# WHO SHALL BEAR THIS BURDEN? USING BURDEN-SHIFTING TO DISRUPT IMPUNITY FOR THE SYSTEMATIC USE OF ENFORCED DISAPPEARANCE

Michael Weaver*

ABSTRACT

Impunity remains a defining feature in States that have systematically perpetrated or tolerated enforced disappearances. Though international judicial bodies such as the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR)—as well as quasi-adjudicatory bodies such as the Human Rights Committee (HRC)—have made some progress in holding States themselves accountable for grave human rights abuses and international crimes, they have had very little success in prompting domestic investigations or prosecutions. The following Note proposes that international judicial and quasi-judicial bodies adopt a novel burden-shifting framework derived from the jurisprudence of the HRC, IACtHR, and ECtHR that creates stronger incentives for States to fully investigate the fates of disappeared persons. Under this framework, international institutions should first determine whether domestic authorities have failed to conduct rigorous investigations to establish a systematic pattern of disappearances in a defendant State. Once an institution has determined that there is a systemic practice of enforced disappearance, that State will bear the burden of proving that it was not involved in every alleged disappearance brought to its attention—a burden it can only meet by conducting an adequate and effective

* J.D., Columbia Law School, 2025. I wish to dedicate this piece to the members of the Saturday Mothers/People, who inspired this Article, as well as the thousands of likeminded people around the world who are fighting for justice for victims of enforced disappearance. I would like to thank my Note Advisor, Kelsey Jost-Creegan, for her invaluable feedback throughout the writing process. I would also like to thank Kai Salem, Skylar Gleason, and all the *HRLR* Staffers who contributed thoughtful edits to improve this work. And finally, I would like to thank all my family and friends who had to listen to me talk about enforced disappearances for many, many months.

investigation. Ideally, all other complainants will then be able to establish a *prima facie* case of State responsibility by making a minimal showing of evidence demonstrating that they or a loved one were subjected to an enforced disappearance. In so doing, the proposed framework seeks to leverage a deliberately overinclusive framework to exert maximal reputational pressure on States and thereby overcome powerful countervailing domestic political pressures.

TABLE OF CONTENTS

ABSTRACT .....823

TABLE OF CONTENTS.....825

INTRODUCTION.....826

I. THE ENDURING PROBLEM OF ENFORCED DISAPPEARANCES .....828

A. The Scope of the Problem .....828
B. Enforced Disappearance Under International Law.....834

II. UNRAVELING THE PUZZLE OF IMPUNITY.....842

A. Causes of Impunity for Enforced Disappearances. .....843
1. Failure to Investigate..... 844
2. Lack of Political Will and Impunity ..... 854
B. Successes of the HRC, IACtHR, and ECtHR .....858
1. Explicit and Implicit Burden-Shifting Frameworks..... 859
2. The Use of Circumstantial Evidence and Presumptions.... 863
3. Judgments Against States..... 872
C. Shortcoming of Accountability Under International Human Rights Law .....876
1. Accessibility and Admissibility Criteria ..... 877
2. Prolonged Proceedings ..... 881
3. (Non-)Compliance..... 885

III. SHIFTING THE BURDEN TO COUNTERACT IMPUNITY.....894

A. Support for the Proposed Burden-Shifting Framework.....895
1. Step One: Establishing a Systematic Pattern of Disappearances Using Evidence from Domestic Investigations..... 895
2. Step Two: Shift the Burden for All Relevant Cases..... 900
3. Step Three: Rely on Special Rapporteurs to Improve Administrability..... 905
B. Combining Best Practices in Burden-Shifting.....907

CONCLUSION: A CASE FOR OVER-INCLUSIVITY.....908

## INTRODUCTION

Enforced disappearance is among the most egregious human rights violations recognized under international law, constituting a multifaceted offense to human rights, international legal norms, and human dignity.[1] The practice has been universally denounced by States, non-government organizations (NGOs), and international institutions.[2] Consequently, enforced disappearance has been expressly prohibited by an ever-growing body of international law[3] and subjected to increasingly intense scrutiny by international judicial and quasi-judicial bodies.[4] Yet States continue to use enforced

1. *See, e.g.*, Kirsten Anderson, *How Effective Is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?*, 7 MELBOURNE J. INT'L L. 245, 246 (2006) ("Enforced disappearance has been labelled 'a particularly heinous violation of human rights' and 'one of the gravest crimes that can be committed against a human being.'"); Cristina Genovese & H. van der Wilt, *Fighting Impunity of Enforced Disappearances Through a Regional Model*, 6 AMSTERDAM L.F. 4, 4 (2014) ("Enforced disappearance has been labelled as one of the gravest violation[s] of human rights.").

2. *See, e.g.*, Jeremy Sarkin, *Why the Prohibition on Enforced Disappearances Has Attained* Jus Cogens *Status in International Law*, 81 NORDIC J. INT'L L. 537, 573–75 (2012) [hereinafter Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*] (noting condemnation from many groups and international organizations including the World Conference on Human Rights, the U.N. General Assembly, the International Committee of the Red Cross, and the Council of Europe); FREDERICO ANDREU-GUZMAN, INT'L COMM'N JURISTS, ENFORCED DISAPPEARANCE AND EXTRAJUDICIAL EXECUTION: INVESTIGATION AND SANCTION 5–8 (2015) (discussing various institutional responses to enforced disappearances beginning in the 1960s); G.A. Res. 47/133, Declaration on the Protection of All Persons from Enforced Disappearance, pmbl. (Dec. 18, 1992) ("Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms . . . .").

3. *See, e.g.*, Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 539 ("Over the last few decades much has been done in international law to address the problem of enforced disappearance. Today, there is a great deal of international law to address it."); Genovese & van der Wilt, *supra* note 1, at 9–13 (evaluating current efforts to criminalize enforced disappearance via international law); ANDREU-GUZMAN, *supra* note 2, at 12–16 (discussing the various international instruments developed to combat enforced disappearance).

4. *See, e.g.*, Genovese & van der Wilt, *supra* note 1, at 4–5 (noting that enforced disappearance "has been extensively dealt with in the international human rights system, holding states responsible for the commission of the violating acts" and awarding compensation and reparations); Ines Osman, Opinion, *There Must Be Truth and Justice for Algeria's Disappeared*, AL JAZEERA

disappearance with alarming frequency.[5] The U.N. Working Group on Enforced or Involuntary Disappearances (WGEID) reported 47,774 unresolved cases of enforced disappearance in at least ninety-seven States as of 2023,[6] though the actual number of disappearances is almost certainly much higher.[7] And in virtually all States that currently practice or have recently practiced enforced disappearance, impunity remains the norm.[8]

This Note proposes a novel burden-shifting framework to facilitate international judicial and quasi-judicial bodies' efforts to hold perpetrators of enforced disappearances accountable. Specifically, it proposes that international human rights institutions such as the Human Rights Committee (HRC), the Inter-American Court of Human Rights (IACtHR), and the European Court of Human Rights (ECtHR) should first investigate any State alleged to have

---

(Mar. 3, 2021), https://www.aljazeera.com/opinions/2021/3/3/there-must-be-truth-and-justice-for-algerias-disappeared [https://perma.cc/SK8G-RHGR] (noting that the Human Rights Committee had issued forty-four rulings against Algeria regarding disappearance in the country between 1992 and 2002).

5. *See* DIANE WEBBER & KHAOLA SHERANI, CTR. FOR STRATEGIC & INT'L STUD., ADDRESSING THE CONTINUING PHENOMENON OF ENFORCED DISAPPEARANCES 2 (2022) ("The problem [of enforced disappearance] persists today, occurring at a large scale in many countries in the context of both armed conflicts and repressive, unaccountable regimes."); Jeremy Sarkin, *The Need to Deal with All Missing Persons Including Those Missing as a Result of Armed Conflict, Disasters, Migration, Human Trafficking, and Human Rights Violations (Including Enforced Disappearance) in International and Domestic Law and Process*, 8 INTER-AM. & EUR. HUM. RTS. J. 112, 119 (2016) [hereinafter Sarkin, *The Need to Deal with All Missing Persons*] ("Enforced disappearances are however not only an issue of the past.").

6. Rep. of Working Grp. on Enforced or Involuntary Disappearances, ¶ 6, U.N. Doc. A/HRC/54/22 (2023) [hereinafter WGEID 2023 Report].

7. *See, e.g.*, Webber & Sherani, *supra* note 5, at 1–2 (noting that experts estimate over 102,000 disappearances in Syria alone between 2011 and 2021, as well as 27,000 to 57,000 in China); Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 538 ("Information collected seems to indicate that over the last 50 years or so, possibly a million people have been disappeared around the world. The numbers could be higher because of under-reporting.").

8. *See* Working Grp. on Enforced or Involuntary Disappearances, *Standards and Public Policies for an Effective Investigation of Enforced Disappearances*, ¶ 93, U.N. Doc. A/HRC/45/13/Add.3 (Aug. 7, 2020) [hereinafter WGEID, *Effective Investigation of Enforced Disappearances*] ("Throughout its history, the Working Group has drawn the attention of the international community to impunity as a distinctive trait of enforced disappearances."); *see also* discussion *infra* Section II.A.0 (discussing causes of impunity for enforced disappearance).

perpetrated or acquiesced to a pattern of enforced disappearances. The investigation should focus on evidence of a systematic failure to investigate disappearances and prosecute perpetrators. Then, if an international institution determines that a State has perpetrated or tolerated the systematic practice of disappearances, that institution should explicitly impose the burden of proof on that State to affirmatively demonstrate that it is *not* responsible for any disappearances occurring within its territory by conducting an adequate and effective investigation. Ideally, this presumption should be applied to all complaints alleging disappearance in a State found to have conducted or acquiesced to the systematic use of enforced disappearance.

This Note proceeds in three parts. Part I provides an overview of the phenomenon of enforced disappearances and the international legal mechanisms developed to hold perpetrators accountable. Part II begins by analyzing two common causes of impunity—defective investigations and a lack of political will. It then evaluates the strengths and weaknesses of the existing international human rights jurisprudence used to hold States accountable. Finally, Part III finds support for the proposed burden-shifting framework in the jurisprudence of the HRC, IACtHR, and ECtHR. It concludes with a case for expanding the framework to apply a presumption of State responsibility to all alleged disappearances.

## I. THE ENDURING PROBLEM OF ENFORCED DISAPPEARANCES

### A. The Scope of the Problem

Before one can understand the urgency of developing novel legal standards to counteract enforced disappearances, it is important to understand the nature of the phenomenon. Under international law, enforced disappearance is composed of four elements: (1) the deprivation of an individual's liberty, (2) which places the individual outside the protection of the law, (3) that is perpetrated by state agents, or by others acting with the State's support or acquiescence (4) who then deny the detention or refuse to acknowledge the fate or whereabouts of the detainee.[9] This definition encompasses a wide

9. Jeremy Sarkin, *Putting in Place Processes and Mechanisms to Prevent and Eradicate Enforced Disappearances Around the World*, 38 S. AFR. Y.B. INT'L L. 20, 23 (2013) [hereinafter Sarkin, *Processes and Mechanisms*]; *see also* Working Grp. on Enforced or Involuntary Disappearances, *Best Practices on Enforced Disappearances in Domestic Criminal Legislation*, ¶ 21, U.N. Doc.

variety of practices, including extraordinary rendition, the use of "black sites" or secret prisons, and the improper registration of detainees in the context of armed conflict.[10] However, in practice, it appears that a significant proportion of enforced disappearances are perpetrated by repressive regimes who adopt a State policy of systematically disappearing, torturing, and executing real or imagined political dissidents.[11] Given its role in facilitating other serious crimes against humanity,[12] the United Nations and legal scholars have construed enforced disappearance as being among the most serious crimes under international law, particularly when it is perpetrated in a systematic way.[13]

Systematic disappearances have become an alarmingly common form of State repression over the past six decades.[14] While

---

A/HRC/16/48/Add.3 (Dec. 28, 2010) [hereinafter WGEID, *Best Practices in Domestic Criminal Legislation*] (defining enforced disappearance as (1) depriving a person of liberty against their will, (2) involving the authority of the State or at least its acquiescence, and (3) refusing to acknowledge the deprivation of liberty or concealing the fate or whereabouts of that person).

10. Sarkin, *Processes and Mechanisms*, *supra* note 9, at 20–21.

11. *See, e.g.*, WEBBER & SHERANI, *supra* note 5, at 2 (noting that enforced disappearances today occur "at a large scale in many countries in the context of both armed conflicts and repressive, unaccountable regimes" such as Syria and China); *What We Do: Enforced Disappearances*, AMNESTY INT'L [hereinafter Amnesty Int'l, *Enforced Disappearances*], https://www.amnesty.org/en/what-we-do/enforced-disappearances [https://perma.cc/K5PT-ZFZU] (noting that enforced disappearances are commonly employed "by governments trying to repress political opponents"); Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 538 (noting that victims of enforced disappearance are frequently "tortured and killed and their bodies disposed of in clandestine locations"); La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 80(4) (Nov. 29, 2006) (noting that 65% to 75% of forcibly disappeared persons in Peru between 1988 and 1993 were killed).

12. Notably, the Rome Statute defines murder, torture, and unlawful imprisonment as crimes against humanity "when committed as part of a widespread or systematic attack directed against any civilian population . . . ." Rome Statute of the International Criminal Court art. 7, ¶ 1(a), (e)–(f) *opened for signature* July 17, 1998, 2187 U.N.T.S. 3, 93 (entered into force July, 1, 2002) [hereinafter Rome Statute].

13. *See, e.g.*, G.A. Res. 47/133, *supra* note 2, pmbl. ("[I]t is none the less important to devise an instrument which characterizes all acts of enforced disappearance of persons as *very serious offences* . . . .") (emphasis added); Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 538 (noting that enforced disappearance "is one of the worst human rights violations that can be committed").

14. *See, e.g.*, Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 538 (noting that as many as a

disappearances are not a new phenomenon, the systematic practice of enforced disappearance was not recorded until the twentieth century.[15] Many scholars point to the Nazis as being the first regime to adopt a strategy of systematically disappearing perceived dissidents,[16] though they were soon followed by the military dictatorships of Latin America starting in the late 1960s.[17] The practice has since spread to all corners of the globe,[18] becoming a favorite tactic of "repressive, unaccountable regimes" and States embroiled in civil conflict.[19] Many authoritarian governments use

million people had been forcibly disappeared since the 1960s); WEBBER & SHERANI, *supra* note 5, at 1–2 (noting that disappearances continue to be used by a variety of States around the world).

15. Sarkin, *Processes and Mechanisms*, *supra* note 9, at 24–25; *see also* ÖZGÜR SEVGİ GÖRAL ET AL., HAFIZA MERKEZİ, THE UNSPOKEN TRUTH: ENFORCED DISAPPEARANCES 14 (2013), https://dealingwiththepast.org/wp-content/uploads/2015/03/Unspoken_Truth-Hafiza_Merkezi_2013.pdf [https://perma.cc/MT4H-DRF8] (noting that disappearances were perpetrated during the late Ottoman Empire and early Republic period of modern Türkiye but that they did not become official state policy until the 1980s).

16. *See, e.g.*, Ariel Dulitzky, *The Latin-American Flavor of Enforced Disappearances*, 19 CHI. J. INT'L L. 423, 428 (2019) ("Many consider Adolf Hitler's 'Night and Fog' (*Nacht und Nebel*) Decree . . . as the origin of the modern use of enforced disappearance."); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 25–26 (discussing Hitler's 'Night and Fog Decree' as the first systematic use of enforced disappearances); GÖRAL ET AL., *supra* note 15, at 11 ("The first known implementation of the use of the strategy of enforced disappearance is the Night and Fog Directive (Nacht und Nebel Erlass) put into force in 1941 by the Nazi Regime."). *But see* Genovese & van der Wilt, *supra* note 1, at 8 (noting that though German Field-Marshal Keitel was arguably the first person condemned for acts amounting to enforced disappearance, he was actually convicted under the laws of war).

17. Sarkin, *Processes and Mechanisms*, *supra* note 9, at 26; *see also* Dulitzky, *supra* note 16, at 425 (noting that "the issue of the disappearance of persons generated neither international concern nor international judicial response" prior to the systematic use of enforced disappearance by Latin American governments); Genovese & van der Wilt, *supra* note 1, at 8 ("It was the widespread scale of disappearances in Latin American during the military dictatorships that shook the world regarding the commission of these atrocities.").

18. Anderson, *supra* note 1, at 246–47; *see also* Sarkin, *Processes and Mechanisms*, *supra* note 9, at 20 ("The statistics reveal a disturbing global phenomenon of governments around the world disregarding human rights norms to oppress societal opposition.").

19. WEBBER & SHERANI, *supra* note 5, at 2; *see also* GÖRAL ET AL., *supra* note 15, at 12 ("[E]nforced disappearance has become a systematic method of oppression used against separatist and dissident forces in regions where international conflicts and civil war is rife."); Amnesty Int'l, *Enforced Disappearances*, *supra* note 11 (noting that enforced disappearances "are commonly carried out in internal conflicts, particularly by governments trying to

campaigns of enforced disappearance to terrorize communities and political groups whom they perceive to be enemies or dissidents.[20] Yet even democratic regimes have more recently begun to employ disappearances as part of the global "War on Terror."[21]

While it is difficult to know the full extent of the problem, available evidence suggests that a significant number of States continue to perpetrate or tolerate the widespread and systematic use of enforced disappearance.[22] Between 1980 and 2023, the WGEID received communications alleging 60,703 disappearances in 112 States.[23] However, this data almost certainly represents only a tiny fraction of the actual number of disappearances that occurred during this time.[24] For example, available estimates suggest that governments and non-state actors have perpetrated 60,000 to 100,000 disappearances in Sri Lanka since 1980; 102,000 disappearances in Syria since 2011; and 27,000 to 57,000 disappearances in China since

---

repress political opponents or by armed opposition groups."); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 24 ("Enforced disappearances often occur during political unrest and often form part of state policy.").

20. Paloma Aguilar & Iosif Kovras, *Explaining Disappearances as a Tool of Political Terror*, 40 INT'L POL. SCI. REV. 437, 437–38 (2019); *see also* Dulitzky, *supra* note 16, at 10 ("Governments [in Latin America] saw most of the victims as opponents and used disappearances as 'the highest stage of repression.'"); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 24 (noting that enforced disappearance are often a state policy designed "to spread general fear, terror, intimidation and uncertainty through the society in question"); Anderson, *supra* note 1, at 245 (noting that enforced disappearance has been used "to deliberately spread terror through the population and to suppress dissent" and that it has at times been "employed extensively as a 'virulent form of state terrorism'").

21. Sarkin, *Processes and Mechanisms*, *supra* note 9, at 21; *see generally* U.N. Hum. Rts. Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, ¶¶ 98–164, U.N. Doc. A/HRC/13/42 (May 20, 2010) [hereinafter *Joint Study on Secret Detention*] (describing use of secret detention—which amounts to a *per se* enforced disappearance—by the United States during the War on Terror).

22. *See, e.g.*, Sarkin, *Processes and Mechanisms*, *supra* note 9, at 26 ("The practice [of enforced disappearance] has occurred in at least ninety countries in all regions of the world.").

23. WGEID 2023 Report, *supra* note 6, ¶ 5. Note that WGEID had officially closed, clarified, or discontinued a total of 12,929 cases during this time, leaving 47,774 cases in ninety-seven States. *Id.*

24. *See id.* ¶ 110 (noting that many families and organizations are unable or unwilling to report disappearances for fear of reprisal); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 20 ("While it is difficult to assess how many people have been disappeared in the recent past, the numbers run into hundreds of thousands.").

2013.[25] In other words, the lowest estimates for disappearances in these three countries alone dwarf the WGEID's estimates for all countries combined. There is also evidence that enforced disappearances have been systematically employed in several recent conflicts, including the wars in Tigray,[26] Ukraine,[27] and Myanmar.[28]

The problem of enforced disappearance poses a unique challenge for international legal institutions—one they have so far failed to overcome. State practice of enforced disappearance is characterized by widespread impunity for perpetrators,[29] resulting in no small part from the fact that domestic courts have generally been unwilling or unable to prosecute those responsible.[30] Consequently,

---

25. WEBBER & SHERANI, *supra* note 5, at 1–2.

26. *See* Int'l Comm'n of Hum. Rts. Experts on Ethiopia, *Comprehensive Investigative Findings and Legal Determinations*, ¶ 480, U.N. Doc. A/HRC/54/CRP.3 (Oct. 13, 2023) (concluding that Ethiopian forces and their allies were guilty of numerous crimes against humanity, including the crime of systematically using enforced disappearance against civilian populations).

27. *See* Hum. Rts. Watch, *Russia: Forcible Disappearances of Ukrainian Civilians* (July 14, 2022), https://www.hrw.org/news/2022/07/14/russia-forcible-disappearances-ukrainian-civilians (documenting numerous cases of enforced disappearance by Russian forces in Ukraine); U.N. OFFICE OF HIGH COMM'R FOR HUM. RTS., DETENTION OF CIVILIANS IN THE CONTEXT OF THE ARMED ATTACK BY THE RUSSIAN FEDERATION AGAINST UKRAINE 1–3 (June 27, 2023), https://www.ohchr.org/en/documents/country-reports/detention-civilians-context-armed-attack-russian-federation-against [https://perma.cc/Z7X8-SK97] (noting that OHCHR had documented hundreds of cases of arbitrary detention and enforced disappearance by both Russian and Ukrainian forces).

28. *See* KAREN HUM. RTS. GRP., IN THE DARK: THE CRIME OF ENFORCED DISAPPEARANCE AND ITS IMPACT ON THE RURAL COMMUNITIES OF SOUTHEAST BURMA SINCE THE 2021 COUP 8, 18–35 (Nov. 2023), https://www.khrg.org/sites/khrg.org/files/report-docs/in_the_dark_english_full_version.pdf [https://perma.cc/LL8Q-GYLK] (documenting hundreds of enforced disappearances and concluding that enforced disappearances have been systematically committed against villagers in southeast Burma); *Myanmar: Hundreds Forcibly Disappeared*, HUM. RTS. WATCH (Apr. 2, 2021), https://www.hrw.org/news/2021/04/02/myanmar-hundreds-forcibly-disappeared [https://perma.cc/F7QC-6BM9] (concluding that Myanmar's military junta had forcibly disappeared hundreds of people since seizing power two months before).

29. WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶ 93; *see also* Sarkin, *Processes and Mechanisms*, *supra* note 9, at 24 ("One of the greatest problems of enforced disappearances is that many perpetrators are never brought to book and enjoy impunity."); Anderson, *supra* note 1, at 246 ("[I]mpunity is perhaps the most significant factor contributing to the phenomenon of enforced disappearance.").

30. *See, e.g.*, Sarkin, *Processes and Mechanisms*, *supra* note 9, at 37–38 (noting that states bear the primary responsibility to prevent and prosecute

since the 1980s, international institutions such as the United Nations, the IACtHR, and the ECtHR have devoted significant attention to the issue of enforced disappearances.[31] Yet despite decades of concerted efforts by international institutions and NGOs,[32] the practice of enforced disappearances remains widespread,[33] and impunity remains the norm.[34] Thus, there remains an urgent need to develop better legal standards under international human rights law to help prevent and punish this particularly gruesome crime.

---

enforced disappearances but that "few who perpetrate enforced disappearances and other serious international crimes are brought to book); GÖKÇEN ALPKAYA ET AL., HAFIZA MERKEZİ, ENFORCED DISAPPEARANCES AND THE CONDUCT OF THE JUDICIARY 30–31 (2013), https://hakikatadalethafiza.org/en/kaynak/enforced-disappearances-and-the-conduct-of-the-judiciary [https://perma.cc/JH26-5KMJ] (noting that impunity is to norm for perpetrators of enforced disappearances in Türkiye despite efforts to hold them accountable in domestic courts).

31. *See* Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 539–40 (discussing various efforts by international institutions to address enforced disappearance); Dulitzky, *supra* note 16, at 426 (noting how international responses to enforced disappearances were prompted by developments in Latin America during the 1970s and 1980s); *see also* discussion *infra* Section II.A.0 (discussing the causes of impunity for enforced disappearance).

32. *See* discussion *infra* Section II.0 (discussing international efforts to end impunity for enforced disappearances).

33. *See, e.g.*, WEBBER & SHERANI, *supra* note 5, at 1–2 (noting that disappearances have continued in many countries in the context of both civil war and oppressive authoritarian regimes); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 20 ("The on-going and large-scale practice of enforced disappearance occurs despite the efforts of families of disappeared persons, NGOs, states, regional human rights systems, the UN and others to address the scourge of disappearances."); Sarkin, *The Need to Deal With All Missing Persons*, *supra* note 5, at 119 (noting that the U.N. Inquiry on North Korea reported about 250,000 disappearances as of 2014 as well as that during Sri Lanka's civil war "considerable numbers of people disappeared").

34. *See* WGEID 2023 Report, *supra* note 6, ¶ 112 ("The Working Group is also concerned that, unfortunately, impunity for enforced disappearances remains rampant . . . ."); WEBBER & SHERANI, *supra* note 5, at 5 ("Despite the existence of an international legal framework, the lack of effective accountability mechanisms prevents meaningful deterrence for states that carry out enforced disappearances.").

## B. Enforced Disappearance Under International Law

Enforced disappearance is subject to an absolute prohibition under international law,[35] meaning States may never justify the use of enforced disappearance under any circumstances.[36] This prohibition is formally codified in numerous treaties, including the Inter-American Convention on the Forced Disappearance of Persons (IACFDP),[37] the Rome Statute of the International Criminal Court,[38] and, most recently, the International Convention on the Protection of All Persons Against Enforced Disappearance (ICED).[39] Moreover, it is well-established by both treaty and custom that the systematic practice of enforced disappearance amounts to a crime against humanity.[40] In fact, the prohibition of enforced disappearance is so universally accepted that many scholars and international judicial institutions have concluded that the prohibition of enforced disappearance has attained the status of a *jus cogens* norm[41]—

35. *See* WGEID 2023 Report, *supra* note 6, ¶ 111 (stressing "once again the absolute nature of the prohibition of enforced disappearances" that may not be overcome under any circumstances).

36. *See* International Convention for the Protection of All Persons from Enforced Disappearance art. 1, ¶ 2, *opened for signature* Feb. 6, 2007, 2716 U.N.T.S. 3, 56 [hereinafter International Convention on Enforced Disappearance] ("No exceptional circumstances whatsoever . . . may be invoked as a justification for enforced disappearance.").

37. *See* Inter-American Convention on Forced Disappearance of Persons art. I, *adopted* June 9, 1994, 33 I.L.M. 1529, 1530 [hereinafter IACFDP] (requiring States Parties "not to practice, permit, or tolerate the force disappearance of persons" and to punish "those persons who commit or attempt to commit the crime of enforced disappearance of persons").

38. Rome Statute art. 7(1)(i), *supra* note 12, 2187 U.N.T.S. at 93. The Rome Statute does not address all acts of enforced disappearance but rather defines enforced disappearance as a crime against humanity "when committed as part of a widespread or systematic attack directed against any civilian population." *Id.* art 7(1)(i). The Rome Statute also grants jurisdiction to the International Criminal Court to prosecute individual perpetrators of crimes against humanity. *Id*. art. 5(1)(b).

39. International Convention on Enforced Disappearance art. 1, *supra* note 36, 2716 U.N.T.S. at 56.

40. *Id.* art. 5, 2716 U.N.T.S. at 57; Rome Statute art. 7(1)(i), *supra* note 12, 2187 U.N.T.S. at 93; *see also* G.A. Res. 47/133, *supra* note 2, pmbl. ("Considering . . . that the systematic practice of such acts is of the nature of a crime against humanity[.]"); Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 560–61 (discussing the evolution of enforced disappearance as a crime against humanity under international law).

41. *See, e.g.*, Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 541 (arguing that "the prohibition of

meaning it constitutes "the highest, or more essential, or the most compelling, international law."[42] This status renders the practice illegal under all circumstances even for States that have never signed a treaty explicitly outlawing enforced disappearance.[43]

International human rights law has sought to enforce this prohibition through two distinct mechanisms. The first approach requires States to adopt and enforce criminal penalties in their domestic law.[44] For example, the ICED and the IACFDP both require States Parties to adopt legislation making enforced disappearance an autonomous crime so as to facilitate criminal prosecutions.[45] This somewhat paradoxical approach addresses the problem of individual criminal liability indirectly by imposing positive obligations on States

---

enforced disappearance can today be classified as having the status of *jus cogens*."); ANDREU-GUZMAN, *supra* note 2, at 20, 22–23, 37 (noting that the IACtHR and the Supreme Courts of Chile and Colombia have concluded that prohibition against enforced disappearance has attained *jus cogens* status); Goiburú v. Paraguay, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 84 (Sept. 22, 2006) ("[T]he Court finds that . . . faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*."); WGEID 2023 Report, *supra* note 6, ¶ 111 (asserting that the prohibition against enforced disappearance "has indeed attained the status of *jus cogens*").

42. Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 541.

43. *See id.* (noting that *jus cogens* norms are "meant to be complied with by states, more than any other international law or principle" because they "hold the uppermost hierarchical point" within international law, even for states that have not expressly agreed to them).

44. *See, e.g.*, International Convention on Enforced Disappearance arts. 3–4, *supra* note 36, 2716 U.N.T.S. at 57 (providing that "[e]ach State Party shall take appropriate measures to investigate [enforced disappearances] . . . and to bring those responsible to justice" and mandating that States "shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law").

45. *See* International Convention on Enforced Disappearance art. 4, *supra* note 36, 2716 U.N.T.S. at 57 (requiring states to "take the necessary measures to ensure that enforced disappearance constitutes an offence under [their] criminal law"); IACFDP art. III, *supra* note 37, 33 I.L.M. at 1530 ("The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity.").

to prosecute perpetrators of international crimes,[46] in recognition of the well-established principle that domestic courts should be the primary fora for criminal prosecutions.[47] The goal is to empower and enable States to overcome the unique obstacles inherent in prosecuting individual perpetrators of enforced disappearances[48]—namely, the characteristic lack of physical evidence[49] and the fact that proceedings often do not commence until after the statutes of limitation for other related crimes (e.g., torture) have expired.[50]

---

46. *See, e.g.*, Anderson, *supra* note 1, at 275 (arguing that the ICED's "drafters intended to affirm the primary role of individual states to prosecute alleged perpetrators for acts of enforced disappearance").

47. *See* Sarkin, *Processes and Mechanisms*, *supra* note 9, at 38 (asserting that majority of enforced disappearances "ought to be prosecuted before domestic courts"); Genovese & van der Wilt, *supra* note 1, at 9 ("National courts are often considered the most suitable fora to prosecute perpetrators . . . ."); Anderson, *supra* note 1, at 275 ("Prosecuting alleged perpetrators of enforced disappearance in the domestic jurisdiction in which the offence occurs is indeed preferable . . . ."). One notable exception to the general reliance upon domestic courts for criminal prosecution of individuals for enforced disappearance is the Rome Statute, which grants the International Criminal Court (ICC) jurisdiction to prosecute the systematic use of enforced disappearances when they rise to the level of a crime against humanity. *See* Rome Statute art. 7(1)(i), *supra* note 12, 2187 U.N.T.S. at 92–93 (enumerating systematic use of enforced disappearance against a civilian population as a crime against humanity over which the International Criminal Court retains jurisdiction). However, as of 2022, the ICC had yet to hear a single case concerning the systematic use of enforced disappearance. WEBBER & SHERANI, *supra* note 5, at 6.

48. *See* Mark S. Berlin & Geoff Dancy, *The Difference Law Makes: Domestic Atrocity Laws and Human Rights Prosecutions*, 51 L. & SOC'Y REV. 533, 560–61 (2017) (concluding that adopting dedicated atrocity laws can provide "legal resources to overcome or avoid formal legal obstacles that often hinder prosecutions"); Anderson, *supra* note 1, at 266–67 (asserting that ICED was designed to fill gaps in existing international law).

49. *See, e.g.*, Ophelia Claude, *A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights Jurisprudence*, 5 INTERCULTURAL HUM. RTS. L. REV. 407, 410 (2010) ("The very nature of making someone disappear implies that meticulous steps are undertaken by the government to erase any evidence of the disappearance."); WEBBER & SHERANI, *supra* note 5, at 4 (asserting that enforced disappearances "leave behind little evidence"); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 23 ("Perpetrators may withhold information or dispose of the victim's body in a way that ensures that his or her identity can never be established in order to escape reprisal . . . .").

50. *See, e.g.*, Naomi Roht-Arriaza, *After Amnesties Are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity*, 37 HUM. RTS. Q. 341, 342–43 (2015) (noting that Latin American countries had opened a large number of criminal proceedings into enforced disappearance and other crimes after many decades in which these cases were dismissed); Gabriella

So far, this approach of leveraging domestic legal systems to combat impunity has been only marginally successful. For one, these treaties necessarily rely on States to implement the relevant domestic legal reforms in good faith.[51] But more importantly, these treaties' substantive provisions do not have any binding effect on States that do not ratify them.[52] Since States that perpetrate enforced disappearances generally resist prosecuting their own agents,[53] these treaties have a limited reach.[54] Although the ICED has been ratified by seventy-two State Parties and signed by ninety-eight countries,[55] it

---

Citroni, *Consequences of the Lack of Criminalization of Enforced Disappearance at the Domestic Level: The Italian Experience*, 19 J. INT'L CRIM. JUST. 675, 688 (2021) (noting that most of the offenses leveraged against alleged perpetrators of enforced disappearance under the Italian Criminal Code were subject to short statutes of limitations and that consequently, "[w]hen it is not possible to convict for murder, the application of statutes of limitations usually leads to impunity"); ÖZGÜR SEVGI GÖRAL, ANY HOPES FOR TRUTH? A COMPARATIVE ANALYSIS OF ENFORCED DISAPPEARANCES AND THE MISSING IN THE MIDDLE EAST, NORTH AFRICA AND THE CAUCASUS 64–66 (2019), https://hakikatadalethafiza.org/en/publications/any-hopes-truth-comparative-analysis-enforced-disappearances-and-missing-middle-east [https://perma.cc/N9SN-D73R] (noting that domestic proceedings in Türkiye against alleged perpetrators of enforced disappearances committed during the early and mid-1990s did not commence until the late 2000s).

51. *See, e.g.*, IACFDP art. III, *supra* note 37, 33 I.L.M. at 1530 ("The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearances of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity."); WEBBER & SHERANI, *supra* note 5, at 5 (noting that the ICED "depends on state parties enacting legislation to criminalize enforced disappearances, investigate potential cases, and hold persons accountable"); Genovese & van der Wilt, *supra* note 1, at 9 ("[I]t must be recalled that the level of protection as promoted by the [ICED], as of every treaty regime, depends on the will of states.").

52. *See* IACFDP art. XVII, *supra* note 37, 33 I.L.M. at 1532 ("This Convention is subject to ratification."); International Convention on Enforced Disappearance art. 38, ¶ 2, *supra* note 36, 2716 U.N.T.S. at 72 ("This Convention is subject to ratification by all Member States of the United Nations.").

53. *See, e.g.*, Anderson, *supra* note 1, at 267 ("[E]xperience has shown that states are usually unwilling to prosecute acts of enforced disappearance carried out by members of state organisations."); *see also* discussion *infra* Section II.0 (discussing the ways in which States impede efforts to hold individual perpetrators of enforced disappearance accountable).

54. *See generally* WEBBER & SHERANI, *supra* note 5, at 5–6 (discussing the limitations of international legal mechanisms in cases of enforced disappearance).

55. *International Convention for the Protection of all Persons from Enforced Disappearance*, UNITED NATIONS TREATY COLLECTION [hereinafter *ICED Signatories*],

has yet to be ratified by many of the States in which most disappearances occur.[56] Of the nineteen countries identified as being "of particular concern" to the WGEID in 2023,[57] only three—Mexico, Sri Lanka, and Sudan—were State Parties to the ICED.[58] Similarly, only fifteen of the Organization of American States' thirty-four Member States have ratified the IACFDP.[59] However, neither El Salvador nor Nicaragua—both identified as "situations of particular concern" by WGEID in 2023[60]—have ratified the IACFDP as of this writing.[61] As a result, these types of treaty are generally unable to alter domestic legal regimes to address impunity for perpetrators of enforced disappearance in the States where it is most prolific and systematic.

The second approach involves using international human rights institutions to hold States themselves accountable for the systematic use of enforced disappearance. It is well-established that enforced disappearance represents a violation of numerous fundamental rights enshrined in U.N. and regional human rights treaties.[62] Individuals impacted by enforced disappearance are thus

---

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&clang=_en. [https://perma.cc/E8SB-CQMC?type=image].

56. *See, e.g.*, Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 539 ("Unfortunately, the 32 countries that have ratified the treaty [as of April 2012] do not represent those countries, with one exception (Mexico),where many new cases of enforced disappearances are occurring.").

57. In its 2023 report, WGEID issued "country-specific observations in relation to situations that are of particular concern" for Algeria, Bangladesh, Belarus, China, North Korea, Egypt, El Salvador, Iran, Libya, Mexico, Nicaragua, Pakistan, Russia, Saudi Arabia, Sri Lanka, Sudan, Syria, Uganda, and Yemen. WGEID 2023 Report, *supra* note 6, ¶¶ 57–108.

58. *ICED Signatories*, *supra* note 55. Uganda and Algeria both signed the ICED in February 2007, but neither has yet ratified the treaty. *Id.*

59. Dep't of Int'l L., *Inter-American Convention on the Forced Disappearance of Persons*, ORG. OF AM. STATES [hereinafter *IACFDP Signatories*], https://www.oas.org/juridico/english/sigs/a-60.html [https://perma.cc/K6Q5-6VAR].

60. WGEID 2023 Report, *supra* note 6, ¶¶ 57, 77–78, 87–89.

61. *IACFDP Signatories*, *supra* note 59. Note that Nicaragua has signed but never ratified the IACFDP. *Id.*

62. *See* Sarkin, *Processes and Mechanisms*, *supra* note 9, at 27 (noting that enforced disappearance "constitutes a *per se* violation of numerous human rights"); Anderson, *supra* note 1, at 252–53 (noting that enforced disappearance has been found to violate numerous human rights under the ICCPR and its regional equivalents). In fact, enforced disappearance violates virtually all major human rights treaties. For example, the practice has been found to violate the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the

empowered to seek remedial measures against *States* (as distinct from individuals) from international institutions such as the HRC or regional tribunals such as the IACtHR and ECtHR.[63] These institutions are often able to exert jurisdiction over State perpetrators that remain beyond the reach of the ICED, such as Algeria,[64] Russia,[65] and Türkiye.[66] And while these regional judicial institutions are unable to impose criminal liability on individual perpetrators,[67]

---

Convention the Elimination of All Forms of Discrimination against Women (CEDAW), and non-binding instruments such as the Universal Declaration of Human Rights (UDHR). Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 540.

63. *See, e.g.*, Nikolas Kyriakou, *An Affront to the Conscience of Humanity: Enforced Disappearances in the Case Law of the Inter-American Court of Human Rights*, 7 INTER-AM. & EUR. HUM. RTS. J. 17, 18–20 (2014) (summarizing the development of international jurisprudence before human rights courts and the HRC); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 32–35 (summarizing the role played by United Nations and regional human rights systems in combating enforced disappearance).

64. As of this writing, Algeria is not a party to the ICED. *ICED Signatories*, *supra* note 55. However, Algeria has recognized the jurisdiction of the Human Rights Committee to receive individual petitions since September 12, 1989. *Optional Protocol to the International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION [hereinafter *ICCPR Optional Protocol Signatories*], https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en. [https://perma.cc/FZ94-GMT8?type=image].

65. As of this writing, Russia is not a party to the ICED. *ICED Signatories*, *supra* note 55. However, it has recognized the jurisdiction of the HRC to receive individual petitions since October 1, 2006. *ICCPR Optional Protocol Signatories*, *supra* note 64. Moreover, Russia recognized the jurisdiction of the ECtHR until September 16, 2022, when it withdrew from the European Convention on Human Rights. Press Release, Council of Eur., Russia Ceases to be Party to the European Convention on Human Rights (Sept. 16, 2022), https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights [https://perma.cc/PM7N-GQ9S].

66. As of this writing, Türkiye is not a party to the ICED. *ICED Signatories*, *supra* note 55. However, it has recognized the jurisdiction of the ECtHR since 1989. *Türkiye*, COUNCIL OF EUR., https://www.coe.int/en/web/execution/turkey [https://perma.cc/QWR3-U3R7]. It has also recognized the right of individual petition to the HRC since November 24, 2006. *ICCPR Optional Protocol Signatories*, *supra* note 64.

67. *See* Claude, *supra* note 49, at 423 (noting that IACtHR in *Velásqeuz Rodríguez* "underscored the intrinsic difference between the international protection of human rights and criminal justice; namely that States are not to be considered as defendants in criminal actions and that the purpose of human rights law is not to punish individuals . . . ."); Genovese & van der Wilt, *supra* note 1, at 17 (noting that ECtHR does not "punish" officials who commit enforced disappearance but limits findings to violations of the ECHR and establishing compensation for such).

they have proven to be remarkably adept at holding States accountable for the underlying human rights violations.[68] Specifically, the HRC, IACtHR and ECtHR have frequently held State perpetrators of enforced disappearance liable for violations of the right to life, the right to liberty and security, the right to recognition as a person before the law, the duty to provide an effective remedy, and the prohibition against torture.[69] To do so, these institutions have developed unique procedural and legal mechanisms to overcome the myriad obstacles inherent in investigating enforced disappearances,[70] which will be discussed further below.

At the same time, the ability to hold States accountable does not seem to have made a significant dent in the impunity gap for individual perpetrators. In theory, judgments by the HRC, IACtHR, or ECtHR against States are designed to prompt domestic reforms to repair the violations of human rights.[71] In practice, States rarely fully comply with such orders from international human rights institutions.[72] In many cases, States have made efforts to appear as

68. *See* Sarkin, *Processes and Mechanisms*, *supra* note 9, at 33–35 (discussing the role of regional human rights bodies in holding States accountable for disappearances).

69. Kyriakou, *supra* note 63, at 18 tbl.1.

70. *See* discussion *infra* Section II.0 (discussing some of the successful procedural mechanisms used by HRC, IACtHR, and ECtHR in cases of enforced disappearance).

71. *See* YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 38–39 (2014) (arguing that a key function of international courts is "norm support" and that such support prods states and other international actors towards improved compliance with their international legal obligations); Douglas Cassel, *The Inter-American Court of Human Rights*, *in* VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA 151, 151, 159 (2007), https://dplf.org/en/2007/06/01/victims-unsilenced-the-inter-american-human-rights-system-and-transitional-justice-in-latin-america [https://perma.cc/ZU42-3HT8] (noting that IACtHR's jurisprudence "seeks to institutionalize national safeguards against impunity" by influencing domestic courts, societies, and state policies). In cases of enforced disappearance, these judgments often include both monetary damages and orders that the defendant State investigate and take all available efforts to hold individual perpetrators accountable. *See* Kyriakou, *supra* note 63, at 30–38 (discussing remedial measures ordered by the IACtHR); El Boathi v. Algeria, Commc'n No. 2259/2013, ¶ 9, U.N. Doc. CCPR/C/119/D/2259/2013 (Hum. Rts. Comm. Mar. 17, 2017) (ordering Algeria to make full reparations to the author by conducting "an in-depth, thorough and impartial investigation into the disappearance" in question and prosecute those responsible).

72. *See, e.g.*, Damián A. González-Salzberg, *The Effectiveness of the Inter-American Human Rights System*, 16 INT'L L. REV. COLOMBIANA DE DERECHO INTERNACIONAL 115, 128–29 (2010) (finding that States have mixed records of

though they are complying with judgments but have nevertheless failed to conduct effective investigations or launch prosecutions.[73] Even when these rulings have made a tangible impact on domestic accountability efforts,[74] such impacts have often not been felt until many decades after the disappearances.[75] In short, though human rights institutions have generally been able to hold States accountable, they have made very little progress in ultimately addressing impunity for individual perpetrators. There is thus a pressing need for these institutions to develop improved legal mechanisms to counteract enforced disappearance.

---

compliance with IACtHR decisions depending on the remedy ordered by the Court); WEBBER & SHERANI, *supra* note 5, at 5–6 (discussing limitations of human rights institutions in holding state accountable for enforced disappearance); *see also* discussion *infra* Section II.C.**Error! Reference source not found.** (discussing State noncompliance).

73. *See* Working Grp. on Enforced or Involuntary Disappearances, *General Allegation, 114th Session (5-9 February 2018)*, ¶ 30 (2018) [hereinafter WGEID, *General Allegations 2018*], https://www.ohchr.org/sites/default/files/Documents/Issues/Disappearances/Allegations/114_RussianFederation.pdf [https://perma.cc/Q6BL-ZADU] (noting that Russian officials have complied with ECtHR orders to pay compensations but have failed to carry out effective investigations into disappearances despite numerous ECtHR rulings against it); HAKİKAT ADALET HAFIZA MERKEZİ & EUR. CTR. FOR CONST. & HUM. RTS., MONITORING REPORT: THE EXECUTION OF JUDGMENTS REGARDING ENFORCED DISAPPEARANCE CASES OF THE *AKSOY* GROUP 38–39 (2016) [hereinafter HAHM & ECCHR], https://hakikatadalethafiza.org/en/publications/monitoring-report-execution-judgements-regarding-enforced-disappearance-cases [https://perma.cc/U7AR-2ZDN] (reporting that numerous investigations related to ECtHR cases remained ongoing or had been closed without revealing the fate or whereabouts of disappeared persons).

74. *See* Dulitzky, *supra* note 16, at 477–78 (noting that IACtHR jurisprudence concerning enforced disappearance "has permeated different Latin American countries in different ways" and that it has had major positive impacts in some countries).

75. *See, e.g.*, Marcie Mersky & Naomi Roht-Arriaza, *Guatemala*, *in* VICTIMS UNSILENCED: THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND TRANSITIONAL JUSTICE IN LATIN AMERICA 7, 8–10, 29 (2007), https://dplf.org/en/2007/06/01/victims-unsilenced-the-inter-american-human-rights-system-and-transitional-justice-in-latin-america [https://perma.cc/ZU42-3HT8] (noting that IACtHR judgments against Guatemala concerning rights violations in the 1980s and 1990s were initially ignored and that the State had begun to partially comply only after a peace agreement in 1996).

## II. UNRAVELING THE PUZZLE OF IMPUNITY

Widespread impunity[76] for perpetrators is perhaps the single greatest challenge facing international legal efforts to counteract the phenomenon of enforced disappearance.[77] The Working Group on Enforced and Involuntary Disappearances has described impunity as "a distinctive trait of enforced disappearances"[78] and asserted that "impunity is perhaps the single most important factor contributing to the phenomenon of disappearance."[79] States are necessarily implicated in perpetrating or acquiescing to a pattern of enforced disappearances.[80] As a result, state officials often take steps to ensure "structural impunity,"[81] which can inhibit future governments from holding individual perpetrators accountable.[82] The problem of

76. For the purposes of this Note, "impunity" may be defined as "the impossibility, de jure or de facto, of bringing the perpetrators of violations to account" due to the fact that perpetrators "are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims." Diane Orentlicher (Independent Expert to Update the Set of Principles to Combat Impunity), *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, at 6, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

77. *See, e.g.*, Sarkin, *Processes and Mechanisms*, *supra* note 9, at 24 ("One of the greatest problems of enforced disappearances is that many perpetrators are never brought to book and enjoy impunity."); Genovese & van der Wilt, *supra* note 1, at 5 (describing impunity as "one of the main obstacles to justice's restoration" in cases of enforced disappearance); International Convention on Enforced Disappearance pmbl., *supra* note 36, 2716 U.N.T.S. at 56 ("Determined to prevent enforced disappearances and to *combat impunity* for the crime of enforced disappearance . . . .") (emphasis added).

78. WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶ 93.

79. Rep. of Working Grp. on Enforced or Involuntary Disappearances, ¶ 406, U.N. Doc. E/CN.4/1991/20 (Jan. 17, 1991) [hereinafter WGEID Report 1991].

80. *See* Anderson, *supra* note 1, at 277 (noting that ICED criminalizes enforced disappearances perpetrated or supported by state agents but that it "enshrines an existing gap by allowing non-state agents to evade international criminal responsibility").

81. *See* WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶¶ 1–2 (noting that "[t]he involvement of the State has often resulted in impunity for perpetrators" and that WGIED has sought to address the issue of structural impunity for enforced disappearance for decades); Genovese & van der Wilt, *supra* note 1, at 5 (noting that the involvement of State authorities often results in impunity).

82. *See* WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶ 4 (noting that the limited availability of institutional instruments often represents an obstacle to the completion of investigations into disappearances).

impunity is far from new[83]—even the earliest draft treaties intending to criminalize enforced disappearance established international jurisdiction over the crime specifically to counteract structural impunity at the domestic level.[84] Yet the proliferation of enforced disappearances necessitates renewed efforts to develop better legal mechanisms to combat impunity for individual perpetrators.[85]

This Part proceeds in three sections. Section II.A provides an analysis of the causes of impunity for enforced disappearances, concluding that impunity for individual perpetrators is a function of the failure to investigate and the lack of political will within domestic judicial systems. Section II.B presents the major successes of supranational judicial and quasi-judicial human rights institutions, including the use of burden-shifting, circumstantial evidence, and mechanisms to establish presumptions of fact, all of which have contributed to these institutions' ability to issue judgments against States for their human rights violations (hereinafter referred to as "violation judgments"). Section II.C then reviews the major shortcomings of accountability efforts in these human rights systems, including the imposition of exclusionary admissibility criteria, the delay in justice caused by prolonged proceedings, and the failure to translate violation judgments against States into domestic efforts to hold individuals accountable.

### A. Causes of Impunity for Enforced Disappearances.

In the context of enforced disappearances, impunity is an undoubtedly complex problem arising from a combination of factors

---

83. *See, e.g.*, Rep. of Working Grp. on Enforced or Involuntary Disappearances, ¶¶ 45–73, U.N. Doc. E/CN.4/1994/26 (Dec. 22, 1993) (detailing responses from governments and NGOs regarding WGEID's work on the question of impunity in 1992 and 1993).

84. *See* Working Grp. on Enforced or Involuntary Disappearances, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Question of Enforced or Involuntary Disappearances*, ¶ 42, U.N. Doc. E/CN.4/1985/15 (Jan. 23, 1985) (noting that the drafters of the International Convention on Enforced Disappearances felt it was essential to establish international jurisdiction over the crime of enforced disappearance because "offenders usually enjoyed impunity in the countries where they had committed such acts").

85. *See* WEBBER & SHERANI, *supra* note 5, at 5 ("Despite the existence of an international legal framework, the lack of effective accountability mechanisms prevents meaningful deterrence for states that carry out enforced disappearances.").

and practices.[86] However, there are two common causes of impunity for enforced disappearance that have been repeatedly addressed by international institutions, scholars, and experts: (1) the failure to conduct investigations,[87] and (2) a lack of domestic political will to prosecute perpetrators.[88] Any efforts to improve existing legal mechanisms should therefore account for the nature of these common causes of impunity.

1. Failure to Investigate

Perhaps the single most important cause of impunity for enforced disappearances is domestic authorities' failure to conduct prompt and effective investigations.[89] Virtually every human rights body and international judicial institution that has addressed the issue of enforced disappearance has long held that States have an obligation to investigate all disappearances that occur within their territory.[90] Indeed, the duty to investigate is so well-established that

86. *See, e.g.*, Orentlicher, *supra* note 76, at 7 (noting that impunity arises from States failing to meet their duty to investigate, prosecute, try, and duly punish perpetrators, provide remedies to victims, uphold the inalienable right to truth, and take other necessary steps to prevent recurrence).

87. *See, e.g.*, Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 582 (concluding that duty to investigate disappearance and prosecute perpetrators has attained the status of *jus cogens*).

88. *See, e.g.*, Genovese & van der Wilt, *supra* note 1, at 11 ("The direct involvement of the state in the disappearance of an individual explains the reluctance in pursuing genuine investigations and the lack of effective prosecutions of perpetrators.").

89. *See, e.g.*, Orentlicher, *supra* note 76, at 7 ("Impunity arises from a failure by States to meet their obligations to investigate violations . . . ."); WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶ 16 ("[I]t is well established that the delaying of investigations has often resulted in de facto impunity.").

90. *See, e.g.*, Christine Bakker, *Duties to Prevent, Investigate, and Redress Human Rights Violations by Private Military and Security Companies: The Role of the Host State*, *in* WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS 130, 142–43 (Francesco Francioni & Natalino Ronzitti eds., 2011) ("The human rights-monitoring bodies have all developed consistent case law in which the duty to ensure the substantial rights . . . includes the duty to investigate serious human rights violations . . . ."); ANDREU-GUZMAN, *supra* note 2, at 119–23 (describing the nature of the duty to investigate under U.N. treaties, regional treaties, and customary international law arising from U.N. bodies and the IACtHR); Boutarsa v. Algeria, Commc'n No. 3010/2017, ¶ 8.3, U.N. Doc. CCPR/C/135/D/3010/2017 (Hum. Rts. Comm. July 8, 2022) (reiterating that States have "the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives"); Gomez Lund v. Brazil,

several scholars and the IACtHR have construed it as a *jus cogens* norm.[91] Moreover, a growing body of international jurisprudence has been dedicated solely to identifying specific standards that an investigation must meet to be considered adequate.[92] In point of fact, the HRC, IACtHR, and ECtHR have all elucidated specific standards for investigations in cases of enforced disappearance.[93] While their

Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 137–46 (Nov. 24, 2010) (summarizing international jurisprudence on the duty to investigate); Er and Others v. Turkey, App. No. 23016/04, ¶ 80 (July 31, 2012), https://hudoc.echr.coe.int/?i=001-112586 ("The Court reiterates that the obligation to protect the right to life . . . requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.").

91. *See, e.g.*, Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 582 ("[I]t is clear that now the prohibition of enforced disappearance and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*."); Goiburú v. Paraguay, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 84 (Sept. 22, 2006) ("[T]he prohibition of forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*."); Claude, *supra* note 49, at 432 (noting that IACtHR has maintained that the duty to investigate has attained the status of *jus cogens*).

92. *See, e.g.*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., THE MINNESOTA PROTOCOL ON THE INVESTIGATION OF POTENTIALLY UNLAWFUL DEATH 7–9 (2017), https://www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf [https://perma.cc/QF6J-SFX9] (setting forth elements and principles of the duty to investigate under international law); Orentlicher, *supra* note 76, at 12 ("States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law . . . ."); WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶¶ 16–55 (summarizing international jurisprudence on standards of an effective investigation in cases of enforced disappearance).

93. *See, e.g.*, INTER-AM. COMM'N ON HUM. RTS., BASIC GUIDELINES FOR INVESTIGATING CRIMES AGAINST HUMAN RIGHTS DEFENDERS IN THE NORTHERN TRIANGLE 15–18 (2021), https://www.oas.org/en/iachr/reports/pdfs/Directrices-TrianguNorte-en.pdf [https://perma.cc/59WG-87LR] (explaining the constituent components of an effective investigation required for a State to fulfill its duty to investigate under the ACHR); EUR. CT. OF HUM. RTS., GUIDE ON ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RIGHT TO LIFE 33–39 (updated Aug. 31, 2022) [hereinafter ECTHR, GUIDE ON ARTICLE 2], https://www.echr.coe.int/documents/d/echr/Guide_Art_2_ENG [https://perma.cc/49ET-QEXE] (describing the requirements inherent in the duty to investigate under Article 2 of the ECHR); Hum. Rts. Comm., General Comment No. 36, ¶ 27, U.N. Doc. CCPR.C.GC.36 (Sept. 3, 2019) (describing the minimum requirements of an investigation under Article 6(1) of the ICCPR).

standards vary somewhat,[94] all three institutions generally agree that investigations must be conducted promptly,[95] independently,[96] and in a way that could reasonably reveal the fate or whereabouts of a disappeared person.[97]

Yet domestic authorities virtually never effectively investigate the systematic use of enforced disappearance.[98] One particularly illustrative example comes from Türkiye, where state agents have been credibly accused of systematically disappearing at least 1,353 mostly Kurdish civilians as part of the State's counterinsurgency strategy against the Kurdistan Workers' Party (more commonly known as the PKK).[99] Faced with widespread impunity in domestic courts, a handful of families brought cases in the European Court of Human Rights.[100] Consequently, between 1998 and 2015, the ECtHR issued at least fifty-one violation judgments against the Turkish government concerning enforced disappearances committed as part of this systematic pattern of abuse.[101] In every case, the ECtHR found serious flaws in investigations amounting to procedural violations of the rights enshrined within the European Convention on Human Rights.[102] The ECtHR's ruling also revealed the deleterious impact that the failure to investigate can have on accountability, as the Court often noted that Türkiye's failure to investigate had hampered its own ability to determine the truth.[103]

---

94. *See* WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, at 21–47 (summarizing ECtHR, IACtHR, and HRC jurisprudence on standards for effective investigations of disappearance).

