

# Harmonizing Legal Approaches to Enforced Disappearances: Evidentiary Challenges, Emerging Developments, and the Role of Non-State Actors

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Jimena Reyes, Susan H. Farbstein, Sabrina Ochoa, Rebecca Gore,  
Adriana Bones, Nitika Khaitan & Victoria Abut\*

*Individuals seeking accountability for enforced disappearances face significant evidentiary hurdles, due to an inherent information asymmetry between victims and the states that commit or enable abuse. The obstacles are even more profound in contexts of extreme violence and widespread impunity, like Mexico. In these situations, non-state actors such as drug cartels and other organized criminal groups often perpetrate enforced disappearances, acting alone or in collusion with the state. Cognizant of these challenges, in May 2023 the United Nations (“U.N.”) Committee on Enforced Disappearances (“CED”) promulgated a “Statement on non-State actors in the context of the International Convention for the Protection of All Persons from Enforced Disappearances” (the “Statement”).*

*Taking the ongoing crisis of disappearances in Mexico as its starting point, this Article evaluates the extent to which the newly released Statement will make a meaningful difference for victims and survivors before the CED. It considers how the CED has drawn from, and harmonized its approach with, other U.N. treaty bodies as well as international and regional courts to determine the boundaries of enforced disappearances under international law.*

*The Article finds some promising developments from the perspective of victims. These advancements include the CED’s understanding of state acquiescence and the role of structural impunity, as well as its willingness to shift the burden of proof given information asymmetries between states and victims. The CED’s recognition that non-state actors can commit enforced disappearances, even when there is no link to the state, is also laudable. As the Statement explains, this may happen in situations of internal armed conflict, where non-state actors commit enforced disappearances as crimes against*

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\* Jimena Reyes is the Americas Director at the International Federation for Human Rights and an *avocat* of the Paris bar. Susan H. Farbstein is a Clinical Professor of Law and the Director of the International Human Rights Clinic at Harvard Law School. Sabrina Ochoa, J.D. ‘24, Rebecca Gore, LL.M. ‘23, Adriana Bones, J.D. ‘24, Nitika Khaitan, LL.M. ‘23, and Victoria Abut, J.D. ‘24 were students in the International Human Rights Clinic at Harvard Law School during the 2022-2023 academic year, where they worked on a project related to enforced disappearances in Mexico that generated many of the ideas and arguments presented in this paper. They contributed essential research, analysis, and drafting in the early stages of writing this Article; Sabrina Ochoa also provided invaluable final edits.

humanity, or where non-state actors exercise effective control or government-like functions over a territory.

However, the Article also raises cause for concern. In particular, the Statement does not sufficiently close the divide between Articles 2 and 3 of the International Convention for the Protection of All Persons from Enforced Disappearance (the “Convention”). It therefore perpetuates a troubling hierarchy in which only some victims will have access to the Convention’s protections and remedies, including reparations. Through a multi-layered analysis, this Article contributes to an active scholarly debate about the modern contours of enforced disappearances under international law, while also seeking to advance the tireless work of survivors pursuing truth and justice.

## INTRODUCTION

Enforced disappearances—generally understood as disappearances perpetrated by state actors or by persons acting with the authorization, support, or acquiescence of the state—plague many regions of the world. The International Convention for the Protection of All Persons from Enforced Disappearance (the “Convention”) is the primary international legal instrument concerning enforced disappearances.<sup>1</sup> Its treaty-monitoring body, the United Nations (“U.N.”) Committee on Enforced Disappearances (“CED”), is empowered to consider communications from or on behalf of individuals alleging that they are victims of enforced disappearances in countries that have ratified the Convention and recognized the CED’s competence.<sup>2</sup> Yet the denial and concealment inherent in enforced disappearances, combined with the evolving nature of these violations and the increasingly prominent role of non-state actors, pose unique evidentiary hurdles for individuals seeking to vindicate their rights before the CED.

In response to these challenges, in May 2023 the CED issued a “Statement on non-State actors in the context of the International Convention for the Protection of All Persons from Enforced Disappearances” (the “Statement”).<sup>3</sup> The Statement marks a crucial step in clarifying the applicability of the Convention with regard to acts committed by non-state actors, as well as the obligations of states for such acts. Taking the newly released Statement as its starting point, this Article considers Mexico as a case study of the evidentiary obstacles present in modern enforced disappearances cases.<sup>4</sup> It then explores how the

1. International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 23, 2010, 2716 U.N.T.S. 3 [hereinafter “Convention”].

2. *Id.* Art. 31.

3. Comm. Enforced Disappearances [hereinafter CED], *Statement on non-State actors in the context of the International Convention for the Protection of All Persons from Enforced Disappearances*, U.N. Doc. CED/C/10 (May 2, 2023) [hereinafter “Statement”].

4. While the systemic practice of enforced disappearances exists across the globe, Mexico and Iraq are currently the two countries that produce the greatest number of individual complaints to the CED. CED, *Report on requests for urgent action submitted under article 30 of the Convention*, ¶ 16, U.N. Doc. CED/C/20 (May 28, 2021).

Statement may advance the interests of victims and survivors seeking accountability and remedies from the CED.

With over 110,000 known disappearances since the 1960s,<sup>5</sup> most after the onset of the so-called “War on Drugs” in 2006, Mexico represents “the worst crisis of the disappeared in Latin America” in decades.<sup>6</sup> The ongoing catastrophe in Mexico exists in a framework distinct from the enforced disappearances rooted in the Latin American dictatorships of the 1960s to 1980s.<sup>7</sup> Previously used primarily by authoritarian governments to repress political opponents,<sup>8</sup> enforced disappearances in Mexico now occur in the context of organized crime. In addition to the state acting alone to perpetrate enforced disappearances, non-state actors such as drug cartels and other organized criminal groups disappear people, either acting on their own or in collusion with the state.<sup>9</sup> Moreover, impunity is rife in Mexico and a forensic crisis is ubiquitous. As of 2021, more than 52,000 unidentified deceased persons had been located in Mexico’s public cemeteries and state institutions.<sup>10</sup> The country’s forensic services face an unprecedented workload and lack not only the independence, but also the training, personnel, protocols, databases, equipment, and supplies necessary to clear this backlog.<sup>11</sup> With Mexico’s current forensic capacity, it would take 120 years to identify the bodies that have already been located.<sup>12</sup> In short, ensuring accountability for enforced disappearances in Mexico is more complex than ever.

This Article proceeds in three parts. Part I outlines the general evidentiary hurdles inherent in enforced disappearances cases and introduces the current situation in Mexico as a case study that vividly illuminates these challenges. Part II explores the specific evidentiary obstacles posed by non-state perpetrators of enforced disappearances and explains why it was crucial for the CED to harmonize its approach with the frameworks adopted by other U.N. treaty bodies (“UNTBs”), as well as international and regional courts. Part III then outlines the approach taken by the CED in its new Statement and evaluates the extent to which the Statement succeeds in clarifying questions about non-state actors. This Part provides a detailed analysis of the Statement, giving

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5. Daniel Shailer, *The official count of disappeared people could be an underestimate, say UN and advocates*, AP NEWS (Oct. 3, 2023), <https://apnews.com/article/mexico-missing-disappearances-united-nations-147b08e445c715fe0ee487a5b0787288> [https://perma.cc/ZPF9-AXMM].

6. Mary Beth Sheridan, *Mexico’s disappeared: Since drug war, country has more missing persons than Argentina, El Salvador and Guatemala during dirty wars*, WASH. POST (Dec. 3, 2020), <https://www.washingtonpost.com/graphics/2020/world/mexico-losing-control/mexico-disappeared-drug-war/> [https://perma.cc/X87K-WLJU].

7. Ariel E. Dulitzky, *The Latin-American Flavor of Enforced Disappearances*, 19 CHI. J. INT’L L. 423, 427, 438, 473 (2019).

8. See José Zalaquett, *The Emergence of “Disappearances” as a Normative Issue*, in HUMAN RIGHTS: FROM PRACTICE TO POLICY 14, 14–15 (Carrie Booth Walling & Susan Waltz eds., 2010).

9. CED, *Report of the Committee on Enforced Disappearances on its visit to Mexico under article 33 of the Convention*, ¶¶ 13, 21–22, U.N. Doc. CED/C/MEX/VR/1 (Findings) (May 18, 2022).

10. Movimiento por nuestros desaparecidos en México, *La Crisis Forense en México: Más de 52,000 personas fallecidas sin identificar*, at 4 (Aug. 2021); CED, *supra* note 9, ¶ 28.

11. *La Crisis Forense en México*, *supra* note 10, at 4.

12. CED, *supra* note 9, ¶ 29.

particular attention to the evidentiary issues of acquiescence, impunity, and burden of proof under Article 2 of the Convention. With respect to Articles 3 and 5 of the Convention, this Part also analyzes boundary issues in international law around the definition of enforced disappearances committed by non-state actors with no link to the state.

This Article concludes that the CED's Statement represents a crucial acknowledgment of the role of non-state actors in enforced disappearances, as well as the role of structural impunity in creating environments where enforced disappearances proliferate. Mindful of advances in international law since the Convention was drafted, the CED's Statement aligns with the approach international human rights law has adopted for quite some time: recognizing that non-state actors—such as transnational corporations, terrorist groups, or organized criminal associations—can themselves be the authors of human rights abuses. In this way, the CED has harmonized its framework for addressing questions of acquiescence, impunity, and burden-shifting in enforced disappearances cases with the approaches of other international bodies and courts. Such alignment is essential to prevent fragmentation of human rights law, ensure its consistent and coherent application at the international, regional, and domestic levels, and reinforce its legitimacy. Although the Statement is laudable in these respects, this Article also sounds a note of caution about other ways the Statement is limited. In particular, the Statement does not sufficiently close the divide between Article 2 of the Convention, on the one hand, and Articles 3 and 5, on the other. It therefore perpetuates a troubling hierarchy in which only some victims of enforced disappearance will be able to fully access the Convention's protections and remedies, including reparations.

### I. EVIDENTIARY CHALLENGES IN CASES OF ENFORCED DISAPPEARANCES

Enforced disappearances pose unique evidentiary challenges. As defined in the Convention, an enforced disappearance constitutes:

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>13</sup>

By its nature, therefore, an enforced disappearance is characterized by unknowns: denial and refusal to acknowledge the deprivation of liberty, and concealment of facts or the whereabouts of the disappeared. Moreover, because the state is either the primary perpetrator or has authorized, supported, or acquiesced in the violation, those seeking legal redress routinely lack state support to search for

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13. Convention, *supra* note 1, Art. 2.

the disappeared, access places of detention and public records, collect evidence, and investigate the case. Initiating such efforts can put family members of the disappeared and human rights advocates in grave danger themselves.<sup>14</sup>

Ascertaining the fate and whereabouts of disappeared persons can be a prolonged and costly process, often requiring DNA testing, collecting ante- and post-mortem data, securing the locations of graves, identifying witnesses, and refrigerating bodies for preservation.<sup>15</sup> The “continuous nature”<sup>16</sup> of enforced disappearances only magnifies these evidentiary hurdles. Cases often stretch across many years, state officials may change over time,<sup>17</sup> follow-up is difficult, and cases can be erroneously considered closed. If the state never acknowledges the disappearance or releases information about the fate of the individual, it may be unclear whether the presumption of death, declaration of death, or victim compensation mark the end of an enforced disappearance.<sup>18</sup>

In short, the state’s dual role as both the perpetrator or facilitator of enforced disappearances, and as the gatekeeper to locating the disappeared, can pose nearly insurmountable barriers to victims and survivors seeking to access truth and a remedy.<sup>19</sup> These challenges are further complicated in countries where non-state actors, like the drug cartels in Mexico, play a central role in committing enforced disappearances.

#### A. Mexico: Involvement of Non-State Actors and the State in Enforced Disappearances

Enforced disappearances in Mexico have proliferated over the past eighteen years. Over 110,000 persons have been forcibly disappeared since the 1960s, with more than ninety-eight percent of these disappearances committed from 2006 onwards.<sup>20</sup> This escalation is often linked to the “War on Drugs” instigated by President Felipe Calderón in 2006 and, in particular, to the

14. See CED, *supra* note 9, ¶ 16; see also Working Group on Enforced or Involuntary Disappearances, *Thirtieth anniversary of the Declaration on the Protection of All Persons from Enforced Disappearances*, ¶ 52, U.N. Doc. A/HRC/51/31/Add.3 (Aug. 31, 2022) (noting “the numerous – usually unpunished – acts of harassment, reprisal and intimidation against relatives of the disappeared, their representatives, witnesses, and other persons involved in the investigation and search . . .”).

15. Issa Cristina Hernández Herrera, *Collaborating with organized crime in the search for disappeared persons? Formalizing a humanitarian alternative for Mexico*, 102 INT’L REV. RED CROSS 607, 609 (2020); Daniel Wilkinson, *Mexico: The Other Disappeared*, HUM. RTS. WATCH (Jan. 15, 2019), <https://www.hrw.org/news/2019/01/15/mexico-other-disappeared> [<https://perma.cc/HW3H-UQ43>].

16. Convention, *supra* note 1, Art. 8(1)(b).

17. See Off. U.N. High Comm’s. Hum. Rts., *Enforced or Involuntary Disappearances*, at 11 (2009), <https://www.ohchr.org/sites/default/files/2021-08/FactSheet6Rev3.pdf> [<https://perma.cc/T8PQ-Y2ZG>] (“The Working Group maintains that the State’s responsibility for enforced disappearances continues irrespective of changes of Government, even if the new Government shows greater respect for human rights than the Government in power at the time the disappearances occurred.”).

