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## THE ENFORCED DISAPPEARANCE OF MIGRANTS

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### ABSTRACT

*The international legal prohibition of enforced disappearances first developed in the context of authoritarianism. In particular, throughout the second half of the 20th century, several Latin American governments used state agents and non-state actors to disappear political opponents and other identity groups. Today, advocates and scholars are employing the same category to contest state violence in a very different context: the disappearance of migrants, through detention and/or death, under the guise of border enforcement. In this paper, we consider acts of border violence at the U.S.-Mexico Border and at the EU's Southern and Eastern borders, including the Mediterranean Sea, imagining the potentials and limitations of labeling such practices as enforced disappearances in legal advocacy. After first exploring the doctrinal histories prohibiting enforced disappearance in international law, the paper examines two questions: first, what are the common and differing underlying assumptions in the authoritarianism and border violence contexts that make the legal category of "enforced disappearance" relevant for migrants and their families? Second, what are the practical benefits for migrant rights struggles in such a framing? Beyond*

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*simply characterizing such acts of border violence as egregious, the categorization of certain practices as enforced disappearances under international law can provide the relatives of missing migrants with concrete informational remedies and other forms of reparation, including through their rights provisioned by the International Convention for the Protection of All Persons from Enforced Disappearance. For countless individuals whose loved ones have gone missing on the move for reasons of State design, this legal framing could help finally uncover the truth behind the fate and whereabouts of their disappeared.*

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#### INTRODUCTION

In the last decade or so, families of migrants who have gone missing have gradually made more use of a novel legal argument. Advocates and scholars have joined.<sup>1</sup> According to this argument, many migrants do not simply “go

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<sup>1</sup> See, e.g., Bernard Duhaime & Andréanne Thibault, *Protection of Migrants from Enforced Disappearance: A Human Rights Perspective*, 99 INT’L. REV. OF THE RED CROSS 569 (2017); Howard Davis & Melanie Klinkner, *Investigating Across Borders: The Right to the*

missing” and remain unaccounted for in their journeys for international protection or improved opportunities.<sup>2</sup> They are, at times, subjected to enforced disappearances as defined under international law.<sup>3</sup> But what does that mean, and who (if anyone) stands to benefit from this argument? The term “missing migrants” refers to individuals who may drop off the map as a result of various factors – including those who die in transportation accidents during their journeys, and corpses categorized as the bodies of migrants after being found near border crossings.<sup>4</sup> By contrast, the term “disappeared” shifts the blame to states for their abusive practices, including in the context of migration control.<sup>5</sup> The purpose of this article is to assess this emerging argument in the context of the U.S.-Mexico borderlands and Europe’s Southern and Eastern borders. We will argue that within the always-imperfect set of available legal tools to hold governments accountable for systematic violations of migrant rights, the legal prohibition of enforced disappearances has special potential.<sup>6</sup> The article thus calls upon human rights lawyers, social movements, and international organizations to further

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*Truth in a European Context*, 26 INT’L J. HUM. RTS. 683, 684 (2022); Martina Tazzioli & Nicholas De Genova, *Kidnapping Migrants as a Tactic of Border Enforcement*, 38 ENV’T & PLAN D: SOC’Y & SPACE 867 (2020); Emilio Distretti, *Enforced Disappearances and Border Deaths Along the Migrant Trail*, in BORDER DEATHS: CAUSES, DYNAMICS AND CONSEQUENCES OF MIGRATION-RELATED MORTALITY 117 (Paolo Cuttitta & Tamara Last eds., 2019).

<sup>2</sup> On the commonalities and differences between the two categories, see Jeremy Sarkin, *The Need to Deal with All Missing Persons including Those Missing as a Result of Armed Conflict, Disasters, Migration, Human Trafficking, and Human Rights Violations (including Enforced Disappearances) in International and Domestic Law and Process*, 8 INTER-AM. & EUR. HUM. RTS. J. 112, 128-29 (2016).

<sup>3</sup> While some sources use the term “forced disappearance,” we prefer “enforced” simply because it is the term used by the general treaty prohibiting the practice. International Convention for the Protection of All Persons from Enforced Disappearance, *opened for signature* Feb. 6, 2007, 2716 U.N.T.S. 3 [hereinafter ICPPED]. The term “enforced disappearance” also appears in important international law instruments such as the Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. When referring to such sources, we use their term. For the present purposes, we take the terms to be interchangeable.

<sup>4</sup> Comm. on Enforced Disappearances [CED], General Comment on Enforced Disappearance in the Context of Migration: Concept Note ¶ 1, (2022).

<sup>5</sup> See Sarkin, *supra* note 2, at 128-29. On the problems in framing claims on behalf of migrants within the human rights and civil rights vocabularies, see Kim Voss, Fabiana Silva & Irene Bloemraad, *The Limits of Rights: Claims-Making on Behalf of Immigrants*, 46 J. ETHNIC & MIGRATION STUD. 791, 795-96 (2020).

<sup>6</sup> For a mapping of such tools see essays collected in a German Law Journal Special Issue dedicated to “border justice,” which address the question of accountability for violations of migrant rights from all these disciplinary perspectives: Cathryn Costello & Itamar Mann, *Border Justice: Migration and Accountability for Human Rights Violations*, 21 GERMAN L. J. 311, 312, 325-32 (2020).

engage with the legal instruments that can help frame the disappearances of migrants as violations that require specific redress.

The origin of the term “enforced disappearances” is often associated with the authoritarian regimes of 20th century Latin America. Countless individuals were disappeared by the hands of Latin American states as a means of suppressing political opposition, of ethnic cleansing, and of instilling fear in civilian populations.<sup>7</sup> Even in the last two decades, it has been estimated that 200,000 have become victims of enforced disappearances in Latin America.<sup>8</sup> The practice is not unique to this region. During the Soviet era, enforced disappearances of political dissenters were rife, and enforced disappearances did not cease in its former territories with the fall of the Soviet Union. Russia and other countries formerly in the Soviet Bloc, notably Belarus, are recognized globally as perpetrators of enforced disappearances.<sup>9</sup> Authoritarian regimes across the Middle East have also become infamous for widespread instances of the practice<sup>10</sup> – and the list goes on.<sup>11</sup> That the practice of enforced disappearance continues worldwide today is unquestionable.

This article seeks to reinforce a newer and yet emergent proposition, that refugees, asylum seekers and other migrants have also often fallen victim to enforced disappearances at international borders and within transit and destination countries. Various states have disappeared individuals under the guise of border enforcement, often with continued impunity.<sup>12</sup> The UN Committee on Enforced Disappearances (CED) notes, in the concept note for its forthcoming General Comment on enforced disappearances in the migration context, that “despite the identification of the issue of enforced disappearance of migrants it remains marginalized in the political and legal

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<sup>7</sup> Ariel E. Dulitzky, *The Latin-American Flavor of Enforced Disappearances*, 19 CHI. J. INT’L L. 423, 426 (2019).

<sup>8</sup> Krishna Jaramillo, *Latin America: The Region with the Highest Number of Enforced Disappearances*, LATIN AM. POST (Sept. 11, 2018), <https://latinamericanpost.com/23187-latin-america-the-region-with-the-highest-number-of-enforced-disappearancesin>; see also *The Missing in Latin America: Families Will Not Stop Searching nor Will We Stop Helping*, INT’L COMM. RED CROSS (July 23, 2019), <https://www.icrc.org/en/document/missing-latin-america-families-will-not-stop-searching>.

<sup>9</sup> See Cristina Genovese & Harmen van der Wilt, *Fighting Impunity of Enforced Disappearances through a Regional Model*, 6 AMSTERDAM L.F. 4, 18 (2014).

<sup>10</sup> See *Neither Dead nor Alive*, AMNESTY INT’L, <https://www.amnesty.org/en/latest/campaigns/2018/08/neither-dead-nor-alive-mena-disappeared/> (last visited Mar. 16, 2022, 12:07 PM).

<sup>11</sup> See generally SIMON ROBINS, *FAMILIES OF THE MISSING: A TEST FOR CONTEMPORARY APPROACHES TO TRANSITIONAL JUSTICE* (2013); GRAŻYNA BARANOWSKA, *RIGHTS OF FAMILIES OF DISAPPEARED PERSONS* (2021).

<sup>12</sup> On the discourse of “impunity” in the migration context, see Itamar Mann, *Border Violence as Crime*, 42 U. PENN. J. INT’L L. 675 (2021).

discourse” and that families “fac[e] shortcomings in searching for their disappeared loved ones.”<sup>13</sup> The forthcoming General Comment thus “aims at fostering interstate cooperation in terms of the prevention and investigation of enforced disappearances in the migration context” and promoting “access to justice for victims and families.”<sup>14</sup> Similar objectives are shared by the Global Compact for Safe Orderly and Regular Migration adopted in 2018, which calls for “coordinated international efforts [to save] migrants,”<sup>15</sup> and the 2019 UN General Assembly Resolution on the protection of migrants, calling for international cooperation in cases of missing and dead migrants.<sup>16</sup>

In both historical and contemporary examples, in the wake of a disappearance, relatives have often been left without access to basic information about what happened to their loved ones: their location, their treatment, and even whether they are alive. As Ariel Dulitzky has noted, family members are “the ones who have led every struggle against disappearances.”<sup>17</sup> Today, the relatives of disappeared migrants have taken up fights for their rights to obtain information in the Americas, Europe, the Middle East, and elsewhere. Despite robust organizing, families continue to face obstacles and barriers that make access to information extremely challenging if not impossible. The international legal framework prohibiting enforced disappearances responds to these demands directly: at its core are informational remedies provisioned for family members and loved ones. In Articles 18 and 20, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) specifically provides “any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel” with the right to access information about the disappeared.<sup>18</sup> We argue that applying the framework of enforced disappearances to acts of border violence offers appropriate recognition and remediation opportunities considering the severity and systemic nature of such acts, as well as the State’s active responsibility.<sup>19</sup> The enforced disappearances framework also recognizes family members as themselves victims of the enforced disappearance,<sup>20</sup> and thereby ascribes a set of rights to them, including the right to report their

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<sup>13</sup> CED, *supra* note 4, ¶¶ 6-7.

<sup>14</sup> *Id.* ¶ 13.

<sup>15</sup> G.A. Res. 73/195, at 6 (Dec. 19, 2018).

<sup>16</sup> G.A. Res. 74/148 (Dec. 18, 2019).

<sup>17</sup> Gabriel Leao, ‘Forced Disappearance Is a Crime of Terror’: Ariel Dulitzky, AMS. PROGRAM (Oct. 10, 2017), <https://www.americas.org/forced-disappearance-is-a-crime-of-terror-ariel-dulitzky/> (interview with Ariel Dulitzky).

<sup>18</sup> ICPPED, *supra* note 3, art. 18. While the category of “loved ones” in the previous sentence may not sound clear-cut, we have thus chosen it intentionally.

<sup>19</sup> *Id.* art. 2.

<sup>20</sup> *Id.* art. 24; *see also* Davis & Klinkner, *supra* note 1, at 684.

loved one's disappearance,<sup>21</sup> rights to their own safety,<sup>22</sup> the right to remains of the deceased,<sup>23</sup> and advanced protections for children related to the disappeared.<sup>24</sup> Further, the ICPPED also creates a duty for the State to investigate such reports,<sup>25</sup> and to cooperate with other states and provide mutual assistance, including to individuals who seek to report disappearances.<sup>26</sup>

While international law has historically centered on states as its subjects, and human rights law has given a central status to the individual, the enforced disappearances framework has a different protagonist. Neither sovereign nor person, at its basis stands the family, and perhaps friends (see Article 18 regarding rights of those with a "legitimate interest"), as a close unit of mutual care: a normative premise that seems to resonate with the real-life experiences of many migrants.<sup>27</sup> We argue that this ontology is an important part of what makes the enforced disappearances framework uniquely promising in a transnational campaign to challenge and seek redress for certain instances of border violence.<sup>28</sup>

By categorizing certain instances of detention, expulsion and death of migrants as direct and indirect products of state-sanctioned disappearance, family members of disappeared migrants may be able to operationalize this legal framework and thereby access forms of redress which would be otherwise unavailable. Despite the very different context in which it emerged, the Committee on Enforced Disappearances (CED) and the Working Group on Enforced or Involuntary Disappearances (WGEID) have recognized that this framework would grant families access to otherwise unavailable remedies, enshrined in the ICPPED, and quite possibly in customary international law.<sup>29</sup> Migrants who disappear while traveling across

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<sup>21</sup> ICPPED, *supra* note 3, art. 12.

<sup>22</sup> *Id.* arts.12 & 18.

<sup>23</sup> *Id.* art. 15.

<sup>24</sup> *Id.* art. 25.

<sup>25</sup> *Id.* arts. 3, 10 & 12.

<sup>26</sup> *Id.* arts. 14 & 15.

<sup>27</sup> *Id.* art. 18; *see also, e.g.,* Maxine B. Zinn, *Familism Among Chicanos: A Theoretical Review*, 10 HUMBOLDT J. SOC. REL. 224, 224-38 (1982); Irene Bloemraad & Christine Trost, *It's a Family Affair: Intergenerational Mobilization in the Spring 2006 Protests*, 52 AM. BEHAV. SCIENTIST 507, 522-32 (2008); *cf.* Nabil Tueme, *All in the Family: The Role of Family Networks, Collective Action Frames, and Identity in Latino Movement Participation*, 15 SOCIO. COMPASS e12866, Mar. 9, 2021, at 2, <https://doi.org/10.1111/soc4.12866>.

<sup>28</sup> On the ambiguous and often overlooked role the family has had in transnational legal thinking, *see* Ivana Isailovic, *Family Law: A Blindspot 2-3* (Jane Monnet Program, Working Paper No. 10/18, 2018), <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-10-Ivana-Isailovic.pdf>.

<sup>29</sup> In the context of armed conflict, Rule 98 in the ICRC's 2005 study on customary international humanitarian law refers to the obligation of the parties to provide family

international borders, or who are apprehended abroad in unknown locations, often do not go missing by accident, but rather as a result of state-orchestrated conditions of disappearance. This paper investigates when their treatment may reach the level of an enforced disappearance as a matter of incipient legal doctrine, focusing on examples from the United States and Europe. It also examines the extent to which certain policies of ‘migration management’, which aim to deter migration through the unprotection, abandonment, and reckless endangerment of persons on the move, may themselves constitute policies of disappearance. It then reflects on the moral and political benefits as well as limitations of the enforced disappearances framework in the migration context. Methodologically, the paper thus offers a mixture of doctrinal analysis and critical reflection, all expressly in the service of border justice campaigns and both collective and individual remedial opportunities.

Section I introduces the development of contemporary international law on enforced disappearances and the holistic framework of informational and restorative remedies which emerged in the context of 20th century authoritarian Latin America. We then examine the common and differing assumptions underlying the practice in the authoritarianism and border violence contexts. Section II summarizes state practices of enforced disappearances in the contemporary context of migration and border violence at the U.S.-Mexico border and at Europe’s southeastern land and sea borders. Section III then considers whether and how the category of enforced disappearances can indeed prove useful in efforts to impose accountability upon states; we engage legal objections as well as moral and political concerns, observing the practical and theoretical benefits of framing certain border violence practices as enforced disappearances. As will become clear, the specific notion of accountability that the enforced disappearances framework may offer to migrants rests, in considerable part, on the political efforts and legal status of families. The final section briefly concludes.

