domestic legislation that characterizes enforced disappearance as a crime even if it is not conducted in the context of crimes against humanity, but in a single instance.<sup>69</sup> In domestic criminal legislation, enforced disappearance should be an autonomous offense, rather than exclusively defined in the context of crimes against humanity.<sup>70</sup> A State has a duty to investigate, prosecute and punish human rights violations regardless of whether the enforced disappearance is conducted in a single instance or in the context of crimes against humanity, but the State does have an enhanced obligation when an enforced disappearance is conducted in the context of crimes against humanity.<sup>71</sup> This is

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, para. 3.

<sup>64</sup> *Palomino*, No. 136, para 108.

<sup>65</sup> *Id.* at 105.

<sup>66</sup> *Id.* at 106.

<sup>67</sup> *Id.*

<sup>68</sup> WGEID, General Comment on enforced disappearance as a crime against humanity, A/HRC/13/31, para. 8 (2009).

<sup>69</sup> U.N Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances: Best Practices on enforced disappearances in domestic criminal legislation, para. 41, U.N Doc. A/HRC/16/48/Add.3 (28 December 2010).

<sup>70</sup> WGEID, Country Visit to Croatia, A/HRC/30/38/Add.3, para. 27 (2015).

<sup>71</sup> *Silva*, No. 360, para. 181.

due to the fact that the State's obligations acquire a particular importance in view of the seriousness of the crimes committed and the nature of the rights violated, which extends to the contextual elements that characterize the practice of enforced disappearance in the context of crimes against humanity.<sup>72</sup> This concept will be discussed in greater detail later in this brief, but it is important to note for the purposes of this section that a crime of enforced disappearance should be codified as an autonomous crime, not only as a crime against humanity.

When enforced disappearances only appear in the context of crimes against humanity, the prosecution and determination of criminal responsibility will only occur in the context of investigations into crimes against humanity and war crimes, excluding other crimes of enforced disappearance from the State's obligations to investigate, prosecute, and punish enforced disappearances.<sup>73</sup>

## IV. Necessary Elements to Include in an Autonomous Crime of Enforced Disappearance

### A. Overall Definition of Enforced Disappearance

The WGEID asked for information on legislation and the overall criminalization of enforced disappearances. The definition of the crime of enforced disappearance as set out in international human rights law, is comprised of three constituent elements and a fourth element which is unclear and debated in international law.<sup>74</sup> The three constituent elements, which are undeniably accepted in international human rights law, are: (1) deprivation of liberty, (2) the direct or indirect involvement of State agents, and (3) a refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person.<sup>75</sup> The fourth element has been contested in international human rights law, although it has been accepted in instruments of international criminal law, so the nature of this element will be discussed more thoroughly at the end of this section.<sup>76</sup> Overall, this next section will outline each of the elements of a crime of enforced disappearance and explain what interpretation of domestic legislation is necessary to satisfy each element.

### B. An Enforced Disappearance Must Begin with the Deprivation of Liberty

The first element of an enforced disappearance is the deprivation of liberty, which may "occur in whatever form as a detention, an arrest or any kind of abduction."<sup>77</sup> The International Convention for the Protection of Persons from Enforced Disappearance (hereinafter ICPPED) utilizes a broad scope for this element, as the drafters of this Convention decided that utilizing terms such as 'arrest,' 'detention,' and 'abduction' as anything beyond concrete examples of the deprivation of liberty would narrow the scope of 'deprivation of liberty' too much.<sup>78</sup> The WGEID has endorsed this interpretation of the term, stating that the term "deprivation of liberty" is a generic one and the domestic law should cover all the varieties of situations that could be covered by that term, rather than rely on terms that would refer only to a certain type of abduction.<sup>79</sup> The deprivation of liberty does not have to be initially unlawful to satisfy the first element of enforced disappearance, as the deprivation of liberty may either be unlawful from the initiation of the deprivation or an initially lawful detention or arrest can become unlawful during the detention.<sup>80</sup> The

<sup>72</sup> *Id.*

<sup>73</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 69, para. 41.

<sup>74</sup> VERMEULEN, ENFORCED DISAPPEARANCE: DETERMINING STATE RESPONSIBILITY UNDER THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE, 169 (2012).

<sup>75</sup> International Convention for the Protection of All Persons from Enforced Disappearance art. 1, Dec. 23, 2010, 2716 U.N.T.S. 3 [hereinafter ICPPED]; Inter-American Convention, *supra* note 4; VERMEULEN, *supra* note 74, at 169.

<sup>76</sup> VERMEULEN, *supra* note 74, at 169.

<sup>77</sup> Lisa Ott, *Enforced Disappearance in International Law*, 21 (2011); (Citing U.N. Declaration on Protection of All Persons from Enforced Disappearance, ICFDP and ICPPED).

<sup>78</sup> VERMEULEN, *supra* note 74, at 54.

<sup>79</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 69, para. 23.

<sup>80</sup> Ott, *supra* note 77, at 21.

protection granted to a victim of enforced disappearance should be “effective upon the act of deprivation of liberty, whatever form such deprivation of liberty takes, and not be limited to cases of illegitimate deprivations of liberty.”<sup>81</sup> In *Osorio Rivera v. Peru*, the Inter-American Court rejected the State’s argument that the initial deprivation of liberty had been carried out lawfully, holding that because the deprivation of liberty was only the start of a complex violation, “the way in which the deprivation of liberty is carried out is unimportant for the purposes of the characterization of an enforced disappearance.”<sup>82</sup> Therefore, an appropriately broad interpretation of deprivation of liberty requires that the deprivation of liberty is not restricted to a particular type of deprivation, or even distinguished between lawful or unlawful, but treated as the beginning of a complex violation.

Additionally, it does not matter whether the victim was immediately killed after the detention or detained for a shorter period of time, as this deprivation of liberty can still qualify as the beginning of a case of enforced disappearance so long as the other elements of an enforced disappearance are satisfied.<sup>83</sup> The deprivation of liberty in an enforced disappearance must be distinguished from other forms of deprivation of liberty that occur in various human rights violations to respond to the various features of an enforced disappearance.<sup>84</sup> The circumstances of a case of enforced disappearance must be examined to determine what crime has occurred, because the deprivation of liberty in an enforced disappearance is closely related to similar crimes of extrajudicial killing, arbitrary detention and incommunicado detention.<sup>85</sup> The European Court of Human Rights primarily regards enforced disappearance as an unacknowledged detention, an interpretation which has been criticized for failing to respond to important elements that distinguish enforced disappearance from other serious human rights violations.<sup>86</sup> The Human Rights Committee and the European Court of Human Rights have generally considered periods of unacknowledged detention for several days after which the person was found alive as violations of the right to liberty, without classifying the case as an enforced disappearance.<sup>87</sup> The duration of the deprivation of liberty or concealment may even be entirely irrelevant for the purposes of classifying an enforced disappearance, as the Committee on Enforced Disappearances has stated.<sup>88</sup> While short periods of detention have been a generally conflicted question in international courts, the Inter-American Court has explicitly held that extrajudicial executions do not take the case outside the scope of an enforced disappearance, a holding which the European Court of Human Rights has also followed.<sup>89</sup> In *Durand and Ugarte v. Peru*, the Inter-American Court held that although it was presumed two persons had died in a prison riot, because the whereabouts of the persons were unknown for over fourteen years after the riot, the case classified as an enforced disappearance.<sup>90</sup> Therefore, if the domestic proceedings of a State were to follow similar practices as international human rights law, the extrajudicial killing of a victim would still enable the case to be tried as an enforced disappearance so long as the other elements of an enforced disappearance are met. However, the question of whether short periods of detention could be tried as an enforced disappearance in accordance with international human rights law is more difficult to determine. However, the Committee on Enforced Disappearances has been clear in stating that when the deprivation of liberty is followed by a refusal to acknowledge the deprivation of liberty or by a

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<sup>81</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 69, para. 22.

<sup>82</sup> *Osorio Rivera and Family members v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 274, para. 125 (2013).

<sup>83</sup> Ott, *supra* note 77, at 21.

<sup>84</sup> VERMEULEN, *supra* note 74, at 172.

<sup>85</sup> Ott, *supra* note 77, at 30–31.

<sup>86</sup> VERMEULEN, *supra* note 74, at 172.

<sup>87</sup> *Id.* at 174.

<sup>88</sup> CED, Views approved by the Committee under article 31 of the Convention for communication No. 1/2013, U.N. Doc. CED/C/10/D/1/2013, para. 10.3 (12 April 2015).

<sup>89</sup> VERMEULEN, *supra* note 74, at 175; *Durand and Ugarte v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No 68, para 71 (2000).

*See Kukayev v. Russia*, 29361/02 Eur. Ct. H.R. (2007) (The Court held that although the victim had been murdered the same day he was detained, the case was still classified as an enforced disappearance because the victim’s whereabouts were unknown for five months after his death).

<sup>90</sup> *Durand*, No. 68, para. 71; VERMEULEN, *supra* note 74, at 175.

concealment of the fate or whereabouts of the disappeared person, the elements of a crime of an enforced disappearance are met, “regardless of the duration of the said deprivation of liberty or concealment.”<sup>91</sup>

Because the rights of liberty and security to person may be invoked in contexts beyond arrest and detention, any interpretation of this deprivation of liberty must not ignore this broad range of possibilities.<sup>92</sup> In *Mojica v. Dominican Republic*, the Human Rights Committee held that an interpretation of “deprivation of liberty” that would “allow States parties to tolerate, condone, or ignore threats made by persons in authority to the personal liberty and security of non-detained individuals” would render the Covenant ineffective and was therefore inadequate.<sup>93</sup> This illustrates that the deprivation of liberty element should be read as broadly as possible and States should be wary of interpretations that would limit this element.

Enforced disappearances laws that use the term “deprivation of liberty of the victim” or “deprivation of liberty in whatever form” are considered among the best practices for the inclusion of this element within an autonomous crime of enforced disappearance in domestic legislation.<sup>94</sup> The terms “legally or illegally detain a person,” or terms inspired by the Rome Statute to cover “the arrest, detention, or abduction of persons,” can also be utilized, so long as they are interpreted broadly enough to cover all types of deprivation of liberty.<sup>95</sup> As stated above, this element of deprivation of liberty should not be limited to illegal deprivations of liberty or a particular type of deprivation but read in a fashion that is appropriately broad to encompass the complexity of an enforced disappearance.

### C. Enforced Disappearances Must be Carried Out With Some Relationship to the State or State Agents

While the UN Declaration and the Inter-American Convention were developed with the primary motivation of eradicating enforced disappearances committed by State agents, recent years have seen non-state actors become an increasing force in the commission of enforced disappearances.<sup>96</sup> The U.N Declaration considers that an enforced disappearance is committed by non-State actors if it occurs “by or with the consent or acquiescence of State agents,” and the Inter-American Convention takes a similar approach by determining non-State actors as “persons or groups of persons acting with the authorization, support, or acquiescence of the State.”<sup>97</sup> However, the WGEID has referred to this by confirming the duty of the State to take “appropriate measures to investigate acts comparable to enforced disappearance,” which cannot be attributable to a State.<sup>98</sup> Therefore, while purely non-State actors will not be considered an enforced disappearance, the conduct of a state may bring these acts within the scope of the definition of a crime of enforced disappearance “by any means of authorization, support, or acquiescence, or if a State fails to comply with their duties under international law if non-state actors are perpetrators of the crime.”<sup>99</sup> A State is not bound to utilize this wording and can broaden the scope, but may not limit the offense of an enforced disappearance purely to State actors.

A State’s obligation to investigate, prosecute and punish perpetrators of enforced disappearances is not only extended to those perpetrators who act as State agents, but private offenders.<sup>100</sup> To satisfy the minimum elements of a legal classification for the crime of enforced disappearance, the nature of a State agent must be broad enough to capture those perpetrators who are “persons or groups of persons acting with the authorization, support, or acquiescence of the State.”<sup>101</sup> In *Radilla-Pacheco v. Mexico*, the Inter-American Court

<sup>91</sup> Committee on Enforced Disappearances, Views approved by the Committee under article 31 of the Convention for communication No. 1/2013, CED/C/10/D/1/2013, para. 10.3 (2016).

<sup>92</sup> *Mojica v. Dominican Republic*, U.N Human Rights Committee, CCPR/C/51/D/449/1991, para. 5.4 (1994).

<sup>93</sup> *Id.*

<sup>94</sup> Best Practices on enforced disappearances, *supra* note 69, para. 24.

<sup>95</sup> *Id.*

<sup>96</sup> Ott, *supra* note 77, at 22.

<sup>97</sup> ICPPED, *supra* note 75; Inter-American Convention, *supra* note 4.

<sup>98</sup> WGEID, General Comment on the definition of enforced disappearance, A/HRC/7/2 (para. 26), para. 2 (2008).

<sup>99</sup> VERMEULEN, *supra* note 74, at 55–56.

<sup>100</sup> SEIBERT-FOHR, PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS, 177 (2009).

<sup>101</sup> *Radilla Pacheco v. Mexico*, Inter-Am. Ct. H.R. (Ser. C) No. 209, para. 321 (2009).



held that Mexico's crime of enforced disappearance was not in compliance with the Inter-American Convention because it only stated that the crime of an enforced disappearance is "committed by the public official," thereby excluding those perpetrators who were "people or groups of people that act with the authorization, support, or acquiescence of the State."<sup>102</sup> Because "States are internationally responsible for any act or omission of any of its powers or bodies in violation of the rights internationally enshrined," the Inter-American Court held that Mexico's narrow definition of a State agent was an obstacle to the guarantee of punishment of all perpetrators of enforced disappearance.<sup>103</sup> The Inter-American Court also faced a similar problem in *Palomino v. Peru*, where Peru's domestic legislation restricted the crime of enforced disappearance to public officials or servants.<sup>104</sup> The Court held that this limited definition amounted to a violation of Articles 1 and 2 of the Inter-American Convention, because it did not contain all types of criminal involvement stipulated in the Convention and therefore acted as an obstacle to the State's duties to investigate, prosecute, and punish the crime of enforced disappearance.<sup>105</sup> The WGEID noted the same issue on their visit to Peru, stating that this restrictive definition of State agent contributed to the impunity in the vast majority of cases of enforced disappearance.<sup>106</sup>

Therefore, in a State's autonomous crime of enforced disappearance, the State should utilize the terms that cover the broadest possible spectrum of enforced disappearances.<sup>107</sup> Wording that "foresees the perpetration of the crime 'by any individual'" or wording that contemplates the crime as committed "by, or with the authorization, support or acquiescence of, a State of a political organization," have been denoted as the best practices to include this element in domestic legislation.<sup>108</sup> So long as these broad definitions are not construed in a manner that dilutes State responsibility and the specificity of the offense is taken into account, these are effective terms to use.<sup>109</sup> The best approach however, would be to restrict the category of potential perpetrators "to those persons who have a link – whatever nature – with the State."<sup>110</sup> Additionally, the legislation for an autonomous crime of enforced disappearance should cover various modes of criminal liability, including "any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance."<sup>111</sup>

#### D. An Enforced Disappearance is Characterized by the Refusal to Acknowledge Deprivation of Liberty or Disclose the Fate and Whereabouts of the Person Concerned

The refusal to acknowledge the detention or disclose information is an essential element of the crime of an enforced disappearance and this element separates this crime from other serious human rights violations.<sup>112</sup> Any domestic legislation regarding the autonomous crime of enforced disappearance that does not contain this element will be in violation of international human rights law. In *Radilla-Pacheco v. Mexico*, the Inter-American Court held that Mexico's definition of enforced disappearance was incomplete because it did not include the refusal to acknowledge deprivation of liberty or refusal to disclose in their definition of the crime.<sup>113</sup> The Court held that the lack of this element meant that Mexico was unable to comply with its international obligations to duly guarantee the investigation, prosecution and punishment of the facts that constitute an enforced disappearance, because this element is necessary to allow a differentiation between enforced disappearances and other normally related crimes.<sup>114</sup> Therefore, for a State to fully comply with its international obligations, it must include this element in an autonomous crime of enforced disappearance.

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<sup>102</sup> *Id.* at 320.

<sup>103</sup> *Id.* at 321.

<sup>104</sup> *Palomino*, No. 136, para. 101.

<sup>105</sup> *Id.* at 101-102.

<sup>106</sup> WGEID, Report on a second visit to Peru by two members of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1987/15/Add.1, para. 18 (1986).

<sup>107</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 69, para. 26.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> WGEID, Country Visit to the Gambia, *supra* note 7, para. 32.

<sup>112</sup> VERMEULEN, *supra* note 74, at 170.

<sup>113</sup> *Radilla Pacheco*, No. 209, para. 323.

<sup>114</sup> *Id.* at 323-24.

Additionally, The Inter-American Court has considered cases in which the respondent State acknowledged the facts after a regime change, but the initial denials were given to the victims or next of kin for a long period of time before that regime change.<sup>115</sup>

This element, ideally, should be included as a “refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons” in the autonomous offense of enforced disappearance.<sup>116</sup> The WGEID has noted that other wordings are acceptable, so long as they are interpreted to cover all the cases contemplated in the Declaration, the ICPPED and the Rome Statute.<sup>117</sup>

#### E. Placement of the Person Concerned Outside the Protection of the Law is an Element Required in International Criminal Law but not in International Human Rights Law

This element represents one of the greatest distinctions between international criminal and human rights law regarding enforced disappearances. While this element is listed in the ICPPED as “exclud[ing] situations in which the authorities momentarily delay notification of an arrest in order to complete an operation,” there is no indication of any case law in human rights courts that complainants must provide evidence that the disappeared was held outside the protection of the law.<sup>118</sup> Rather, this element has been treated as a natural consequence of an enforced disappearance, rather than a constituent element of the definition.<sup>119</sup> However, international criminal law, exemplified by the Rome Statute, have treated this element as a constituent element of the crime of enforced disappearance.<sup>120</sup> However, because the Declaration, the Inter-American Convention, and case law of international and regional human rights courts refer to this fourth element as a natural consequence of an enforced disappearance, a human rights approach to this matter should follow a similar approach.<sup>121</sup>

## V. Duty to Investigate

As mentioned earlier in this brief, the obligation of States to investigate violations of human rights exists throughout international human rights law. The duty to investigate is clearly defined in the International Convention on Enforced Disappearances, the United Nations Declaration on Enforced Disappearances and the Inter-American Convention on Enforced Disappearances. Despite that the duty to investigate is not explicitly stated in the American Convention or the International Covenant on Civil and Political Rights (ICCPR), the respective jurisprudence of the Inter-American Court and the Human Rights Committee has found that this obligation arises from the general obligations of the States and the general principles of law.<sup>122</sup> Specifically, the Inter-American Court has stated that the obligation to investigate “arises from the general obligation guarantee the rights to life, personal integrity and personal liberty.”<sup>123</sup> A relatively recent decision of the Court characterized this duty as one that includes the “identification, prosecution, trial and, where appropriate, punishment of those responsible, as well as compliance with the eventual sentence, in the terms in which it is decreed.”<sup>124</sup> The Human Rights Committee, in a similar fashion, has found obligation to arise from its general obligation to respect and guarantee human rights (found in Article 2(1)) of the International Covenant on Civil and Political Rights).<sup>125</sup> Investigations are required to be carried out “promptly, thoroughly

<sup>115</sup> VERMEULEN, *supra* note 74, at 170. (Citing *La Cantuta v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 162, para 226 (2006))

<sup>116</sup> Best Practices on enforced disappearances, *supra* note 69, para. 28.