18. CED, *Guiding principles for the search for disappeared persons*, Principle 7, U.N. Doc. CED/C/7 (May 8, 2019). See generally Working Group on Enforced or Involuntary Disappearances, *General Comment on Enforced Disappearance as a Continuous Crime* (2010), <https://www.ohchr.org/sites/default/files/Documents/Issues/Disappearances/GC-EDCC.pdf> [<https://perma.cc/55TQ-6LU3>].

19. See Convention, *supra* note 1, Arts. 3, 6, 10, 12, 15, 23, 24.

20. Shailer, *supra* note 5; CED, *supra* note 9, ¶ 11.

participation of the armed forces in this effort.<sup>21</sup> However, the steep increase is also attributable to the evolving dynamic between organized crime and public power in Mexico since the early 2000s. The conclusion of the Institutional Revolutionary Party's ("PRI") one-party dominance after eighty-one years marked the end of its relationship with organized crime, which in turn initiated a period of fragmentation and battles for territorial control among different criminal organizations.<sup>22</sup> New cartels were strategic in their use of displays of violence to create a reign of terror, and in their use of corruption to capture local public forces, militaries, and state governments, thus making the distinction between state and non-state actors particularly complex.<sup>23</sup>

The pervasive presence of multiple organized criminal groups fighting each other for territorial control, the fact that state structures have been captured by these groups through corruption at various levels, and the reality that state structures have sometimes become criminal actors themselves, all combined to result in abuse at a massive scale.<sup>24</sup> As a result, enforced disappearances in Mexico may now be committed by the state alone, by the state acting with non-state actors, or by non-state actors alone. To complicate matters, endemic corruption enables state officials—including police and prosecutors—to erect a “wall of silence” to shield themselves from responsibility and culpability.<sup>25</sup> Other state actors may fail to fulfill their duties to investigate and seek accountability due to incompetence, bureaucratic indifference, or fear.<sup>26</sup>

In November 2021, the CED conducted a country visit to Mexico and subsequently released a report of its findings.<sup>27</sup> In recognizing a “steep rise” in the number of disappearances since 2006,<sup>28</sup> the CED identified several prominent patterns. First, enforced disappearances “continue to be committed directly by public officials at the federal, state and municipal levels,” as well as by “persons

21. CED, *supra* note 9, ¶ 11.

22. Int'l Crisis Grp., *Veracruz: Fixing Mexico's State of Terror*, at 6–7 (Feb. 21, 2017), [https://icg-prod.s3.amazonaws.com/061-veracruz-fixing-mexico-s-state-of-terror\\_0.pdf](https://icg-prod.s3.amazonaws.com/061-veracruz-fixing-mexico-s-state-of-terror_0.pdf) [<https://perma.cc/6YZH-BS3B>].

23. See Eduardo Guerrero Gutiérrez, *El Dominio de Miedo* (July 1, 2014), <https://www.nexos.com.mx/?p=21671>; Univ. Texas School of Law Hum. Rts. Clinic, *Control... Over the Entire State of Coahuila*, at 49–50 (Nov. 2017); Tim Golden, *The Cienfuegos Affair: Inside the Case that Upended the Drug War in Mexico*, N.Y. TIMES MAG. (Dec. 8, 2022) [<https://perma.cc/ST87-EX2V>].

24. See generally, e.g., Int'l Fed. for Hum. Rts. [hereinafter “FIDH”], *Mexico: Criminal Structure Within the Public Prosecutor's Office of the State of Nayarit and Crimes Against Humanity* (June 2021) [hereinafter “FIDH, Nayarit”]; FIDH, *Mexico: Murders, Disappearances, and Torture in Coahuila de Zaragoza are Crimes against Humanity* (July 2017) [hereinafter “FIDH, Coahuila”]; FIDH, *Veracruz, Mexico: The largest clandestine graves in Latin America* (Oct. 2022), <https://www.fidh.org/en/region/americas/mexico/veracruz-mexico-the-largest-clandestine-graves-in-latin-america#:~:text=The%20state%20of%20Veracruz%2C%20an,America%2C%20with%20over%20600%20bodies> [<https://perma.cc/3FSK-MMDG>] [hereinafter FIDH, *Veracruz*].

25. Barbara A. Frey, *Conceptualising Disappearances in International Law*, in *DISAPPEARANCES IN THE POST-TRANSITION ERA IN LATIN AMERICA* 37, 53 (Karina Ansolabehere, Barbara A. Frey & Leigh A. Payne eds., 2021).

26. *Id.* at 38; see also generally Helen Keller & Corina Heri, *Enforced Disappearance and the European Court of Human Rights: A ‘Wall of Silence’, Fact-Finding Difficulties and States as ‘Subversive Objectors’*, 12 J. INT'L CRIM. JUST. 735 (2014).

27. CED, *supra* note 9, ¶ 2.

28. *Id.* ¶ 11.



involved in organized crime, with various forms of collusion and varying degrees of participation, acquiescence or omission by public officials . . .”<sup>29</sup> Second, enforced disappearances primarily affect men between fifteen and forty years of age. However, enforced disappearances of children and women linked to sexual violence, femicide, and gang recruitment have increased.<sup>30</sup> Third, enforced disappearances of human rights advocates and journalists, as well as individuals detained in prisons or migrant holding centers, have escalated.<sup>31</sup>

The statistics are chilling: beyond the 110,000 disappeared persons, since 2006 an additional 340,000 have been murdered,<sup>32</sup> more than 52,000 unidentified bodies have been found (including more than 5,500 in clandestine graves),<sup>33</sup> and approximately 380,000 persons have been forcefully displaced by violence.<sup>34</sup> The CED determined that forensic services in Mexico are “insufficient” to confront this crisis.<sup>35</sup> Given the thousands of unidentified bodies located in mass graves, forensic service facilities, universities, or forensic storage centers,<sup>36</sup> it would take “120 years to identify all such bodies, and that is without taking into account the new bodies that are being added to the total every day.”<sup>37</sup>

As a result, the CED characterized the situation in Mexico as one of “almost absolute impunity.”<sup>38</sup> Domestic procedures are largely ineffective<sup>39</sup> and, paradoxically, a climate of impunity persists despite numerous laws adopted to address the crisis.<sup>40</sup> The CED emphasized that “impunity is a structural feature that is conducive to the recurrence and concealment of acts of enforced

29. *Id.* ¶ 13.

30. *Id.* ¶ 14.

31. *Id.* ¶¶ 16–20.

32. *La Crisis Forense en México*, *supra* note 10, at 11.

33. *Id.* at 13; CED, *supra* note 9, ¶ 28.

34. U.N. High Comm’r for Refugees, *Displacement in Mexico Explained* (Aug. 22, 2023), <https://www.unrefugees.org/news/displacement-in-mexico-explained/> [https://perma.cc/KP29-2LPS]. See generally *General Context*, GOBIERNO DE MEXICO, <https://versionpublicarripdno.segob.gob.mx/Dashboard/ContextoGeneral> [https://perma.cc/X7VC-38K9] (presenting data on the number of disappeared persons); Pablo Ferri, *Mapping Mexico’s 5,689 Clandestine Graves*, EL PAÍS (Oct. 10, 2023), <https://english.elpais.com/international/2023-10-10/mapping-mexicos-5698-clandestine-graves.html> [https://perma.cc/9VQX-66GF]; José L. Pardo Veiras & Íñigo Arredondo, *Una guerra inventada y 350,000 muertos en México*, WASH. POST (June 14, 2021), <https://www.washingtonpost.com/es/post-opinion/2021/06/14/mexico-guerra-narcotrafico-calderon-homicidios-desaparecidos/> [https://perma.cc/AVQ3-7SW3].

35. CED, *supra* note 9, ¶ 29.

36. *Id.* ¶ 28.

37. *Id.* ¶ 29.

38. *Id.* ¶¶ 24–27.

39. Rodolfo D. Saenz, *Confronting Mexico’s Enforced Disappearance Monsters: How the ICC Can Contribute to the Process of Realizing Criminal Justice Reform in Mexico*, 50 VAND. J. TRANSNAT’L L. 45, 71–75 (2017); see FIDH, *Situación de impunidad en México: Llamamos al Estado Mexicano a reconocer la existencia de crímenes de lesa humanidad y remitir la situación de México a la Corte Penal Internacional*, 14–16 (May 2020) (describing the deficiencies in current processes to address crimes against humanity).

40. For example, the 2017 General Law on the Forced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons System was introduced as a means to meet the international human rights standards underlying the human rights treaties to which Mexico is a party. However, the General Law falls short of international human rights standards on issues of military jurisdiction and criminal responsibility among military and state chains of command. For further information, see generally Salvador Leyva Morelos Zaragoza, *The Mexican General Law on the Forced Disappearance*

disappearance.<sup>41</sup> Although the CED noted the “often passive attitude of judicial institutions in the face of such a serious phenomenon,”<sup>42</sup> the challenge is even more pronounced because there is a mismatch between the state’s discourse and its actions. Indeed, the administration of justice is not commensurate with the massive, widespread, and systematic nature of the crimes committed.<sup>43</sup>

As a result of pressure from civil society organizations and victims’ collectives, the Mexican government has passed multiple laws and created numerous entities ostensibly intended to investigate enforced disappearances. For example, the law on enforced disappearances provides for the creation of contextual analysis units.<sup>44</sup> However, prosecutors and tribunals have generally failed to investigate the systematic nature of a series of enforced disappearances,<sup>45</sup> rendering the work of these units meaningless. Rather than applying international criminal law standards or drawing from the work of judicial systems that have addressed mass abuse, cases of enforced disappearances in Mexico continue to be analyzed as individual files and crimes.<sup>46</sup> This discrepancy, and the resulting impunity, can be attributed not only to a lack of institutional capacity but also to an unwillingness to investigate and prosecute. Admittedly, the judiciary has an insufficient budget, and the budgets of entities responsible for investigating or prosecuting enforced disappearances are even more inadequate.<sup>47</sup> However, this lack of capacity does not excuse the state’s unwillingness to proceed, much less the deliberate actions of state officials to obstruct investigations and prosecutions—through capture of state institutions by criminal groups, corruption, self-censorship, or recklessness—and to shield perpetrators from justice.<sup>48</sup>

The consequences of impunity are dire, particularly because the majority of victims of enforced disappearances come from humble backgrounds. Families feel the state’s disinterest and contempt, both when they attempt to file a complaint and throughout any subsequent proceedings: “victims [are] visibly

*of Persons, Disappearances Committed by Individuals and the National Missing Persons System: How Many Steps Forward?*, 12 MEX. L. REV. 125 (2019).

41. CED, *supra* note 9, ¶ 27.

42. *Id.* ¶ 26.

43. See FIDH, *Mexico requires the support of the ICC to eradicate structural impunity*, 13–14 (May 26, 2020) (noting the paucity of resources designated to investigate and adjudicate crimes against humanity).

44. Ley General En Materia De Desaparición Forzada De Personas, Desaparición Cometida Por Particulares y Del Sistema Nacional De Búsqueda De Personas, Art. 68 (Nov. 17, 2017), [https://repositorio.colmex.mx/concern/legislations/qf85nc273?f%5Bresource\\_type\\_sim%5D%5B%5D=Ley+federal&locale=es](https://repositorio.colmex.mx/concern/legislations/qf85nc273?f%5Bresource_type_sim%5D%5B%5D=Ley+federal&locale=es) [<https://perma.cc/X5GG-G6QJ>].

45. See FIDH, *Situación de impunidad en México*, *supra* note 39, at 14 n.74.

46. See, e.g., *id.* at 14–15.

47. Maritza Pérez, *Ante la crisis en desapariciones en México, el presupuesto luce insuficiente*, EL ECONOMISTA (Sept. 17, 2023), <https://www.economista.com.mx/politica/Ante-la-crisis-en-desapariciones-en-Mexico-el-presupuesto-luce-insuficiente-20230916-0023.html> [<https://perma.cc/MN7G-A2N3>]; see also Juan Antonio Le Clercq Ortega & Gerado Rodríguez Sánchez Lara, *Global Impunity Index 2020, Chulula: Fundación Universidad de las Américas Puebla*, at 13 (Dec. 15, 2020); Alejandro Anaya-Muñoz, *Bringing Willingness Back in: State Capacities and the Human Rights Compliance Deficit in Mexico*, 41 HUM. RTS. Q. 441, 460–62 (2019).

48. Alejandro Anaya-Muñoz, Patricia Cruz-Marín & James Cavallaro, *More Than Lack of Capacity: Active Impunity in Mexico*, J. HUM. RTS. PRAC. 1, 3 (2023).



lacking confidence in these institutions, which, in turn, results in the high number of cases going unreported.”<sup>49</sup>

### B. *The Role of Victims’ Collectives in Evidence Collection*

As the crisis in Mexico has escalated since 2006, many family members of the disappeared have gradually evolved from victims and survivors to defenders of their rights by becoming “searchers” or, as they call themselves, *buscadoras*.<sup>50</sup> These family members have organized themselves into collectives that make visible the phenomenon of enforced disappearances and seek justice.<sup>51</sup> In a world of impunity, the collectives play a crucial role by amassing evidence and searching for truth.<sup>52</sup>

Following widespread human rights abuse, victims and survivors worldwide often take collective action to denounce violations, demand accountability, and advocate for changes in public policy, thereby becoming human rights defenders.<sup>53</sup> However, the collectives in Mexico have gone one step further, actively investigating the disappearances of their loved ones by forming “highly organized and professionalized victims’ groups that search [for bodies] at the community, regional and even national levels.”<sup>54</sup> In this way, victims’ collectives have become a social movement through their revindication of the right to search.<sup>55</sup> They have thereby forced the Mexican authorities to comply with their official duty to search for the disappeared.