## I. WHAT IS AN ENFORCED DISAPPEARANCE?

### A. *The Emergence of Enforced Disappearances and Their International Condemnation*

Disappearance policies can be traced back to colonial practices, with early examples including France’s practices of abduction for the purposes of

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members of persons reported missing with all available information on their fate. See 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. FOR THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 340 (2005), <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

interrogation in Algeria and Indochina. Nazi Germany's notorious 1941 Night and Fog Decree (*Nacht und Nebel Erlass*), which authorized the abduction of resistance figures, is also often cited as an early example.<sup>30</sup> But the modern *legal* history of enforced disappearances starts in Latin America. In the mid-1960s,<sup>31</sup> Guatemala began to systematically "disappear" civilians. In the following decades, the practice spread widely across Central and South America, with significant numbers of enforced disappearances reported in Argentina, Bolivia, Brazil, Chile, Colombia, El Salvador, Haiti, Honduras, Mexico, Peru and Uruguay.<sup>32</sup> Continuing colonial legacies, Argentina's disappearance practice was influenced first by France and then the United States, the main sources of its counterinsurgency training.<sup>33</sup> The estimated number of individuals who were disappeared in Latin America varies widely. Scovazzi and Citroni estimate that between 1970 and 2000, about 100,000 individuals were disappeared by Latin American governments in the context of internal armed conflicts.<sup>34</sup> The 1999 report of Guatemala's Commission for Historical Clarification (CEH), however, estimated that more than 200,000 individuals were killed or disappeared in Guatemala alone in the decades following the 1962 outbreak of internal conflict.<sup>35</sup>

Led by security agents, intelligence operations and paramilitaries, Latin American disappearances targeted people across all levels of society, most frequently on the basis of the political activity of individuals.<sup>36</sup> As Scovazzi and Citroni explain, the objective was to "disarticulate the movements or organizations identified by the State as favorable to the insurgency, as well as to spread terror among the people."<sup>37</sup> The targets and perpetrators of Latin American enforced disappearance regimes differed over time and space. For example, in Guatemala, an estimated 80% of disappearances were conducted

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<sup>30</sup> See, e.g., Heinz Dieterich, *Enforced Disappearance and Corruption in Latin America*, 25 HUM. RTS. & JUST. UNDER SIEGE 40, 48-49 (1986), <https://www.jstor.org/stable/29766291>.

<sup>31</sup> Claudio M. Grossman & K. Catherine Walker, *Disappearances*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2021), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e778>.

<sup>32</sup> TULLIO SCOVAZZI & GABRIELLA CITRONI, *THE STRUGGLE AGAINST ENFORCED DISAPPEARANCE AND THE 2007 UNITED NATIONS CONVENTION 2* (2007).

<sup>33</sup> COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS [CONADEP], *NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION OF THE DISAPPEARED 442* (1986) [hereinafter CONADEP Report].

<sup>34</sup> SCOVAZZI & CITRONI, *supra* note 32, at 2.

<sup>35</sup> GUATEMALA: MEMORY OF SILENCE, REPORT OF THE COMMISSION FOR HISTORICAL CLARIFICATION: CONCLUSIONS AND RECOMMENDATIONS 17 (1990) [hereinafter Guatemala CEH Report], <https://hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf>.

<sup>36</sup> SCOVAZZI & CITRONI, *supra* note 32, at 7, 10; see also Guatemala CEH Report, *supra* note 35, at 35, 52.

<sup>37</sup> SCOVAZZI & CITRONI, *supra* note 32, at 10 (quoting Guatemala CEH Report, *supra* note 35, at 35).

by the army, 12% by paramilitary agents, and 8% by the national police.<sup>38</sup> Victims included peasants (*campesinos*), teachers and professors, student leaders, as well as religious actors and opposition figures.<sup>39</sup> In Colombia, state officials like police, military and security forces were responsible for most disappearances between the 1970s and 1990s. They targeted mainly association members, rights defenders, and “left-wing sympathizers.”<sup>40</sup> Starting from roughly 1998, paramilitaries became increasingly involved as the perpetrators, and civilian groups such as farmers became increasingly targeted as the victims.<sup>41</sup>

Latin American disappearance regimes also targeted children, particularly the children of disappeared adults. For example, between 1979 and 1986, roughly 5,000 cases of child disappearances were reported in Guatemala, 80% of whom were indigenous children.<sup>42</sup> Several hundreds of children were disappeared in El Salvador to “punish or threaten their families, who were considered to be subversive or active members of guerrilla groups, and, in general, to spread terror within the country.”<sup>43</sup> Some state practices of child disappearances were conducted through transnational cooperation, with the “clandestine transportation” of children across international borders.<sup>44</sup> This transnational aspect, noted by the Inter-American Commission on Human Rights (IACommHR),<sup>45</sup> may be particularly pertinent for understanding contemporary cross-border disappearances. Transnational cases of enforced disappearance were of course not limited to children; for example, Uruguayan security forces and the Argentinian state officials collaborated to disappear Uruguayan adults in Argentina.<sup>46</sup>

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<sup>38</sup> SCOVAZZI & CITRONI, *supra* note 32, at 90.

<sup>39</sup> Guatemala CEH Report, *supra* note 35, at 35.

<sup>40</sup> SCOVAZZI & CITRONI, *supra* note 32, at 23.

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

<sup>42</sup> *Id.* at 18. Disappearances of Guatemalan children were most common between 1979 and 1986, with 11% of the 45,000 disappearance cases reported being disappearances of children. *Id.* Of these nearly 5,000 cases, 88% were perpetrated by State agents, 80% of the child victims were indigenous, and 66% were under 8 years old. *Id.*

<sup>43</sup> *Id.* at 20; *see also* *Hermanas Serrano Cruz v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120 (Mar. 1, 2005).

<sup>44</sup> 1988 INTER-AM. Y.B. ON HUM. RTS., at 478 (1988).

<sup>45</sup> *Id.* (“In some cases, the kidnapping of the minors was done with the complicity of security forces of more than one country, either in the clandestine transportation of the minor across borders, or in the irregular and unlawful protection afforded in other countries to those who took the children away in order to evade justice.”).

<sup>46</sup> *Id.* (“Cases known to the Commission have taken place mostly in Argentina, during the counter-insurgency campaign called the ‘dirty war,’ under the military dictatorship that ruled the country between 1976 and 1983. Some of the cases affected Uruguayan children during their parents’ exile in Argentina. In those cases, responsibility lies not only with the Argentine authorities of the time, but also with their Uruguayan counterparts, since there is

Unlike Germany's Night and Fog Decree, which overtly introduced the use of enforced disappearance in the occupied territories as an "[e]ffective and lasting intimidation" measure,<sup>47</sup> disappearances in the context of Latin American authoritarianism involved both public and covert aspects. The covert aspects made efforts to piece together the events and to establish State responsibility much more complicated and time-consuming.<sup>48</sup> In the prologue to *Nunca Mas (Never Again)*, the final report published by Argentina's Comisión Nacional sobre la Desaparición de Personas (CONADEP), Ernesto Sabato notes that despite the authoritarian military regime's power and control of information, "countless attempts at wringing information from those in authority" were unsuccessful.<sup>49</sup> Authorities claimed to have no record of the imprisoned or existence of the disappeared.<sup>50</sup> And yet, it was clear that the practice of repression through enforced disappearance was a political weapon in a war carried out "with our doctrine in our hands, with the written orders of each high command," as former general Santiago Omar Riveros admitted before CONADEP.<sup>51</sup>

The regional adjudication and international advocacy that developed in response to enforced disappearances by Latin American authoritarian regimes also led to the establishment of domestic fora for informational remedies and reconciliation. For example, the 1983 establishment of Argentina's CONADEP led to the examination of thousands of cases of enforced disappearances, producing reports of more than 50,000 pages.<sup>52</sup> The Commission on Truth for El Salvador (CVES), created in 1991, documented more than 5,500 complaints of enforced disappearance.<sup>53</sup> Guatemala's Commission for Historical Clarification (CEH), created in 1994, registered

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evidence of the participation of Uruguayan security agents in the pattern of forced disappearance of their countrymen in Argentina.").

<sup>47</sup> *Nuremberg Trial Proceedings Vol. 6, Forty-Third Day, Friday, 25 January 1945, Morning Session*, at 182, YALE L. SCH. LIBR.: THE AVALON PROJECT, <https://avalon.law.yale.edu/imt/01-25-46.asp> (last visited Jan. 25, 2022); Tatjana Milić, *International Convention for the Protection of all Persons from Enforced Disappearance*, 62 *MEDJUNARODNI PROBLEMI [INT'L PROBS.]* 37, 38 n.4 (2010), <http://www.doiserbia.nb.rs/img/doi/0025-8555/2010/0025-85551001037M.pdf>.

<sup>48</sup> Emilio Crenzel, *Between the Voice of the State and the Human Rights Movement: Never Again and the Memories of the Disappeared in Argentina*, 44 *J. SOC. HIST.* 1063, 1064-65 (2011).

<sup>49</sup> Ernesto Sabato, *Prologue to 3 TRANSITIONAL JUSTICE: LAWS, RULINGS, AND REPORTS* 5 (Neil J. Kritz ed., 1995).

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

<sup>51</sup> *Id.* at 4.

<sup>52</sup> SCOVAZZI & CITRONI, *supra* note 32, at 75.

<sup>53</sup> See U.S. INST. OF PEACE, *TRUTH COMMISSION: COMMISSION ON THE TRUTH FOR EL SALVADOR* (1992), <https://www.usip.org/publications/1992/07/truth-commission-el-salvador> (conclusions).

6,159 victims of enforced disappearance, and further estimated that more than 200,000 individuals had been killed or disappeared.<sup>54</sup> These national mechanisms allowed family members the opportunity to try to access information about loved ones who had been disappeared by the State.

The Inter-American Commission on Human Rights (IACCommHR) first began to condemn the state-sponsored practice of disappearance in OAS countries in 1974, with a report on Chile.<sup>55</sup> In a 1976 report, the Commission offered an overarching characterization of the phenomenon of enforced disappearances, in which it described the elements of such acts to include illegal deprivation of liberty by authorities and anguish by relatives and friends unable to avail themselves of any legal remedies.<sup>56</sup> That report notes that “the status of ‘missing’” was used as “a comfortable expedient to avoid application of the legal provisions established for the defense of personal freedom, physical security, dignity and human life itself.”<sup>57</sup> The Commission later noted in its 1977 Annual Report that, in various Latin American countries, “there are numerous cases wherein the government systematically denies the detention of individuals, despite the convincing evidence that the claimants provide to verify their allegations.”<sup>58</sup>

The legal definition of an enforced disappearance was later developed and applied by the IACCommHR in its 1980 report on Argentina, which provided “an analysis of this phenomenon whose moral, family, social and legal implications deeply affect all members of the Argentine society.”<sup>59</sup> Drawing upon numerous claims received by the Argentinian Supreme Court in the three years prior, the Commission highlighted two elements of disappearance: a) the apprehension of individuals “in their homes, jobs, or on the public thoroughfares” by “members of the public forces”; and b) where “[a]ll the recourses of habeas corpus, claims, criminal suits and administrative efforts have failed, as the investigative authorities in each case invariably reported no record on their detention.”<sup>60</sup> The Commission held such practice to be “a demonstration of the government’s inability to

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<sup>54</sup> Guatemala CEH Report, *supra* note 35, at 17.

<sup>55</sup> See generally Inter-Am. Comm’n H.R., Rep. on the Status of Human Rights in Chile: Findings of “on the Spot” Observations in the Republic of Chile, OEA/Ser.L/V/II.34, doc. 21 (Oct. 25, 1974).

<sup>56</sup> See Inter-Am. Comm’n H.R., Annual Rep. 1976, OEA/Ser.L/V/II.40, doc. 5 corr. 1, pt. II (June 7, 1977).

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

<sup>58</sup> Inter-Am. Comm’n H.R., Rep. on the Status of Human Rights in Argentina, OEA/Ser.L/V/II.49, doc. 19 corr. 1, Ch. 3.A ¶ 2 (April 11, 1980) (quoting Inter-Am. Comm’n H.R., Annual Rep. 1977, OEA/Ser.L/V/II.43, doc. 21 corr. 1, pt. II (Apr. 20, 1978) (original in Spanish)), <http://www.cidh.org/countryrep/argentina80eng/chap.3.htm>.

<sup>59</sup> *Id.* ¶ 1.

<sup>60</sup> *Id.* ¶¶ 1, 3.

maintain public order and state security by legally-authorized means and of its defiant attitude toward national and international agencies in the protection of human rights.”<sup>61</sup> The Commission also later applied this definition of disappearances in its analysis of the practice in Guatemala in 1985.<sup>62</sup>

The Inter-American Court of Human Rights (IACtHR) rendered its first decision on this issue in the case of *Velásquez-Rodríguez v. Honduras* in 1988.<sup>63</sup> In this case, the IACtHR held Honduras responsible for serious violations of human rights related to its enforced disappearance of a student union leader.<sup>64</sup> It stated that “forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention.”<sup>65</sup> The Court also developed a “reasonableness” test for shifting the burden of proof from the individual to the State, whereby “once a pattern of disappearances has been proven, the link between the individual case and the pattern could be proved through circumstantial evidence.”<sup>66</sup> The Court adopted a two-step approach, holding that the burden of proof will be established where: a) there is a pattern of a government practice of enforced disappearance; and b) the individual’s disappearance is linked to that pattern.<sup>67</sup> It further “asserted that the State’s defense cannot rest solely on the fact that the victims cannot provide direct proof of the violation, especially since the investigation (and ultimately punishment) depends on State and government action.”<sup>68</sup>

Throughout these contexts, the Inter-American Commission and Court’s use of the term “enforced disappearance” aimed to describe an organized yet covert practice of political repression that a) targeted individuals part of certain groups, such as indigenous peoples or groups engaged in certain activity, b) deprived them of liberty in circumstances that suspended their enjoyment of all rights, and c) prevented them from invoking any remedy by effectively stripping them of their personhood in the eyes of the law. The framing of enforced disappearance in the Court’s jurisprudence and Commission’s reports was formative in the development of the definition that was subsequently adopted by the UN General Assembly in the 1992 UN

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<sup>61</sup> *Id.* ¶ 2.

<sup>62</sup> See Grossman & Walker, *supra* note 31, ¶ 2; SCOVAZZI & CITRONI, *supra* note 32, at 94.

<sup>63</sup> *Velásquez-Rodríguez v. Honduras*, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

<sup>64</sup> *Id.* ¶ 194.

<sup>65</sup> *Id.* ¶ 155.

<sup>66</sup> Grossman & Walker, *supra* note 31, ¶ 15.