<sup>117</sup> *Id.*

<sup>118</sup> VERMEULEN, *supra* note 74, at 170–71.

<sup>119</sup> *Id.*

<sup>120</sup> Ott, *supra* note 77, at 28–29.

<sup>121</sup> *Id.* at 30.

<sup>122</sup> *Castillo Páez v. Peru*, Inter-Am. Ct. H.R. (Ser. C.) No. 34 November 3, 1997; *Velásquez Rodríguez v. Honduras*, Inter-Am Ct. H.R. (Ser. C.) No.7 (1989); *Godínez Cruz v. Honduras*, Inter-Am. Ct. H.R. (Ser. C.) No. 8, (1989); *Caballero Dalgado and Santana v. Columbia*, Inter-Am. Ct. H.R. (Ser. C) No. 22 (1997).

<sup>123</sup> *González et. al. v. Mexico*, Inter-Am. Ct. H.R. (Ser. C) No. 2005, para. 287 (2009).

<sup>124</sup> *Silva*, No. 360, para. 211.

<sup>125</sup> U.N. Human Rights Committee, General comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, para. 15, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).



and effectively through independent and impartial bodies”, the Committee has stated.<sup>126</sup> If there is a failure to investigate allegations of violations of human rights, that “failure by a State Party . . . could in and of itself give rise to a separate breach of the Covenant.”<sup>127</sup> One such separate breach could be the failure to respect the procedural guarantees found in Article 9 of the Covenant, which are designed to prevent disappearances.<sup>128</sup>

The Inter-American Court has held repeatedly that in the context of serious violations of human rights, including enforced disappearance, the obligation to investigate is “an international obligation that the State cannot waive”<sup>129</sup>, and that its compliance is part of the “overriding need to combat impunity.”<sup>130</sup> This will be discussed in more detail later, but this obligation to investigate “becomes particularly . . . intense and significant in cases of crimes against humanity.”<sup>131</sup>

The Court stresses that the obligation to investigate is “one of means and not results” but “this does not imply, however, that the investigation may be carried out as ‘a mere formality condemned beforehand to be unsuccessful.’”<sup>132</sup> Moreover, “each State action in the investigation process, as well as the investigation in its totality, shall be oriented toward a specific purpose, the determination of the truth and the investigation, persecution, capture, trial, and if appropriate, the punishment of those responsible for the acts.”<sup>133</sup> That specific purpose should also include assessment of the “systematic patterns that allowed the perpetration of the serious human rights violations found in [cases concerning enforced disappearances].”<sup>134</sup> As such, the Inter-American Court has ruled that “the investigation must be conducted using all available legal means and it must be aimed at discovering the truth and at the pursuit, capture, prosecution and eventual punishment of all the masterminds and perpetrators of the facts, especially when State agents are or could be involved.”<sup>135</sup>

The investigations into enforced disappearance are usually of a criminal nature. As such, the end purpose of investigations of enforced disappearance is to capture, prosecute, bring to trial, and punish all the perpetrators of the acts. The Human Rights Committee has even explicitly stated that investigations of enforced disappearance must be criminal in nature and oriented to the prosecution of those responsible.<sup>136</sup> Truth commissions, or other similar mechanisms that also generally function with the goals of reconciliation and revealing of the facts around human rights violations, cannot in any way exonerate the State from this obligation to investigate these violations.<sup>137</sup> The Inter-American Court, when discussing the Truth and Reconciliation Commission of Peru, recognized the benefits of the Commission but stated that the Commission’s report “does not complete or substitute the State’s obligation to *also* establish the truth through court proceedings.”<sup>138</sup>

In addition to the normal aims of an investigation of gross human rights violations, investigations related to enforced disappearances must also seek to establish the fate or whereabouts of the victim.<sup>139</sup> This is linked

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* para. 16.

<sup>128</sup> General comment on article 6, *supra* note 39, para. 57.

<sup>129</sup> *Second Report on the Situation of Human Rights in Peru*, OAS/Ser.L/V/II.106, Doc. 59rev., 2 June 2, 2000, para. 230.

<sup>130</sup> Inter-American Comm’n on Human Rights, Report No. 136/99, Case. No. 10.488 *Ignacio Ellacuría S.J. and others* (El Salvador), December 22, 1999, para. 230.

<sup>131</sup> *La Cantuta v. Peru*, (Ser. C) No. 162, para. 110.

<sup>132</sup> *Velásquez Rodríguez*, No. 4, para. 177.

<sup>133</sup> *Cantoral Huamani and García Santa Cruz v. Peru*, Inter-Am. Ct. H.R. (Ser. C) No. 167, para. 131.

<sup>134</sup> *Cardenas*, No. 217, para. 166.

<sup>135</sup> *Osoria Rivera*, No. 274, para. 178.

<sup>136</sup> Human Rights Committee, Views of 24 October 2002, José Antonio Coronel and others v. Colombia, Communication No. 778/1997, U.N. Doc. CCPR/C/77/D/778/1997.

<sup>137</sup> *Castro*, No. 202, para. 180.

<sup>138</sup> *La Cantuta*, No. 162, para. 224 (emphasis added).

<sup>139</sup> *See, inter alia*: 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 (art. 22(c)).

to the right to an effective remedy and the rights of the victim's relatives to know the fate and whereabouts of the victims.<sup>140</sup> The WGEID has stated that, although there is “an absolute obligation to take all the necessary steps to find the person . . . there is no absolute obligation of result.”<sup>141</sup> This means that States do not necessarily need to find a victim or the victim's body, but must investigate until it can determine by presumption the fate or whereabouts of the person.<sup>142</sup>

### A. Characteristics of the Investigation

There are specific requirements prescribed by international law for investigations of enforced disappearance. The investigations must be carried out with due diligence and without unreasonable delay, and must also be thorough, effective, impartial, independent, and make use of all legal means available. Without such requirements, the Inter-American Court has stated that “the State cannot subsequently exercise effectively and efficiently its authority to bring charges and the courts cannot conduct the judicial proceedings that this type of violations calls for.”<sup>143</sup> While the previous characteristics are similar for those laid out for any serious human rights violation, various international instruments and jurisprudence on human rights mandates specific requirements for enforced disappearance due to the unique nature of the offense.<sup>144</sup> Investigations following the norms set out in international law must have the following characteristics.

#### 1. Due Diligence and Good Faith

The duty on States to investigate enforced disappearance must be fulfilled in good faith and with due diligence, with the intention of that investigation to avoid impunity for the crime. The Inter-American Court has held that “the State's obligation to investigate must be fulfilled diligently to avoid impunity and the repetition of this type of act.”<sup>145</sup> Every obstacle that that would impede the investigation and thus lead to impunity must be removed by States.<sup>146</sup> Every action and inquiry necessary to procure the result sought in the investigation must be completed.<sup>147</sup> Further, any alleging of “internal obstacles such as lack of infrastructure or staff to conduct the investigation process” does nothing to obviate the obligation of the State to investigate.<sup>148</sup> Legal barriers that interfere with the obligation of the State to investigate and punish enforced disappearance are not allowed to stand, either.<sup>149</sup> The absolute bar on impunity in cases of enforced disappearance will be discussed in more detail later in this brief.

Investigations lacking due diligence do not serve to meet the obligation of a State to investigate. The Human Rights Committee has specifically stated that “perfunctory and unproductive investigations whose genuineness is doubtful” do not meet the international obligation of an adequate investigation by States.<sup>150</sup> The Inter-American Court, when specifically discussing extrajudicial executions Columbia, has held that due diligence in investigations requires

. . . taking into account the patterns of action of the complex structure of the individuals who perpetrated the extrajudicial execution, because the structure remains after a crime has been committed; and, precisely to ensure its impunity, it uses threats to instill fear in those who investigate

<sup>140</sup> General Comment on article 6, *supra* note 39, para. 28.

<sup>141</sup> Human Rights Committee, General Comment on the Right to the Truth in Relation to Enforced Disappearances, U.N. Doc A/HRC/16/48, para. 5.

<sup>142</sup> *Id.*

<sup>143</sup> *Cantoral-Huamani*, No. 167, para 133.

<sup>144</sup> ICPPED arts. 11, 12, 18, 24, *supra* note 75; Declaration art. 13, *supra* note 18; *See also*, Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (Principles); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (principles 22–26); Guidelines on the Role of Prosecutors (principles 11–16, 20–24); Code of Conduct for Law Enforcement Officials (arts. 4, 5, 8).

<sup>145</sup> *Narciso González Medina and Family v. Dominican Republic*, Inter-Am. Ct. H.R. (Ser. C) No. 240, para 203 (2012).

<sup>146</sup> *Osorio Rivera*, No. 274, para. 178.

<sup>147</sup> *Silva*, No. 360, para. 182.

<sup>148</sup> *Garibaldi v. Brazil*, Inter-Am. Ct. H.R. (Ser. C), No. 203, para. 137 (2009).

<sup>149</sup> *Barrios Altos and La Cantunta v. Peru*, Inter-Am. H.R. (Ser. C), No. 87, para. 41 (2018), para. 41.

<sup>150</sup> Human Rights Committee, View of 2 April 2009, *Abubakar Amirov and others v. The Russian Federation*, Comm. No.1447/2006, U.N. Doc CCPR/C/95/D/1447/2006, para. 11.4et seq (2009).

the crime and on those who could be witnesses or have an interest in the search for the truth, as in the case of the victim's next of kin. The State should have adopted sufficient measures of protection and investigation to prevent that type of intimidation and threat.<sup>151</sup>

When addressing cases of enforced disappearance where the victims had been executed, the Court found that

the obligation of due diligence in the investigation of these events included the correct processing of the crime scene and the examination, identification, and removal of the corpses in order to clarify what happened. The Court has established that the effective establishment of the truth in the context of the obligation to investigate a possible death must be apparent in the meticulous nature of the initial measures taken.<sup>152</sup>

In addition, throughout the investigation, actions must be promptly taken to clarify the fate or whereabouts of the victim and locate them.<sup>153</sup>

## 2. Duty to Investigate *Ex Officio*

The duty to investigate enforced disappearances is an *ex officio* one.<sup>154</sup> The Inter-American Court in *Anzualdo Castro v. Peru* stated that “whenever there is reason to believe that a person has been subjected to enforced disappearance, an investigation must be conducted.”<sup>155</sup> The Court reiterated this obligation in *Silva*, stating that “reasonable grounds” to suspect a person has been subjected to enforced disappearance mandates the initiation of an investigation.<sup>156</sup> This obligation on a State does not rest on the filing of a complaint by the victim's next of kin.<sup>157</sup> Any requirement of a “step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for truth by the government” is a violation of this duty.<sup>158</sup> Without this duty, there is inadequate protection of further rights such as the right to life, personal liberty, and personal integrity.<sup>159</sup> As long as there is not a negative effect to the protection of those essential rights, every State authority “who is aware of acts purported to forcibly disappear persons, shall immediately report them.”<sup>160</sup>

An example of a failure to commence an *ex officio* investigation was found by the Court in *Ibsen Cárdenas and Ibsen Peña v. Bolivia*. The investigation into the alleged disappearances of the victims in that case began on April 26, 2000—about twenty-eight years after the disappearances.<sup>161</sup> The victims' names in *Cárdenas* appeared on the lists of disappeared persons included in the impeachment trial attempted against Hugo Banzer in 1979, so the duty to investigate was imposed on the State—at the latest—when the names appeared on those lists.<sup>162</sup> The fact that the investigation in *Cárdenas* only began because a relative filed a criminal complaint is a violation of the human rights of both the victims and next of kin; the investigation must “be undertaken by the States as their own legal obligation and not as a simple step taken by private interests.”<sup>163</sup>

Officials who have knowledge of the commission of enforced disappearance, or even simply reason to believe one of these crimes occurred, must inform their superiors and/or supervisory or investigative authorities.<sup>164</sup> A failure in this situation may potentially constitute participation in the acts at question, thus

<sup>151</sup> *Manuel Cepeda Vargas v. Columbia*, Inter-Am. Ct. H.R. (Ser. C) No. 212, para. 149 (2010).

<sup>152</sup> *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Columbia*, Inter-Am. Ct. H.R. (Ser. C) No. 0287, para. 489.

<sup>153</sup> *Castro*, No. 202, para. 135.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Silva*, No. 360, para. 195.

<sup>157</sup> *Castro*, No. 202, para. 135.

<sup>158</sup> *Velásquez Rodríguez*, No. 4, para. 177.

<sup>159</sup> *Castro*, No. 202, para. 65.

<sup>160</sup> *Id.*

<sup>161</sup> *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Inter-Am. Ct. H.R. (Ser. C), No. 217, para. 154.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* para. 155.

<sup>164</sup> ICPPED *supra* note 4, art. 23(3).

giving individual criminal responsibility to officials who fail to report.<sup>165</sup> Any State authority that becomes aware of acts tied to enforced disappearance are also obligated to immediately denounce those acts.<sup>166</sup>

The international standards relating to when the duty to investigate arises *ex officio* have been described slightly differently by different instruments. The ICCPED uses “reasonable grounds”<sup>167</sup>, whereas the Declaration uses “reason to believe”.<sup>168</sup> Even in an absence of reasonable grounds or suspicion, the enforced disappearance of detainees imposes an automatic obligation to investigate *ex officio*. This is due to the duty of care of a State to take appropriate measures to protect the lives of individuals deprived of their liberty by the State.<sup>169</sup> The Human Rights Committee’s reasoning for this understanding is that when a State has taken the liberty of an individual, that State has voluntarily assumed the duty to care for the life and bodily integrity of that individual.<sup>170</sup> Lack of financial resources or logistical issues are not effective means of mitigating this duty.<sup>171</sup> The Inter-American Court has also held that “the State is responsible, in its capacity as guarantor of the rights enshrined in the Convention, for the observance of the right to humane treatment of every individual who is in its custody.”<sup>172</sup>

### 3. The Importance of Specialized, Independent and Impartial Investigations of Enforced Disappearances

The WGEID asked for information on the importance of impartial and independent prosecutions and investigations. Standards of international law require investigations of enforced disappearance to be independent and impartial.<sup>173</sup> The Inter-American Court has stated that “[t]he investigations must be conducted in line with the rules of the process of law, which implies that the bodies of administration of justice must be organized in a manner so that its independence and impartiality is guaranteed and the prosecution of grave human rights violations is made before regular courts in order to avoid impunity and the search for the truth.”<sup>174</sup> These requirements of impartiality and independence “also extend to non-judicial bodies responsible for the investigation prior to the judicial proceedings, conducted to determine the circumstances of a death and the existence of sufficient evidence.”<sup>175</sup> The Covenant also obligates parties to initiate an “in-depth, thorough and impartial investigation” into enforced disappearance.<sup>176</sup>

Investigations of enforced disappearance attributed to security forces must not be investigated by any body affiliated body to the security forces. Discussing Peru, the Human Rights Committee stated that such investigations should be “carried out by an impartial body that does not belong to the organization of the security forces themselves.”<sup>177</sup> Further, “[p]ersons convicted of such crimes should be dismissed and, pending the outcome of the investigation, be suspended from office.”<sup>178</sup> The Committee on Enforced Disappearance has also issued recommendations aimed at ensuring the impartiality and independence of investigations of enforced disappearance, saying that States should adopt mechanisms to ensure that any person, whether a law enforcement official or private individual, suspected of committing enforced disappearance is not in a position to influence the course of an investigation in any way.<sup>179</sup> And for its part, the Inter-American Court

<sup>165</sup> See, *inter alia*, Committee against Torture, Decision of 21 November 2002, *Harjizi Džemajl and others v. Yugoslavia*, Communication No. 161/2000, U.N. Doc. CAT/C/29/D/161/2000 para. 9.2 (2002).

<sup>166</sup> *Silva*, No 360, para. 195.

<sup>167</sup> ICCPED, *supra* note 4, Art. 12(2)

<sup>168</sup> *Id.*, art. 13(1).

<sup>169</sup> General comment on article 6, *supra* note 37, para. 25.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Baldón García v. Peru*, Inter-Am. Ct. H.R. (Ser. C), No. 147, para. 120 (2006).

<sup>173</sup> ICCPED, *supra* note 73 art. 12(1); Declaration on the Protection of All Persons, *supra* note 17, art. 13(1).

<sup>174</sup> *Castro*, No. 202, para. 125.

<sup>175</sup> *Cantoral-Huamani*, No.167, para. 133.

<sup>176</sup> Human Rights Committee, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2259/2013, U.N. Doc. CCPR/C/119/D/2259/2013, para. 7.11 (16 May 2017).

<sup>177</sup> CED, Concluding Observations of the Human Rights Committee: Peru U.N. Doc. CCPR/C/79/Add.67, July 25, 1996 para. 22.

<sup>178</sup> *Id.*

<sup>179</sup> CED, Concluding Observations on the Report submitted by Argentina under article 29, para. 1 of the Convention, U.N. Doc. CED/C/ARG/CO/1, December 12, 2013, para. 23.

has stated that independence in an investigation requires “not only hierarchical or institutional independence, but also actual independence.”<sup>180</sup> For example, in Japan, the decision to investigate persons accused of enforced disappearance is subject to the discretion of a relevant police officer.<sup>181</sup> The implications of this for the independence of investigations was a matter of concern for the Committee on Enforced Disappearances.<sup>182</sup> And in Argentina, an enforced disappearance was initially investigated by the security forces belonging to the body suspected of committing the enforced disappearance.<sup>183</sup> The mother of the disappeared requested that evidence gathering procedures be carried out by separate security forces, but her request was considered “extravagant” and without judicial basis, so it was denied.<sup>184</sup> The Court stated that this sort of treatment of an investigation constitutes “a lack of due diligence in initial evidence collection.”<sup>185</sup>

The IACHR, in reporting on the state of human rights in Mexico, mentioned that prosecutors were subject to improper pressure when they investigated and presided over cases involving human rights violations.<sup>186</sup> This pressure came in not only a political manner, but from intimidation and coercion by members of organized crime.<sup>187</sup> This is unacceptable, because States must guarantee the security of prosecutors from all types of external pressures in order to ensure the independence and impartiality of investigations.<sup>188</sup>

#### 4. Thorough and Effective Investigations

The Working Group specifically requested information on effective investigations and the right to truth. International law requires investigations of enforced disappearance to be thorough and effective.<sup>189</sup> In order for such an investigation to be thorough and effective, enforced disappearance, while made up of many individuals acts, should be investigated as unique and consolidated crime.<sup>190</sup> The Inter-American Court has stated that “the analysis of a possible forced disappearance should not be approached in an isolated, divided or segmented way, based only on the detention or possible torture or risk to lose one’s life, but on the set of facts presented in the case brought to the Court’s attention.”<sup>191</sup> The Court further elaborated in a later case, saying that it “is incumbent on the State to adapt the functioning of its institutions in order to guarantee an investigation of forced disappearance in all its dimensions with due diligence, rather than analyzing its constituent elements piecemeal.”<sup>192</sup> That case, dealing with an enforced disappearance in the Dominican Republic, cited to an analysis of decisions by the judicial organs involved in the domestic remedies pursued that confirmed those organs “did not understand the complexity of conducts that accumulatively constitute forced disappearance.”<sup>193</sup>

The Committee on Enforced Disappearances, in reviewing an enforced disappearance that occurred in Argentina, noted that the investigations into the victim’s disappearance had been solely based on the causes and circumstances of his death and the criminal liability that might arise therefrom.<sup>194</sup> There was no explanation from the State party as to why the circumstances of the victims disappearance were not

<sup>180</sup> *Baldeón García* (Ser. C), No. 147, para. 95.