95. *Id.* at 24–26.

96. *Id.* at 30–31.

97. *Id.* at 29–30.

98. *See, e.g.*, *Joint Study on Secret Detention*, *supra* note 21, at 5 ("In almost no recent cases have there been any judicial investigations into allegations of secret detention, and practically no one has been brought to justice.").

99. ALPKAYA ET AL., *supra* note 30, at 14.

100. GÖRAL, *supra* note 50, at 66.

101. HAHM & ECCHR, *supra* note 73, at 12.

102. *See* HAHM & ECCHR, *supra* note 73, at 13 (noting that the ECtHR expressed concern regarding the "overarching issue of inadequate investigation" in all disappearance cases in Türkiye).

103. *See, e.g.*, Enzile Özdemir v. Turkey, App. No. 54169/00, ¶ 48 (Jan. 8, 2008), https://hudoc.echr.coe.int/?i=001-84277 (noting that the Court "is unable to draw a complete picture of the factual circumstances surrounding Mehmet Özdemir's disappearance due to the defects in the domestic investigation"); Tekdağ v. Turkey, App. No. 27699/95, ¶¶ 76, 80–82 (Jan. 15, 2004), https://hudoc.echr.coe.int/?i=001-61582 (finding no violation of Article 2's substantive limb in part because the Court had been unable to interview the eyewitnesses cited by the applicant but finding a procedural violation based on

Indeed, other experts have argued that the failure to investigate is both a cause and consequence of Türkiye's "culture of impunity."[104]

The failure to investigate generally takes one of two forms. First, government officials have been known to explicitly refuse to open investigations into state agents accused of wrongdoing.[105] Collectively, the HRC, IACtHR, and ECtHR have found such failures by officials in Russia,[106] Algeria,[107] Türkiye,[108] Guatemala,[109] and Nepal,[110] among others.[111]

---

the prosecutor's failure to interview witnesses); *see also* Tepe v. Turkey, App. No. 27244/95, ¶¶ 127–35 (May 9, 2003), https://hudoc.echr.coe.int/?i=001-61089 (holding Türkiye liable for violating the obligation to furnish all necessary facilities to the Court in its task of establishing the facts under article 38 section 1(a)); İpek v. Turkey, App. No. 25760/94, ¶¶ 112–27 (Feb. 17, 2004), https://hudoc.echr.coe.int/?i=001-61636 (arriving at the same holding).

104. *See* MEHMET ATILGAN & SERAP IŞIK, TÜRKİYE EKONOMİK VE SOSYAL ETÜDLER VAKFI, DISRUPTING THE SHIELD OF IMPUNITY: SECURITY OFFICIALS AND RIGHTS VIOLATIONS IN TURKEY 26 (2012) (noting that Türkiye's "culture of impunity" had persisted despite several high-profile efforts to hold state agents accountable because "no investigations were initiated into the many murders by unknown perpetrators or many incidents of enforced disappearance, allegedly committed by the security forces" during the 1990s); *see generally* AMNESTY INT'L, TURKEY: THE ENTRENCHED CULTURE OF IMPUNITY MUST END (2007), https://www.amnesty.org/en/documents/eur44/008/2007/en [https://perma.cc/R5RU-QXV5] (documenting how flawed investigations and prosecutions resulted from and contribute to a "culture of impunity" in Türkiye).

105. *See, e.g.*, HAHM & ECCHR, *supra* note 73, at 14 (noting that Turkish officials "even abstain[ed] from commencing an investigation in some instances"); HUM. RTS. WATCH, "IF WE RAISE OUR VOICE THEY ARREST US": SRI LANKA'S PROPOSED TRUTH AND RECONCILIATION COMMISSION 28 (2023) [hereinafter HRW, "IF WE RAISE OUR VOICE THEY ARREST US"], https://www.hrw.org/report/2023/09/18/if-we-raise-our-voice-they-arrest-us/sri-lankas-proposed-truth-and-reconciliation [https://perma.cc/CG54-RA27] (noting that the Sri Lankan government has failed to investigate numerous mass graves).

106. *See, e.g.*, Magomadova v. Russia, Commc'n No. 2524/2015, ¶ 7.4, U.N. Doc. CCPR/C/125/D/2524/2015 (Hum. Rts. Comm. Mar. 19, 2019) (noting that Russia refused to open a formal criminal investigation into the disappearances in question).

107. *See, e.g.*, Boutarsa v. Algeria, Commc'n No. 3010/2017, ¶ 7.4, U.N. Doc. CCPR/C/135/D/3010/2017 (Hum. Rts. Comm. July 8, 2022) (noting that Algeria had not undertaken any investigation into the allegation of enforced disappearance).

108. *See, e.g.*, Seyhan c. Turquie [Seyhan v. Turkey], App. No. 33384/96, ¶ 34 (Nov. 2, 2004), https://hudoc.echr.coe.int/?i=001-67289 (available in French) (noting that Turkish prosecutors never responded to any of applicant's twelve requests to open an investigation); Osmanoğlu v. Turkey, App. No. 48804/99, ¶¶ 88, 91–92 (Jan. 24, 2008), https://hudoc.echr.coe.int/?i=001-84667 (noting Turkish

Second, and far more common, States have often conducted deliberately deficient investigations into alleged disappearances.[112] Common defects include undue delays in initiating investigations,[113] the failure to collect evidence or take relevant witness statements that tend to incriminate state agents,[114] and investigations conducted

government's acknowledgment that it had refused to open an investigation based on claims that the allegations were "abstract and unsubstantiated").

109. *See, e.g.*, Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 196 (Sept. 4, 2012) (concluding that Guatemala violated the duty to investigate by failing to open an investigation into the disappearance in question for over 30 years).

110. *See, e.g.*, Sharma v. Nepal, Commc'n No. 1469/2006, ¶ 7.8, U.N. Doc. CCPR/C/94/D/1469/2006 (Hum. Rts. Comm. Oct. 28, 2008) (noting that Nepalese government never conducted an official inquiry into the disappearance of the author's husband).

111. *See, e.g.*, Tshidika v. Dem. Rep. Congo, Commc'n No. 2214/2012, ¶ 6.4, U.N. Doc. CCPR/C/115/D/2214/2012 (Hum. Rts. Comm. Nov. 5, 2015) (noting that no investigation had been opened despite multiple complaints filed with government officials).

112. *See, e.g.*, Anna Oriolo, *Right to the Truth and International Jurisprudence as the "Conscience" of Humanity: Comparative Insights from the European and Inter-American Courts of Human Rights*, 16 GLOB. JURIST 175, 184 (2016) (noting several cases before the ECtHR in which the Court's ruling concerned the absence of effective investigations into the fate of the disappeared persons); WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶ 4 ("[T]he Working Group continues to observe reluctance when it comes to diligent investigation of all allegations of disappearances and the holding of their perpetrators to account."); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 38–39 ("At present states raise various excuses to explain away why these cases [of enforced disappearance] take so long to investigate . . . .").

113. WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, annex ¶¶ 25–34. For examples of cases in which international institutions have found States liable for undue delays, see Timurtaş v. Turkey, App. No. 23531/94, ¶¶ 89–90 (June 13, 2000), https://hudoc.echr.coe.int/eng?i=001-58901; Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 214–17 (Nov. 23, 2009).

114. For example, the European Court concluded in *Ibragimov v. Russia* that, although domestic investigators had implicitly accepted the applicant's assertion that the perpetrators were state agents, the investigation was nevertheless "unable to establish precisely which military or security units had carried out the operation" because "it does not appear that any serious steps were taken to that end." Ibragimov and Others v. Russia, App. No. 34561/03, ¶¶ 79–80 (May 29, 2008), https://hudoc.echr.coe.int/?i=001-86607; *see also* Tepe v. Turkey, App. No. 27244/95, ¶¶ 133, 181 (May 9, 2003), https://hudoc.echr.coe.int/?i=001-61089 (noting numerous discrepancies in the domestic investigation by Turkish authorities, including the failure to summon seven witnesses who were purportedly detained with the victim and the failure of the medical examiner to

by insufficiently independent and impartial authorities.[115] The HRC has noted habitual defects in the investigations into enforced disappearance cases conducted by state authorities in Algeria,[116] Nepal,[117] and elsewhere.[118] The IACtHR has found similar defects in

conduct a full medico-legal autopsy); Akdeniz and Others v. Turkey, App. No. 23954/94, ¶ 93 (May 31, 2001), https://hudoc.echr.coe.int/?i=001-59482 (finding that prosecutors had shown "reluctance in face of accumulating evidence to pursue any lines of enquiry concerning security force involvement" which represented "a failure to provide an effective investigation into the disappearance of the applicants' relatives"). This phenomenon is not exclusive to Europe. For example, in the case of *Baldeón-García v. Peru*, the IACtHR noted "significant omissions in the investigation," including an autopsy that did not comply with the standards set forth under international law and the authorities' apparent failure to obtain witness testimonies. Baldéon-Garciá v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶¶ 98–104 (Apr. 6, 2006).

115. *See, e.g.*, ATILGAN & IŞIK, *supra* note 104, at 17–18 (discussing structural issues undermining the independence of investigations into security officials in Türkiye and listing instances in which the involvement of the accused officials undermined the impartiality of the investigation); Rep. of the Working Grp. on Enforced or Involuntary Disappearances on Its Mission to Sri Lanka, ¶¶ 31, 47, U.N. Doc. A/HRC/33/51/Add.2 (July 8, 2016) (noting serious concerns about the independence of judicial mechanisms tasked with investigating enforced disappearance in Sri Lanka); *see also* WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, annex ¶¶ 35–37, 40 (discussing the obligation to ensure impartial investigations by excluding individuals and institutions suspected of perpetrating enforced disappearances).

116. *See, e.g.*, Madoui v. Algeria, Commc'n No. 1495/2006, ¶ 7.8, U.N. Doc. CCPR/C/94/D/1495/2006 (Hum. Rts. Comm. Oct. 28, 2008) (concluding that Algeria "appears not to have conducted a thorough investigation into the fate of the [author's] son"); Boutarsa v. Algeria, Commc'n No. 3010/2017, ¶ 8.12, U.N. Doc. CCPR/C/135/D/3010/2017 (Hum. Rts. Comm. July 8, 2022) (concluding that Algeria "did not conduct an investigation into the disappearance" of the author's husband); Djebbar and Chihoub v. Algeria, Commc'n No. 1811/2008, ¶ 8.6, U.N. Doc. CCPR/C/103/D/1811/2008 (Hum. Rts. Comm. Oct. 31, 2011) (noting that Algeria's failure to effectively investigate the disappearance of two persons exacerbated the anguish and distress of their loved ones).

117. *See, e.g.*, Maharjan v. Nepal, Commc'n No. 1863/2009, ¶¶ 5.4, 8.3, U.N. Doc. CCPR/C/105/D/1863/2009 (Hum. Rts. Comm. July 19, 2012) (accepting the author's claim that Nepal had failed to conduct an effective investigation into his disappearance in light of the State's failure to disprove that claim); Sedhai v. Nepal, Commc'n No. 1865/2009, ¶ 7.3, U.N. Doc. CCPR/C/108/D/1865/2009 (Hum. Rts. Comm. July 19, 2013) (noting that Nepalese officials had not taken "any concrete action to investigate the whereabouts" of the disappeared person despite directives from its Supreme Court).

118. *See, e.g.*, Lale and Blagojevic v. Bosn. & Herz., Commc'n No. 2206/2012, ¶¶ 7.4–7.6, U.N. Doc. CCPR/C/119/D/2206/2012 (Hum. Rts. Comm. Mar. 17, 2017) (finding that defects in investigations into disappeared persons amounted to inhuman and degrading treatment under the ICCPR); Abushaala v. Libya, Commc'n No. 1913/2009, ¶ 6.8, U.N. Doc. CCPR/C/107/D/1913/2009 (Hum. Rts.

the investigations conducted into alleged disappearances in Guatemala,[119] Paraguay,[120] and Honduras,[121] among others.[122] The ECtHR has likewise found systematic deficiencies in the investigations conducted into alleged disappearances in both Türkiye[123] and Chechnya.[124] While the specific defects may vary, the result is generally the same—faulty investigations that produce little or no direct evidence concerning the fate of the person or the identity of the perpetrators.[125] Consequently, defective investigations impede

---

Comm. Mar. 18, 2013) (concluding that Libya "failed to conduct a thorough and effective investigation into the disappearance" of the missing man despite multiple efforts by his family).

119. *See* Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 236 (Sept. 4, 2012) (concluding that Guatemala failed to conduct adequate or effective investigations into the fate of disappeared victims); Chitay Nech v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶¶ 195, 197, 204, 207, 209 (May 25, 2010) (finding multiple failures in investigations into two forcibly disappeared persons).

120. *See* Goiburú v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 118 (Sept. 22, 2006) (observing that Paraguay "has not shown any diligence in the official investigations, which . . . were not instituted *de oficio*" and did not take any steps to determine the fates of the victims).

121. *See* Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 147(d)(v) (July 29, 1988) ("The investigative committees created by the Government and the Armed Forces did not produce any results.").

122. *See, e.g.*, Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶¶ 140, 153 (Sept. 22, 2009) (finding numerous defects in investigations conducted by Peruvian authorities into alleged enforced disappearance); Maidanik v. Uruguay, Merits and Reparations, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 444, ¶ 152 (Nov. 15, 2021) (concluding that Uruguay failed to conduct an effective investigation into the fates of two disappeared persons).

123. *See*, *e.g.*, Meryem Çelik and Others v. Turkey, App. No. 3598/03, ¶¶ 76–78 (Apr. 16, 2013), https://hudoc.echr.coe.int/?i=001-118569 (concluding that Turkish authorities failed to conduct an adequate or effective investigation into the disappearance of 12 persons); Er and Others v. Turkey, App. No. 23016/04, ¶¶ 84–87 (July 31, 2012), https://hudoc.echr.coe.int/?i=001-112586 (concluding that authorities failed to conduct a timely or effective investigation into the disappearance of applicants' relative).

124. *See, e.g.*, Utsayeva and Others v. Russia, App. No. 29133/03, ¶¶ 175–82 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86605 (noting multiple deficiencies in the investigations into the disappearances of applicants' relatives and holding Russia liable for procedural violations of ECHR Article 2); Sangariyeva and Others v. Russia, App. No. 1839/04, ¶¶ 79–85 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86610 (same).

125. *See, e.g.*, Kyriakou, *supra* note 63, at 23 (noting that IACtHR's conception of the duty to investigate requires the effective determination of facts

accountability both in the short- and long-term by denying victims' families and future investigators access to critical evidence.

Consider, for example, investigations that are not sufficiently prompt. The WGEID has stated that "the first hours after the deprivation of liberty are key for the investigation of an enforced disappearance" because inaction by state officials during this period allows perpetrators to circumvent legal protections and conceal or destroy evidence of their crimes.[126] Unfortunately, for a variety of reasons many investigations are not commenced until months or even years after a disappearance is reported.[127] Even if later investigations are conducted in good faith, they often struggle to produce sufficient

---

in order to enable claimants to substantiate their access to courts); Osorio Rivera v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 274, ¶ 185 (Nov. 26, 2013) (asserting that "the passage of time bears a directly proportionate relationship to the limitation—and in some case, the impossibility—of obtaining evidence and/or testimony, making it difficult and even useless or ineffective" to investigate enforced disappearances); Dulitzky, *supra* note 16, at 435 ("The prevalent impunity generated by the absolute control over the judiciary by the repressive regimes [in Latin America] not only facilitated the perpetration of enforced disappearances but also exacerbated the delay in the national and international response to disappearances."); WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶ 16 ("[I]t is well established that the delaying of investigations has often resulted in de facto impunity.").

126. WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶¶ 12, 22. It is also telling that both the IACtHR and the ECtHR have acknowledged that the more time passes after a disappearance, the less likely it is that any future investigations will produce any meaningful evidence. *See, e.g.*, *Anzualdo Castro*, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 135 (reiterating that "the passage of time has a directly proportionate relationship to the constraints—and, in some cases, the impossibility—of obtaining evidence or testimonies that help clarify the facts under investigation . . . ."); Sayğı v. Turkey, App. No. 37715/11, ¶ 48 (Jan. 27, 2015), https://hudoc.echr.coe.int/eng?i=001-150670 ("The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably.").

127. *See, e.g.*, Nesibe Haran v. Turkey, App. No. 28299/95, ¶ 75 (Oct. 6, 2005), https://hudoc.echr.coe.int/eng?i=001-70458 (noting that an investigation into an applicant's allegations commenced two years after the disappearance in question and only after the applicant's allegations were communicated to the Turkish government); Toğcu v. Turkey, App. No. 27601/95, ¶ 113 (May 31, 2005), https://hudoc.echr.coe.int/eng?i=001-69214 (noting that "no action seems to have been taken for several months" after authorities were informed of the disappearance in question); Ibsen Cárdenas and Ibsen Peña v. Bolivia, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 217, ¶ 154 (Sept. 1, 2010) (noting that an official investigation was not commenced for approximately twenty-eight years after the disappearances in question despite the names of the victims being included in a formal list of disappeared persons).

direct evidence to meet the standards of proof to convict perpetrators within domestic courts due to the passage of time and the concealment of evidence.[128] A stark example of the consequences of delayed investigations comes from Chile. Though Chilean authorities have been applauded for their efforts to hold perpetrators of enforced disappearances accountable,[129] the fates of many disappeared persons remain unknown due to the lack of physical evidence and the amount of time that has lapsed since the crimes were perpetrated.[130] Critically, these delays were largely the result of deliberate efforts by the Pinochet regime to ensure impunity for state agents, including legal guarantees of amnesty and a negotiated transition to democracy that allowed Pinochet to retain considerable power within the new regime.[131] In fact, the Chilean government did not formally lead the search for victims until 2023, fifty years after Pinochet's coup d'état.[132]

---

128. *See* WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶ 96 (noting that delays in investigations caused by the destruction or loss of evidence, the passing of perpetrators, victims and witnesses, and other obstacles may lead to de facto impunity); *see also* Danushka S. Medawatte, *Chasing Tails: Establishing the Right to Truth, Mourning and Compensation*, 46 CAL. W. INT'L L. J. 69, 76 (2016) (noting that enforced disappearances in Sri Lanka "generally remain unprosecuted due to lack of evidence"); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 38–39 (noting that States often claimed "that the evidence to prosecute successfully cannot be found" as an explanation for their failure to hold perpetrators accountable).

129. *See* Comm. on Enforced Disappearances, *Concluding Observations on the Report Submitted by Chile under Article 29(1) of the Convention*, ¶ 7, U.N. Doc. CED/C/CHL/CO/1 (May 8, 2019) ("The Committee notes with satisfaction the significant progress that has been made in the State party, since the return to democracy, in the areas of truth, justice and reparation in connection with enforced disappearances perpetrated during the military dictatorship.").

130. *Id.* ¶ 26; *see also* Martin Bernetti & Paulina Abramovich, *'Where Are They?': Families Search for Chile's Disappeared Prisoners*, GUARDIAN (Aug. 14, 2019), https://www.theguardian.com/world/2019/aug/14/where-are-they-families-search-for-chile-disappeared-prisoners [https://perma.cc/3GFS-FPXZ] (noting that finding disappeared persons is particularly difficult given that many bodies were blown up using dynamite and an estimated 180 people were dropped into the sea from aircraft).

131. *See* J. Patrice McSherry, *The NGO Coalition Against Impunity: A Forgotten Chapter in the Struggle Against Impunity*, 7 INT'L J. HUM. RTS. EDUC. 1, 13 (2023) (noting that the 1978 Amnesty Law and Chile's "pacted transition" to democracy made it impossible for relatives to learn the fates of disappeared loved ones and obtain justice).

132. Carrie Kahn, *Chile Will Search for 1,000+ Victims of Forced Disappearance by Pinochet Dictatorship*, NPR (Aug. 31, 2023),

The obvious question is why: why would States expend any effort conducting defective investigations when they likely have no intention of holding their own agents accountable? Perhaps it is because the duty to investigate under international human rights law is an obligation of means, not ends.[133] Thus, in theory, States can comply with the duty to investigate even if they are unable to determine the fate or whereabouts of a disappeared person.[134] States may make efforts to appear as if they are investigating disappearances to present themselves as compliant with their human rights obligations.[135] The ubiquity of sham investigations may therefore evince a broader reputational concern among State perpetrators of enforced disappearance that could be leveraged by international institutions.[136]

---

https://www.npr.org/2023/08/31/1197019905/chile-search-disappeared-victims-pinochet-dictatorship [https://perma.cc/8594-GAEQ].

133. *See* Working Grp. On Enforced or Involuntary Disappearances, General Comment on the Right to the Truth in Relation to Enforced Disappearance, ¶ 5, U.N. Doc. A/HRC/16/48 (Jan. 26, 2011) [hereinafter WGEID, General Comment on the Right to Truth] ("There is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result."); ECTHR, GUIDE ON ARTICLE 2, *supra* note 93, at 36 (reiterating that the duty to investigation under Article 2 of the ECHR "is not an obligation of result, but of means").

134. *See* WGEID, General Comment on the Right to Truth, *supra* note 133, ¶ 5 ("Indeed, in certain cases, clarification is difficult or impossible to attain, for instance when the body, for various reasons, cannot be found.").

135. *See generally* Ilga A. Avdeyeva, *Does Reputation Matter for States' Compliance with International Treaties? States Enforcement of Anti-Trafficking Norms*, 16 INT'L J. HUM. RTS. 298 (2012) (arguing that states are more willing to comply with international norms if they believe it will improve their reputation with exclusive international organizations such as the European Union); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002) (arguing that states may be influenced by international law based on concerns about reputational damage and direct sanctions arising from violations).

136. *See, e.g.*, Courtney Hillebrecht, *The Domestic Mechanisms of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System*, 34 HUM. RTS. Q. 959, 985 (2012) (concluding that Latin American States have been more likely to comply with IACtHR rulings when there is a reputational and material benefit derived from doing so); Avdeyeva, *supra* note 135, at 299–300 ("[I]mproving [a] state's reputation is an instrumental goal for increasing their bargaining powers among other states."). *But see* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S96 (2002) (asserting that empirical evidence shows "that the impact of reputation is either weaker or more complicated than much of the theoretical literature suggests").

2. Lack of Political Will and Impunity

Another key driver of impunity is a lack of political will to hold perpetrators accountable.[137] For obvious reasons, regimes that have adopted a policy of forcibly disappearing suspected dissidents are unlikely to have sufficient political will to hold their own agents accountable.[138] An illustrative example comes from Algeria. Following the end of its civil war in 2002, the Algerian government enacted the Charter for Peace and National Reconciliation, which had the effect of granting amnesty to all state agents for human rights abuses committed during the conflict, including enforced disappearance.[139] The HRC subsequently held in several cases that the Charter represents an unlawful amnesty in violation of the ICCPR and ordered officials to conduct thorough investigations into alleged disappearances.[140] Unfortunately, as of this writing, Algeria has yet to implement any of the HRC's rulings.[141]

---

137. *See* Sarkin, *Why the Prohibition of Enforced Disappearances Has Attained* Jus Cogens *Status*, *supra* note 2, at 549 ("[W]hat is most lacking is the political will at the domestic level to enforce these norms. Without such will . . . whatever resources are thrown at such cases will be without justification."); WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶ 1 ("The involvement of the State has often resulted in impunity for the perpetrators.").

138. *See, e.g.*, Anderson, *supra* note 1, at 256 ("[T]here may be a lack of political will to bring individual perpetrators connected to the state to account under domestic criminal provisions . . . ."); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 38 (asserting that "what is most lacking is the domestic political will to enforce" legal norms related to enforced disappearance); Genovese & van der Wilt, *supra* note 1, at 11 ("The direct involvement of the state in the disappearance of an individual explains the reluctance in pursuing genuine investigations and the lack of effective prosecutions of perpetrators.").

139. Osman, *supra* note 4; *see also* Boutarsa v. Algeria, Commc'n No. 3010/2017, ¶¶ 2.12, 2.14, U.N. Doc. CCPR/C/135/D/3010/2017 (Hum. Rts. Comm. July 8, 2022) (summarizing the author's claims that she was no longer able to initiate judicial proceedings or use the justice system to learn the fate of her disappeared husband due to the Charter for Peace and National Reconciliation).

140. *See*, *e.g.*, Boudjemai v. Algeria, Commc'n No. 1791/2008, ¶¶ 8.2, 10, U.N. Doc. CCPR/C/107/D/1791/2008 (Hum. Rts. Comm. Mar. 22, 2013) (recalling that Algeria "may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant" because the Charter "cannot . . . be considered compatible" with the ICCPR and ordering Algeria to conduct a "thorough and effective investigation"); Berzig v. Algeria, Commc'n No. 1781/2008, ¶¶ 8.2, 10, U.N. Doc. CCPR/C/103/D/1781/2008 (Hum. Rts. Comm. Oct. 31, 2012) (same); *Boutarsa*, Commc'n No. 3010/2017, ¶¶ 8.2, 10 (same).

141. *See* Osman, *supra* note 4 (noting that Algeria had failed to implement any of the forty-four HRC judgments against it as of March 2021).

Yet political will remains an obstacle to holding perpetrators accountable even when new regimes take charge through democratic processes. This is true both when new regimes take power through existing democratic systems[142] or in the context of negotiated transitions from authoritarian rule to democratic governance.[143] For example, there has been little progress in holding state agents accountable for the systematic use of enforced disappearance in Türkiye,[144] even though most known disappearances occurred during the early 1990s[145] and there have since been several democratic regime changes.[146] Additionally, the transitional regimes in Chile, Argentina, and Uruguay generally failed to investigate or prosecute state agents for enforced disappearances and other crimes in the years immediately following their return to democratic rule, despite calls from civil society and families to hold perpetrators accountable.[147]

The lack of political will in democratic governments seems to result from at least two interrelated concerns—one existential and the other expedient. First, political leaders may believe that holding security forces accountable jeopardizes their political careers, their agendas, and even their lives.[148] In most cases, the perpetrators of

142. *See, e.g.*, Berlin & Dancy, *supra* note 48, at 536 (finding that only 20 percent of all human rights prosecutions occurred in stable democratic or autocratic contexts).

143. *See, e.g.*, Geoff Dancy & Verónica Michel, *Human Rights Enforcement From Below: Private Actors and Prosecutorial Momentum in Latin American and Europe*, 60 INT'L STUD. Q. 1, 3 (2016) (summarizing academic literature asserting that "[w]hen a democratic transition is negotiated, and the new executive faces significant opposition from the military or hold-over political leaders from the previous regime, it is more difficult to prosecute security forces").

144. *See* GÖRAL, *supra* note 50, at 67 (noting that all defendants in cases concerning enforced disappearance in Türkiye had either been acquitted or were awaiting acquittal).

145. GÖRAL ET AL., *supra* note 15, at 24–25.

146. Specifically, Türkiye saw six different prime ministers between 1991 and 2001—none of whom ever took steps to investigate disappearances or political murders. ALPKAYA ET AL., *supra* note 30, at 11.

147. *See, e.g.*, Dulitzky, *supra* note 16, at 455–56 (noting that initial attempts to prosecute perpetrators were thwarted by amnesty laws and other legal obstacles); Roht-Arriaza, *supra* note 50, at 346 ("[F]or the most part, governments [in Latin America] eschewed prosecutions and retained—or put in place—amnesty laws that precluded investigation and prosecution of the security forces.").

148. *See* Roht-Arriaza, *supra* note 50, at 346 (noting that amnesties in Latin American countries "were triggered in part by a fear of military backlash"); McSherry, *supra* note 131, at 14 (noting that efforts to hold military officials

systematic enforced disappearances are state agents,[149] many of whom remain employed within state security forces during transitional periods and through multiple election cycles.[150] These security forces generally resist efforts to hold them accountable for human rights violations.[151] As a result, a regime seeking to hold perpetrators accountable must contend with political pushback,[152] up to and including the threat of a military coup.[153] This problem is particularly acute in transitional contexts, where newly elected leaders may feel that they must choose between maintaining a fragile, nascent democracy and pursuing justice for abuses of former regimes.[154]

---

accountable in Latin American were impeded for years because "[s]ome new civilian leaders fear military coups").

