THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE: CONCEPTUAL AND PRACTICAL CHALLENGES AS REVEALED BY NATIONAL COURT DECISIONS FROM ARGENTINA, CHILE, AND MEXICO

Denise González-Núñez[*]

ABSTRACT

The adoption of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) by the UN General Assembly in December 2006 could be considered the highest point of a series of normative developments in the field that gained strength in the 1980s. The ICPED's legal, political and symbolic value cannot be overstated, as it is a powerful tool for stakeholders pushing for truth, justice and reparations worldwide. This paper asked how enforced disappearance cases prosecuted by domestic courts in Latin America elucidate some of the challenges that States are likely to face when implementing the ICPED's standards both from a conceptual and a practical perspective, and how the ICPED favors accountability.

This article evinced that by introducing the superior responsibility doctrine, the ICPED may have raised the standards for prosecution at the domestic level. It also noted that the further development of the doctrine would be desirable to clarify the nature and the scope of the duty to investigate. This article further argued that the ICPED contains several "enabling" features for prosecution, which could continue to empower victims, civil society organizations and other relevant actors seeking truth and justice. Ultimately, a historical and comparative analysis of the sentencing practices of national courts would allow for a more comprehensive and unique understanding of the evolving interplay between domestic jurisdictions and international human rights law, as applied to enforced disappearances.

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[*] Denise González-Núñez is a Mexican lawyer with almost 15 years of experience advocating for human rights. Her experience includes documenting enforced disappearance cases, conducting research on the clandestine inhumation of people in Mexico and its relation to enforced disappearances and providing technical assistance to victims' groups and governmental actors involved in the implementation of national legislation in this field. She holds an LLM from Harvard Law School, a Master of Studies in International Human Rights Law from the University of Oxford and a Master in Public Policy from Universidad Iberoamericana Mexico City. The original version of this article was submitted as my LLM thesis in the Spring of 2022. I am very grateful to Martha Minow, 300th Anniversary Professor at Harvard Law School, for agreeing to supervise my work and guiding me during the drafting process, and to the Rutgers International Law and Human Rights Journal Editors for their valuable comments and suggestions.

TABLE OF CONTENTS

INTRODUCTION

The criminalization of grave human rights violations and the prosecution of perpetrators have been one of the cardinal features of international law, especially when violations have been committed on a large scale with collective dimensions.[1] International law has consistently responded to episodes of mass atrocities and great human suffering caused by conflict or conflict-like situations by calling upon States to ensure that perpetrators are held accountable, and that impunity is prevented, outstandingly, through criminal models of intervention.[2]

The international regime concerning enforced disappearances is an example of this response applied to a specific type of human rights violation.[3] The adoption of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) by the UN General Assembly in 2006 could be considered the highest point of a series of normative developments in the field that gained strength in the 1980s.[4] This treaty imposes on States the obligations to criminalize

[1] The 1945 London Agreement and the Nuremberg trials are iconic examples. PHILIPPE SANDS, EAST WEST STREET: ON THE ORIGINS OF GENOCIDE AND CRIMES AGAINST HUMANITY (2016).

[2] *See*, *e.g.*, U.N. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Organization of American States, Inter-American Convention on Forced Disappearance of Persons, Jun. 4, 1995, 33 I.L.M. 1429; U.N. Econ. & Soc. Council, Comm. on Hum. Rts., Updated Set of principles for the protection and promotion of human rights through action to combat impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (initially published in 1997). *See also*, Ruti G. Teitel, *Human Rights in Transition: Transitional Justice Genealogy*, 16. HARV. HUM. RTS. J. 69 (2014) (offering a "genealogical perspective" on the legal responses after periods of conflict or repressive regimes).

[3] Enforced disappearance is "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law." *See* U.N. International Convention for the Protection of All Persons from Enforced Disappearance, art. II, Dec. 23, 2010, 2716 U.N.T.S. 3 [hereinafter ICPED].

[4] A backdrop of judgements and decisions issued throughout the 1980s and 1990s by various international human rights bodies accompanied the hard-law developments. TULLIO SCOVAZZI & GABRIELLA CITRONI, THE STRUGGLE AGAINST ENFORCED DISAPPEARANCE (2007); MARTHE LOT VERMEULEN, ENFORCED DISAPPEARANCE: DETERMINING STATE RESPONSIBILITY UNDER THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES (2012); Report of the Working Group on Enforced or Involuntary Disappearances, *Thirtieth Anniversary of the Declaration on the Protection of All Persons from Enforced Disappearance,* U.N. Doc. A/HRC/51/31/Add.3 (Aug. 31, 2022).

enforced disappearances as a separate offense, and to investigate and prosecute the perpetrators.[5]

With the above in mind, this paper asks how enforced disappearance cases prosecuted by domestic courts in Latin America elucidate some of the challenges that States are likely to face when implementing the ICPED's standards both from a conceptual and a practical perspective, and how the ICPED favors accountability. This paper argues that a historical and comparative analysis of the sentencing practices of national courts allows for a more comprehensive and unique understanding of the evolving interplay between domestic jurisdictions and international human rights law, as applied to enforced disappearances. This type of analysis reveals some of the conceptual and practical challenges that States face when prosecuting perpetrators of enforced disappearances under the ICPED's standards. Moreover, it sheds light on the nature of the obstacles experienced at the domestic level at different points in time, and how international instruments may help States and other stakeholders in paving the roads towards accountability. In this sense, it argues that the ICPED contains several "enabling" features for prosecution[6] that become apparent when analyzing sentencing practices at the domestic level. The lessons learned from this approach offer human rights bodies, such as the UN Committee on Enforced Disappearances and the Working Group on Enforced or Involuntary Disappearances, civil society organizations, and States themselves, relevant inputs to improve the current implementation of international obligations.

Chapter 1 reviews the legal framework set by the ICPED regarding the obligations to define the crime, investigate perpetrators, and hold them accountable. It also discusses the interpretation that the UN Committee on Enforced Disappearances is likely to give to each of the applicable ICPED provisions based on other international human rights bodies' practice and caselaw. Taken together, these three obligations are reflective of the drafters' deep concern with the

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[5] U.N. Econ. & Soc. Council, Commission on Human Rights, Declaration on the Protection of All Persons from Enforced Disappearance, Dec. 18, 1992, U.N. Doc. E/CN.4/RES/1992/29; Inter-American Convention on Forced Disappearance of Persons, *supra* note 3; ICPED, *supra* note 4.

[6] The concept of "enabling feature" has been used in the human rights literature. Knox applies it to describe the opportunities created by the use of "human rights discourse and digital and social media" by social movements in Mexico demanding justice and social change. *See* Rupert Knox, Transforming Mexico: Social Movements, human rights and social media (November 14, 2018) (Ph.D. dissertation, University of Sheffield). This article applies the concept to the law itself, and the opportunities that it creates to achieve certain objectives, such as providing legal avenues to seek justice for particularly heinous crimes, such as enforced disappearance.

establishment of provisions that would help eradicate impunity.[7] Understanding its normative boundaries helps set out the foundation for a critical assessment when applying the framework to particular contexts, and this, in turn, provides valuable inputs for the UN Committee on Enforced Disappearances when engaging with States as part of their monitoring mandate.

Chapter 2 studies three judgments issued by the domestic courts of Argentina, Chile, and Mexico.[8] It looks into how the international standards were used and applied to hold perpetrators responsible for enforced disappearance and, on that basis, identify some of the practical challenges that domestic jurisdictions may encounter in the process of implementing the ICPED. Finally, Chapter 3 compares and discusses the findings and how the judgments illustrate some of the ICPED's enabling features for State prosecution, as well as the challenges that they are likely to face, as described above.

This paper uses a qualitative and comparative approach to analyze how enforced disappearance cases prosecuted in domestic courts elucidate some of the practical and conceptual challenges raised by the ICPED. It focuses on three countries that share a common history of enforced disappearances as part of State strategies to eliminate allegedly communist groups during the Cold War: Argentina, Chile, and Mexico.

The research for this paper included a convenience sampling[9] of several judgments from different Latin American countries, including Guatemala, Colombia, and Perú. The three countries mentioned previously were selected due to the common characteristics of the enforced disappearances committed in each

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[7] U.N. Econ. & Soc. Council, Comm. on Hum. Rts., Civil and Political Rights, including the question of enforced disappearances, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all personas from enforced disappearances, ¶ 42, U.N. Doc. E/CN.4/2003/71 (Feb. 12, 2003) [hereinafter U.N. Econ. & Soc. Council, Comm. on Hum. Rts.].

[8] Juzgado Nacional en lo Criminal y Correccional Federal n° 4 [National Court on Federal Crime and Correction], 18/12/2007, "Guerrieri Pascual Oscar y otros s/ Privación ilegal de la libertad Personal / sentencia de primera instancia." (Arg.) [hereinafter Juzgado Nacional en lo Criminal y Correccional Federal n° 4]; Juzgado Primero Civil de Concepción [First Civil Court of Concepción], 15/12/2009, Rol 24.776, secuestro, at 5 (Chile) [hereinafter Juzgado Primero Civil de Concepción]; Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán) [Ninth District Court in the State of Sinaloa (Mazatlán)], Causa Penal 179/2006 (Sep. 30, 2009) (Mex.) [hereinafter Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán)].

[9] SHARAN B. MERRIAM & ELIZABETH J. TISDELL, QUALITATIVE RESEARCH. A GUIDE TO DESIGN AND IMPLEMENTATION 98 (4th ed. 2016) (explaining that "[c]onvenience sampling is just what is implied by the term—you select a sample based on time, money, location, availability of sites or respondents, and so on").

case (the facts of the three cases fell under the "classic" model of enforced disappearances);[10] the temporal proximity of the facts, and the temporal proximity of the judgments.[11] Additionally, the three selected judgments were issued by domestic courts on enforced disappearance cases right after Mexico, Argentina, and Chile ratified the ICPED.[12]

It is important to clarify that this paper did not expect that ratification would automatically trigger full and immediate appropriation of the ICPED by prosecutors and courts within each country. In fact, none of the courts in those three judgments even mentioned the ICPED.[13] While the trial judgments were not final, this methodological decision rendered a photograph of what the implementation of international human rights law looked like by courts from Argentina, Chile and Mexico in cases of enforced disappearances. It offered the possibility of retrieving a snapshot of States' performance at the moment of ratification when confronted with a case, particularly the prosecutors' ability to present a solid case before a court and the courts' legal thinking when adjudicating criminal responsibility. It also introduced a rational criterion to the process of selecting three judgments out of an ample universe, particularly in the cases of Argentina and Chile, where trials were profuse.[14] Overall, the sentencing analysis was inspired by grounded theory,

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[10] Ariel E. Dulitzky, *The Latin-American Flavor of Disappearance*, 19 CHI. J. INT'L L. 423 (2019).

[11] Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9; Juzgado Primero Civil de Concepción, *supra* note 9; Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9.

[12] Mexico ratified the ICPED on March 18, 2008. The Mexican judgment that was analyzed here (issued on September 30, 2009) is the only one issued by a domestic court for an enforced disappearance committed during the "dirty war". Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9. Argentina ratified the ICPED on December 14, 2007. The Argentinean judgment was issued four days later, on December 18, 2007. Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9. Finally, Chile ratified the ICPED on December 8, 2009. The Chilean judgment was issued on December 15, 2009. Juzgado Primero Civil de Concepción, *supra* note 9. To review the status of ratifications of the ICPED visit the United Nations Treaty Collection System, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4.

[13] Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9; Juzgado Primero Civil de Concepción, *supra* note 9; Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9.

[14] MINSTERIO PÚBLICO FISCAL [PUBLIC PROSECUTOR'S OFFICE], PROCURADURÍA DE CRIÍMENES CONTRA LA HUMANIDAD [OFFICE OF CRIMES AGAINST HUMANITY], DOSSIER DE SENTENCIAS PRONUNCIADES EN JUICIOS DE LESA HUMANIDAD EN ARGENTINA [DOSSIER. OF SENTENCES IN TRIAL AGAINST HUMANITY IN ARGENTINA] (2018); UNIVERSIDAD DIEGO PORTALES CENTRO DE DERECHOES HUMAN [DIEGO PORTALES UNIVERSITY HUMAN RIGHTS CENTER], PRINCIPALES HITOS JURISPRUDENCIALES, JUDICIALES, LEGISLATIVOS EN CAUSAS DE DDHH EN CHILE 1990-2022 [MAIN

meaning that its approach to the judgments was predominantly inductive.[15]

The legal scholarship focusing on the international regime specialized on enforced disappearances is abundant, especially the scholarship that emerged around the Inter-American human rights system.[16] The literature focusing on the ICPED is more limited, probably due to its relatively recent adoption.[17] Two of the most comprehensive studies so far may be Vermeulen's extensive analysis of state responsibility[18] and Guercke's recent study on disappearances by non-state actors under article 3 of the ICPED.[19] In general, the scholarship is mainly doctrinal.[20] This paper aims to contribute to the literature by analyzing the interaction between the ICPED's standards and domestic jurisdictions when adjudicating enforced disappearance cases.