<sup>181</sup> CED, Concluding observations on the report submitted by Japan under article 29(1) of the Convention, U.N. Doc CED/C/JPN/CO/1, para. 23 (19 November 2018).

<sup>182</sup> *Id.*

<sup>183</sup> *Torres Millacura and others v. Argentina*, Inter-Am. Ct. H.R. (Ser. C) No. 229, para. 121 (2011).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Mexico, OAS/Ser.L/V/II.100, Doc. 7 Revs. 1, paras. 372 and 381.

<sup>187</sup> *Id.*

<sup>188</sup> *See id.*, paras. 372–73, 381.

<sup>189</sup> ICPPED *supra* note 75, art. 12(1); Declaration on the Protection of All Persons from Enforced Disappearance, *supra* note 4, art. 13(1).

<sup>190</sup> *See* General Comment on Enforced Disappearances as a Continuous Crime, *supra* note 2, para. 2.

<sup>191</sup> *Heliodoro Portugal v. Panama*, No. 186, paras. 196–97.

<sup>192</sup> *Narciso González Medina and Family v. Dominican Republic* (Ser. C), No. 240, para. 244 (2012).

<sup>193</sup> *Id.*

<sup>194</sup> Views approved by the Committee, *supra* note 88, para. 10.9.

investigated.<sup>195</sup> Enforced disappearance must be investigated holistically, as solely focusing on individual aspects of the crime leads to impunity.<sup>196</sup>

The investigation must also ensure that it covers all those responsible.<sup>197</sup> The Working Group, when reviewing enforced disappearances in Gambia, found that most of the suspects against whom proceedings had been initiated were low or mid-level officers.<sup>198</sup> None of these suspects had disclosed any information about the alleged masterminds behind any of the human rights abuses and crimes that were being investigated.<sup>199</sup> It is essential investigations of enforced disappearance take the proper steps to identify the superiors of lower-level officers or government officers, including providing incentives for witnesses and suspects.<sup>200</sup>

In complex cases like enforced disappearance, the Court has stated that

[T]he obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators. In other words, the protection of human rights should be one of the central purposes that determine how the State acts in any type of investigation.<sup>201</sup>

When determining the structures that allowed the violations of human rights to occur in a specific situation, “it is essential to analyze the awareness of the power structures that allowed, designed and executed [the crime], both intellectually and directly, as well as the interested persons or groups and those who benefited from the crime (beneficiaries).”<sup>202</sup> The Court said that the reason for doing so is to lead to the “generation of theories and lines of investigation, the examination of classified or confidential documents and of the scene of the crime, witnesses, and other probative elements, but without trusting entirely in the effectiveness of technical mechanisms such as these to dismantle the complexity of the crime. . . .”<sup>203</sup> Thus, the crime should not be examined “in isolation, but rather [inserted] in a context that will provide the necessary elements to understand its operational structure.”<sup>204</sup> This type of a contextual analysis is especially important when enforced disappearances are committed in the context of crimes against humanity, as explained later in this brief.

##### 5. Prompt Investigations Without Delays

Investigations should be initiated promptly and without delays.<sup>205</sup> As mentioned earlier, “whenever there is reason to believe that a person has been subjected to enforced disappearance, an investigation must be conducted.”<sup>206</sup> The immediacy of an investigation is essential for a few reasons, the first of which is to ensure that evidence related to the disappearance does not disappear, be destroyed, or be altered.<sup>207</sup> The Inter-American Court has highlighted the importance of this element in cases of enforced disappearance, noting that “this type of repression is characterized by an attempt to suppress all information about the abduction, the whereabouts and the fact of the victim.”<sup>208</sup> Later, in *Osorio Rivera*, the Court further elaborated by stating that

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<sup>195</sup> *Id.* paras. 10.9, 11.

<sup>196</sup> *See id.*

<sup>197</sup> Country Visit to Gambia, *supra* note 7, para. 55.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Manuel Cepeda Vargas*, No. 213, paras. 118–119.

<sup>202</sup> *Id.* para. 119

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> ICPPED, *supra* note 75, art. 12(1); Declaration, *supra* note 18, art.13(1).

<sup>206</sup> *Castro*, No. 202, para. 135.

<sup>207</sup> *See id.*, para. 38.

<sup>208</sup> *Id.*

[T]he passage of time bears a directly proportionate relationship to the limitation – and in some case [sic], the impossibility – of obtaining evidence and/or testimony, making it difficult and even useless or ineffective, to carry out probative measures in order to clarify the facts that are being investigated, to identify the possible authors and participants, and to establish the eventual criminal responsibilities, as well as to identify those responsible for [the] disappearance.<sup>209</sup>

The Court in *Ibsen Cárdenas and Ibsen Peña v. Bolivia* stated that “[t]he right to have access to justice implies the effective investigation of the facts and, where appropriate, the determination of the corresponding criminal responsibilities within a reasonable period of time.”<sup>210</sup> It affirmed this holding in *Silva*, saying that the right of access to justice implies that all the necessary steps of an investigation should be completed within a reasonable period of time.<sup>211</sup> The phrase “reasonable period of time” is key. This means, regardless of the complexity of the issue, a prolonged delay in proceedings involving an enforced disappearance can be in itself a violation of the right to a fair trial.<sup>212</sup>

A significant modifier of the complexity of an issue, especially in the context of enforced disappearances, is the passage of time. During a public hearing before the Inter-American Court of Human Rights, an expert witness stated the following:

... the main enemy is time, in a situation of forced disappearance or in any other; the best would be to conduct an immediate investigation, in forensic terms, into the facts after their occurrence, [ . . . ] time deteriorates the things, time produces a series of phenomena that, basically, can alter the evidence until such item of evidence becomes useless; bones can be altered, by the effect of water, soil, whatever . . .”<sup>213</sup>

Delays can also be initiated through judicial procedure. The right to effective judicial protection “requires that the judges direct the process in such a way that undue delays and hindrances do not lead to impunity, thus frustrating adequate and due protection of human rights.”<sup>214</sup> Judicial officials have a duty to channel the proceedings in a manner that “restrict[s] the disproportionate use of actions whose effect is to delay the proceeding,” regardless of the obstacles presented in domestic law.<sup>215</sup> In *Myrna Mack Chang v. Guatemala*, the Court held that although Guatemala’s law forced courts to give proceeding to any amparo remedy, even if it was patently inadmissible, the domestic judges did not process these amparo remedies with due diligence, allowing the amparo remedy to “become a dilatory resource of the procedure.”<sup>216</sup> The Court held that judicial authorities have a duty to channel such remedies in a manner that restricts “the disproportionate use of actions that may have dilatory effects,” and the fact that judicial authorities had instead tolerated these measures and allowed them to be used as tools to perpetuate impunity constituted a violation of the States’ international obligations regarding human rights violations.<sup>217</sup>

The speed at which an investigation is conducted must not in any way inhibit its effectiveness. The Human Rights Committee states that parties to the Covenant must “take adequate measures to prevent the enforced disappearance of individuals, and conduct an effective *and* speedy inquiry to establish the fate and whereabouts of persons who may have been subject to enforced disappearance.”<sup>218</sup> Thus, while haste is important, it should be to the benefit of the investigation, not the detriment.

<sup>209</sup> *Osorio Rivera*, No. 274, para. 185.

<sup>210</sup> *Cardenas*, No. 217, para. 152.

<sup>211</sup> *Silva*, No. 360, para. 185.

<sup>212</sup> *Id.*; *Cardenas*, No. 217, para. 152.

<sup>213</sup> *Castro*, No. 202, 44 n.174.

<sup>214</sup> *Bulacio v. Argentina*, Inter-Am Ct. H.R. (Ser. C) No. 100, para. 114 (2003).

<sup>215</sup> *Myrna Mack Chang v. Guatemala*, Inter-Am. Ct. H.R. (Ser C) No. 101, para 207 (2003).

<sup>216</sup> *Id.* at para. 204, 207.

<sup>217</sup> *Id.* at para 207, 211.

<sup>218</sup> General comment on article 6, *supra* note 39, para. 58.



## 6. Adequate Legal Powers for the Investigators

All of the investigating authorities should be equipped with the powers they need, including the power to use resources and to access information to “carry out all measures and investigations necessary to shed light on the fate of the victims and identify the responsible for the forced disappearance.”<sup>219</sup> To accomplish this, the State must guarantee that the “authorities in charge of the investigation have the logistic and scientific resources necessary to collect and process evidence” as well as “the power to access to the documents and information relevant to the investigation of the facts denounced and that they be able to obtain evidence of the locations of the victims.”<sup>220</sup> Investigating authorities should also have unrestricted access to any detention centers.<sup>221</sup>

Officials charged with investigative duties should be vested with the powers necessary to carry out those duties effectively.<sup>222</sup> Such officials should be given, both formally and substantively, the “appropriate and necessary power and guarantees to access documentation and information that is pertinent for the investigation of the facts denounced and to obtain indicators or evidence of the whereabouts of the victims.”<sup>223</sup> Similarly, investigating authorities should be provided with “the logistic and scientific resources necessary to collect and process evidence, and more specifically, the power to access the documents and information relevant to the investigation of the denounced.”<sup>224</sup> However, it should be noted that a lack of these resources and elements, while damaging to an effective investigation, “does not exonerate state authorities from making the necessary efforts to comply with this obligation.”<sup>225</sup>

Investigations of enforced have the tendency to run into the issue of restricted access to documents subject to legal privilege or confidentiality on the grounds of national security or public order.<sup>226</sup> The WGEID has determined that “[t]he right to the truth implies that the State has an obligation to give full access to information available allowing the tracing of disappeared persons.”<sup>227</sup> Further, the majority of information concerning the investigative steps taken and the findings of the investigation, its conclusions, and its recommendations, should be made public subject to only “absolutely necessary redactions justified by a compelling need to protect the public interest or the privacy and other legal rights of directly affected individuals.”<sup>228</sup> A caveat to this availability of information is that, if a victim of enforced disappearance is available for consultation, no information related to that individual’s enforced disappearance should be made public without that consultation occurring.<sup>229</sup> And, while this will be addressed in more detail later, States are unable to use the state secret defense to obstruct the investigation of human rights violations.<sup>230</sup>

States are unable to “seek protection in arguing the lack of existence of requested documents.”<sup>231</sup> Instead, a State “must establish the reason for denying the provision of said information, demonstrating that it has adopted all the measures under its power to prove that, in effect, the information sought did not exist.”<sup>232</sup> The Inter-American Commission has stated that the final decision on documents requested by investigating

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<sup>219</sup> *Castro*, No. 202, para. 135.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> ICPED, *supra* note 75, art. 12(3); Declaration, *supra* note 18, art. 13(2); ICFDP, *supra* note 4, art. 10.

<sup>223</sup> *Gudiel Álvarez and others (Diario Militar) v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 153, para. 251 (2012)

<sup>224</sup> *Castro*, No. 202, para. 135.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> General Comment on the Right to the Truth, *supra* note 141, para. 9.

<sup>228</sup> General comment on article 6, *supra* note 39, para. 27.

<sup>229</sup> CED, Concluding observations on the report submitted by Mexico under article 29, para. 1 of the Convention. U.N. Doc. CED/C/MEX/FU/1, para. 16 (19 November 2018) (Unofficial translation by University of Texas Human Rights Clinic).

<sup>230</sup> *Myrna Mack Chang v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No.10, para. 181 (2004).

<sup>231</sup> *Gomes Lund and others (“guerrilha do Araguaia”) v. Brazil*, Inter-Am. Ct. H.R. (Ser. C) No. 219, para. 211 (2010).

<sup>232</sup> *Id.*



authorities cannot rely on the discretion of the State, as the alleged perpetrators either belong or are affiliated with it.<sup>233</sup>

Adequate measures for the preservation of records and documents related to an investigation within a State should be in place.<sup>234</sup> The Inter-American Commission has specifically stated that

the State has the obligation to produce, recover, reconstruct or capture the information it needs in order to comply with its duties under international, constitutional or legal norms. In this regard, for example, if information that it should safeguard was destroyed or illegally removed and such information was necessary to clarify human rights violations, the State should, in good faith, make every effort within its reach to recover or reconstruct that information.<sup>235</sup>

#### 7. Experiences on the Protection of Victims, Witnesses, Human Rights Defenders, Lawyers, Judges, Prosecutors and Other Persons Involved in the Investigation

The WGIED invited feedback on the issue of protecting victims and families in the context of investigating enforced disappearances. During the course of investigations, measures must be taken by authorities to ensure that all those who are involved in the investigations are protected from any act or threat of violence, intimidation, abuse or reprisals.<sup>236</sup> The Inter-American Court has stated that

States must provide all necessary means to protect agents of justice, investigators, witnesses, and next of kin of victims from harassment and threats aimed at obstructing the proceedings and avoiding the elucidation of the facts, and concealing the perpetrators, because, to the contrary, this would have an intimidating effect on those who could be witnesses, seriously impairing the effectiveness of the investigation.<sup>237</sup>

Threats against those individuals who have an interest in seeking the truth drastically influences the effectiveness of an investigation.<sup>238</sup> It is reported that relatives of forcibly disappeared persons are afraid to file complaints, and in some instances persons with crucial information have refused to testify.<sup>239</sup> States are obligated to protect the lives of such individuals and, in doing so, ensure the effectiveness of the investigation.<sup>240</sup> To that end, incentives should be provided to witnesses so they are willing to testify and an adequate witness protection program should be established.<sup>241</sup> The WGEID recommended that any witness protection mechanisms not be linked to government agencies such as the police, security agencies, or any military groups against which the witness may testify.<sup>242</sup> This obligation to protect individuals at risk who are involved in the investigation does not end at the conclusion of the investigation; protection measures should remain in place until there is an “assessment that the risk has ceased . . . [which] requires a careful analysis of the reasons that led to and justified their adoption, as well as the circumstances at the time their conclusion and lifting are evaluated.”<sup>243</sup>

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<sup>233</sup> Inter-American Commission on Human Rights, *The Right to Truth in the Americas*, OEA/Ser.L/V/II/152, Doc. 2, para. 114 (2014).

<sup>234</sup> *See id.*, para. 116.

<sup>235</sup> *Id.*

<sup>236</sup> ICPPED, *supra* note 75, arts. 12(1), 18(2); Declaration, *supra* note 18, Art. 13(3).

<sup>237</sup> *Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Columbia*, Inter-Am. Ct. H.R. (Ser. C) No. 279, para. 376 (2013).

<sup>238</sup> *See La Rochela Massacre v. Columbia*, Inter-Am Ct. H.R. (Ser. C), No. 163, para. 165 (1989).

<sup>239</sup> Country Visit to the Gambia, *supra* note 7, para. 60.

<sup>240</sup> *See La Rochela*, No. 163, para. 165.

<sup>241</sup> Country Visit to the Gambia, *supra* note 7, para. 60.

<sup>242</sup> WGEID, Addendum: Mission to Argentina, U.N. Doc. A/HRC/10/9/Add.1, para. 74 (2009).

<sup>243</sup> *Rodríguez Vera*, No. 287, para. 526.

## 8. Suspension and/or Reassignment of Those Implicated in Enforced Disappearances and Sanctions for Those Who Hinder Investigations

States are obligated to punish individuals who hinder the development of investigations<sup>244</sup>, or in some cases remove individuals suspected of involvement in human rights violations from positions where they can influence the course of investigations.<sup>245</sup> Many international bodies have recommended a total suspension from official functions of any state agents implicated in cases of enforced disappearance.<sup>246</sup> Measures such as these can serve to “foster confidence on the part of witnesses”, regardless of if the risks to them are real or only perceived.<sup>247</sup>

Multiple international norms and standards require that States punish individuals who act to hinder investigations.<sup>248</sup> The Inter-American Court very explicitly stated that “[p]ublic officials and private citizens who hamper, divert or unduly delay investigations tending to clarify the truth of the facts must be punished, rigorously applying, in this regard, provisions of domestic legislation.”<sup>249</sup> If obstructive practices aimed at concealing the fate or whereabouts of an individual are tied to a crime of enforced disappearance, then any perpetrators of those practices must be investigated and prosecuted for the crime of enforced disappearance.<sup>250</sup>

## 9. Investigation of Enforced Disappearances in the Context of Crimes Against Humanity

A crime against humanity is, in and of itself, a serious violation of human rights and affects mankind as a whole.<sup>251</sup> As such, the duty to investigate, prosecute and punish enforced disappearances is heightened in the context of crimes against humanity. The Inter-American Court in *Silva v. Peru* stated that the “Court has emphasized the importance of the State’s duty to investigate and punish human rights violations, which acquires particular importance in view of the seriousness of the crimes committed and the nature of the rights violated.”<sup>252</sup> The Court held similarly in *La Cantuta*, stating that “[t]he duty to investigate becomes particularly intense and significant in cases of crimes against humanity.”<sup>253</sup> This is in-line with the definitions of the Inter-American system and general human rights law.<sup>254</sup> Crimes against humanity are “characterized by *contextual elements*”, and these specific elements make it possible to differentiate isolated enforced disappearances from those occurring as a crime against humanity.<sup>255</sup>

A specific instance of this heightened duty being used in the jurisdiction of the Inter-American Court is found in *Goiburú v. Paraguay*.<sup>256</sup> The enforced disappearances occurred in the context of crimes against humanity committed in Paraguay.<sup>257</sup> In that context, need to eliminate impunity in crimes of enforced disappearance is heightened.<sup>258</sup> Certain individuals who were accused of committing the crime of enforced

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<sup>244</sup> Article 16 (1) of the Declaration on the Protection of All Persons from Enforced Disappearance.

<sup>245</sup> ICPPED, *supra* note 75, art. 12(4).

<sup>246</sup> Human Rights Committee, Concluding Observations of the Human Rights Committee: Brazil, U.N. Doc. CCPR/C/79/Add.66, para. 20 (1996); Human Rights Committee, Concluding Observations on: Argentina, U.N. Doc. CED/C/ARG/CO/1, para. 23 (2013); WGEID, U.N. Doc. E/CN.4/2005/65, para. 68 (2004).