Families of the disappeared often first meet in front of the town halls, state governor’s offices (*gubernaciones*), or prisons where they seek to learn the whereabouts of their child, parent, sibling, or spouse.<sup>56</sup> Since 2010, they have then assembled into local collectives to share similar situations of despair when confronted with interlocking abuse: the disappearance of their loved one and

49. CED, *supra* note 9, ¶ 26.

50. Jorge Verástegui González, *The right to search in the case of disappeared persons: A right constructed from below*, in *DISAPPEARANCES IN MEXICO: FROM THE ‘DIRTY WAR’ TO THE ‘WAR ON DRUGS’* 187, 196 (Silvana Mandoleesi & Katia Olalde eds., 2022).

51. Hernández Herrera, *supra* note 15, at 614.

52. FRANCISCO RODRÍGUEZ ET AL., *DESAPARICIONES FORZADAS E INVOLUNTARIAS: CRISIS INSTITUCIONAL FORENSE Y RESPUESTAS COLECTIVAS FRENTE A LA BÚSQUEDA DE PERSONAS DESAPARECIDAS* 102–05 (2020); Madeleine Wattenbarger, *‘We’re Doing What the Government Won’t Do’*, FOREIGN POL’Y (Apr. 24 2020), <https://foreignpolicy.com/2020/04/24/mexico-drug-war-forced-disappearance-victims-families-government/> [https://perma.cc/8YLB-5YA2].

53. E.g., Cecília MacDowell Santos, *Mobilizing Women’s Human Rights: What/Whose Knowledge Counts for Transnational Legal Mobilization*, 10 J. HUM. RTS. PRAC. 191, 193 (2018); Mary Lawlor (Special Rapporteur on the situation of human rights defenders), *Success through perseverance and solidarity: 25 years of achievements by human rights defenders*, ¶¶ 95–97, U.N. Doc. A/HRC/52/29 (Dec. 21, 2022).

54. Hernández Herrera, *supra* note 15, at 614.

55. González, *supra* note 50, at 197.

56. Drawn from the personal experiences and observations of Jimena Reyes, who for many years has worked with and interviewed families of victims of enforced disappearances, in particular those from Coahuila, Nayarit, and Veracruz. See also Jaqueline Garza Placencia, *Familiares Organizados en la Vigilancia y Defensa de los Derechos Humanos Frente a la Desaparición de Personas en México*, 17 REVISTA DE DERECHOS HUMANOS Y ESTUDIOS SOCIALES 81, 83 (2017).

the subsequent failure of local authorities to take the disappearance seriously, for example by refusing to launch an investigation or accept legal complaints.<sup>57</sup>

The collectives have become a powerful social movement and have notably advanced the right to know the truth about the disappeared.<sup>58</sup> In the early years, the movement was composed mostly of local collectives, such as Coahuila, which was created in 2009.<sup>59</sup> In 2011, the movement gained additional prominence with the emergence of the national *Movimiento por la Paz con Justicia y Dignidad* (“Movimiento”) (Movement for Peace with Justice and Dignity), led by well-known writer Javier Sicilia, whose son was killed in 2011.<sup>60</sup> That spring, the *Movimiento* organized a march from Morelos to the Zócalo (the main plaza) of Mexico City, which made visible to the nation the increase in violent crime and missing persons.<sup>61</sup> Subsequently, in 2015, another movement, *El Movimiento por Nuestros Desaparecidos en México* (Movement for our Disappeared in Mexico), formed. This social movement continues to be symbolized by the great march to the Zócalo in Mexico City every year on Mother’s Day. The collectives are supported by domestic human rights non-governmental organizations as well as alliances with international non-governmental organizations such as the International Federation for Human Rights (“FIDH”).<sup>62</sup>

As often happens with serious human rights violations, victims’ collectives have become key actors in gaining recognition for the crisis of enforced disappearances in Mexico and making clear the involvement of state structures and senior officials in those crimes. Despite profound security risks, they have engaged in disruptive activities such as demonstrations in front of inefficient public entities,<sup>63</sup> and efforts to publicly name and shame governors and senior state officials, even in regions where fear and *omerta* (silence) reign.<sup>64</sup> In these ways, the collectives build repertoires of engagement and repositories of information through processes that allow families to have a voice of their own.<sup>65</sup> Through their actions, they have obtained some public policy advances and have been instrumental in the identification of mass graves.

57. Drawn from the personal experiences and observations of Jimena Reyes.

58. González, *supra* note 50, at 196–97.

59. *Id.* at 188.

60. *Id.* at 194, 196.

61. Luz Angélica Ramírez González, *The Mexican Movement for Peace with Justice and Dignity: An Exploratory Analysis of its Origins and Development* 1, 15 (2012) (Masters Research Paper, Int’l Inst. Soc. Stud.).

62. González, *supra* note 50, at 189.

63. See Silvana Mandoleesi, *Introduction—Disappearances in Mexico: From the ‘dirty war’ to the ‘war on drugs’*, in *DISAPPEARANCES IN MEXICO: FROM THE ‘DIRTY WAR’ TO THE ‘WAR ON DRUGS’* 1, 10 (Silvana Mandoleesi & Katia Olalde eds., 2022).

64. See Victor M. Sánchez Valdés et al., *Formación y Desarrollo de los colectivos de búsqueda de personas desaparecidas en Coahuila: Lecciones para el Futuro*, *EL COLEGIO DE MÉXICO*, at 32–33, 78–79 (2018).

65. *Id.* at 118.

### 1. *The Search for Mass Graves*

Since 2015, victims' collectives in Mexico have played a critical role in the search for mass graves containing the bodies of the disappeared, locating over two thousand clandestine graves in the last decade.<sup>66</sup> Indeed, faced with the inaction of authorities, families often do the work that is properly the responsibility of the state,<sup>67</sup> gradually undertaking and professionalizing their search activities.<sup>68</sup> Given the scale of enforced disappearances, reliance on eyewitnesses or local residents may be necessary to learn the locations of clandestine burials.<sup>69</sup> Victims' collectives investigate and sometimes accept assistance from whistleblowers, including state security forces and non-state actors, to obtain information on the possible locations of graves.<sup>70</sup>

One of the pioneers in this activity was the *Solecito de Vera Cruz Collective* ("*Solecito*"), which identified the two largest mass graves ever discovered in Latin America, containing more than six hundred bodies.<sup>71</sup> In one case in Colina de Santa Fe, on Mother's Day 2016 a handmade plan left for *Solecito* led them to the mass grave.<sup>72</sup> Even without this kind of help, however, the collectives are still able to search for mass graves. They first identify a potential burial area,<sup>73</sup> looking for places where the earth has a different texture or color than the surrounding ground, or where plants have been cleared. Next, the collectives plunge a two-meter-long metal rod into the earth, bring it up, and sniff the tip for the stench of decomposition. If they smell death, they dig.<sup>74</sup>

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66. Interviews conducted by Jimena Reyes with members of a victims' collective; see also Guillermo Rivera & Lauro Rodríguez, *Desaparecer a los desaparecidos*, CONECTAS (Dec. 14, 2022), <https://www.conectas.org/especiales/quien-teme-a-las-rastreadoras/desaparecer-a-los-desaparecidos.html> [https://perma.cc/5LYF-H98G].

67. Wattenbarger, *supra* note 52.

68. For example, a civil society collective called the Mexican Forensic Anthropology Team has formalized the activities undertaken by these victims' groups as part of a search for their loved ones, dead or alive, into eight stages. In the search stage, relatives often undertake contextual analysis or conduct covert fieldwork and research to locate more information about potential sources of evidence. The search stage is followed by the recovery stage, in which these groups labor—often in a manner that prosecutorial authorities have declined or failed to do—to locate their loved ones and, upon discovery of their remains, support each other through the difficult process of exhumation, identification, and burial. See Rodríguez et al., *supra* note 52, at 102 tbl.9, 103–05.

69. Cf. Hum. Rts. Watch, *Mexico's Disappeared: The Enduring Cost of a Crisis Ignored*, at 5–6, 17 (2013), <https://www.hrw.org/report/2013/02/20/mexicos-disappeared/enduring-cost-crisis-ignored> [https://perma.cc/3KEC-X2NV].

70. Hernández Herrera, *supra* note 15, at 614.

71. FIDH, *Veracruz*, *supra* note 24, at 5.

72. Aída Palau, *Veracruz, la fosa clandestina más grande de México*, RFI (Mar. 16, 2017), <https://www.rfi.fr/es/america/20170316-veracruz-la-fosa-clandestina-mas-grande-de-mexico> [perma.cc/H6AT-NXK6].

73. El Centro de Derechos Humanos Miguel Agustín Pro Juárez A.C. (Centro Prodh), *Brigada Nacional de Búsqueda de Personas Desaparecidas*, YouTube, at 2:54–3:36 (Apr. 8, 2016), <https://www.youtube.com/watch?v=Bgb-okYdbZY> [https://perma.cc/L4GX-BAUZ] ("We know that there are people in society who have information about the whereabouts of many disappeared or executed people who could be our relatives, that they do not provide [this information] out of fear or distrust of the authorities. Today we call on society to break its silence and indifference and to show solidarity. We will not reveal anyone's identity. We only want to know where our relatives are, find them and bury them with dignity. We want to know that they are not cold or hungry, that they are not badly injured or suffering.")

74. Wilkinson, *supra* note 15 ("They hammer a metal rod into the group at a suspected gravesite. When the stench of death emerges, they know they have hit their mark.")

Once they find a mass grave, they contact the prosecutor's office to carry out the exhumation.<sup>75</sup> The collectives may search for months at a time before locating a mass grave. While they may rely on simple techniques to locate buried bodies, the collectives have formed "highly organized and professionalized victims' groups that search at the community, regional and even national levels."<sup>76</sup>

Initially, some human rights organizations, lawyers, and authorities criticized the collectives' actions and strategies. These critics argued that the collectives' work, when undertaken without the presence of the Public Prosecutor's Office, could break the chain of custody and render evidence inadmissible in court, or that it was counterproductive for collectives to replace the state in administering justice.<sup>77</sup> Despite those concerns, the collectives' methodology has spread. Networks of victims and civil society alliances have been essential in facilitating mass searches and in professionalizing the forensic work conducted by families through sharing their own experiences, and through capacity-building facilitated by forensic experts to empower families.<sup>78</sup> Today, the collectives' strategies are more widely recognized and frequently praised.<sup>79</sup>

## 2. *Monitoring of Exhumations and Identification*

Upon discovery of a mass grave, it is the practice of many collectives to monitor and later evaluate the official process of exhumation and identification.<sup>80</sup> Indeed, this paradoxical situation where victims' collectives hand crucial evidence to state investigators who are charged with obtaining it has added legitimacy to the collectives. The state, in turn, has also facilitated the collectives' efforts to be present during exhumations, to see for themselves how the bodies were buried, to identify direct information about the abduction (for example, if the hands are tied, the bones are broken), and to begin to understand and assess the systematicity of the violations.<sup>81</sup> Without the collectives' presence, this information might otherwise remain confidential for an extended period.<sup>82</sup>

75. Rodríguez et al., *supra* note 52, at 99–102.

76. Hernández Herrera, *supra* note 15, at 614.

77. Alvaro Martos & Elena Jaloma Cruz, *Desenterrando el dolor propio: Las Brigadas Nacionales de Búsqueda de Personas Desaparecidas en México*, in *DESDE Y FRENTE AL ESTADO: PENSAR, ATENDER Y RESISTIR LA DESAPARICIÓN DE PERSONAS EN MÉXICO* 75, 103–04 (Javier Yankelevich ed., 2017); González, *supra* note 50, at 197.

78. González, *supra* note 50, at 196. See, for example, the work of *el Equipo Mexicano de Antropología Forense* (EMAF), <https://emaf.org.mx> [<https://perma.cc/7PFC-FRFX>]; Fernando Camacho Servín, *The Mexican Forensic Anthropology Team celebrates two years of work*, *POLITICA* (Apr. 13, 2015), <https://www.jornada.com.mx/2015/04/13/politica/015n3pol> [<https://perma.cc/VR4X-HN2Y>].

79. See, e.g., Rodríguez et al., *supra* note 52, at 143–44 (describing the example of increasing institutional and economic support for the National Searchers' Brigade).

80. *Id.* at 104.

81. *Id.* at 104–07.

82. The conclusions in this paragraph are based on joint documentation and fact-finding work performed by FIDH with victims collectives in Coahuila, Veracruz, and Nayarit and with local NGOs including *Idheas Litigio Estratégico*, *Comisión Mexicana de Defensa y Promoción de los Derechos Humanos*, *Familias Unidas en Búsqueda y Localización de Personas Desaparecidas*, *Fuerzas Unidas por*

However, in a context of structural impunity, the relationship between the collectives and state authorities can sometimes be at odds, especially where the level of state corruption or collusion with those responsible for crimes is very high. For example, in Nayarit, following the discovery of a mass grave on a Friday, the prosecutor's office refused to secure the location. To protect the site, representatives from the victims' collectives spent the night near the grave containing human remains.<sup>83</sup> Still, being present in these moments has allowed the collectives, together with human rights organizations and forensic experts, to identify and document situations in which state officials disregard standard protocols and practices, misuse evidence, or fail to proceed with investigation and prosecution.<sup>84</sup> In most Mexican states there is now, despite some remaining reluctance, an accepted division of work. The *buscadoras* understand how far they may dig before contacting the authorities to avoid breaking the chain of custody, and the authorities accept the collectives' presence and monitoring during some of their subsequent activities.<sup>85</sup>

International human rights bodies have long recognized that testimonies can provide particularly valuable evidence demonstrating enforced disappearances.<sup>86</sup> The CED should similarly acknowledge the value of *buscadoras*' information regarding the inaction of authorities as well as the evidence they gather when locating mass graves. This international recognition of the work of victims' collectives would also contribute to greater respect for such information at a national level.