JURISPRUDENTIAL, JUDICIAL, AND LEGISLATIVE MILESTONES IN HUMAN RIGHTS CASE IN CHILE 1990-2020] (2020).

[15] SHARAN B. MERRIAM & ELIZABETH J. TISDELL, QUALITATIVE RESEARCH. A GUIDE TO DESIGN AND IMPLEMENTATION 31 (4th ed. 2016).

[16] *See, e.g.,* SCOVAZZI & CITRONI, *supra* note 5; JUAN MARÍA IBÁÑEZ ET AL., DESAPARICIÓN FORZADA EN EL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS. BALANCE, IMPACTO Y DESAFÍOS [ENFORCED DISAPPEARANCE IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS. BALANCE, IMPACT AND CHALLENGES] (2020); 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 (2010); Brian Finucane, *Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War*, 35 YALE J. INT'L L. 171 (2010); Hellen Keller & Corina Heri*, Enforced Disappearance and the European Court of Human Rights,* 12 J. INT'L CRIM. JUST. 735 (2014); Alexander Murray, *Enforced Disappearance and Relatives' Rights before the Inter-American and European Human Rights Courts*, 2 INT'L HUM. RTS. L. REV. 57 (2013).

[17] *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 MELB. J. INT'l L. 245 (2006); Nikolas Kyriakou, *The International Convention for the Protection of Enforced Disappearance and its contributions to international human rights law, with specific reference to extraordinary rendition*, 13 MELB J. INT'L L. 424 (2012); Susan McCrory, *The International Convention for the Protection from Enforced Disappearance*, 7 HUM. RTS. L. REV. 545 (2007); LISA OTT, ENFORCED DISAPPEARANCE IN INTERNATIONAL LAW (2011); Carlos María Pelayo, *La Convencion Internacional para la Protección de Todas las Personas contra las Desapariciones Forzadas [The International Convention for the Protection of All Persons against Enforced disappearances]*, *in* Colección del Sistema Universal de Protección de los Derechos Humanos Fascículo 11 (2012); ANA SROVIN CORALLI, *Non-State Actors and Enforced Disappearance: Defining a Path Forward*, in WORKING PAPERS (Geneva Academy 2021).

[18] VERMEULEN, *supra* note 5.

[19] Lene Charlotte Guercke, Protecting Victims of Disappearances Committed by Organized Criminal Groups: State Responsibility in International Human Rights Law and the Experiences of Human Rights Practitioners in Mexico (October 2021) (Ph. D. dissertation, KU Leuven).

[20] *Id*. at 9, 171.

I. CHAPTER 1

A. Introduction: Bringing Perpetrators to Justice and Preventing Impunity under the ICPED

The idea of holding perpetrators accountable and preventing impunity is a central feature of the ICPED, as expressed in the preamble.[21] The reports of the intersessional open-ended working group reflect the drafters' concern in establishing provisions that would favor progress in these areas.[22] Their concern was ultimately expressed throughout the Convention by introducing various provisions designed to establish specific obligations and motivate prosecutions.[23] However, during the drafting process, there were several discussions on the ways to achieve these goals.[24] While some of the participants in the working sessions proposed including a more "general clause" on the obligation to implement "the necessary measures," other participants argued that the obligations had to be clearly stated.[25] According to said reports, "[t]he aim was . . . to identify the fundamental minimum obligations in combating the impunity of those responsible for enforced disappearances."[26] The latter approach prevailed.[27] With that in mind, the ICPED imposed the obligations to: (1) codify enforced disappearance as an autonomous crime in their criminal legislations; (2) conduct thorough and effective investigations, and (3) hold any person or superior criminally responsible for enforced disappearance.[28] The following sections discuss them in further detail.

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[21] ICPED, *supra* note 4, at pmbl.
[22] U.N. Econ. & Soc. Council, Comm. on Hum. Rts., *supra* note 8, at ¶ 42; U.N. Econ. & Soc. Council, Comm. on Hum. Rts., Civil and Political Rights, including the question of enforced disappearances, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all personas from enforced disappearances, ¶ 62, U.N. Doc. E/CN.4/2004/59 (23 February 2004); U.N. Comm. on Hum. Rts., Civil and Political Rights, including the question of enforced disappearances, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all personas from enforced disappearances, ¶ 43, U.N. Doc. E/CN.4/2005/66, (Mar. 10, 2005).
[23] ICPED, *supra* note 4, at arts. 6-23.
[24] U.N. Econ. & Soc. Council, Comm. on Hum. Rts., Civil and Political Rights, Report of the intersessional open-ended working group, *supra* note 8.
[25] *Id.*
[26] Civil and Political Rights, including the question of enforced disappearances, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all personas from enforced disappearances, *supra* note 23, at ¶ 62.
[27] ICPED, *supra* note 4.
[28] *Id.*

B. The duty to criminalize enforced disappearance as an autonomous offense

The process of finding new concepts to describe horrible atrocities seems to be an essential human need to rationalize awful and unthinkable realities of pain and destruction.[29] In reacting to such realities, this process seems to have an instrumental purpose — both political and legal — when assigning guilt and adjudicating criminal responsibility.[30] It has been argued that criminalizing certain conducts in domestic legislation paves the path towards justice and accountability, especially in the light of "[t]he central role of domestic courts in the international atrocity regime."[31] Not doing so, creates "a number of challenges that may slow down or ultimately sink prosecutions."[32]

Particularly as regards enforced disappearances, in 2010 the UN's special procedure on the matter, the Working Group on Enforced or Involuntary Disappearances (WGEID), stated that "the obligation to criminalize enforced disappearance under national legislation as a separate offence is a powerful mechanism for overcoming impunity."[33] According to Citroni, "the criminalization of enforced disappearance as an autonomous offense under domestic criminal legislation is crucial to adequately grasp its specificities . . . it is a powerful mechanism for overcoming impunity and preventing the recurrence of grave

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[29] Carolina Robledo, *Genealogía e historia no resuelta de la desaparición forzada en México [Genealogy and unresolved history of forced disappearance in Mexico*], 55 ÍCONOS, REVISTA DE CIENCIAS SOCIALES 93, 95-96 (2016) (explicating the concept of "state of liminality" as one that may be helpful to understand the "mismatch in the relationship between identity and language" that is evidenced by the relatives of victims of enforced disappearance who describe themselves as unable to find words to name and define their situation).

[30] *See, e.g.,* Martha Minow, *Naming Horror: Legal and Political Words for Mass Atrocities*, 2 GENOCIDE STUDIES AND PREVENTION: AN INTERNATIONAL JOURNAL 37 (2007).

[31] MARK S. BERLIN, CRIMINALIZING ATROCITY: THE GLOBAL SPREAD OF CRIMINAL LAW AGAINST INTERNATIONAL CRIMES 8 (2020).

[32] *Id.*

[33] U.N. Econ. & Soc. Council, Hum. Rts. Council, Rep. of the Working Group on Enforced or Involuntary Disappearances, Best practices on enforced disappearances in domestic criminal legislation, ¶ 10, U.N. Doc. A/HRC/16/48/Add.3 (December 28, 2010). *See also* Gómez Palomino v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.), No. 136 ¶ 96 (Nov. 22, 2005) (confirming the duty to typify the crime of enforced disappearance); and Ibsen Cárdenas and Ibsen Peña v. Bolivia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.), No. 217 ¶ 200 (Sept. 1, 2010) (where the Inter-American Court affirmed that "an incorrect assessment at the domestic level regarding the juridical contents of the forced disappearance of persons hinders the effective conduct of the criminal proceeding to the prejudice of the obligation of the State to investigate.").

crimes."[34] The International Commission of Jurists further suggested, citing the International Law Commission, that the consequence of not investigating enforced disappearances *as such*, but rather as "more minor offenses," constituted by itself "a serious form of impunity."[35]

In the case of Argentina, for example, Pérez-Christiansen argued that the trial of *Las Juntas* in the 80s failed to "truly" reflect "what the disappearance phenomenon meant,"[36] since the members of the military government had been convicted of ordinary crimes (such as illegal deprivation of liberty and homicide, among others). Taking Italy as a case study, Citroni showed how the lack of criminalization of enforced disappearance in domestic legislation caused courts to face a number of procedural obstacles and "the failure to adequately implement the aut dedere aut judicare principle, ultimately resulting in an increased rate of impunity."[37]

The literature normally traces the origins of the specialized legal framework on enforced disappearances and the intrinsic process of naming this phenomenon to the United Nations' 1975 resolutions on the situations of Cyprus and Chile, when the UN called upon both States to, respectively, account for the "missing," [38] and "clarify the status of individuals who are not accounted for."[39]

However, the term "disappeared" was explicitly used prior to these events by another international body, namely, the Inter-American Commission of Human Rights.[40] In its 1974 report on human rights in Chile, the Commission expressed concern over the observation that "the indiscriminate use of the power of administrative arrest of persons had substantially affected the possibility of duly

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[34] Gabriella Citroni, *Consequences of the Lack of Criminalization of Enforced Disappearance at the Domestic Level. The Italian Experience*, 19 J. INT'L. CRIM. JUST. 675, 676 (2021).

[35] FEDERICO ANDREU GUZMÁN, INTL COMM. JURISTS, ENFORCED DISAPPEARANCE AND EXTRAJUDICIAL EXECUTION: INVESTIGATION AND SANCTION. A PRACTITIONER'S GUIDE 142 (2015).

[36] Mikaela Pérez Christiansen, The crime of enforced disappearance: concept and enforcement 36 (May 9, 1989) (Submitted to P. Alston in the Seminar on Human Rights Research in satisfaction of the written work requirement, Harvard University).

[37] Citroni, *supra* note 35, at 677.

[38] U.N. Econ. & Soc. Council, Commission on Human Rights Res. 4 (XXXI), U.N. Doc. E/CN.4/RES/4(XXXII) (Feb. 27, 1976); G.A. Res. 3450 (XXX) (Dec. 9, 1975).

[39] G.A. Res. 3448 (XXX) (Dec. 9, 1975).

[40] Probably the process of naming enforced disappearances can be traced to earlier dates, with the emergence of the victims' movements and human rights organizations.

counting or registering prisoners, to duly verify their identity."[41] The Commission stated that "[t]he number of cases in which persons *disappeared* after their arrest and whose whereabouts were unknown was very high" (emphasis added).[42] This term was later used for the first time by the UN General Assembly in Resolution 32/118 regarding Cyprus.[43] One year later it would express its deep concern "by report from various parts of the world relating to *enforced or involuntary disappearances* of persons as a result of excesses on the part of law enforcement or security authorities or similar organizations, often while such persons are subject to detention or imprisonment" (emphasis added).[44]

The Inter-American Convention on Forced Disappearance of Persons and the UN Declaration on the Protection of All Persons from Enforced Disappearance, both adopted in the 1990s, established the State duty to ensure that the enforced disappearance of persons constituted an offense under criminal law.[45] The emergence of international criminal tribunals during that same period may have energized the incorporation of enforced disappearance as a crime against humanity in domestic laws around the world.