<sup>247</sup> Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary and arbitrary executions, Philip Alston, U.N. Doc. A/63/313, para. 17 (2008).

<sup>248</sup> *See, e.g.*, Human Rights Committee, Concluding Observations of the Human Rights Committee: Brazil, U.N. Doc. CCPR/C/BRA/CO/2, para. 12 (2005); Human Rights Committee, Conclusions and recommendations of the Committee against Torture: El Salvador, U.N. Doc. CAT/C/SLV/CO/2, para. 12 (2009); Human Right Committee, Conclusions and recommendations of the Committee against Torture: Honduras, U.N. Doc. CAT/C/HND/CO/1 para. 20 (2009).

<sup>249</sup> *Caracazo v. Venezuela*, Inter-Am. Ct. H.R. (Ser. C) No. 95, para. 119 (2002).

<sup>250</sup> ICPPED, *supra* note 75, arts. 21(1), 22.

<sup>251</sup> *Almonacid Arellano et al. v. Chile*, Inter-Am. Ct. H.R. (Ser. C) No. 154, para 105 (2006).

<sup>252</sup> *Silva*, No. 360, para. 181.1.

<sup>253</sup> *La Cantuta v. Peru*, No. 162, para. 110.

<sup>254</sup> *See generally*, 1994 ICFDP, *supra* note 4, preamble para. 6.; Code of Crimes Against Security for Mankind, art 18 (1996); ICPPED art. 5 (2006).

<sup>255</sup> General Comment, *supra* note 2, para. 10.

<sup>256</sup> *See generally Goiburú v. Paraguay*, Inter-Am. Ct. H.R. (Ser. C) No. 153 (2006).

<sup>257</sup> *Id.*, para.128.

<sup>258</sup> *Id.*

disappearance had fled the country, and Paraguay had a compulsory duty to request the extradition of these individuals.<sup>259</sup> The State should have used every measure possible, of both a diplomatic and judicial measure, to prosecute and punish those responsible for perpetrating enforced disappearances.<sup>260</sup> Where there is an extradition treaty between the State requesting and the state hosting the individual in question is not a defense for failing to initiate an extradition request in this context.<sup>261</sup> In tandem to the heightened obligation imposed on Paraguay to avoid impunity, there is an obligation on the international community to work together to ensure inter-State cooperation to this end.<sup>262</sup> Both the general responsibility of the State in which the enforced disappearance occurred and the criminal responsibility of the agents or individuals responsible must be determined in order to eliminate this type of impunity.<sup>263</sup>

## VI. Duty to Punish

In addition to the obligations to investigate, there is a duty on States to punish those who perpetrate enforced disappearances. The Declaration stipulates that “all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness.”<sup>264</sup> The principle of proportionality is key here, “both in the determination of the penalty and its execution.”<sup>265</sup> Specifically, “the response that the State attributes to the unlawful conduct of the author of the transgression must be proportional to the legal right affected and the culpability with which the author acted, so it must be established in the function of the diverse nature and seriousness of the facts.”<sup>266</sup> For the rule of proportionality to be properly implemented in a State, it “must ensure, in the exercise of [its] duty to prosecute these serious violations, that the sentences imposed and their execution do not constitute factors of impunity, taking into account various aspects such as the characteristics of the crime and the participation and guilt of the accused.”<sup>267</sup> The Covenant imposes the same obligations on parties, obligating them to ensure that enforced disappearance is punished with appropriate criminal sanctions.<sup>268</sup>

The principle of proportionality is also found in article 7(1) of the ICPPED.<sup>269</sup> It states that “[e]ach State Party shall make the offense of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.”<sup>270</sup> In the Netherlands, the International Crimes Act allows for the imposition of fines not exceeding 81,000 euros as the stand-alone penalty for the crime of enforced disappearance.<sup>271</sup> There is no specification of a minimum fine.<sup>272</sup> The Committee on Enforced Disappearances found that this amount of discretion given to judges violates the principle of proportionality, as it could lead to punishments that do not adequately address the seriousness of the offense.<sup>273</sup> The Committee has also stated that a significant gap between the minimum and maximum penalties prescribed for an offense of enforced disappearance is violation of the principle of proportionality.<sup>274</sup> Article 312(b) of the

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<sup>259</sup> *Id.* para. 130.

<sup>260</sup> *Id.*

<sup>261</sup> *Goiburí*, No. 153, para. 130.

<sup>262</sup> *Id.* para. 131.

<sup>263</sup> *Id.*

<sup>264</sup> WGEID, General comment on article 18 of the Declaration on the Protection of All Persons from Enforced Disappearance, para. 48.m

<sup>265</sup> *Barrios Altos*, No. 87, para. 39.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> General comment on article 6, *supra* note 39, para. 58.

<sup>269</sup> ICPPED art. 1, Dec. 23, 2010, 2716 U.N.T.S. 3.

<sup>270</sup> *Id.*

<sup>271</sup> CED, Concluding observations on the report submitted by the Netherlands under article 29, paragraph 1, of the Convention, U.N. Doc. CED/C/NLD/CO/1, paras. 16–17 (10 April 2014).

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> CED, Concluding observations on the report submitted by Austria under article 29 (1) of the Convention, U.N. Doc. CED/C/AUT/CO/1, para. 12 (July 6, 2018).

Austrian Criminal Code, which penalizes the perpetuation of a normal instance of enforced disappearance, gives a range of 1 to 10 years of imprisonment for punishment. Article 321(a)(3)(5), which penalizes enforced disappearances committed in the context of crimes against humanity, gives a range of 5 to 15 years of imprisonment or 10 to 20 years or life if the enforced disappearance caused the death of the victim.<sup>275</sup> This sort of a range was stated by the Committee to be a large-enough range of punishment to violate the principle of proportionality.<sup>276</sup>

In Honduras, there were two specific reasons the principle of proportionality was violated by domestic legal mechanisms to combat enforced disappearances.<sup>277</sup> The first was the fact that the Public Prosecution Service is allowed to decline to bring criminal proceedings if the suspect in a case of enforced disappearance cooperates effectively with the investigation.<sup>278</sup> The refusal to bring any criminal proceedings at all should not be an option in any circumstance.<sup>279</sup> The second violation was due to enforced disappearances not being listed among the offenses that are subject to the most severe penalties in the criminal code.<sup>280</sup> As enforced disappearances should be treated in a comparable manner to the most heinous offenses like murder and torture, any penalty allowed for those should also be allowed for enforced disappearances.<sup>281</sup>

Even countries that have a “comprehensive judicial response” to serious human rights violations such as enforced disappearance can run afoul of ensuring adequate and proper punishment is meted out.<sup>282</sup> In Chile, the justice system had worked to initiate proceedings on behalf of at least three quarters of the total number of victims of enforced disappearances at issue.<sup>283</sup> While the WGEID found this effort commendable, it also noted issues with the sentences imposed at the conclusion of many of those proceedings.<sup>284</sup> Only 64 of the individuals who were convicted of serious human rights violations by the Chilean justice system were serving prison sentences, while 173 officials convicted of similar offenses received light sentences that did not involve any prison time.<sup>285</sup> The WGEID found a pattern in Chile of “imposing non-effective sentences (non-custodial sentences) on the perpetrators of these offenses, or custodial sentences mainly on persons already in prison.”<sup>286</sup> A punishment for serious human rights offenses such as enforced disappearance must be at least of a custodial nature in order to adequately take into account the seriousness of the offense.<sup>287</sup>

In Chile, the nature of conditions of detention for those persons convicted of enforced disappearance was another concern in terms of ensuring the seriousness of the offense is addressed.<sup>288</sup> Certain individuals who were convicted of enforced disappearances received privileges “such as prison benefits apparently allowing them to obtain permission to go out on Sundays or weekends, to be released on parole and/or receive a reduced sentence before the full completion of the original conviction.”<sup>289</sup> While those persons convicted of enforced disappearance have the same rights as the rest of the prison population, the WGEID

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<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> Committee on Enforced Disappearance, Concluding observations on the report submitted by Honduras under article 29 (1) of the Convention, U.N. Doc. CED/C/HND/CO/1, paras. 14–15 (July 4, 2018).

<sup>278</sup> *Id.* para. 14.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* para. 15.

<sup>281</sup> *Id.*

<sup>282</sup> WGEID, Mission to Chile, U.N. Doc. A/HRC/22/45/Add.1, para. 26 (29 January 2013).

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* para. 27.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* para. 28.

<sup>287</sup> *See id.* paras. 27–28.

<sup>288</sup> *Id.* para. 32.

<sup>289</sup> *Id.*

outlined three elements of consideration to bear in mind whenever any modifications to a sentence for enforced disappearance is contemplated.<sup>290</sup> They are as follow:

1. The granting of any type of benefit must be subject to effective judicial oversight
2. The particular seriousness of the offense must be considered when deciding to grant benefits
3. There process must be transparent and provide appropriate public information on the criteria used for the granting of any benefits and their reasons for award in each specific case.<sup>291</sup>

#### A. Modifications to Punishment

The Court in *Barrios Altos* voiced concerns about multiple ways the “attenuation of the punitive power or the reduction of punishment” may come about.<sup>292</sup> A particular method pushed by Peru was the “humanitarian pardon”, which Peru argued was not subject to the restrictions of international law.<sup>293</sup> Peru recognized that the granting of pardons in cases of serious human rights violations is incompatible with international law, but saw its humanitarian pardon as an exception to the rule.<sup>294</sup> The humanitarian pardon allowed Peru to pardon anyone, even those convicted of egregious crimes and human rights violations, if the life or health of that person was at risk.<sup>295</sup> Peru’s argument in favor of the pardon comporting to international law was that the pardon does not extinguish criminal action by preventing the investigation and prosecution it merely removes the sentence imposed after a criminal proceeding.<sup>296</sup> But States are never able to resort to mechanisms that serve to suppress the effects of a condemnatory sentence; no “undue grant of benefits in the execution of the penalty” are allowed.<sup>297</sup> The sentence should be carried out in exactly the manner in which it was decreed.<sup>298</sup>

## VII. Measures of Impunity that Interfere with the Investigation and Prosecution of Enforced Disappearances

Impunity of perpetrators is one of the obstacles in the investigation and punishment of enforced disappearance. The Inter-American Court defined impunity as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention.”<sup>299</sup> Impunity could occur at any of the above listed stages, so an investigation could be conducted but the impunity would occur if there was no prosecution or capture, or likewise, the trial could occur without conviction, indicating impunity. Impunity could also occur after a conviction has been granted, if the punishment is not followed through.<sup>300</sup> U.N Human Rights experts denounced the granting of a pardon to Peru’s former president, Alberto Fujimori, as a method of granting impunity even after all the above-listed stages had been completed.<sup>301</sup> Therefore, the protection against impunity must occur at all stages of the process required of a State for its human rights violations, from the initial investigation to the punishment.

Legislation that grants impunity to perpetrators of human rights violations see that Court orders to fulfill a State’s international obligations to investigate, prosecute, and punish these human rights violations are

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<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Barrios Altos*, No. 87, para. 28.

<sup>293</sup> *Id.*, para. 29.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* para. 30.

<sup>297</sup> *Id.* para. 31.

<sup>298</sup> *Barrios Altos*, No. 87, para. 28.

<sup>299</sup> *Bàmaca Velásquez v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C.) No. 70, para 211.

<sup>300</sup> WGEID et al., *Peru: UN human rights experts appalled by Fujimori pardon*, U.N Human Rights Office of the High Commissioner (Dec. 28, 2017).

<sup>301</sup> *Id.*

seldom fulfilled, as the State power structure will lack the means or will to bring those perpetrators to justice.<sup>302</sup> Additionally, if unchecked, these impunity measures will “foster the chronic repetition of human rights violations and the total defenselessness of the victims and the next of kin...”<sup>303</sup> In the context of enforced disappearances, impunity is simultaneously one of the underlying causes of enforced disappearances and one of the major obstacles to clarifying cases of enforced disappearance.<sup>304</sup> In fact, the crime of enforced disappearance itself “attempts to erase any trace of the crime in order to ensure the total impunity of those who committed it.”<sup>305</sup> Therefore, to fully comply with the international duties of a State to investigate, prosecute, and punish enforced disappearances, a State must also comply with its obligation to prevent impunity from interfering with these duties.

States have an obligation not to make or enact laws that would in effect give immunity to perpetrators of disappearances.<sup>306</sup> Not only do States have a duty not to enact laws that perpetuate impunity for perpetrators of human rights violations, States must remove any obstacles that contribute to this impunity. To comply with a State’s international obligations to investigate, prosecute, and punish the crime of enforced disappearance, States are required to “remove all obstacles, legal and factual, contributing to impunity.”<sup>307</sup> A “systematic pattern of denial of justice and impunity” will keep the State from fulfilling its obligations in regards to enforced disappearances and the State will be obligated to remove those measures of impunity in a manner that is not only legally viable, but effective in the terms of that rule.<sup>308</sup> When cases of enforced disappearances do not act in an isolated manner but “within the framework of the obstacles that were placed to impede a diligent and effective investigation,” these facts will be converted to perpetuate impunity and impede truth, requiring the State to remedy this pattern of impunity to discover the truth.<sup>309</sup> In *Chitay Nech v. Guatemala*, the Court found that because the facts of the case of enforced disappearance were framed in this systematic pattern of denial of justice and impunity, the State was required to “remove all the obstacles, de facto and de jure, that maintain the impunity and that this must be eradicated through the determination of [the] responsibilities,” whether general (on part of State) or individual.<sup>310</sup>

As impunity could occur through any stage required for a State to carry out its obligations in regard to violations of serious human rights, States will not only be required to refrain from enacting any laws that would perpetuate this impunity but remove any obstacles that would contribute to this impunity at any stage of the State’s performance of its obligations. This section will set out various practices within domestic legislation that perpetuate a system of impunity and illustrate how these practices interfere with a State’s international obligations to investigate, prosecute, and punish the crime of enforced disappearance, both in terms of legal and factual obstacles.

### A. Amnesty Laws

The Declaration expressly provides that:

“persons who have or are alleged to have committed [enforced disappearance] 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.”<sup>311</sup>

The WGEID expanded on this by stating that amnesty laws are contrary to the provisions of the Declaration if the amnesty law directly or indirectly terminates the State’s obligation to investigate, prosecute,

<sup>302</sup> Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, 8 (2013).

<sup>303</sup> *Anzualdo Castro*, No.202, para. 179.

<sup>304</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 69, para. 47.

<sup>305</sup> *Bàmaca Velásquez v. Guatemala*, No. 70, para. 122.

<sup>306</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 69, para. 47.

<sup>307</sup> *Castro*, No. 202, para. 125; See also *La Cantuta*, No. 162, para 226; *Kavas Fernández v. Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 196, para 192 (2009).

<sup>308</sup> *Chitay Nech*, No. 212, paras 199, 202.

<sup>309</sup> *Id.* at 201.

<sup>310</sup> *Id.* at 199.

<sup>311</sup> Declaration, *supra* note 18, art. 18.

and punish perpetrators of serious human rights violations such as enforced disappearance, or if the amnesty laws serve to hide the names of the perpetrators or exonerate them.<sup>312</sup> Various international and regional human rights bodies have substantiated this principle, determining that amnesty laws granted to serious human rights violations, including enforced disappearances, are incompatible with the obligations imposed on States through international human rights law to investigate, prosecute, and punish those who perpetrate these human rights violations.<sup>313</sup> The Inter-American Court takes a broad stance against amnesty laws and similar provisions, holding that all amnesty provisions designed to eliminate responsibility are inadmissible, as they are “intended to prevent the investigation and punishment of those responsible for serious human rights violations.”<sup>314</sup>

In *El Mozote v. El Salvador*, the Court held that El Salvador’s dismissal of the *El Mozote* case under the Law of General Amnesty for the Consolidation of Peace was a violation of the State’s international obligations to investigate, prosecute and punish human rights violations.<sup>315</sup> Because the case collectively referred to a division of the armed forces responsible for the massacre, without naming the individuals on active service responsible for the event, the domestic court of El Salvador dismissed the *El Mozote* case and refused to reopen proceedings, under El Salvador’s Law of General Amnesty, which provided full amnesty to those who “participative in any way in committing political crimes.”<sup>316</sup> The Inter-American Court held that because this dismissal based on El Salvador’s Law of General Amnesty for the Consolidation of Peace resulted in the “installation and perpetuation of a situation of impunity owing the absence of investigation, pursuit, capture, prosecution and punishment of those responsible for the facts,” the amnesty law prevented El Salvador from fulfilling their obligations to investigate, prosecute and punish grave human rights violations.<sup>317</sup> Similarly, in *Gelman v. Uruguay*, the Court found that Uruguay’s Expiry Law, which relinquished penal actions against State officials who had perpetrated any crime in fulfillment of their functions and in the course of obeying orders until 1985, was incompatible with Uruguay’s obligations under the Inter-American Convention and the American Convention.<sup>318</sup> This incompatibility derives from the notion that the Expiry Law prevented the next of kin from being heard before a judge, therefore hindering the international obligation of the State to investigate, prosecute and punish serious human rights violations.<sup>319</sup>

The Committee against Torture has also held that amnesty laws are generally incompatible with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention against Torture).<sup>320</sup> In its concluding observations on Algeria, the Committee against Torture held that Algeria’s Character for Peace and National Reconciliation to be inconsistent with Algeria’s obligations under the Convention against Torture. Algeria’s law included one provision that stipulated that those perpetrators who came forward and had not committed mass killing, bomb attacks or rapes would not be prosecuted or would be given a reduced sentence and another that prevented the institution of any proceedings against members of Algeria’s defense and security forces from without excepting international crimes “such as torture or enforced disappearance,” provisions the Committee against Torture noted were “not consistent with the obligation of every State party to conduct an impartial investigation... to prosecute the perpetrators of such acts and to compensate the victims.”<sup>321</sup> The Human Rights Committee has also endorsed the position that amnesty laws are generally incompatible with the duty

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<sup>312</sup> WGEID, General comment on article 18 of the Declaration on the Protection of All Persons from Enforced Disappearance, para. 49.

<sup>313</sup> *Gelman*, No. 221, para. 199 (Citing UN High Commissioner for Human Rights: Report of the Office of the High Commissioner of the United Nations for Human Rights. Right to the Truth. UN Doc. A/HRC/5/7, of June 7, 2007, para. 20).

<sup>314</sup> *Barrios Altos*, No. 75, para. 41; Pasqualucci, *supra* note 302, para. 218.

<sup>315</sup> *The Massacres of El Mozote and nearby places v. El Salvador*, Inter-Am. Ct. H.R. (Ser. C) No. 252, para 296, 312 (2012).

<sup>316</sup> *Id.* at 275-276.

<sup>317</sup> *Id.* at 296.

<sup>318</sup> *Gelman*, No. 221, para. 253.