## II. THE LEGAL CHALLENGE OF THE PARTICIPATION OF NON-STATE ACTORS IN ENFORCED DISAPPEARANCES

### A. *The International Legal Framework*

Enforced disappearances are a well-recognized violation of international law.<sup>87</sup> The term was coined in response to disappearances perpetrated by Latin

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Nuestros Desaparecidos en México, Centro Diocesano para los Derechos Humanos Fray Juan de Larios, EMAF. Jimena Reyes has participated extensively in such work.

83. This was an observation by Jimena Reyes while conducting fieldwork in Nayarit in May 2019.

84. Rodríguez et al., *supra* note 52, at 136–38.

85. This was an observation by Jimena Reyes while conducting fieldwork in Coahuila, Veracruz, and Nayarit.

86. See, e.g., Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 128–31, 147 (July 29, 1988); Blake v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶¶ 49–51 (Jan. 24, 1998) (“the Court attributes a high probatory value to the statements of the aforementioned witnesses, in the context and circumstances of a case of a forced disappearance with its attendant difficulties in which, owing to the very nature of the crime, proof essentially takes the form of indirect and circumstantial evidence.”).

87. G.A. Res. 47/133, Art. 1 (Dec. 18, 1992); Inter-American Convention on Forced Disappearances Art. 2, June 9, 1994, 33 I.L.M. 1529; Rome Statute of the International Criminal Court Art. 7, July 17, 1988, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; see also, e.g., Hum. Rts. Comm. [hereinafter HRC], *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, ¶¶ 57–58, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019); International Covenant on Civil and Political Rights Arts. 7, 16, Dec. 16, 1966, 999 U.N.T.S. 171; HRC, *General comment No. 35: Article 9 (Right to Liberty and Security of Person)*, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).

American governments to maintain political power beginning in the 1960s and 1970s.<sup>88</sup> Lacking remedies domestically, victims' families increasingly turned to regional and international bodies.<sup>89</sup>

The Convention, which was adopted in 2006 and entered into force in 2010, defines "enforced disappearance" as:

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>90</sup>

Its precursor, the Declaration on the Protection of all Persons from Enforced Disappearance, describes an enforced disappearance as "a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights" that "places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families."<sup>91</sup> The Convention specifies that an enforced disappearance can be committed by persons or groups of persons who are not agents of the state when they act with the authorization, support, or acquiescence of the state. In these circumstances, the Convention triggers the state's responsibility for the enforced disappearance and gives victims a right under Article 24(4) "to obtain reparation and prompt, fair and adequate compensation."<sup>92</sup>

While drafting the Convention, participants considered whether non-state actors should also be included in the definition of perpetrators of enforced disappearances.<sup>93</sup> Some delegates maintained that including non-state actors was vital to guarantee that the law reflects "the situation on the ground."<sup>94</sup> Others argued, however, that human rights violations could not be committed by non-state actors, and that this interpretation would change the nature of the crime and effectively dilute states' responsibility to address enforced

88. Zalaquett, *supra* note 8, at 14–15.

89. See, e.g., Velásquez-Rodríguez, 1988 Inter-Am. Ct. H.R. ¶¶ 74–81; HRC, Bleier v. Uruguay, ¶¶ 2.5–2.6, U.N. Doc. CCPR/C/15/D/30/1978 (March 29, 1982).

90. Convention, *supra* note 1, Art. 2. An enforced disappearance often involves additional violations of international law including the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, and the right to life. G.A. Res. 47/133, *supra* note 87, Art. 2.

91. G.A. Res. 47/133, *supra* note 87, Art. 1.

92. Convention, *supra* note 1, Art. 24(5) ("The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition.")

93. See Olivier de Frouville, *La Convention des Nations Unies pour la Protection de Toutes les Personnes Contre les Disparitions Forcées: les Enjeux Juridiques d'une Négociation Exemplaire*, 6 DROITS FONDAMENTAUX 1, 21–24 (2006).

94. MARTHE LOT VERMEULEN, ENFORCED DISAPPEARANCE: DETERMINING STATE RESPONSIBILITY UNDER THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE 55 n.31 (2012); de Frouville, *supra* note 93, at 22.



disappearances under international law.<sup>95</sup> Some delegates also expressed concern that states might use a definition encompassing non-state actors as a pretext to shift culpability.<sup>96</sup>

These divergent perspectives resulted in a compromise. Although the Convention does not explicitly use the term “non-state actor,” Article 2 defines an enforced disappearance as “the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State.”<sup>97</sup> Article 3 then addresses “acts defined in Article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State,” and places upon states parties the obligation to “take appropriate measures to investigate” such acts and “bring those responsible to justice.”<sup>98</sup> Article 3 thus imposes a duty on the state to investigate and effectively makes the state responsible not for the act of disappearance itself, but for taking “appropriate measures” to investigate regardless of the state’s involvement. The acts described in Article 3 committed by non-state actors have been understood to constitute “disappearances” but not “enforced disappearances.”<sup>99</sup> Victims of mere “disappearances” cannot claim reparations under Article 24, which provides remedies only for victims of “enforced disappearances.”<sup>100</sup>

Other entities and influential institutions, including the International Criminal Court (“ICC”) and regional human rights bodies, have embraced an approach extending the definition of enforced disappearances to non-state actors.<sup>101</sup> In contrast, the Convention’s distinctions do not contribute to a clear understanding of the role of non-state actors in enforced disappearances under international law, and offer insufficient guidance to victims and practitioners. The situation is particularly muddled with respect to the threshold for acquiescence and the issue of whether a context of impunity can be raised as an element of acquiescence despite the existence of Article 3. As a result, the international community may be missing opportunities to exert pressure on states to take preventative or remedial action,<sup>102</sup> and victims may be unable to access meaningful remedies.

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95. de Frouville, *supra* note 93, at 22.

96. Diane Webber & Khaola Sherani, *Addressing the Continuing Phenomenon of Enforced Disappearances*, CTR. FOR STRATEGIC & INT’L STUD., at 3 (2022), [https://cis-website-prod.s3.amazonaws.com/s3fs-public/publication/220818\\_Webber\\_Enforced\\_Disappearances.pdf?VersionId=jf2638.qFpM.iWKgfQfrvBbOFGBsczYQ](https://cis-website-prod.s3.amazonaws.com/s3fs-public/publication/220818_Webber_Enforced_Disappearances.pdf?VersionId=jf2638.qFpM.iWKgfQfrvBbOFGBsczYQ) [https://perma.cc/WUF6-FW6R].

97. Convention, *supra* note 1, Art. 2.

98. *Id.* Art. 3.

99. Statement, *supra* note 3, ¶ 12.

100. Convention, *supra* note 1, Art. 24(1) (“For the purposes of this Convention, ‘victim’ means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”).

101. Statement, *supra* note 3, ¶¶ 11–15; Rome Statute, *supra* note 87, Art. 7.

102. See Webber & Sherani, *supra* note 96, at 3; Ana Srovin Coralli, *Non-State Actors and Enforced Disappearances: Defining a Path Forward*, GENEVA ACADEMY 11 n.65 (2021).

### B. Harmonizing Approaches to Non-State Actors

Given the evolving nature of enforced disappearances, in May 2023 the CED issued its Statement, which recognizes the importance of non-state actors' accountability and deterrence and attempts to address some of the evidentiary hurdles often present in enforced disappearances cases.<sup>103</sup> Notably, Mexico opposed the Statement and asserted that the CED lacked the power to issue a declaration interpreting the Convention and defining its scope.<sup>104</sup> Mexico suggested that to broaden the application of the CED to cases beyond those provided under Article 2, states parties must undertake the amendment process outlined in Article 44 of the Convention.<sup>105</sup> In addition, Mexico took issue with the Statement's language, which it asserted would extend the obligations of states parties who did not expressly consent to such obligations.<sup>106</sup>

The Statement aims to "clarify[] the scope of applicability of the Convention with regard to acts committed by non-State actors, the obligations of States parties in that regard, and the implications thereof for the functions entrusted to the Committee."<sup>107</sup> Although the CED cannot unilaterally amend the Convention,<sup>108</sup> the Statement provides helpful interpretive clarification. It implicitly acknowledges the merits of a broader understanding of enforced disappearances which embraces non-state actors. It also illuminates the CED's underlying motivations for the Statement: "concern[] about the growing number of allegations of disappearance imputable to non-State actors acting without the authorization, support, or acquiescence of the State[.]"<sup>109</sup> The CED further explains that it considers the Convention "a living instrument" which "should be interpreted in the light of present-day conditions and of the evolution of international law."<sup>110</sup>

The Statement also acknowledges the importance of harmonizing the CED's approach with other treaty bodies and institutions that have already embraced a framework better suited to the marked rise of disappearances imputable to non-state actors.<sup>111</sup> Indeed, the CED explicitly notes that in drafting the

103. Statement, *supra* note 3, ¶¶ 9–10.

104. Secretaría de Relaciones Exteriores, *Contribución de México al proyecto de Declaración sobre los actores no estatales y las desapariciones forzadas*, at 1 (2022).

105. *Id.*

106. *Id.*

107. Statement, *supra* note 3, at Introduction.

108. See Convention, *supra* note 1, Art. 44.

109. Statement, *supra* note 3, ¶ 9.

110. *Id.* ¶ 10.

111. The U.N. Working Group stretched its humanitarian mandate in 2019 to include non-state actors in limited contexts as acts tantamount to enforced disappearances if committed by "non-state actors that exercise effective control and/or government-like functions over a territory." See Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances*, ¶ 94, U.N. Doc. A/HRC/42/40 (July 30, 2019). In addition, the Human Rights Committee has noted that enforced disappearances may extend to "forces independent of or hostile to a State party, in addition to disappearances attributable to a State party." HRC, *Dovadžija v. Bosnia and Herzegovina*, ¶ 11.3, U.N. Doc. CCPR/C/114/D/2143/2012 (Jul. 22, 2015). Also, commissions of inquiry have classified disappearances perpetrated by non-state actors as enforced disappearances. See, e.g., Indep. Int'l Comm'n Inquiry on the Syrian Arab Republic, *Without a trace: enforced disappearances in Syria*, ¶ 5 (Dec. 19, 2013); Grp. of Eminent Int'l and Reg'l Experts on Yemen, *Situation of human rights in Yemen, including violations and abuses since September 2014*, ¶ 166, U.N. Doc. A/HRC/45/CRP.7 (Sept. 29, 2020); Indep. Fact-Finding

Statement it “reviewed the case law of the Human Rights Committee and of other treaty bodies, the practice of the special procedures of the Human Rights Council, and the case law of regional tribunals and human rights mechanisms and other relevant bodies” and “consulted the relevant human rights bodies with a view to ensuring the consistency of their respective observations and recommendations.”<sup>112</sup>

Harmonization in international human rights law regarding enforced disappearances is crucial for many reasons, including preventing fragmentation of the law, ensuring its consistent and coherent application at the international, regional, and domestic levels, and reinforcing its legitimacy. UNTBs, along with international and regional courts, constitute a “unitary human rights system,” which aims to ensure the universal protection of human rights.<sup>113</sup> The CED’s individual complaints procedure is quasi-judicial in nature and, accordingly, the UNTBs engage in judicial dialogue among themselves and with international and regional courts, which can be understood as a type of “deliberative engagement” to seek insight and information.<sup>114</sup> In other words, this “deliberative engagement” operates internally among UNTBs, and externally between UNTBs and international or regional courts, which then filter back to domestic courts. Through this process, UNTBs and courts can ensure that they rationalize their interpretations and coordinate to circumvent fragmentation in international human rights law, thereby reinforcing its legitimacy.<sup>115</sup> Building coherence in international human rights law is all the

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Mission on Libya, *Report of the Independent Fact-Finding Mission on Libya*, ¶ 14, U.N. Doc. A/HRC/48/83 (Nov. 29, 2021); González et al. (“Cotton Field”) v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

112. Statement, *supra* note 3, at Introduction.

113. Anja Seibert-Fohr, *Judicial Engagement in International Human Rights Comparativism*, in INTERNATIONAL LAW: SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 1, 19 (August Reinisch et al. eds. 2016).

114. *Id.* at 13, 15 (citing VICKI JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010)). Seibert-Fohr explains how “deliberative engagement” has rationalizing, legitimizing, and coordinating functions. These functions “do not only inform the extent to which [a UNTB] engages in human rights comparativism. These rationales also determine the limits of its engagement.” *Id.* at 17.

115. *Id.* at 21. Furthermore, when a UNTB addresses a complaint, the decision is meant to have domestic repercussions. For example, in 2018 the Supreme Court of Spain held that views expressed by UNTBs in individual complaints are binding on the state. Koldo Casla, *Supreme Court of Spain: UN Treaty Body individual decisions are legally binding*, EJILTALK (Aug. 1, 2018), <https://www.ejiltalk.org/supreme-court-of-spain-un-treaty-body-individual-decisions-are-legally-binding/> [<https://perma.cc/KJZ9-LDFQ>]. In 2020, the Senate of Mexico recognized the competence of the CED to examine individual complaints, and in 2021, the Supreme Court of Justice declared that Mexican authorities are under an obligation to comply with the urgent actions of the CED. Press Release, CED, Enforced disappearances: UN Committee welcomes Mexico’s decision on individual complaints (Sept. 4, 2020), <https://www.ohchr.org/en/press-releases/2020/09/enforced-disappearances-un-committee-welcomes-mexicos-decision-individual> [<https://perma.cc/24GN-PGRB>]; Desaparición Forzada de Personas: El Cumplimiento de las Acciones Urgentes Dictadas por el Comité Contra la Desaparición Forzada de la Naciones Unidas Puede y Debe Ser Supervisado Judicial y Constitucionalmente, SEMINARIO JUDICIAL DE LA FEDERACIÓN (Nov. 19, 2021), <https://sjfsemanal.scjn.gob.mx/detalle/tesis/2023813> [<https://perma.cc/2PTW-MBGE>] [hereinafter “Desaparición Forzada de Personas”]. While the Supreme Court of Justice focused on compliance with urgent actions, it also reinforced the domestic legitimacy of the CED by stating that the CED is the mechanism authorized to interpret the Convention and that ignoring the binding nature of urgent actions would void the Convention by frustrating its object and purpose.

more important given that, when a UNTB addresses a complaint, the decision is meant to have domestic repercussions.