Despite these earlier developments, the duty to criminalize enforced disappearance separately was a contentious issue during the ICPED's drafting sessions.[46] One group considered that imposing on States the burden of reforming their domestic legislation was unnecessary.[47] This group of delegations considered that several offenses in their penal codes allowed for the prosecution of "acts of enforced disappearance."[48] Another group argued that requiring States to criminalize enforced disappearance as an independent offense was a better approach to adequately reflect "the complexity" of the crime.[49] These delegations

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[41] Report on the Status of Human Rights in Chile, Inter-Am. Comm'n. H.R. (Chapter 9), OEA/Ser.L/V/II.34 doc. 21 corr.1 (Oct. 25, 1974). *See also* Second Report on the Situation of Human Rights in Chile (Chapter 9), Inter-Am. Comm'n. H.R., OEA/Ser.L/V/II.37 doc. 19 corr.1 (Jun. 28, 1976).
[42] Report on the Status of Human Rights in Chile, Inter-Am. Comm'n. H.R., *supra* note 42.
[43] SCOVAZZI & CITRONI, *supra* note 5.
[44] G.A. Res. 33/173 (Dec. 20, 1978).
[45] ICPED, *supra* note 4, at art. III; U.N. Econ. & Soc. Council, Commission on Human Rights, Declaration on the Protection of All Persons from Enforced Disappearance, *supra* note 6, at art. IV.
[46] Civil and Political Rights, including the question of enforced disappearances, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all personas from enforced disappearances, *supra* note 23 at ¶¶ 49-52, 62.
[47] *Id.* at ¶50.
[48] U.N. Econ. & Soc. Council, Comm. on Hum. Rts., *supra* note 23.
[49] U.N. Econ. & Soc. Council, Comm. on Hum. Rts., *supra* note 8, at ¶ 37.

also maintained the need to establish "effective" criminal sanctions and facilitate States' adoption of "rules concerning specific aspects of the offence [sic], such as statutory limitations, exemption from responsibility and extradition."[50]

The view that prevailed and eventually crystallized in the Convention was the latter. Article 4 clearly established that "[e]ach State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law."[51] The ICPED was the first global instrument to impose a state obligation to codify enforced disappearance as such, in other words, separate from other offenses but also separate from the domesticated versions of the international criminal law regime within countries.[52]

C. The duty to investigate enforced disappearances

The duty to investigate enforced disappearance is a *jus cogens* norm.[53] According to article 12.1 of the ICEPD, States undertake the duty to examine allegations of enforced disappearances in a prompt and impartial manner, and "where necessary," conduct investigations thoroughly and without delay.[54] Furthermore, article 12.3 (a) introduces an effectiveness criterion to characterize this duty.[55] The ICPED does not elaborate on the meaning and scope of these duties.[56] Although the UN Committee on Enforced Disappearances has published a couple of instruments to guide States in the process of implementing the

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[50] *Id*.
[51] ICPED, *supra* note 4, at art. IV.
[52] The 1994 Inter-American Convention preceded the ICPED, but it is a regional treaty. The 1992 UN Declaration is not strictly speaking a binding instrument, however, Citroni has argued that its normative content could be considered customary international law. ICPED, *supra* note 4; U.N. Declaration on the Protection of All Persons from Enforced Disappearance, *supra* note 6; Gabriela Citroni in "Foro 30 Aniversario de la Declaración de la ONU sobre la protección de todas las personas contras las desapariciones forzadas" [Forum 30th Anniversary of the UN Declaration on the protection of all people against enforced disappearances], November 10, 2022, Mexico City, organized by OHCHR Mexico, (on file with author).
[53] U.N. Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances on the Thirtieth anniversary of the Declaration on the Protection of All Persons from Enforced Disappearance, U.N. Doc. A/HRC/51/31/Add.3, at ¶ 74, 75 (31 August 2022). Naomi Roht-Arriaza, *State responsibility to investigate and prosecute grave human rights violations in international law*, 78 CAL. L. REV. 449 (1990) (analyzing the foundations of this international norm).
[54] ICPED, *supra* note 4, at art. IV.
[55] *Id*.
[56] *Id.*

Convention,[57] it has not yet conducted an extensive analysis on the duties related to criminal investigations.[58]

It is possible to draw from a variety of sources to predict some of the parameters that the Committee could eventually set regarding this obligation, particularly as regards the thoroughness and effectiveness standards. The General Comments and reports of the WGEID, and the caselaw by the UN Human Rights Committee and the Inter-American Court of Human Rights could inform the Committee to some extent.[59] For example, according to the WGEID's Report on standards and public policies for an effective investigation of enforced disappearance, "promptly" means starting investigations within the first hours after a person has been forcefully disappeared.[60] It underlines that the implementation of waiting periods to initiate investigations, as is the practice in many countries, gives perpetrators the opportunity "to circumvent the protections established by the law,"[61] so States should provide for "early complaint mechanisms."[62]

The *thoroughness* standard is usually used by human rights bodies in connection to the concept of *effectiveness,* although with a lack of clarity as to the differences between the two.[63] The meaning of each concept may be inferred to

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[57] U.N. Committee on Enforced Disappearances, Guiding principles for the search for disappeared people, U.N. Doc. CED/C/7 (Aug. 28, 2019); U.N. Committee on Enforced Disappearances, Key guidelines on Covid-19 and Enforced Disappearances (Sep. 18, 2020).

[58] *See* Committee on Enforced Disappearances, *Yrusta v. Argentina*, Views approved by the Committee under article 31 of the Convention for communication No. 1/2013, U.N. Doc. CED/C/10/D/1/2013, ¶ 10.9 (April 12, 2006) (addressing the victim's relatives right to participate in the criminal investigations). The Working Group on Enforced or Involuntary Disappearances issued a report on the subject. *See* U.N. Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, U.N. Doc. A/HRC/45/13/Add.3 (Aug. 7, 2020).

[59] *See generally* U.N. Working Group on Enforced or Involuntary Disappearances, General Comments, https://www.ohchr.org/en/special-procedures/wg-disappearances/general-comments; U.N. Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, *supra* note 59; INTER-AM. CT OF HUM. RTS, CUADERNILLO DE JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS NO. 6: DESAPARICIÓN FORZADA (2020).

[60] U.N. Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, *supra* note 59, at ¶ 12.

[61] *Id*.

[62] *Id*. at ¶ 13.

[63] The International Commission of Jurists encompasses "thorough and effective" and defines them as "tak[ing] all necessary measures in order to establish the conditions and circumstances under

some extent from the higher or lesser degree of specificity with which these bodies have articulated their concerns depending on the circumstances. In the case of the 2013 forced disappearance of Mr. Guajardo Rivas in the State of Coahuila, Mexico, the UN Human Rights Committee noted that, despite the issuance of three arrest warrants and one detention, the State failed to demonstrate "the existence of any lines of investigation regarding other persons involved in the enforced disappearance."[64] The Committee then enlisted a number of specific evidence-related measures that Mexico should have taken "to clarify the circumstances of the disappearance, fate and whereabouts of Mr. Guajardo Rivas and to identify those responsible."[65] In the case of the 2010 forced disappearance of Mr. Téllez Padilla, the same Committee made reference to the absence of "significant progress" in the investigation and the consequential loss of evidence.[66] The Committee noted in great detail a series of omissions by state authorities.[67]

Within the realm of the Inter-American human rights system, the landmark case of *Velasquez Rodriguez vs. Honduras (1988*) articulated the three initial standards elaborated by the Inter-American Court as regards investigations.[68] Although the standards were phrased differently as to the thoroughness criterion contained in the ICPED, they elucidated the normative goals that the UN Committee on Enforced Disappearances could also pursue in the process of formulating standards. In *Velásquez Rodríguez*, the Court required investigations: (1) to be *serious*, that is, conducted in a meaningful way, "and not as a mere formality preordained to be ineffective"; (2) to set *clear goals*; and (3) reflect *proactivity*, that is, undertaking

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which the crime was committed, including its cover-up, and the identity, degree of involvement and motivation of all those who are implicated in the events (intellectual and material authors, participants, chain of command, accessories, etc.)." *See* ANDREU, *supra* note 36, at 139.

[64] U.N. Hum. Rts. Comm., Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No. 2766/2016, U.N. Doc. CCPR/C/127/D/2766/2016, at ¶ 12.11 (Dec. 23, 2019).

[65] *Id*.

[66] U.N. Hum. Rts. Comm., Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning Communication No. 2750/2016, ¶ 8.4, U.N. Doc. CCPR/C/126/D/2750/2016 (Sep. 13, 2019).

[67] The Committee specifically mentioned "not requesting security camera footage of the scene of the incident in time, not requesting security camera footage at the location of the car, failing to order an on-site investigation at the inter-municipal police station, failing to analyse the call list for the disappeared person's telephone in time, not collecting fingerprints from Mr. Téllez Padilla's car, failing to summon the police officers identified to testify in a timely fashion, not ordering a police line-up and failing to investigate the context." *See id*. at ¶ 9.10.

[68] Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 4 ¶ 177, 179-81 (July 29, 1988).

the investigation "as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof."[69]

Almost twenty years later, in the *Massacre of Pueblo Bello*, the Court referred to the European Court of Human Rights' "procedural obligation" to carry out an *effective* investigation.[70] Interestingly, in the case of *Anzualdo Castro*, the Inter-American Court stated the obligation "to establish an appropriate legal framework" and suggested that this was a pre-condition for effective investigations.[71] It further observed that this duty, which is instrumental to the right to access justice, "implies the effective determination of the facts under investigation and, if applicable, of the corresponding criminal responsibilities in a reasonable time."[72] When addressing the 1993 investigations on the enforced disappearance of university student Kenneth Ney Anzualdo, the Court stated the following:

> [U]pon assessing the lack of objectivity with which the authorities acted when deciding to provisionally close the investigation, their attitude towards the victim, the lack of identification of the responsible, the testimonies taken at the request of the party, the lack of search for evidence at the place of the facts, the lack of investigation of the possible places where the victim could have been taken, the lack of verification of the registries at the detention centers and the manner in which the investigation was solved, allows to conclude that this first investigation was not seriously, *effectively* and *thoroughly* carried out (emphasis added). [73]

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[69] *Id.* When the Court examined the State of Honduras' performance, it underlined various aspects of the criminal proceedings that supported its conclusion that investigations had not fulfilled these requirements. Among these actions were the dismissal of the criminal complaint; judicial authorities' incapacity to access possible places of Manfredo's detention; the opening of an investigation (upon requests by the Inter-American Commission) by the Armed Forces, who were the alleged perpetrators of the enforced disappearance; the continuous requests from authorities to the victims to provide proof of their allegations, among others.

[70] The Inter-American Court determined that "the investigations into the Pueblo Bello events conducted in Colombia "were seriously flawed," but did not specify what particular aspects of the investigations it considered to be flawed or whether there were missing actions that particularly undermined the victim's access to justice or that were particularly representative of the State's incapacity or unwillingness to investigate. Pueblo Bello Massacre v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 140 ¶ 147-48 (Jan. 31, 2006).

[71] Anzualdo Castro v. Perú, Preliminary Objections, Merits, Reparations and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C.), No. 202 ¶ 66 (Sep. 22, 2009).

[72] *Id.* at ¶ 124.

[73] *Id*. at ¶ 140.

Regarding the second portion of investigations (those carried out after 2002), the Court noted the lack of progress caused by "the existence of segmented parallel inquiries regarding the alleged responsible and in which the authorities are investigating, also, different complex facts."[74] In characterizing the State's diligence when carrying out investigations, the Court noted the importance of adopting measures to understand the relation between the complex structures of perpetration operating at the time and Kenneth's disappearance.[75] According to the *Anzualdo* Court, the investigations should consider "the complexity of the facts, the context in which they occurred, and the patterns that explain why the events occurred, ensuring that there were no omissions in gathering evidence or in the development of logical lines of investigation."[76]

Furthermore, in the case of the *Alvarado Espinoza* family in Mexico *(2018)*, the Court expressed its concern over the competent investigative authorities' various omissions including safeguarding the scene and collecting evidence.[77] The Court made reference to "the guiding principles that… must be observed in criminal investigations into human rights violations [including] the recovery and preservation of the evidentiary material in order to contribute to any potential criminal investigation of those responsible; the identification of possible witnesses and obtaining their statements, and the determination of the cause, manner, place and time of the incident investigated."[78] The Court added, among other things, that "[i]t is also necessary to conduct a thorough investigation of the scene of the crime, and rigorous examinations must be made by qualified professionals using the most appropriate procedures."[79] The Court has also underlined that the duty to investigate goes *beyond* the mere act of collecting testimonies and documents; rather, it entails doing so in such a way that allows authorities to develop new lines of inquiry or point to potential new sources of evidence.[80]

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[74] *Id.* at ¶ 143; *see also* Isaza Uribe and others v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C.), No. 363 ¶ 153 (Nov. 20, 2018) (where the Court made reference to the duty to "unravel the structures" that facilitate the commission of enforced disappearances, and develop hypothesis and lines of inquiry that ultimately leads them to both intellectual and material authors).

[75] Anzualdo Castro v. Perú, *supra* note 72, at ¶ 152-54.

[76] *Id.* at ¶ 199.

[77] Alvarado Espinoza et al. v. Mexico, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C.), No. 370 ¶ 221 (Nov. 28, 2018).

[78] *Id.* at ¶ 222.

[79] *Id.*

[80] Aldea Los Josefinos Massacre v. Guatemala, Preliminary Exceptions, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C.), No. 442 ¶ 108 (Nov. 3, 2021).