<sup>319</sup> *Id.* at 227.

<sup>320</sup> Human Rights Committee, Concluding observations of the Committee against Torture: Algeria of 13 May 2008, U.N. Doc. CAT/C/DZA/CO/3, para. 11 (2008)

<sup>321</sup> *Id.*



of States in regards to serious human rights violations, holding that measures that allow impunity for perpetrators of grave human rights violations and keep the crimes from being investigated and keep the authors from being prosecuted and punished are incompatible with the States obligations under the ICCPR.<sup>322</sup> In this sense, the Human Rights Committee has also noted that the non-adoption of amnesty laws or other similar measures, or prohibitions of such laws in constitutional clauses, are “positive factors for the implementation of the obligations enshrined in the ICCPR.”<sup>323</sup>

When an amnesty law bars the ability of a State to effectively carry out their duties to investigate, prosecute and punish serious human rights violations, the Inter-American Court has commonly ruled that these domestic amnesty laws lack legal effect.<sup>324</sup> This applies to any amnesty that prevents a State from carrying out these obligations, regardless of whether or not the amnesty law is a self-amnesty law. In *Barrios Altos v. Peru*, the Court held Peru’s self-amnesty law was incompatible with the American Convention, because self-amnesty laws perpetuate impunity as they “preclude[s] the identification of the individual who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.”<sup>325</sup> However, the prohibition on amnesty laws extends to any amnesty law that prevents States from fulfilling its obligations, not just self-amnesty laws. In *Gomes Lund v. Brazil*, the Inter-American Court held that Brazil’s amnesty law was incompatible with its international obligations regarding enforced disappearance, even though the law was not a self-amnesty law.<sup>326</sup>

The Court held that the incompatibility of amnesty laws regarding serious human rights violations is not limited to self-amnesty laws, but based on the fact that the law was intended to leave “unpunished serious violation in international law committed by the military regime.”<sup>327</sup> Additionally, a State may not use the imposition of an amnesty law to exempt itself from investigating human rights violations committed during a prior regime.<sup>328</sup> In *Rodriguez v. Uruguay*, the Human Rights Committee held that Uruguay’s law establishing amnesty of a “special kind, subject to certain conditions for military and police personnel alleged to have been engaged in violations of human rights during the period of the previous . . . regime” was incompatible with Uruguay’s obligations under the ICCPR. The Committee explicitly stated that States still had an obligation to investigate violations of ICCPR rights by a prior regime, especially in the case of serious human rights violations, and an amnesty law that prevented this investigation violated the duties of the State to investigate and ultimately ascertain responsibility for serious human rights violations.<sup>329</sup> Therefore, a State will not be exempt from its responsibility to investigate serious human rights violations if those violations occur during a previous regime and cannot enact any amnesty laws that would hinder that investigation.

The Committee against Torture has also held a similar position, holding that “[i]n order to ensure that the perpetrators of torture and ill-treatment do not enjoy impunity, the State party [should] ensure the investigation, and, where appropriate, the prosecution of all those accused of having committed such acts,” which required that amnesty laws exclude those serious human rights violations from their reach.<sup>330</sup> The Committee also emphasized that “waivers of prosecution do not apply under any circumstance to crimes” such as enforced disappearance, and that amnesties or other impediments “which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of nonderogability.”<sup>331</sup>

<sup>322</sup> International Commission of Jurists, Practitioner’s Guide No. 9, *International Law and the Fight Against Impunity*, Pg. 279–280 (2015).

<sup>323</sup> *Id.* At 281.

<sup>324</sup> Pasqualucci, *supra* note 302, para. 218.

<sup>325</sup> *Barrios Altos*, No. 75, para 43; See also *La Cantuta*, No. 162.

<sup>326</sup> *Gomes Lund et al. v. Brazil*, Inter-Am. Ct. H.R (Ser. C) No. 219, para 175 (2010).

<sup>327</sup> *Id.*

<sup>328</sup> Human Rights Committee, *Hugo Rodriguez v. Uruguay*, U.N. Doc. CCPR/C/51/D/322/1988, para. 12.3 (1994).

<sup>329</sup> *Id.* at 12.3–12.4.

<sup>330</sup> Human Rights Committee, Concluding observations of the Committee against Torture: Senegal, U.N. Doc. CAT/C/SEN/CO/3 of 17 January 2013, para. 9.

<sup>331</sup> *Id.*



Therefore, when evaluating the compatibility of an amnesty law with international obligations, it is important to take into account the purpose of the amnesty provision, to “distinguish blank impunity from faithful efforts to re-establish peace, security, and respect for human rights.”<sup>332</sup> If the purpose of the amnesty provision is to shield perpetrators of human rights violations from responsibility, then it is deemed incompatible with the internationally imposed obligations on a State to investigate, prosecute, and punish human rights violations.<sup>333</sup> The Inter-American Court has often looked to the **ratio legis** of the amnesty law to determine whether an amnesty law is incompatible with the American Convention or other international law.<sup>334</sup> In *Arellano v. Chile*, the Court held that even though Chile had not applied the amnesty law in their domestic laws for some years, by formally keeping a law that was contrary to the “wording and spirit of the Convention, the State had not complied with the obligations imposed by Article 2 thereof.”<sup>335</sup>

In addition to the purpose of an amnesty law, one must also consider the scope of the amnesty law in evaluating its compatibility with the ability of a State to fulfill its international obligation to investigate, prosecute, and punish the crime of enforced disappearance.<sup>336</sup> The U.N. has consistently maintained that amnesty cannot be granted in respect to international crimes, such as crimes against humanity or violations of international humanitarian law.<sup>337</sup> This principle has been reiterated by various international and regional human rights bodies. The Inter-American Court has ruled that domestic legislation cannot provide amnesty for crimes that involve serious violations of human rights.<sup>338</sup> In the case of *Arellano v. Chile*, the Inter-American Court held that Chile’s amnesty law, which did not grant exceptions for several crimes against humanity, including enforced disappearances, was a violation of the American Convention because it affected the rights embodied in the Convention.<sup>339</sup>

For an amnesty law to be declared a violation of a State’s international obligations, it is not required that the amnesty law be applied in the case, so long as the amnesty law still causes an interference in the performance of those obligations. In *Dos Erres Massacre v. Guatemala*, the Court held that even though the requests for amnesty under Guatemala’s National Reconciliation Law were eventually denied, the question of the application of amnesty under this law delayed the investigation process.<sup>340</sup> Because the eventual application of the amnesty law would have been found to lack legal effect, the Court found that the delay in the question of application was an excessive violation of the “reasonable term” principle of the States’ duty to investigate, and therefore prevented the State from fulfilling this duty to investigate.<sup>341</sup>

While amnesty laws have been accepted by the United Nations in some capacity to ensure peace and encourage reconciliation after a conflict, any law that allows amnesty for enforced disappearances is directly incompatible with international human rights norms.<sup>342</sup> The United Nations have clearly stipulated that “amnesties that exempt from criminal sanction those responsible for human rights crimes have often failed to achieve their goals and instead seem to have emboldened beneficiaries to commit further crimes,” a position the Inter-American Court has endorsed.<sup>343</sup> Enforced disappearances violate comprehensive human rights treaties, international conventions, and the judgement of international human rights Courts, so any amnesty

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<sup>332</sup> SEIBERT-FOHR, *supra* note 100, para. 217.

<sup>333</sup> *Id.*

<sup>334</sup> *Almonacid Arellano*, No. 154, para 120; *El Mozote*, No. 252, para. 292.

<sup>335</sup> *Almonacid Arellano*, No. 154, para. 122.

<sup>336</sup> SEIBERT-FOHR, *supra* note 100, para. 217.

<sup>337</sup> U.N Security Council, *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, S/2000/915, para. 22 (4 October 2000).

<sup>338</sup> *Gelman*, No. 221, para. 213 (Citing *Yaman v. Turkey* (55) which holds that Criminal procedures which refer to crimes that imply serious violations of human rights may not allow amnesties or pardons in this regard.)

<sup>339</sup> *Arellano*, No. 154, para. 119.

<sup>340</sup> “*La Dos Erres*” *Massacre v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C) No. 211, para 136 (2009).

<sup>341</sup> *Id.*

<sup>342</sup> Office of the United Nations High Commissioner For Human Rights, *Rule-of-Law tools for post-conflict States: Amnesties*, HR/PUB/09/1, Pg. 19 (2009).

<sup>343</sup> *Id.* at 3.

law that provides protection for perpetrators of enforced disappearances will be incompatible with these human rights bodies.<sup>344</sup>

## B. Due Obedience to Superior Orders

Another obstacle in the prosecution of the crime of enforced disappearances is the due obedience plea. The impunity that arises from the concept of due obedience is an obstacle to the States ability to carry out the State's duties to prosecute and punish perpetrators of human rights violations.<sup>345</sup> Due obedience, or superior orders, is a defense brought by alleged perpetrators of human rights violations in which the perpetrator will claim that they were a subordinate carrying out a superior's orders.<sup>346</sup> When accepted, this defense becomes a source of immunity for that perpetrator that justifies any brutality.<sup>347</sup> The Human Rights Committee has determined that it will not accept the defense of due obedience to superior orders for particularly serious human rights violations, for fear that those perpetrators would be immune from prosecution.<sup>348</sup> In regards to the crime of enforced disappearance, international human rights law has expressly forbidden the defense of due obedience as a defense to prosecution and punishment.<sup>349</sup> These international instruments have also determined that those who receive orders to conduct enforced disappearances have the right and duty not to obey them.<sup>350</sup>

The defense of due obedience primarily arises in the context of a military chain of command, therefore it is important that a competent tribunal also be utilized to prevent the applicability of this defense.<sup>351</sup> In *Rivera v. Peru*, the Inter-American Court held that the military court's dismissal of a case of enforced disappearance under the defense that the accused had "acted in keeping with his duties," which the State said raised doubts regarding the responsibility of the accused, was a violation of the State's obligation to investigate enforced disappearances.<sup>352</sup>

While the defense of due obedience is primarily seen in a military context, the rule has not been limited to military, or even governmental, relationships.<sup>353</sup> Because the theory behind the inapplicability of the defense of due obedience is that no one is authorized to give patently illegal orders, it does not matter whether a military, government, or nongovernmental movement has delivered the order, it will not be admissible as a defense for those accused of perpetuating serious human rights violations.<sup>354</sup>

The inapplicability of due obedience as a defense does not only apply to subordinates, but their superiors. Violations committed by a subordinate, particularly criminal violations, do not exempt the superior from responsibility if the superior had reason to know that the subordinate was committing or about to commit the crime and did not take all necessary measures within their power to prevent or punish the crime.<sup>355</sup> Moreover, the fact that a perpetrator acted from a position of status, such as State official, does not exempt him from prosecution, reduce punishment, or be considered a mitigating circumstances.<sup>356</sup>

Domestic legislation regarding the defense of due obedience must be utilized to prevent that defense from being used to perpetuate impunity. In general, the principle that no order or instruction from any public authority, civilian, military, or other, should be used to justify an offense of enforced disappearances," should

<sup>344</sup> *Id.* at 19; *Gelman*, No. 221, para. 199; *Gomes Lund*, No. 219, para. 147.

<sup>345</sup> SEIBERT-FOHR, *supra* note 100, para. 30.

<sup>346</sup> STEVEN R. RATNER ET AL., *Accountability for Human Rights Atrocities in International Law*, 150 (2009).

<sup>347</sup> *Id.*

<sup>348</sup> SEIBERT-FOHR, *supra* note 96, para. 30.

<sup>349</sup> ICFDP, *supra* note 4, art. 8; Declaration, *supra* note 18, art. 6.

<sup>350</sup> ICFDP, *supra* note 4, art. 8; Declaration, *supra* note 18, art. 6; International Commission of Jurists, *Practitioners Guide No. 9, Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Pg. 212 (2015).

<sup>351</sup> STEVEN R. RATNER ET AL., *supra* note 346, 152.

<sup>352</sup> *Osorio Rivera*, No. 274, para. 89, 196 199.

<sup>353</sup> STEVEN R. RATNER ET AL., *supra* note 346, 152.

<sup>354</sup> *Id.*

<sup>355</sup> U.N. Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through action to combat impunity*, U.N. Doc. E/CN.4/2005/102/Add.1, Pg. 15 (8 February 2005).

<sup>356</sup> *Practitioners Guide No. 9, supra* note 350, Pg. 213.

be appropriately mirrored by the domestic legislation of a State.<sup>357</sup> Domestic legislation should cover many forms of criminal liability, including accomplices, those who order, solicit, or induce the commission of a crime of enforced disappearance and should “expressly provide for the application of command or superior individual criminal responsibility for a crime.”<sup>358</sup> A number of States that consider the offense of enforced disappearance as a crime against humanity included provisions in their domestic legislation that expressly state that no order or instruction may be used to justify an enforced disappearance.<sup>359</sup> For those States that do allow due obedience as a justification unless the order is “manifestly unlawful” or out the limits of the superiors powers, or the subordinate would commit a criminal act by carrying out the order, the WGEID suggests that either judicial interpretation or a legislative amendment of this legislation specify that the order to commit or participate in an enforced disappearance is “manifestly unlawful” or criminal.<sup>360</sup> Finally, for States that allow due obedience as an exempting circumstance regardless of the crime commit, the WGEID recommends that States amend its legislation on this matter in line with international law.<sup>361</sup>

While the defense of due obedience may not be used to justify the offense of enforced disappearance, according to international human rights bodies, this defense can be used to mitigate punishment.<sup>362</sup> However, any national legislation that introduces a mitigation of the sentence based on this defense must not reduce the sentence by too great an amount, or it would violate the State’s duty to punish human rights violations by contravening the obligation of the State to provide an appropriate penalty for human rights violations.<sup>363</sup>

### C. Statute of Limitations

A statute of limitations in a State’s domestic legislation poses another difficulty in prosecuting enforced disappearances. International human rights law and bodies agree that a statute of limitations for the crime of enforced disappearance will contribute to impunity for such crimes and determined that the best practice is for a State to provide in its domestic legislation that there should be no a statute of limitations for the crime of enforced disappearance.<sup>364</sup> When this is not possible, a statute of limitations must be within a reasonable time and must be assessed in line with the continuing nature of the offense in order for a State to comply with its duties to investigate, prosecute, and punish the crime of enforced disappearances.<sup>365</sup>

While International human rights law has generally allowed, although it is disfavored, States to have a statute of limitations for the crime of enforced disappearance, the Inter-American Court’s jurisprudence seems to determine that the statute of limitations and other time bars to the State’s duties to investigate, prosecute, and punish international human rights violations are generally incompatible with the American Convention.<sup>366</sup> In *Trujillo-Oroza v. Bolivia*, the Inter-American Court held that because these measures were intended to prevent the State from fulfilling its duties to investigate, prosecute, and punish these serious human rights violations, the time bars to the States’ duties were incompatible with the Inter-American Convention.<sup>367</sup> Therefore, this duty to investigate, prosecute, and punish serious human rights violations extends until these duties have been fulfilled completely.<sup>368</sup> In *Las Palmeras v. Colombia*, the Inter-American Court held that the American Convention could not be denied legal effect because of a domestic statute of limitations, rather the duties of a State to investigate, prosecute, and punish serious human rights violations subsists until they have been fulfilled.<sup>369</sup> Therefore, it is important to analyze the domestic statute of

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<sup>357</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 69, para. 52.

<sup>358</sup> WGEID, Country Visit to the Gambia, *supra* note 7, para. 32.

<sup>359</sup> *Id.* at para. 53.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at para. 54.

<sup>362</sup> *Id.*; Updated Set of Principles for the Protection and Promotion of Human Rights through action to combat impunity, *supra* note 355, pg. 15.

<sup>363</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 67, para. 52.

<sup>364</sup> ICFDP, *supra* note 4, art. 7; Declaration, *supra* note 18, art. 17.

<sup>365</sup> ICFDP, *supra* note 4, art. 7; Declaration, *supra* note 18 art. 17.

<sup>366</sup> SEIBERT-FOHR, *supra* note 100, para. 80.

<sup>367</sup> *Trujillo Oroza*, No. 92, para. 92.

<sup>368</sup> *Las Palmeras v. Colombia*, Inter-Am. Ct. H.R. (Ser. C) No. 96, para 69 (2002).

<sup>369</sup> *Id.*

limitations in regards to the duties of a State to end impunity with regards to human rights violations. If a statute of limitations or other time bars create a “reluctance to investigate and prosecute and [the] obstruction of justice lead to long delays so that the criminal case would be ultimately extinguished,” or the time bar provision is enacted to shield perpetrators from responsibility, they are incompatible with a States’ duties to investigate, prosecute, and punish serious human rights violations.<sup>370</sup>

The intent with which a statute of limitations is passed in domestic legislation does not bring a statute of limitations into compliance with international human rights law. Recently, the Inter-American Court also held that the intent with which a statute of limitations is passed is irrelevant, as the Court in *Rochela Massacre v. Colombia* held that the statute of limitations, or any time bar for prosecution of the offense of enforced disappearance, was generally incompatible with the American Convention regardless of its intent.<sup>371</sup> This ruling extended the non-applicability of the statute of limitations and other time bars to a State’s duty to investigate, prosecute, and punish enforced disappearance to serious human rights violations below the level of international crimes, such as genocide, war crimes and crimes against humanity.<sup>372</sup> So long as the time bar provision makes it so the State cannot carry out its duties under international law, the intent with which the statute of limitations is passed is irrelevant.

While the best practice is for a State to reject a statute of limitations for the crime of enforced disappearance, the Inter-American Court and the United Nations, as well as other human rights bodies, have acknowledged that there will often be instances where a State cannot or will not reject a statute of limitations entirely.<sup>373</sup> If a statute of limitations for the crime of enforced disappearance does exist, the Inter-American Convention dictates that this period of limitation be equivalent to “the gravest crime in the domestic laws of the corresponding State Party.”<sup>374</sup> The Declaration reiterates the same concept in more general terms, stating that the statute of limitations should be “substantial and commensurate with the extreme seriousness of the offense.”<sup>375</sup> Additionally, this statute of limitations must be considered in terms of the continuous nature of the offense. Because the crime of an enforced disappearance does not end until the fate or whereabouts of the victim remain unknown, the statute of limitations cannot begin until the fate or whereabouts are determined.<sup>376</sup> In the WGEID’s visit to Spain, the Group noted that Spain’s Supreme Court had held the criminal investigations in cases of enforced disappearance during the Civil War were inadmissible because the statute of limitations had expired and the Supreme Court had held that the “continuing nature of the disappearance was a fiction that was legally unacceptable.”<sup>377</sup> The WGEID noted that this holding by Spain’s Supreme Court ran directly counter to the principle and duties derived from Spain’s international obligations, including the Declaration, and that the period of limitations could only begin once the disappearance had ceased.<sup>378</sup> Even then, the WGEID stated that the statute of limitations should only apply once the judicial investigation had been completed, and the State had fulfilled their duty to investigate the crime.