149. *See* WGEID, *Effective Investigation of Enforced Disappearances*, *supra* note 8, ¶ 1 (noting that enforced disappearance "is a crime characterized . . . by the involvement of State agents").

150. *See, e.g.*, ATILGAN & IŞIK, *supra* note 104, at 17 ("Security forces who were involved in many cases of serious human rights violations continue to work as an employee of the authorities from which pertinent evidence and information must be demanded during the investigation and prosecution phases."); Sarkin, *Processes and Mechanisms*, *supra* note 9, at 24 ("[I]n many regions the perpetrators continue to hold powerful positions, preventing the truth from coming out and denying victims a remedy."); GÖRAL, *supra* note 50, at 13 ("In most of the cases, perpetrators are not only protected by an impenetrable shield of impunity but are also incorporated into the state apparatus, given top ranks in political parties and promoted to important positions in various security and intelligence bodies.").

151. *See* Berlin & Dancy, *supra* note 48, at 537 ("Governments must simultaneously rely on police and security forces for coercion while still punishing individuals that use excessive violence. This creates a potential risk of backlash against state leaders: if they push too far with punishment, then they will lose the support of their agents.").

152. *Id.*; *see also* Anderson, *supra* note 1, at 267–68 (noting that "political sensitivities or lack of political will" have often impeded efforts to prosecute acts of torture, "even where these acts have been particularly large-scale and egregious").

153. *See, e.g.*, McSherry, *supra* note 131, at 12–13 (noting that militaries in Uruguay, Chile, and Brazil "had threatened dire consequences if the process of justice continued" thereby prompting the adoption of amnesty laws). For example, according to Mark Berlin and Geoff Dancy, sustained legal campaigns to hold militaries accountable for past human rights violations in Argentina and the Philippines in the late 1980s prompted coup attempts that threatened democratic transitions. Berlin & Dancy, *supra* note 48, at 537.

154. *See, e.g.*, Raúl Alfonsín, *Confronting the Past: "Never Again" in Argentina*, 4 J. DEMOCRACY 15, 18–19 (1993) (asserting that a policy punishing all perpetrators during transitional periods risks isolating and provoking the military and other groups, thereby "creating a serious threat to the preservation of the

Second, political leaders may wish to be seen as allies of state security forces for their own political benefit.[155] Military and police institutions are often able to exert considerable political influence within society,[156] particularly when a country has recently experienced periods of insecurity or civil conflict.[157] Consequently, elected officials may benefit from providing leaders of these state security institutions immunity from prosecution.[158] In democracies, politicians may use immunity to solicit popular support.[159] For example, Sri Lankan President Gotabaya Rajapaksa promised to protect "war heroes" from prosecution and subsequently derailed several police investigations into conflict-related killings and enforced disappearances after taking office in 2019.[160] Similarly, transitional

democratic system"); José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L. J. 1425, 1428–29 (1992) (arguing that newly democratic governments in Brazil, Uruguay, Guatemala, the Philippines, Poland, Hungary, Czechoslovakia, Chile, Nicaragua, and El Salvador were constrained in prosecuting perpetrators of past crimes because those perpetrators "still wielded considerable political or military power or were inextricably meshed with the fabric of state institutions"); WGEID Report 1991, *supra* note 79, ¶ 20 (noting concern by NGOs that transitional democracies were using impunity "as a means of consolidating the stability" of newly democratic governments).

155. *See* Roht-Arriaza, *supra* note 50, at 346–47 (asserting that amnesties in Latin America were partially the result of deals between political elites and military high command which effectively boiled down to "a return to the barracks in exchange for total impunity").

156. *See* Berlin & Dancy, *supra* note 48, at 536–37 ("Holding current or former leaders accountable for abuses also expends political capital, since leaders often still enjoy the support of large constituencies.").

157. Zalaquett, *supra* note 154, at 1428; *see generally* Carlos Solar, *Trust in the Military in Post-Authoritarian Societies*, 70 CURRENT SOCIO. 317 (2022) (analyzing why militaries remain some of the most trusted institutions in post-authoritarian societies).

158. *See, e.g.*, Zalaquett, *supra* note 154, at 1428–29 (noting that "past rulers or the party they represented may have still enjoyed a significant measure of political support" after a transition to democracy and arguing that this political power creates considerable constraints on the ability to prosecute perpetrators of human rights abuses); McSherry, *supra* note 131, at 12 (asserting that right-wing civilian politicians in many countries in Latin America worked with military leaders to ensure impunity for past abuses as a means of exerting social control).

159. *See, e.g.*, McSherry, *supra* note 131, at 14 (noting that some civilian leaders in Latin America resisted efforts to hold militaries accountable due to their conservative beliefs and an unfriendliness to popular movements).

160. HRW, "IF WE RAISE OUR VOICE THEY ARREST US", *supra* note 105, at 12; *see also* Aloka Wanigasuriya, *Justice Delayed, Justice Denied? The Search for Accountability for Alleged Wartime Atrocities Committed in Sri Lanka*, 33 PACE INT'L L. REV. 219, 259 (2021) ("Because those who allegedly bear responsibility for

governments overseeing a negotiated transfer of power from autocratic regimes have often provided amnesties for security forces to ensure their continued cooperation.[161] The perverse incentive to act against democratic values in order to ensure a transition away from autocracy encourages political figures in transitional contexts to continue to provide state agents with the "shield of impunity."[162] In short, whether driven by existential concerns or political expedience, many leaders resist calls to hold security forces accountable for enforced disappearance due to a lack of political will.

### B. Successes of the HRC, IACtHR, and ECtHR

The Human Rights Committee, the Inter-American Court, and the European Court have developed several successful strategies for holding States accountable for enforced disappearances when inadequate domestic investigations and insufficient political will facilitate individual impunity. Specifically, all three institutions have developed implicit or explicit burden-shifting frameworks to address the inherent obstacles to proving State responsibility for disappearances. And, faced with a dearth of physical evidence, all three bodies have developed flexible approaches to circumstantial evidence and presumptions.[163] This flexibility has enabled them to

---

the commission of international crimes occupy the most senior positions within the government of Sri Lanka, the chances of establishing a credible accountability mechanism that will investigate and prosecute any alleged international crimes committed during the civil war appear to be slim.").

161. *See, e.g.*, TRANSITIONAL JUST. INST., UNIV. OF ULSTER, THE BELFAST GUIDELINES ON AMNESTY AND ACCOUNTABILITY 9 (2013), https://www.ulster.ac.uk/__data/assets/pdf_file/0005/57839/TheBelfastGuidelinesFINAL_000.pdf [https://perma.cc/5MFM-U73V] (noting that amnesties are used for a variety of purposes including persuading authoritarian rulers to hand over power and providing incentives to offenders to participate in truth and recovery or reconciliation programs); Leigh A. Payne et al., *Overcoming Barriers to Justice in the Age of Human Rights Accountability*, 37 HUM. RTS. Q. 728, 732 (documenting sixty-three amnesty laws across thirty-four transitional countries).

162. *See* GÖRAL, *supra* note 50, at 13 ("[T]he complacency and undisturbed status of the perpetrators protected by the shield of impunity, along with the ineffectiveness of the local juridical mechanisms are tragically similar.").

163. *See* Claude, *supra* note 49, at 410–14 (comparing evidentiary rules of the IACtHR and ECtHR); Kyriakou, *supra* note 63, at 19 (noting that HRC's decisions have articulated principles concerning the probative value of evidence submitted that have influenced other international institutions); ANDREU-GUZMAN, *supra* note 2, at 144 (noting that "circumstantial evidence and indications are of great significance" in cases where there are no direct witnesses or where such witnesses have been intimidated or eliminated).

hold States accountable for the particularly grievous and multifaceted human rights violations inherent in the practice of enforced disappearance.[164]

### 1. Explicit and Implicit Burden-Shifting Frameworks

As an initial matter, all three international human rights institutions developed either explicit or implicit burden-shifting frameworks to help hold States accountable for their role in perpetrating or acquiescing to enforced disappearances. Like their domestic counterparts, the HRC, IACtHR, and ECtHR typically consider that the party making an assertion bears the burden of proving or otherwise substantiating that assertion.[165] However, petitioners often cannot provide enough evidence to meet this burden in cases alleging enforced disappearance, as "the policy of disappearance practiced by a government involves measures that are carefully designed to erase whatever traces of evidence that remain."[166] International human rights institutions have therefore implemented "burden-shifting frameworks" that shift the burden of

164. *See, e.g.*, Sarkin, *Processes and Mechanisms*, *supra* note 9, at 34 (noting that IACtHR "has made a significant contribution in the development of procedural and substantive policies involving the adjudication of enforced disappearance."); Kyriakou, *supra* note 63, at 18 (summarizing the rights violations arising from cases of enforced disappearance before the HRC, IACtHR, and ECtHR); Claude, *supra* note 49, at 433–60 (summarizing the jurisprudence of the IACtHR and ECtHR regarding enforced disappearance).

165. *See, e.g.*, Marie-Bénédicte Dembour, *The Evidentiary System of the European Court of Human Rights in Critical Perspective*, 4 EUR. CONVENTION ON HUM. RTS. L. REV. 363, 364 (2023) ("[T]he burden of *having to persuade* the [European] Court [of Human Rights] of the validity of one's allegations . . . normally rests with the applicant."); Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 123 (July 29, 1988) ("Because the [Inter-American] Commission is accusing the Government [of Honduras] of the disappearance . . . it, in principle, should bear the burden of proving the facts underlying its petition."); OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., FACT SHEET NO. 15 (REV. 1): CIVIL AND POLITICAL RIGHTS: THE HUMAN RIGHTS COMMITTEE 26 (May 1, 2005) [hereinafter U.N. FACT SHEET ON THE HRC], https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-15-rev-1-civil-and-political-rights-human-rights-committee [https://perma.cc/UW49-HKZE] (noting that, although there is no formal standard of proof, the HRC "will tend to accept the facts as alleged by the victim if it receives no information from the relevant State" but that it "will tend to accept the State's specific denials of certain facts unless the victim can provide documentary proof supporting his or her own assertions").

166. Claude, *supra* note 49, at 415.

proof from the petitioner to the State once the former has made a *prima facie* case.

The HRC was the first institution to adopt a burden-shifting framework in cases of enforced disappearance.[167] In the landmark 1982 case of *Bleier v. Uruguay*, the Committee concluded that the burden of proof "cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information."[168] Rather, it emphasized that States are obligated to investigate all alleged violations of the ICCPR, "especially when such allegations are corroborated by evidence submitted by the author of the communication . . . ."[169] Consequently, the Committee held that "where further clarification of the case depends on information exclusively in the hands of the State party, the Committee may consider such allegations as substantiated in the absence of satisfactory evidence and explanations to the contrary submitted by the State party."[170] The HRC relied on this burden-shifting framework in many subsequent cases to establish State liability in cases of enforced disappearance.[171]

---

167. Kyriakou, *supra* note 63, at 19. Note that the HRC generally employs a flexible approach to allocating the burden of proof for individual complaints. *See* U.N. FACT SHEET ON THE HRC, *supra* note 165, at 26 (noting that, when "the nature of a complaint . . . make[s] it impossible for the victim to submit further relevant evidence" or when information is "exclusively in the hands of the State party," the Committee has placed a higher burden on the State to refuse an alleged victim's allegations).

168. Bleier v. Uruguay, Commc'n No. R.7/30, ¶ 13.3, U.N. Doc. CCPR/C/15/D/30/1978 (Hum. Rts. Comm. Mar. 29, 1982).

169. *Id.*

170. *Id.*

171. *See, e.g.*, Boutarsa v. Algeria, Commc'n No. 3010/2017, ¶¶ 8.3, 8.5–8.6, 8.8–8.9, U.N. Doc. CCPR/C/135/D/3010/2017 (Hum. Rts. Comm. July 8, 2022) (reiterating that "[i]n the absence of any explanation from the State party . . . due weight must be given to the author's allegations, provided that they have been sufficiently substantiated" and holding Algeria responsible for violations of articles 6(1), 7, 9, and 16 of the ICCPR based on its refusal to provide any information on the merits); Sharma v. Nepal, Commc'n No. 1469/2006, ¶ 7.5, U.N. Doc. CCPR/C/94/D/1469/2006 (Hum. Rts. Comm. Oct. 28, 2008) (reaffirming that "the burden of proof cannot rest on the author of the communication alone" particularly because the parties in HRC proceedings do not always have equal access to the evidence and "frequently the State party alone has the relevant information"); Djebbar and Chihoub v. Algeria, Commc'n No. 1811/2008, ¶ 8.3, U.N. Doc. CCPR/C/103/D/1811/2008 (Hum. Rts. Comm. Oct. 31, 2011) (same).

This practice and philosophy of burden-shifting to combat unequal access to information in enforced disappearance cases has since been applied by the IACtHR and the ECtHR, albeit in meaningfully different ways. Inspired in part by the HRC's jurisprudence,[172] the IACtHR developed an implicit[173] burden-shifting framework in cases of enforced disappearance.[174] The Court effectively imposes a two-prong test.[175] First, a claimant must make a *prima facie* case by showing that (1) there is, or was, a "pattern of disappearances" that the government perpetrated or acquiesced to during the material time, and (2) the disappearance of specific individuals was linked to that practice.[176] Then, once both are demonstrated, the burden shifts to the State to affirmatively rebut the presumption that it was responsible for the disappearance in question.[177]

The ECtHR, meanwhile, utilizes a narrower burden-shifting framework to establish State responsibility for violations of the right to life in cases of enforced disappearance in which the victim's body

172. *See* Bámaca-Velásquez v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶¶ 152–54 (Nov. 25, 2000) (quoting with approval HRC's jurisprudence to support conclusion that applicant's claims had been proven due to State's silence); JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 171–72 (2d ed. 2013) [hereinafter PASQUALUCCI, PRACTICE AND PROCEDURE] (noting that IACtHR burden-shifting framework in forced disappearance cases was at least in part inspired by the HRC).

173. The Court has not explicitly framed its judgments as establishing a burden-shifting framework. Claude, *supra* note 49, at 416. Rather, it frames the two-prong test as a means for the Inter-American Commission to meet its own burden of proof using indirect evidence. *See, e.g.*, Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 126 (July 29, 1988) ("If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, *the Commission's allegations will have been proven* . . . .") (emphasis added).

174. Claude, *supra* note 49, at 415; PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 170–71 (noting that IACtHR has held that circumstantial evidence is especially important in disappearance cases).

175. *See* PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 172–73 (describing two-step framework and noting that IACtHR has not used this burden-shifting framework in recent cases).

176. Claude, *supra* note 49, at 415, 420; *see also Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C), No. 4, ¶ 126 (establishing a burden-shifting framework for cases of enforced disappearance).

177. PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 173; Claude, *supra* note 49, at 415.

has not been found.[178] The Court has established at least three "crucial elements" in determining whether a victim may be presumed dead.[179] Specifically, the ECtHR requires a showing that (1) the missing person was detained by government forces[180] (2) in a situation that could "be reasonably regarded as life-threatening for the detained person"[181] and that (3) there has been no reliable news of the disappeared person's fate since their disappearance.[182] At that point, the burden shifts to the respondent government to either submit a sufficiently plausible and exculpatory explanation as to what happened after the person was detained[183] or provide a

178. Claude, *supra* note 49, at 418–19.

179. *See, e.g.*, Bazorkina v. Russia, App. No. 69481/01, ¶ 110 (July 27, 2006), https://hudoc.echr.coe.int/fre?i=001-76493 (identifying four "crucial elements in the present case that should be taken into account when deciding whether [the disappeared man] can be presumed dead and whether his death can be attributed to the authorities"); Timurtaş v. Turkey, App. No. 23531/94, ¶¶ 82–86 (June 13, 2000), https://hudoc.echr.coe.int/eng?i=001-58901 (noting that ECtHR may presume death of detained person who was last seen in state custody in a situation that may be regarded as life-threatening and about whom no information has come to light since).

180. *See, e.g.*, *Timurtaş*, App. No. 23531/94, ¶ 81 (noting that ECtHR accepted Commission's establishment that missing man was apprehended and detained by gendarmes); *Bazorkina*, App. No. 69481/01, ¶ 110 ("First of all, the Government do not deny that [the missing man] was detained during a counter-terrorist operation . . . ."); Tanış and Others v. Turkey, App. No. 65899/01, ¶ 206 (Aug. 2, 2005), https://hudoc.echr.coe.int/?i=001-70021 (noting that the "decisive factor" for the Court was that the two missing men attended Silopi district gendarmerie command and had not been seen since).

181. *Bazorkina*, App. No. 69481/01, ¶ 110; *see also* Sangariyeva and Others v. Russia, App. No. 1839/04, ¶ 66 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86610 (noting findings from previous cases in Chechnya that "when a person is detained by unidentified servicemen without any subsequent acknowledge of the detention, this can be regarded as life-threatening"); Orhan v. Turkey, App. No. 25656/94, ¶ 330 (June 18, 2022), https://hudoc.echr.coe.int/?i=001-60509 ("[I]t can by no means be excluded that an unacknowledged detention of such persons would be life-threatening.") (citations omitted).

182. *See*, *e.g.*, *Orhan*, App. No. 25656/94, ¶ 331 (presuming deaths of missing persons in part because no news had been heard of them in eight years); Utsayeva and Others v. Russia, App. No. 29133/03, ¶ 162 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86605 (presuming deaths of four missing persons because they had not been seen or heard from in more than five years); *Bazorkina*, App. No. 69481/01, ¶¶ 110–11 (presuming death of missing man in part because there had been "no reliable news" of him in six years).

183. *See, e.g.*, *Bazorkina*, App. No. 69481/01, ¶ 110 ("[T]he Government do not submit any plausible explanation as to what happened to [the disappeared man] after his detention."); *Tanış and Others*, App. No. 65899/01, ¶ 207 ("[T]he Court is

justification for the use of lethal force.[184] The Court has not framed these factors as exhaustive or comprehensive requirements.[185] Nevertheless, it has generally required all three elements to establish the presumed death of disappeared persons and thereby shift the burden of proof to the respondent State.[186]

### 2. The Use of Circumstantial Evidence and Presumptions

International human rights institutions have also adopted expansive rules concerning the types of evidence that parties may submit as a means of overcoming the lack of direct evidence in cases of enforced disappearance. Burden-shifting frameworks do not jettison all traditional evidentiary standards; applicants must still produce *some* evidence before shifting the burden onto respondent

---

not satisfied that the explanations furnished by the Government . . . suffice to cast reasonable doubt on the applicants' allegations.").

184. *See*, *e.g.*, Çiçek v. Turkey, App. No. 25704/94, ¶ 147 (Feb. 27, 2001), https://hudoc.echr.coe.int/?i=001-59219 (noting that Turkish authorities "do not rely on any ground of justification in respect of any use of lethal force by their agents" and holding them liable for presumed violation of Article 2); *Orhan*, App. No. 25656/94, ¶¶ 331–32 (same); *Timurtaş*, App. No. 23531/94, ¶ 86 (same).

185. *See Bazorkina*, App. No. 69481/01, ¶ 110 (referring to the four factors as "crucial elements in the *present* case that should be taken into account when deciding whether [the disappeared man] can be presumed dead and whether his death can be attributed to the authorities.") (emphasis added); Betayev and Betayeva v. Russia, App. No. 37315/03, ¶ 66 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86611 (referring to the elements discussed in *Bazorkina* as "general principles relating to the establishment of facts in dispute" when determining whether a missing person may be presumed dead).

186. *See, e.g.*, *Betayev and Betayeva*, App. No. 37315/03, ¶¶ 66–75 (finding that applicant made their prima facie case because disappeared man was last seen detained by state agents in circumstance that may be considered life-threatening and had not been heard from in five years); *Sangariyeva and Others*, App. No. 1839/04, ¶¶ 60–69 (same). It should be noted that the Court has not always used the language of "prima facie case" when shifting the burden of proof to the respondent State. For example, in *Timurtaş v. Turkey*, the Court applied all three elements to presume the death of the applicant's son. *Timurtaş*, App. No. 23531/94, ¶¶ 83–86. The Court then held Türkiye liable because Turkish authorities had failed to provide an explanation or justification. *Id.* ¶ 86. However, it did not frame its decision in terms of "burden-shifting" but rather claimed that the issue was whether the applicant could provide "sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody . . . ." *Id.* ¶ 82. It was only in later cases that the Court expressed these requirements in terms of a burden-shifting framework. Claude, *supra* note 49, at 418–19.

States.[187] However, as in domestic proceedings, faulty investigations create multiple obstacles for petitioners seeking justice through international legal mechanisms.[188] In particular, the lack of concrete evidence has often impeded the ability of the HRC, IACtHR, and ECtHR to make necessary determinations of fact.[189] This problem is exacerbated by the inherent power imbalance between the petitioners and respondent States.[190] International human rights institutions have often noted that States have both exclusive access to crucial evidence (e.g., police reports, detention logs)[191] and the legal authority

187. *See* discussion *supra* Section II.B.0 (summarizing the burden-shifting frameworks used by the HRC, IACtHR, and ECtHR).

188. *See, e.g.*, Dulitzky, *supra* note 16, at 435 (noting that impunity for disappearances during repressive regimes in Latin America exacerbated the delay in international responses).

189. *See* Claude, *supra* note 49, at 410 (noting that IACtHR and ECtHR have both developed flexible approaches to admitting evidence to compensate for the "uncertainty" inherent in cases of enforced disappearance). For example, the ECtHR has often noted that a State's failure to investigate hampers its ability to make accurate determinations in enforced disappearance cases. *See, e.g.*, Enzile Özdemir v. Turkey, App. No. 54169/00, ¶ 48 (Jan. 8, 2008), https://hudoc.echr.coe.int/?i=001-84277 (concluding that ECtHR "is unable to draw a complete picture of the factual circumstances surrounding Mehmet Özdemir's disappearance due to the defects in the domestic investigation"); Tekdağ v. Turkey, App. No. 27699/95, ¶¶ 76, 80–82 (Jan. 15, 2004), https://hudoc.echr.coe.int/?i=001-61582 (finding no substantive violation of the right to life in part because it was unable to interview the eyewitnesses cited by the applicant and citing the Turkish prosecutor's failure to interview these witnesses or identify other possible witnesses to find a procedural violation of the right to life).

190. *See, e.g.*, *Godínez-Cruz*, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶¶ 136–44 (Jan. 20, 1989) (reiterating that "[c]ircumstantial or presumptive evidence is especially important in allegations of disappearances" and emphasizing that "[t]he State controls the means to verify acts occurring within its territory"); Akkum and Others v. Turkey, App. No. 21894/93, ¶ 211 (Mar. 24, 2005), https://hudoc.echr.coe.int/eng?i=001-68601 (holding that in cases involving events which "lie wholly, or in large part, within the exclusive knowledge of the authorities" and "where it is the non-disclosure by the Government of crucial documents in their exclusive possession which is preventing the Court from establishing the facts" the defendant State must either conclusively argue why the documents cannot corroborate the allegations made by the applicant or "provide a satisfactory and convincing explanation of how the events in question occurred" to avoid a violation judgment); Hiber Conteris v. Uruguay, Commc'n No. 139/1983, ¶ 7.2, U.N. Doc. CCPR/C/25/D/139/1983 (Hum. Rts. Comm. July 17, 1985) (noting that "the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information").

191. *See, e.g.*, Bámaca-Velásquez v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 152 (Nov. 25, 2000) (reiterating that "in cases of forced

to prevent or impede independent investigations by such institutions within their territory.[192] As a result, when faced with allegations of enforced disappearance, international human rights institutions have compensated for the characteristic lack of physical evidence by admitting a wide variety of unconventional circumstantial evidence to help substantiate petitioners' allegations[193] and by relying on presumptions of fact.[194]

In practice, the HRC, IACtHR, and ECtHR have adopted remarkably similar evidentiary rules to overcome the unique obstacles to establishing responsibility for enforced disappearances. International judicial and quasi-judicial institutions are not bound by

---

disappearance . . . it is the State that controls the means to clarify the facts that have occurred in its jurisdiction"); Tepe v. Turkey, App. No. 27244/95, ¶ 128 (May 9, 2003), https://hudoc.echr.coe.int/?i=001-61089 ("It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations."); Çelikbilek v. Turkey, App. No. 27693/95, ¶ 71 (May 31, 2005), https://hudoc.echr.coe.int/?i=001-69202 (noting that the government failed to provide custody records to the Court "despite having been given ample opportunity to do so").

192. *See, e.g.*, *Godínez-Cruz*, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 142 ("Although the Commission has investigatory powers, it cannot exercise them within a State's jurisdiction unless it has the cooperation of that State."); *Tepe*, App. No. 27244/95, ¶¶ 130–35 (finding the Turkish government liable for "fail[ing] to furnish all necessary facilities to the Court in its task of establishing the facts" due to its repeated failure to provide evidence and otherwise facilitate the ECtHR's investigation into the disappearance and murder of the petitioner's son).

193. *See, e.g.*, Claude, *supra* note 49, at 410 (asserting that both IACtHR and ECtHR have "proved to be flexible and, therefore, accepted a wide range of evidence" to compensate for the lack of physical evidence in cases of enforced disappearance); PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS 234 (4th ed. 2017) (noting that ECtHR has often made inferences to presume death in cases of enforced disappearance); PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 168–69 (2d ed. 2013) (noting that IACtHR has held that circumstantial evidence is especially important in disappearance cases). For the purposes of this Note, circumstantial evidence refers to "indirect evidence that is not based on the personal knowledge or observations of a witness." PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 168.

194. *See* Claude, *supra* note 49, at 411, 419 (noting that admission of presumptive evidence has been particularly crucial in cases of disappearances for IACtHR and that ECtHR has been increasingly willing to rely on presumptions of fact); U.N. FACT SHEET ON THE HRC, *supra* note 165, at 26 (noting that when "the nature of a complaint . . . make[s] it impossible for the victim to submit further relevant evidence" or when information is "exclusively in the hands of the State party" the Committee has placed a higher burden on the State to refuse an alleged victim's allegations).

the evidentiary standards of domestic courts.[195] Indeed, all three institutions have often asserted their ability to evaluate all evidence freely.[196] Even so, the ECtHR and IACtHR have explicitly acknowledged that flexible evidentiary rules are particularly important in disappearance cases.[197] All three bodies have admitted a wide range of unconventional documentary evidence, including

195. *See* PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 168 ("The practice of international courts allows circumstantial evidence and presumptions to supplement testimonial and documentary evidence."). Part of the reason for the discrepancy between international and domestic approaches to circumstantial evidence is that international human rights institutions are focused on establishing *State* liability for human rights violations. The IACtHR has explained that "[u]nlike domestic criminal law, it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated . . . ." Paniagua-Morales et al. v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 91 (Mar. 8, 1998). Instead, plaintiffs must show only that "State authorities supported or tolerated infringement of the rights recognized in the Convention." *Id.* The latter is implicitly subject to a lower standard of proof because there is less risk of injustice in holding a State accountable than there might be in holding an individual accountable. *See* discussion *infra* Section III.0 (making a case for over-inclusivity in cases against States).

196. *See* Nachova and Others v. Bulgaria, App. Nos. 43577/98 & 43579/98, ¶ 147 (July 6, 2005), https://hudoc.echr.coe.int/tur?i=001-69630 ("[The ECtHR] adopts the conclusions that are, in its view, supported by the *free evaluation* of all evidence . . . .") (emphasis added); PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 173 (noting that the IACtHR has recognized the power of international courts to weigh evidence freely); U.N. FACT SHEET ON THE HRC, *supra* note 165, at 26–27 (noting that HRC has no strict rules regarding weighing of evidence or allocation of burden of proof).