Overall, it could be inferred that thoroughness is more strongly associated to the designing of a theory or theories of the case, the search for patterns and structures of commission, and the gathering of evidence in a rational and meaningful way. In other words, there is a comprehensive list of actions (and attitudes) that States are expected to carry out when conducting investigations of enforced disappearances, but "not as a mere formality preordained to be illusory".[81] Effectiveness appears more closely connected to the accomplishment of the desired results, that is, investigations are able to lead authorities to identity of the perpetrators and discover the victims' fate or whereabouts. In any case, an overview of some of these sources reveals the process of standard-making is highly fragmented and highly contingent upon the characteristics of the cases that are brought before the various bodies.

D. The duty to hold perpetrators criminally accountable

The ICPED dictates that suspect perpetrators should be criminally charged and brought before the courts.[82] Article 9 prescribed states' obligation to establish *ratione loci* and *ratione personae* jurisdiction over crimes of enforced disappearance, the second of which covers cases where either the perpetrator or victim are state nationals.[83] Articles 9.2 and 10 created an obligation to prosecute or extradite perpetrators that are within their territories, regardless of their nationality.[84]

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[81] Alvarado Espinoza et al. v. Mexico, *supra* note 78, at ¶ 221-222, 240 (The court highlights some of the actions that States should carry out when investigating human rights violations and underscores that they should assume the task as an "inherent legal duty").

[82] For example: (1) article 9 prescribing States' obligation to establish *ratione loci* and *ratione personae* jurisdiction over crimes of enforced disappearance, the second of which covers cases where either the perpetrator or victim are State nationals; (2) articles 9.2 and 10 creating an obligation to prosecute or extradite perpetrators that are within their territories, regardless of their nationality; (3) article 8 providing that, in case the States decide to enact statutes of limitations for the crime of enforced disappearance (when not amounting to a crime against humanity), they should make sure that the terms of limitation are "of long duration and… proportionate to the extreme seriousness of this offence"; and that they start "from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature." ICPED, supra note 4, at arts. 8-10. *See also* U.N. Working Group on Enforced or Involuntary Disappearances, *supra* note 54, at 74-75. (establishing the *jus cogens* nature of the duty to punish perpetrators).

[83] ICPED, *supra* note 4, at art. IX.

[84] 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, 276 (2006).

The ICPED also established the duty to prosecute "any person" who commits or participates in the commission of enforced disappearances in any of the modes of liability.[85] Furthermore, according to article 6(b), States should prosecute "a superior" whose actions conform to three conditions, namely that s/he:

> (1) knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
> (2) exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
> (3) failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.[86]

The ICPED incorporated the superior responsibility doctrine in similar terms to article 28(b) of the Rome Statute applied to non-military commanders.[87] Then, through article 6(c), the ICPED enabled States to apply "without prejudice the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander."[88]

Although article 6(a) generally refers to "any person", that article 6(b) plainly mentions "a superior", and that paragraph 6(c) states the possibility to use "without prejudice" relevant international law, could raise doubts as to whether it would be possible under the Convention to prosecute military superiors under lower standards of liability, at least partially that the enforced disappearances in particular do not amount to crimes against humanity.[89] Some delegations participating in the open-ended working group to draft the Convention voiced the concern that the language of article 6(b) would create discrepancies with international criminal law, if it did not fully revert particularly to article 28 of the Rome Statute.[90] Those

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According to Vermeulen, "[t]his form of jurisdiction is referred to as quasi-universal jurisdiction because it is not the most pure form of universal jurisdiction." *See* VERMEULEN, *supra* note 5.

[85] ICPED, *supra* note 4, at art. VI(a).

[86] *See id.*

[87] Rome Statute of the International Criminal Court art. 28(b), July 17, 1998, 2187 U.N.T.S. 90.

[88] ICPED, *supra* note 4 at art. VI(c).

[89] *Id.* at arts. 6(a)-(c).

[90] Civil and Political Rights, including the question of enforced disappearances, Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all personas from enforced disappearances, *supra* note 23 at ¶ 43.

concerns were dissipated by adding paragraph 6(c),[91] which seems to be reinforced by the distinctions made within international criminal law between military, military-like and civilian superiors and the fact that the superior responsibility doctrine is considered to be part of customary international law, at least within the context of armed conflict.[92]

Nonetheless, while the case law developed within international criminal law has expanded our understanding of the boundaries of superior responsibility to military or military-like commanders, the inexistence of jurisprudence regarding civilian superiors will continue to cast doubts to *mens rea* standards that should govern the adjudication of cases. Although some commentators have addressed the issue,[93] the UN Committee on Enforced Disappearances could potentially offer valuable clarification.

II. CHAPTER 2

A. *Introduction: Three "dirty war" judgments from Argentina, Chile and Mexico*

The term "dirty war" was coined by the Argentinean military junta's policy of elimination of communist groups.[94] It has been widely used to refer to the State abuses and grave human rights violations committed across Latin American countries during the Cold War to eliminate social groups associated with communism.[95] The sections that follow analyze three judgments issued by domestic courts from Argentina, Chile and Mexico in 2007 and 2009.

As was mentioned earlier, the in-depth analysis of these judgments provided a snapshot of how certain domestic courts applied the international law in enforced disappearance cases when they ratified the ICPED. They allowed for a prospective

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[91] *Id.*

[92] International Committee of the Red Cross, *Rule 153. Command Responsibility for Failure to Prevent, Repress or Report War Crimes in Customary International Humanitarian Law Volume II, Chapter 43, Section C*, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule153 (last visited Dec. 31, 2022).

[93] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME I: FOUNDATIONS AND GENERAL PART, at 227-28 (2013),

[94] Pérez Christiansen, *supra* note 37.

[95] *E.g.*, Ariel C. Armony, *Transnacionalizando la "guerra sucia": Argentina en Centroamérica*, in DANIELA SPENSER, ESPEJOS DE LA GUERRA FRÍA: MÉXICO, AMÉRICA CENTRAL Y EL CARIBE (2004).

analysis of the potential challenges likely to be faced by States when applying said treaty's framework to certain factual patterns. Increasing the sample of judgments, including cases that have been more recently adjudicated, will be necessary to complement the following analysis and to ultimately grasp the evolving interplay between domestic courts and international human rights law applied to enforced disappearance.

B. Argentina: The prosecution of former member of the Military Junta, Cristino Nicolaides, and others in 2007 for the illegal deprivation of liberty of 6 members of the Montoneros organization.

When the Argentinean military forces took power in 1976, they enacted a set of decrees to enable the armed forces to identify and eradicate the "subversive" groups.[96] Through one of those decrees, the Argentinean territory was divided into four Zones (I, II, III, IV) overseen by different institutions within the Armed Forces. The 601 Battalion, which depended on the Intelligence "Jefatura" II of the General Staff of the Armed Forces (Estado Mayor General), was the intelligence center that received and provided information to the commanding offices of each of these four zones.[97] It also gathered information through its own "task groups" (dependent of the Reunion Central, under the 601 Battalion) and organized the military operations to eliminate members of those "subversive" groups.[98] In this context, between 10,000 and 30,000 people were disappeared from 1976 to 1983.[99]

In February 1980, Angel Carbajal, Julio C. Genoud, Lía M. Ercilia, Verónica M. Cabilla and Ricardo M. Zucker were detained by members of the military in Buenos Aires.[100] Additionally, in September of that same year, Silvia N. Tolchinsky was detained in the immigration checkpoint of Las Cuevas, Mendoza province.[101] These events were part of the Murciélago Operation that started in 1978 to identify the exiled members of the "Montoneros" organization who sought

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[96] Pérez Christiansen, *supra* note 37, at 8-10.
[97] Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9, at 213.
[98] *Id.*
[99] PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS 45 (2011).
[100] The majority of them were detained in the city of Buenos Aires, except for Angel, who was detained in Olivos, Buenos Aires Province. *See* Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9.
[101] *Id.* at 204, 240.

to reenter the country as part of their activities against the dictatorship.[102] All of the victims were detained and photographed in the Higher School of Mechanics of the Navy and at least half were also detained in Campo de Mayo military base, both in Buenos Aires, within Zone IV. With the exception of Silvia N. Tolchinsky, they were all forcefully disappeared.[103]

Family members of the victims in this case (and 9 other victims) filed a *habeas corpus* petition, and on March 8, 1983, the National Court on Federal Crime and Correction No. 2 opened the criminal file 12.616 and heard their testimonies.[104] As a result, eight suspects were prosecuted for qualified unlawful deprivation of liberty, provided for by article 144 bis of the Penal Code.[105] At the time of the events, the eight defendants, in this case, held posts within the military structure mentioned above.[106] In particular, Cristino Nicolaides, the head of the Command of Military Institutes, was in charge of overseeing the entire Zone IV.[107] He was Commander of the army, member of the Military Junta from June 1982 to December 1983, and "the highest-ranking official to be convicted of human rights crimes since 'dirty war' amnesty laws and pardons were scrapped in 2003."[108]

The prosecutor gathered 159 pieces of evidence.[109] Among them were 67 witness testimonies, including that of the sole surviving victim in the case, Ms. Tolchinsky.[110] The rest of the evidence was composed of journalistic pieces, press releases, transcripts from tv interviews, personal correspondence, files from the National Commission for the Disappeared (CONADEP), official reports from various authorities such as the National Gendarmerie, the police of Buenos Aires, the Deputy-Secretary of Social and Human Rights, the Military Geographic

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[102] *Id.* at 203, 205.
[103] *Id.* at 227.
[104] After a long procedural journey involving various courts rejecting their jurisdictions on some of the facts, the case was finally settled around six victims and eight defendants.
[105] They were also prosecuted for illicit association.
[106] Pascual O. Guerreri was chief of operations of the 601 Battalion; Carlos G. Fontana was mayor in the intelligence unit in the 601 Battalion; Juan C. Gualco was chief of the general situation unit in the Interior Department of the "Jefatura II"; Waldo C. Roldan, assigned to Jefatura II; Santiago M. Hoya was part of the civil staff of intelligence in the 601 Battalion; Julio H. Simón was also a member of the civil staff of intelligence in the Reunion Central, and member of the special group 50. *See* Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9.
[107] *Id.* at 218.
[108] *Argentina "dirty war" general gets 25 years*, REUTERS, Dec. 18, 2007, https://www.reuters.com/article/uk-argentina-rights-trial/argentina-dirty-war-general-gets-25-years-idUKN1850957120071218.
[109] Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9.
[110] *Id.* at 227.

Institute, a report by the US Department of Justice, etc.[111] Even with ample evidence presented, the National Court noted the clandestine nature of the criminal activities and the power with which they were carried out caused "multiple difficulties when carrying out the investigation, due to the suppression of documents, registries and evidence of the activities at that time."[112]

Particularly, the Court analyzed the facts and charges against the defendants in the light of the specialized framework on enforced disappearances and other international human rights treaties.[113] Even if the ICPED had just been ratified and was not cited in the judgment, the Inter-American Convention on the Enforced Disappearance of Persons and the Inter-American Court's jurisprudence were extensively used by the Court to support its findings and conclusions.[114]

The Court used international law, namely the Inter-American Convention to establish its own jurisdiction in the case *vis-à-vis* the defendant's contention that the military courts were competent considering the defendants' membership to the armed forces.[115] The Court also used international law to overcome the statute of limitations.[116] The Court established that having occurred as part of a "clandestine system of repression implemented by the military dictatorship,"[117] the defendants' crimes amounted to crimes against humanity.[118] According to the Court, the facts constituted enforced disappearances committed as part of a "widespread and systematic attack against the civilian population, of which the victims were a part".[119] The Court made reference to various legal developments in the field from the adoption of the 1945 London Agreement to the creation of the *ad hoc* international criminal tribunals; and stated that "long before the commission of the facts investigated in the proceedings, the imputed behaviors were already considered to be crimes against humanity."[120]

Furthermore, even if the perpetrators were not prosecuted for enforced disappearance *per se*, the National Court reviewed the facts of the case and reviewed evidence "taking into account all the factors that characterize the enforced

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[111] *Id.*
[112] *Id*. at 218.
[113] *Id.* at 170, 236, 239, 246-47.
[114] *Id*. at 189-90, 244.
[115] *Id.* at 170-72.
[116] *Id.* at 233-41.
[117] *Id*. at 233.
[118] *Id.* at 233-41.
[119] *Id*. at 240.
[120] *Id*. at 238.

disappearance of persons not only as regards its impact on vital rights, but most importantly as regards its continuous or permanent character, its prolonged effects over time, its main consequences, and the need to take into account the context in which each case occurred."[121]

Regarding the merits of the case, the Argentinean Court concluded the defendants had "significant incidence" in the events that led to the victims' detention and ultimate disappearance, insofar as they had "performed relevant tasks within the 601 Battalion, the Reunion Central and the Task Groups."[122] The Court found that the 601 Battalion gathered the intelligence regarding the targeted people and sent it to the highest-ranking military units in charge of each zone, who then conducted the military operations.[123] In this regard, the Court noted "the existing coordination among the 601 Battalion, the Reunion Central, the Task Groups, the Command of Military Institutes, the First, Second, and Third Army Corps for the purposes of carrying out the procedures that led to the kidnappings and disappearances."[124] According to the Court, each unit's actions "were not isolated, but rather part of a systematic, interdependent process."[125] The Court also found, that the six victims had been detained and kidnapped by members of the military in the four different Zones of the territory (according to the military territorial division), held in custody in clandestine and military detention centers in Zone IV (such as the Campo de Mayo base and the Higher School of Mechanics of the Navy).[126]

Relative to the suspects' responsibility, the Court noted that the events had been driven by the Command of Military Institutes, for which Cristino Nicolaides was in charge, as responsible for Zone IV.[127] Each of the defendants held relevant positions within the structure of command and served particular functions to achieve the goal of eliminating the individuals belonging to alleged subversive groups.[128]

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[121] *Id*. at 190.
[122] *Id*. at 217.
[123] *Id*. at 216.
[124] *Id*.
[125] *Id*. at 217.
[126] *Id.* at 201, 206-07, 216.
[127] *Id.*
[128] *Id. at* 217-26.