Domestic legislation must reflect the notion that the statute of limitations cannot apply to any of the duties of a State to investigate, prosecute, or punish enforced disappearances. In *Portugal v. Panama*, the Inter-American Court held that even though Panama’s Penal Code recognized that the punishment for an enforced disappearance was not subject to a statute of limitations, the Inter-American Convention required that the penal code expressly indicate the criminal proceedings, not just punishment, were not subject to a statute of limitations.<sup>379</sup> Therefore, if a statute of limitations only applies to one element of the State’s duties, it will not be acceptable under International human rights law.

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<sup>370</sup> SEIBERT-FOHR, *supra* note 100, para. 80.

<sup>371</sup> *Id.* (Citing *Rochela Massacre*, No. 163, para. 292).

<sup>372</sup> SEIBERT-FOHR, *supra* note 100, para. 80.

<sup>373</sup> ICFDP, *supra* note 4, art. 7; Declaration, *supra* note 18, art. 17.

<sup>374</sup> ICFDP, *supra* note 4 art. 7.

<sup>375</sup> Declaration, *supra* note 18, art. 17.

<sup>376</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 69, para. 56.

<sup>377</sup> WGEID, Country Visit to Spain Mission Report, U.N. Doc. A/HRC/27/49/Add.1, para. 39 (2014).

<sup>378</sup> *Id.* at 39, 41.

<sup>379</sup> *Heliodoro Portugal*, No. 186, para 55–56.

There are two strategies that a State could use to ensure accountability for the crime of enforced disappearance and comply with their duties under international human rights law. For one, the legislature of the State may be able to pass legislation that eliminates the statute of limitations or lengthens it in accordance with the principles stated above.<sup>380</sup> In a context where human rights abuses occurred in tandem with a general assault on a judicial system, the State's court or legislature could determine that the application of a normal statute of limitations was suspended during the period where accountability was suspended, thereby ensuring that those crimes of enforced disappearance are not subject to impunity.<sup>381</sup>

#### D. Fraudulent Res Judicata

The legal principles of *Res Judicata* and *Ne Bis in Idem*, while accepted principles in international law, can add to the difficulty of prosecuting those responsible for enforced disappearances. These principles are often used illegitimately to validate the impunity of those responsible for extrajudicial executions and enforced disappearances.<sup>382</sup> While these fundamental principles constitute norms of international humanitarian law, the Inter-American Court of Human Rights has clearly recognized that these principles are not an absolute right and cannot be used to perpetuate impunity in certain circumstances.<sup>383</sup> When a procedure has not met the international standards of fair trial and due process, or the decisions handed down by courts have not met the requirements of independence, impartiality and/or competence, the principle of *ne bis in idem* and *res judicata* cannot be invoked.<sup>384</sup>

In *Almonacid Arellano*, the Inter-American Court held that because the initial dismissal of the case before Chile's State court had been intended to shield the accused party from criminal responsibility and had not been conducted independently or impartially in accordance with due procedural guarantees, the accused could not invoke *ne bis in idem* to avoid another trial for the same crime.<sup>385</sup> The Court held similarly in *Carpio Nicolle v. Guatemala*, where the Court found that the initial judgment had been handed in order to exempt the State from its obligation to investigate and punish, therefore the first judgment could not have been adequate because it did not respect due process and was not conducted with independence and impartiality.<sup>386</sup> Not only did the Court hold that the principles of *ne bis in idem* and *res judicata* would not be violated by another trial, the Court held that the continuing lack of independence and impartiality meant the State would have to remove any impunity in order to comply with its obligation to investigate and punish human rights violations in the next trial.<sup>387</sup> The application of an amnesty law could also constitute a defective trial, as the Inter-American Court also held in *Almonacid Arellano* that the application of Decree Law No. 2.191, an amnesty law, prevented those responsible from being brought to court and favored impunity in these proceedings, therefore the cases could be brought to court again without constituting a violation of these principles.<sup>388</sup>

Additionally, the Inter-American Court has also held that the presence of new facts or evidence could allow an investigation to be reopened without constituting a violation of the principles of *ne bis in idem* and *res judicata*. In *Almonacid Arellano*, the Court also held that new facts or evidence that made it possible to ascertain the identity of those responsible for human rights violations or crimes against humanity would allow the case to be reopened.<sup>389</sup>

Therefore, while *ne bis in idem* and *res judicata* are fundamental principles of international law, the Inter-American Court imposes limitations on these principles in order to prevent the use of these principles to perpetuate impunity. If the initial trial was handed down in order to exempt the State from its duties to investigate, prosecute and punish human rights violations, or the trial was contaminated by some defect such

<sup>380</sup> STEVEN R. RATNER ET AL., *supra* note 346, 160.

<sup>381</sup> *Id.*

<sup>382</sup> Practitioners Guide No. 9, *supra* note 350, Pg. 218.

<sup>383</sup> *Id.* at Pg. 219; *Almonacid Arellano*, No. 154, para. 154.

<sup>384</sup> Practitioners Guide No. 9, *supra* note 350, Pg. 220.

<sup>385</sup> *Arellano*, No. 154, paras. 154–155.

<sup>386</sup> *Carpio Nicolle et al. v. Guatemala*, Inter-Am. Ct. H.R. (Ser. C). No. 117, para. 131–134 (2004).

<sup>387</sup> *Id.*

<sup>388</sup> *Arellano*, No. 154, para. 155.

<sup>389</sup> *Id.*

as a lack of respect for due process or independence or impartiality, or if new facts are brought to light, the case can be brought to trial again without constituting a violation of these principles.

### E. Lack of a Competent Tribunal Will Impede Proper Investigation of Cases of Enforced Disappearances

The prosecution of enforced disappearances may be impeded by courts and judges that lack impartiality. Therefore, to ensure that a State can fulfill its duties to investigate, prosecute, and punish human rights violations, the judiciary that such cases are brought before must “have the requisite independence and neutrality to arrive at an impartial decision.”<sup>390</sup> This section will focus on the two main types of tribunals that hinder the prosecution of enforced disappearances: Military courts and Judicial Recusals.

#### 1. Military Courts are Not a Competent Tribunal for Enforced Disappearances

In accordance with international human rights law, those persons alleged to have committed the crime of enforced disappearance are to be tried only by competent ordinary courts, not military jurisdictions.<sup>391</sup> The Inter-American Court has held that the use of military courts to try human rights violations violates the State’s duties to investigate, prosecute, and punish human rights violations.<sup>392</sup> This position has been reiterated by the WGEID, which states that according to the Declaration, “no role or intervention should be given to the armed forces in the prosecution and trial of enforced disappearances.”<sup>393</sup> When military forces that were engaged in the context that brought about human rights violations turn around to try their peers, those courts will lack the required independence and impartiality to fulfill a States’ duties to investigate, prosecute, and punish serious human rights violations.<sup>394</sup> Not only are the principles of independence and impartiality violated, but the Inter-American Court has also held that the prosecution of serious human rights violations before a military court violates the right to a competent tribunal.<sup>395</sup> Because of the nature of the crime of enforced disappearance and the rights violated by this crime, military jurisdiction is not the competent tribunal to enforce a State’s duties to investigate, prosecute, and punish perpetrators of human rights violations.<sup>396</sup>

The scope of military jurisdiction cannot extend to serious human rights violations, but must be restricted to military offenses committed by military personnel.<sup>397</sup> According to the Inter-American Court, under a democratic rule of law, military criminal jurisdiction must have “a restrictive and exceptional scope and its purpose must be to protect special legal rights related to functions intrinsic to military forces.”<sup>398</sup> Because military courts can only be used to try soldiers on active duty for misdemeanors that violate legal rights relating to the military system, the nature of the crime of enforced disappearance and the rights violated by it make it so any extension of military jurisdiction to the crime of enforced disappearance, or any other human rights violation, is an infringement on the right to a natural judge and due process.<sup>399</sup> In *Rivera v. Peru*, the Inter-American Court held that because the allegations that concern a disappearance are “closely related to criminal acts and definitions that bear no relationship to the military discipline or mission,” the conduct of an enforced disappearance should be excluded from the competence of a military jurisdiction.<sup>400</sup> Furthermore, the Court also held that the very nature of human rights violations and the rights involved in those violations, including in an enforced disappearance, took the enforced disappearance outside of the scope of military jurisdiction.<sup>401</sup> On this reasoning, the Court held that by trying a case of enforced disappearance in the

<sup>390</sup> SEIBERT-FOHR, *supra* note 100, para. 74.

<sup>391</sup> ICFDP, *supra* note 4, art. 9; Declaration, *supra* note 18, art. 16.

<sup>392</sup> SEIBERT-FOHR, *supra* note 100, para. 75. (Citing *Las Palmas* and *Durand and Ugarte*)

<sup>393</sup> WGEID, Country Visit to the Gambia, *supra* note 7, para. 54.

<sup>394</sup> *Durand and Ugarte*, No. 68, para. 125; *See also La Cantuta*, No. 162, para. 142–143.

<sup>395</sup> *Radilla-Pacheco*, No. 209, para. 273.

<sup>396</sup> *Id.*; *See also Osorio Rivera*, No. 274, para. 88.

<sup>397</sup> Updated Set of Principles for the Protection and Promotion of Human Rights through action to combat impunity, *supra* note 355, Pg. 16.

<sup>398</sup> *Osorio Rivera*, No. 274, para. 187.

<sup>399</sup> *Id.* at 187–188.

<sup>400</sup> *Id.* at 189.

<sup>401</sup> *Id.*

military court, Peru had violated the guarantee of an ordinary judge in relation to the investigation of an enforced disappearance, thereby violating the duty of the State to investigate the crime of enforced disappearance.<sup>402</sup> Additionally, the requirement of a competent tribunal must be available to the victims from the first instance of trial, it is not satisfactory that decisions of military courts can be revised by federal authorities.<sup>403</sup> In *Radilla-Pacheco*, the Inter-American Court held that Mexico's argument that an appeal of relief to ordinary authorities was available to the victim of a human rights violation was not sufficient to establish a competent tribunal, as the "criminal proceedings should be considered as a whole throughout their different stages, both the ones that correspond to the first instance and those regarding the ulterior instances."<sup>404</sup>

To ensure that States are fulfilling its duties to investigate, prosecute, and punish the crime of enforced disappearance by ensuring a competent tribunal, the guarantee to competent ordinary courts must be reflected in domestic legislation.<sup>405</sup> International human rights treaties and bodies have declared that the crime of enforced disappearance must be tried before an ordinary court and expressly forbid the use of a military tribunal to investigate, prosecute, and punish enforced disappearances.<sup>406</sup> To ensure a competent tribunal, domestic legislation must "stipulate that those responsible for the offence of enforced disappearance shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts."<sup>407</sup>

It is important that domestic legislation should expressly stipulate that the ordinary jurisdiction must apply to all of a State's duties. In the WGEID's visit to Mexico, the WGEID found that while Article 1 of the Mexican Constitution expressly forbade military courts from trying cases involving civilians, Article 57 of the Code of Military Justice defined offenses against military discipline as ordinary offenses and subject to military jurisdiction when committed by military personnel on active duty on in connection with their active service.<sup>408</sup> The WGEID found that this definition in the Code had been used to ensure that allegations of enforced disappearances were almost always dealt with by military courts, which limits the ability of the State to fulfill its duty to investigate, prosecute, and punish these crimes.<sup>409</sup> While Mexico had tabled a proposal to reform the Code to exclude the offense of enforced disappearance from military jurisdiction, the WGEID stressed that this proposal should also establish that investigations into enforced disappearances should be carried out by civil authorities as well, also cautioning that this legislative reform could encourage military prosecutors to investigate and submit cases as different offenses to maintain military jurisdiction.<sup>410</sup>

The Inter-American Court has also endorsed the principle that military jurisdiction should not extend to the investigation, prosecution or punishment of enforced disappearances, as "the Court's consistent case law that the military jurisdiction is not the competent jurisdiction to investigate and, when appropriate, prosecute and punish the perpetrators of alleged human rights violations; but rather the prosecution of those responsible corresponds always to the ordinary system of justice."<sup>411</sup> Therefore, a State must ensure that all of the State's obligation in regards to enforced disappearances are conducted by the appropriate civilian jurisdiction, not the military jurisdiction. As stated above, the Court in *Osorio Rivera* held that the intervention of the military system of justice to investigate an enforced disappearance extended beyond the scope of military jurisdiction, as the investigation of an enforced disappearance should have been left to civilian jurisdiction.<sup>412</sup> In *Anzualdo Castro*, the Court held that the prosecution of grave human rights

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<sup>402</sup> *Id.* at 191.

<sup>403</sup> *Radilla-Pacheco*, No. 209, para. 281.

<sup>404</sup> *Id.* at 280.

<sup>405</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 69, para. 57.

<sup>406</sup> Declaration, *supra* note 18, art. 16, para 2; *See also* ICFDP, *supra* note 4, art. 9.

<sup>407</sup> Best Practices on enforced disappearances in domestic criminal legislation, *supra* note 69, para. 57 (quoting the Declaration, *supra* note 18, art. 16); *See also* ICFDP, *supra* note 4, art. 9.

<sup>408</sup> WGEID, Country Visit to Mexico, *supra* note 10, para. 37.

<sup>409</sup> *Id.* at 37-39.

<sup>410</sup> *Id.* at 40.

<sup>411</sup> *Osorio Rivera*, No. 274, para. 189. *See La Cantuta*, No. 162, para. 142.

<sup>412</sup> *Osorio Rivera*, No. 274, para. 189.



violations, such as enforced disappearances, should also have been made before regular courts.<sup>413</sup> Overall, the Inter-American Court has consistently held that the nature of a human rights violation such as enforced disappearance should be left to civilian jurisdiction, as “military criminal courts have no competent jurisdiction to investigate or prosecute and punish the authors of these events.”<sup>414</sup>

## 2. An independent and impartial judiciary is necessary to combat impunity for serious human rights violations including enforced disappearances

Speaking more broadly, courts and judges that lack impartiality and independence are substantial impediments to prosecuting crimes of enforced disappearances. Therefore, to comply with the obligation to determine the general responsibility of the perpetrators of enforced disappearances, States are required to conduct investigations in line with the due process of law, which “implies that the bodies of administration must be organized in a manner so that its independence and impartiality are guaranteed.”<sup>415</sup>

When States fail to ensure the independence and impartiality of its judicial systems, that tribunal can no longer be determined competent to investigate, prosecute, and punish human rights violations. This will create a situation as noted by the WGEID in its mission report on the Gambia, where the lack of impartiality and independence will result in “little confidence in judges and prosecutors.”<sup>416</sup> If a State’s judicial system is not independent from other branches of the government, that State will lack the ability to fulfill its international obligations. In *Anzualdo Castro*, the Inter-American Court held that the Attorney General’s office was not independent from Peru’s Executive Power and for this reason did not comply with its duty to properly investigate an enforced disappearance.<sup>417</sup> The Court also noted that during the period after Peru’s coup d’état in 1992, the “creation of administrative bodies not involved with the judicial system” was another factor that contributed to the impunity for serious human rights violations.<sup>418</sup> Therefore, for a State’s judiciary system to be a competent tribunal to process human rights violations, it must be independent enough to provide the State with the ability to carry out its international obligations.

The tribunal must also be impartial and thus able to effectively carry out the duties of a State to investigate, prosecute and punish human rights violations. One major factor that impedes the impartiality of a State’s judicial systems and thus provides impunity for serious human rights violations is the recusals of judges from cases involving enforced disappearances. The Inter-American Court noted that the “massive dismissal of judges” was a contributing factor to the impunity for serious human rights violations after Peru’s coup d’état in 1992, as were the provisional appointments that followed.<sup>419</sup> However, it is not necessary that the judges be dismissed, as a recusal made by the judges themselves indicate a lack of impartiality, which hinders a competent tribunal, contributes to impunity, and prevents the State from being able to fulfill its international obligations. In *Cardenas and Ibsen Pena*, the Inter-American Court held that the constant abstentions of judges “compromised the serious conduct of the domestic criminal proceedings, and that those abstentions affect the processing of this case due to the delays caused by the judicial system’s minimal control.”<sup>420</sup> The Court noted that Bolivia’s legislation regarding judicial recusals contributed significantly to the impunity perpetuated by these judicial recusals, as the legislation stipulated that a request for a recusal would only be reviewed by a superior authority if the recusal was referred by the judge who later received the case.<sup>421</sup> Under Bolivia’s legislation, if the superior authority found the request for recusal to be illegal, the judge who requested the recusal would face a penalty and if the request for recusal was found to be legal, the

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<sup>413</sup> *Castro*, No. 202, para. 125.

<sup>414</sup> *La Cantuta*, No. 162, para. 142.

<sup>415</sup> *Anzualdo Castro*, No. 202, para. 125.

<sup>416</sup> WGEID, Country Visit to the Gambia, *supra* note 7, para. 61.

<sup>417</sup> *Anzualdo Castro*, No. 202, para. 138.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*

<sup>420</sup> *Cardenas and Ibsen Pena*, No. 217, para 190.

<sup>421</sup> *Id.* at 183-184.



judge who referred it would face a penalty.<sup>422</sup> This legislation contributed to climate where recusals were not being reviewed, so out of 111 recusals, only 3 were referred for consultation.<sup>423</sup> The Inter-American Court held that these laws contributed to delays in cases involving serious human rights violations due to these judicial recusals, which contributed to impunity and amounted to a violation of Article 8(1) and Article 2 of the Inter-American Convention.<sup>424</sup>

In order to ensure a competent tribunal and ensure the right to effective judicial protection, the judicial authorities of a State are required to “direct the process in order to avoid undue delays and nuisances,” which lead to impunity and frustrate the judicial protection of human rights.<sup>425</sup> This requirement stands even in the face of domestic laws, as the Court stated in *Myrna Mack*, holding that although Guatemala’s law that forced courts to give proceeding to any remedy of amparo was inappropriate, the judicial authorities consistently tolerated the use of this remedy and did not process the amparo action with due diligence, but allowed amparo to “become a dilatory resource of the procedure.”<sup>426</sup> Because these amparo actions, along with their respective appeals, were being processed without being subject to legal deadlines and this created a situation where the domestic courts were taking an average of six months in each remedy, causing a situation where the amparo remedies were being used to perpetuate impunity by delaying the judicial process unnecessarily.<sup>427</sup> The Court held that judicial authorities have a duty to channel such remedies in a manner that restricts “the disproportionate use of actions that may have dilatory effects,” and the fact that judicial authorities had instead tolerated these measures and allowed them to be used as tools to perpetuate impunity constituted a violation of the States’ international obligations regarding human rights violations.<sup>428</sup>

Finally, the domestic legislation of a State must not create a situation where it becomes impossible to apply to a judicial body at all. The Human Rights Committee noted that Algeria’s Order regarding the implementation of the Charter for Peace and National Reconciliation deprived the victim of an effective remedy because this Order “prohibits using the justice system to shed light on the worst offences, including enforced disappearance,” which constituted a violation of the ICCPR.<sup>429</sup>

## F. State Secrets

The Working Group invited feedback on the issue of access to information in the context of investigating enforced disappearances. A State has a duty to provide the “truth about the facts of serious human rights violations.”<sup>430</sup> Part of this obligation is satisfied through the *ex officio* duty to investigate, and the other part through “public disclosure of the results of criminal and investigative processes.”<sup>431</sup> This is to ensure that there is a “procedural determination of the joint action patterns and of all the persons who in various ways participated in said violations.”<sup>432</sup> While the right to access to public information is not an absolute right, all obstacles, both *de jure* and *de facto*, that prevent the investigation and prosecution of the facts must be removed by the State, and the right should not be limited in this context.<sup>433</sup> Additionally, in order to guarantee the effectiveness of an investigation, State authorities are “obliged to collaborate in the collection of evidence in

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<sup>422</sup> *Id.*

<sup>423</sup> *Id.* at 185.