<sup>67</sup> See *Velásquez-Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4, *supra* note 63, ¶ 148; see also Grossman & Walker, *supra* note 31, ¶ 15.

<sup>68</sup> Grossman & Walker, *supra* note 31, ¶ 16.

Declaration on the Protection of all Persons from Enforced Disappearance, as well as codified in the 1994 Inter-American Convention on Forced Disappearance of Persons.<sup>69</sup> Since the 1990s, the European Court of Human Rights (ECtHR) has also contributed to the international jurisprudence on enforced disappearances with cases from *inter alia* Cyprus, Russia and Turkey, and has spurred deliberation of the adoption of a European regional instrument on enforced disappearance.<sup>70</sup>

These developments together crystallized a customary norm against enforced disappearance, with two important tenets for loved ones of the disappeared: an emphasis on the rights of families, and information as the basic remedy for their breach.<sup>71</sup> The prohibition of disappearance is not only fixated on state agents' direct conduct which disappears an individual 'enforcedly', through state action or omission; instead it also extends to the conditions and realities that indirectly produce disappearance within a state's jurisdiction, thus triggering the State's obligations of prevention, investigation, and, where these have a transnational dimension, also interstate cooperation. The human rights framework for enforced disappearances thus has a preventative rather than a retributive valence, different from the prosecution of enforced disappearances as crimes. All states are bound to these aspects of the norm, even without their explicit consent, unless they are recognized as persistent objectors. The absolute prohibition on these heinous acts has led to some legal authorities regarding the prohibition on enforced disappearance as a peremptory norm of international law, or *jus cogens*.<sup>72</sup>

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<sup>69</sup> 16. *International Convention for the Protection of All Persons from Enforced Disappearance*, U.N. TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-16.en.pdf> (Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, Honduras, Mexico, Panama, Paraguay, Peru, and Uruguay).

<sup>70</sup> See Hannah Russell, *Striving for Never Again: A European Convention for the Protection of All Persons from Enforced Disappearance and the Veiled Protection of Article 2 of the ECHR*, 9 INTER-AM. & EUR. HUM. RTS. J. 470, 473, 476 (2016).

<sup>71</sup> The 1992 Declaration on Enforced Disappearances, the implementation of which is monitored by the Working Group on Enforced or Involuntary Disappearances, was adopted by the UNGA and has "several provisions which indirectly have binding effects insofar as they clearly reproduce generally recognized customary rules." SCOVAZZI & CITRONI, *supra* note 32, at 249. The prohibition on enforced disappearances is also regarded as a customary norm in the ICRC study of customary international law. See HENCKAERTS & DOSWALD-BECK, *supra* note 29, at 340-44 (Rule 98).

<sup>72</sup> See Antônio Augusto Cançado Trindade, *Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights*, 81 NORDIC J. INT'L L. 507, 511 (2012); see generally Jeremy Sarkin, *Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law*, 81 NORDIC J. INT'L L. 537 (2012).

*B. The Right Not To Be Subjected to Enforced Disappearance*

In 1980, the UN Commission on Human Rights created the Working Group on Enforced or Involuntary Disappearances (WGEID).<sup>73</sup> The Working Group's first report, published in 1981, offered the first international characterization of the term "enforced disappearance", which it described as entailing the infringement and denial of a wide range of human rights of victims and their families.<sup>74</sup> The report summarized the complaints of enforced or involuntary disappearances that the Working Group had received from various parts of the world in its first year, concerning "persons who had been arrested, detained or abducted" by an organ of government or actors operating with State complicity, and in which the government concerned "neither accepted responsibility for the arrest, detention or abduction, nor accounted for these actions."<sup>75</sup> The Working Group described the two main causes and contexts of the complaints as a) "excesses on the part of law enforcement authorities . . . or similar organizations, often when such persons are subject to detention or imprisonment" and b) "unlawful actions or widespread violence."<sup>76</sup> The 1981 report was a precursor for the 1992 Declaration defining the responsibilities of governments to keep central records on detention (with a view to rapidly providing information to relatives of detainees), to identify competent authorities charged with arrest and detention, and to ensure that detention only takes place in locations which are known and destined for that purpose.<sup>77</sup>

Also in the 1980s, the international community began to develop a specialized international framework which would later become the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).<sup>78</sup> The ICPPED was intended to redress protection gaps resulting from the variation in remedies provided by different

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<sup>73</sup> U.N., Econ. & Soc. Council, Comm. on Hum. Rts., Question of Missing and Disappeared Persons, Res. 20 (XXXVI) (Feb. 29, 1980), [https://www.ohchr.org/sites/default/files/Documents/Issues/Disappearances/E-CN.4-RES-1980-20\\_XXXVI.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Disappearances/E-CN.4-RES-1980-20_XXXVI.pdf).

<sup>74</sup> See Maria Clara Galvis Patiño, *Rights Related to Enforced Disappearance*, in THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS 415, 417-18 (Andreas von Arnould et al. eds., 2020).

<sup>75</sup> U.N., Econ. & Soc. Council, Comm. on Hum. Rts., Rep. of the Working Group on Enforced or Involuntary Disappearances on Its Thirty-seventh Session: Question of Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Question of Missing and Disappeared Persons, ¶ 3, U.N. Doc. E/CN.4/1435 (Jan. 26, 1981). In addition to Latin American countries the report also analyzed information from Cyprus, Indonesia, Philippines, Ethiopia, South Africa and Namibia, *inter alia*.

<sup>76</sup> *Id.* (quoting G.A. Res. 33/173 (Dec. 20, 1978)).

<sup>77</sup> See *id.* ¶ 184.

<sup>78</sup> ICPPED, *supra* note 3.

international and regional bodies.<sup>79</sup> Prior to its adoption, international and regional human rights mechanisms had regarded enforced disappearance as “a conjunction of violations of different rights contained in other conventions and statutes,” such as the right to life, freedom from arbitrary detention, and freedom from torture.<sup>80</sup> The ICPPED was the first to recognize enforced disappearance as a unique, standalone serious violation of international law.<sup>81</sup> It was adopted by the UN General Assembly in December 2006 and entered into force in 2010,<sup>82</sup> following decades of advocacy by lawyers’ collectives representing victims and non-governmental organizations.<sup>83</sup> As of June 2022, there were 68 State Parties to the ICPPED.<sup>84</sup>

The Convention was first to maintain that every act of enforced disappearance is an act of inhuman treatment, given the complex and composite nature of this “paradigmatic violation of the right to be recognized as a person before the law.”<sup>85</sup> It holds that the prohibition on enforced disappearance is absolute and non-derogable,<sup>86</sup> and defines enforced disappearance in its Article 2 as follows:

[T]he arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>87</sup>

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<sup>79</sup> See Manfred Nowak (Independent Expert Charged with Examining International and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances), *Rep. on Civil and Political Rights, Including Questions of Disappearances and Summary Executions*, ¶ 49, U.N. Doc. E/CN.4/2002/71 (Jan. 8, 2002), <https://digitallibrary.un.org/record/459055>.

<sup>80</sup> Grossman & Walker, *supra* note 31, ¶ 3.

<sup>81</sup> See ICPPED, *supra* note 3, art. 5.

<sup>82</sup> *International Convention for the Protection of All Persons from Enforced Disappearance*, U.N. TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-16&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-16&chapter=4&clang=_en) (last visited Sept. 2021).

<sup>83</sup> See generally Federico Andreu-Guzmán, *Progress Towards a UN Treaty against Enforced Disappearances*, 1 YEARBOOK OF THE INTERNATIONAL COMMISSION OF JURISTS 325, 329-340 (2004).

<sup>84</sup> *International Convention for the Protection of All Persons from Enforced Disappearance*, *supra* note 82.

<sup>85</sup> Hum. Rts. Council, Rep. of the Working Group on Enforced or Involuntary Disappearances on Its Nineteenth Session, ¶ 42, U.N. Doc. A/HRC/19/58/Rev.1 (2012).

<sup>86</sup> See ICPPED, *supra* note 3, art. 1(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.”).

<sup>87</sup> *Id.* art. 2.

It is also the first human rights instrument to define the victims of such acts as including relatives of the disappeared, and to afford a broad category of concerned persons the right to truth and information through a range of remedies including accountability and reconciliation processes, which we discuss in Section III.A.

As very few states outside Latin America have explicitly defined enforced disappearance as a serious crime in their domestic law,<sup>88</sup> the Convention mandates State Parties to explicitly criminalize such acts (Articles 3, 4 and 7), without any statute of limitation (Article 8). It also includes provisions on the responsibility of superiors (Article 6), transnational criminal cooperation (Articles 13 and 14), and the aggravated offense of the disappearance of children (Article 25). An extensive set of provisions was also devised to guarantee that “no one shall be held in secret detention” (Article 17).<sup>89</sup> The Convention also requires States to investigate all reports of enforced disappearances (Articles 3 and 12),<sup>90</sup> and to punish and prevent the recurrence of such acts (Article 23 and 24).<sup>91</sup> To this end, they must assist other states in the collection of information and the identification of perpetrators.<sup>92</sup> Many of these provisions are similar to those of the Convention Against Torture and are aimed at deterring such acts and ensuring that they cannot be endorsed by the judiciary, irrespective of whether they were ordered by state agents (Article 6(2)).

Based on the operational definitions used by the Working Group and others, we propose that the binding customary international law definition of enforced disappearances under international human rights law (IHRL) is constituted by four cumulative elements:

- i) Deprivation of liberty against the will of the person through their **arrest, detention, and/or abduction;**
- ii) Involvement of government officials, at least by or with the authorization, support or acquiescence of a **State or political organization;**
- iii) **Refusal to acknowledge** the deprivation of liberty **or concealment** of the fate or whereabouts of the disappeared person; and
- iv) The consequence of **removing the person from the protection of**

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<sup>88</sup> Hum. Rts. Council, Rep. of the Working Group on Enforced or Involuntary Disappearances on Its Fourth Session: Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council,” ¶ 48, U.N. Doc. A/HRC/4/41 (2007).

<sup>89</sup> ICPPED, *supra* note 3.

<sup>90</sup> *Id.* arts. 3, 12.

<sup>91</sup> *Id.* arts. 23, 24.

<sup>92</sup> *Id.* arts. 14, 15.

**the law** (compared with the requirement of *intention to remove* under international criminal law).<sup>93</sup>

Using versions of this definition, the CED and the WGEID have condemned a broad range of acts, practices and policies which have had the effect of subjecting persons to enforced disappearance. These include cases of transnational disappearances, in which more than one state is involved in bringing about a disappearance;<sup>94</sup> rights-infringing policies of deprivation of liberty, defined in the broadest sense to include public and private institutions and various forms of being under the control and supervision of the State;<sup>95</sup> permanent and temporary concealment of the person's whereabouts or fate or the denial of the said deprivation, including through incommunicado, secret, and unregistered detention;<sup>96</sup> and the *de facto* suspension of legal rights during apprehension and detention, irrespective of whether these are intended or systemic acts.<sup>97</sup> In its 2017 report, the WGEID held that detention includes the "execution of deportation procedures" in a manner that routinely deprives individuals of due process protections to which they are entitled in the course of regular detention and deportation procedures.<sup>98</sup>

Although policies of enforced disappearance necessarily implicate the political organs of the State, and are often adopted by regimes which perceive themselves to be under siege by an internal threat which must be eradicated, political factors are not a legal element of the definition of an enforced disappearance. Such acts can also result from an unofficial policy of clandestine detention and expulsion, including 'pushback' practices and other extreme forms of border violence which states enact, though these may indeed be conducted with political motivations in response to perceived 'threats' by migrants.<sup>99</sup> The only mention of the political character of

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<sup>93</sup> *Id.* arts. 2-3

<sup>94</sup> See generally 1988 INTER-AM. Y.B. ON HUM. RTS., *supra* note 44.

<sup>95</sup> See, e.g., SCOVAZZI & CITRONI, *supra* note 32, at 25-26 (enforced disappearances relating to the "War on Terror" and specifically the "Not-in-My-Backyard" doctrine).

<sup>96</sup> See, e.g., EUR. PARL. ASS. DEB., *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States: Draft report – Part II (Explanatory memorandum)*, ¶ 38, 57th Sess., Doc. No. 10957 (2006), [https://assembly.coe.int/CommitteeDocs/2006/20060606\\_Ejdoc162006PartII-FINAL.pdf](https://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf) (detention in CIA black-sites).

<sup>97</sup> See, e.g., Belisario Betancur, Chairman, U.N. Comm. on the Truth, *From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador*, ¶ 4 (1993), <https://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf> (on the role of administrative courts which cannot impose penalties).

<sup>98</sup> Hum. Rts. Council, Rep. of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration on Its Thirty-sixth Session, ¶ 23, U.N. Doc. A/HRC/36/39/Add.2 (2017) [hereinafter WGEID Rep. in the Context of Migration], <https://undocs.org/en/A/HRC/36/39/Add.2>.

<sup>99</sup> See, e.g., AMNESTY INT'L, GREECE: VIOLENCE, LIES AND PUSHBACKS,

enforced disappearance in the ICPPED is related to extradition, for which “the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.”<sup>100</sup> In fact, IHRL has been criticized for depoliticizing individual subjects of disappearance to emphasize their innocence in the face of indiscriminate state violence, and thus appearing to undermine the justness of their political struggle.<sup>101</sup>

### *C. Enforced Disappearance as Crime*

In parallel to the development of protective and preventative measures against enforced disappearances in international human rights law (IHRL), international criminal law (ICL) norms and institutions also undertook to prohibit and pursue the crime of enforced disappearance. The purpose of our contribution is not to consider whether certain practices of border violence have risen to the level of a crime against humanity in any specific context. Yet, examining this parallel trajectory of doctrinal development in IHRL and ICL is helpful to understand the different and overlapping ways this offense is understood in different areas of international law. Whereas ICL provides for the prosecution of the most direct forms of enforced disappearance as international crimes, requiring both large-scale effects-based evidence and clear premeditated intentionality, IHRL functions as a preventive framework and prohibits a broader category of acts associated with disappearances.

While adopting a narrower conceptualization of the offense of enforced disappearance than IHRL, ICL punishes acts by state and non-state actors that “intend[] to remove the victims from the protection of the law for a prolonged period of time.”<sup>102</sup> Further, the perpetration of enforced disappearances on an organized and large scale, in contexts of armed conflict or internal violence, has been codified as a war crime in the statutes and constitutive documents of a number of international and hybrid criminal courts and tribunals.<sup>103</sup> The 1998 Rome Statute of the International Criminal

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EUR 25/4307/2021 (2021), <https://www.amnesty.org/en/documents/eur25/4307/2021/en/>.

<sup>100</sup> ICPPED, *supra* note 3, art. 13(1).

<sup>101</sup> Crenzel, *supra* note 48, at 1066.

<sup>102</sup> Nowak, *supra* note 79, at ¶ 74 (citing Rome Statute, *supra* note 3, art. 7(2)).