Accordingly, although the Statement's approach directly impacts the evidentiary framework applied by the CED, it may also influence the standards of other UNTBs, as well as international, regional, and domestic courts.<sup>116</sup> One particularly important feature of the Statement is that, beyond harmonization of international human rights law, it also explicitly aims to align the CED's treatment of non-state actors with international criminal law and international humanitarian law.<sup>117</sup> This approach is part of an ongoing dialogue between the UNTBs and the ICC. Usually, this dialogue expresses itself through the UNTBs mentioning or citing ICC case law in their general comments and concluding observations.<sup>118</sup> By contrast, in this particular instance, the CED looked at definitions from the Rome Statute, as well as ICC case law, as inspiration for its Statement. This choice is significant given the domestic respect due to the Rome Statute and the CED by states, in particular by domestic judiciaries.

### III. THE COMMITTEE ON ENFORCED DISAPPEARANCES' STATEMENT: A NEW EVIDENTIARY FRAMEWORK

With respect to enforced disappearances committed by non-state actors in the context of Article 2, the Statement explains the circumstances in which acts or omissions of persons who are not state agents can be attributed to the state and thereby trigger state responsibility. It specifies the content of three situations envisaged by Article 2 of the Convention: authorization, support, and acquiescence. "Authorization" means that "the State, through its agents, has either orally or in writing given permission to persons or groups of persons to commit disappearance."<sup>119</sup> "Support" means that "the State has provided some assistance to persons or groups of persons who have committed enforced disappearance, inter alia, through the sharing of information and/or the provision of means such as infrastructure, funding, weapons, training or logistics. For the purpose of attribution in this context, support does not have to be provided with the specific aim of committing enforced disappearance."<sup>120</sup> Finally, "acquiescence" means:

116. On the "great weight" afforded to the views of UNTBs in interpreting their founding treaties, see, e.g., Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Merits, Judgment, 2010 I.C.J. 639, ¶ 664 (Nov. 30); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. U.A.E.), Preliminary Objections, Judgment, 2021 I.C.J. 71, ¶ 104 (Feb. 4).

117. Statement, *supra* note 3, ¶ 11 n.8, ¶¶ 13, 17–18.

118. See, e.g., HRC, *General comment No. 37 (2020) on the right of peaceful assembly (article 21)*, ¶ 98 n.146, U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020) (citing the Rome Statute, *supra* note 87, Art. 7); Comm. Against Torture, *General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, ¶ 29(g), U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018) (citing the Rome Statute, *supra* note 87, Arts. 6, 7, 8).

119. Statement, *supra* note 3, ¶ 3.

120. *Id.* ¶ 4.

that the State knew, had reasons to know or ought to have known of the commission or of the real and imminent risk of commission of enforced disappearance by persons or groups of persons, but that one of the following applies:

- (a) The State has either accepted, tolerated or given consent to this situation, even implicitly;
- (b) The State has deliberately and in full knowledge, by action or omission, failed to take measures to prevent the crime and to investigate and punish the perpetrators;
- (c) The State has acted in connivance with the perpetrators or with total disregard for the situation of the potential victims, facilitating the actions of the non-State actors who commit the act; or
- (d) The State has created the conditions that allowed their commission.<sup>121</sup>

The Statement adds that there is acquiescence within the meaning of Article 2 “when there is a known pattern of disappearances of persons and the State has failed to take the measures necessary to prevent further cases of disappearance and to investigate the perpetrators and bring them to justice.”<sup>122</sup> The Statement explains that the CED will adopt a burden-shifting approach in such cases: “the State has the burden of proving that there was no acquiescence on its part, and it must demonstrate that it has taken concrete measures and action to prevent, investigate and punish the crime, and that such measures have been effective in practice.”<sup>123</sup> Finally, the Statement references decisions of the Inter-American Court of Human Rights (“IACtHR”) as well as the Human Rights Committee to clarify that the circumstances covered under Article 2 apply to, among others:

so-called “paramilitary groups”, “civil patrols” and private security companies. They may also apply to persons involved in organized crime, in particular groups of smugglers or traffickers, and extend to any individuals or groups of individuals, including informal groups or networks, from the moment when they received the authorization, support or acquiescence of a State authority.<sup>124</sup>

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121. *Id.* ¶ 5.

122. *Id.* ¶ 6.

123. *Id.* ¶ 7.

124. *Id.* ¶ 8 (footnotes omitted) (citing, e.g., 19 Merchants v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, (July 5, 2004); “Mapiripán Massacre” v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, (Sept. 15, 2005); HRC, Serna v. Colombia, U.N. Doc. CCPR/C/114/D/2134/2012 (July 9, 2015); Blake v. Guatemala, 1998 Inter-Am. Ct. H.R. ¶¶ 76, 78); see also Int’l Comm. Red Cross, *The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict*, at 12 (Aug. 2009); CED, *supra* note 8, ¶ 13 (“Acts of enforced disappearance continue to be committed directly by public officials at the federal, state and municipal levels. In addition, persons involved in organized crime, with various forms of collusion and varying degrees of participation, acquiescence or omission by public officials, have become some of the main perpetrators of disappearances.”).

The Statement's newly articulated construction of acquiescence will be especially important in complex contexts like Mexico. The pattern of enforced disappearances in Mexico, discussed in Part I of this Article, is easily mapped onto the Statement's framework, including the state's knowledge of violations; acceptance and tolerance of such acts; failure to prevent, investigate, and punish; collaboration with perpetrators and disregard for victims; and the creation of conditions, including structural impunity, that allow enforced disappearances to flourish.

### A. *Acquiescence under Article 2*

#### 1. *Reconsidering the Applicable Framework, Harmonizing International Law*

Pursuant to the Convention, "acquiescence" is the minimum threshold for attributing state responsibility for enforced disappearances committed by non-state actors.<sup>125</sup> The Statement's paragraphs on acquiescence begin with the theory of foreseeable and avoidable risk. According to the CED, acquiescence first requires that "the State knew, had reasons to know or ought to have known of the commission or of the real and imminent risk of commission of enforced disappearance by persons or groups of persons."<sup>126</sup> The foregoing seems to be a broad framing that implicates the state when it knew or should have known of the risk of enforced disappearances. Moreover, it does not necessarily require that the state knew or should have known of the risk of a specific enforced disappearance. Rather, this standard could plausibly include situations in which the state knew or should have known generally of the risk of enforced disappearances given, for example, the past actions of non-state actors, the context or conditions in a certain situation, patterns of prior abuses, or a prevailing culture of impunity.<sup>127</sup>

The CED's application of the theory of foreseeable and avoidable risks appears to be an effort to bring it in line with the approaches of the European Court of Human Rights ("ECtHR") and the IACtHR. Under the IACtHR's case law, when human rights violations are committed by non-state actors, the Court may establish state responsibility in two different ways.<sup>128</sup> One is state complicity, establishing the direct responsibility of the state for tolerance, acceptance, or support of such violations.<sup>129</sup> The other is indirect state

125. See Frey, *supra* note 25, at 41.

126. Statement, *supra* note 3, ¶ 5.

127. Cf. Rome Statute, *supra* note 87, Art. 7(2)(i) ("'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization followed by the refusal to acknowledge that deprivation of liberty . . .").

128. See Jimena Reyes, *State Capture Through Corruption: How Can Human Rights Help?* Harv. L. Sch. Hum. Rts. Program Working Paper, Paper No. HRP 19-002, at 25, [https://hrp.law.harvard.edu/wp-content/uploads/2022/10/JimenaReyes\\_HRP\\_19\\_002.pdf](https://hrp.law.harvard.edu/wp-content/uploads/2022/10/JimenaReyes_HRP_19_002.pdf); Víctor Abramovich, *Responsabilidad estatal por violencia de género: comentarios sobre el caso "Campo Algodonero" en la Corte Interamericana de Derechos Humanos*, 6 ANUARIO DE DERECHOS HUMANOS 167, 167–68, 171 (2010).

129. See "White Van" (Paniagua Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 91 (Mar. 8, 1998).



responsibility for breaching the obligation to guarantee certain rights and to prevent violations.<sup>130</sup> To determine the latter, the IACtHR uses the doctrine of foreseeable and avoidable risk, a theory that originated from the ECtHR.<sup>131</sup> This doctrine contains three requirements: awareness of a situation of real and imminent danger; danger that threatens a specific individual or group; and reasonable possibilities of preventing or avoiding the danger.<sup>132</sup> The Court analyzes both the violation of substantive rights committed by non-state actors as well as the state's breach of the duty to prevent the violations through criteria that establish the existence of a foreseeable and avoidable risk of the violation.<sup>133</sup>

The IACtHR has also found state responsibility in cases where the state itself contributed to the creation of the risk of human rights violations, including through the state's public actions, norms, practices, or policies.<sup>134</sup> In those cases, the degree of state contribution in creating or maintaining the risk is a key criterion when evaluating whether the risk was avoidable and foreseeable.<sup>135</sup> Given the complex nature of enforced disappearances and the growing role of non-state actors, coupled with the importance of harmonization among regional and international human rights bodies, the CED's integration of principles from this risk-based approach will help solidify the legal framework for linking states to violations committed by non-state actors.

Once the requisite level of state knowledge and risk is established, the Statement outlines four separate ways to demonstrate acquiescence, thereby providing helpful guidance to victims and survivors. Beyond harmonization with the regional human rights systems, this section of the Statement attempts to clarify the foreseeable and avoidable risk theory.

First, acquiescence exists when the state "has either accepted, tolerated or given consent to this situation, even implicitly[.]"<sup>136</sup> This construction appears to align with the practice of the IACtHR and ECtHR but, crucially, the Statement explicitly notes that such acceptance, tolerance, or consent can be given "implicitly," for example, by allowing impunity to take hold. In addition, this language is even more favorable to victims and survivors seeking justice as it provides that such acceptance, tolerance, or consent can be given to a "situation." This approach seems to reinforce the notion that the state need not accept, tolerate, or consent to each specific enforced disappearance but rather can have accepted or tolerated a broader context or situation in which abuses generally prevail.

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130. See *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶¶ 123–24 (Jan. 31, 2006).

131. *Id.*

132. See *Osman and Osman v. United Kingdom*, 1998 Eur. Ct. H.R. 101, ¶ 116.

133. See *Abramovich*, *supra* note 128, at 171–72.

134. See, e.g., *Valle Jaramillo et al. v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 192, ¶¶ 76–81 (Nov. 27, 2008); *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 132 (July 1, 2006); *Pueblo Bello Massacre*, 2006 Inter-Am. Ct. H.R. ¶ 7 (sep. op. Cañado Trindade, J.); *Mapiripán Massacre*, 2005 Inter-Am. Ct. H.R. ¶¶ 122–24.

135. See *Abramovich*, *supra* note 128, at 173–76.

136. Statement, *supra* note 3, ¶ 5(a).

Second, acquiescence exists when a state “has deliberately and in full knowledge, by action or omission, failed to take measures to prevent the crime and to investigate and punish the perpetrators[.]”<sup>137</sup> On the one hand, this construction constitutes a meaningful reminder of a state’s obligation to prevent, investigate, *and* punish. Failure to take measures to punish, for example, can be sufficient to establish acquiescence even if the state has taken measures to prevent and investigate. On the other hand, by including the condition of “deliberately”, the Statement appears to go beyond the theory of foreseeable and avoidable risk and the state obligation to prevent human rights violations. Therefore, there is a danger that the CED has unnecessarily raised the threshold and rendered nearly inoperative this avenue to acquiescence by including the requirement that the state act “deliberately.” It may be difficult for survivors to prove deliberation in omission or in the negative: that a state deliberately failed to take the necessary measures to prevent, investigate, and punish.

Third, acquiescence can be shown when the state “has acted in connivance with the perpetrators or with total disregard for the situation of the potential victims, facilitating the actions of the non-State actors who commit the act[.]”<sup>138</sup> This sub-section introduces new language that requires further exploration, particularly the use of the terms “connivance” and “total disregard.” Upon an initial impression, however, it is unclear why this sub-section was included or what avenues it offers that do not duplicate the other circumstances in which, under Article 2, acts of non-state actors can be attributed to the state. Acting in “connivance” and “facilitating” the actions of non-state actors seem potentially akin to offering support or assistance. Acting with “total disregard” for the situation of victims seems parallel to accepting or tolerating the situation.

Finally, acquiescence exists when the state has “created the conditions that allowed [enforced disappearances]’ commission.”<sup>139</sup> Here, the CED appears to put forward a standard that ensures the state will not benefit from its own turpitude. This standard means victims and survivors can argue that, for example, patterns of impunity linked to the state’s failure to investigate and prosecute create conditions that allow enforced disappearances to recur. The Statement’s next paragraph further reinforces this understanding, emphasizing that: “In particular, there is acquiescence within the meaning of article 2 when there is a known pattern of disappearance of persons and the State has failed to take the measures necessary to prevent further cases of disappearance and to investigate the perpetrators and bring them to justice.”<sup>140</sup>

Impunity fosters the repetition of human rights violations and can create feelings of disempowerment and helplessness for victims and survivors.<sup>141</sup> States therefore have a duty, articulated in Article 3 of the Convention, to investigate, prosecute, punish, and provide effective remedies when non-state

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137. *Id.* ¶ 5(b).