<sup>424</sup> *Id.* at 191.

<sup>425</sup> *Myrna Mack Chang*, No. 101, para. 210.

<sup>426</sup> *Id.* at para. 204, 207.

<sup>427</sup> *Id.* at para. 207.

<sup>428</sup> *Id.* at para 207, 211.

<sup>429</sup> Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2267/2013: Algeria, U.N Doc. CCPR/C/120/D/2267/2013, para. 6.10 (2017).

<sup>430</sup> *Members of the Village of Chichupac and Neighboring Communities of the Municipality of Rabinal v. Guatemala*, Inter-Am Ct. H.R. (Ser. C), No. 328, para. 213 (2016).

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> *Id.* at para. 215; *Gomes Lund*, No. 219, para. 229.

order to achieve the objectives of the investigation.”<sup>434</sup> Therefore, for a State to fully comply with its obligations, “it is essential that the entities responsible for the investigation are provided, both formally and substantially, with the appropriate and necessary powers and guarantees” to access information relevant to the investigation.<sup>435</sup> Authorities in charge of the investigation or the judicial proceeding must have unrestricted access to the documentation within the States’ hands in order to fulfill the duties of the State regarding serious human rights violations.<sup>436</sup>

### 1. A State Must Facilitate Access to Information in Order to Combat Impunity

While the right to access to public information is not an absolute right and may be subject to restrictions, those restrictions must be previously established by law and must be necessary in a democratic society and oriented to satisfy an imperative public interest.<sup>437</sup> The Inter-American Court determines the acceptability of such restrictions by asking whether they are “necessary to assure ‘the respect for the rights and reputation of other’ or ‘the protection of national security, public order, or public health and morals,’” and whether these measures are the least invasive from all possible alternatives to maintain the effective exercise of the right to truth.<sup>438</sup> Especially in the context of serious human rights violations, the claim of national security should only be used in exceptional circumstances.<sup>439</sup> The passage of time will also serve to limit the use of this claim, as the threat to national security will be significantly lessened if enough time has passed.<sup>440</sup>

The State will always have the burden of proof regarding the impossibility of providing the information, but States still have an obligation to “not seek protection in mechanisms such as State secrets or confidentiality of information in cases of human rights violations.”<sup>441</sup> On the contrary, the State “must establish the reason for denying the provision of said information, demonstrating that it has adopted all the measures under its power to prove that, in effect, the information sought did not exist.<sup>442</sup> In *Gomes Lund*, the Court held that the State had erred by arguing the lack of evidence of the existence of certain information “without at least noting the procedures carried out to confirm the nonexistence of said information,” as the State said this argument would allow the State to provide this information in a discretionary and arbitrary manner, which created “legal uncertainty regarding the exercise of said right.”<sup>443</sup>

States have an obligation to guarantee an effective procedure to process and resolve requests for information and if denied, are obliged to guarantee a “simple, quick, and effective remedy before an independent organ, distinct from the one that denied the request.”<sup>444</sup> Restrictions on access to information indicate a lack of will on the part of the State to fully uncover the truth and achieve accountability for serious human rights violations, which indicates that States are not complying with its obligations to investigate, prosecute, and punish enforced disappearances under international law.<sup>445</sup>

The authorities responsible to carry out the duties to investigate and prosecute an enforced disappearance also have an obligation to demand relevant evidence. When the State omits to obtain information that is necessary to conduct an investigation, the “omission can still be classified as ‘manifestly unreasonable.’”<sup>446</sup> Omissions like these from the State can be extremely detrimental in the investigation, because this information could assist to “clarify the fate of the victim and identify those responsible for” the

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<sup>434</sup> *El Mozote*, No. 252, para. 275; *See Also Guidel Alvarez v. Guatemala (Diario Militar)*, Inter-Am Ct. H.R. (Ser C), No. 253, para. 252 (2012).

<sup>435</sup> *Guidel Alvarez*, No. 253, para. 251.

<sup>436</sup> *Id.*; *See El Mozote*, No. 252, para 257.

<sup>437</sup> *Gomes Lund*, No. 219, para. 229.

<sup>438</sup> *Id.*

<sup>439</sup> WGEID, Country Visit to Peru, U.N. Doc E/CN.4/1986/18/Add.1, para. 41; WGEID, Country Visit to Spain, *supra* note 377, para. 31.

<sup>440</sup> *Id.*

<sup>441</sup> *Gomes Lund*, No. 219, para. 230. *See also Osorio Rivera*, No. 274, para. 244 (e).

<sup>442</sup> *Gomes Lund*, No. 219, para. 211; *See also El Mozote*, No. 252, para. 257.

<sup>443</sup> *Gomes Lund*, No. 219, para. 211.

<sup>444</sup> *Id.* at para. 231.

<sup>445</sup> WGEID, Country Visit to Peru, *supra* note 439, para. 50.

<sup>446</sup> *Silva*, No. 360, para. 199.

disappearance.<sup>447</sup> Additionally, this access to information also extends to the duty to prosecute, as judicial authorities have a duty to demand relevant evidence and the State has an obligation to provide the necessary resources and capacity, regardless of the institution that holds that information.<sup>448</sup>

When a State enacts legislation that restricts access to evidence, it indicates a lack of will on the part of the State to uncover the truth and comply with their obligation to investigate serious human rights violations.<sup>449</sup> While Mexico's Constitution guarantees freedom of access to information, secondary laws were found to restrict this access, particularly information regarding the status of investigations being conducted.<sup>450</sup> The WGEID noted a particular issue with the Federal Code of Criminal Procedure, finding that it "restricts the right of access to information regarding preliminary inquiries by establishing that only decisions to dismiss proceedings should be published, provided that a period of time has elapsed equivalent to the statute of limitations for the offences in questions," and recommended that Mexico amend this code to combat impunity based on lack of access to information.<sup>451</sup> The WGEID also noted a similar issue in Spain, stating that the law on protection of personal databases was restricting the victims access to information because authorities were using the law to "deny access to information relating to disappearance if the information contains a personal detail."<sup>452</sup> The WGEID stated that public information containing personal details should be considered on a case-by-case basis to strike a balance between access to information and protection of personal data, so it is not used as a complete blanket restricting access to this information.<sup>453</sup> It is essential that States do not restrict access to information outside of the limited exceptions allowed by international human rights law, as judicial bodies must have full access to that information to be able to investigate, prosecute and punish enforced disappearances and the next of kin must have that access to help in this process or locate the disappeared.<sup>454</sup>

Just as any restrictions to the right to truth must operate in a manner that assures they are not subject to the discretion of the public power, which would further contribute to impunity, States should also enact legislation to protect access to this information.<sup>455</sup> In the WGEID's visit to Spain, the WGEID noted that the lack of a comprehensive law regulating access to information and archives meant that information was being accessed differently depending on the regions and institutions, creating situations where the access to information was dependent on the official dealing with the request.<sup>456</sup>

## 2. A State Must Also Facilitate Access to Military Information Regarding Enforced Disappearances

To truly facilitate access to information in a manner sufficient to combat impunity, States must ensure that military records and archives are accessible to the next of kin and judicial authorities so that the State will be able to comply with its obligations under international law to ensure that perpetrators of serious human rights violations are held accountable. The States' obligations to investigate, prosecute and punish those responsible for enforced disappearances extends to the military as well, as "all the State authorities must cooperate, support and assist, within their sphere of competence, the proper investigation on the facts."<sup>457</sup> In *Guidel Alvarez v. Guatemala*, the Court held that the constant refusals of information by Guatemala's Ministry of Defense impeded the investigation into the enforced disappearance and therefore Guatemala had failed to comply with its obligations in the American Convention.<sup>458</sup>

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<sup>447</sup> *Id.*

<sup>448</sup> WGEID, Country Visit to Peru, *supra* note 439, para. 50.

<sup>449</sup> *Id.*

<sup>450</sup> WGEID, Country Visit to Mexico, *supra* note 10, para. 53.

<sup>451</sup> *Id.*

<sup>452</sup> WGEID, Country Visit to Spain, *supra* note 377, para. 31.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

<sup>455</sup> *Gomes Lund*, No. 219, para. 229.

<sup>456</sup> WGEID, Country Visit to Spain, *supra* note 377, para. 29.

<sup>457</sup> *Guidel Alvarez*, No. 253, para 252.

<sup>458</sup> *Id.*

The WGEID noted the lack of access to military archives as a significant obstacle to the accessing information and presents significant problems for victims in their searches in Peru.<sup>459</sup> The WGEID noted a reluctance to allow access to documents, as the State had not provided all the evidence that would make it possible for the State to fulfill its obligations and try to locate the disappeared person or determine their fate.<sup>460</sup> In particular, the WGEID noted that the armed forces had reported that the information did not exist, was contradictory, or stated the magnitude of the search made the access to information impossible, all while refusing to take a proactive attitude towards searching for and processing the available information that could locate the disappeared person or determine their fate or identify those responsible.<sup>461</sup> This reluctance to allow access to this information, particularly military archives, impedes the State's ability to investigate the available information because the next of kin or relevant judicial bodies cannot access it.

Military archives will often have evidence that is unavailable in already public information, which could help facilitate the process of investigation and help clarify the fate or whereabouts of the missing persons. The WGEID noted that in Serbia, many of the bodies of the missing persons had been removed from their initial burial site or the scene of the crime and transferred.<sup>462</sup> Because the military or police might have documented these transfers in some instances, full access to this information might have revealed information regarding the fate of those disappeared persons.<sup>463</sup> In Peru, the WGEID noted that a significant number of the military personnel who had participated in the human rights violations utilized pseudonyms or aliases, making it exceptionally difficult to locate those perpetrators as there was no record of their pseudonyms.<sup>464</sup> These sorts of details as stated above are unlikely to be available in civilian records and therefore access to military records and archives is necessary for the States to be able to fulfill its obligations to investigate, prosecute, and punish these disappearances.

Therefore, to remove the barriers to impunity presented by a lack of information, especially regarding military records, it is vital that a State take appropriate measures to facilitate access to this information. In Turkey, the WGEID recommended that access to archives, including the military, the gendarmerie and the security and intelligence services should be guaranteed both to families searching for the victims and to judicial authorities, to allow them to fully investigate and prosecute those responsible.<sup>465</sup> The WGEID noted the importance again in Sri Lanka, stating that the States' obligation to investigate the allegations and prosecute and punish the perpetrators required Sri Lanka to ensure access to all archives, including military archives, that may contain information on the fate and whereabouts of disappeared persons.<sup>466</sup> In Serbia, the WGEID welcome the decision to open the archives of the Ministry of the Interior, but recommended that the archives of the Ministry of Defense be opened as well.<sup>467</sup>

### 3. Several States Have Enacted Laws to Ensure the Right to Access to Information and Combat Impunity for Enforced Disappearances

There have been several efforts made by States to ensure the right to access to information held by public authorities. The WGEID welcomed Croatia's adoption of a law on free access to information, which governed the right to access information possessed by, at the disposal of or under the control of the public authorities.<sup>468</sup> Because this law allowed for access to public information or secret information on enforced disappearances held by the State, the WGEID noted that this law was one of the main tools for the next of kin to achieve the truth regarding the fate of the disappeared person.<sup>469</sup>

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<sup>459</sup> WGEID, Country Visit to Peru, *supra* note 439, para. 39.

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> WGEID, Country Visit to Serbia Mission Report, U.N. Doc. A/HRC/30/38/Add.1, para. 31. (2015).

<sup>463</sup> *Id.*

<sup>464</sup> WGEID, Country Visit to Peru, *supra* note 439, para. 40.

<sup>465</sup> WGEID, Country Visit to Turkey, *supra* note 14, para. 26.

<sup>466</sup> WGEID, Country Visit to Sri Lanka, *supra* note 10, para. 44.

<sup>467</sup> WGEID, Country Visit to Serbia, *supra* note 462, para. 37.

<sup>468</sup> WGEID, Country Visit to Croatia, *supra* note 70, para. 31.

<sup>469</sup> *Id.*

Albania's passage of a law on the right to information to the documents of the former security service of the Popular Socialist Republic of Albania created an obligation for public authorities to make all related documents held in their archives available, an important tool for the families of the disappeared and the entities providing support to them to search for the disappeared person.<sup>470</sup> While the WGEID noted the importance of this law, the WGEID also noted that classified information remained under the custody of the State Intelligence Services, the Ministry of the Interior, and the National Archives, although the Law did not provide for authority to declassify this information, leaving it to the relevant ministries to make this information available.<sup>471</sup> Therefore, for information left within those institutions, the access to information is still dependent on the official or institution who holds access to it, which impedes the State's obligation to investigate these disappearances, and the WGEID recommended expanding this legislative framework to further ensure this access.<sup>472</sup>

Not only should all relevant institutions be obliged to provide access to information, any restrictions to this access by law should be limited and in line with the restrictions developed by international human rights bodies. The WGEID noted that Peru's Transparency and Access to Public Information Act had not actually served to facilitate or enable access to information on disappeared persons, recommending that the claim to deny access based on "reasons of State security" should be used restrictively and in exceptional circumstances because the information was related to investigating enforced disappearances committed in a context of international crimes.<sup>473</sup>

#### 4. A Centralized Database Can Facilitate Access to Information and Combat Impunity

The challenges in identification can contribute to the lack of clarification of facts, transfer of remains, and the reluctance of witnesses to testify, which could impede the obligations of a State to investigate, prosecute and punish enforced disappearances.<sup>474</sup> The WGEID has recommended the creation of a centralized, electronic database with all the relevant data regarding missing persons, noting that the creation of such a database in Croatia significantly improved the process of identification.<sup>475</sup> The WGEID also recommended this procedure in Turkey, noting that a national register of forcibly disappeared persons should be created and that full access to this register should be granted to relatives, lawyers, human rights defenders, and any other concerned persons.<sup>476</sup> Along with enacting legislation that guarantees access to records, establishing this centralized database and allowing concerned persons access to this database would allow States to fully carry out its obligations to investigate, prosecute and punish enforced disappearances, as the necessary information would be made available to the families and judicial bodies who are carrying out these obligations.

#### G. De Facto Impunity and Other Obstacles to Investigation and Prosecution

Through de facto impunity States will create amnesty for perpetrators of enforced disappearances by acts or omissions that impede the investigation, prosecution, or punishment of crimes of enforced disappearance. This section will detail some of the ways a State can create de facto impunity, which does not arise from the legal structures of the State, but from when States use these acts or omissions to create impunity for perpetrators of enforced disappearances.

##### 1. The harassment, intimidation, and violence instigated against individuals involved with cases of enforced disappearance contributes to a climate of impunity.

The harassment and even murder of individuals involved with these cases is a common method in which States create impunity. The individuals who receive these threats or violence range from judges to witnesses, investigators to next of kin. In *Radilla-Pacheco*, the prosecutor did not want to take the accusation due to this

<sup>470</sup> WGEID, Country Visit to Albania, U.N. Doc. A/HRC/36/39/Add.1, para. 43, 45.

<sup>471</sup> *Id.* at 45.

<sup>472</sup> *Id.* at 79a.

<sup>473</sup> WGEID, Country Visit to Peru, *supra* note 439, para. 41.

<sup>474</sup> WGEID, Country Visit to Croatia, *supra* note 70, para. 39.

<sup>475</sup> *Id.* at 38.

<sup>476</sup> WGEID, Country Visit to Turkey, *supra* note 14, para. 68 c–d.



intimidation, as a car full of soldiers stood outside the prosecutor's office, and this intimidation made it so the accusation was not received until midnight.<sup>477</sup> Witnesses or potential witnesses are also common targets, as seen in the case of *Myrna Mack Chang*, where numerous witnesses, including two that recognized the victims' attacker, received harassment and threats that forced them into exile.<sup>478</sup> Delays that contribute to impunity will also occur if judges are the subject of intimidation, as seen in the case of *Rochela Massacre*, where judges requested to change the court's venue due to the death threats they received in connection with their involvement on the case.<sup>479</sup> The victims next of kin are also common targets will become the subject of threats and harassment that can even force the next of kin into exile.<sup>480</sup> The Human Rights Committee noted a similar concern, finding that when Algeria "hounded the author so that he would apply for a declaration of his son's death," they were attempting to end his efforts to establish the truth and obtain justice for the crime of enforced disappearance, resulting in a violation of the ICCPR.<sup>481</sup>

The murder of individuals connected with cases of enforced disappearance is also a serious issue that contributes to impunity, as it not only silences that one individual, but instills a sense of fear in any other who would otherwise come forward. In the case of *Rochela Massacre*, it was alleged that three witness and an investigating agent were murdered, and although the Court only found the murder of one of the witnesses in collaboration with the justice officials to be proven, the Court found that the State had demonstrated its "negligence in the investigation into and the punishment of the violence perpetrated against the judicial officials and witnesses."<sup>482</sup>

The State is required to adopt "protective and investigative measures" to confront this intimidation and violence, in order to combat impunity.<sup>483</sup> The State's failure to provide these protections will contribute to a situation of impunity, as individuals with information regarding the facts of the disappearance will be intimidated or forcibly silenced and the investigation will not have been conducted with the due diligence required. The WGEID noted the presence of the issue in the Gambia, finding that relatives of forcibly disappeared persons were afraid to file complaints and people with crucial information refused to testify, contributing to a situation of impunity.<sup>484</sup> To remedy this situation, the WGEID recommended that incentives be provided to witnesses so they are willing to testify and an adequate witness protection program should be created.<sup>485</sup> Therefore, the State is obligated to provide the protections necessary to ensure that these individuals are safe from harassment, threats, and violence.<sup>486</sup>

## 2. Delays in and the mishandling of the excavation and exhumation of evidence contributes to impunity in investigations.

In the collection of evidence, the passage of time has a "directly proportionate relationship to the constraint[s]" that hinder the identification of the victims, perpetrators, and the events investigated.<sup>487</sup> Therefore, when delays occur in the gathering of evidence, it will contribute to a climate of impunity, as there will be less or lower quality evidence available. In the case of *El Mozote*, this delay in the gathering of evidence was created when judges were told to delay proceedings, so the judge refused to set a date for the exhumation of the site, giving credibility to rumors of minefields on the site that had been denied by both inhabitants and

<sup>477</sup> *Radilla Pacheco*, No. 209, para. 198.