Regarding Cristino Nicolaides, the Court underlined that as the commander of Military Institutes, he was the highest-ranking officer in Zone IV.[129] Given the number of people involved in the detentions and the duration of the said detentions, the Court concluded that it was unlikely that the events remained unknown to him.[130] On the contrary, the fact that he participated in a press conference on April 25, 1981, where he mentioned the detention of up to 14 people belonging to the Montoneros organization in the year 1980, served as proof, among other pieces of evidence.[131] Additionally, since Zone IV was not divided into sub-areas, like other Zones, the Court concluded that he directly received all the information regarding the military operations carried out by members under his chain of command.[132] Although five of the six victims in the case were not detained in Zone IV, they were all held in custody in clandestine detention centers in the said zone.[133] According to the evidence, the Court found that Nicolaides personally received periodic reports about the people that entered, exited, or were transferred from such centers.[134] The Court did not analyze whether Nicolaides exercised effective *de jure* and *de facto* control over the armed forces, or whether he failed to take reasonable measures to prevent the enforced disappearance of the victims. Since the Inter-American Convention on Forced Disappearances of Persons did not incorporate the superior responsibility doctrine as codified in the subsequent specialized treaties, that did not seem to raise any legal concerns.

The Court then analyzed, although in a seemingly unsystematic way (*i.e.*, not applying the same criteria to each case), the criminal liability of the other defendants. It underscored that Luis J. Arias Duval was in charge of Task Group 2 and thus coordinated the deployment of those who directly conducted the operations.[135] Based on the evidence, the Court stated that Pascual O. Guerrieri, Chief of Operations in the 601 Battalion, knew about the events as they took place, and did not take measures to prevent them.[136] When analyzing the individual liability of Carlos G. Fontana, a member of the 601 Battalion, the Court considered administrative documents reporting his direct participation in other operations (that

[129] *Id.* at 218.
[130] *Id.* at 262.
[131] *Id.* at 196, 262.
[132] *Id.* at 262.
[133] *Id.* at 216.
[134] *Id.* at 263.
[135] *Id.* at 277.
[136] *Id.* at 231.

is, not the operation that led to the disappearances of the victims in this case).[137] Regarding Juan C. Gualco, who was the Chief of the Subversive Intelligence Unit, and a high-ranking officer in Jefatura II- Inteligencia, the Court stated that it was unlikely that he ignored the events related to this case, and failed to take measures.[138] In relation to Waldo C. Roldán, also a member of the 601 Battalion (superior to Luis J. Arias Duval), the Court concluded that the U.S. Department of State's reports pointing to his bad relationship with Arias, and the latter's attempts to make Roldán the sole person responsible for the kidnappings of the Montoneros in Perú, were more than enough to ascertain that Roldán knew about the Battalion's operations.[139] In the case of Santiago M. Hoya, who worked in the Reunion Central as an intelligence civilian officer, the Court especially weighed that he was identified by the only surviving victim of the case, Ms. Tolchinsky, as one of her captors, and indeed the person who was in charge of the house where she was detained.[140] Finally, Julio H. Simón, an intelligence civilian officer in the 601 Battalion, was found guilty considering he was identified by Ms. Tolchinsky as one of the people that participated in her arbitrary detention. [141]

The defendants argued, among other things, that the evidence provided by the prosecutor was insufficient, indirect, or was not produced according to the procedural requirements established by the law.[142] However, the Court concluded that the different pieces of evidence were valuable insofar as they "cooperated" amongst them to support the accusation, regardless of whether they were direct, circumstantial or merely "indicative" of the crime.[143] They were especially relevant given the fact the enforced disappearance involved the destruction of evidence.[144] The Court cited the standards established by the Inter-American Court of Human Rights on the analysis of evidence on enforced disappearance cases, saying that circumstantial evidence and presumptions can be used when consistent conclusions can be drawn from the facts.[145] In this case, according to the Argentinean Court,

[137] *Id.* at 223.
[138] *Id.* at 227.
[139] *Id.* at 227-28.
[140] *Id.* at 224.
[141] *Id.* at 232.
[142] *Id.* at 188-89.
[143] *Id*. at 190.
[144] *Id.* at 189, 192.
[145] *Id*. (citing various cases from the Inter-American Court of Human Rights)

the evidence, both direct and presumptive, had sufficiently led to a single conclusion, as described above.[146]

The Court issued its judgment on the case (also known as the 601 Battalion case) on December 18, 2007, four days after ratifying the ICPED.[147] It sentenced the defendants to sentences varying between 25 and 20 years of imprisonment.[148] Cristino Nicolaides, in particular, was sentenced to 25 years.[149] The 601 Battalion trial was the second one to take place after federal courts declared that the Due Obedience and Final Stop laws were unconstitutional in 2001, and their annulment by Congress in 2003.[150] This decision was issued on a case involving crimes against humanity after Argentina ratified the ICPED.[151]

C. Chile: The Prosecution of former Chief of Navy Intelligence in Talcahuano in 2009 for the Kidnapping of Rudy Carcamo, Member of the Left Revolutionary Movement.

On September 11, 1973, the Chilean armed forces carried out a *coup d'état* against Salvador Allende's government.[152] Several decrees were immediately enacted to establish a state of siege to combat the allegedly subversive groups.[153] Under the *de facto* government of the military *junta* and Augusto Pinochet's dictatorship, around 3,000 people were forcefully disappeared.[154]

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[146] *Id.* at 232.
[147] *Id.* at 1.
[148] *Id.* at 280-94.
[149] *Id.* at 288.
[150] ROSARIO FIGARI LAYUS, LOS JUICIOS POR SUS PROTAGONISTAS: DOCE HISTORIAS SOBRE LOS JUICIOS POR DELITOS DE LESA HUMANIDAD EN ARGENTINA [TRIALS BY THEIR PROTAGONISTS: TWELVE STORIES ABOUT TRIALS FOR CRIMES AGAINST HUMANITY IN ARGENTINA], 225-26 (2015); *Argentina: Amnesty Laws Struck Down: Supreme Court's Long Awaited Ruling Allows Prosecution of 'Dirty War' Crimes*, HUM. RTS. WATCH, (June 14, 2005) https://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down.
[151] PROCURADURÍA DE CRÍMENES CONTRA LA HUMANIDAD [OFFICE OF CRIMES AGAINST HUMANITY], DOSSIER DE SENTENCIAS PRONUNCIADAS EN JUICIOS DE LESA HUMANIDAD EN ARGENTINA [DOSSIER OF SENTENCES PRONOUNCED IN TRIALS AGAINST HUMANITY IN ARGENTINA], 13-14 (2018).
[152] Juzgado Primero Civil de Concepción, *supra* note 9, at 3.
[153] *Id*.
[154] HAYNER, *supra* note 100, at 48; CATH COLLINS, RESPUESTAS ESTATALES A LA DESAPARICIÓN FORZADA EN CHILE: ASPECTOS FORENSES, POLICIALES Y JURÍDICOS [STATE RESPONSES TO FORCED DISAPPEARANCE IN CHILE: FORENSIC, POLICE, AND JUDICIAL ASPECTS] (2016).

Rudy Cárcamo, a member of the Left Revolutionary Movement (MIR), one of the said alleged groups, was arbitrarily detained in his house on the night of November 27, 1974.[155] He was detained by members of the Armed Forces and taken to the Talcahuano Naval Base, where he was interrogated and tortured.[156] According to witness testimonies, he died as a result of the torture and was clandestinely inhumated; others say that his body was thrown into the sea.[157]

His wife, Lilian A. Erices sought judicial remedy on January 11, 1975.[158] But the case was dismissed in 1979 on the basis of the amnesty law passed through decree 2191 of April 19, 1978, that prohibited the prosecution of crimes committed between September 11, 1973, and March 10, 1978.[159] The case was later reopened.[160] The First Civil Court of Concepción, also known as the former First Criminal Court of Talcahuano, ordered the investigation of Rudy's disappearance to determine the responsibility of five suspects, all former members of the Navy, who were working in the Tehualcano Naval Base at the time of the events.[161]

The prosecution supported its case on 45 pieces of evidence (one of them composed of several police reports).[162] Most of them were statements rendered by family members, former detainees, members of the MIR, and military or intelligence officers.[163] There were two key testimonies, rendered by people who were detained at the same time as Rudy.[164] First, Mr. Luis E. Peebles, who was also arrested and taken to the Naval Base, testified that he could see Rudy through his blindfold and identified the five defendants.[165] Second, Jaime A. Oehninger, who was detained before Rudy and taken to the Naval Base where he was interrogated and asked questions about Rudy Cárcamo's physical traits.[166] After Rudy's detention, Oehninger was moved from one detention site to another

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[155] Juzgado Primero Civil de Concepción, *supra* note 9, at 27.
[156] *Id*.
[157] *Id.* at 21-26.
[158] *Id*. at 1.
[159] *Id*. at 2.
[160] *See* Cárcamo Ruiz Rudy, MEMORÍA VÍVA, June 6, 2022, https://memoriaviva.com/nuevaweb/detenidos-desaparecidos/desaparecidos-c/carcamo-ruiz-rudy/.
[161] Juzgado Primero Civil de Concepción, *supra* note 9.
[162] *Id.*
[163] *Id.*
[164] *Id.* at 17-18.
[165] *Id.* at. 17.
[166] *Id*. at 17-18.

inside the Base.[167] Then his blindfold was removed, and he was ordered to identify Rudy, who had been taken there as well.[168] In addition to these testimonies, the prosecution presented various police reports, historical records, and a copy of the relevant section on Rudy of the National Truth and Reconciliation Commission's report.[169] Among the said records was an official list of people who had disappeared and information about their fates, stating that Rudy was thrown into the sea.[170]

The Court convicted the five detainees of kidnapping.[171] To overcome the statute of limitations and the alleged validity of the amnesty law, the Court took the decrees establishing a state of siege as a recognition of a state of war.[172] It stated that "at the time the events […] the national territory was, in reality and legally, in a state of internal war […] there was a 'non-international armed conflict' in the terms of common article 3 of the Geneva Conventions".[173] It followed, according to the Court's reasoning, that the Geneva Conventions were applicable. The Court cited Protocol IV, which established Contracting Parties' obligation to bring those who committed or were ordered to commit any of the breaches described in the Protocol, before the courts.[174]

Then the Court found that the facts of the case had occurred in a context of "grave, massive, and systematic" human rights violations, as part of a state policy,[175] so the offenses amounted to crimes against humanity.[176] Even if Law 20.357 had been published in the official gazette in July 2009 (decades after the commission of the crimes), "its recent promulgation cannot be interpreted as a lack of previous regulation in that sense […]", since the Geneva Conventions were already fully applicable.[177] Law 20.357 was just "an expression of compliance by our nation, of the obligation to adapt the internal legislation."[178] The Court

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[167] *Id.*
[168] *Id.*
[169] *Id.* at 20.
[170] *Id*. at 20-21.
[171] *Id*. at 45.
[172] *Id*. at 5-9.
[173] Juzgado Primero Civil de Concepción, *supra* note 9, at 5.
[174] *Id.*
[175] *Id*. at 6.
[176] *Id.*
[177] *Id.* at 9.
[178] *Id.* at 9.