138. *Id.* ¶ 5(c).

139. *Id.* ¶ 5(d).

140. *Id.* ¶ 6.

141. *White Van v. Guatemala*, 1998 Inter-Am Ct. H.R. ¶ 173.

actors perpetrate abuses.<sup>142</sup> The Statement helpfully underscores the importance of impunity as both a sign of the state's failure to provide a remedy for abuses committed by non-state actors and an indicator of state acquiescence to such enforced disappearances.

Other international bodies have adopted a similar approach. For example, the U.N. Working Group on Enforced or Involuntary Disappearances found that “systematic situations of impunity regarding the abduction and detention of migrants by private actors” may “be considered in certain circumstances as a form of acquiescence and, as such, constitute an enforced disappearance.”<sup>143</sup> The Convention's definition of enforced disappearance, particularly the elements of silence and concealment, can be interpreted as incorporating the circumstances of impunity into the very human rights violation. That is, as the Human Rights Committee has also noted, state inaction contributes to the existence and perpetuation of lack of knowledge of an individual's whereabouts.<sup>144</sup>

This harmonization of the Statement with other UNTB case law on impunity both reinforces the due diligence obligations of states, which may be held “accountable for their failure to take positive steps to prevent or remedy human rights violations,”<sup>145</sup> and acknowledges that impunity can in some cases trigger

142. HRC, *General Comment 31 (80) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.

See also Comm. Econ., Soc. & Cultural Rts., *General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities*, ¶¶ 38–57, U.N. Doc. E/C.12/GC/24 (June 23, 2017); Convention on Preventing and Combating Violence against Women and Domestic Violence Arts. 45, 49, 54, C.E.T.S. 210 (May 11, 2011).

143. Hum. Rts. Council, Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration*, ¶ 42, U.N. Doc. A/HRC/36/39/Add.2 (July 28, 2017).

144. See HRC, *General Comment 31*, *supra* note 142, ¶ 8 (“There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.”). HRC decisions evaluating slow and botched State investigations in enforced disappearance cases also align with this approach. For instance, in *García v. Mexico*, the HRC stated that “failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the [ICCPR].” HRC, *García v. Mexico*, ¶ 9.10, U.N. Doc. CCPR/C/126/D/2750/2016 (July 15, 2019). If investigations are not “prompt and thorough” and “independent and impartial,” the State violates due diligence requirements under ICCPR Article 2(3). *Id.*

145. Frey, *supra* note 25, at 45–46 (“In the sphere of human rights law, due diligence is a two-pronged obligation, measuring the state's conduct in both pre-abuse and post-abuse settings. Due diligence requires states to take steps to prevent or minimise foreseeable human rights violations by private actors, and they can be held responsible for those violations for failing to do so. Due diligence also requires states to investigate, prosecute, punish, and provide reparations for victims of violations. In assessing state responsibility for enforced disappearances, therefore, due diligence provides an important standard for measuring the state's efforts to carry out a timely search for the victims as well as to investigate criminal

the state's responsibility for the enforced disappearance itself. The situation in Mexico aligns neatly with this description, given the well-known and robustly documented pattern of enforced disappearances and the state's utter failure to prevent, investigate, and bring perpetrators to justice. In the Mexican context, the prevalence of widespread, structural impunity becomes an important barometer of the State's acquiescence to enforced disappearances.

## 2. *Shifting the Burden of Proof*

The Statement makes a crucial contribution with respect to the burden of proof to demonstrate state authorization, support, or acquiescence under Article 2 of the Convention: "In such cases, the State has the burden of proving that there was no acquiescence on its part, and it must demonstrate that it has taken concrete measures and action to prevent, investigate and punish the crime, and that such measures have been effective in practice."<sup>146</sup> The CED has thus set a high bar for the state, requiring it to demonstrate not only "concrete measures" but also "that such measures have been effective in practice." Such burden shifting is both appropriate and necessary given the gravity of enforced disappearances, the frequent state failure to prioritize investigations and to sanction perpetrators, as well as the inherent evidentiary challenges facing victims and survivors.

This approach brings the CED in line with other human rights bodies that have developed jurisprudence to shift the burden of proof in recognition of the information asymmetry between victims of enforced disappearances and the states that perpetrate or enable such abuse. For example, the Human Rights Committee has noted that one key criterion for enforced disappearances is the "refusal to acknowledge detention" and "reveal the facts and whereabouts of the person."<sup>147</sup> To overcome the impasse from non-cooperative states and related evidentiary hurdles, the Human Rights Committee has provided that:

{T}he burden of proof cannot fall exclusively on the authors of the communication, since the author and the State party do not always have equal access to the evidence and the State party is often the only one with access to the relevant information. Therefore, when the authors have submitted credible complaints to the State party and when further clarification depends on information that is solely in the hands of the State party, the Committee may consider the complaints substantiated if the State party does not produce satisfactory evidence or explanations to refute them.<sup>148</sup>

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responsibility effectively."). The Committee Against Torture ("CAT") requires "the 'consent or acquiescence' element of the UNCAT has been approached by the Committee against Torture as requiring actual knowledge of a particular incident and actual refusal to act. It does not seem to create obligations on a state to take any pre-abuse preventive measures." Alice Edwards, *The 'Feminizing' of Torture Under International Human Rights Law*, 19 LEIDEN J. INT'L L. 349, 374 (2006).

146. Statement, *supra* note 3, ¶ 7.

147. *García v. Mexico*, *supra* note 144, ¶ 9.3; *see also* HRC, *Zamora v. Mexico*, ¶ 12.2, U.N. Doc. CCPR/C/127/D/2760/2016 (Nov. 5, 2019).

148. *García v. Mexico*, *supra* note 144, ¶ 9.3.

In cases where victims and survivors must rely on limited or contextual evidence, the Human Rights Committee has accepted such evidence as sufficient to reach the evidentiary threshold, finding that acts constitute enforced disappearances when the state party does not provide an explanation to refute the allegations.<sup>149</sup>

In this way, the Human Rights Committee has developed an evidentiary approach that acknowledges the systematic dearth of evidence in enforced disappearances cases. Accordingly, it rebalances the burden of proof by requiring the state party to investigate with due diligence to sufficiently refute the allegations. For example, in a case concerning the disappearance of Christian Téllez Padilla in Mexico, the Human Rights Committee considered the “prevailing background of human rights violations” at the “time and place of the events” and “in light of the consistent account of events” and documents provided by the authors of the communication.<sup>150</sup> In another case concerning the disappearance of Víctor Manuel Guajardo Rivas in Mexico, the Human Rights Committee referred to the authors’ submission (citing a report on Mexico from the U.N. High Commissioner for Human Rights) that the disappearance occurred in the context of the “war on drug trafficking,” which had led to a “significant increase in human rights violations by soldiers and police officers.”<sup>151</sup> The Human Rights Committee further noted that many persons were missing in Coahuila, the state where the victim was taken by the elite police force.<sup>152</sup>

In the recent decision in *Rea v. Mexico*, the Human Rights Committee considered the “general context of the enforced disappearances” in Mexico (relying on the CED and Working Group reports on Mexico) as well as in the state of Nuevo León where the particular disappearance occurred (referring to a report by *Ciudadanos en Apoyo a los Derechos Humanos*).<sup>153</sup> The Human Rights Committee acknowledged the “alleged links” between state security forces and organized criminal groups.<sup>154</sup> Without the state’s refutation of evidence relating to this context, including the specific context in Nuevo León and the relationships between state authorities and criminal groups, the Human Rights Committee found that the acts constituted an enforced disappearance attributable to Mexico.<sup>155</sup>

In short, the Human Rights Committee exercises a flexible approach to overcoming evidentiary hurdles in enforced disappearances cases. First, it accepts that, given the very nature of enforced disappearances, the state and victims do not have equal access to evidence. Second, once a victim puts forward a credible communication, the burden shifts to the state to refute the evidence based on an adequate or concrete explanation. Third, the Human

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149. HRC, *Rea v. Mexico*, ¶¶ 9.2–9.3, U.N. Doc. CCPR/C/131/D/3259/2018 (Mar. 25, 2021).

150. HRC, *Cantú v. Mexico*, ¶ 9.4, U.N. Doc. CCPR/C/127/D/2766/2016 (Oct. 24, 2019).

151. *Id.* ¶ 2.9 n.6.

152. *Id.* ¶ 2.9 n.7.

153. *Rea v. Mexico*, *supra* note 149, ¶ 9.3.

154. *Id.*

155. *Id.* ¶ 9.4.

Rights Committee has moved away from requiring evidence related to the specific context of the particular enforced disappearance and instead considers evidence of a more general context of enforced disappearances. In cases against Mexico, it has relied on reports from the U.N., the CED, and civil society organizations about Mexico's War on Drugs and the links between security forces and criminal groups.

The CED has been wise to adopt a similarly pragmatic approach to the burden of proof. Based on the CED's most recent decision, *Medina v. Mexico*, it appears that the CED will generally follow the Human Rights Committee.<sup>156</sup> The CED affirmed that "the burden of proof cannot rest exclusively on the author of the communication, since the alleged victims and the State party do not always have equal access to the evidence, and often only the State party has access to the relevant information."<sup>157</sup> The CED reiterated that "the existence of sufficient direct or circumstantial evidence of the involvement of State agents reverses the burden of proof" and the state party must then "disprove such evidence and disprove the disappearance is attributable to it, whether through direct involvement of State agents or by persons acting with the authorization, support, or acquiescence of the State, by means of an investigation carried out with due diligence."<sup>158</sup> In this case, because the state party failed to disprove either the evidence provided by the author, or that the disappearance was attributable to the state party through an investigation carried out with due diligence, the CED found that the disappearance constituted an enforced disappearance under Article 2 of the Convention.<sup>159</sup>

Accordingly, the Statement makes a crucial contribution to the burden of proof in the context of state authorization, support, or acquiescence to enforced disappearances. The CED's articulated approach of burden-shifting is both appropriate and necessary given the gravity of enforced disappearances, the frequent state failure to properly investigate, as well as the evidentiary challenges facing victims when the state has a monopoly on relevant information. This framework aligns the CED with other human rights bodies that similarly shift the burden of proof in recognition of the information asymmetry between victims of enforced disappearances and the states that perpetrate or enable such abuse.

### 3. *Pattern and Context Evidence*

In addressing structural impunity, the conditions that allow for the commission of enforced disappearances, and enforced disappearances as crimes against humanity,<sup>160</sup> the Statement indicates that, going forward, the CED will likely need to consider evidence of patterns of abuse and of the broader contexts

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156. CED, *Medina v. Mexico*, ¶ 7.3, CED/C/24/D/4/2021 (Mar. 24, 2023).

157. *Id.* ¶ 7.3. The CED substantiated its approach by relying on decisions from the HRC.

158. *Id.*

159. *Id.* ¶ 7.7.

160. *See supra* Section II.B.



in which particular disappearances occur. This development is laudable and could assist victims seeking truth and remedies before the CED. However, the CED's current procedures for individual communications do not sufficiently or explicitly address how the CED should consider pattern and context evidence. For example, Rule 76 of the CED Rules of Procedure (the "Rules") empowers the CED to formulate its views in light of materials submitted by the parties as well as "relevant documentation emanating from" other U.N. bodies, international organizations, and state institutions.<sup>161</sup> The same Rules, however, do not elaborate on what constitutes relevance, or specify how documentation can be relevant even if it does not directly pertain to the specific disappearance at issue. It may be helpful for the CED to outline examples of the types of evidence that can be relevant to prove broader patterns and context.

The CED has engaged with the question of systemic patterns and context only in a limited capacity in its small number of Article 31 decisions.<sup>162</sup> In its most recent decision, the CED determined that the "contextual analyses prepared by the Veracruz State Search Commission" and the fact that victim's disappearance was "carried out by police and security forces in the context of security operations" provided "sufficient evidence providing strong indications of the direct involvement of the agents of the State" in the victim's disappearance.<sup>163</sup> Moreover, in considering whether the state party conducted an "investigation carried out with due diligence," the CED explained that the state party must "immediately devise a comprehensive strategy that includes an action plan and a timeline to conduct an exhaustive search for the disappeared person, and which takes into account all available information, including the context in which the disappearance occurred."<sup>164</sup> Thus, the CED understands

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161. CED, *Rules of Procedure*, Rule 76.1, U.N. Doc. CED/C/1 (June 22, 2012).

162. See generally CED, *Yrusta v. Argentina*, U.N. Doc. CED/C/10/D/1/2013 (Mar. 11, 2016); CED, *M.I. v. Czechia*, U.N. Doc. CED/C/14/D/2/2017 (May 30, 2018); CED, *E.L.A. v. France*, U.N. Doc. CED/C/19/D/3/2019 (Nov. 12, 2020). In *E.L.A. v. France*, a Sri Lankan asylum seeker alleged that if he were sent back home, he risked being subjected to enforced disappearance. The victim alleged a violation of Article 16 of the Convention, under which the competent authority must take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant, or mass violations of human rights or serious violations of international humanitarian law, to determine whether there are substantial grounds for believing there is a risk of enforced disappearance. The CED examined the author's asylum applications, decisions by asylum courts, and claims brought in domestic court, such as the dismissal of evidence without a reason. Considering admissibility, the CED took into account the "specific circumstances of the case at hand, including the author's personal experience and that of his family, and the general context of enforced disappearance in Sri Lanka." See *id.* ¶¶ 3.1, 7.2, 6.7.