<sup>478</sup> *Myrna Mack Chang*, No. 101, para. 192.

<sup>479</sup> *Rochela Massacre*, No. 163, para. 166.

<sup>480</sup> *Id.* at 169.

<sup>481</sup> Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, *supra* note 408, para 6.10.

<sup>482</sup> *Rochela Massacre*, No. 163, para. 168.

<sup>483</sup> *Id.* at 165.

<sup>484</sup> WGEID, Country Visit to the Gambia, *supra* note 7, para. 60.

<sup>485</sup> *Id.*

<sup>486</sup> *Radilla-Pacheco*, No. 209, para. 223; *Rochela Massacre*, No. 163, para. 170.

<sup>487</sup> *El Mozote*, No. 252, para. 262.

press.<sup>488</sup> As El Salvador experienced a shortage of forensic experts during that time, members of the Argentine Forensic Anthropology Team came to El Salvador, only to wait three months to be appointed to the exhumation, and then the exhumation was not given a date, until the members of the forensic team eventually left.<sup>489</sup> The expert witness testified that this delay in the exhumation had “direct repercussions on the quality of human remains...and on the possibility of determining the identity of the remains that were exhumed.”<sup>490</sup>

Even when these exhumations are eventually performed, the State can also create impunity if the evidence is mishandled, which destroys or diminishes the quality of the evidence and makes it more difficult to identify the victims and gather evidence about the events. In *Radilla-Pacheco*, the excavation was performed unexpectedly during the night, without warning to the next of kin, who alleged that those who performed the excavation collected evidence carelessly or destroyed it altogether, only to inform the next of kin that they were animal remains, despite the fact that the next of kin saw clothing articles around the remains.<sup>491</sup> The next of kin also alleged that only one percent of the total property was excavated.<sup>492</sup> In some cases material evidence will be completely eliminated or reduced, as seen in *Anzualdo Castro*, when the victims’ remains were mutilated or incinerated at the clandestine detention center.<sup>493</sup>

Similar issues regarding the mishandling of evidence were present in *Rodríguez Vera*, where bodies were removed without any record of the specific place where they had been found.<sup>494</sup> When the Palace of Justice was retaken, military authorities ordered the seizure of materials and that all bodies be assembled, with their clothes and belongings removed.<sup>495</sup> Additionally, some of the bodies were “carefully washed,” so that the officials responsible for documenting the removal of the bodies and important details had a heightened difficulty in identifying the corpses. Forensic scientists in this investigation also complained that they were rushed and pressured by the State to identify a large volume of bodies, which resulted in numerous errors.<sup>496</sup> In *Rochela Massacre*, the Court also found that the State had failed to protect the judicial officers who were responsible for removing the bodies on the day of the events, as the military did not offer them the required protection, making it so the judicial officials had to travel to the site on their own and at their own risk, creating a serious obstacle to the administration of justice.<sup>497</sup>

The situation of impunity created by delays in collection of evidence and the mishandling of evidence is exacerbated in States which entirely neglect to assemble this information. In *Aslakhanova and others v. Russia*, the European Court of Human Rights found that the state failed to provide forensic tools necessary to examine evidence, conduct autopsies and perform forensic medical tests.<sup>498</sup> The applicants submitted that no centralized database or information bank for disappearances existed in the region, nor were there suitable forensic laboratories in Chechnya able to conduct genetic and molecular tests<sup>499</sup>.

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<sup>488</sup> *Id.* at 259.

<sup>489</sup> *Id.* at 261.

<sup>490</sup> *Id.*

<sup>491</sup> *Radilla Pacheco*, No. 209, para. 207.

<sup>492</sup> *Id.* at 226.

<sup>493</sup> *Anzualdo Castro*, No.202, para. 83.

<sup>494</sup> *Rodríguez Vera*, No. 0287, para. 146.

<sup>495</sup> *Id.* at 145.

<sup>496</sup> *Id.* at 151.

<sup>497</sup> *Rochela Massacre*, No. 163, para. 174.

<sup>498</sup> *Aslakhanova v Russia*, No. 2944/06 and others, judgement of 18 December 2012.

<sup>499</sup> *Aslakhanova v Russia*, No. 2944/06 and others, judgement of 18 December 2012; *Khatsiyeva and others v Russia*, No. 5198/02, judgment of 7 July 2008.



3. The manipulation and concealment of evidence can seriously impede the administration of justice and contribute to impunity.

States will often manipulate evidence in the reports that are then offered to the judiciary, which will conceal relevant information that could bring the perpetrators to justice. In *Myrna Mack*, the Inter-American Court of Human Rights held it proven that the Presidential General Staff and the Ministry of National Defense of Guatemala forwarded manipulated documents to the Public Prosecutor's Office, with errors such as claiming a soldier was 'discharged' or 'not in active duty' at the time of the events, in order to conceal information.<sup>500</sup> The Court also found that another report regarding the police investigation, which concluded that the victim had been murdered for political reasons and even identified a suspect, was replaced by another report that stated the motive was robbery and identified no suspects.<sup>501</sup> These actions demonstrate that there was an attempt to cover up the incident and this "constitutes an obstruction of justice and an inducement for those responsible of the facts to remain in a situation of impunity."<sup>502</sup>

In *Aslakhanova and others v. Russia*, authorities suspended investigations into enforced disappearances under the pretext that the perpetrators could not be identified, even though strong evidence existed as to the identity of the perpetrators and the military units to which they belonged.<sup>503</sup> A deputy prosecutor involved in the criminal proceedings accused the Investigative Committee of outright concealment of the crimes.<sup>504</sup> This failure was due, in part, to institutional deficiencies of the investigative committee and the dependence of its work on the "inadequate operational support" provided by the police, who themselves could have been involved in the disappearances.<sup>505</sup> Search measures requested by the Committee were carried out by the police with undue delays, or not thoroughly, and did not contain the data requested.<sup>506</sup> The poor results of the committee and the military investigators in collecting evidence was tantamount to concealment.<sup>507</sup> The European Court of Human Rights stated "it must be ensured that the investigation, or the supervision of the investigation, is not entrusted to persons or structures who could be suspected of being implicated in the events at issue."<sup>508</sup> In *Baysayeva v Russia*, video footage showing Russian Riot Police (OMON) carrying out a 'sweeping' operation and detaining the disappeared individual was made available to the authorities in 2000, yet none of the servicemen involved had been identified or questioned by February 2006<sup>509</sup>.

The concealment of evidence by State authorities also exists where relatives of disappeared individuals are prevented from gaining meaningful access to case files, thereby obstructing effective investigation.<sup>510</sup> This fact creates a situation of impunity by precluding applicant's ability to undertake thorough analysis of the facts and circumstances relating to the enforced disappearance. This problem is particularly prevalent in the Chechen zone of Russia<sup>511</sup>.

4. The failure or omission of the State to bring the accused or witnesses to trial contributes to impunity.

When the accused are not brought to trial, either as a result of arrest warrants that are not issued or warrants that are not enforced, this will contribute to a situation of impunity, as perpetrators will not be made to face the relevant charges. In *Las Dos Erres*, the Inter-American Court of Human Rights found that

<sup>500</sup> *Myrna Mack Chang*, No. 101, para. 173.

<sup>501</sup> *Id.* at 168–169.

<sup>502</sup> *Id.* at 172

<sup>503</sup> *Aslakhanova v Russia*, No. 2944/06 and others, judgment of 18 December 2012.

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

<sup>507</sup> *See id.*

<sup>508</sup> *Id.*

<sup>509</sup> *Baysayeva v Russia*, No. 74237/01, para. 128, judgment of 5 April 2007.

<sup>510</sup> *See Aslakhanova v Russia*, No. 2944/06 and others, judgement of 18 December 2012.

<sup>511</sup> *See Aslakhanova v Russia*, No. 2944/06 and others, judgment of 18 December 2012, and more recent interviews with applicants.

although at least 60 soldiers participated in the massacre, only 20 were identified, arrest warrants were only issued against 17, and of those 17, only one was arrested, only to be subsequently released.<sup>512</sup> The case of *Pueblo Bello Massacre v. Colombia* identified similar issues, as preventative detention measures and arrest warrants were issued without any results, so most of the approximately 60 members of the paramilitary group who took part in the raid were not investigated, identified, or prosecuted.<sup>513</sup> Of the six that were convicted, only two were in prison, which the Court held indicated a situation of impunity that continued in the *Pueblo Bello* case.<sup>514</sup> Arrest warrants must be properly issued and enforced to ensure that the alleged perpetrators are not granted impunity.

If a State fails to bring other relevant individuals to trial, such as witnesses, this can also contribute to a situation of impunity. In the case of *Anzualdo Castro*, the Court found that key witnesses such as personnel operating the clandestine detention centers, police officers suspected to be involved in the disappearance, and other officials on duty at the time the events constituting an enforced disappearance were never summoned to give statements.<sup>515</sup> When these witnesses are not summoned, the relevant facts will not be brought to light and this can contribute to a situation of impunity.

Financial compensation to the victims does not negate a state's duty to investigate enforced disappearances and bring the perpetrators to justice. In *Aslakhanova and others v. Russia*, the Russian authorities paid financial compensation to the victims as required by the European Court of Human Rights; however, the authorities refused to investigate the disappearances, to identify the perpetrators, and to discover and provide families with information about the fate of their relatives.<sup>516</sup> Financial compensation, without more, contributes to a climate of impunity, enabling a state to absolve itself of further responsibility.<sup>517</sup> In response to a letter to President Putin by Chechnyan residents, entreating him to pursue the matter to its conclusion, a member of the investigative committee of the Chechnyan disappearances summoned those responsible for the letter and shouted at them, "You have your compensation—what else do you want from us?"<sup>518</sup> In the absence of a meaningful investigation, a monetary payment contributes to a climate of impunity by serving as a justification for authorities to take no further action in holding perpetrators accountable.<sup>519</sup>

##### 5. Lapses in time regarding procedural actions will delay the case and contribute to a situation of impunity.

When delays in the criminal proceedings occur, not because of the complexity of the case but owing to the inaction of judicial body, a State will not only fail in its duties to investigate and prosecute enforced disappearances with due diligence, but the delays can contribute to a situation of de facto impunity. In the case of *Serrano-Cruz Sisters v. El Salvador*, the Inter-American Court of Human Rights observed that long periods of time elapsed when the judge did not order any measures, and the prosecutor and the judge let time spans between months and even a year elapse before "requesting and ordering the execution of a measure that had not been taken at the first procedural opportunity."<sup>520</sup> When the inspection of military logbooks and records remained pending when the first investigation was not carried out because the files were in disarray, the prosecutor and judge let three months elapse before making another request and ordering the inspection.<sup>521</sup> Additionally, when a new prosecutor took over the investigation, almost one year and eight

<sup>512</sup> *Las Dos Erres*, No. 211, para. 142.

<sup>513</sup> *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R. (Ser. C) No. 140, para. 183 (2006).

<sup>514</sup> *Id.*

<sup>515</sup> *Anzualdo Castro*, No. 202, para. 131.

<sup>516</sup> *Aslakhanova v Russia*, No. 2944/06 and others, judgment of 18 December 2012.

<sup>517</sup> EHRAC interview with applicants August 2017.

<sup>518</sup> *Id.*

<sup>519</sup> *See id.*

<sup>520</sup> *Serrano-Cruz Sisters v. El Salvador*, Inter-Am. Ct. H.R. (Ser C), No. 120, para. 71 (2005).

<sup>521</sup> *Id.*

months elapsed before the prosecutor took the first measures in the proceedings.<sup>522</sup> In the case of *Terrones Silva v. Peru*, the Court noted that the proceedings related to enforced disappearances were carried out sporadically and often without results, as the investigations were shelved throughout the years due to various reasons, such as the alleged perpetrators not being identified or a determination by the Prosecutor's Office that it would not be appropriate to continue.<sup>523</sup> The Court found that these delays and the omissions in the investigations contributed to a generalized situation of impunity and an ineffective judicial institution in regards to such violations.<sup>524</sup>

In the case of *Anzualdo Castro*, it took 6 years from the time of the enforced disappearance for the Prosecutor's Office to order the forwarding of official letters to different public institutions to order them to locate the whereabouts of the victim.<sup>525</sup> Even then, the required institutions sent no response to the authorities charged with the investigation.<sup>526</sup> And as mentioned earlier when discussing due process - the Courts stated that this sort of passage of time in proceedings, both in this case and others, has "a directly proportionate relationship to the constraints – and, in some cases, the impossibility – of obtaining evidence or testimonies that help clarify the facts under investigation and even invalidates the practice of procedures for taking evidence in order to shed light on the facts of the investigation, identify the possible perpetrators and participants and determine the possible criminal responsibilities."<sup>527</sup>

Delays in initiating the procedural steps of criminal proceedings are also attributable to the reluctance of different governmental bodies to share information and collaborate effectively, thus contributing to impunity. For example, the ECtHR and PACE have identified the lack of cooperation between the Security Services and law enforcement agencies in Russia as a major factor in the slow progress of cases<sup>528</sup>. This has been confirmed by the former Deputy Head of the Investigative Directorate of the Chechen Republic, who highlighted 'the inability of investigators to gain access to the archives of the Ministry of Defence and the Federal Security Service (the FSB) regarding the conduct of special operations' and 'the lack of effective interdepartmental co-operation in the course of investigations' as significant obstacles to effective investigation<sup>529</sup>.

## 6. Writs of Habeas Corpus must be effective in order to protect from a situation of impunity.

The consistent denial of judicial remedies will create a situation of de facto impunity in a case of enforced disappearances. In the case of *Anzualdo Castro*, a writ of habeas corpus filed by the father of the disappeared individual against the General of the Joint Chief of Staff for the Army and the Commander-in-Chief of the Navy before the Sixth Criminal Court in and for Lima was declared inadmissible because "it [was] not possible to determine evidence that directly point to the defendants as responsible" for the disappearance. Another habeas application was denied when a domestic court established that "actions for protection shall not be admissible when the injured party opts to institute proceedings in the general jurisdiction."<sup>530</sup> The appeal of the second habeas application was rejected on the grounds that the allowed time period to appeal such a decision was expired.<sup>531</sup> The creation of a climate where habeas remedies are ineffective serves to

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<sup>522</sup> *Id.*

<sup>523</sup> *Silva*, No. 360, para. 196.

<sup>524</sup> *Id.* at 199.

<sup>525</sup> *Anzualdo Castro*, No. 202 para. 134.

<sup>526</sup> *Id.*

<sup>527</sup> *Id.* para. 135.

<sup>528</sup> *Aslakhanova v Russia*, No. 2944/06 and others, judgement of 18 December 2012.

<sup>529</sup> "Problems in the Investigation of Criminal Cases subject to examination by the European Court of Human Rights" Journal of the Investigative Committee No. 2(8) 2010, cited in PACE Doc. 14083 'Human Rights in the North Caucasus: what follow-up to Resolution 1738 (2010)?' para 59.

<sup>530</sup> *Id.* at 71.

<sup>531</sup> *Id.*

drastically promote impunity.<sup>532</sup> In the case of *Terrones Silva v. Peru*, the Court noted that although a writ of habeas corpus was filed regarding the investigation of an enforced disappearance, the investigation was not immediately opened but delayed by more than a month, when the remedy was declared groundless.<sup>533</sup>

There are many methods through which a State can create de facto impunity in the course of the investigation, prosecution, and punishment of enforced disappearances. These acts or omissions will prevent the relevant facts of a crime of enforced disappearances from being brought to light or prevent the perpetrators of the crime from being identified and tried appropriately. Therefore, this creation of impunity is unacceptable, and a State must do all in its power to ensure that all measure of impunity, whether de facto or de jure, are removed from the criminal proceedings.

#### 7. Contradictory information will contribute to a climate of impunity.

When the State provides the author of an enforced disappearance complaint with contradictory information, this will contribute to a climate of impunity, as this information will hinder the willingness of the State to proceed thoroughly and effectively with investigations. In the case of El Boathi's disappearance, the Human Rights Committee noted that Algeria issued many contradictory pieces of information regarding the victim's fate, including a refusal to issue a disappearance decision, which implied that the victim was alive.<sup>534</sup> The author of the complaint received only "vague and contradictory information" regarding the victims fate and the State did not provide any evidence to clarify this conflicting information or "confirm the date or the circumstances of his possible death."<sup>535</sup> This contradictory information contributed to a situation of impunity, as the State did not initiate an in-depth, thorough and impartial investigation, partially as a result of their reliance on this information.<sup>536</sup>

#### 8. A seriously flawed investigation does not avoid a situation of impunity.

An ineffective and cursory investigation does not avoid a situation of impunity. In the *Khashiyev and Akayeva* group of cases, the European Court of Human Rights was struck by the prosecutors "serious and unexplained failures to act" once the investigation had commenced.<sup>537</sup> Most notably, there was no evidence of any attempt to establish the location of the military unit the perpetrators belonged to, the "205th brigade from Budennovsk", referred to extensively in the criminal investigation, and to examine its possible involvement in the killings.<sup>538</sup> "It does not appear that the investigators tried to establish the exact name and location of this military unit, to contact its commanders or to try and identify the soldiers whom some witnesses mentioned by name with the aim of at least questioning them in relation to the crimes."<sup>539</sup> The Court noted that because of the prosecutor's failure to establish any details of the military unit which had been referred to by name, "it is difficult to imagine how the investigation could be described as efficient."<sup>540</sup> Furthermore, the investigation failed to obtain a plan of the military operations conducted in the Staropromyslovskiy district of Grozny, a plan that would have constituted vital evidence in respect of the circumstances of the crimes in question.<sup>541</sup> A government does not avoid a situation of impunity merely by

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<sup>532</sup> *See id.* paras. 74–75.

<sup>533</sup> *Silva*, No. 360, para. 196.

<sup>534</sup> Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol concerning communication No. 2259/2013: Algeria, U.N Doc. CCPR/C/119/D/2259/2013, para. 7.5 (2017).

<sup>535</sup> *Id.* at 7.5, 7.11.

<sup>536</sup> *Id.* at 7.11

<sup>537</sup> *Khatsiyeva and others v Russia*, Application No. 5198/02, judgment of 7 July 2008.

<sup>538</sup> *Id.*

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

setting up an investigation that is not efficient and does not pursue pertinent information and facts brought to the attention of investigators.<sup>542</sup>

## VIII. Conclusion

This brief has used the work of the bodies of the Inter-American Court of Human Rights, the Working Group on Enforced and Involuntary Disappearances, the United Nations Human Rights Committee and the Committee on Enforced Disappearances to achieve an analysis of those principles reflected throughout international human rights law. This analysis determined what it means to conduct an effective investigation of enforced disappearances. We hope that this information informs the WGEID in the preparation of its important study that would support the plight of the victims and assist States in fulfilling their obligations regarding enforced disappearances in international human rights law.

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<sup>542</sup> *See id.*