dismissed the defendants' objections regarding the statute of limitations and the alleged application of the 1978 amnesty law.[179]

Regarding the merits of the case, the Court concluded that the evidence gave rise to a set of "judicial presumptions" that, taken together, supported the convictions.[180] The Court found that one of the defendants, Víctor Donoso, had been assigned to collect intelligence on the members of the subversive groups and support the logistics related to their detention; two others, Conrado A. Sesnic and Francisco Harnish, conducted the questioning of the detainees, including through the use of torture.[181] One of the defendants, José Cáceres, argued that he was not in the Telcahuano Naval Base at the time of the events, as he was allegedly in the Navy School of Valparaíso conducting training for new recruits.[182] However, the Court convicted him on the basis of witness testimonies pointing to him as one of the people present during the questioning and torturing of detainees and issuing of orders.[183] Officer Arturo Garay, testified about having participated in the questioning of detainees with Sesnic, Harnish, and Cáceres.[184] He also stated that Sesnic, Harnish, and Cáceres had told him that Rudy had been detained and, days later, that he had died.[185] In his testimony, Garay also said that Donoso, Harnisch, and Sesnic were part of the group that transferred Rudy's body to Hualpén for his clandestine burial.[186]

Hugo N. González, who held a high-ranking position in the Naval Base and was Chief of the Regional Intelligence Command (CIRE), was also convicted on the basis of his knowledge of the facts.[187] Former officer Garay testified that González "was fully aware of what was going on."[188] According to the Court, González knew who the members of the MIR were and that Rudy was a high-profile suspect.[189] The Court concluded that it was reasonable that the CIRE

[179] *Id*. at 6-8.
[180] *Id*. at 27.
[181] *Id*. at 23, 36, 39.
[182] *Id.* at 38.
[183] *Id.* at 38-40.
[184] *Id.* at 23.
[185] *Id.*
[186] *Id.* at 24.
[187] *Id.* at 30.
[188] *Id.* at 22.
[189] *Id.* at 30.

ordered Rudy's detention and that the last information about his whereabouts located him in the Naval Base, where González discharged his duties.[190]

The Court issued its judgment on December 15, 2009, seven days after ratifying the ICPED.[191] Surprisingly, the court sentenced the defendants to less than two years of imprisonment (541 days) and suspension from public office for the same period of time.[192] Considering their "irreproachable" conduct since the commission of the crimes, the Court granted the benefit of conditional remission of the sentence.[193]

D. Mexico: The prosecution of former intelligence officer of the Federal Safety Directorate in 2009 for the enforced disappearance of college student Miguel Hernández, alleged member of the September 23rd Communist League.

From the late 1960s until the early 1980s, the PRI governments implemented a policy to violently repress organizations generally associated with leftist or communist ideals or who demanded participation and better access to rights.[194] Almost 1,000 people went missing because of this practice.[195] One of the implementing agencies of such policies was the Federal Safety Directorate, created in 1947 to collect intelligence on the targeted groups.[196]

In September 1977, Miguel A. Hernández-Valerio, a 19-year-old high school student living in the northern state of Sinaloa, was arbitrarily detained in the city of Mazatlán.[197] Three other youths were detained with him by the municipal police and members of the former Federal Safety Directorate on suspicions of being part

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[190] *Id.*
[191] *Id.* at 1.
[192] *Id.* at 45.
[193] *Id.*
[194] PROCURADURÍA GENERAL DE LA REPÚBLICA, INFORME HISTÓRICO A LA SOCIEDAD MEXICANA 2006 (Vol.6), at 285-286; Radilla-Pacheco v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser C.) No. 209 ¶¶ 132-37 (Nov. 23, 2009).
[195] *See* Javier Yankelevich, *Guerra Sucia: la Femospp sólo logró una condena, y leve*, REVISTA PROCESO, Jan. 30, 2020, https://www.proceso.com.mx/reportajes/2020/1/30/guerra-sucia-la-femospp-solo-logro-una-condena-leve-237662.html (last visited Dec. 29, 2022).
[196] *La Dirección Federal de Seguridad, los dueños* [*Federal Security Directorate, the owners*], GOBIERNO DE MÉXICO [GOVERNMENT OF MEXICO] https://sitiosdememoria.segob.gob.mx/es/SitiosDeMemoria/Direccion_Federal_de_Seguridad (last visited Dec. 29, 2022).
[197] Yankelevich, *supra* note 196.

of the September 23rd Communist League.[198] After their illegal arrest, Miguel and the others were taken to DFS agent, Esteban Guzmán, in the police headquarters.[199] After asking whether they belonged to the "Rojillos" (*red ones*) or "Communists", the defendant ordered their transfer to an unmarked car.[200] They were blindfolded and taken to a clandestine place of detention, where Miguel and the others were subjected to torture and questioning for approximately four days.[201] Afterward, the victims were transferred to the Ninth Military Zone in the city of Culiacan, where they were ill-treated again.[202] One month or month and a half later, the other three detainees were left undressed in the middle of the Culiacán-Mazatlán Highway.[203] The Ninth Military Zone was the last place where Miguel was seen by one of his co-detainees.[204]

The organization "Eureka Committee" (conformed by family members of victims of enforced disappearance during the dirty war) filed a complaint before the National Human Rights Commission on September 19, 1990, on behalf of Miguel's family.[205] The investigations carried out within the National Human Rights Commission on the dirty war cases began to show progress ten years later, after the 2000 election that threw the PRI out of the Executive power.[206] Around the same time, Mexico established the enforced disappearance of persons as a separate offense in its federal criminal code in 2001 and created a Special

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[198] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9, at 114-15.
[199] *Id*. at 137.
[200] *Id*.
[201] *Id*. at 138.
[202] *Id*. at 139-40.
[203] *Id*. at 140.
[204] *Id*. at 36.
[205] According to, Yankelevich, Mexican historian and expert on the dirty war, the complaint was filed before the General Directorate for Human Rights of the Ministry of Government in 1989 and then transferred to the National Human Rights Commission upon its creation. *See* Yankelevich, *supra* note 196.
[206] *Id.* With the overthrowing of the Institutional Revolutionary Party (after 70 years in power), there was a sense of change among political actors and society. In 2000, the then President Vicente Fox promoted the idea that his government would be different. In this context, the National Human Rights Commission's "investigation of the abduction and disappearance of 532 victims of the "dirty war," […] was taken out of the freezer and speedily completed." *See* Mariclaire Acosta & Esa Ennelin, *The "Mexican solution" to transitional justice*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 94, 100 (Naomi Roht-Arriaza & Javier Marriezcurrena eds., 2006).

Prosecutor's Office for Crimes committed against People belonging to Social and Political Movements in 2002 (closed in 2006).[207]

In 2004, the Special Prosecutor's Office opened a criminal investigation into Miguel's case.[208] On December 7, 2006, the Special Prosecutor submitted the investigation to the Ninth District Court in Sinaloa state, which issued an arrest warrant against Esteban Guzmán the next day.[209] The defendant was arrested on March 17, 2007. On March 22, 2007, the Court confirmed the Special prosecutor's accusation and held the defendant in custody for trial.[210] The defendant appealed the accusation, but appellate courts later confirmed it, so the proceedings continued.[211]

Esteban Guzmán was prosecuted for enforced disappearance as provided for in article 215-A of the Federal Penal Code (now abrogated, as a General Law on Disappearances was passed in 2017 by Congress criminalizing enforced disappearance in more similar terms to the ICPED).[212] The code defined the crime as follows: "[c]ommits the crime of enforced disappearance the public servant who, regardless of whether he participated in the legal or illegal detention of more persons, causes or intentionally maintains their concealment under any form of detention."[213]

The prosecutor gathered and presented 54 pieces of evidence to the Court.[214] Overall, the prosecutor supported its case on two pillars. First, witness testimonies. Some of Miguel's family members rendered their testimonies, particularly two siblings, who appeared before the special prosecutor on April 1, 2005.[215] One of them gave an account of the threats received from officials in prosecutors' offices

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[207] Mariclaire Acosta y Esa Ennelin, *The "Mexican solution" to transitional justice*, in NAOMI ROHT-ARRIAZA Y JAVIER MARRIEZCURRENA, TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 94 (2006); Acuerdo 317/07 del Procurador General de la República, D.O.F., March 26, 2007, http://www.ordenjuridico.gob.mx/Federal/PE/PGR/Acuerdos/2007/26032007(1).pdf

[208] Yankelevich, *supra* note 196.

[209] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9, at 2-3.

[210] *Id*. at 4.

[211] *Id*. at 7.

[212] *Id*.

[213] Article 215-B established a punishment of no less than 5 years and no more than 40 years imprisonment for the public servant who committed enforced disappearance. Article 215-C also established dismissal and disqualification from public office for up to 20 years as additional punishments. Código Penal [CP], Diario Oficial de la Federación [DOF] 14-08-1931, últimas reformas DOF 12-11-2021 (Mex).

[214] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9.

[215] *Id*. at 18-21.

and detention centers not to continue asking for their brother, a few days after he went missing.[216] One of Miguel's roommates, who was also detained that night, also rendered his statement on August 3, 2005.[217] His account of the events was key for the prosecution.

The prosecutor also relied on statements by former intelligence officers of the Federal Safety Directorate, including one former FSD officer who said he knew the defendant and was aware that he was involved in the arrest of several members of the Communist League.[218] The prosecutor further relied on a statement by another witness who recognized the defendant as his direct superior in 1977 and the officer in charge of the "White Brigade," conformed by members of the military and state police to collect intelligence of the September 23rd Communist League and other communist groups.[219] Other witnesses gave information regarding the modes of operation of the Federal Safety Directorate. [220]

The prosecutor's other pillar was the historical archives preserved by the National General Archive.[221] The prosecutor was able to produce, among other things, (1) a copy certified by the National General Archive of the defendant's official communication on September 12, 1977, to the Federal Safety Directorate, informing that Miguel and others had been detained; that the detainees possessed propaganda of the September 23rd Communist League; were in the custody of the Mazatlán municipal police and under interrogation by members of the said Directorate; and (2) a certified copy of the official communication of October 18, 1977, to the Federal Safety Directorate, informing that the victim and others had been detained and held under custody.[222] Moreover, the prosecutor also found and presented to the court a certified copy of an official report issued on the occasion of Miguel's interrogation on August 23, 1984, that is, 7 years after his detention.[223] The defendant denied having had contact with members of the September 23rd Communist League but acknowledged having a photo album of the alleged members of the League as part of his work materials.[224]

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[216] *Id*. at 21.
[217] *Id*. at 29-35, 114.
[218] *Id*. at 93.
[219] *Id*. at 77. *See also* PROCURADURÍA GENERAL DE LA REPÚBLICA, *supra* note 195, at 441.
[220] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9, at 93.
[221] *Id*. at 16-17, 28-29.
[222] *Id*.
[223] *Id*. at 36.
[224] *Id*. at 26.