197. *See* PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 168–69 (explaining IACtHR's emphasis on using circumstantial evidence in disappearance cases); Osmanoğlu v. Turkey, App. No. 48804/99, ¶ 45 (Jan. 24, 2008), https://hudoc.echr.coe.int/eng?i=001-84667 (noting ECtHR's case law that "proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact" in lieu of direct evidence). For example, in a long line of cases beginning with *Velásquez Rodríguez*, the IACtHR has repeatedly asserted that "[c]ircumstantial or presumptive evidence is especially important in allegation of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim." Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 ¶ 131 (July 29, 1988). Consequently, it has long held that "[c]ircumstantial evidence, indicia, and presumptions may be considered, so long as they lead to conclusions consistent with the facts." *Id.* ¶ 130; Godínez-Cruz v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 136 (Jan. 20, 1989); Blake v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 49 (Jan. 24, 1998).

journalistic articles and other news media,[198] reports by NGOs and inter-governmental organizations,[199] academic writings,[200] press releases,[201] reports by Truth Commissions,[202] and "unofficial" government reports that had been leaked to the public.[203]

198. Claude, *supra* note 49, at 412; *see, e.g.*, Sharma v. Nepal, Commc'n No. 1469/2006, ¶ 5.4, U.N. Doc. CCPR/C/94/D/1469/2006 (Hum. Rts. Comm. Oct. 28, 2008) (noting applicant's use of news articles to help corroborate claim that Nepal knew about her husband's disappearance and death); *Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 146 (admitting press clippings for the purposes of corroborating testimony and other evidence); *Godínez-Cruz*, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 125 (citing testimony and documentary evidence corroborated by press clippings to conclude that there was a systematic practice of disappearances); Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 25 (Sept. 22, 2009) (admitting press clippings that "refer to public and notorious facts or statements made by state officials or when they corroborate aspects related to the case and evidenced by other means"); Mahmut Kaya v. Turkey, App. No. 22535/93, ¶ 60 (Mar. 28, 2000), https://hudoc.echr.coe.int/eng?i=001-58523 (noting that applicant provided the Commission with a book and newspaper articles concerning contra-guerrillas in Türkiye); A.A. and Others v. Russia, App. No. 37008/19, ¶ 9 (Dec. 14, 2021), https://hudoc.echr.coe.int/?i=001-214031 (admitting a news article describing the execution of men accused of killing two police officers).

199. *See* LEACH, *supra* note 193, at 57 ("The [ECtHR] is regularly referred to, and frequently places reliance upon, reports produced by inter-governmental institutions and human rights NGOs."); Claude, *supra* note 49, at 412–13 (noting that both IACtHR and ECtHR have admitted reports by NGOs and inter-governmental organizations); Sangariyeva and Others v. Russia, App. No. 1839/04, ¶ 52 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86610 (noting that applicants referred to "reports of various NGOs and international bodies" to support their claim that there was a practice of not investigating crimes committed by state agents); Utsayeva and Others v. Russia, App. No. 29133/03, ¶ 162 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86605 (citing "[a] number of international reports" to support the conclusion that "the phenomenon of 'disappearances' is well known in Chechnya"); Rochac Hernández v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 285, ¶ 50 (Oct. 14, 2014) (citing work by a civil society organization known as Search Association to characterize the systematic pattern of forced disappearance of children in El Salvador during the material time); *Blake*, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 48 (citing report by WGEID); Alvarado Espinoza v. Mexico, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 370, ¶ 57 (Nov. 28, 2018) (citing report by WGEID).

200. *See, e.g.*, Gomez Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 55 (Nov. 24, 2010) (admitting academic articles).

201. *See*, *e.g.*, Tepe v. Turkey, App. No. 27244/95, ¶¶ 76–77 (May 9, 2003), https://hudoc.echr.coe.int/?i=001-61089 (citing a press release by Amnesty International concerning the disappearance of applicant's son); *Sharma*, Commc'n

All three institutions have also frequently placed considerable weight on various forms of indirect witness testimony to establish State liability for enforced disappearances.[204] In particular, the IACtHR and ECtHR have relied on witness testimony concerning the circumstances in which a person disappeared to establish State liability, even when the State submits witness testimony to contradict the claim that its agents were involved.[205] For example, the ECtHR

No. 1469/2006, ¶ 2.6 (noting that Amnesty International released an Urgent Action appeal for author's husband).

202. *Anzualdo Castro*, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 48; *see also* Chitay Nech v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶¶ 64–69 (May 25, 2010) (citing report by the Commission for Historical Clarification to establish the pattern of enforced disappearances in Guatemala during the material time); *Gomez Lund*, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 85–86 (citing report by Brazil's Special Commission on Politically Motivated Deaths and Disappearances of Persons to establish the systematic practice of enforced disappearances during the material time).

203. For example, the ECtHR admitted and considered copies of the so-called "Susurluk Report" commissioned by the Turkish government in the mid 1990s. *See* Selim Yıldırım and Others v. Turkey, App. No. 56154/00, ¶¶ 43–46 (Oct. 19, 2006), https://hudoc.echr.coe.int/eng?i=001-77580 (discussing the "unofficial" Susurluk Report commissioned and released by the Turkish Prime Minister). The ECtHR acknowledged that the report was not based on a judicial investigation. *Id.* ¶ 44. It nevertheless admitted the report in several cases alleging human rights abuses in Türkiye with the caveat that the report "may not be relied on for establishing to the required standard of proof that State officials were implicated in any particular incident." *See id.* ¶ 64 (citing earlier judgments concerning Susurluk Report).

204. *See, e.g.*, Bleier v. Uruguay, Commc'n No. R.7/30, ¶ 13.3, U.N. Doc. CCPR/C/15/D/30/1978 (Hum. Rts. Comm. Mar. 29, 1982) (noting that author of the complaint had supported her claims "by substantial witness testimony"); Boucherf v. Algeria, CCPR/C/86/D/1196/2003, ¶ 9.6 (Apr. 27, 2006) (concluding that "several concordant testimonies . . . give rise to a strong inference" that the author's son had been repeatedly tortured); Godínez-Cruz v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 125 (Jan. 20, 1989) (citing "testimony and documentary evidence" to conclude that disappeared man was a victim of the "systematic and selective practice of disappearance" in Honduras between 1981 and 1984); İpek v. Turkey, App. No. 25760/94, ¶¶ 150–59 (Feb. 17, 2004), https://hudoc.echr.coe.int/?i=001-61636 (setting out findings of fact based on documentary evidence and witness testimony).

205. *See, e.g.*, Caballero-Delgado & Santana v. Colombia, Merits, Judgement Inter-Am. Ct. H.R., (ser. C) No. 22, ¶ 53(b) (Dec. 8, 1995) (citing testimony to conclude that "there exists sufficient evidence to infer the reasonable conclusion that the detention and the disappearance . . . were carried out by persons who belonged to the Colombian Army and by several civilians who collaborated with them"); Akdeniz and Others v. Turkey, App. No. 23954/94, ¶¶ 16–18, 73–77 (May 31, 2001), https://hudoc.echr.coe.int/?i=001-59482 (accepting the Commission's

found Russia liable for several disappearances in Chechnya based largely on testimony establishing that disappeared persons were last seen in the custody of unknown uniformed personnel who were able to pass through roadblocks during curfew hours.[206] Critically, the ECtHR's jurisprudence holds that the State must not have denied that the allegedly disappeared person was detained by its officers in order for the applicant to make a *prima facie* case of State responsibility.[207] Yet in each case the Court rejected the Russian government's assertions that state agents had not been involved in detaining the disappeared persons,[208] thereby implicitly placing greater weight onto the witness testimony submitted by the applicants. Similarly, the IACtHR has often relied on indirect testimony, particularly testimony provided by expert witnesses and journalists, to establish a pattern or practice of disappearances in a respondent State during the material time.[209]

---

findings of fact, which were based in large part on the testimony of the applicants themselves, and rejecting the Turkish government's claim that applicants had fabricated their claims because "[the applicants] were honest, convincing and suffering deeply from the uncertainty as to the fate of their relatives").

206. *See, e.g.*, Claude, *supra* note 49, at 419 (noting that ECtHR has "relied on mere witness testimonies that could only certify that State service men were patrolling during curfew hours to make a *prima facie* case"); Betayev and Betayeva v. Russia, App. No. 37315/03, ¶¶ 68, 70 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86611 (concluding that applicants established a prima facie case of State responsibility for the disappearances of their two sons based on witness testimony that the kidnappers have been part of "a large group of armed men in uniform" driving military vehicles and moving freely through federal roadblocks during curfew hours); Ibragimov and Others v. Russia, App. No. 34561/03, ¶¶ 80–82, 89 (May 29, 2008), https://hudoc.echr.coe.int/?i=001-86607 (concluding that applicants established a prima facie case of State responsibility based on evidence that disappeared person was last seen in custody of unidentified agents who drove military vehicles and drove through roadblocks during curfew hours, despite denials by Russia).

207. Claude, *supra* note 49, at 418; *see also* Bazorkina v. Russia, App. No. 69481/01, ¶ 110 (July 27, 2006), https://hudoc.echr.coe.int/?i=001-76493 (identifying the fact that the respondent government did not deny taking the disappeared man into custody as one of the "crucial elements" to be considered in determining whether the victim can be presumed dead and his death attributed to the State).

208. *See Betayev and Betayeva*, App. No. 37315/03, ¶¶ 77, 81 (finding Russia liable for the presumed death of applicants' relatives despite the State's contention that the no servicemen had been involved in their alleged kidnapping and murder); *Ibragimov and Others*, App. No. 34561/03, ¶¶ 89, 93 (same).

209. *See, e.g.*, Blake v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶¶ 46–48 (Jan. 20, 1989) (admitting testimony from witnesses who did not see any of the acts involved in the disappearance at issue); Gelman v.

The HRC, IACtHR, and ECtHR have also used adverse inferences and presumptions in cases of enforced disappearance. Even the most liberal evidentiary rules may not be enough to overcome the lack of evidence in cases of enforced disappearance.[210] All three institutions have thus expressly held that they may draw inferences from a State's failure to disclose requested information, particularly where a State is the only party with access to that information.[211] This strategy has at least two distinct advantages—it allows institutions to make factual determinations despite a lack of evidence and creates a powerful incentive for States to comply with requests for information.[212]

---

Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 444, ¶¶ 34–35 (Feb. 24, 2011) (admitting both expert testimony and indirect witness testimony from journalists); Gomez Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶¶ 52–53 (Nov. 24, 2010) (admitting testimony and declarations from numerous expert witnesses); Maidanik v. Uruguay, Merits and Reparations, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 444, ¶ 27 (Nov. 15, 2021) (admitting expert testimony).

210. For example, respondent States have frequently refused to hand over documents concerning official investigations into disappearances, thereby preventing international institutions from determining the facts of the case, *See, e.g.*, Timurtaş v. Turkey, App. No. 23531/94, ¶¶ 70, 72 (June 13, 2000), https://hudoc.echr.coe.int/eng?i=001-58901 (noting that ECtHR was "unable to obtain certain documentary evidence and testimony which it considered essential" despite conducting a thorough investigation and that the government did not provide requested documents); Tepe v. Turkey, App. No. 27244/95, ¶¶ 129–34 (May 9, 2003), https://hudoc.echr.coe.int/?i=001-61089 (documenting numerous failures by Turkish government to provide documentary evidence and facilitate witness testimony); Boutarsa v. Algeria, Commc'n No. 3010/2017, ¶¶ 8.2–8.3, U.N. Doc. CCPR/C/135/D/3010/2017 (Hum. Rts. Comm. July 8, 2022) (noting that Algeria failed to reply to author's allegations and merely submitted general comments concerning its amnesty law); Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 4 (July 29, 1988) (noting that the government of Honduras repeatedly refused to comply with requests for information from the Inter-American Commission).

211. LEACH, *supra* note 193, at 55; PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 170; U.N. FACT SHEET ON THE HRC, *supra* note 165, at 26.

212. *See, e.g.*, Jo Pasqualucci, *The Inter-American Human Rights System: Progress Made and Still to Be Made*, 52 GERMAN YB. INT'L L. 181, 191 (2009) [hereinafter Pasqualucci, *The Inter-American Human Rights System*] (noting that the Inter-American Commission on Human Rights adopted the procedural rule that "the facts alleged by the petitioner and sent to the State would be presumed to be true if the State did not make a timely response and other evidence did not lead to a different conclusion" in response to repeated noncompliance with requests for information and that "[f]ortunately, States now generally respond to Commission requests for information").

The European Court's jurisprudence illustrates the importance of presumptions in cases of enforced disappearance. The ECtHR has been particularly willing to use presumptions in such cases in part because of its inordinately high standard of proof.[213] The ECtHR has long required applicants to prove their assertions "beyond a reasonable doubt"[214]—a notably higher standard than the one employed by the IACtHR.[215] To compensate for this barrier, the ECtHR's evolving jurisprudence on enforced disappearance has increasingly relied on presumptions,[216] particularly presumptions arising from the State's refusal to cooperate.[217] For example, in the case of *Çelikbilek v. Turkey*, the Court held Türkiye liable for substantive and procedural violations of the right to life primarily because the government refused to provide it with custody records and other documents necessary to corroborate or refute the applicant's claims.[218] Similarly, in a series of cases concerning

213. Claude, *supra* note 49, at 425–26.

214. *Id.* at 424–25; Christine Bicknell, *Uncertain Certainty? Making Sense of the European Court of Human Rights' Standard of Proof*, 8 INT'L HUM. RTS. L. REV. 155, 156 (2019). It should be noted that the ECtHR's standard is not the same as that used in Anglo-American criminal law. Claude, *supra* note 49, at 425; *see also* Osmanoğlu v. Turkey, App. No. 48804/99, ¶ 45 (Jan. 24, 2008), https://hudoc.echr.coe.int/eng?i=001-84667 ("[I]t has never been the Court's purpose to borrow the approach of the national legal systems that use the standard of proof 'beyond reasonable doubt . . . .'"). However, the Court has not provided substantial information concerning what might constitute a sufficiently "reasonable doubt" to prevent it from finding in favor of the applicant. Claude, *supra* note 49, at 424.

215. Claude, *supra* note 49, at 422–23. In practice, this standard has presented a significant obstacle in cases alleging State responsibility for an enforced disappearance. Bicknell, *supra* note 214, at 171.

216. Claude, *supra* note 49, at 424–26.

217. *See, e.g.*, Helen Keller & Corina Heri, *Enforced Disappearances 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, 739 (2014) (noting that the ECtHR responded to the difficulties of proving State responsibility to the requisite standard of proof in cases of enforced disappearance by requiring the State to disprove prima facie allegations and making strong presumptions against the respondent State when it fails to do so); Varnava and Others v. Turkey, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ¶ 184 (Sept. 18, 2009), https://hudoc.echr.coe.int/?i=001-94162 (holding that "[i]f [the respondent State] then fail[s] to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation, strong inferences may be drawn" against that State).

218. Çelikbilek v. Turkey, App. No. 27693/95, ¶¶ 69–72, 79 (May 31, 2005), https://hudoc.echr.coe.int/?i=001-69202.

disappearances in Chechnya, the ECtHR held the Russian government liable for disappearances in part because officials repeatedly refused to provide case files concerning domestic investigations into the facts of each case.[219]

International human rights institutions' use of circumstantial evidence and presumptions has been essential in enabling them to hold States accountable for enforced disappearance. By allowing petitioners to substantiate their claims using circumstantial evidence and presumptions alone, these institutions have effectively lowered the burden of proof in cases of enforced disappearance.[220] The IACtHR has emphasized that "it would be impossible to prove that an individual has been disappeared" if petitioners were not permitted to rely on circumstantial evidence and presumptions to support claims of State responsibility.[221] All three human rights institutions' broad acceptance of alternative means of substantiating their claims should therefore be understood as an important success in the fight against the crime of enforced disappearance.

3. Judgments Against States

Due in part to their use of a burden-shifting framework, circumstantial evidence, and presumptions of fact, the HRC, IACtHR, and ECtHR have made major strides in holding States accountable

219. *See, e.g.*, Sangariyeva and Others v. Russia, App. No. 1839/04, ¶ 64 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86610 ("Drawing inferences from the Government's failure to submit the documents which were in their exclusive possession or to provide another plausible explanation of the events in question, the Court considers that Musa and Magomed Gaytayev were apprehended . . . by State servicemen during an unacknowledged security operation."); Ibragimov and Others v. Russia, App. No. 34561/03, ¶¶ 82, 85–87 (May 29, 2008), https://hudoc.echr.coe.int/?i=001-86607 (concluding that "it has been established beyond reasonable doubt" that victim disappeared following an unacknowledged detention based on inferences drawn from Russia's failure to submit requested documents); Alikhadzhiyeva v. Russia, App. No. 68007/01, ¶ 61 (July 5, 2007), https://hudoc.echr.coe.int/?i=001-81400 ("The authorities' behaviour in the face of the applicant's well-substantiated complaints gives rise to a strong presumption of at least acquiescence in the situation and raises strong doubts as to the objectivity of the investigation.").

220. Gobind Singh Sethi, *The European Court of Human Rights' Jurisprudence on Issues of Forced Disappearances*, 8 HUM. RTS. BRIEF 29, 29 (2001).

221. Godínez-Cruz v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, ¶ 130 (Jan. 20, 1989) (summarizing the Inter-American Commission's argument for admitting circumstantial evidence); *see also id.* ¶ 132 (accepting the Commission's argument).

for enforced disappearance by delivering judgments in favor of applicants.[222] For example, of the sixty-seven ECtHR applications concerning enforced disappearance in Türkiye brought between 1998 and 2015, fifty-one resulted in violation judgments and seven in friendly settlements.[223] The HRC has likewise held Algeria liable for enforced disappearances committed during its decade-long civil war in at least forty-four cases.[224] Meanwhile, the IACtHR has issued dozens of judgments against a wide range of countries since the groundbreaking case of *Velásquez Rodríguez* in 1988.[225]

Such judgments[226] have two notable benefits. First, there is evidence that judgments from international human rights institutions impact States' reputational concerns.[227] Many States make great efforts to project and protect their reputation by complying with shared international norms.[228] Violation judgments by international institutions directly challenge this reputation,[229] thereby encouraging States to comply with the rulings to demonstrate

222. *See* Sarkin, *Processes and Mechanisms*, *supra* note 9, at 33–35 (noting contributions of regional human rights mechanisms in holding States accountable for disappearances).

223. HAHM & ECCHR, *supra* note 73, at 12.

224. Osman, *supra* note 4.

225. *See, e.g.*, Eduardo Ferrer Mac-Gregor, *The* Right to the Truth *as an Autonomous Right Under the Inter-American Human Rights System*, 9 MEX. L. REV. 121, 121 (2016) ("Since [1988], of the 182 contentious cases that it has decided to date, the Court has heard forty-two cases concerning forced disappearances.").

226. While it is beyond the scope of this Note to address the goals of human rights law generally, there is a strong argument that a primary function of regional human rights courts such as the ECtHR and IACtHR is to support the norms established by their respective treaties. SHANY, *supra* note 71, at 38–40. In the case of human rights tribunals, the goal of supporting norms has often superseded other functions of international courts more generally, including their dispute resolution function. *See id.* at 41–42 (noting that the dispute-settling function of international human rights courts has declined due to the focus on their mandate to support human rights norms).

227. *See* Hillebrecht, *supra* note 136, at 985 (concluding that State leaders may comply with rulings by regional human rights courts to reap reputational and material benefits); *see also* Avdeyeva, *supra* note 135, at 299 (noting that compliance generally improves a State's reputation and that improving reputation is often an instrumental goal for improving a State's bargaining power among other States).

228. Avdeyeva, *supra* note 135, at 299.

229. *See* Guzman, *supra* note 135, at 1827 (arguing that "compliance occurs due to state concern about both reputation and direct sanctions triggered by violations").

their commitment to human rights and the rule of law.[230] For example, the HRC has found that Bosnia and Herzegovina has taken substantive steps to establish the fate or whereabouts of disappeared persons and bring those responsible to justice in compliance with several of the Committee's non-binding Views.[231] Similarly, one empirical study of IACtHR cases found that States modified at least *some* of their conduct in response to sixty-five of the sixty-eight judgments surveyed.[232] This progress lends credence to the theory that reputational impacts can provide human rights advocates with a powerful tool to influence a State's decision-making.

Second, violation judgments can provide meaningful support for domestic advocacy by victims, their families, and civil society by reducing or eliminating barriers to justice.[233] An inspiring example of the potential impact of violation judgments from international institutions comes from Latin America, where States have conducted many domestic investigations and prosecutions over the past two decades.[234] Scholars have attributed much of this progress to the work of civil society organizations and families agitating for change.[235] For example, Professor Janice Gallagher has found

230. *See, e.g.*, Hillebrecht, *supra* note 136, at 978 (concluding that Argentina used its compliance with IACtHR rulings to "signal their commitment to human rights to domestic and international audiences").

231. Hum. Rts. Comm., *Follow-up Progress Report on Individual Communications*, at 5, 7–8, 9–11, U.N. Doc. CCPR/C/118/3 (Feb. 15, 2017) [hereinafter HRC, *Follow-Up Progress Report 2017*].

232. González-Salzberg, *supra* note 72, at 129.

233. *See* Genovese & van der Wilt, *supra* note 1, at 16 (asserting that regional bodies can give "proper voice to victims and witnesses" and allow them to actively participate in proceedings to facilitate truth and accountability of perpetrators); Hillebrecht, *supra* note 136, at 972 (asserting that domestic constituents and civil society may mobilize around rulings by human rights tribunals in the same way they mobilize around human rights treaties).

234. *See, e.g.*, Dulitzky, *supra* note 16, at 453–59 (summarizing progress in terms of prosecutions for enforced disappearance in Latin America); KARINA ANSOLABEHERE ET AL., DISAPPEARANCES IN THE POST-TRANSITION ERA IN LATIN AMERICAN 2–3 (Karina Ansolabehere et al. eds., 2021) (noting that Latin America has been referenced as "going farther than any other region in addressing human rights violations" during past authoritarian regimes and that accountability and deterrence mechanisms were initiated in nearly every country).

235. *See, e.g.*, Dulitzky, *supra* note 16, at 463 (noting that Latin American countries have adopted national search plans in great numbers due to demands made by family associations, civil society organizations, and their allies); Roht-Arriaza, *supra* note 50, at 343 (attributing reversal of amnesty laws to work by civil society networks, family members, human rights advocates, and their professional allies); Dancy & Michel, *supra* note 143, at 4 ("The rise in domestic

evidence that the involvement of activists and advocates in cases of enforced disappearance and homicide in Mexico and Colombia more than doubled the probability that the case would be investigated and "enter the judicial pipeline."[236] However, civil society organizations often faced major legal obstacles, such as amnesties and prohibitively short statutes of limitation.[237] The IACtHR has provided essential support by nullifying amnesties and statutes of limitation as violations of the State's duty to investigate, prosecute, and punish those responsible.[238] In short, violation judgments against States may provide much-needed moral, political, and legal support to those seeking justice for enforced disappearance.

---

prosecutorial efforts against human rights violations in Latin America and Europe largely results from a process of institutional conversion led by victims and NGOs interacting with existing legal institutions over time.").

236. Janice Gallagher, *The Last Mile Problem: Activists, Advocates, and the Struggle for Justice in Domestic Courts*, 50 COMP. POL. STUD. 1666, 1689 (2017). Professor Gallagher concluded that, despite high levels of impunity in both countries, civil society members have been able to prompt effective investigations by participating in the judicial process and pressuring the State for results. *Id.*

237. *See* Roht-Arriaza, *supra* note 50, at 350–53 (discussing the methods used by prosecutors and advocates in Latin American to bypass amnesties and statutes of limitation that prevented them from opening an investigation into crimes such as enforced disappearance).

238. *Id.* at 348; *see also* Almonacid-Arellano v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 17–23 (Sept. 26, 2006) (finding that Chile's amnesty law violated its obligations under the American Convention and holding that "the respondent State may not formally maintain said decree law in force as part of its domestic law"); Gomez Lund v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 219, ¶ 325(3) (Nov. 24, 2010) (unanimously declaring that "[t]he provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention, lack legal effect, and cannot continue as obstacles for the investigation of the facts of the present case"). Indeed, some scholars have argued that the IACtHR's most influential rulings were those that struck down amnesty laws throughout Latin America, which paved the way for domestic-level accountability efforts. *See* Roht-Arriaza, *supra* note 50, at 348–49 (discussing IACtHR jurisprudence concerning amnesties and asserting that "[n]ational courts widely cited the Court's decisions in this arena"); Dulitzky, *supra* note 16, at 455–56 (discussing the importance of IACtHR decisions concerning the inapplicability of amnesty laws to the success of subsequent domestic cases challenging those laws).

### C. Shortcoming of Accountability Under International Human Rights Law

Institutions like the HRC, IACtHR, and ECtHR provide reliable mechanisms for holding States accountable for the systematic use of enforced disappearances on the global stage.[239] Yet international institutions have generally been unable to utilize these violation judgments to adequately address the myriad causes of structural impunity for individual perpetrators.[240] As a result, most perpetrators are able to avoid criminal prosecution,[241] and State officials who enact policies of enforced disappearance are almost never prosecuted.[242] In fact, it appears that impunity remains the norm when it comes to *individual* perpetrators of enforced disappearance,[243] despite the proliferation of violation judgments against States.

There are at least three explanations for the disparity inherent in the numerous judgments against States and the continued impunity for individual perpetrators. First, the

239. *See, e.g.*, Sarkin, *Processes and Mechanisms*, *supra* note 9, at 33–35 (discussing the myriad contributions of regional human rights systems to combating impunity for enforced disappearances); Claude, *supra* note 49, at 433–60 (summarizing the jurisprudence of the IACtHR and ECtHR regarding enforced disappearance); Kyriakou, *supra* note 63, at 18–20 (summarizing the HRC, IACtHR, and ECtHR jurisprudence concerning enforced disappearance).

240. *See, e.g.*, WGEID 2023 Report, *supra* note 6, ¶ 112 (expressing concern that "impunity for enforced disappearances remains rampant"); WEBBER & SHERANI, *supra* note 5, at 2 ("Despite a strong consensus prohibiting enforced disappearances under international law, the practice continues unabated.").

241. *See, e.g.*, GÖRAL, *supra* note 50, at 13 (noting that perpetrators are often given high-ranking positions within the government or security agencies and enjoy "an impenetrable shield of impunity"); *see also* discussion *supra* Section II.A.0 (discussing causes of impunity for enforced disappearance).

242. *See* Dancy & Michel, *supra* note 143, at 7 (finding that former state leaders were prosecuted in only 33 of 615 cases from 1970 to 2010). *But see* Dulitzky, *supra* note 16, at 453 (noting that Latin American courts have convicted several former heads of state, including Fujimori in Peru, Bordaberry in Uruguay, and Ríos Montt in Guatemala).

243. *See, e.g.*, Press Release, Int'l Comm'n Jurists, MENA: Enforced Disappearances and Accompanying Impunity Continue to Prevail (Aug. 30, 2021), https://www.icj.org/mena-enforced-disappearances-and-accompanying-impunity-continue-to-prevail [https://perma.cc/V8TC-Q9JJ] ("Impunity for perpetrators of enforced disappearances remains the norm."); *International Day of the Victims of Enforced Disappearances, 30 August*, UNITED NATIONS, https://www.un.org/en/observances/victims-enforced-disappearance [https://perma.cc/B9LM-6KL9] ("Of particular concern [is] . . . the still widespread impunity for enforced disappearance.").

admissibility criteria imposed by international institutions may render them inaccessible for many victims and their families, thereby reducing the number of judgments against States. Second, the length of proceedings before the HRC, IACtHR, and ECtHR often complicate efforts to hold perpetrators accountable because, even if States wish to honor violation judgments, the passing of time may make it impossible to locate disappeared persons or hold perpetrators accountable. Third, States' regular failure to comply with the orders and recommendations included in violation judgments indicates that these rulings inflict insufficient reputational harm to achieve the desired effect.

### 1. Accessibility and Admissibility Criteria

The accessibility of international courts is particularly important for combating impunity for enforced disappearance.[244] The fact that States refuse to investigate disappearances or prosecute perpetrators means that, in many cases, international bodies represent the only sources of justice for the families of disappeared persons.[245] By extension, any obstacles that impede access to these institutions may preclude all hopes of judicial accountability.

The HRC, IACtHR, and ECtHR impose two related admissibility criteria on all petitions (including those relating to enforced disappearances): (1) the exhaustion of domestic remedies[246]

244. *See* Genovese & van der Wilt, *supra* note 1, at 9–11 (arguing that domestic courts provide limited hope for holding perpetrators of enforced disappearance accountable).

245. *See, e.g.* GÖRAL, *supra* note 50, at 65–66 (comparing the "total impunity" for perpetrators in Turkish courts with the success of disappearance cases brought before the ECtHR); Dulitzky, *supra* note 16, at 440–43 (discussing the important role of international legal mechanisms in combatting impunity for enforced disappearances in Latin America during the 1970s and 1980s).