<sup>103</sup> See, e.g., Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, U.N. Doc. S/25704 annex (May 3, 1993) (“ICTY Statute”), *adopted in* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, art. 23, S.C. Res. 955, U.N. Doc. S/RES/955 annex (Nov. 8, 1994) (“ICTR Statute”); UNTAET, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses, § 10, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000); Statute of the Special Court for Sierra Leone art. 19, Jan. 16, 2002, 2178 U.N.T.S. 138; Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, Law No.

Court includes enforced disappearance as a crime against humanity in its Article 7(1)(i), and offers a definition in Article 7(2)(i):

[T]he arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>104</sup>

For an act to amount to the crime of enforced disappearance under the Rome Statute, the perpetrator is thus required to have had the *double* intent of “remov[ing] a person from the protection of the law” and of having the intention to “do[] so for a prolonged period of time.”<sup>105</sup>

The use of the practice of enforced disappearance may amount to a crime against humanity, including outside the context of an armed conflict, when such acts entail a systematic or widespread ‘attack’ on a civilian population.<sup>106</sup> The intent to erode the recognition and protection of certain groups of persons by the law as an ‘attack’ on a civilian population is characteristic of the authoritarian doctrines of such practices, often considered part of the highest stage of political repression. This can be seen, for example, in Argentina’s Doctrine of National Security, which “developed a repressive apparatus to reinforce its concept of ‘permanent warfare’” and operated with absolute impunity, such that it could not be challenged or modified even by the highest echelons of government.<sup>107</sup> Such effects represent an intentional systemic abuse of power through the suspension and overrun of normal criminal law procedure in relation to a certain group of individuals along racial and political lines. Under such exceptional measures, authorities exercise “total power over the prisoner” through outright denial of legal protections to personal freedom, physical integrity and human dignity.<sup>108</sup>

The ICL definition targets the gravest and most organized manifestations

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NS/RKM/1004/006, art. 24 (Oct. 27, 2004) (Cambodia), unofficial translation at <http://www.derechos.org/human-rights/seasia/doc/krlaw.html>.

<sup>104</sup> Rome Statute, *supra* note 3, art. 7(2)(i).

<sup>105</sup> AMNESTY INT’L, NO IMPUNITY FOR ENFORCED DISAPPEARANCES: CHECKLIST FOR EFFECTIVE IMPLEMENTATION OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE 5 (2011), <https://www.amnesty.org/en/documents/IOR51/006/2011/en/>.

<sup>106</sup> Rome Statute, *supra* note 3, arts. 5, 7.

<sup>107</sup> CONADEP Report, *supra* note 33, at 442 (citation omitted).

<sup>108</sup> Matthew Lippman, *Disappearances: Towards a Declaration on the Prevention and Punishment of the Crime of Enforced or Involuntary Disappearances*, 4 CONN. J. INT’L L 121, 122 (1988) (quoting TORTURE IN BRAZIL: A REPORT BY THE ARCHDIOCESE OF SAO PAULO 204 (J. Wright translation 1986)).

of state-sponsored violence of enforced disappearance, often associated with other crimes against humanity and war crimes, including extra-judicial executions, persecution and genocide. The evidentiary and substantive thresholds for establishing the crime of an enforced disappearance under ICL are therefore significantly higher and more cumbersome than those required for a determination of state responsibility for a breach of IHRL.<sup>109</sup> Since crimes against humanity are necessarily committed at scale, individual cases or inchoately implemented unofficial policies of enforced disappearance would not be sufficient to meet the definition. This is of course logical since ICL is intended to function as an avenue of last resort for the enforcement of the minimum standards of IHRL in cases of its most serious violations. The rush to adjudicate insufficiently grave, unintended or incomplete acts of enforced disappearance thus also risks offering repressive regimes an exculpatory verdict.

## II. ENFORCED DISAPPEARANCES IN THE CONTEXT OF BORDER VIOLENCE

The widespread use of enforced disappearance in the context of Latin American authoritarianism, as well as the domestic and international responses they triggered, framed these practices as iconic historical precedents which happened in a specific region and which should never happen again anywhere. Regimes the world over have, however, continued to use enforced disappearances either to pursue political aims, as in the case of Assad's regime in Syria,<sup>110</sup> or in relation to highly violative law enforcement operations, such as in Mexico's war on drugs.<sup>111</sup> One such contemporary context which remains underexplored is that of border violence.

Thousands of persons on the move go missing each year, either in transit between states or upon arrival in their intended host country.<sup>112</sup> In addition to the ways in which states indirectly endanger the lives of unauthorized

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<sup>109</sup> Pat Rubio Bertran, *Europe's Border Crimes: Bridging the Impunity Gap for the Enforced Disappearance of Migrants in the Mediterranean Graveyard*, UNIV. OF OXFORD FAC. OF L.: BORDER CRIMINOLOGIES BLOG (Apr. 27, 2022), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2022/04/europes-border>.

<sup>110</sup> See generally AMNESTY INT'L, BETWEEN PRISON AND THE GRAVE: ENFORCED DISAPPEARANCES IN SYRIA (2015), <https://www.amnesty.org/en/documents/mde24/2579/2015/en/>; see also SYRIA'S DISAPPEARED: THE CASE AGAINST ASSAD (Afshar Films 2019).

<sup>111</sup> Benito Juárez, *Vanished: The Disappeared of Mexico's Drug War*, HUM. RTS. WATCH (Jan. 8, 2014), <https://www.hrw.org/news/2014/01/08/vanished-disappeared-mexicos-drug-war>.

<sup>112</sup> GRAŻYNA BARANOWSKA, GERMAN INST. FOR HUM. RTS., DISAPPEARED MIGRANTS AND REFUGEES 10 (2020), [https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse\\_Studie/Analysis\\_Disappeared\\_Migrants\\_and\\_Refugees.pdf](https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analysis_Disappeared_Migrants_and_Refugees.pdf).

migrants by forcing them to take precarious routes, states also increasingly detain and expel migrants in different circumstances which may amount to the practice of enforced disappearance.<sup>113</sup> With the aim to reduce entries into their territory, some states have systematically violated human rights law to deter and expel foreigners. Such practices include apprehending and detaining individuals without registration or access to asylum procedures, before summarily and clandestinely expelling them from their territory, such as by forcing individuals onto unnavigable watercrafts in the Aegean Sea and propelling them to drift out of their jurisdiction. These and other acts of border violence render people missing not only for the duration of their physical detention, whether it lasts hours or weeks, but also for much longer and even indefinitely, through their summary expulsion out of the detaining state's jurisdiction.<sup>114</sup> This has the result of removing the person from the protection of the law, thus oftentimes fulfilling that element of the legal definition of enforced disappearance.

As Grażyna Baranowska writes, “Deprivation of liberty of migrants and refugees, if followed by a refusal to acknowledge it, or by concealment of the fate or whereabouts of the persons, is an enforced disappearance, irrespective of its duration and where it takes place.”<sup>115</sup> Whereas duration may bear on the criminal responsibility of perpetrators under ICL, it is not decisive to the determination of state responsibility for enforced disappearance under IHRL. What matters is the very fact that the State, which should have taken record of the arrest and made remedies available, has actively chosen to effectuate an unofficial policy of incommunicado detention of migrants, deny them basic due process guarantees including in the course of their expulsion, and then conceal and deny such information to relatives, legal representatives and ultimately also the disappeared. We thus share Baranowska's view and seek to develop it further by reviewing the various forms of enforced disappearance that have occurred in the context of several states' border operations.

#### A. Violence at the U.S.-Mexico Border

##### 1. Family Separation

The Trump Administration notoriously began to forcibly separate children and parents at the U.S.-Mexico border in 2017, without any proper procedure in place for guardians to track the children or be reunified.<sup>116</sup> This practice

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<sup>113</sup> See *id.* at 14-15.

<sup>114</sup> *Id.* at 21-22.

<sup>115</sup> *Id.* at 16.

<sup>116</sup> See generally *Family Separation under the Trump Administration: A Timeline*, SOUTHERN POVERTY L. CTR., <https://www.splcenter.org/news/2020/06/17/family-separation->

was formalized into the Zero Tolerance Policy in May 2018,<sup>117</sup> under which all undocumented migrants and asylum seekers who entered the U.S. were detained, and all children under age 18 were separated from their parents and placed into federal custody.<sup>118</sup> These minors, including hundreds under age five, were detained in shelters throughout the country or transferred to foster families with no adequate mechanism in place for their tracking or family reunification.<sup>119</sup> In October 2018, Amnesty International reported that Customs and Border Patrol (CBP) admitted to separating more than 6,000 family units between 19 April and 15 August 2018.<sup>120</sup> However, the exact number of family separations is still not known, even to the Department of Homeland Security (DHS), as the records of an unknown number of children were lost by the system.<sup>121</sup>

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under-trump-administration-timeline (last updated Mar. 23, 2022) (“Under the El Paso program, begun in mid-2017, adults who crossed the border without permission – a misdemeanor for a first-time offender – were detained and criminally charged. No exceptions were made for parents arriving with young children. The children were taken from them, and parents were unable to track or reunite with their children because the government failed to create a system to facilitate reunification. By late 2017, the government was separating families along the length of the U.S.-Mexico border, including families arriving through official ports of entry.”); Lisa Riordan Seville & Hannah Rappleye, *Trump Admin Ran Pilot Program for Separating Migrant Families in 2017*, NBC NEWS (June 29, 2018, 4:30 AM), <https://www.nbcnews.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616>.

<sup>117</sup> Press Release, U.S. Dep’t of Just., Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.

<sup>118</sup> See *Family Separation under the Trump Administration: A Timeline*, *supra* note 116 (establishing a comprehensive timeline of the program).

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

<sup>120</sup> *Catastrophic Immigration Policies Resulted in More Family Separations than Previously Disclosed*, AMNESTY INT’L (Oct. 11, 2018), <https://www.amnestyusa.org/reports/usa-catastrophic-immigration-policies-resulted-in-more-family-separations-than-previously-disclosed/> (revealing the severe undercounting presented in prior reports). For example, the Department of Homeland Security (DHS) reported that between April 19 and May 31, 2018, it separated 1,995 children from 1,940 adults at the border. Tal Kpoano, *DHS: 2,000 Children Separated from Parents at Border*, CNN: POL. (June 16, 2018, 2:44 AM), <https://www.cnn.com/2018/06/15/politics/dhs-family-separation-numbers/index.html>. CBP later reported that between May 5 and June 9, 2018, 2,342 minors were separated from 2,206 adults. Graham Kates, *Migrant Children at the Border – the Facts*, CBS NEWS (June 20, 2018, 10:32 AM), <https://www.cbsnews.com/news/migrant-children-at-the-border-by-the-numbers/>.

<sup>121</sup> See, e.g., OFF. OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., *OIG-20-06, DHS LACKED TECHNOLOGY NEEDED TO SUCCESSFULLY ACCOUNT FOR SEPARATED MIGRANT FAMILIES* 7 (2019), <https://www.oig.dhs.gov/sites/default/files/assets/2019-11/OIG-20-06-Nov19.pdf>.

The Zero Tolerance Policy was stopped by a preliminary injunction issued by a federal judge on 26 June 2018, which called for the immediate reunification of separated families.<sup>122</sup> Still, by 13 July 2018, the government reported that 2,551 children between ages five and 17 remained separated from their guardians, and that fewer than 60 of 103 children under age five had been reunified with theirs.<sup>123</sup> The Justice Department admitted that not all guardians could be located<sup>124</sup> – a challenge which would remain for years to come. Meanwhile, family separations continued at the border, with more than a thousand additional families separated during 2018 and 2019.<sup>125</sup> In February 2021, *The New York Times* reported that “[m]ore than 1,000 migrant children still in the United States likely remain separated from their parents, and another 500 or more were taken from their parents who have yet to be located.”<sup>126</sup> Noting that this systematic practice began before and extended beyond the formal institution of the Zero Tolerance Policy, we use the broader term “Family Separation Policy” to recognize separations committed before, during and after the Zero Tolerance Policy was in place.

From a legal standpoint, Alonso Gurmendi argues, the Family Separation Policy “has often involved widespread Enforced Disappearance of

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<sup>122</sup> Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1149 (S.D. Cal. 2018). The policy was not officially rescinded until January 26, 2021 under the Biden Administration. Memorandum from the Acting Attorney General to All Federal Prosecutors, Rescinding the Zero-Tolerance Policy for Offenses Under 8 U.S.C. § 1325(a) (Jan. 26, 2021), <https://www.justice.gov/ag/page/file/1360706/download>.

<sup>123</sup> Phil McCausland, *Government Says Around 2,551 Migrant Children Still Need Reunification with Parents*, NBC NEWS (July 13, 2018, 10:10 PM), <https://www.nbcnews.com/news/us-news/government-says-around-2-551-migrant-children-still-need-reunification-n891366>.

<sup>124</sup> Julia Ainsley, *Judge Extends Deadline as U.S. Struggles to Reunify Migrant Families*, NBC NEWS (July 9, 2018, 1:58 PM), <https://www.nbcnews.com/storyline/immigration-border-crisis/judge-extends-deadline-u-s-struggles-reunify-migrant-families-n889876>; see also Holly Yan, *The US Must Reunite Separated Families by Today – but Over 900 Probably Won't be Reunited*, CNN (July 26, 2018, 1:20 PM), <https://www.cnn.com/2018/07/25/politics/separated-families-by-the-numbers/index.html>.

<sup>125</sup> John Washington, *The Government Has Taken At Least 1,100 Children from Their Parents Since Family Separations Officially Ended*, INTERCEPT (Dec. 9, 2019, 10:56 AM), <https://theintercept.com/2019/12/09/family-separation-policy-lawsuit/>; Ginger Thompson, *Families Are Still Being Separated at the Border, Months After “Zero Tolerance” Was Ended*, PROPUBLICA (Nov. 27, 2018, 4:45 PM), <https://www.propublica.org/article/border-patrol-families-still-being-separated-at-border-after-zero-tolerance-immigration-policy-reversed>.

<sup>126</sup> Miriam Jorden, *Separated Families: a Legacy Biden Has Inherited from Trump*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/02/01/us/immigration-family-separations-biden.html>; see also Kristina Davis, *U.S. Officials Say They are Highly Confident to Have Reached Tally on Separated Children: 4,368*, L.A. TIMES (Jan. 18, 2020, 5:38 AM), <https://www.latimes.com/world-nation/story/2020-01-18/u-s-officials-say-they-are-highly-confident-to-have-reached-tally-on-separated-children-4-368>.

children.”<sup>127</sup> The policy is therefore similar, he says, to the practices reviewed by the IACtHR in the case of *Gelman v. Uruguay*, wherein the Court found that the detention and transfer of a migrant woman, without being given any information as to her separated daughter’s fate, constituted a type of enforced disappearance under the Inter-American Convention.<sup>128</sup> The Court held that “the separation of a child from her migrant mother implies, necessarily, a threat to the exercise of the child’s liberty” and amounted to “interference of an unlawful or arbitrary nature” in the family life of the child as “her survival and development was placed at risk.”<sup>129</sup> The *Gelman* case is thus comparable to those of the victims of the Family Separation Policy, as Gurmendi argues: “[t]hese children are, in effect, *desaparecidos*, as their families have no way of knowing their whereabouts, because of US negligence.”<sup>130</sup> Gurmendi’s assertion that the Family Separation Policy has disappeared children holds in an analysis of the four legal elements required for establishing enforced disappearance, as outlined in Section I.C.