The Court divided its *actus reus* analysis into three major sections on the basis of the three main elements of the crime: the identity of the perpetrator; the detention of the victim, and his concealment.[225] First, the Court found that the defendant was in fact working in the Federal Safety Directorate at the time of the events.[226] It also found that he was temporarily commissioned to the city of Culiacán, but was transferred to other cities within the state.[227] Second, the Court gave special relevance to the testimony of Miguel's then-roommate (who was also detained and witnessed the events directly) and the statements rendered by Miguel's siblings on the fact that they had not ever seen him after his detention.[228] Even if much of the evidence provided by the prosecutor was circumstantial or indirect, the Court found that they supported his accusation against the defendant.[229] These findings were also supported by the prosecutor's inspection of the building where Miguel and his roommates' apartment used to be (where they were detained),[230] and the visit to the Ninth Military Zone in Culiacan.[231] Having been produced directly by the prosecutor in accordance with the federal code of criminal procedure, this evidence constituted "full proof."[232] Finally, as regards to the third element of the crime, the hiding of the detainee, the Court considered the official communications where several authorities informed that there were no records of the victim (which also constituted "sufficient proof").[233]

Regarding *mens rea*, the Court made reference to article 9 of the Federal Criminal Code, which provides that the perpetrator acts intentionally if "knowing the elements of crime or foreseeing as possible the result of the said crime, wants or accepts the occurrence of the fact described by the Law."[234] The Court cited the criminal code and concluded that "when executing the criminal conduct… [the defendant] did so with full knowledge that he was committing a crime."[235] The Court found that the defendant was aware of the prevailing social norms, and knew

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[225] *Id*. at 109, 113.
[226] *Id*. at 113.
[227] *Id*. at 111.
[228] *Id*. at 18-21.
[229] *Id*. at 131.
[230] The judgment does not provide details regarding the inspection. Considering that the case involved an enforced disappearance that happened 45 years ago, it was probably limited to verifying that the building and the apartment actually existed.
[231] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9, at 124-25.
[232] *Id*. at 131.
[233] *Id*. at 131, 154, 170.
[234] Código Penal [CP], Diario Oficial de la Federación [DOF], *supra* note 214.
[235] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9, at 155.

that the illegal deprivation of liberty was subject to punishment.[236] The Court also considered that there was no proof that his conduct had been unintentional.[237] The Court cited a case by the Supreme Court stating that *mens rea* could be presumed,[238] and concluded that, in light of the circumstances, there was no evidence to presume that his conduct had been involuntary.[239] According to the judge, the defendant could have abided by the law and chose not to.[240]

Even if there was evidence to support the defendant's direct participation in the events (*i.e.,* the torture against Miguel and the rest of the detainees and their transfer from police headquarters to a "dungeon"[241]), The Court found Esteban Guzmán liable under an indirect participation theory considering that he did not personally participate in Miguel's detention.[242] Under article 13, section IV, of the Federal Criminal Code, the "perpetrators or participants of crime" include "[t]hose who commit it through another person[.]"[243] The Court concluded that the defendant had participated in Miguel's enforced disappearance "through others".[244] The crime, as established in the penal code, arguably enabled the judge to convict Guzmán on a "direct participation" theory of liability, on the basis of his order to transfer Miguel to a clandestine site of detention. However, the judgment did not explain why the Court did not pursue this path. Overall, the Ninth District Court found that there was no evidence to support his denial of responsibility,[245] and that there was sufficient evidence to support the accusation.[246] The Court went further to conclude that the defendant had rendered false statements to evade liability, and that, taken together, the evidence fully proved the defendant's culpability.[247] Interestingly, the Court did not refer to international law to support its decision. The Court did not mention the ICPED, not even the Inter-American Convention on the Enforced Disappearance of Persons that was ratified by Mexico seven years before.[248]

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[236] *Id*. at 154.
[237] *Id*. at 155-56.
[238] *Id*. at 156.
[239] *Id*. at 156-57.
[240] *Id*. at 157.
[241] *Id*. at 32-35, 167.
[242] *Id*. at 121, 131-32, 154, 197.
[243] Código Penal [CP], Diario Oficial de la Federación [DOF], *supra* note 214.
[244] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9, at 131.
[245] *Id*. at 168.
[246] *Id*. at 166.
[247] *Id*. at 131.
[248] *See generally* Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9.

The Court issued its judgment on September 30, 2009, 18 months after Mexico ratified the ICPED, on March 18, 2008.[249] It convicted Esteban Guzmán—then 73 years old—for enforced disappearance, and sentenced him to five years in prison.[250] However, the judge suspended his sentence for a period of official surveillance and territorial restriction.[251] The Esteban Guzmán case was the only dirty war case to be brought to trial by the extinct Special Prosecutor's Office.[252] Although several investigations were opened, only this one made its way to a court in December 2006, three months before the Special Prosecutor's Office was officially closed.[253]

III. CHAPTER 3

A. Introduction: Three judgments analyzed

This paper analyzed three judgments that exposed the domestic practice in the late 2000s when prosecuting perpetrators of enforced disappearances committed during the "dirty war" in Latin America. While the ICPED was not cited and applied by either domestic courts (despite the fact that the Convention had just been ratified by the States involved), the three judgments illustrated ways in which, prospectively, the ICPED may favor state prosecution (what this paper calls, "enabling features"). At the same time, they illustrated ways in which States face challenges to fulfill their obligations under the ICPED when holding perpetrators accountable.

B. Making enforced disappearance a separate offense favors accountability

If congresses indeed criminalize enforced disappearance as separate offenses, then the accountability door is certainly easier to open. The Mexican case reviewed here clearly illustrates the point by showing how the court was not forced to come up with any arguments to overcome the challenge of codification. However, the

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[249] *Id*. at 1. To review the status of ratifications of the ICPED visit the United Nations Treaty Collection System, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4.
[250] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9, at 199.
[251] *Id*. at 201.
[252] Yankelevich, *supra* note 196.
[253] Acuerdo 317/07 del Procurador General de la República, D.O.F., March 26, 2007, http://www.ordenjuridico.gob.mx/Federal/PE/PGR/Acuerdos/2007/26032007(1).pdf

definition of enforced disappearance under the Mexican penal provision in force at the time of the judgment opened the door to another potential discussion, and that is whether States should be given some level of latitude when criminalizing enforced disappearance.

As was analyzed previously, Article 4 of the ICPED established the obligation to ensure that enforced disappearance was criminalized separately.[254] The UN Committee on Enforced Disappearance has consistently called upon States to make sure that their criminal codes define enforced disappearance and that the offense contains all the elements of the definition under Article 2.[255] The Committee has considered any deviation to result in an uncompliant definition.[256] Yet, the majority of ratifying states seem to be unconvinced or feel uncompelled to change their legislation, as mandated by the ICPED.[257] Up to date 67 States have ratified the Convention. Thirty-seven of them have submitted their reports to the Committee under Article 29.[258] By the time those 37 States had submitted their reports,[259] just 17 of them had criminalized enforced disappearance as an independent offense and less than half of them had done so in a manner that was fully compliant with Article 2.[260]

In the Mexican case reviewed here, the perpetrator was criminally punished under a flawed definition of the crime of enforced disappearance introduced in the

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[254] ICPED, *supra* note 4 at art. 4.

[255] Some recent examples include: U.N. Comm. on Enforced Disappearance, Concluding observations on the report submitted by Iraq under article 29 (4) of the Convention, ¶ 6, U.N. Doc. CED/C/IRQ/OAI/1 (Dec. 1, 2020); U.N. Comm. on Enforced Disappearance, Concluding observations on the report submitted by Italy under article 29 (1) of the Convention, ¶ 14, U.N. Doc. CED/C/ITA/CO/1 (May 10, 2019); U.N. Comm. on Enforced Disappearance, Concluding observations on the report submitted by Portugal under article 29 (1) of the Convention, ¶ 14, U.N. Doc. CED/C/PRT/CO/1 (Dec. 5, 2018).

[256] There were States that, having modified their penal legislation, failed to include all the elements of Article 2 in the relevant provisions, had introduced ambiguous terms or missed specific concepts. *See, for example,* U.N. Comm. on Enforced Disappearance, Concluding observations on the report submitted by Mongolia under article 29 (1) of the Convention, ¶ 16, U.N. Doc. CED/C/MNG/CO/1 (Sept. 30, 2021).

[257] Citroni, *supra* note 35, at 676.

[258] OHCHR Comm. on Enforced Disappearances, *State Parties Reporting*, https://www.ohchr.org/en/treaty-bodies/ced (last visited Dec. 29, 2022).

[259] Since the review exercise before the Committee, some of them may have changed their laws.

[260] After submitting their reports to the Committee, some of them could have reformed their domestic legislation. For example, in 2017 Mexico passed national legislation applicable both to federal and state jurisdictions within the country, criminalizing enforced disappearance.

Mexican Federal Penal Code on June 1, 2001.[261] The ICPED was still in the drafting process (from 2003 to 2006) when the Special Prosecutor brought the investigation of Miguel's disappearance to a court.[262] Although Mexico signed the Inter-American Convention on the Forced Disappearance of Persons in May 2001, the crime's definition did not conform to that under article II of the said treaty, and ultimately would not conform either to the definition introduced in the ICPED.[263] The definition in the criminal code did not provide for the various forms of detention; nor for enforced disappearances committed by non-state actors acting with the authorization, support, or acquiescence of the State.[264] Additionally, the definition of the criminal code did not include the refusal to acknowledge the disappearance, and the removal of the person from the protection of the law (or the possibility to access judicial recourse, as stated in the Inter-American Convention).[265]

Fortunately, due to the characteristics of the case (especially that the perpetrator was a public official), these deficiencies did not legally impact the possibility ~~of~~ prosecution.[266] Under the participation clause ("regardless of whether he participated…"), the definition allowed sufficient flexibility to prosecute Guzmán even if he did not personally conduct the victim's arrest.[267] Domestic authorities did not have to resort to an accomplice theory of liability. Furthermore, given that the crime was defined in less complex terms as compared to the definition in the Inter-American Convention on Forced Disappearance of Persons or the ICPED, the prosecutor did not have to prove the refusal to acknowledge the disappearance and the removal from the protection of the law.[268] At the domestic level, the judgment

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[261] Probably as a reaction to Mexico's signing of the Inter-American Convention on Enforced Disappearance of Persons on May 4, 2001.
[262] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9, at 2.
[263] Inter-American Convention on Forced Disappearance of Persons, *supra* note 3, at art. 2.
[264] *DECRETO por el que se reforman y adicionan diversas disposiciones del Código Penal Federal y del Código Federal de Procedimientos Penales* [*Decree through which various provisions of the Federal Criminal Code and the Code of Criminal procedure were reformed*], DIARIO OFICIAL DE LA FEDERACIÓN [OFFICIAL FEDERAL GAZETTE], Jun. 1, 2021 https://dof.gob.mx/nota_detalle.php?codigo=763896&fecha=01/06/2001#gsc.tab=0.
[265] *Id*.; Inter-American Convention on Forced Disappearance of Persons, *supra* note 3, at art. 2.
[266] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9.
[267] *DECRETO por el que se reforman y adicionan diversas disposiciones del Código Penal Federal y del Código Federal de Procedimientos Penales*, *supra* note 265.
[268] The UN Committee on Enforced Disappearances has stated that the removal from the protection of the law should not be construed as an intentional element, but rather as a consequence of the other elements. *See* U.N. Comm. on Enforced Disappearances, Concluding observations on the report

was not so much questioned for the legal definition used at the time. Rather, it was questioned for what was socially perceived, with justification, as a very low punishment for such an egregious crime.[269]

Some State parties have not just failed to criminalize in the exact terms of ICPED article 2, but have even defended their *own* legal definitions.[270] However, the Convention and the Committee have established the nature and scope of this duty in very categorical terms, as was already explained.[271] Even if the question of definition allowed for some flexibility, the main concern would be how much flexibility to allow *vis-à-vis* the risk of entirely diluting its core.[272] Apart from the legal considerations, the moral and symbolic value of the definition of enforced disappearance would be especially relevant considering the empowerment and sense of recognition that it provides to thousands of victims seeking for truth and justice around the world.[273]

In any case, the enabling potential of defining and criminalizing enforced disappearance, as established in the ICPED, could be further discussed if the sample of cases is widened, and the more recent cases that have been adjudicated by the three countries scrutinized in this paper and other countries are included. Analyzing domestic practice by States who have reformed their penal codes, like Argentina and Mexico, would also offer an invaluable opportunity for comparison against this paper's findings.

It is important to mention that the three judgments reviewed here involved *prototypical* cases of enforced disappearance. The facts of each case conformed to the "classic" model of the crime where a state official directly or indirectly participated in the enforced disappearance of person(s) within very specific

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submitted by Paraguay under article 29, paragraph 1, of the Convention, ¶ 13, U.N. Doc. CED/C/PRY/CO/1 (Oct. 20, 2014).

[269] Other questions were directed towards the Special Prosecutor, as this case was the only dirty war case brought to a court. *See* Yankelevich, *supra* note 196.

[270] For example, in its 2015 report to the UN Committee on enforced Disappearances, Colombia argued regarding its uncompliant definition that "it includes each of the elements enshrined in article 2 of the Convention and provides even more guarantees insofar as it does not qualify the perpetrator of the offence". U.N. Comm. on Enforced Disappearances, Consideration of reports of States parties under article 29, paragraph 1, of the Convention. Reports of States parties due in 2014. Colombia, ¶ 29 U.N. Doc. CED/C/COL/1 (Jan. 26, 2015).

[271] *See supra* Chapter III(B).

[272] U.N. Working Group on Enforced or Involuntary Disappearances, *supra* note 54, at ¶ 49.