163. *Medina v. Mexico*, *supra* note 156, ¶ 7.4. The CED also noted the author's other allegations and the consistency of the eyewitnesses in asserting "the participation of the Veracruz police forces, and that the investigating authorities have neither disproved nor detected inconsistencies in those testimonies."

164. *Id.* ¶¶ 7.4–7.5. The CED noted the State party's argument that the State had analyzed the case within the framework of the Standardized Protocol for the Search for Missing and Disappeared Persons, and noted as well the existence of a contextual analysis report. *Id.* ¶ 7.8. The CED also outlined the "diligence requirements for all stages of the search process (the requirements that investigations be immediate, thorough and launched on the authorities' own initiative) as well as ensuring the competence and independence of the professionals involved." *Id.* ¶ 7.5.

that context plays a pivotal role in establishing a state party's involvement in enforced disappearances.

As the CED grapples with more cases, it may look to the IACtHR for guidance on using systemic patterns and underlying contexts to fill evidentiary gaps. The IACtHR has consistently found that a broader pattern or state practice is a crucial consideration that should be admitted as evidence supporting an enforced disappearance.<sup>165</sup> In *Velásquez-Rodríguez v. Honduras*, the Court held that upon proof of an official practice of enforced disappearances perpetrated or tolerated by the state, the disappearance in question need only be linked to the larger practice.<sup>166</sup> The IACtHR reached this conclusion because enforced disappearances rely upon concealing and destroying evidence, so any particular disappearance “may be proved through circumstantial or indirect evidence or by logical inference.”<sup>167</sup> In *Fairén-Garbi and Solís-Corrales v. Honduras*, the IACtHR emphasized that a practice of enforced disappearances “could serve as a principal element, together with other corroborative evidence, to create a legal presumption that certain persons were the victims of that practice.”<sup>168</sup> However, the IACtHR found that proof of a practice alone is insufficient absent evidence that the enforced disappearance in question is linked to that practice.<sup>169</sup>

The domestic context plays a pivotal role when the IACtHR evaluates competing arguments about the identity of the perpetrators.<sup>170</sup> In *Radilla-Pacheco v. Mexico*, the IACtHR took into account “political and historical surroundings” as “determining factors.”<sup>171</sup> Similarly, in *Alvarado Espinoza et al. v. Mexico*, the IACtHR held that its analysis of any disappearance “must encompass the whole series of events,” including “the need to consider the context in which

165. *Velásquez Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. ¶¶ 76, 99, 124, 126, 147; *Fairén-Garbi & Solís-Corrales v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 2, ¶ 157 (March 15, 1989); *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 116, 132–37, 146, 151–52, 221–22, 333 (Nov. 23, 2009); *Alvarado Espinoza et al. v. Mexico*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 370, ¶¶ 166–70 (Nov. 28, 2018).

166. *Velásquez Rodríguez v. Honduras*, 1988 Inter-Am. Ct. H.R. ¶¶ 126, 148.

167. *Id.* ¶¶ 124, 130–31. In the Court's jurisprudence, the following conditions must be satisfied to prove a systematic practice of enforced disappearances: (i) a significant number of disappearances must have occurred during a particular period of time; (ii) the disappearances must follow a particular pattern; (iii) the kidnappings must be attributable to the state; and (iv) the disappearances must have been carried out in a systematic manner.

168. *Fairén-Garbi v. Honduras*, 1989 Inter-Am. Ct. H.R. ¶ 157. The Court also made explicit that “in the absence of other evidence, whether circumstantial or indirect, the practice of disappearances is insufficient to prove that a person whose whereabouts is unknown was the victim of that practice.” *Id.*

169. *Id.*

170. *Anzualdo Castro v. Peru*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 48 (Sept. 22, 2009). The Court primarily drew on evidence provided by the official Truth and Reconciliation Commission to understand how the disappearance followed “the modus operandi” of state and military personnel. This context helped confirm that State agents, and not only private actors, were responsible for the enforced disappearance. *Id.* ¶¶ 47–50.

171. *Radilla-Pacheco v. Mexico*, 2009 Inter-Am. Ct. H.R. ¶ 116. Based on reports prepared by the National Human Rights Commission of Mexico and other governmental bodies, the Court noted a pattern of enforced disappearances at the time *Radilla-Pacheco* disappeared, particularly of “militant members of the guerrilla or people identified as its supporters.” *Id.* ¶¶ 132, 136.

the facts took place.”<sup>172</sup> Restating its reasoning from *Velásquez*, the IACtHR “attribute[d] a high probative value to . . . links to a general practice of disappearances,” given that enforced disappearances are “characterized by the endeavor to eliminate any factor that would prove the detention, the whereabouts and fate of the victims.”<sup>173</sup>

Applying this model to Mexico, if an individual brought a case alleging an enforced disappearance but lacked evidence establishing the identity of the perpetrator, the CED could look at contextual and pattern evidence that would facilitate the inference of state support or acquiescence. Such evidence could come from the CED’s own findings in its recent report on Mexico, which notes that 95,121 persons have been registered as disappeared; a state policy of militarization has been explicitly implemented since 2006; patterns in enforced disappearances persist throughout the country, such as direct perpetration by public officials or through collusion with organized crime; and only two to six percent of disappearance cases are brought before Mexican courts.<sup>174</sup> Further information could be provided by members of civil society organizations and victims’ collectives, who play a crucial role in developing evidence related to patterns and whose testimony can illustrate the broader context in which any single disappearance occurs.<sup>175</sup>

*B. Articles 3 and 5: Enforced Disappearances by Non-State Actors Acting with No Link to the State*

Beyond enforced disappearances perpetrated by non-state actors with state authorization, support, or acquiescence under Article 2 of the Convention, the Statement also makes important contributions with respect to enforced disappearances perpetrated by non-state actors with no link to the state. In particular, the Statement elaborates on the CED’s understanding of Article 5, under which the widespread or systematic practice of enforced disappearances constitutes a crime against humanity as defined by international law.<sup>176</sup> The Statement advances the harmonization of international law by aligning the CED’s position on enforced disappearances as crimes against humanity with customary international law and the Rome Statute.<sup>177</sup> However, practically speaking,

172. Alvarado Espinoza v. Mexico, 2018 Inter-Am. Ct. H.R. ¶ 166.

173. *Id.* ¶ 169.

174. See generally CED, *supra* note 9.

175. For example, in documenting seventy cases of enforced disappearance in Nayarit, FIDH analyzed testimony and open sources, including media and government reports, to illuminate the context in which the disappearances were committed. FIDH, *Nayarit*, *supra* note 24, at 5. Through this combination of sources, FIDH produced evidence that illustrated clear patterns in the violations, which stemmed from a criminal enterprise conducted through the Nayarit Public Prosecutor’s Office that both enabled the disappearances and served as an obstacle to other avenues of evidence collection. *Id.* at 38.

176. Convention, *supra* note 1, Art. 5.

177. Both the ICC and other international tribunals have developed case law related to enforced disappearance as a crime against humanity. See, e.g., Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶¶ 1831–39 (I.C.T.Y. Apr. 15, 2011); Prosecutors v. Nuon Chea, Case No. 002/01, Judgment, ¶¶ 441–44 (E.C.C.C. Aug. 7, 2014); Prosecutors v. Nuon Chea, Case No. 002/02, Judgment, ¶¶ 753–55 (E.C.C.C. Nov. 16, 2018); Ministère public v. Hissène Habré, Judgment, ¶ 1471 (Extr. Afr. Chambers May

victims may struggle to demonstrate the relevant context of a widespread or systematic attack given their limited access to evidence and resources. The Statement also addresses Article 3 of the Convention, under which states parties must investigate acts defined in Article 2 committed by persons acting *without* the authorization, support, or acquiescence of the state.<sup>178</sup> Although the CED seems to recognize that a rigid and inflexible division between Article 2 versus Articles 3 and 5 has become increasingly problematic and should no longer be sustained,<sup>179</sup> the Statement has unfortunately maintained a hierarchy of victims in which only some benefit from the protections and remedies contained in Articles 16 to 24.

### 1. *Crimes against Humanity*

At the time the Convention was drafted, the question of how to avoid the fragmentation of international human rights law and international criminal law was a point of consideration when defining enforced disappearance as a crime against humanity.<sup>180</sup> Despite the insistence of some civil society organizations that the Convention adopt the definition in Article 7 of the Rome Statute,<sup>181</sup> the Convention ultimately adopted a tautological Article 5: “The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.”<sup>182</sup> The Convention’s negotiators did not follow the language of the Rome Statute,<sup>183</sup> which included the possibility for non-state actors to commit the crime against humanity of enforced disappearances.<sup>184</sup> More than twenty years later, this

30, 2016); Situation in the Republic of Burundi, Case No. ICC-01/17-X, public redacted version of “Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Burundi,” ¶¶ 120–29 (Nov. 9, 2017). See also Working Group on Enforced or Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances*, ¶ 39, U.N. Doc. No. A/HRC/13/31 (Dec. 21, 2009).

178. Statement, *supra* note 3, Sections IV, V.

179. See *supra* Section II.A.

180. Intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance [hereinafter Intersessional Working Group], *Civil and Political Rights, Including the Question of Enforced or Involuntary Disappearances*, Fifty-ninth Sess. ¶ 39, U.N. Doc. E/CN.4/2003/71 (Feb. 12, 2003); Intersessional Working Group, *Civil and Political Rights, Including the Question of Enforced or Involuntary Disappearances*, Sixtieth Sess. ¶¶ 16–18, 42–48, U.N. Doc. E/CN.4/2004/59 (Feb. 23, 2004); Intersessional Working Group, Sixty-first Sess. ¶¶ 36–38, 42–44, U.N. Doc. E/CN.4/2005/66 (Mar. 10, 2005); Intersessional Working Group, *Civil and Political Rights, Including the Question of Enforced or Involuntary Disappearances*, Sixty-second Sess., ¶¶ 105–07, U.N. Doc. E/CN.4/2006/57 (Feb. 2, 2006).

181. Intersessional Working Group, Sixtieth Sess., *supra* note 180, ¶ 16; Intersessional Working Group, Sixty-first Sess., *supra* note 180, ¶ 43; Intersessional Working Group, Sixty-second Sess., *supra* note 180, ¶ 107.

182. Convention, *supra* note 1, Art. 5.

183. Cf. Kirsten Anderson, *How Effective is the International Convention for the Protection of all Persons from Enforced Disappearances Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?*, 7 MELB. J. INTL L. 245, 269–70 (2006).

184. *Id.* at 256.

issue appears to have become one of the primary motivations leading the CED to reconsider the scope of enforced disappearances in its recent Statement.<sup>185</sup>

The section of the Statement addressing disappearances under Article 5 of the Convention explicitly references the Rome Statute. The Statement notes that while the Rome Statute had already been adopted when the Convention was being drafted, the Statute has now been incorporated into the domestic legislation of at least forty-six states, and Article 7 of the Rome Statute on crimes against humanity has also been transposed in the statutes of hybrid tribunals.<sup>186</sup> As a result, the CED observes that the “International Criminal Court and other tribunals have developed case law related to enforced disappearance as a crime against humanity.”<sup>187</sup> The CED further recalls that, in 2009, the Working Group on Enforced or Involuntary Disappearances stated it was “convinced that the definition given in article 7 (1) of the Rome Statute now reflected customary international law and could thus be used to interpret and apply the provisions of the Declaration on the Protection of All Persons from Enforced Disappearances.”<sup>188</sup> Based on these advances in international law since the drafting of the Convention, the CED considers it necessary to clarify that:

Under article 5 of the Convention, disappearance perpetrated by a non-State actor acting without the authorization, support or acquiescence of the State constitutes “enforced disappearance” if committed as part of a widespread or systematic attack against a civilian population, in compliance with the definition of crimes against humanity in international criminal law.<sup>189</sup>

This represents an important step forward in the harmonization of international law, emphatically bringing the CED’s understanding in line with customary international law and the Rome Statute. However, from a practical standpoint, victims of enforced disappearances may struggle to demonstrate the relevant context of a widespread or systematic attack given their limited access to evidence and resources.

Although some civil society organizations have sought recognition of the phenomenon of enforced disappearances in Mexico as a crime against humanity,<sup>190</sup> the

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185. Statement, *supra* note 3, pmb. (“Noting article 7 of the Rome Statute of the International Criminal Court, under which enforced disappearance of persons constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (art. 7 (1) (i)); and is defined as the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time (art. 7 (2) (i))”). See also *id.* ¶ 11 nn.8–10.

186. *Id.* ¶ 11.

187. *Id.*

188. *Id.*

189. *Id.* ¶ 17.

190. See, e.g., FIDH, *Nayarit*, *supra* note 24; FIDH, *Coahuila*, *supra* note 24; FIDH, *Veracruz*, *supra* note 24.

ICC and other international and regional human rights bodies have not yet reached any official determinations on this matter. Since 2014, the ICC Office of the Prosecutor (“OTP”) has received Article 15 communications about possible crimes against humanity of enforced disappearance and torture in Mexico.<sup>191</sup> In its 2020 report presented to the Assembly of States Parties, the OTP noted that Mexico was in Phase 1 of preliminary examinations and stated that the OTP was finalizing its response to senders of communications on Mexico.<sup>192</sup> However, Prosecutor Fatou Bensouda’s mandate ended without any further news on Mexico.<sup>193</sup>

While the role of non-state actors as perpetrators and the question of collusion with the state makes preliminary examination a bit more complicated in the Mexican context, it is undoubtedly *realpolitik* that explains the OTP’s deafening silence. Mexico is a global player that is neither a country at war nor a dictatorship, making it politically difficult to recognize the existence of crimes against humanity therein. Mexico seems to believe that such a statement from the OTP could damage its image and dampen economic investment.<sup>194</sup> The United States, its neighbor to the north, uses judicial actions against drug cartels and corrupt political authorities as a negotiation tool, and thus has no interest in ICC involvement in Mexico’s crisis of disappearances. Although the Inter-American Commission on Human Rights has mentioned the widespread nature of enforced disappearances in Mexico, it has not qualified this epidemic as a crime against humanity.<sup>195</sup> As for the IACtHR, although it has addressed enforced disappearances committed in the twenty-first century,<sup>196</sup> it has not yet had to determine whether such disappearances amount to crimes against humanity in Mexico. As a result, and given the guidance from its Statement, the CED could make a critical contribution by recognizing the crisis of enforced disappearances in Mexico as a widespread or systematic attack against civilians, and therefore a crime against humanity.