In order for an act to satisfy the first element of enforced disappearance, there must be deprivation of liberty against the will of the person through their arrest, detention, or abduction. To establish the second element, this deprivation of liberty must involve government officials, at least by or with the authorization, support or acquiescence of a State or political organization. In detaining and separating migrant families, CBP officers acted in their official capacities as members of a federal agency, in furtherance of a policy authorized by the DHS in its official capacity as a federal executive department. These deprivations of liberty, which included the confinement of persons in both public and private institutions, such as shelters and foster care, all involved the placement of persons under the custody of the State without their consent.<sup>131</sup> The actions of DHS, and of CBP as an agency within DHS, under the Family Separation Policy thereby certainly satisfy the first

<sup>127</sup> Alonso Gurmendi, *On Calling Things What They Are: Family Separation and Enforced Disappearance of Children*, OPINIO JURIS (June 24, 2019), <https://opiniojuris.org/2019/06/24/on-calling-things-what-they-are-family-separation-and-enforced-disappearance-of-children/>.

<sup>128</sup> *Id.* (citing *Gelman v. Uruguay*, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 132 (Feb. 24, 2011)).

<sup>129</sup> *Gelman*, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶¶ 129-130; see also Sascha Meisel & Zach Tripodes, *Gelman v. Uruguay*, 37 LOY. L.A. INT’L & COMP. L. REV. 1861, 1875 (2015), [https://iachr.ils.edu/sites/default/files/iachr/Cases/Gelman\\_v\\_Uruguay/tripodes\\_gelman\\_v\\_u\\_ruguay.pdf](https://iachr.ils.edu/sites/default/files/iachr/Cases/Gelman_v_Uruguay/tripodes_gelman_v_u_ruguay.pdf).

<sup>130</sup> Gurmendi, *supra* note 127.

<sup>131</sup> See Inter-Am. Comm’n H.R., Res. No. 1/08, Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, at 3 (Mar. 13, 2008), <https://www.oas.org/en/iachr/mandate/Basics/principles-best-practices-protection-persons-deprived-liberty-americas.pdf>.

two elements of the enforced disappearance test.

To establish the third element of enforced disappearance, the deprivation of liberty must be followed by a refusal to acknowledge it or by the concealment of the fate or whereabouts of the disappeared person. While families were separated, CBP and DHS failed to provide them with information on the fate and whereabouts of their loved ones for weeks or months – and even when the government attempted to reunify families, it found itself unable to locate hundreds of the families it had separated.<sup>132</sup> An audit conducted in November 2019 by the DHS Office of the Inspector General concluded that “DHS did not have the information technology (IT) system functionality needed to track separated migrant families during the execution of the Zero Tolerance Policy,” and that CBP officials had been “aware of these IT deficiencies since at least November 2017 when U.S. Border Patrol conducted an initiative that mirrored the Zero Tolerance Policy.”<sup>133</sup> Even families who were eventually located and reunified had been unable to access information about their loved ones for a prolonged period of time while they were detained.

The UN Working Group on Enforced or Involuntary Disappearances (WGEID) has stated that disappearances can be caused by “a lack of transparency”<sup>134</sup> or, as Gurmendi phrases it, an “inability to account for a detained person, who, in fact, simply ‘disappears’ from public record.”<sup>135</sup> Such opacity and the resultant negligent incapacity are characteristic of the U.S. immigration detention system. Despite the international standard that “migrants deprived of liberty must be held in an officially recognized place of detention and their detention must be formally registered, including with accurate information on the reasons for their detention and the place or places of detention,”<sup>136</sup> CBP officers routinely conceal information about the migrants whom they apprehend and detain and the locations of their detention, including from their loved ones. The government does not publicly

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<sup>132</sup> See, e.g., Daniel Gonzalez, *628 Parents of Separated Children are Still Missing. Here's Why Immigrant Advocates Can't Find Them*, USA TODAY (Dec. 11, 2020), <https://www.usatoday.com/story/news/nation/2020/12/11/immigrant-advocates-cant-locate-parents-separated-border-children/3896940001/>.

<sup>133</sup> OFF. OF INSPECTOR GEN., *supra* note 121, at i (“These conditions persisted because CBP did not address its known IT deficiencies adequately before implementing Zero Tolerance in May 2018. DHS also did not provide adequate guidance to personnel responsible for executing the Zero Tolerance Policy. Because of these IT deficiencies, we could not confirm the total number of families DHS separated during the Zero Tolerance period. . . . Without a reliable account of all family relationships, we could not validate the total number of separations, or reunifications.”).

<sup>134</sup> WGEID Rep. in the Context of Migration, *supra* note 98, ¶ 23.

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

<sup>136</sup> *Id.* ¶ 62 (citation omitted).

list all of its migrant detention facilities,<sup>137</sup> detainees are routinely forbidden from making phone calls,<sup>138</sup> and even where a relative is able to contact a loved one's detention center, it may be impossible for them to access any information – even about whether that individual is in U.S. custody.<sup>139</sup> These forms of denial of information can make it virtually impossible for a relative to locate a loved one who has gone missing en route to the United States; to know if that person is dead or alive, safe or in distress, detained or deported. As illustrated by the consequences of the Family Separation Policy, these questions may remain unanswered indefinitely. DHS' failure to keep track of the separated families detained under the Zero Tolerance Policy meant that information on the guardians' and children's whereabouts was withheld from each other and from outside relatives – in some cases, to the point that they were lost in the system beyond CBP's ability to relocate them, even to this day. The knowledge gaps created by the Zero Tolerance Policy have been exacerbated by the Department's systematic concealment of information about all migrants in its custody. Such a severe lack of transparency arguably fulfills the third element of the definition of an enforced disappearance.

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<sup>137</sup> NO MORE DEATHS & LA COALICIÓN DE DERECHOS HUMANOS, THE DISAPPEARED REPORT PART III: LEFT TO DIE: BORDER PATROL, SEARCH AND RESCUE, AND THE CRISIS OF DISAPPEARANCE 50 [hereinafter THE DISAPPEARED REPORT PART III], [http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/left\\_to\\_die\\_-\\_english.pdf](http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/left_to_die_-_english.pdf) (last visited Mar. 5, 2022) (“The United States has the largest immigration detention infrastructure in the world, only a fraction of which are publicly listed facilities. In 2016, ICE publicly identified only 78 detention sites. However, a May 2016 report by the nonpartisan research group TRAC, tallied a total of 637 facilities used during 2015, and a Freedom of Information Act request from 2013 revealed that there were 961 sites owned or contracted by the government for federal immigration detention.” (citation omitted)).

<sup>138</sup> *Id.* (citing Ryan Keisel & Carl Takei, *Forget About Calling A Lawyer Or Anyone At All If You're In An Immigration Detention Facility*, HUFFPOST (June 15, 2017, 3:48 PM), [https://www.huffpost.com/entry/forget-about-calling-a-lawyer-immigration-detention\\_b\\_10462438](https://www.huffpost.com/entry/forget-about-calling-a-lawyer-immigration-detention_b_10462438)).

<sup>139</sup> *Id.* (“Even when calling publicly listed numbers for ICE offices, US Marshals offices, and individual detention centers, it is remarkably difficult to get detention center staff on the phone. Case notes from the Derechos Humanos Crisis Line are replete with failures of families and advocates to reach officials who would confirm whether or not a person was in custody. When families and advocates do connect with detention center staff while searching for a missing loved one, they are often faced with an insurmountable barrier: detention center employees do not generally disclose who is being incarcerated at a given facility without inquirers providing the ‘A-number’ (Alien Registration Number) for the person that they are looking for. However, families would only know the A-number of their loved one if they had received a phone call from them. In this cruel, Catch-22 set-up, detention center officials refuse to assist with locating missing people unless their loved ones have already heard from them by phone. The frustration and near-impossibility of navigating the detention system prompted more than one family to ask if the Crisis Line recommended they try to hire a private investigator to find their missing person in ICE custody.”).

A larger but not insurmountable challenge in framing these family separations as enforced disappearance is establishing that the affected families were removed from the protection of the law, through lack of access to legal counsel and remedies, and often through the deportation of parents. Hundreds of guardians were separated from their children at the border and deported from the United States while their children remained in the U.S. custody.<sup>140</sup> Both the guardians and children were in most cases *de facto* denied access to legal representation,<sup>141</sup> and as such denied any remedies for their separation and deportation. In doing so, the U.S. authorities also *de facto* deprived the guardians of access to pathways that could enable them to remain in the United States, thus effectively placing them outside the protection of the law, in fulfillment of the fourth element of the definition of an enforced disappearance. In sum, many families separated by the Zero Tolerance Policy and the broader Family Separation Policy have likely been subject to enforced disappearance as a matter of customary international law.

## 2. “Chase and Scatter” in the Desert Borderlands

While the prior section discussed the separation and disappearance of migrants who arrived and were separated at the U.S.-Mexico border, this section considers the many others who have gone missing in the U.S.-Mexico borderlands. A set of U.S. policies implemented since the 1990s has led to thousands of people disappearing on the move through the Sonoran Desert.<sup>142</sup> Which, if any, may have involved instances of enforced disappearance?

While the United States is not a party to the ICPPED, the analysis of its

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<sup>140</sup> Gonzalez, *supra* note 132.

<sup>141</sup> According to Wendy Young of Kids in Need of Defense (KIND), about 40 percent of children at the border had legal representation before the Zero Tolerance Policy; by June 2018, only about 30 percent did, due to the additional demand for counsel. See Ella Nilsen, *There aren't Enough Immigration Lawyers to Handle the Family Separation Crisis*, VOX (June 21, 2018, 7:00 AM), <https://www.vox.com/2018/6/21/17479030/immigration-courts-lawyers-trump-family-separation-policy>. (“‘There’s always been a shortage of attorneys to provide legal representation for children, but it’s likely exacerbated [by] the number of children taken from their parents and put in government custody,’ said Maria Woltjen, the executive director of the Young Center for Immigrant Children’s Rights at the University of Chicago. Before the Trump administration’s policy went into effect, one attorney could represent a whole family. But now that previously accompanied children are being redesignated as unaccompanied, the parents and kids need separate attorneys. That has had a ripple effect. Before family separation was in effect, about 60 percent of kids at the border were unrepresented by legal counsel, said Wendy Young, president of the nonprofit Kids in Need of Defense, which staffs and trains immigration lawyers to represent these kids. Now it’s closer to 70 percent.”).

<sup>142</sup> See generally James Verini, *How U.S. Policy Turned the Sonoran Desert into a Graveyard for Migrants*, THE N.Y. TIMES MAG. (Nov. 22, 2020), <https://www.nytimes.com/2020/08/18/magazine/border-crossing.html>.

practices is not merely theoretical. As reflected from the discussion above about its emergence, the prohibition on enforced disappearances is binding under customary international law.<sup>143</sup> Though not as straightforward as U.S. domestic law, customary international law is enforceable in both federal and state courts.<sup>144</sup> Both the executive and the legislative branches are also as responsible as the judiciary in ensuring that the U.S. lives up to its customary international law obligations.<sup>145</sup>

The Prevention Through Deterrence program, introduced in 1994, heavily militarized the United States border with Mexico and the American borderlands (a 100-mile strip of land between the border and checkpoints).<sup>146</sup> Facing more armed CBP officers, more highway checkpoints, more surveillance technology, and a longer border wall, individuals attempting to reach the United States by foot were pushed into more remote, lengthy and precarious routes through the Sonoran Desert.<sup>147</sup> CBP also adopted the routine and systematic practice of “chase and scatter” methods, whereby officers chase and disperse groups of migrants and further push them into life-threatening terrains and conditions.<sup>148</sup> In a series of reports co-authored

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<sup>143</sup> See, e.g., *Last seen . . . : Continued “Disappearances” in Chechnya*, 14 HUM. RTS. WATCH (2002), <https://www.hrw.org/reports/2002/russchech02/chech0402-01.htm>; cf. Davis & Klinkner, *supra* note 1, at 685 (suggesting that the prohibition on enforced disappearances has “may have reached the status of a general principle of law”).

<sup>144</sup> See generally Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265 (2001); Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641 (2017).

<sup>145</sup> The most famous authority for this proposition is *The Paquete Habana* where the Supreme Court held that customary international law is “part of our law.” 175 U.S. 677, 700 (1900). Therefore, the President has a duty to see that customary international law is applied within the U.S. federal system. See Jonathan I. Charney, *The Power of the Executive Branch of the United States Government to violate Customary International Law*, 80 AM. J. INT’L L. 913, 914 (1986). *But see* Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205-70 (1988).

<sup>146</sup> U.S. BORDER PATROL, U.S. CUSTOMS AND BORDER PROTECTION, BORDER PATROL STRATEGIC PLAN 1994 AND BEYOND 6 (1994), <https://www.hsdl.org/?view&did=721845>.

<sup>147</sup> NO MORE DEATHS & LA COALICIÓN DE DERECHOS HUMANOS, THE DISAPPEARED REPORT PART II: INTERFERENCE WITH HUMANITARIAN AID: DEATH AND DISAPPEARANCE AT THE US-MEXICO BORDER 5 [hereinafter THE DISAPPEARED REPORT PART II], [http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/disappeared\\_report\\_part\\_2.pdf](http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/disappeared_report_part_2.pdf) (last visited Mar. 5, 2022).

<sup>148</sup> NO MORE DEATHS & LA COALICIÓN DE DERECHOS HUMANOS, THE DISAPPEARED REPORT PART I: DEADLY APPREHENSION METHODS: THE CONSEQUENCES OF CHASE & SCATTER IN THE WILDERNESS 3, 17 [hereinafter THE DISAPPEARED REPORT PART I], <http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/fianlpart1.pdf> (last visited Mar. 5, 2022) (“For the purposes of this report, we define scatter as the separation of individuals from a coherent group and their dispersal into the wilderness due to Border Patrol intervention. In the chaos, border crossers are separated from traveling companions, guides,

by La Coalición de Derechos Humanos and No More Deaths, the organizations allege that U.S. border enforcement has “created the conditions for widespread human disappearance”<sup>149</sup> in the borderlands, where “mass death and disappearance are the inevitable outcomes of a border-enforcement plan that uses the wilderness as a weapon against the unauthorized entry of refugees, migrants, and other border crossers.”<sup>150</sup> It has been estimated that as many as 80,000 individuals have died trying to cross the U.S. borderlands since 1994.<sup>151</sup>

Boyce and Chambers powerfully describe the structural violence of U.S. border policies and their spatial arrangements as an “infrastructure of death” that includes a “corral apparatus:” “the network of walls, checkpoints and surveillance infrastructures that combines with natural obstacles of landscape and terrain in order to restrict the area available for forward progression, so that a multitude of bodies become concentrated into a narrower corridor of movement where spatial isolation, physiological strain, suffering, and

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and personal belongings—often permanently. This outcome is especially common at night. Slower-moving people, including the very young, very old, sick, and injured are left behind alone in the backcountry. Scatter is a routine result of chase through remote areas by Border Patrol agents on the ground. Our research shows that scattering by Border Patrol agents causes individuals to become disoriented, lost, and empty-handed: many border crossers perish during the prolonged exposure to the elements that results.”).