246. *See* Optional Protocol to the International Covenant on Civil and Political Rights arts. 2, 5(2)(b), *entry into force* Mar. 23, 1976, 999 U.N.T.S. 302, 302–03 [hereinafter Optional Protocol to the ICCPR] (establishing that individuals must exhaust domestic remedies before submitting a Communication to HRC); American Convention on Human Rights art. 46(1)(a), *entry into force* July 18, 1978, 1144 U.N.T.S. 123, 155 [hereinafter ACHR] (requiring petitions to show "[t]hat the remedies under domestic law have been pursued and exhausted in accordance with recognized principles of international law"); European Convention on Human Rights, art. 35(1), *entry into force* Sept. 3, 1953, 3, 21 [hereinafter ECHR], https://www.echr.coe.int/documents/d/echr/convention_ENG [https://perma.cc/8535-67F6] (establishing duty to exhaust domestic remedies and four-month time limit).

and (2) timeliness.[247] In general, the "exhaustion of domestic remedies" criteria requires applicants to show that they have pursued all remedies that are available, effective, and sufficient.[248] Meanwhile, the "timeliness" criteria requires applicants to file their applications within a specified period of time once domestic remedies have been exhausted—five years for the HRC,[249] six months for the IACtHR,[250] and four months for the ECtHR.[251] The IACtHR and ECtHR generally construe their respective time limits as analogous to statutes of limitation.[252] However, it may be particularly difficult

247. *See* discussion *infra* notes 249–251 (discussing temporal limitations of all three institutions).

248. *See* LEACH, *supra* note 193, at 145 (noting that an applicant to the ECtHR "is only required to pursue remedies that are available, effective and sufficient"); PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 94–97 (noting that IACtHR requires States to demonstrate that there are still domestic remedies that are available to the petitioner, adequate, appropriate, and effective); Boudjedmai v. Algeria, Commc'n No. 1791/2008, ¶¶ 7.3–7.5, U.N. Doc. CCPR/C/107/D/1791/2008 (Hum. Rts. Comm. Mar. 22, 2013) (rejecting Algeria's argument that author had not exhausted domestic remedies after finding no evidence that an effective remedy was available). The obligation to exhaust domestic remedies prior to bringing a case before an international court forms part of customary international law, the rationale being that domestic authorities must have the opportunity to prevent or correct any alleged violations. EUR. CT. OF HUM. RTS., PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA ¶¶ 107, 110 (Aug. 31, 2024) [hereinafter ECTHR, PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA], https://www.echr.coe.int/documents/d/echr/Admissibility_guide_ENG [https://perma.cc/2W6R-J4CB].

249. Rule 99(c) of the HRC's Rules of Procedure establishes that "a communication *may* constitute an abuse of the right of submission, when it is submitted five years after the exhaustion of domestic remedies . . . or, where applicable, three years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay . . . ." Hum. Rts. Comm., Rules of Procedure of the Human Rights Committee, at 19, U.N. Doc. CCPR/C/3/Rev.12 (Jan. 4, 2021) [hereinafter HRC, Rules of Procedure] (emphasis added). However, it is worth noting that the Optional Protocol does not impose a formal statute of limitations. Optional Protocol to the ICCPR, art. 13, *supra* note 246, 999 U.N.T.S. at 303.

250. ACHR, art. 46(1)(b), *supra* note 246, 1144 U.N.T.S. at 155.

251. ECHR, art. 35(1), *supra* note 246, at 21. Note that, prior to the adoption of Protocol 15, the ECtHR also imposed a six-month rule. Blaga Thavard, *The Admissibility Hurdle*, VERFASSUNGSBLOG (May 27, 2021), https://verfassungsblog.de/the-admissibility-hurdle [https://perma.cc/8HJ8-VTLF] (arguing that ECtHR uses inordinately strict admissibility criteria to preclude hearing the vast majority of petitions).

252. *See* PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 88 ("The six-month rule serves much like a statute of limitations that eliminates stale claims and provides a date of closure for the State."); LEACH, *supra* note 193, at 160–61 (noting that ECtHR applied its then-six-month rule strictly in order to

for applicants to definitively establish that existing remedies have been exhausted in cases of enforced disappearance because States frequently pursue "sham" investigations for years without actually attempting to hold perpetrators accountable.[253] By extension, the ambiguity inherent in assessing whether an applicant has exhausted available remedies may make it particularly difficult for applicants to meet the timeliness criteria. After all, an applicant cannot reasonably be expected to apply in a timely manner if there is no objective means of establishing when remedies have been exhausted.

Petitioners have faced particularly strict admissibility criteria in the European System. The ECtHR has tended to make exceptions to its time limit only in cases where applicants allege defects in ongoing criminal investigations that became apparent at a later date.[254] The Court has held that "[s]pecial considerations *may* apply in exceptional case where an applicant first avails himself of a domestic remedy and only at a later stage becomes aware, or *should have* become aware, of circumstances which make that remedy ineffective."[255] In practice this rule has produced mixed results for applications alleging enforced disappearance. On the one hand, the Court has used this standard to bypass its timeliness requirement and admit cases filed as much as a decade after a disappearance.[256]

---

provide legal certainty and promote the processing of cases within a reasonable time). By contrast, the HRC does not consider the five-year requirement to be a mandatory rule. *See, e.g.*, Boutarsa v. Algeria, Commc'n No. 3010/2017, ¶ 7.5, U.N. Doc. CCPR/C/135/D/3010/2017 (Hum. Rts. Comm. July 8, 2022) ("[S]ubmitting a communication five years after the exhaustion of domestic remedies *can* amount to an abuse of the right of submission.") (emphasis added).

253. *See, e.g.*, Orhan v. Turkey, App. No. 25656/94, ¶¶ 338–48 (June 18, 2022), https://hudoc.echr.coe.int/?i=001-60509 (finding major defects in all three investigations opened into the disappearance applicants' relatives); Amirov v. Russia, Commc'n No. 1447/2006, ¶ 11.4, U.N. Doc. CCPR/C/95/D/1447/2006 (Hum. Rts. Comm. Apr. 2, 2009) (noting "a pattern of perfunctory and unproductive investigations whose genuineness is doubtful" surrounding enforced disappearance cases in Russia).

254. *See* ECTHR, PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA, *supra* note 248, ¶¶ 218–22 (summarizing ECtHR's approach to admissibility in cases concerning the lack of an effective investigation in death or ill-treatment and asserting that an application will be considered untimely if the Court concludes that "before the applicants petitioned the competent domestic authorities they were already aware, or ought to have been aware, of the lack of any effective criminal investigation").

255. Bozkır and Others v. Turkey, App. No. 24589/04, ¶ 47 (Feb. 26, 2013), https://hudoc.echr.coe.int/?i=001-116824 (emphases added).

256. *See id.* ¶¶ 1, 48–50 (finding application admissible even though it was filed eight years after the disappearance in question because of developments

On the other hand, the Court has rejected disappearance cases based on the presumption that "the absence of a meaningful investigation must have been apparent to the applicants long before they applied to the Court . . . ."[257] In addition to the timeliness criterion, the ECtHR has been criticized for imposing unnecessarily strict procedural hurdles for applicants during the admissibility phase,[258] with some accusing the Court of using its admissibility criteria "to close the door to legitimate applications from victims."[259] Critically, even though enforced disappearances are characterized by a lack of evidence,[260] the European Court has rejected several applications as manifestly

related to the domestic investigation); Er and Others v. Turkey, App. No. 23016/04, ¶¶ 59–60 (July 31, 2012), https://hudoc.echr.coe.int/?i=001-112586 (dismissing government's objection that applicant failed to adhere to the six-month rule because a "sporadic" investigation was being conducted over the course of ten years following the disappearance).

257. Fındık v. Turkey & Omer v. Turkey, App. Nos. 33898/11 & 35798/11, ¶ 15 (Oct. 9, 2012), https://hudoc.echr.coe.int/?i=001-114303; *see also* Taşçı and Duman v. Turkey, App. No. 40787/10, ¶¶ 20–23 (Oct. 9, 2012), https://hudoc.echr.coe.int/?i=001-114445 (finding that application was inadmissible because "the absence of a meaningful investigation must have been apparent to the applicants"). Between 1998 and 2016, the ECtHR declared at least eleven applications concerning seventeen disappeared persons in Türkiye to be inadmissible. HAKİKAT ADALET HAFIZ MERKEZİ, ENFORCED DISAPPEARANCES AND THE CONDUCT OF JUDICIARY IN TURKEY: ANALYSIS RESULTS IN BRIEF 7 (2015), https://hakikatadalethafiza.org/wp-content/uploads/2015/02/Executive-Summary_Enforced-Disappearances-and-The-Conduct-of-The-Judiciary.pdf [https://perma.cc/DSS8-GBCD]. The ECtHR has also rejected at least one application as being filed out of time despite evidence that the applicants were not informed of a ruling against them by domestic courts. Yavuz et autres c. Turquie [Yavuz and Others. v. Türkiye], App. No. 48064/99, 5–6 (Feb. 1, 2005), https://hudoc.echr.coe.int/?i=001-68432.

258. *See* Leighann Spencer, *The ECtHR and Post-Coup Turkey: Losing Ground or Losing Credibility?* VERFASSUNGSBLOG (July 17, 2018), https://verfassungsblog.de/the-ecthr-and-post-coup-turkey-losing-ground-or-losing-credibility [https://perma.cc/XB4G-4DN4] (noting that over 90% of the more than 33,000 applications received from Türkiye following the attempted coup d'état in 2016 had been deemed inadmissible and that these dismissals were "often on dubious grounds"); Thavard, *supra* note 251 (noting that ECtHR ruled inadmissible 95% of cases submitted to it 2020 and arguing that "[i]t is doubtful that a national court with such statistics would pass the test of the effectiveness of legal remedy" under ECtHR case law).

259. Thavard, *supra* note 251.

260. *See* discussions *supra* Sections II.A.0, II.B.0–0 (discussing the fact that most States do not adequately investigate disappearances and summarizing judicial strategies to cope with the lack of evidence in disappearance cases).

ill-founded[261] on the grounds that the applicants did not present enough evidence to support their claims.[262] The admissibility criteria established by the ECtHR thus represent a major impediment to justice in cases of serious human rights violations, including the systematic use of enforced disappearance.

2. Prolonged Proceedings

The length of proceedings before the HRC, IACtHR, and ECtHR represents another major impediment to holding perpetrators accountable. Cases before these bodies often take many years to result in a violation judgment.[263] For example, the HRC generally takes anywhere from three to six years to deliver its Views on enforced disappearance cases.[264] Moreover, the Committee has seen a dramatic increase in its backlog of cases, receiving 1,615 new individual complaints between 2015 and 2021[265] but issuing only 864

261. The ECtHR is empowered to reject any application on the grounds that it is "'manifestly ill-founded' if a preliminary examination of its substance does not disclose any appearance of a violation of the rights guaranteed by the Convention." ECTHR, PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA, *supra* note 248, ¶ 356.

262. *See, e.g.*, Efe c. Turquie [Efe v. Turkey], App. No. 39235/98, 10, 12 (Oct. 9, 2003), https://hudoc.echr.coe.int/?i=001-44531 (rejecting applicant's case as ill-founded because she did not support her allegations with sufficient evidence); Nergiz et Karaaslan c. Turquie [Nergiz and Karaaslan v. Turkey], App. No. 39979/98, 11–12, 16 (Nov. 6, 2003), https://hudoc.echr.coe.int/?i=001-44580 (same); Ulumaskan et autres c. Turqiue [Ulumaskan and Others v. Turkey], App. Nos. 9785/02, 17309/04, & 22010/04, 6–8 (June 13, 2006), https://hudoc.echr.coe.int/?i=001-76274 (same).

263. *See What Is the I/A Court H.R.?*, INTER-AM. CT. HUM. RTS. [hereinafter *What Is the I/A Court H.R.?*], https://www.corteidh.or.cr/que_es_la_corte.cfm [https://perma.cc/5NKA-CGQ8] (noting that the average duration of a contentious case before the IACtHR in 2019 was 21.97 months); Bill Swannie, *Individual Communications: Can They Provide Effective Redress for Human Rights Violations?* 48 ALT. L.J. 258, 261 (2023) (noting that HRC typically takes three or four years to deliver a View after receipt of communication).

264. *See, e.g.*, Bousroual v. Algeria, Commc'n No. 992/2001, U.N. Doc. CCPR/C/86/992/2001 (Hum. Rts. Comm. Mar. 30, 2006) (five-and-a-half years between receipt of communication and adoption of Views); Abushaala v. Libya, Commc'n No. 1913/2009, U.N. Doc. CCPR/C/107/D/1913/2009 (Hum. Rts. Comm. Mar. 18, 2013) (three-and-a-half years); Magomadova v. Russia, Commc'n No. 2524/2015, U.N. Doc. CCPR/C/125/D/2524/2015 (Hum. Rts. Comm. Mar. 19, 2019) (almost five years).

265. Rep. of Sec'y-Gen, *Status of the Human Rights Treaty Body System: Supplement Information*, U.N. Doc A/77/279, annex VI tbl.1 (Aug. 8, 2022) [hereinafter *Status of the Human Rights System 2022*],

final decisions.[266] This helps explain why, as of December 31, 2021, the HRC had 1,225 communications pending review.[267]

Hearings before regional human rights courts can also take many years to result in a violation judgment. On average, the ECtHR takes five years or longer to review a case and issue a judgment.[268] In cases concerning enforced disappearance in particular, the Court has at times taken almost ten years to issue judgments.[269] And although the ECtHR has made progress reducing its backlog of cases,[270] the Court reported 70,150 pending cases at the end of 2021.[271] Incidentally, the European Court has justified adopting more stringent standards on admissibility by claiming it was necessary to reduce this backlog.[272] This implicitly highlights the important relationship between the administrability of judicial procedures and the length of proceedings—an issue that will be discussed further in Part III.

Meanwhile, proceedings in the Inter-American system often take even longer. Critically, individuals are not entitled to bring cases

---

https://www.ohchr.org/en/documents/reports/fourth-biennial-report-status-human-rights-treaty-body-system [https://perma.cc/LYB7-KKZL].

266. *Id.* annex VII tbl.1.

267. *Id.* annex VIII tbl.1.

268. *See European Court of Human Rights*, CONSCIENTIOUS OBJECTOR'S GUIDE TO INT'L HUM. RTS. SYS., https://co-guide.info/mechanism/european-court-human-rights [https://perma.cc/MKB4-SWHZ] ("Even though the Court aims to decide on important cases within three years, it is highly likely that it will take five years or more.").

269. *See, e.g.*, Osmanoğlu v. Turkey, App. No. 48804/99, ¶ 4 (Jan. 24, 2008), https://hudoc.echr.coe.int/eng?i=001-84667 (issuing judgment on January 24, 2008, nearly ten years after the application was transmitted to ECtHR on November 1, 1998).

270. Specifically, the ECtHR's total number of "pending" cases dropped from around 160,000 in 2011 to 70,000 in 2021. EUR. CT. HUM. RTS. & COUNCIL OF EUR., EUROPEAN COURT OF HUMAN RIGHTS ANNUAL REPORT 2021, at 7 (2021) [hereinafter ECTHR ANNUAL REPORT 2021], https://www.echr.coe.int/documents/d/echr/Annual_report_2021_ENG [https://perma.cc/AX5N-HN8K].

271. *Id.* at 179.

272. *See* Thavard, *supra* note 251 (noting that stringent standards imposed by Protocol No. 15 were adopted to reduce the number of applications to the ECtHR and thereby "tackle the mounting number of unprocessed [applications]"); ECTHR, PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA, *supra* note 248, ¶ 387 (noting that the introduction of the "no significant disadvantage" criterion was designed to empower the ECtHR to focus on cases "which warrant an examination on the merits" by rejecting "minor" cases "in view of the ever-increasing caseload of the Court.").

directly before the IACtHR.[273] Rather, individuals seeking redress must first petition the Inter-American Commission on Human Rights, which must determine whether the petition is admissible and, if necessary, conduct an investigation to determine the facts of the case.[274] If the Commission concludes that a case is admissible, it then must "draw up a report setting forth the facts and stating its conclusions" and transmit that report to the State concerned, along with recommendations on how to rectify any rights violations.[275] The Commission may only refer the case to the IACtHR if the State does not comply with these recommendations within a set time frame.[276]

In practice, these procedural requirements mean that most applicants do not receive a judgment from the IACtHR for many years. For example, the Commission often takes a decade or more to issue a report on admissibility.[277] Unfortunately, the Commission's backlog of cases has increased dramatically in recent years due to a mixture of financial constraints and an influx of applications.[278] As of

273. ORG. AM. STATES, PETITION AND CASE SYSTEM 10 (2021) [hereinafter OAS, PETITION AND CASE SYSTEM], https://www.oas.org/en/iachr/docs/Booklet/folleto_peticiones_EN.pdf [https://perma.cc/A333-SF87]. Only States Parties and the Inter-American Commission on Human Rights have the right to submit a case for consideration before the IACtHR. ACHR art. 61(1), *supra* note 246, 1144 U.N.T.S. at 159.

274. ACHR art. 48, *supra* note 246, 1144 U.N.T.S. at 156.

275. ACHR arts. 50(1)–(2), *supra* note 246, 1144 U.N.T.S. at 157; *see also* PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 151 ("The Commission makes a determination of the facts of the case, and then, if it finds that the State has violated the individual's rights, it makes recommendations to the State.").

276. PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 151; *see also* OAS, PETITION AND CASE SYSTEM, *supra* note 273, at 10 (noting that petitioners must apply to the Commission "and complete the procedure provided for it" and that the Commission may then refer cases to IACtHR "when the conditions are met"). Note that States may also refer cases to the Court if they disagree with the Commission's findings. PASQUALUCCI, PRACTICE AND PROCEDURE, *supra* note 172, at 151.

277. The Inter-American Commission drafts admissibility reports in chronological order and, as of this writing, is analyzing mainly petitions filed between 2010 and 2014. *Frequently Asked Questions*, INTER-AM. COMM. ON HUM. RTS. [hereinafter *Inter-American Commission FAQs*], https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/usersupport/faq.asp [https://perma.cc/62MR-8J8Y].

278. *See* Bruno de Oliveira Biazatti, *Overcoming the Backlog in the Initial Review of Petitions in the Inter-American Commission on Human Rights*, EJIL:TALK (Oct. 27, 2023), https://www.ejiltalk.org/overcoming-the-backlog-in-the-initial-review-of-petitions-in-the-inter-american-commission-on-human-rights [https://perma.cc/B79W-PPXD] (describing the "chronic" backlog of cases pending

February 2021, the Commission recorded delays of more than twenty-five years in the merits stage, more than fifteen years in the admissibility stage, and negotiations exceeding twenty years for the friendly settlement process.[279] Once a cases reaches the IACtHR, the Court takes an average of just under two years to issue judgments.[280] Proceedings in the Inter-American System may thus take a decade or more to result in a judgment, even when applications concern alleged State responsibility for enforced disappearances.[281]

Unfortunately, prolonged proceedings may have the effect of further impeding efforts to hold perpetrators accountable. As a general rule, the more time passes after a disappearance, the harder it is to effectively investigate.[282] By extension, the longer the proceedings, the more likely it is that any investigation will prove fruitless, particularly if applicants, witnesses, or perpetrators die before a case is decided.[283] Indeed, despite the progress made by the IACtHR, the majority of perpetrators remain unprosecuted in many

initial review before the Inter-American Commission arising from a 361% growth in the number of petitions and concomitant financial constraints).

279. Press Release, Inter-Am. Comm'n on Hum. Rts., IACHR Reports Good Results in 2020, the Fourth Year of Its Program to Overcome Procedural Backlog (Feb. 1, 2021), https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2021/019.asp [https://perma.cc/VV87-G25Z].

280. *What Is the I/A Court H.R.?*, *supra* note 263.

281. *See, e.g.*, La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, ¶ 1 (Nov. 29, 2006) (noting that the case originated in a petition received by the Commission on July 30, 1992 and submitted to the IACtHR on February 14, 2006); Osorio Rivera v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 274, ¶¶ 1–2 (Nov. 26, 2013) (noting that the case originated in a petition received by the Commission on November 20, 1997 and submitted to the IACtHR on June 10, 2012); Anzualdo Castro v. Peru, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 1 (Sept. 22, 2009) (noting that the case originated in a petition received by the Commission on May 27, 1994 and submitted to the IACtHR on July 11, 2008).

282. *See* discussion *supra* notes 126–133 (discussing potential impacts of delayed investigations).

283. *See, e.g.*, Paul and Audrey Edwards v. The United Kingdom, App No. 46477/99, ¶ 86 (Mar. 14, 2002), https://hudoc.echr.coe.int/eng?i=001-60323 ("The passage of time will inevitably erode the amount and quality of the evidence available and the appearance of a lack of diligence will cast doubt on the good faith of the investigative efforts, as well as drag out the ordeal for the members of the family.").

Latin American countries[284] and the fate of many disappeared persons remains unknown.[285]

3. (Non-)Compliance

Finally, none of the three international institutions surveyed have been able to consistently compel States to conduct investigations or hold individual perpetrators accountable.[286] In practice, many States have ignored orders to investigate and prosecute perpetrators issued by the HRC, IACtHR, or ECtHR. For example, Algeria and Nepal have failed to comply with numerous HRC orders to investigate and remedy alleged instances of enforced disappearance.[287] And while it may be tempting to attribute the

284. *See, e.g.*, Roht-Arriaza, *supra* note 50, at 368 (noting that many Central American countries' prosecutors have focused only on emblematic leaders and incidents because of the "much higher numbers of potential defendants," rather than comprehensively prosecuting possible perpetrators—unlike in the Southern Cone, where it was "feasible to investigate . . . most of the remaining defendants"); Dulitzky, *supra* note 16, at 486–87 (noting that progress for holding perpetrators accountable has varied considerably between countries and regions in Latin America).

285. For example, as of September 2023, the remains of 307 persons forcibly disappeared in Chile during the Pinochet regime had been identified, whereas the State estimated that the remains of an additional 1,162 persons remained to be found. Kahn, *supra* note 132. In Argentina, an estimated 30,000 people were killed or disappeared. Lucía C. Herrera, *Will Argentina's Stolen Generation Be Forgotten*, FOREIGN POLICY (Apr. 30, 2022), https://foreignpolicy.com/2022/04/30/argentina-disappeared-history-military-dictatorship-abuelas-memory-human-rights [https://perma.cc/GCG2-2UP3]. The Argentine Forensic Anthropology Team (EAAF)—which was founded in 1984 to search for forcibly disappeared persons—has to date found only a little more than 1,400 bodies and identified just over 800. *Argentina*, EQUIPO ARGENTINO DE ANTROPOLOGÍA FORENSE, https://eaaf.org/eaaf-en-el-mundo/argentina [https://perma.cc/4AZW-WE7B].

286. *See, e.g.*, Jo M. Pasqualucci, *The Inter-American Human Rights System: Progress Made and Still to Be Made*, 52 GERMAN YB. INT'L L. 181, 226 (2009) [hereinafter Pasqualucci, *The Inter-American Human Rights System*] (noting that IACtHR orders relating to "the duty to investigate and punish the intellectual authors and perpetrators of [human rights] abuses, are seldom followed in any State."); Genovese & van der Wilt, *supra* note 1, at 4–5 (noting that the international human rights system has frequently held States accountable but that States often fail to hold individual perpetrators accountable).

287. *See, e.g.*, HRC, *Follow-Up Progress Report 2017*, *supra* note 231, at 26–32 (finding that Nepal had failed to comply with HRC Views regarding enforced disappearance in five cases); Osman, *supra* note 4 (noting that as of March 2021, Algeria had yet to comply with any of the forty-four rulings delivered by the HRC concerning alleged enforced disappearances).

HRC's failure to the fact that it cannot issue binding judgments, [288] regional human rights courts with binding authority have also struggled to compel domestic investigations.[289] A 2010 empirical study found that only around one quarter of States had even *partially* complied with IACtHR orders to investigate and prosecute perpetrators of human rights violations—making it "the most unfulfilled" order by the Court.[290] A recent study by the European Implementation Network (EIN) found that numerous Member States had failed to conduct investigations into a variety of human rights abuses ordered by the ECtHR during the previous ten years.[291] Moreover, authorities in Türkiye and Russia have consistently refused to investigate disappearances in defiance of the ECtHR.[292] It thus appears that impunity remains the norm in many countries that

288. For an example of such an argument, see Swannie, *supra* note 263, at 261–62.

289. *See, e.g.*, Pasqualucci, *The Inter-American Human Rights System*, *supra* note 286, at 210 (noting that the IACtHR consistently orders States to investigate and prosecute human rights violations but that "States have not been as willing to comply with these court orders even when they have complied with other types of reparations"); COMM'R FOR HUM. RTS., COUNCIL OF EUR., MISSING PERSONS AND VICTIMS OF ENFORCED DISAPPEARANCE IN EUROPE 42 (2016) [hereinafter COE COMM'R FOR HUM. RTS., VICTIMS OF ENFORCED DISAPPEARANCE], https://rm.coe.int/missing-persons-and-victims-of-enforced-disappearance-in-europe-issue-/16806daa1c [https://perma.cc/K3LQ-RCFX] (noting that States almost never comply with ECtHR orders to investigate).

290. González-Salzberg, *supra* note 72, at 128.

291. *See* EUR. IMPLEMENTATION NETWORK & DEMOCRACY REPORTING NETWORK, JUSTICE DELAYED AND JUSTICE DENIED: NON-IMPLEMENTATION OF EUROPEAN COURTS JUDGEMENTS AND THE RULE OF LAW 23, 25, 28, 37, 42, 56, 69, 72, 76 (2023), https://static1.squarespace.com/static/55815c4fe4b077ee5306577f/t/64a29f5698963750a81c90f7/1688379227726/Justice+Delayed+and+Justice+Denied_Final%282%29.pdf [https://perma.cc/6TTJ-MHST] (finding that Belgium, Bulgaria, Croatia, Estonia, Germany, Lithuania, Romania, Slovakia, and Spain had failed to conduct investigations ordered by the ECtHR).

292. *See* HAHM & ECCHR, *supra* note 73, at 47–48 (concluding that Türkiye had yet to comply with ECtHR's orders to investigate disappearances); WGEID, *General Allegations 2018*, *supra* note 73, ¶ 30 (noting that despite ECtHR's many rulings, "the Russian authorities have failed to carry out an effective investigation into the disappearances to identify and prosecute perpetrators, and to provide meaningful information to the families of the disappeared individuals").

have been the subject of violation judgments, such as Algeria,[293] Türkiye,[294] and Mexico.[295]

Admittedly, all three institutions have made some impact in the fight against impunity. For example, though the ECtHR has struggled to compel investigations into disappearances, its rulings have helped spur major legislative reforms in Türkiye which some have credited with providing better safeguards against abuse by security personnel.[296] But other advocates have argued that these reforms do not sufficiently address the underlying problem of impunity, particularly given the continued refusal to hold individual security personnel accountable.[297] The IACtHR's rulings have likewise prompted investigations into disappearances in Peru,[298] Guatemala,[299] Paraguay,[300] and Bolivia.[301] However, even States that

293. *See* Osman, *supra* note 4 (noting the "climate of impunity" that protects perpetrators of human rights violations).

294. *See* HAHM & ECCHR, *supra* note 73, at 25 (noting the "overarching impunity problem" in Türkiye).

295. *See Experts of the Committee on Enforced Disappearances Welcome Mexico's Cooperation with the Committee's Country Visit, Raise Issue Concerning Apparent Rise in Enforced Disappearances, High Levels of Impunity and the Slow Progress of Investigations*, UNITED NATIONS NEWS (Sept. 15, 2023), https://www.ohchr.org/en/news/2023/09/experts-committee-enforced-disappearances-welcome-mexicos-cooperation-committees [https://perma.cc/6C63-3BHH] (noting that the impunity level for Mexico "had reportedly reached 98 per cent").

296. *See* HAHM & ECCHR, *supra* note 73, at 36 (noting that the ECtHR's Committee of Ministers had worked with Türkiye to develop and implement "comprehensive amendments" related to protection under police custody and concluding that "[b]eyond doubt, these enhancements in the legislation regarding protection of individuals under police custody have impeded widespread and systematic torture and ill-treatment in official detention centres").

297. *See id.* at 36–37 (arguing that torture and ill-treatment by security forces have continued in public spaces and detention centers despite the legal reforms adopted in response to ECtHR rulings and asserting that those rulings have done little to change Turkish authorities' willingness to hold state agents accountable).