[273] *See* McCrory, *supra* note 18, at 549 (stating that the definition in ICPED article 2 "is the single most important provision the Convention contains".) *See also* Robledo, *supra* note 30 (on the importance of being able to name the suffering victims have experience).

historical circumstances.[274] Further research is needed to discuss the challenges raised by the definition in Article 2 when prosecuting cases that distance from this "classic" model, particularly cases involving non-state actors acting with or without "acquiescence" of the State.[275]

C. Other non-legal factors matter

Two of the cases analyzed here, namely the judgments from Argentina and Chile, evinced that the failure to criminalize enforced disappearance as a separate offense does not necessarily lead to total impunity.[276] In light of the circumstances (including the fact that the legislative branches of each country had not reformed their penal codes), the prosecution of perpetrators for ordinary crimes was probably the only way to prevent impunity. Notably, the Argentinean and Chilean courts in the cases analyzed here were able to overcome legal barriers (the statute of limitations and the amnesty laws) through creative arguments supported by international law.[277] However, the Mexican case discussed here showed that accountability is better served when enforced disappearance is defined as a separate offense. Not only because of the reasons argued by Citroniy, Pérez-Christiansen and other authors,[278] but also from a practical perspective.

This paper does not ignore that numerous social and political factors play a role in achieving accountability.[279] From 2006 to 2018, Argentinean courts had issued 203 judgments for crimes against humanity.[280] The crime of enforced

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[274] Dulitzky, *supra* note 11.
[275] ICPED, *supra* note 4, at art. 2.
[276] A separate question—not thoroughly discussed here—is whether, from a retributive perspective, the punishment imposed in said cases was proportionate to the gravity of the crime.
[277] Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9; Juzgado Primero Civil de Concepción, *supra* note 9.
[278] *See generally* Pérez Christiansen, *supra* note 37; Citroni, *supra* note 35.
[279] Cath Collins, *Human Rights Trials in Chile during and after the "Pinochet Years"*, 4 INT'L J. OF TRANSITIONAL JUST. 67, 67-86 (2010); Centro de Estudios Legales y Sociales [Center for Legal and Social Studies], *Las políticas de memoria, verdad y justicia a cuarenta años del golpe* [The policies of memory, truth and justice forty years after the coup] in DERECHOS HUMANOS EN ARGENTINA, INFORME 2016 (2016) https://www.cels.org.ar/web/wp-content/uploads/2016/12/IA2016-01-memoria-verdad-justicia.pdf; Minow, *supra* note 31.
[280] *See* PROCURADURÍA DE CRÍMENES CONTRA LA HUMANIDAD, DOSSIER DE SENTENCIAS PRONUNCIADAS EN JUICIOS DE LESA HUMANIDAD EN ARGENTINA (2018) (although involving various crimes considered under the crimes against humanity framework).

disappearance was introduced into the criminal code until 2011.[281] In its 2018 report to the UN Committee on Enforced Disappearances, Chile reported 178 "final judgments" (although not specifying whether this number included extrajudicial executions or just enforced disappearances) and 281 cases "in progress."[282] The crime of enforced disappearance has not been included in the Chilean criminal code.[283] In the case of Mexico, the crime of enforced disappearance was introduced in the criminal code in 2001, and yet the case analyzed here was the only dirty war case to be adjudicated by the Mexican courts.[284]

D. Discussing the mens rea aspect

The judgments show that the *mens rea* analysis by the involved Latin American courts was almost nonexistent. In the case of Argentina and Chile, none of the crimes for which the perpetrators were prosecuted introduced a mental element.[285] In the case of Mexico, even if the definition included a *mens rea* component that the regional and ultimately the international definition of enforced disappearance did not, the court did not hesitate to convict Guzmán for reasons that were already explained.[286] When introducing the last element to the definition of enforced disappearance ("which place such a person outside the protection of the law"), the ICPED drafters eliminated the mental component that is present in the Rome Statute definition of enforced disappearance.[287] Additionally, the Committee on Enforced Disappearances has stated that this phrase should not be construed as

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[281] *See* Law No. 26.679 B.O. May 9, 2011 http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/texact.htm (Arg.).
[282] U.N. Comm. on Enforced Disappearances, *Report submitted by Chile under article 29 (1) of the Convention*, ¶ 104 U.N. Doc. CED/C/CHL/1 (Feb. 6, 2018).
[283] Juan Pablo Cavado Herrera, *Delito de desaparición forzada de personas en Chile: Proyecto de ley, obligación internacional, legislación, jurisprudencia.* [*Crime of forced disappearance of persons in Chile: Bill, international obligation, legislation, jurisprudence*], BIBLIOTECA DEL CONGRESO NACIONAL DE CHILE [LIBRARY OF THE NATIONAL CONGRESS OF CHILE], June 1, 2021 https://obtienearchivo.bcn.cl/obtienearchivo?id=repositorio/10221/33308/2/JPC_Delito_de_Desaparicion_Forzada__Ley__Proyecto_JRC.pdf.
[284] *DECRETO por el que se reforman y adicionan diversas disposiciones del Código Penal Federal y del Código Federal de Procedimientos Penales*, *supra* note 265.
[285] Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9, at 213; Juzgado Primero Civil de Concepción, *supra* note 9, at 27.
[286] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9, at 154-57.
[287] SCOVAZZI & CITRONI, *supra* note 5, at 273 (explaining that the mental element in the definition of enforced disappearance contained in the Rome Statute, along with other elements, represented an "undeniable step backwards").

a *mens rea* component.[288] So, it would seem that the absence of a mental element should facilitate the prosecution of perpetrators.[289] The extent to which this is practically implemented should also be examined.

E. The ICPED may function when States fail to legislate

If State congresses fail to reform criminal legislations, the ICPED, and specifically article 5, could enable domestic courts to prosecute—as occurred in Argentina and Chile—if they are able to argue that enforced disappearances were committed in their jurisdictions in a widespread and systematic manner (as they arguably are, more commonly than not), in which case they would amount to crimes against humanity, for which the statute of limitations does not apply.[290]

F. Some reflections regarding the duty to investigate

As regards the duty to investigate, the three judgments reviewed here highlight how the prosecution's legal success was highly contingent on the possibility of weaving a narrative and producing different types of evidence to support it. As can be observed in the judgments, the three prosecutors had access to official records and did extensive research to present official documents connecting the defendants to the facts of each case. It was also interesting to observe that at least two of the prosecutors submitted the reports issued by truth commissions created in their countries, which underscores the relevance that these efforts may have in holding perpetrators accountable.[291] Furthermore, although all the testimonies rendered before the courts played a role in securing the conviction and punishment of the perpetrators, two particular types of witnesses were crucial in each case. On the one hand, eyewitnesses: in the Argentinean case, the testimony of Ms. Tolchinsky, the sole surviving victim; in the Chilean case, the testimony of two people who, as

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[288] U.N. Comm. on Enforced Disappearances, Concluding observations on the report submitted by Paraguay under article 29, paragraph 1, of the Convention, *supra* note 269, at ¶ 13.
[289] SCOVAZZI & CITRONI, *supra* note 5, at 276 (noting that the mental element in the definition of enforced disappearance contained in the Rome Statute, "places an almost impossible burden of proof on the prosecutor of the International Criminal Court").
[290] ICPED, *supra* note 4.
[291] Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9, at 192; Juzgado Primero Civil de Concepción, *supra* note 9, at 20.

Rudy, were detained in the Naval Base.[292] In the Mexican case, the testimony of Miguel's roommate, who was detained and taken to military facilities with him.[293] On the other hand, former state officials testified before the three courts, which was key to collecting evidence on the patterns and structures that facilitated the crimes, but also to assigning individual liabilities.[294]

These shared characteristics highlight that the *thoroughness* standard of investigations entails comprehensiveness, but certainly not as part of a mechanical task of checking a list of specific actions. What the sentencing analysis adds to this understanding of a thorough investigation is a note on the importance of *strategy* when gathering evidence to prove individual responsibility for enforced disappearance. The duty to conduct a thorough investigation does not only entail gathering the evidence and identifying the possible theories of the case. The duty to thoroughly investigate entails a *strategically* meaningful way of collecting evidence. Former international prosecutor, Dermot Groome, explains that complex criminal investigations undergo four phases. First, "casting the net," that is to say, collecting as much evidence as needed.[295] Second, "discovering the case," that is, identifying the emerging theories of the case (rather than imposing a "preconceived theory of events").[296] Third, "exploring the case," which means, "develop[ing] concrete avenues of investigation to gather evidence which will either prove or disprove each possible scenario."[297] Fourth, "building the case," in other words, "gather[ing] sufficient credible and reliable evidence to establish what happened and who is responsible."[298]

As expected, the ICPED does not include specific standards on the gathering of evidence or its strategic use by the competent authorities *vis-à-vis* the inherent challenges of investigating enforced disappearances (*i.e.*, the passage of time, the fact that direct victims are absent, and the overall secret and highly fragmented conditions in which enforced disappearances occur, among others). However, the

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[292] Juzgado Primero Civil de Concepción, *supra* note 9, at 17-18; Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9, at 227.
[293] Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9, at 29-35, 114.
[294] *See generally* Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9; Juzgado Primero Civil de Concepción, *supra* note 9; Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9.
[295] DERMOT GROOME, *Evidence in cases of mass criminality*, in CRIMINOLOGICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW 121 (2014).
[296] *Id.*
[297] *Id.*
[298] *Id.*

WGEID has made reference to this issue highlighting the "key role" played by victims and organizations; the importance of highly experienced and autonomous forensic teams and the development of policies regarding conservation and disclosure of governmental archives.[299]

G. The prosecution of superiors

The judgments show that the prosecution of superior officers is possible. This is especially true in the cases of Argentina and Chile.[300] However, it can be observed that the superior responsibility analysis by both courts were less stringent than what Article 6(b) of the ICPED indicates.[301] In general, the courts examined whether the high-ranking defendants were aware of the situations leading to enforced disappearances.[302] This analysis could have satisfied section (i) of Article 6(b) of the ICPED.[303] However, the courts did not conduct a detailed analysis of the superior officers' effective responsibility for and control over the activities connected to the enforced disappearances, and in general did not analyze whether they had failed to take measures to prevent them.[304] By introducing the superior responsibility doctrine with such detail, the ICPED may have raised—from a purely technical perspective—the standards of prosecution, as compared to the State practice expressed in those judgments. This paper does not ignore, however, that holding perpetrators accountable, especially superiors, tends to be a highly politicized issue, and that politics could thus potentially influence or determine the higher or less degree of rigor with which these standards are interpreted and applied in concrete cases by national courts.

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[299] *See* U.N. Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, *supra* note 59.
[300] Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9; Juzgado Primero Civil de Concepción, *supra* note 9.
[301] ICPED, *supra* note 4.
[302] Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9; Juzgado Primero Civil de Concepción, *supra* note 9; Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9.
[303] ICPED, *supra* note 4.
[304] Juzgado Nacional en lo Criminal y Correccional Federal n° 4, *supra* note 9; Juzgado Primero Civil de Concepción, *supra* note 9; Juzgado Noveno de Distrito en el Estado de Sinaloa (Mazatlán), *supra* note 9.

CONCLUSION

This paper asked how enforced disappearance cases prosecuted by domestic courts in Latin America elucidate some of the challenges that States are likely to face when implementing the ICPED's standards both from a conceptual and a practical perspective, and how the ICPED favors accountability. It focused on three obligations set by the ICPED: the duty to criminalize enforced disappearance as a separate offense, the duty to investigate enforced disappearances, and the duty to hold perpetrators accountable.

Through a qualitative and comparative approach, this paper discussed three judgments issued by trial courts of Argentina, Chile and Mexico after these countries had just ratified the ICPED, for enforced disappearances committed during the "dirty war." By doing so, it identified some of the ICPED's enabling features for the prosecution of perpetrators and ways in which States may continue to face challenges to prosecute under the ICPED's standards.

This paper provided more detailed insights into sentencing practices by national authorities in Latin America. While a wider sample of judgments would be desirable to enrich the analysis, this paper's methodology contributed to the drawing of a "baseline" against which to analyze and compare subsequent judgments.

Ultimately, this paper's findings represent a starting point in a much more ambitious enterprise to analyze sentencing practices in enforced disappearances cases. Following up on this research agenda will contribute to the development of a more comprehensive and unique understanding of the evolving interplay between domestic jurisdictions and international human rights law, as applied to enforced disappearances. It will also offer the UN Committee on Enforced Disappearances, the Working Group on Enforced or Involuntary Disappearances, and other stakeholders' relevant inputs to better guide States on the implementation of their obligations.

The ICPED represented a powerful acknowledgment of the suffering of thousands of victims, and a global recognition of the need to offer them stronger legal support and protection. Without attenuating State responsibility to fulfil its international obligations, identifying the conceptual and practical challenges faced by States when implementing the ICPED on the ground will contribute to achieve its overall goals. Analyzing its enabling features from a more practical perspective

maximizes its potential as an empowerment tool for those seeking accountability worldwide for the atrocious crime of enforced disappearance.