<sup>149</sup> NO MORE DEATHS & LA COALICIÓN DE DERECHOS HUMANOS, THE DISAPPEARED REPORT INTRODUCTION: DISAPPEARED: HOW THE U.S. BORDER ENFORCEMENT AGENCIES ARE FUELING A MISSING MIGRANTS CRISIS 5 [hereinafter THE DISAPPEARED REPORT INTRODUCTION], <http://www.thedisappearedreport.org/uploads/8/3/5/1/83515082/disappeared-introduction.pdf> (last visited Mar. 5, 2022); see THE DISAPPEARED REPORT PART II, *supra* note 147, at 3 (“[T]he Border Patrol’s practice of chasing and scattering border crossers is indisputably responsible for human deaths and disappearances.”); see also *id.* at 23 (“Of the 544 Missing Migrant Crisis Line cases where the missing person was reported to have passed through remote terrain, chase and scatter by the Border Patrol was explicitly mentioned in 84 cases as the event that had caused this person to go missing. In 36.9% of these cases (31 out of 84), death or disappearance is known to have resulted. In those cases where chase and scatter in the wilderness was explicitly mentioned as the event that caused the person to go missing, 36.9% ended in death or disappearance.”).

<sup>150</sup> *Id.* (“By conducting interviews and surveys, and through an analysis of databases, our report finds that the design and implementation of US border-enforcement strategies has engineered this crisis.”).

<sup>151</sup> THE DISAPPEARED REPORT PART III, *supra* note 137, at 60 (“[A]dvocates suggest that when accounting for the high rate of disappearance, the true death toll on the border may be three to ten times higher than official counts, raising the potential death toll to as high as 80,000 since the adoption of Prevention Through Deterrence. Border Patrol’s own number of 7,805 border deaths represents only a small fraction of the unknowable scope of the humanitarian emergency playing out every day in the US borderlands.”); see also *id.* at 5 (“While Border Patrol itself claims an official count of 7,805 remains recovered from 1998 through 2019, our team estimates that three to ten times as many people may have died or disappeared since the implementation of Prevention through Deterrence.”).

corresponding rates of mortality are likely to be greatest.”<sup>152</sup> But can it be argued that these policies of unprotection and endangerment affecting thousands of individuals were, in some cases, acts of enforced disappearances by the United States? One must establish all four of the required elements of the test outlined above.

First, it must be established that CBP’s actions involve an arrest, detention, abduction or other deprivation of liberty. Some of the individuals who are chased through the borderlands are indeed apprehended and detained. But what of the many thousands who simply never emerge from these desert corridors into which they are funneled? Those who fall to their deaths while being chased by CBP off of cliffs and canyons? Those on the brink of death who call 911 for emergency assistance and whom the authorities refuse to rescue?<sup>153</sup> Deprivation of liberty is textually understood as a condition in which an individual is in direct custody of a state agent and cannot leave at will. It can extend to cases of a private actor, acting under state fiat. Here, chasing people into the desert may be a way for the State to *absolve* itself of the responsibilities entailed by the *direct* apprehension of people. The extent to which such a strategy amounts to a “deprivation of liberty” in the strict sense of the law may, however, be questionable. As one indication of the relatively broad interpretation of the scope of such actions, Article 5 of the European Convention on Human Rights maintains that “[a] deprivation of liberty is not confined to the classic case of detention following arrest or conviction, but may take numerous other forms” beyond mere movement restrictions.<sup>154</sup> In *Guzzardi v. Italy*, the European Court of Human Rights

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<sup>152</sup> Geoffrey Alan Boyce & Samuel Norton Chambers, *The Corral Apparatus: Counterinsurgency and the Architecture of Death and Deterrence Along the Mexico/United States Border*, 120 GEOFORUM 1, 2 (2021); see also Cameron Gokee et al., *Scales of Suffering in the US-Mexico Borderlands*, INT’L J. HIST. ARCHAEOLOGY (2020).

<sup>153</sup> See, e.g., THE DISAPPEARED REPORT PART III, *supra* note 137, at 68 (“The result of local and state agencies entrusting Border Patrol with emergency response to the missing persons crisis has been disastrous. Border Patrol agents are consistently unwilling to respond effectively, if at all, to reported emergencies. Rather than preventing mortality, we find that the Border Patrol monopoly over emergency search and rescue response in the borderlands has left thousands to die, and has consigned untold numbers of people to disappear on US soil. The families of those missing are left to respond with little to no institutional support or recourse, while also facing insurmountable barriers and interference in their efforts to locate their loved ones. We conclude that the agency’s systematic negligence toward emergency reports of undocumented people in distress constitutes a state crime of historic proportions.”).

<sup>154</sup> REGISTRY OF EUR. CT. H.R., GUIDE ON ARTICLE 5 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RIGHT TO LIBERTY AND SECURITY 8 (2021) (citing *Guzzardi v. Italy*, App. No. 7367/76, 3 Eur. H.R. Rep. 333, ¶ 95 (1981)), [https://www.echr.coe.int/documents/guide\\_art\\_5\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_5_eng.pdf) (“2. The difference between restrictions on movement serious enough to fall within the ambit of a deprivation of liberty under Article 5 § 1 and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree or intensity, and not one of

held that the applicant's special supervision and residential assignment to a small island for three years was a form of deprivation of liberty due to his permanent supervision and inability to make social contacts.<sup>155</sup>

From the perspective of an individual subjected to this practice, it may be just as difficult to escape from these areas to safety or to access protection in places where U.S. state authorities have "monopolized emergency services for undocumented people in the borderlands."<sup>156</sup> Chasing someone into these zones of abandonment, which are controlled exclusively by the government, should indeed be recognized as a form of governmental custody and exclusive control over a person's life and physical integrity.<sup>157</sup> That said, it is distinct from that which both IHRL and ICL jurisprudence have independently condemned as forms of unlawful or arbitrary detention.

Second, to constitute enforced disappearance, the deprivation of liberty must involve government officials, at least by or with the authorization, support or acquiescence of a State or political organization. The Prevention Through Deterrence policy was created and implemented by the United States Border Patrol as a "systematic approach to strengthen control of the border with goals and measures of success based on the [Clinton] Administration's and [Immigration and Naturalization Service's] immigration initiatives."<sup>158</sup> The United States Border Patrol, which is CBP's federal law enforcement arm within DHS, thereby authorized the policy in its official capacity as a federal executive department. Furthermore, in chasing, separating and detaining migrants, CBP officers act in their official capacities as members of a federal agency. The intentional design, systematic implementation and individual execution of this policy therefore satisfy the second element of enforced disappearance.

Third, the State must refuse to acknowledge the deprivation of liberty or conceal information on the fate or whereabouts of the affected. Despite being the only actors with official access to the borderlands, CBP operates under a *de facto* policy of abandonment and routinely fails to provide adequate emergency responses,<sup>159</sup> initiate investigations, or give information or follow

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nature or substance." (citation omitted)).

<sup>155</sup> *Guzzardi*, App. No. 7367/76, ¶ 95.

<sup>156</sup> THE DISAPPEARED REPORT PART III, *supra* note 137, at 10.

<sup>157</sup> *Cf. Tazzioli & De Genova*, *supra* note 1, at 880 ("The violence of kidnapping [migrants] may be exercised through direct physical force. However, in other instances, it may eschew the exercise of direct physical violence in favour of tactical arrangements that compel migrants to remain confined against their will indefinitely in spaces not of their choosing.").

<sup>158</sup> U.S. BORDER PATROL, *supra* note 146, at 1.

<sup>159</sup> *See* THE DISAPPEARED REPORT PART III, *supra* note 137, at 11 ("For example: In 63% of all emergency requests made to Border Patrol, the agency did not conduct any confirmed search or rescue response for the distressed person. In 40% of these emergency cases, Border Patrol directly stated to families and/or humanitarian responders that the agency would not

up calls to the relatives, travel companions and volunteers who call to express concern about missing, lost or injured migrants in the desert.<sup>160</sup> In fact, according to La Coalición de Derechos Humanos and No More Deaths, “Border Patrol impedes, demeans, and threatens family and humanitarian efforts to search for missing people in distress,”<sup>161</sup> and CBP officers even provide “false or misleading information, resulting in ill-fated efforts to search the desert and prolonged periods of uncertainty for families.”<sup>162</sup> The extent of this pattern of disinformation suggests that it is at least a product of reckless negligence, if not also indirect intent.

CBP officers also further conceal information about (and from) the migrants whom they apprehend and detain. Gurmendi observes that enforced disappearances may occur where there is an “inability to account for a detained person, who, in fact, simply ‘disappears’ from public record.”<sup>163</sup> The WGEID has affirmed that disappearances can be caused by a failure to ensure that detained migrants are “formally registered, including with accurate information on the reasons for their detention and the place or places of detention,” including “a lack of transparency.”<sup>164</sup> The United States regularly conceals the locations of its migrant detainees, including from their loved ones. The government does not publicly list all of its migrant detention

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conduct any search or rescue response for a known distressed person. In an additional 23% of these emergency cases, Border Patrol agents were unresponsive and/or unwilling to confirm to families or humanitarians that any emergency mobilization was taking place for a known distressed person. Confirmation is an essential component of any official emergency service. In the 37% of cases in which Border Patrol did confirm that they mobilized search or rescue measures, we find that there were significant patterns of negligence in which the quality and scope of Border Patrol’s efforts were seriously diminished or otherwise inadequate when compared with search and rescue protocols and resources deployed by government agencies for lost and/or distressed US citizens. We find that the longest amount of time that Border Patrol spent on a search was three days. In most of these emergency cases, however, searches lasted for less than one day, and in some cases, less than one hour.”); *see also id.* at 6 (“[Most] emergenc[y] searches lasted less than a day, and in some cases, less than an hour. 27% of all confirmed Border Patrol searches ended in disappearance, meaning that the missing person was never rescued, nor were their remains located, recovered, or identified. This failure rate—when compared with the near 100% success rate of county-led search and rescues in the same or similar remote borderland corridors—is a clear indication of systemic and deadly discrimination.”).

<sup>160</sup> *Id.* at 22 (“Families and Crisis Line volunteers often never heard back from the Border Patrol agent who received their emergency report, despite being told that the agent would follow up with them as the case progressed.”).

<sup>161</sup> *Id.* at 70; *see also id.* at 15 (“Our analysis reveals that when family members, advocates, and distressed people contacted Border Patrol for emergency assistance, they were met with evasiveness, disinterest, and downright refusal.”).

<sup>162</sup> *Id.* at 49.

<sup>163</sup> Gurmendi, *supra* note 127.

<sup>164</sup> *Id.* (quoting WGEID Rep. in the Context of Migration, *supra* note 98, ¶¶ 23, 62).

facilities;<sup>165</sup> detainees are routinely forbidden from making phone calls;<sup>166</sup> and even where a relative is able to contact a detention center where a loved one is being held, it may be impossible for them to access any information from the employees (even simply a yes or no about if that individual is detained).<sup>167</sup> These forms of denial of information can make it virtually impossible for a relative to locate someone who goes missing in the borderlands, and to know if that person is dead or alive, safe or in distress, detained or deported.<sup>168</sup> By actively concealing information about the individuals they patrol in the borderlands, CBP arguably satisfies the third element of the enforced disappearance test.

Finally, the fourth element of enforced disappearance requires removing the concerned individual from the protection of the law. By chasing individuals into the most remote corridors of the desert, destroying water sources,<sup>169</sup> and in other ways actively inhibiting an individual's chance of reaching a place of safety, CBP effectively cuts migrants off from the outside world. La Coalición de Derechos Humanos and No More Deaths have illustrated how CBP moves migrants into corridors without cell reception in life-endangering conditions.<sup>170</sup> The U.S. government also bans independent parties from gaining access to areas of the borderlands where the most disappearances occur, thereby reducing the chance that an individual may be rescued or assisted by non-governmental actors including humanitarian aid

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<sup>165</sup> THE DISAPPEARED REPORT PART III, *supra* note 137, at 50 (“The United States has the largest immigration detention infrastructure in the world, only a fraction of which are publicly listed facilities. In 2016, ICE publicly identified only 78 detention sites. However, a May 2016 report by the nonpartisan research group TRAC, tallied a total of 637 facilities used during 2015, and a Freedom of Information Act request from 2013 revealed that there were 961 sites owned or contracted by the government for federal immigration detention.”).

<sup>166</sup> *Id.* (“After enduring short-term Border Patrol custody, undocumented people are either rapidly deported or transferred into Immigration and Customs Enforcement (ICE) custody for long-term detention. Those held in ICE custody are frequently denied the basic right to make a phone call. In one case, a man named Bryan was held in a detention center for two months without being allowed to make a phone call, while his family actively searched for him. Bryan was not able to contact his family until he was deported to Mexico. In another case, a young man named Josué was in ICE custody for ten days without a phone call, until he read a poster that stated that he had a right to a call and pointed it out to a guard. In the case of Cristian, his family didn’t receive a call from him until five months after receiving his frantic phone calls from the desert. Cristian’s family had already completed forensic interviews with local morgues, convinced that he was dead.”).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 51.

<sup>169</sup> THE DISAPPEARED REPORT PART II, *supra* note 147, at 1 (“In data collected by No More Deaths from 2012 to 2015, we find that at least 3,586 gallon jugs of water were destroyed in an approximately 800-squaremile desert corridor near Arivaca, Arizona.”).

<sup>170</sup> THE DISAPPEARED REPORT PART III, *supra* note 137, at 15.

workers or indeed family members.<sup>171</sup> As a result, the State effectively strips affected individuals from recognition before and protection of the law, as well as taking them off the physical map altogether.

In summary, disappearances resulting from the Prevention Through Deterrence policy and “chase and scatter” practices are likely to constitute *enforced* disappearances insofar as the conditions for their occurrence are engineered by the State. While it may be argued that the affected are not deprived of liberty through the State’s actions in a traditional sense, it is clear that CBP actively conceals information on their fate and whereabouts, and that U.S. state authorities’ actions have the cumulative effect of removing individuals from the protection of the law. As the WGEID has already maintained, the scale and longevity of such practices and policies of abandonment, unprotection and endangerment under the exclusive control of the State, in contexts such as the Sonoran Desert and the Central Mediterranean, at least certainly trigger *indirect* responsibilities of the border state to investigate and account for the death.