298. *See* González-Salzberg, *supra* note 72, at 125 (finding that Peru partially complied with the duty to investigate and prosecute perpetrators in the case of *Durand and Ugarte*); *see also* Durand and Ugarte v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 68, ¶ 143 (Aug. 16, 2000) (ordering Peru to investigate the disappearance of two persons).

299. *See* González-Salzberg, *supra* note 72, at 125 (finding that Guatemala partially complied with the order to investigate and prosecute perpetrators in the *Blake* case); Blake v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36, ¶ 121 (Jan. 24, 1998) ("The Court considers that Guatemala must use all the means at its disposal to investigate the facts denounced and to punish those responsible . . . .").

have launched investigations virtually never fully comply with the duty to investigate and prosecute.[302] One study of seventy IACtHR judgments issued between 1989 and 2006 found that no State had fully complied with the IACtHR's orders to investigate and prosecute individuals responsible for human rights abuses.[303] While these institutions have made progress in holding States accountable, they have thus far been unable to consistently compel either individual investigations or the domestic reforms necessary to hold individuals criminally responsible.

Much of this failure may be traced to these institutions' attenuated theory of change. Critically, none of the surveyed institutions have the authority to determine the criminal liability of an individual perpetrator.[304] The ECtHR and IACtHR instead rely on

300. *See* González-Salzberg, *supra* note 72, at 126 (finding that Paraguay partially complied with the order to prosecute the perpetrators in the *Goiburú* case); Goiburú v. Paraguay, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶¶ 165 (Sept. 22, 2006) (ordering Paraguay "to activate and conclude effectively, within a reasonable time, the investigation to determine the identity of the masterminds and perpetrators of the acts committed [against disappeared persons] . . . [and to] complete the criminal proceedings").

301. *See* González-Salzberg, *supra* note 72, at 127 (finding that Bolivia partially complied with the duty to prosecute the perpetrators in the *Trujillo-Oroza* case); Trujillo-Oroza v. Bolivia, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 111 (Feb. 27, 2002) ("Bolivia should investigate, identify and punish those responsible for the harmful facts that are the subject of the instant case.").

302. *See, e.g.*, González-Salzberg, *supra* note 72, at 128 (noting that "the obligation of conducting domestic investigations regarding the human rights violation, in order to prosecute and punish the wrongdoers, appears as the most unfulfilled by the States" in the Inter-American system); COE COMM'R FOR HUM. RTS., VICTIMS OF ENFORCED DISAPPEARANCE, *supra* note 289, at 42 ("The [ECtHR]'s judgments concerning enforced disappearances remain poorly or only slowly implemented. Investigations are very seldom launched . . . .").

303. González-Salzberg, *supra* note 72, at 124. Note that the study defined "fully complied" as "cases where the States have completely fulfilled the ordered measure"; "partially complied" as cases "when some steps were tak[en] in order to comply, but the result has not yet been accomplished"; and "pending fulfillment" as "cases where no relevant actions were taken." *Id.*

304. *See* THE GENOCIDE NETWORK & EUROJUST, DIGEST OF THE EUROPEAN COURT FOR HUMAN RIGHTS JURISPRUDENCE ON CORE INTERNATIONAL CRIMES 2 (2017), https://www.eurojust.europa.eu/sites/default/files/assets/2017-09-digest-of-european-court-for-human-rights-jurisprudence-on-core-international-crimes-en.pdf [https://perma.cc/RR9M-W3GA] ("[T]he role of the Court is not to try individuals for international criminal offences . . . ."); Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 134 (July 29, 1988) ("The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to

binding violation judgments against States to compel domestic authorities to initiate or reopen domestic criminal proceedings.[305] The HRC, similarly, though without binding authority, issues "Views" on the legality of State practices vis-à-vis the ICCPR.[306] Nevertheless, the HRC has a broadly similar theory of change for combatting impunity—use violation judgments to prompt domestic officials to investigate and prosecute perpetrators.[307]

It is important to note that this theory of change is not limited to ordering specific criminal proceedings. All three institutions have also ordered States to enact general measures to prevent recurring violations, including through comprehensive legislative, administrative, and judicial reforms.[308] There are, of

---

provide for the reparation of damages resulting from the acts of the States responsible."); Genovese & van der Wilt, *supra* note 1, at 20–21 ("Being primarily oriented towards the regulation of states' behaviour, human rights law can only impose duties on the states and not individual persons.").

305. *See, e.g.*, Lorna McGregor, *The Role of Supranational Human Rights Litigation in Strengthening Remedies for Torture Nationally*, 16 INT'L J. HUM. RTS. 737, 741–42 (2012) (asserting that supranational courts have increasingly focused on delivering judgments designed to improve access to effective remedies in domestic courts); Maria Issaeva et al., *Enforcement of the Judgments of the European Court of Human Rights in Russia: Recent Developments and Current Challenges*, 8 INT'L J. ON HUM. RTS. 67, 71 (2011) (discussing challenges of reopening court cases in Russia following ECtHR violation judgments); González-Salzberg, *supra* note 72, at 125–27 tbl.1 (presenting cases in which IACtHR ordered States to investigate and prosecute perpetrators).

306. U.N. FACT SHEET ON THE HRC, *supra* note 165, at 26–27; *see also* Swannie, *supra* note 263, at 261 ("[T]he HRC's views are not binding in the sense that State Parties do not have to comply with them and victims cannot enforce a view in domestic courts.").

307. *See, e.g.*, U.N. FACT SHEET ON THE HRC, *supra* note 165, at 27 (asserting that when the HRC makes a violation judgment it requests the respondent State to remedy that violation by providing an effective remedy and noting that requested remedies have included payment of compensation, the repeal or amendment of legislation, and the release of detained persons); Boutarsa v. Algeria, Commc'n No. 3010/2017, ¶ 10, U.N. Doc. CCPR/C/135/D/3010/2017 (Hum. Rts. Comm. July 8, 2022) (ordering Algeria to conduct an investigation into the disappeared person, release them or return their remains, prosecute those responsible, and provide adequate compensation to the author and disappeared person if they are still alive).

308. *See* McGregor, *supra* note 305, at 738–39, 742 (noting that supranational courts and U.N. treaty bodies have "focuse[d] on tackling structural problems at the national level that give rise to repetitive cases and generally strengthening domestic remedies" and consequently that they often issue orders which "include general measures recommending change to the broader law, policy and practice in the state concerned"); Pasqualucci, *The Inter-American Human Rights System*, *supra* note 286, at 208–09 (discussing various legislative and judicial reforms

course, salient differences between each institution's specific approach to general measures. The IACtHR has adopted an expansive approach which entails providing detailed instructions concerning what steps States must take to comply with their human rights obligations, including by ordering respondents to enact specific, comprehensive reforms designed to facilitate access to an effective remedy for all similarly situated persons in the respondent State.[309] For example, in the case of *Serrano-Cruz Sisters v. El Salvador*, the IACtHR ordered the respondent State to create a webpage to facilitate the search of disappeared persons and a genetic information system to assist with identifying missing persons.[310] By contrast, the ECtHR "has traditionally been reluctant to specify necessary remedial measures other than compensation, in its judgments."[311] While the ECtHR has long held that certain violation judgments

ordered by the IACtHR as part of reparations for human rights abuses); Issaeva et al., *supra* note 305, at 69 (noting that reforms required to comply with violation judgments "may not be limited to legislative change, but may also involve, for example, changes in administrative practice, public opinion or the attitudes of State officials to a particular practice").

309. *See* McGregor, *supra* note 305, at 742 (noting that the IACtHR has been a pioneer in issuing specific reparation orders); Kyriakou, *supra* note 63, at 32–37 (summarizing the IACtHR's recent approach to non-pecuniary damage and the duty to investigate before concluding that "this Court has devised meticulous reparative schemes for enforced disappearances cases" that "exemplify the Court's efforts to move beyond the paradigm of individual justice to address the broader causes underlying violations and to reach wider segments of the population."); Jan Schneider, Reparation and Enforcement of Judgments: A Comparative Analysis of the European and Inter-American Human Rights Systems 105–06 (Oct. 22, 2015) (Ph.D. dissertation, University of Mainz) (on file with the *Columbia Human Rights Law Review*) (discussing remedies ordered by the IACtHR and concluding that the Court has a particular interest in ensuring "that measures have public effects"); Blanco-Romero v. Venezuela, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 138, ¶ 105 (Nov. 28, 2005) (ordering Venezuela to "take the necessary action to reform . . . its criminal legislation for the purpose of rendering it compatible with the international standards for the protection of individuals as relating to the forced disappearance of persons"); Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶¶ 342–44 (Nov. 23, 2009) (ordering Mexico to amends its Military Criminal Code to make it compatible with international standards and the American Convention on Human Rights and to adopt "all the measures necessary" to make its legal classification of enforced disappearance compatible with international standards).

310. Serrano-Cruz Sisters v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶¶ 189–93 (Mar. 1, 2005).

311. *See* Issaeva et al., *supra* note 305, at 69 ("[T]he [ECtHR] has traditionally been reluctant to specify necessary remedial measures other than compensation, in its judgments.").

necessarily require States to implement general measures to prevent similar violations from occurring in the future,[312] the Court has generally left the specifics of reforms to the Member States themselves, albeit under the supervision of the Committee of Ministers.[313] Similarly, the HRC has tended to couch its orders for general measures in broad terms that preserve the State's discretion to choose the specific method of fulfilling its obligations.[314] The HRC has at times provided more detailed instructions to States (such as by explicitly instructing a State to repeal legislation that the Committee found to be incompatible with the ICCPR[315]), but the HRC's Views more closely resemble the broad approach of the ECtHR than the specific, granular orders of the IACtHR.[316]

---

312. *Id.* at 68; *see also* Broniowski v. Poland, App. No. 31443/94, ¶ 193 (June 22, 2004), https://hudoc.echr.coe.int/eng?i=001-61828 ("[I]n view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures which must take into account the many people affected."); Schneider, *supra* note 309, at 87 ("[T]he [ECtHR] has also begun to order states to adopt general measures in cases where it could identify systemic problems underlying a huge number of similar human rights violations.").

313. Issaeva et al., *supra* note 305, at 69; *see also* Glas, *infra* note 323, at 53 ("The Court's directives are not only general rather than specific; the Court also does not, in principle, either in the operative provisions, or in the merits, explain how the State is to achieve the measure."); Schneider, *supra* note 309, at 92 (noting that in most cases the ECtHR orders changes in a State's domestic legal order "without going very much into the details" but that in some cases the Court "gives more specific hints to the state [concerning] how to adapt its national legislation and administrative or judicial practices").

314. *See, e.g.*, Sharma v. Nepal, Commc'n No. 1469/2006, ¶ 9, U.N. Doc. CCPR/C/94/D/1469/2006 (Hum. Rts. Comm. Oct. 28, 2008) ("The State party is also under an obligation to take measures to prevent similar violations in the future."); Tshidika v. Dem. Rep. Congo, Commc'n No. 2214/2012, ¶ 8, U.N. Doc. CCPR/C/115/D/2214/2012 (Hum. Rts. Comm. Nov. 5, 2015) (same); Abushaala v. Libya, Commc'n No. 1913/2009, ¶ 8, U.N. Doc. CCPR/C/107/D/1913/2009 (Hum. Rts. Comm. Mar. 18, 2013) (same).

315. *See, e.g.*, Drif and Rafraf v. Algeria, Commc'n No. 3321/2019, ¶ 10, U.N. Doc. CCPR/C/135/D/3321/2019 (Hum. Rts. Comm. Oct. 11, 2022) ("[Algeria] *should* review its legislation . . . and, in particular, repeal the provisions of Ordinance No. 06-01 that are incompatible with the Covenant to ensure that the rights enshrined in the Covenant can be enjoyed fully in the State party."); Swannie, *supra* note 263, at 260 (describing the Toonen case in which the HRC found that Tasmanian laws concerning same-sex marriage violated Australia's legal obligations under the ICCPR and noting that the State ultimately repealed the offending law).

316. *Compare* El Boathi v. Algeria, Commc'n No. 2259/2013, ¶ 9, U.N. Doc. CCPR/C/119/D/2259/2013 (Hum. Rts. Comm. Mar. 17, 2017) ("[Algeria] is also under an obligation to take steps to prevent similar violations in the future. In

In practice, this theory of change seems to depend upon the effective use of political incentives to alter State behavior.[317] Consider, for example, that all three institutions have frequently ordered respondent States to publicize violation judgments against them in cases of enforced disappearance.[318] This tactic appears to be designed to alter the domestic political calculus within respondent States by educating individuals about the substantive nature of their legal rights[319] and publicly acknowledging the responsibility of the respondent State for the violations in question.[320] In cases of enforced

---

that regard, the Committee is of the opinion that the State party *should* review its legislation . . . and, particularly, reconsider Ordinance No. 06-01 . . . .") (emphasis added) *with* Blanco-Romero v. Venezuela, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 138, ¶ 105 (Nov. 28, 2005) ("The State *must* take the necessary action to reform, within a reasonable time, its criminal legislation . . . .") (emphasis added).

317. *See, e.g.*, Schneider, *supra* note 309, at 173 (noting that the Committee of Ministers responded to Russia's noncompliance by "mounting political pressure against the recalcitrant state"); David Kosai & Jan Petrov, *Determinants of Compliance Difficulties Among 'Good Compliers': Implementation of International Human Rights Rulings in the Czech Republic*, 29 EUR. J. INT'L L. 397, 400 (2018) (finding that the level of compliance with rulings by international human rights bodies "depends on a repeated balancing exercise, in which domestic political actors balance domestic political costs of compliance against international reputational costs of non-compliance."); Tatiana Sainati, *Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights*, 56 HARV. INT'L. L.J. 147, 155 (2015) ("The Committee of Ministers . . . uses political pressure and public censure to ensure compliance with the [ECtHR]'s judgments.")

318. *See, e.g.*, Boutarsa v. Algeria, Commc'n No. 3010/2017, ¶ 11, U.N. Doc. CCPR/C/135/D/3010/2017 (Hum. Rts. Comm. July 8, 2022) ("The State party is also requested to publish the Committee's Views and to have them widely disseminated in the official languages of the State party."); Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 350 (Nov. 23, 2009) ("As stated by this Tribunal in other cases, the State shall publish in the Official Gazette of the Federation and in another newspaper of ample national circulation . . . [selections] of the present Judgment . . . ."); COMM. OF MINISTERS, RULES OF THE COMMITTEE OF MINISTERS FOR THE SUPERVISION OF THE EXECUTION OF JUDGMENTS AND OF THE TERMS OF FRIENDLY SETTLEMENTS, 2 n.2 (2017), https://rm.coe.int/16806eebf0 [https://perma.cc/6R7B-5TXZ] (noting that general measures ordered as part of the execution of ECtHR judgments includes "publication of the Court's judgment in the language of the respondent").

319. *See, e.g.*, Pasqualucci, *The Inter-American Human Rights System*, *supra* note 286, at 209 ("[T]o educate society about a case, the [IACtHR] generally orders the State to publish pertinent parts of the Court's judgment.").

320. *See, e.g.*, Gina Donoso, *Inter-American Court of Human Rights' Reparation Judgments: Strengths and Challenges for a Comprehensive Approach*, 49 REV. IIDH 29, 58 (2009) ("[T]he obligation to publish the judgement in an

disappearance, the goal of publishing violation judgments is likely to create and reinforce the political will necessary to combat impunity.[321]

The centrality of political incentives is also illustrated by the ECtHR's "pilot judgment procedure," which is designed to address instances in which the Court receives numerous repetitive petitions concerning the same underlying problem.[322] Through that procedure, the Court is empowered to give priority treatment to a representative case and use its judgment "to identify the dysfunction under national law that is at the root of the violation" and "to give clear indications to the Government as to how it can eliminate this dysfunction . . . ."[323] The Court will then freeze—but not dismiss—other cases arising from the same issue, ostensibly to give the respondent State time to rectify the violations.[324] While it is not legally required to do so, the ECtHR has in practice always set a time limit on its pilot judgments, thereby using the threat of reopening frozen cases to place pressure on States to adhere to the Court's ruling.[325] The ECtHR's pilot judgment procedure thus exemplifies the importance of political incentives in compelling compliance with supranational rulings.

If one accepts that supranational judicial and quasi-judicial institutions rely on political incentives to ensure compliance, then States' widespread noncompliance with HRC, IACtHR, and ECtHR rulings may be understood as a failure to extract sufficient political costs.[326] The question, then, is how the HRC, IACtHR, and ECtHR

---

official newspaper serves not only as recognition of the State's responsibility and the clarification of the facts, but also contributes to . . . the rescue of collective memory and the creation of social conscience.").

321. *See* discussion *supra* notes 233 to 238 (discussing the positive intersection between supranational rulings on domestic civil society action in combating impunity).

322. EUR. CT. OF HUM. RTS., THE PILOT-JUDGMENT PROCEDURE: INFORMATION NOTE ISSUED BY THE REGISTRAR 1 (2009) [hereinafter ECTHR, PILOT-JUDGMENT PROCEDURE], https://rilm.am/wp-content/uploads/2022/06/d1062c05af72f27e789115eef11b093e.pdf [https://perma.cc/JQN9-P6CH].

323. *Id.* Note that the ECtHR has not used this procedure frequently. Between its first pilot judgment in 2004 and July 1, 2015, the Court had only used the procedure in twenty-four cases. Lize R. Glas, *The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice*, 34 NETH. Q. HUM. RTS. 41, 44 (2016).

324. ECTHR, PILOT-JUDGMENT PROCEDURE, *supra* note 322, at 2.

325. Glas, *supra* note 323, at 59.

326. *See, e.g.*, Kosai & Petrov, *supra* note 317, at 424 ("[International human rights institutions] must 'read' domestic, as well as international, politics well. No

can rectify the glaring discrepancy between the number of violation judgments against States and the continued impunity for individual perpetrators. The third and final Part of this Note will propose a solution for bridging that gap by adopting a novel legal standard designed to ease the burdens on petitioners at the admissibility stage, ameliorate issues associated with prolonged proceedings, and further incentivize domestic reforms and prosecutions.

## III. SHIFTING THE BURDEN TO COUNTERACT IMPUNITY

To combat impunity for the systematic use of enforced disappearances, international adjudicatory bodies should adopt a framework that creates stronger reputational incentives to thoroughly investigate and prosecute individual cases of enforced disappearance. To that end, this Note proposes that the HRC, IACtHR, and ECtHR adopt a three-step burden-shifting framework in line with their existing jurisprudence. First, these institutions should thoroughly investigate States that have been accused of perpetrating or acquiescing to a pattern of disappearances. In doing so, they should focus on establishing that the defendant State has systematically failed to conduct effective investigations or genuine prosecutions for alleged disappearances.[327] Second, once an institution determines that there is or has been a systematic pattern of disappearances in a specific State during a specific period, the burden should shift to the State to affirmatively rebut the presumption that it was responsible for any disappearances that occurred during the material time. This presumption should then be applied to all disappearances alleged to have occurred during the material time.[328] Third, to improve administrability, institutions should appoint special rapporteurs to oversee the eligibility of all applications alleging disappearances within the established temporal and geographic boundaries.

The following Part lays out support for this proposed framework. It begins by finding support for each step in the existing practices of the HRC, IACtHR, and ECtHR in cases of enforced

---

international body can impose its own legal solutions in the absence of the support of domestic and transnational interlocutors.").

327. Moreover, investigators should continue to use all available sources of evidence, including NGO and inter-governmental reports, reliable media coverage, and evidence submitted by other applicants making related allegations. *See* discussion *supra* Section II.B.0.

328. Ideally, the presumption would even apply to allegations that had been previously rejected as inadmissible. *See* discussion *infra* Section III.0.

disappearance. In so doing, it identifies unique legal mechanisms developed by each institution that have the potential to contribute to a framework that is both administrable and more likely to compel compliance. At the same time, it explains why the proposed framework deviates from these mechanisms (rather than simply incorporating them outright). Finally, this Part concludes by presenting a brief argument for applying an over-inclusive approach to State responsibility for the heinous human rights violations inherent in enforced disappearance.

## A. Support for the Proposed Burden-Shifting Framework

The proposed framework represents both a synthesis and an expansion of the existing jurisprudence of the HRC, IACtHR, and ECtHR. The following Section examines each step of that framework in turn and presents arguments to justify each proposal. The first step in the burden-shifting framework is designed to synergize the procedures currently used by the IACtHR and the ECtHR, thereby maximizing both moral weight and administrability. The second step expands the use of burden-shifting based on the principle of issue preclusion in a bid to exert maximal reputational harm to States to compel them to conduct adequate and effective investigations. The third and final step seeks to ensure that the burden-shifting framework does not overwhelm institutional resources by streamlining the process for admitting new cases.

### 1. Step One: Establishing a Systematic Pattern of Disappearances Using Evidence from Domestic Investigations

The first step in the proposed burden-shifting framework—establishing a pattern of disappearances by focusing on whether the State has engaged in a pattern of defective investigations and/or prosecutions—represents a synthesis of the practices of the IACtHR and the ECtHR and strives for moral authority and administrability. Specifically, the proposed framework seeks to combine the moral authority of the IACtHR's "systematic pattern of disappearances" standard[329] with the administrability of the ECtHR's reliance on "procedural violations."

329. *See* discussion accompanying *supra* notes 172–177 (describing the IACtHR's burden-shifting framework).

The IACtHR's jurisprudence directly supports the decision to craft a burden-shifting framework specifically predicated upon a finding of a systematic practice of disappearances within a respondent State for two reasons. First, the declaration that a State orchestrated or tolerated the systematic practice of enforced disappearance holds considerable moral and political weight. As noted in Part I, it is well-established that the systematic practice of enforced disappearance constitutes a crime against humanity.[330] A declaration of State responsibility for the systematic use of enforced disappearance would thus be tantamount to an accusation of criminal liability for that State. Empirical evidence suggests that States respond to criminal investigations by international tribunals by increasing domestic prosecutions against state agents for human rights violations, likely because such investigations create powerful incentives for certain domestic politicians.[331] A declaration of State responsibility by a human rights court would hopefully create similar political incentives, at least for States concerned with their reputation. Indeed, this conclusion finds support from the fact that States in the Inter-American System have increasingly accepted some international responsibility for disappearances in subsequent cases

330. *See supra* note 40 (listing treaties defining the systematic use of enforced disappearance as a crime against humanity).

331. *See* Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 AM. J. INT'L. L. 689, 690 (2017) (finding that some African States increased prosecutions of state agents for human rights violations in response to actions by the International Criminal Court and arguing that this is a result of "latent political struggles between ruling coalitions and reformer coalitions that are exacerbated by ICC investigations").

before the IACtHR[332]—a trend that may evince the inherent moral authority of the IACtHR's framework.[333]

Second, the IACtHR's system has proven to be highly administrable once a presumption of State responsibility has been established. In many recent cases, the Court has avoided having to apply the two-prong test for establishing a *prima facie* case of State responsibility for a disappearance.[334] One key reason is that the Court has been able to cite findings from prior IACtHR cases to establish the "systematic practice" prong.[335] Thus, by adopting a "systematic pattern" standard, international human rights bodies could simply focus on establishing a pattern of disappearances during a specific time period, rather than expend time, money, and personnel to determine the merits of each claim on a case-by-case basis.[336] All

332. *See, e.g.*, Rochac Hernández v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 285, ¶ 18 (Oct. 14, 2014) (noting El Salvador's recognition that enforced disappearance was "part of a pattern of violence" during its civil war); Chitay Nech v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶¶ 3, 13–16 (May 25, 2010) (noting that Guatemala partially acknowledged its international liability for multiple human rights violations including the systematic use of enforced disappearance during the material time); Alvarado Espinoza v. Mexico, Inter-Am. Ct. H.R. (ser. C) No. 370, ¶¶ 31–33 (Nov. 28, 2018) (noting Mexico's partial acknowledgement of its international responsibility and of certain facts); Ibsen Cárdenas and Ibsen Peña v. Bolivia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 217, ¶¶ 23–26 (Sept. 1, 2010) (noting Bolivia's acknowledgement of international responsibility for forced disappearances and other abuses during the material time).

333. This Note does not present a conclusive explanation of the trend towards accepting responsibility. Alternative explanations include that States would rather admit to partial responsibility than be perceived as liars on the world stage or that democratically elected regimes genuinely wish to make amends for the crimes of former authoritarian governments.

334. *See, e.g.*, Rochac Hernández v. El Salvador, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 285, ¶ 26 (Oct. 14, 2014) (noting that El Salvador had accepted as true both State involvement in the disappearances in question and the context of the systematic pattern of forced disappearances); Maidanik v. Uruguay, Merits and Reparations, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 444, ¶¶ 31, 105 (Nov. 15, 2021) (citing prior IACtHR case to establish the systematic use of enforced disappearances and noting that Uruguay did not deny the violations in the present case).

335. *See, e.g.*, *Maidanik*, Inter-Am. Ct. H.R. (ser. C) No. 444, ¶ 31 (citing prior case concerning violations during the same material time to establish the existence of a systematic pattern of enforced disappearance).

336. The ECtHR has implicitly adopted a similar standard regarding disappearances in the context of the conflicts in Chechnya and southeast Türkiye between 1992 and 1996. ECTHR, GUIDE ON ARTICLE 2, *supra* note 93, ¶¶ 129–30. However, the European Court has never explicitly incorporated the significance of

future cases alleging State responsibility for disappearances during that time could rely on this finding to alleviate the burden on the petitioner.[337] However, it is important to reiterate that the IACtHR's specific approach has not been sufficiently capable of providing swift relief to petitioners.[338] Any comprehensive burden-shifting framework must therefore incorporate additional mechanisms to streamline the process, improve administrability, and further reduce the need to expend judicial resources.

One possible solution comes from the ECtHR, which developed an efficient methodology that relies on "procedural violations" when determining State liability for enforced disappearance. Specifically, the ECtHR has identified numerous procedural rights arising out of existing provisions of the European Convention on Human Rights (ECHR), including a positive duty to investigate all homicides and alleged acts of torture.[339] Where States fail to adhere to its procedural obligations, the Court will hold them liable for violating the procedural limb of the relevant right (what this Note refers to as "procedural violations").[340] The Court has frequently relied on the concept of procedural violations to compensate for the lack of physical evidence establishing State responsibility for disappearances.[341] Such violations appear to be significantly easier to establish,[342] in part because States may reasonably be expected to create and maintain significant

patterns of disappearance into its determinations, while the IACtHR has relied on its standard since its first disappearance case. Claude, *supra* note 49, at 460–61.

337. *See* Sethi, *supra* note 220, at 29 (asserting that the IACtHR's framework effectively reduces the burden placed on petitioners).

338. *See* discussion *supra* Section II.C.0 (discussing how regional courts often experience prolonged delays before rendering judgements in cases of enforced disappearance).

339. Claude, *supra* note 49, at 438, 443 (noting that the ECtHR has derived a "duty to investigate" from both the right to life and the prohibition against torture under the ECHR); Orhan v. Turkey, App. No. 25656/94, ¶ 334 (June 18, 2022), https://hudoc.echr.coe.int/?i=001-60509 ("The Court recalls that the obligation to protect the right to life under Article 2 . . . also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.") (citations omitted).

340. ECTHR, GUIDE ON ARTICLE 2, *supra* note 93, ¶ 144.

341. Claude, *supra* note 49, at 425–26, 434–35.

342. *See, e.g.*, *id.* at 425 (noting that the ECtHR has relied on procedural violations because the "beyond reasonable doubt" standard barred the Court from finding a violation of the substantive right).

documentation during a formal investigation.[343] Focusing on procedural rights therefore enables the ECtHR to find violations whenever States are unable[344] or unwilling to provide documentation from their investigation, or when such documents evince that an investigation is a sham.