191. See FIDH, *International Criminal Court: An Analysis of Prosecutor Bensouda’s Legacy*, at 43 (Dec. 2021).

192. Int’l Crim. Ct., Off. Prosecutor, *Report on Preliminary Examination Activities 2020*, ¶ 35 (Dec. 14, 2020), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> [<https://perma.cc/GK63-KUQE>].

193. See FIDH, *supra* note 191, at 47.

194. See Open Soc’y Just. Initiative, *Undeniable Atrocities: Confronting Crimes Against Humanity in Mexico*, at 100–01 (2016).

195. Inter-Am. Comm’n Hum. Rts., *Situation of Human Rights in Mexico*, ¶ 16, OEA/Ser.L/V/II. Doc. 44/15 (Dec. 31, 2015) (describing “a context of widespread violence and serious human rights violations”). *Id.* ¶ 212 (finding “torture and abuse are widespread” in Mexico), <https://www.oas.org/en/iachr/reports/pdfs/Mexico2016-en.pdf> [<https://perma.cc/TT5U-B3E5>]. The work carried out since 2014 by the Inter-American Commission’s Interdisciplinary Group of Independent Experts, on the forty-three disappeared students in Ayotzinapa, has contributed greatly to making the collusion between states forces and organized crime visible and undeniable. See generally *Interdisciplinary Group of Independent Experts*, INTER-AM. COMM’N HUM. RTS., <https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/giei/ayotzinapa/default.asp> [<https://perma.cc/K2R8-NKKR>].

196. Sandra Serrano, *Forced Disappearances in the Inter-American Human Rights System, in DISAPPEARANCES IN THE POST-TRANSITION ERA IN LATIN AMERICA* 251, 256–59 (Karina Ansolabehere, Barbara A. Frey & Leigh A. Payne eds., 2021).



## 2. *Enforced Disappearances without State Authorization, Support, or Acquiescence*

The Statement also takes steps to clarify the CED's understanding of acts defined in Article 2 committed by non-state actors *without* state authorization, support, or acquiescence—and therefore falling under Article 3. At the time the Convention was drafted, states' views diverged regarding whether disappearances perpetrated in such circumstances should be called enforced disappearances.<sup>197</sup> As a result, the Convention refers to such acts separately in Article 3 and uses the language “acts defined in article 2” instead of “enforced disappearance.”<sup>198</sup> The drafters made this choice in an attempt to avoid confusion between enforced disappearances and other crimes, such as abduction or kidnapping,<sup>199</sup> but the distinction has proven problematic.

Both twenty years ago when the Convention was being negotiated and still today, the role of non-state actors raises questions about the boundaries of human rights law: Is the state the only possible perpetrator of human rights violations? What is the scope of state obligations regarding human rights abuses committed by non-state actors? The Convention responded conservatively to these questions. Yet faced with the evolution of international law, the CED has acknowledged that the Convention is a living instrument which should be interpreted in light of present-day realities and understandings.<sup>200</sup>

In its Statement, the CED seeks to align itself with other UNTBs as well as the evolution of international humanitarian and criminal law,<sup>201</sup> without derailing the

197. Statement, *supra* note 3, ¶ 12; *see also* Intersessional Working Group, Fifty-ninth Sess., *supra* note 180, ¶¶ 35, 39; Intersessional Working Group, Sixtieth Sess., *supra* note 180, ¶ 17.

198. Convention, *supra* note 1, Art. 3.

199. Statement, *supra* note 3, ¶ 12; *see also* Intersessional Working Group, Sixty-second Sess., *supra* note 180, ¶ 13 (“Many delegations suggested replacing the words ‘enforced disappearances’ by a reference to acts or conduct described or defined in article 1, in order to highlight the fact that disappearances committed by non-State actors are not of the same nature as those committed by agents of the State and fall outside the sphere of application of article 1.”).

200. Statement, *supra* note 3, ¶10. On the evolution of international law, the Statement noted that “the ICRC has resolved that the prohibition of enforced disappearances is part of international humanitarian customary law. This prohibition is applicable to both international and non-international armed conflict and, in the latter, to all ‘parties’, including armed groups having some level of organization.” *Id.* ¶ 13. The Statement further noted that some commissions of inquiry set up after 2006 have classified disappearances perpetrated by non-State actors as enforced disappearances and that, in its 2019 report, the Working Group on Enforced and Involuntary Disappearances decided to document cases concerning acts tantamount to enforced disappearances allegedly perpetrated by non-State actors that exercise effective control and/or government-like functions over a territory. *Id.* ¶¶ 14–15.

201. Statement, *supra* note 3, pmb1. (“Having reviewed the case law of the Human Rights Committee and other treaty bodies, the practice of the special procedures of the Human Rights Council, and the case law of regional tribunals and human rights mechanisms and other relevant bodies, and having consulted the relevant human rights bodies with a view to ensuring the consistency of their respective observations and recommendations”). Enforced disappearances violate, or threaten to violate, a range of customary rules of international humanitarian law, including the prohibition of arbitrary deprivation of liberty, the prohibition of torture and other cruel or inhuman treatment, and the prohibition of murder. In addition, in international armed conflicts, the extensive requirements concerning registration, visits, and transmission of information with respect to persons deprived of their liberty are aimed, *inter alia*, at preventing enforced disappearances. In non-international armed conflicts, parties are also required to take steps to prevent disappearances, including through the registration of persons deprived of their liberty.

intentions of the negotiators of the Convention. It therefore outlines the conditions in which an enforced disappearance committed by non-state actors could be characterized as such when the case does not fall into the category of crimes against humanity under Article 5, or crimes committed with state authorization, support, or acquiescence under Article 2.<sup>202</sup> Yet the Statement refrains from calling such acts enforced disappearances, still referring only to “acts as defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State.”<sup>203</sup> The Statement thus explains:

An act defined in article 2 committed by a non-State actor acting without the authorization, support or acquiescence of the State falls under article 3 of the Convention in either of the following circumstances:

- a) It was perpetrated in the context of a non-international armed conflict, as defined in international humanitarian law;
- b) It was perpetrated by a non-State actor exercising effective control and/or government-like functions over a territory.

Other acts defined in article 2 falling within the scope of article 3 but not perpetrated in the above circumstances are generally characterized as “kidnapping” or “abduction”, or as appropriate under domestic law.<sup>204</sup>

This distinction is merely rhetoric, however, as all acts under Article 3 trigger the same state obligations “to take appropriate measures to investigate” and “to bring those responsible to justice. As a corollary, states have an obligation to search for disappeared persons in accordance with the ‘Guiding Principles for the Search for Disappeared Persons’ adopted by the Committee.”<sup>205</sup>

The Statement proceeds to explain that states parties must report on all disappearances attributable to non-state actors falling within the scope of Articles 3 and 5, and must report on the fulfilment of their obligations under those Articles.<sup>206</sup> The Statement further explains that the CED may register cases falling under Articles 3 and 5 and request a state to take all reasonable measures to search for and locate the person with urgency;<sup>207</sup> receive communications alleging that a state party has violated its obligations under Articles 3 and 5 with respect to disappearances allegedly committed by non-state actors;<sup>208</sup> conduct state visits if it receives reliable information that a state party is violating its obligations with respect to disappearances falling within the

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The cumulative effect of these rules is that the phenomenon of “enforced disappearance” is prohibited by international humanitarian law. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 340 (2012).

202. Statement, *supra* note 3, ¶¶18–19.

203. *Id.* ¶ 20.

204. *Id.* ¶¶ 18–19.

205. *Id.* ¶ 20. See also generally CED, *supra* note 18.

206. Statement, *supra* note 3, ¶ 23.

207. *Id.* ¶ 24.

208. *Id.* ¶ 25.

scope of Article 3 and 5;<sup>209</sup> and bring a widespread or systematic practice of enforced disappearances under Article 5 to the attention of the U.N. General Assembly.<sup>210</sup> By so clarifying, the Statement seems to recognize that a rigid and inflexible division between Article 2 on the one hand, and Articles 3 and 5 on the other, had become increasingly problematic and should no longer be sustained. From the standpoint of victims and survivors seeking truth and justice, these are positive developments.

However, the CED has still perpetuated a gradation of regimes. In cases of enforced disappearances as a crime against humanity committed by non-state actors under Article 5, the victims will benefit from Articles 16 to 24, including reparations, thus accessing the same regime as victims of enforced disappearances committed under Article 2.<sup>211</sup> In other cases of enforced disappearances perpetrated by non-state actors without the authorization, support, or acquiescence of the state under Article 3—those committed by non-state actors in situations of internal armed conflict or by non-state actors exercising effective or territorial control, as well as victims of abductions or kidnapping—victims may not benefit from Articles 16 to 24.<sup>212</sup> Moreover, it is possible that only enforced disappearances committed in the context of Article 2 will trigger state responsibility, as the Statement does not explicitly clarify whether this responsibility is incurred under Articles 3 and 5. The Statement could be read to suggest, with its extended discussion of procedural consequences in Section VI, that state responsibility for enforced disappearances is triggered by non-state actors acting without state authorization, support, or acquiescence in contexts of widespread or systematic attacks constituting crimes against humanity, non-international armed conflicts, and when non-state actors exercise effective control or government-like functions. Yet the Statement could have been clearer in this respect by decisively dismantling any hierarchy of victims under the Convention.

#### IV. CONCLUSION

The ongoing crisis of enforced disappearances in Mexico vividly illustrates the current challenges that confront victims seeking truth and justice. In contrast to prior abuses perpetrated by authoritarian governments in Latin America to repress political opponents, enforced disappearances in Mexico now occur in a context where drug cartels and organized criminal groups are the primary actors, often in collusion with the state, thus blurring the line between enforced disappearances committed by the state and those committed by non-state actors. In addition, insufficient investigative and forensic capacity, along with the state's unwillingness to act and its obstruction of investigations

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209. *Id.* ¶ 26.

210. *Id.* ¶ 27.

211. *Id.* ¶ 21.

212. *See id.* ¶ 20.

and prosecutions to shield perpetrators from justice, have combined to create a culture of structural impunity.

As enforced disappearances and impunity have escalated in Mexico, many family members of the disappeared have evolved from victims and survivors into *buscadoras* defending their rights to truth and justice. By organizing into collectives and searching for their loved ones, they have created a social movement that makes visible the magnitude of enforced disappearances. The collectives also play a crucial role in amassing evidence, including through the identification of mass graves.

The CED's Statement is an important acknowledgment of this new reality of enforced disappearances. The Statement recognizes and responds to the evolution of this phenomenon over the last twenty years, incorporating developments in international law since the Convention was drafted. It seeks to encompass a theory of attribution of state responsibility for enforced disappearances committed by non-state actors through, on one side, harmonization with international criminal law and international humanitarian law and, on the other side, harmonization with the case law of the Inter-American and European human rights systems. Notably, the consideration of international criminal law and international humanitarian law goes beyond routine harmonization, which is usually contained within regional and international human rights bodies. In this sense, the Statement represents a rather unique development and is all the more consequential.

Crucially, the Statement recognizes that non-state actors can commit enforced disappearances even when there is no link to the state. Such enforced disappearances may happen in situations of internal armed conflict, where non-state actors commit enforced disappearances as crimes against humanity, or where non-state actors exercise effective control or government-like functions over a territory. The Statement thus continues along a path that international human rights law has adopted for quite some time by recognizing that non-state actors—whether transnational corporations, terrorist groups, or organized criminal associations—can themselves be the authors of human rights violations. From the standpoint of victims, the Statement's understanding of the role of non-state actors, as well as its awareness that structural impunity can amount to acquiescence, is a critical development. This approach should advance truth, remedies, and accountability before the CED and also domestically, by allowing victims to use the Statement's framework to advocate for public policy changes in their own legal systems.

Although laudable in these respects, the Statement is also limited and conservative in other ways. While the CED seems to acknowledge that a rigid and inflexible division between Article 2 versus Articles 3 and 5 has become increasingly problematic and should no longer be sustained, it unfortunately appears to maintain a hierarchy of victims. The Statement's framework suggests that victims of enforced disappearances committed by non-state actors in situations of internal armed conflict or by non-state actors exercising territorial

control, as well as victims of abductions or kidnapping, cannot fully benefit from the Convention's protections and remedies, including reparations.

As the CED begins to implement its new approach to non-state actors, it should ensure the wide dissemination of the Statement so human rights organizations and victims' collectives will understand the framework in which the CED now operates. The CED should also more formally recognize the crucial work of victims' collectives in investigating and documenting enforced disappearances. For example, it should consider hearing direct testimony from victims and survivors when security allows, including evidence related to the search for mass graves and the actions of prosecutors and other state authorities. The Statement alone will be useful to victims and survivors because, in contexts like Mexico, it can be exceedingly difficult to demonstrate the link with the state even when it does exist. However, creating a space for victims and survivors to speak directly to the CED would further aid in its decision-making process, and could itself represent a meaningful acknowledgment of past abuse.