#### *B. Enforced Disappearances at the EU’s Southern and Eastern Borders*

The legal environment in the European context may be more amenable to the progressive development and application of the law of enforced disappearances. Unlike in the United States, which has not formally bound itself to relevant treaty obligations, there is no need to rely on customary international law to trigger obligations concerning enforced disappearances in the European judicial system. With some exceptions, such as Hungary and the United Kingdom, most European countries have signed and ratified the relevant treaties. Further, the European Convention on Human Rights (ECHR) provides a more robust set of substantive and procedural human rights standards to enforce. The Convention’s judicial body, the European Court of Human Rights (ECtHR), is just one of the two separate fora available for supranational human rights adjudication, alongside the Court of Justice of the European Union (CJEU) with its own laws on fundamental human rights protection.<sup>172</sup> Supranational tribunals are not normally

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<sup>171</sup> *Id.* at 55-56 (“In July 2017, Cabeza Prieta and the BMGR altered the language of their entrance permits to specifically ban the work of independent humanitarian aid groups in both land areas. Cabeza Prieta administrators also maintain a ‘do not issue’ list of individual names of No More Deaths volunteers who are prohibited from receiving permits to enter refuge lands to leave aid, search for the missing, or recover the dead.”); *see also id.* at 56 (“Only a small portion of the Barry M. Goldwater Air Force Range is open to the public at all—the vast majority is completely inaccessible to humanitarian groups or families searching for their loved ones.”).

<sup>172</sup> *The Council of Europe in Brief: Do Not Get Confused*, COUNCIL OF EUR., <https://www.coe.int/en/web/about-us/do-not-get-confused#main-content> (last visited Jan. 12, 2022); *see* Davis & Klinkner, *supra* note 1, at 684-86 (discussing the importance of a “right

available for those victimized by U.S. policies.

While this legal landscape may suggest that it would be more difficult for European states to get away with acts of enforced disappearances, that is not necessarily true. Asylum seekers, refugees and other migrants at the EU's external borders and within Europe have suffered patterns of human rights violations that are both similar and different from migrants entering the U.S. For example, in the European context, many of the clandestine expulsions that may amount to enforced disappearances take place at sea and may therefore implicate maritime law. This is simply because the sea pathways to reach Europe's external borders currently remain of popular use from various Middle Eastern and African nations, while sea routes to the United States, such as that often taken from Haiti in the 1970s-1990s, are not currently very active.

Below, we provide an analysis of some of the relevant policies behind migrant disappearances in the European context. We consider border violence in the Eastern and Mid-Mediterranean regions, examining acts by Greece and Italy, where the practices that may amount to enforced disappearances have reached international news outlets more often than acts committed in other parts of Europe. We also consider other parts of the Balkans – namely the borders of Croatia, where of late there have been significant developments which suggest that the enforced disappearances framework should be applied there too.

### 1. Violence at Greece-Turkey Land and Sea Borders

For decades, Greece has engaged in various forms of border violence at both its land and sea borders, which have resulted in thousands of migrants disappearing. Asylum seekers, registered refugees and other migrants have been summarily expelled and pushed back to Turkey both across the Evros-Meriç River<sup>173</sup> (the 'land border') and across the Aegean Sea (the 'sea border'). Greece's land and sea borders with Turkey have been increasingly militarized and violently governed by Greece with EU and Member State

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to truth" in the European Court of Human Rights for disappeared migrants. Accordingly, "the Court retains jurisprudential space, under the European Convention, to develop independent principles relating to effective investigation and it provides a closer and more effective process and remedy for enforced disappearance in Europe.").

<sup>173</sup> *Greece: Violent Pushbacks at Turkey Border*, HUM. RTS. WATCH (Dec. 18, 2018, 12:01 AM), <https://www.hrw.org/news/2018/12/18/greece-violent-pushbacks-turkey-border>. The river is known as the *Evros* in Greek, the *Meriç* in Turkish, and the *Maritsa* in Bulgarian. The *Evros-Meriç* refers to the 192-kilometer portion of the river separating Greece and Turkey. An additional 310 kilometers are in Bulgaria, where the river begins. The *Evros region* refers to one of the regional units of Greece, which encompasses the most northeastern corner of the country. As many others do when writing about Greece, we sometimes use the *Evros River* as shorthand to refer to the *Evros-Meriç River*.

financial and technical support, including through the reinforcement of and consistent presence of active European Border and Coast Guard Agency (Frontex) border guards.<sup>174</sup>

Local and international organizations have reported a pattern of routine and systematic ‘pushbacks’ perpetuated by the Greek authorities against thousands of refugees, asylum seekers and other migrants, beginning in Greece’s northeastern region of Evros as early as the mid-1990s<sup>175</sup> and in the Aegean since at least the early 2000s.<sup>176</sup> Multiple organizations have distilled similar patterns from testimonies collected from unrelated persons who suffered completely separate ‘pushbacks’, highlighting distinct themes and consistencies in Greece’s ‘pushback’ operations.<sup>177</sup>

In the Evros region, migrants routinely are caught by Greek police, either while crossing the Evros River, immediately after reaching the Greek riverbank, while walking in a nearby village, or even from deeper within the

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<sup>174</sup> *Managing Migration: EU Financial Support to Greece*, EUR. COMM’N (Nov. 2020), [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/202007\\_managing-migration-eu-financial-support-to-greece\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/202007_managing-migration-eu-financial-support-to-greece_en.pdf); *Frontex and the RABIT Operation at the Greek-Turkish Border*, EUR. COMM’N (Mar. 2, 2011), [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_11\\_130](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_130) (Frontex began deploying Rapid Border Intervention Teams (RABIT) along the Evros River in 2010, sending guest officers from 26 Member States to assist Greek authorities “in controlling the border areas as well as in identifying the apprehended irregular immigrants”); AMNESTY INT’L, *THE HUMAN COST OF FORTRESS EUROPE* 11 (2014), <https://www.amnesty.org/en/documents/eur05/001/2014/en/> (Greece then initiated Operation Aspida (“Shield”) in 2012, which continues to send more border patrol officers and surveillance technologies to the Evros border).

<sup>175</sup> Eric Reidy, *An Open Secret: Refugee Pushbacks Across the Turkey-Greece Border*, THE NEW HUMANITARIAN (Oct. 8, 2018), <https://www.thenewhumanitarian.org/special-report/2018/10/08/refugee-pushbacks-across-turkey-greece-border-Evros>.

<sup>176</sup> E.g. PRO ASYL ET AL., *THE TRUTH MAY BE BITTER, BUT IT MUST BE TOLD: THE SITUATION OF REFUGEES IN THE AEGEAN AND THE PRACTICES OF THE GREEK COAST GUARD* 5 (Perowne et al. trans, 2017), [https://www.proasyl.de/wp-content/uploads/2015/12/PRO\\_ASYL\\_Report\\_Refugees\\_in\\_Greece\\_The\\_truth\\_may\\_be\\_bitter\\_but\\_it\\_must\\_be\\_told\\_Oct\\_2007.pdf](https://www.proasyl.de/wp-content/uploads/2015/12/PRO_ASYL_Report_Refugees_in_Greece_The_truth_may_be_bitter_but_it_must_be_told_Oct_2007.pdf); HUM. RTS. WATCH, *STUCK IN A REVOLVING DOOR IRAQIS AND OTHER ASYLUM SEEKERS AND MIGRANTS AT THE GREECE/TURKEY ENTRANCE TO THE EUROPEAN UNION* 1, 3-4 (2008), [https://www.hrw.org/sites/default/files/reports/greeceturkey1108web\\_0.pdf](https://www.hrw.org/sites/default/files/reports/greeceturkey1108web_0.pdf).

<sup>177</sup> For example, between August 2018 and August 2019, Mobile Info Team collected 27 first-hand testimonies from individuals who had been pushed back across the Evros. The organization was “struck by the similarity of the stories by respondents who never met or spoke to one another.” MOBILE INFO TEAM, *ILLEGAL PUSHBACKS IN EVROS: EVIDENCE OF HUMAN RIGHTS ABUSES AT THE GREECE/TURKEY BORDER* 1, 5-8 (2019), [https://static1.squarespace.com/static/597473fe9de4bb2cc35c376a/t/5dcd1da2fefabc596320f228/1573723568483/Illegal+Evros+pushbacks+Report\\_Mobile+Info+Team\\_final.pdf](https://static1.squarespace.com/static/597473fe9de4bb2cc35c376a/t/5dcd1da2fefabc596320f228/1573723568483/Illegal+Evros+pushbacks+Report_Mobile+Info+Team_final.pdf).

Greek mainland.<sup>178</sup> Regardless of where they are apprehended, the pattern of following events is generally always the same.<sup>179</sup> Once apprehended by police, they are brought to detention centers or other unofficial detention facilities such as warehouses.<sup>180</sup> They are detained for hours or days, in unsanitary conditions, without access to food or water, even for infants.<sup>181</sup> The Greek police fail to provide a reason for their detention, they ignore requests for legal representation including to seek asylum, and they instruct the detainees to remain silent or else face physical violence.<sup>182</sup> Individuals are stripped and searched, and the officials confiscate and/or destroy their mobile phones and other personal belongings,<sup>183</sup> sometimes including money, passports and other documentation.<sup>184</sup> Officials regularly beat the migrants, sometimes including pregnant women and children,<sup>185</sup> and keep

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<sup>178</sup> HUM. RTS. WATCH, *supra* note 176, at 38-41.

<sup>179</sup> See MOBILE INFO TEAM, *supra* note 177, at 1, 17.

<sup>180</sup> See, e.g., *PushBacks Across The Evros/Meric River: Situated Testimony*, FORENSIC ARCHITECTURE (Oct. 19, 2020), <https://forensic-architecture.org/investigation/evros-situated-testimony>.

<sup>181</sup> See, e.g., MOBILE INFO TEAM, *supra* note 177, at 9; GREEK COUNCIL FOR REFUGEES, ADMINISTRATIVE DETENTION IN GREECE: FINDINGS FROM THE FIELD 3, 5 (2018), [https://www.gcr.gr/media/k2/attachments/GCR\\_Ekthesi\\_Dioikitik\\_Kratisi\\_2019\\_en.pdf](https://www.gcr.gr/media/k2/attachments/GCR_Ekthesi_Dioikitik_Kratisi_2019_en.pdf); see also ALICE LUCAS ET AL., NO END IN SIGHT: THE MISTREATMENT OF ASYLUM SEEKERS IN GREECE (2019), [https://resourcecentre.savethechildren.net/pdf/rre\\_noendinsight.pdf](https://resourcecentre.savethechildren.net/pdf/rre_noendinsight.pdf); EUR. PARL. ASS., *Pushback Policies and Practice in Council of Europe Member States*, 3rd Sess., Doc. 14909 (2019).

<sup>182</sup> See MOBILE INFO TEAM, *supra* note 177, at 8.

<sup>183</sup> See, e.g., GREEK COUNCIL FOR REFUGEES ET AL., THE NEW NORMALITY: CONTINUOUS PUSH-BACKS OF THIRD COUNTRY NATIONALS ON THE EVROS RIVER 5-6, 17, 28-29, <https://www.gcr.gr/en/ekdoseis-media/reports/reports/item/1028-the-new-normality-continuous-push-backs-of-third-country-nationals-on-the-evros-river> (last visited Mar. 8, 2022); MOBILE INFO TEAM, *supra* note 177, at 8; Panayote Dimitras, *09/09/2018: Unprecedented Systematic Police Violence and Illegal Deportation of Asylum Seekers in Evros*, RACIST CRIMES WATCH (Sept. 9, 2018), <https://racistcrimeswatch.wordpress.com/2018/09/09/1-652/>; Vassilis Tsarnas, *29/01/2018 and Not Only: Complaints of Violent, Illegal and Systematic Repatriation of Asylum Seekers, in Evros*, RACIST CRIMES WATCH (Jan. 1, 2018), <https://racistcrimeswatch.wordpress.com/2018/01/29/2-88/>; *08/07: 19 Travellers at Turkish-Greek Landborder, Pushed Back to Turkey*, WATCH THE MED (July 9, 2018, 10:30 PM), <https://watchthemed.net/index.php/reports/view/943>; *05/07: Two Groups at the Turkish-Greek Landborder, 14 Travellers Pushed Back*, WATCH THE MED (July 6, 2018, 10:23 PM), <https://watchthemed.net/reports/view/942>; Dimitris Angelidis, *Return Without . . . Ticket*, EFSYN (Oct. 19, 2017, 3:02 PM), [https://www.efsyn.gr/ellada/dikaiomata/127452\\_epanaprotithisi-horis-eisitirio](https://www.efsyn.gr/ellada/dikaiomata/127452_epanaprotithisi-horis-eisitirio).

<sup>184</sup> See, e.g., GREEK COUNCIL FOR REFUGEES ET AL., *supra* note 183, at 6-7, 10, 13, 16, 17, 25; Tsarnas, *supra* note 183.

<sup>185</sup> MOBILE INFO TEAM, *supra* note 177, at 15.

them detained until after dark. At night, masked commandos, wearing black or camouflage, then conduct the summary expulsion of the migrants in Greek custody by forcibly loading them onto rubber dinghies, driving them across the Evros River, and abandoning them on the Turkish riverbank, often beating them along the way.<sup>186</sup>

In the Aegean Sea, Greek authorities regularly apprehend migrants in boats on the water as well as on the shores of Greek islands. The authorities often deceive them of the purpose of their apprehension<sup>187</sup> and then push them back into Turkish waters. Many such apprehensions on land begin with abductions from public thoroughfares such as food lines, bus stops and city streets. Individuals apprehended on Greek islands are routinely detained incommunicado in unofficial detention sites before being pushed back to Turkey.<sup>188</sup> When Greek authorities apprehend migrant boats on the water, they frequently damage the boats, remove or ruin the motors, and either leave the unseaworthy boat to drift at sea or actively tow it towards Turkish waters by rope.<sup>189</sup> In other cases, authorities take the migrants on board a Greek vessel and then transfer them onto inflatable life rafts, a type of traditional lifesaving equipment which has been weaponized as an instrument for ‘pushbacks’ during the COVID-19 pandemic.<sup>190</sup> The narratives of deceit and logistic procedures of these ‘pushback’ operations have indeed adapted within the context of COVID-19. For example, authorities reportedly now often lie to individuals after their arrival on a Greek island that they are going to transfer them to a COVID-19 quarantine area, but then instead

<sup>186</sup> *Id.* at 11, 13 & 15; *Greece: Violent Pushbacks at Turkey Border*, *supra* note 173.

<sup>187</sup> *See, e.g., Small Children Left Drifting In Life Rafts In The Aegean Sea!*, AEGEAN BOAT REP. (Feb. 17, 2021), <https://aegeanboatreport.com/2021/02/22/small-children-left-drifting-in-a-life-raft-in-the-aegean-sea-approved-by-notis-mitarachi/> (regarding the false excuse of detaining individuals to administer a COVID-19 test and instead expelling them).

<sup>188</sup> LEGAL CTR. LESVOS, CRIMES AGAINST HUMANITY IN THE AEGEAN 22, 38 (2021); LEGAL CTR. LESVOS, COLLECTIVE EXPULSIONS DOCUMENTED IN THE AEGEAN SEA: MARCH - JUNE 2020, at 4 (2020).