These same procedural violations can serve as evidence of a systematic pattern of disappearances. Rather than devoting limited resources to determining the facts of each case concerning missing persons, investigators should look for evidence of systematic discrepancies and inadequacies in domestic investigations of those disappearances. As the experiences of international human rights institutions illustrate,[345] investigators may reasonably conclude that a State is *at least* tolerating the practice of disappearances when there is a systematic pattern in inadequate investigations,[346] as may be evidenced if the State presents documentation revealing

343. *See, e.g.*, Bazorkina v. Russia, App. No. 69481/01, ¶ 172 (July 27, 2006), https://hudoc.echr.coe.int/fre?i=001-76493 ("In a case where the application raises issues of grave unlawful actions by State agents, the documents of the criminal investigation are fundamental to the establishment of facts and their absence may prejudice the Court's proper examination of the complaint both at the admissibility and merits stage."). Note that the ECtHR's use of procedural rights overlaps with its use of presumptions. Specifically, where States have refused to provide documentation from their domestic investigation, the Court has drawn adverse inferences establishing their liability for procedural violations. *See, e.g.*, Betayev and Betayeva v. Russia, App. No. 37315/03, ¶¶ 84, 90 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86611 (noting that Russia failed to provide most documents requested and finding it liable for failing to adequately investigate); Utsayeva and Others v. Russia, App. No. 29133/03, ¶¶ 164, 175–82 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86605 (noting that "most of the documents from the investigation were not disclosed" by the Russian government and concluding that the authorities' behavior "gives rise to a strong presumption of at least acquiescence in the situation and raises strong doubts as to the objectivity of the investigation" before ultimately holding the government liable for violating the procedural limb of the right to life).

344. In some cases, defendant States have admitted that they did not conduct any formal investigation. *See, e.g.*, Osmanoğlu v. Turkey, App. No. 48804/99, ¶ 45 (Jan. 24, 2008), https://hudoc.echr.coe.int/eng?i=001-84667 (finding Türkiye liable for failing to investigate because the government acknowledged it had not carried out an investigation).

345. *See supra* Section II.0.0 (discussing the causes and consequences of inadequate investigations).

346. *See, e.g.*, *Utsayeva and Others*, App. No. 29133/03, ¶ 164 ("The authorities' behaviour in the face of the applicants' well-substantiated complaints gives rise to a strong presumption of *at least acquiescence* in the situation . . . .") (emphasis added).

systematic defects[347] in investigations (as Turkish officials did in several cases before the ECtHR[348]). If the State repeatedly refuses to provide such documentation, international institutions can draw adverse inferences concerning the State's responsibility.[349]

Although procedural evidence may be a useful tool to find a systematic pattern of disappearances, relying on procedural violations alone may be an inadequate accountability device. The European Court's use of procedural violations has been criticized as "highly unsatisfactory,"[350] while procedural violations themselves have been described as "obviously less serious than a [substantive] violation."[351] Importantly, in *Labita v. Italy*, eight dissenting judges expressly alleged that some States may be more willing to accept procedural violations than substantive ones.[352] While procedural violations are an effective means of overcoming the lack of evidence in enforced disappearance cases, they lack the moral authority of substantive violations. Consequently, the proposed framework should clarify that the procedural failings are merely *prima facie* evidence of State responsibility for serious substantive violations, which can be accomplished by adopting the IACtHR's standard for establishing a pattern of disappearances. Failure to make this distinction may undermine the political and moral authority of any subsequent violation judgments against States.

2. Step Two: Shift the Burden for All Relevant Cases

The second step in the proposed framework is to shift the burden not just for the case at hand but for all cases alleging State responsibility for a disappearance during the time the State has perpetrated or acquiesced to disappearances. The use of burden-

347. For a discussion of such defects, see *supra* Section II.A.0.

348. For examples of cases in which the ECtHR found defects in domestic investigations based in part on documentation provided by Turkish authorities, see Meryem Çelik and Others v. Turkey, App. No. 3598/03, ¶¶ 15–23, 76–78 (Apr. 16, 2013), https://hudoc.echr.coe.int/?i=001-118569; Er and Others v. Turkey, App. No. 23016/04, ¶¶ 16, 30–41, 84–87 (July 31, 2012), https://hudoc.echr.coe.int/?i=001-112586.

349. *See supra* Section II.B.0 (discussing international human rights institutions' ability to use presumptions of fact in cases of enforced disappearance).

350. Claude, *supra* note 49, at 425–26.

351. Labita v. Italy, App. No. 26772/95, ¶ 1 (Apr. 6, 2000) (Joint Partly Dissenting Opinion (Pastor Ridruejo et al.)), https://hudoc.echr.coe.int/eng?i=001-58559.

352. *Id.*

shifting per se is not controversial.[353] Rather, it is the expansion of the burden-shifting framework to all other relevant cases that represents the greatest departure from existing precedent. This proposal finds support from domestic legal doctrine and the practice of the HRC, the IACtHR, and the ECtHR, as well as the theory of reputational interests underlying these institutions.

#### i. Issue preclusion before international human rights institutions

As an initial matter, the proposed expansion of the burden-shifting framework finds support from the legal doctrine known as collateral estoppel. In the context of American civil procedure, collateral estoppel (also known as "issue preclusion"[354]) allows a party to prevent their opponent from re-litigating an issue already resolved by a prior judgment,[355] provided that the issue was "actually litigated and determined in the original action."[356] When used offensively by plaintiffs, the doctrine of collateral estoppel effectively reduces the burden of proof, increases the chances of success, and decreases the cost of bringing a case.[357] The proposed framework applies the doctrine of collateral estoppel to the factual issue of whether there has been a systematic pattern of enforced disappearances in a State.

All three international human rights institutions already implicitly utilize some form of collateral estoppel in disappearance cases,[358] even though it is not entirely clear how much weight each

353. Indeed, as previously discussed, all three international human rights institutions use some form of burden-shifting framework for cases involving enforced disappearance. *See supra* Section II.B.0 (summarizing the burden-shifting approaches of the HRC, IACtHR, and ECtHR).

354. *Collateral Estoppel*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/colllateral_estoppel [https://perma.cc/CKM4-Z4QG].

355. *See* Rose M. Alexander et al., Note, *Collateral Estoppel*, 16 U. RICH. L. REV. 341, 342 (1982) ("The doctrine of collateral estoppel involves the use of an old judgment in a new action to prevent the relitigation of issues resolved by that old judgment.").

356. Benton v. Maryland, 395 U.S. 784, 804 (1969) (quoting Cromwell v. County of Sac, 94 U.S. 351, 353 (1877)).

357. Alfred J. Weisbrod, *Offensive Collateral Estoppel*, 6 AM. J. TRIAL ADVOC. 257, 259 (1982).

358. As previously discussed, the IACtHR has effectively applied the concept of issue preclusion to the finding that there was a pattern of disappearances in a State during the material time. *See, e.g.*, Maidanik v. Uruguay, Merits and Reparations, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 444, ¶¶ 31, 105 (Nov. 15, 2021) (citing prior IACtHR case to establish the systematic use of enforced

institution gives to issues determined in prior cases.[359] The proposed framework would compel these institutions to *explicitly* acknowledge their use of issue preclusion in order to streamline judicial review of repetitive cases.

### ii. Burden-shifting and theories of reputational interest

Another reason to apply the finding of a pattern of disappearances in all future cases derives from the theory of change that States care about their reputations and will take steps to

---

disappearances and noting that Uruguay did not deny the violations in the present case). Though it has been less direct in applying something akin to issue preclusion, the ECtHR has repeatedly referenced findings in past cases concerning "the phenomenon of 'disappearances'" in Chechnya. Utsayeva and Others v. Russia, App. No. 29133/03, ¶ 162 (May 29, 2008), https://hudoc.echr.coe.int/eng?i=001-86605; Alikhadzhiyeva v. Russia, App. No. 68007/01, ¶ 61 (July 5, 2007), https://hudoc.echr.coe.int/?i=001-81400. It has likewise referred to "the pattern of disappearances of large numbers of persons in south-east Turkey." Er and Others v. Turkey, App. No. 23016/04, ¶ 77 (July 31, 2012), https://hudoc.echr.coe.int/?i=001-112586; Meryem Çelik and Others v. Turkey, App. No. 3598/03, ¶ 58 (Apr. 16, 2013), https://hudoc.echr.coe.int/?i=001-118569; Osmanoğlu v. Turkey, App. No. 48804/99, ¶ 58 (Jan. 24, 2008), https://hudoc.echr.coe.int/eng?i=001-84667. Similarly, the HRC has implicitly adopted the concept of issue preclusion in the context of repetitive cases alleging disappearances. For example, the Committee has often heard disappearances cases against Algeria, which has repeatedly argued that such cases were settled through the Charter for Peace and National Reconciliation and therefore cannot be adjudicated by international mechanisms. Boutarsa v. Algeria, Commc'n No. 3010/2017, ¶ 8.2, U.N. Doc. CCPR/C/135/D/3010/2017 (Hum. Rts. Comm. July 8, 2022); Boudjemai v. Algeria, Commc'n No. 1791/2008, ¶ 8.2, U.N. Doc. CCPR/C/107/D/1791/2008 (Hum. Rts. Comm. Mar. 22, 2013). In rejecting that argument, the HRC has consistently referred to its prior conclusion that the Charter "appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant." *Boudjemai*, Commc'n No. 1791/2008, ¶ 8.2; Saadoun v. Algeria, Commc'n No. 1806/2008, ¶ 8.2, U.N. Doc. CCPR/C/107/D/1806/2008 (Hum. Rts. Comm. Mar. 22, 2013); *see also Boutarsa*, Commc'n No. 3010/2017, ¶ 8.2 (finding that the Chater "contributes, in the present case, to impunity and therefore cannot be considered compatible . . . with the provisions of the Covenant").

359. For example, Claude argues that the ECtHR's "careful choice of wording suggests that the sole existence of a pattern of disappearances would not be sufficient to make a *prima facie* case." Claude, *supra* note 49, at 422. "The fact that the Court mentions the phenomenon of disappearances *after* it concludes that a *prima facie* case has been made, corroborates that it is not intended to be taken into account in the reasoning." *Id.* (emphasis added).

preserve those reputations.[360] While States do seem to alter their behavior somewhat in response to violation judgments issued by international human rights institutions,[361] these judgments have generally failed to convince States to conduct effective investigations.[362] This discrepancy supports the conclusion that violations judgments alone do not impose sufficient reputational harm on States to convince them to investigate and prosecute individual perpetrators.

The proposed framework seeks to address this discrepancy by imposing a higher reputational cost that can only be remedied by conducting adequate and effective investigations. The framework would achieve the higher reputational cost both by focusing on a *pattern* of disappearances[363] and by enabling more petitioners to make *prima facie* cases of State responsibility.[364] The proposed standard would treat all petitions as open cases pending definitive proof of State efforts to remedy the violations. The proposed framework also envisions some form of public database establishing the number of *prima facie* cases that have alleged State responsibility for enforced disappearances—a database which would serve as a source of ongoing reputational harm. The only way for a State to avoid further reputational harm and shift the burden of proof back to petitioners would be by conducting an adequate and effective investigation in line with the standards set forth by international human rights law. The proposed framework does not call for States to *affirmatively disprove* that they were involved in a disappearance. Rather, they must show that, after an adequate and effective investigation, there is no evidence of State involvement. As such, the proposed burden-shifting framework seeks to enable a "critical mass"

360. *See supra* Section II.B.0 (discussing evidence that States respond to violation judgments due to reputational concerns).

361. *See* Guzman, *supra* note 135, at 1827 (arguing that "compliance occurs due to state concern about both reputation and direct sanctions triggered by violations"); HRC, *Follow-Up Progress Report 2017*, *supra* note 231, at 5, 7–8, 9–11 (reporting that Bosnia and Herzegovina had taken substantive action regarding several disappearance cases).

362. *See supra* Section II.C.**Error! Reference source not found.** (discussing issues of State noncompliance with violation judgments).

363. *Supra* text accompanying notes 330–333.

364. *See, e.g.*, Sethi, *supra* note 220, at 29 (arguing that the IACtHR's standard effectively lowers the burden of petitioners); *see also* Weisbrod, *supra* note 357, at 259 ("[O]ffensive collateral estoppel increases the probability of victory for the plaintiff by lessening his burden in proving his case.").

of allegations against a State to create a stronger incentive to investigate and prosecute individual perpetrators.

The ECtHR's pilot judgement procedure, while insufficient on its own to combat impunity,[365] supports this framework's theory that international institutions should utilize reputational incentives to compel States to address systematic violations. The ECtHR developed the "pilot judgment" procedure to handle repetitive petitions arising from the same underlying violation of human rights.[366] This procedure allows the Court to select a representative case and issue a judgment to compel the respondent State to reform structural problems, thereby resolving all other related petitions within a designated amount of time.[367] In effect, the pilot judgment procedure pressures respondent States to implement general measures ordered by the ECtHR by threatening to resume other cases if the State fails

365. There are at least two reasons why the proposed framework does not simply integrate the pilot judgment process. First, the pilot judgment procedure can effectively deny victims of gross human rights violations access to an adequate and effective remedy. Dilek Kurban, *Forsaking Individual Justice: The Implications of the European Court of Human Rights' Pilot Judgment Procedure for Victims of Gross and Systematic Violations*, 16 HUM. RTS. L. REV. 731, 733 (2016). Although the procedure allows the Court to take up repetitive cases in the event of noncompliance, it also empowers the ECtHR to reject pending cases if it finds that the State has taken adequate steps to resolve the underlying structural issues. Sainati, *supra* note 317, at 149. However, in cases involving gross human rights abuses such as disappearances, changes in domestic law alone may not provide an effective remedy. *See generally* Kurban, *supra*, at 742–69 (discussing issues associated with the pilot judgment procedure as applied to gross human rights violations in Türkiye). Second, the ECtHR's pilot judgment procedure does not exert sufficient political pressure to compel domestic investigations and prosecutions. Consider the example of *Doğan and Others v. Turkey*, a case which concerned forcible eviction in Türkiye. Doğan and Others v. Turkey, App. Nos. 8803–8811/02, 8813/02, & 8815-8819/02, ¶ 3 (June 29, 2004), https://hudoc.echr.coe.int/eng?i=001-61854. Following the ECtHR's ruling that Türkiye had violated its obligations under the ECHR, the Turkish government implemented a Compensation Law that purported to offer pecuniary damages to individuals displaced by Turkish forces. Kurban, *supra*, at 755–56. However, that law imposed unduly high evidentiary burdens, severely limited monetary damages, and precluded other forms of remedy such as truth-telling. *Id.* at 756–59. Despite these flaws, the ECtHR ruled in a subsequent case that the law represented an effective remedy. Içyer v. Turkey, App. No. 18888/02, ¶ 82 (Jan. 12, 2006), https://hudoc.echr.coe.int/eng?i=001-72123. The ECtHR thus effectively denied other petitions relating to similar claims. Kurban, *supra*, at 754–55.

366. ECTHR, PILOT-JUDGMENT PROCEDURE, *supra* note 322, at 1.

367. *See* Glas, *supra* note 323, at 43–44 (noting that the purported purpose of the pilot judgment procedure is to "induce[] the respondent States to resolve large numbers of cases").

to comply in a timely manner.[368] By extension, the pilot judgment procedure validates the theory behind the proposed burden-shifting framework. While the proposed standard of burden-shifting in all cases might be over-inclusive,[369] it represents a considerable increase in reputational harm against a respondent State—one that has a better chance of compelling the necessary steps to end impunity at the domestic level.

### 3. Step Three: Rely on Special Rapporteurs to Improve Administrability

The third and final step of the proposed framework involves using special rapporteurs, rather than judges, to evaluate all petitions alleging State responsibility for disappearance during the material time. Faced with overwhelming backlogs of cases,[370] the HRC has developed a specialized procedure that uses special rapporteurs to streamline repetitive communications.[371] These rapporteurs are required to review communications which "raise facts and legal questions of substantially the same nature of those already decided by the Committee in previous cases"[372] and issue recommendations to guide its Views.[373] In theory, incorporating a

368. *See, e.g.*, A. Buyse, *The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges*, 2013 LAW UKR.: LEGAL J. 303, 310 (2013) (noting that one way "to put pressure on the respondent state is to include a time limit within which the state has to effect domestic changes"); Sainati, *supra* note 317, at 158 (noting that if a State fails to take required action within the designated time limit that the ECtHR will resume consideration of repetitive petitions).

369. *See infra* Section III.0 (making a case for over-inclusivity).

370. All three international human rights institutions have struggled with backlogs of cases, as they receive more petitions than they can reasonably process. *See* ECtHR ANNUAL REPORT 2021, *supra* note 270, at 7, 179 (reporting that the ECtHR faced a backlog of 70,150 pending cases at the end of 2021 despite major progress in reducing the Court's backlog); *Status of the Human Rights System 2022*, *supra* note 265, annex VIII tbl.1 (reporting that the HRC had 1,225 communications pending review as of the end of 2021); Biazatti, *supra* note 278 (describing the "chronic" backlog of cases before the IACtHR).

371. Rule 105 of the HRC's current Rules of Procedure permits the Committee to appoint one or two members as rapporteurs for repetitive communications. HRC, Rules of Procedure, *supra* note 249, at 20–21.

372. *Id.* at 20.

373. The rapporteurs must then propose a draft recommendation to the HRC, subject to the approval or modification of the Committee's Working Group. *Id.* They then present their recommendations to the Committee itself, which retains the right to object to the rapporteurs' draft. *Id.* If no member of the Committee

similar procedure will improve the administrability of the proposed framework by reducing the number of hours needed for judges to admit each petition arising from the same pattern of disappearances.[374] Repetitive petitions are particularly problematic because all three bodies generally consider each admitted case individually and on its own merits,[375] which by its very nature takes considerable time and the expenditure of judicial resources.[376] However, the HRC's procedure cannot simply be grafted onto a framework employed by regional human rights courts,[377] which will

objects, the draft recommendations proposed by the rapporteurs for repetitive communications are considered to be the Views of the Committee. *Id*. at 20–21.

374. *See supra* Section II.A.0 (discussing the problems of prolonged proceedings arising from mounting backlogs of cases). For the IACtHR and the HRC, part of the problem lies in the fact that these bodies meet infrequently. *See* Swannie, *supra* note 263, at 261 (noting that the delay in providing Views is "due to the large—and increasing—number of communications received by the HRC, and the Committee's infrequent meeting times."); Pasqualucci, *The Inter-American Human Rights System*, *supra* note 286, at 220 ("Part of the problem, which is also a result of inadequate financing, is that the Commission and the [IACtHR] sit only on a part time basis which is no longer adequate to handle the number of complaints and cases in a timely manner.").

375. *See, e.g.*, Swannie, *supra* note 263, at 261 (noting that the HRC was required "to respond to all admissible communications"); ECTHR, PRACTICAL GUIDE ON ADMISSIBILITY CRITERIA, *supra* note 248, ¶ 3 (noting that "the [ECtHR] is required to respond to each application" and that the large number of inadmissible decisions prevent it "from dealing within reasonable time-limits with those cases which warrant examination on the merits"); *Inter-American Commission FAQs*, *supra* note 277 (noting that the Inter-American Commission drafts admissibility and merits reports for each case in chronological order). *But see* Başak Çalı, *No Rule of Law?* VERFASSUNGSBLOG (Dec. 8, 2021), https://verfassungsblog.de/no-rule-of-law [https://perma.cc/93ZG-JBWZ] (discussing the ECtHR's decision not to review all applicants' cases on the merits in *Turan and Others v. Turkey* because of concerns relating to delays in processing and the lack of "commensurate benefits" to applicants or "development of the case law").

376. For example, the Inter-American Commission received over 1,300 individual petitions in 2008. Pasqualucci, *The Inter-American Human Rights System*, *supra* note 286, at 220. However, the IACtHR was only able to issue nineteen judgments in 2009, and it had only ever issued a total number of 211 contentious judgments by December 31 of that year. *Id.* At that time the IACtHR had only nine fulltime attorneys while the Commission had only twenty-four. *Id*. Pasqualucci argued that this discrepancy was due to several factors, including the lack of adequate funding and the bodies' part-time nature. *Id.*

377. This is primarily due to the discrepancy in their purported authority. The HRC has no binding authority. U.N. FACT SHEET ON THE HRC, *supra* note 165, at 26–27. On the other hand, the ECtHR and the IACtHR purport to issue legally binding judgments against States. *See* Schneider, *supra* note 309, at 139 (noting that the treaties underlying the ECtHR and IACtHR "had to expressly

likely need to meet a higher standard of proof to justify the use of rapporteurs because they issue legally binding judgments.[378]

### B. Combining Best Practices in Burden-Shifting

The proposed burden-shifting framework builds off the successes and limitations of the unique strategies employed by these institutions. The IACtHR's shifting of the burden of proof to the State after it has established a pattern of disappearances carries significant legal, political, and moral authority, but that Court's experience shows that it is difficult to establish such a pattern in a timely manner (at least for the initial judicial inquiry). The ECtHR's use of procedural violations is administrable but fails to exact the same degree of moral condemnation or political pressure on States. The HRC's use of rapporteurs provides a compelling solution to the problem of repetitive applications overburdening international courts but requires stronger showings of proof to be adapted by human rights courts with binding authority. By synthesizing the administrability and the moral authority of these three human rights institutions, the proposed burden-shifting framework offers a way to reduce backlogs of cases, increase access for victims of enforced disappearance and their families, and free up judicial resources. And, by using the IACtHR's standard based on patterns of disappearances, this framework may provide a means of inflicting sufficient reputational damage on States to prompt necessary domestic reforms by accusing States of liability for a practice that may well amount to a crime against humanity.

Several important outstanding issues would need to be addressed by any international human rights institution seeking to utilize this framework. Crucially, the framework ought only to establish the *presumption* of State responsibility for a specified time period, thereby allowing the respondent State to clear its name (and save its reputation) if, and *only* if, it complies with its duty to conduct

---

define the binding effects of the courts' judgments, including an obligation for the states to comply with them").

378. The regional human rights courts would likely have to establish a higher evidentiary standard during the initial investigation in order to justify the use of special rapporteurs. Once the pattern has been found, the special rapporteurs could effectively screen all incoming petitions to ensure that they meet the minimum showing necessary to make a *prima facie* case against the State in question. This standard would ensure that the courts themselves retain the responsibility for establishing the key factual issue, thereby avoiding allegations of impropriety.

timely investigations into the fates of disappeared persons. However, there is no clear mechanism in place to establish the requisite temporal boundary, meaning international human rights institutions will have to develop concrete standards to resolve this issue.[379] Similarly, international institutions ought to establish a high burden of proof for anyone seeking to establish that a State has perpetrated or acquiesced to a pattern of disappearances, since this is a serious allegation amounting to a claim that the State itself (and therefore at least a few of its individual agents) is liable for one or more crimes against humanity.[380] International institutions will thus have to determine how many defective investigations or other indicia suffice to conclude that there is a pattern or practice of enforced disappearances. Nevertheless, the fact that international human rights institutions will need to develop additional standards should not deter them from adopting the improved framework. On the contrary, the proposed burden-shifting framework represents an opportunity to develop international law to facilitate just outcomes for the victims of the most serious human rights abuses.

## CONCLUSION: A CASE FOR OVER-INCLUSIVITY

The proposed framework shifts the burden from petitioners to States to demonstrate that the latter was not responsible for a pattern of enforced disappearances. Unlike existing burden-shifting frameworks, once an institution determines that a State has practiced or tolerated a pattern of disappearances, it would apply the presumption of responsibility to all prior and subsequent cases that can meet a minimum showing of evidence and fall within a designated time frame. Ideally, this should include cases previously deemed inadmissible, assuming they qualify under the new, lower standard.

This new framework is undoubtedly a bold pitch—one that seems to fly against conventional concerns for certainty and closure

379. Imagine, for example, that petitioners brought their claims to an international tribunal a few months after the initial disappearance. If the pattern of disappearances is relatively new and ongoing, that tribunal would be remiss in declaring a set time period for which to apply the presumption of State responsibility, since the State is arguably in the midst of an ongoing policy of perpetrating or acquiescing to disappearances. This issue will have to be addressed by each institution on a country-by-country basis.

380. *See supra* text accompanying notes 35–43 (discussing the absolute prohibition against enforced disappearances and the fact that the systematic use of enforced disappearance is a crime against humanity).

in legal proceedings.[381] It also represents a clear risk of being overinclusive, particularly in contexts where disappearances are perpetrated by non-state actors and a State is not fully in control of its territory.[382]

However, there are four equally bold reasons to make an exception to the conventional rule. First, States are not individuals—they are not beholden to the same needs nor bound by the same constraints. States do not succumb to old age. Their actions are not the product of a single will but rather a multitude of minds, many of whom may have distinct and even conflicting goals. Consequently, international human rights institutions should not unduly constrain themselves by adhering to standards designed to protect individuals. A person unfairly convicted of a crime may spend many years of their life in prison, but there is no such risk for a State facing a violation judgment from an international human rights institution. Moreover, a State is presumed to be responsible for respecting the rights of those within its territory and jurisdiction.[383] It is therefore both morally and legally correct to hold a State accountable for failing to investigate an alleged disappearance—regardless of the reasons for that failure or the identity of the perpetrators.

Second, the persistent prevalence of impunity requires institutions to leverage all the moral authority of international law. It is clearly not enough to simply shame a State for a fraction of disappearances.[384] However, a comprehensive list of missing persons presumptively disappeared by the State may be sufficient, particularly if it supports the inference that that State might be

381. *See* LEACH, *supra* note 193, at 160 (discussing the need for legal certainty and the need to ensure that past decisions are not continually open to challenge in ECtHR proceedings).

382. *See, e.g.*, WEBBER & SHERANI, *supra* note 5, at 2–4 (discussing the proliferation of enforced disappearances by non-state actors).

383. Hum. Rts. Comm., General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add/13 (2004).

384. *See* Julia Glukhikh & Nikita Gryazin, *Four Ways to Strengthen the Enforcement of the Judgments of the European Court of Human Rights*, EUR. LEADERSHIP NETWORK (May 11, 2023), https://europeanleadershipnetwork.org/commentary/four-ways-to-strengthen-the-enforcement-of-the-judgments-of-the-european-court-of-human-rights [https://perma.cc/L7A3-2B49] (arguing that the Committee of Ministers should use a strategy of "naming and shaming" in cases where Member States unreasonably fail to implement an ECtHR decision); *see also* discussion *supra* Section II.C.**Error! Reference source not found.** (noting that holding States accountable has not prompted domestic accountability for perpetrators).

responsible for crimes against humanity. Scholars David Kosai and Jan Petrov have argued that compliance with rulings by international judicial rulings depends upon a "repeated balancing exercise, in which domestic political actors balance domestic political costs of compliance against international reputational costs of non-compliance."[385] Their theory of compliance suggests that international human rights institutions must create sufficiently strong incentives to overcome countervailing domestic pressures.[386] Viewed through that lens, a legal determination that a respondent State is presumptively liable for perpetrating or tolerating a pattern of disappearance would likely create a strong incentive for authorities to comply with their duty to investigate to prevent or offset reputational damage.[387]

Third, an overinclusive framework is justified in the context of enforced disappearances. The crime of enforced disappearance seems specifically designed to avoid all legal accountability. Indeed, one of the elements of the crime is the destruction or concealment of evidence.[388] In effect, the resources of the State are leveraged to ensure that there is not sufficient evidence to hold individuals criminally responsible for conventional crimes.[389] Faced with the dual problem of inadequate investigations and insufficient domestic political will,[390] as well as increasingly limited judicial resources,[391]

385. Kosai & Petrov, *supra* note 317, at 400. Kosai and Petrov's work is derived from evidence of the Czech Republic's compliance with the European Court of Human Rights. *Id*. at 399.

386. *See id*. at 425 ("[C]ases with low domestic political costs and high international reputational costs tend to lead to full and timely compliance.").

387. *See id.* at 423 (concluding that States are more likely to comply with rulings "when either initial domestic political costs decrease or when initial international reputational costs increase (or both phenomena occur at the same time) to such an extent that it alters the result of the balancing exercise in favour of compliance").

388. *See* International Convention on Enforced Disappearance art. 2, *supra* note 36, 2716 U.N.T.S. at 56 (defining enforced disappearance in part by the State's "refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person").

389. *See, e.g.*, Velásquez-Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 157 (July 29, 1988) ("The practice of disappearances often involves secret execution without trial, followed by the *concealment* of the body to eliminate any material evidence of the crime and to ensure impunity for those responsible.") (emphasis added).

390. *See supra* Section II.0 (discussing the problems surrounding investigations and political will).

391. *See supra* Section II.C.0 (discussing the increasing caseloads of international human rights institutions and the strain on judicial resources).

the HRC, ECtHR, and IACtHR are justified in applying an overinclusive framework to compel States to fulfill their international legal obligations.

Finally, expanding the presumption is essential for uplifting rightsholders. It would enable international institutions to provide significantly more political and moral support to victims of enforced disappearance and their families. It would solidify these institutions' roles as neutral authorities capable of facilitating the memorialization of victims. And, most importantly, it would serve as a symbol of hope and an affirmation of the promise of human rights. To do anything less would be a betrayal of the very foundations of the modern conception of human rights.