<sup>189</sup> LEGAL CTR. LESVOS, CRIMES AGAINST HUMANITY IN THE AEGEAN, *supra* note 188, at 22, 38

<sup>190</sup> *See* Itamar Mann & Niamh Keady-Tabbal, *Torture by Rescue: Asylum-Seeker Pushbacks in the Aegean*, JUST SEC. (Oct. 26, 2020), <https://www.justsecurity.org/72955/torture-by-rescue-asylum-seeker-pushbacks-in-the-aegean/>; Niamh Keady-Tabbal & Itamar Mann, *Tents at Sea: How Greek Officials Use Rescue Equipment for Illegal Deportations*, JUST SEC. (May 22, 2020), <https://www.justsecurity.org/70309/tents-at-sea-how-greek-officials-use-rescue-equipment-for-illegal-deportations/>; Bashar Deeb & Leone Hadavi, *Masked Men on A Hellenic Coast Guard Boat Involved in Pushback Incident*, BELLINGCAT (June 23, 2020), <https://www.bellingcat.com/news/uk-and-europe/2020/06/23/masked-men-on-a-hellenic-coast-guard-boat-involved-in-pushback-incident/>; LEGAL CTR. LESVOS, CRIMES AGAINST HUMANITY IN THE AEGEAN, *supra* note 188, at 23-24.

clandestinely force them onto these unnavigable rafts and abandon them at sea.<sup>191</sup>

Like those pushed back across the Evros River, those apprehended in the Aegean are often beaten, forced to avert their gaze from the perpetrators, and stripped of personal belongings including documentation and cell phones.<sup>192</sup> Legal and investigative NGOs have identified various actors involved in these ‘pushbacks’, including the Hellenic Coast Guard, Hellenic Police, armed commandos dressed in dark uniforms with masked faces, NATO and Frontex.<sup>193</sup> All of these individuals, whether apprehended on land or sea, are summarily expelled to Turkey without access to the Greek asylum system or their procedural rights of due process.<sup>194</sup>

The patterns of ‘pushbacks’ described in the Evros region and the Aegean Sea thus share several common themes and practices, as well as some distinct details due to their geographical differences. All such instances begin with the deprivation of liberty, an act of arrest, abduction, and/or unregistered detention as part of clandestine removal procedures.<sup>195</sup> Uniformed Hellenic Police or Coast Guard officers, acting as authorized agents of the State, carry out these acts themselves and/or work collaboratively with others – such as unidentifiable masked commando officers, Frontex officers, and/or migrants who themselves are coerced or fraudulently employed to drive the boats – to physically apprehend migrants and bring them into the Greek State’s custody.<sup>196</sup> The Greek State therefore maintains effective control over the ‘pushbacks’ even in cases where individuals other than uniformed officers drive the dinghy across the river to execute the final stage of the expulsion.<sup>197</sup>

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<sup>191</sup> See, e.g., Giorgos Christides & Steffen Lüdke, *Frontex Involved in Illegal Pushbacks of Hundreds of Refugees*, DER SPIEGEL (Apr. 28, 2022), <https://www.spiegel.de/international/europe/frontex-involved-in-illegal-pushbacks-of-hundreds-of-refugees-a-9fe90845-efb1-4d91-a231-48efcafa53a0>; Katy Fallon, ‘*It’s an atrocity against humankind’: Greek pushback blamed for double drowning*’, THE GUARDIAN (Feb. 17, 2022), <https://www.theguardian.com/global-development/2022/feb/17/its-an-atrocity-against-humankind-greek-pushback-blamed-for-double-drowning>.

<sup>192</sup> See, e.g., LEGAL CTR. LESVOS, COLLECTIVE EXPULSIONS DOCUMENTED IN THE AEGEAN SEA, *supra* note 188, at 5.

<sup>193</sup> LEGAL CTR. LESVOS, CRIMES AGAINST HUMANITY IN THE AEGEAN, *supra* note 188, at 23.

<sup>194</sup> See, e.g., LEGAL CTR. LESVOS, CRIMES AGAINST HUMANITY IN THE AEGEAN, *supra* note 188, at 21, 37-38.

<sup>195</sup> *Id.* at 37; see also GREEK COUNCIL FOR REFUGEES, *supra* note 181, at 1, 2, 4.

<sup>196</sup> LEGAL CTR. LESVOS, CRIMES AGAINST HUMANITY IN THE AEGEAN, *supra* note 188, at 8-11, 22-23.

<sup>197</sup> See, e.g., “*Their Faces Were Covered*”: Greece’s Use of Migrants as Police Auxiliaries in Pushbacks, HUM. RTS. WATCH (Apr. 7, 2022), <https://www.hrw.org/report/2022/04/07/their-faces-were-covered/greeces-use-migrants-police-auxiliaries-pushbacks>.

By carrying out these operations themselves and/or exercising direct control over other perpetrators, Greek officials thereby generally establish the first and second elements of the test in cases of Greek ‘pushbacks’ at land or sea.

The third element of the definition of an enforced disappearance requires the denial that such deprivations of liberty were conducted by the State, or the withholding of such information. Greece has consistently denied both its routine execution of ‘pushbacks’ and the apprehension and detention of specific individuals who were subjected to disappearance and expulsion at the land and sea borders. Successive Greek governments and relevant line ministries in charge of border security forces have persistently and adamantly denied the very fact that Greek border forces are involved in such acts.<sup>198</sup> This practice of sweeping denial continues despite the overwhelming authoritative body of evidence of this practice at both the Evros border and the Aegean Sea, attesting to the manifestly illegal and clandestine nature of such summary expulsions and the extreme forms of accompanying violence. In addition to this denial, successive Greek governments have also obstructed independent investigations.<sup>199</sup> Dozens of cases have been submitted to Greek prosecutors and courts, as well as Greece’s Ombudsman office, but the unwillingness of the political echelons to allow for proper investigations – with a view to shielding those responsible – has thus far effectively prevented such inquiries from happening.<sup>200</sup>

<sup>198</sup> See EUR. PARLIAMENT COMM. ON C.L., JUST. & HOME AFFS. MEETING (July 6, 2020), [https://multimedia.europarl.europa.eu/en/libe-committee-meeting\\_20200706-1645-COMMITTEE-LIBE\\_vd?fbclid=IwAR1b2v-pjXhVGeOu-4JrIWhlCzXM2B8rFXHnG0JR02taCKSNtYNZmldmsk](https://multimedia.europarl.europa.eu/en/libe-committee-meeting_20200706-1645-COMMITTEE-LIBE_vd?fbclid=IwAR1b2v-pjXhVGeOu-4JrIWhlCzXM2B8rFXHnG0JR02taCKSNtYNZmldmsk); Interview by Bild with Kyriakos Mitsotakis, Prime Minister, Greece (Dec. 15, 2019), <https://primeminister.gr/2019/12/15/22745>; Eva Cossé, *Greece Is Still Denying Migrant Pushbacks*, HUM. RTS. WATCH (Aug. 21, 2020, 2:59 PM EDT), <https://www.hrw.org/news/2020/08/21/greece-still-denying-migrant-pushbacks>; *Greece: Violent Pushbacks at Turkey Border; End Summary Returns, Unchecked Violence*, HUM. RTS. WATCH (Dec. 18, 2018, 12:01 AM EST), <https://www.hrw.org/news/2018/12/18/greece-violent-pushbacks-turkey-border>.

<sup>199</sup> Laurence Lee, *Evros River: ‘Forced Pushback’ of Refugees at the Edge of EU*, AL JAZEERA (Jan. 28, 2018), [aljazeera.com/videos/2018/1/28/evros-river-forced-pushback-of-refugees-at-the-edge-of-eu](http://aljazeera.com/videos/2018/1/28/evros-river-forced-pushback-of-refugees-at-the-edge-of-eu); see also *Απάντηση Γεροβασίλη για τις εpanaproothiseis* [Gerovasilis’s Answer for the Promotions], KOUTI PANDORAS (May 5, 2019), <https://www.koutipandoras.gr/article/apantisi-gerobasili-gia-tis-epanaproothiseis>; Patrick Kingsley, *Greek Government Accused of Deporting Turkish Asylum Seekers*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/world/europe/turkey-greece-asylum-pushbacks.html>.

<sup>200</sup> The Greek Ombudsman remains seized of this matter: GREEK OMBUDSMAN INDEP. AUTH., OWN INITIATIVE INVESTIGATION: ALLEGED PUSHBACKS TO TURKEY OF FOREIGN NATIONALS WHO HAD ARRIVED IN GREECE SEEKING INTERNATIONAL PROTECTION 20-22 (Yiannis Boutselis ed., 2021). See generally *Greece: Renewed Demands for Human Rights Monitoring, Pushbacks Continue with NGO Oversight Restricted, Refugee Children Risk*

This routine of denial has been maintained even in the face of the recent surge in inquiries into the fundamental rights mechanisms of the European Border and Coast Guard Agency (Frontex), triggered by independent investigative findings that demonstrate the Agency's involvement in Greece's 'pushbacks' practice.<sup>201</sup> In July 2021, the European Parliament's Frontex Scrutiny Working Group held that Frontex's fundamental rights mechanisms "failed to address and follow-up" violations committed by member states' authorities.<sup>202</sup> In January 2022, the European Anti-Fraud Office (OLAF) concluded an investigation which remains unpublished but reportedly revealed that Frontex's own internal documentation was concealed by senior management and systemically misclassified under the Agency's internal reporting mechanism to cover up illegal acts that had been committed by the Agency and others.<sup>203</sup> While an inquest by the Agency's Management Board is ongoing, on 31 March 2022 the European Parliament decided to postpone the approval of Frontex's 2020 financial reports because of OLAF's findings.<sup>204</sup> The Greek National Transparency Authority – a body that is not constitutionally independent<sup>205</sup> – completed a three-month investigation on 29 March 2022 noting that it found no evidence of Greek

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*Exclusion*, EUR. COUNCIL ON REFUGEES & EXILES (Sept. 17, 2021), <https://ecre.org/greece-renewed-demands-for-human-rights-monitoring-pushbacks-continue-with-ngos-oversight-restricted-refugee-children-risk-exclusion/>.

<sup>201</sup> *Frontex Under Scrutiny: Inquiries and Investigations November 2020 Onwards*, STATEWATCH, <https://www.statewatch.org/observatories/frontex/frontex-under-scrutiny-inquiries-and-investigations-november-2020-onwards/>; see, e.g., *Frontex, The EU Pushback Agency*, LIGHTHOUSE REPS. (May 6, 2022), <https://www.lighthousereports.nl/investigation/frontex-the-eu-pushback-agency/>.

<sup>202</sup> Tineke Strik (Rapporteur), Eur. Parliament, LIBE Comm. on Civil Liberties, Just. and Home Aff., Rep. on the Fact-Finding Investigation on Frontex Concerning Alleged Fundamental Rights Violations (2021), [https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG\\_en.pdf](https://www.europarl.europa.eu/cmsdata/238156/14072021%20Final%20Report%20FSWG_en.pdf); see also *Frontex Has Failed on Fundamental Rights, Says European Parliament Scrutiny Group*, STATEWATCH (July 15, 2021), <https://www.statewatch.org/news/2021/july/frontex-has-failed-on-fundamental-rights-says-european-parliament-scrutiny-group/>.

<sup>203</sup> Giorgos Christides et al., *EU Anti-fraud Authority Raises Serious Allegations Against Frontex*, DER SPIEGEL (Jan. 3, 2022), <https://www.spiegel.de/ausland/eu-antibetrugsbehoerde-erhebt-schwere-vorwuerfe-gegen-frontex-a-1d445ef2-cbcc-4227-90b4-697481aeb2c7>.

<sup>204</sup> Press Release, Eur. Parliament, MEPs Withhold Discharge of EU Border Control Agency Frontex' Accounts (Mar. 31, 2022), <https://www.europarl.europa.eu/news/en/press-room/20220328IPR26301/meps-withhold-discharge-of-eu-border-control-agency-frontex-accounts>.

<sup>205</sup> APOSTOLIS FOTIADIS, MAPPING POTENTIAL ELEMENTS OF AN INDEPENDENT BORDER MONITORING MECHANISM IN GREECE (2022), <https://bit.ly/3x8M8dX>; UNHCR ET AL., TEN POINTS TO GUIDE THE ESTABLISHMENT OF AN INDEPENDENT AND EFFECTIVE NATIONAL BORDER MONITORING MECHANISM IN GREECE (2021), <http://bitly.ws/q5IL>.

authorities' involvement in 'pushbacks.'<sup>206</sup> While it first refused to publish its findings,<sup>207</sup> the report was published on 13 May 2022, revealing various serious shortcomings in the methodology of the investigation.

Greek legal practitioners, civil society and the Greek Ombudsman have all attested that the Greek government and law enforcement authorities routinely conceal and deny such acts, and thus actively obstruct their investigation and prosecution. Greek officials' routine seizure of migrants' cell phones and heavy restriction of access to border areas also serve this purpose. Such continuous denial and dereliction of duty concerning the investigation of well-documented patterns of 'pushbacks' by the Greek authorities' satisfies the third element of enforced disappearance.

'Pushbacks' not only have the necessary effect of removing the individual from the protection of the law, but in fact *intend* the outcome of preventing the individual from seeking a suspensive remedy for their incommunicado detention and clandestine summary expulsion, resultantly denying their access to asylum procedures. This practice extends to those with documentation in Greece and elsewhere in the EU, including refugee and residency status.<sup>208</sup> Asylum seekers pushed back to Turkey may also face further direct and persistent threats of apprehension, detention and 'chain refoulement' to their countries of origin, where they may be subjected to torture, persecution, or enforced disappearance. The CED has held that under Article 16 of the ICPED, State Parties are obligated to refrain from returning migrants to a country where they would risk 'chain refoulement' to a place where enforced disappearances are widespread.<sup>209</sup> For refugees, whose own country has become a source of persecution rather than protection, the stripping of refugee status is analogous to the stripping of nationality, rendering them *de facto* stateless. By effectively denying access to procedural

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<sup>206</sup> GREEK NAT'L TRANSPARENCY AUTH., COMPLETION OF THE INVESTIGATION IN REGARD WITH THE MANAGEMENT OF MIGRATION FLOWS TOWARDS THE GREEK TERRITORY AS WELL AS THE CONTENT OF PUBLICATION CONCERNED WITH INFORMAL FORCED RETURNS (PUSHBACKS), No. 0M3/4 (2022), <https://aead.gr/en/publications-en/essays-en/investigation-report-om-2022>.

<sup>207</sup> *National Transparency Authority Should Publish the Full Investigation Regarding Pushbacks in Accordance with the Principle of Transparency*, GREEK COUNCIL for REFUGEES (Apr. 9, 2022), [https://www.gcr.gr/en/news/press-releases-announcements/item/1940-national-transparency-authority-should-publish-the-full-investigation-regarding-pushbacks-in-accordance-with-the-principle-of-transparency#\\_edn1](https://www.gcr.gr/en/news/press-releases-announcements/item/1940-national-transparency-authority-should-publish-the-full-investigation-regarding-pushbacks-in-accordance-with-the-principle-of-transparency#_edn1).

<sup>208</sup> Matina Stevis-Gridneff et al., *'We Are Like Animals': Inside Greece's Secret Site for Migrants*, N.Y. TIMES (Mar. 10, 2020), <https://www.nytimes.com/2020/03/10/world/europe/greece-migrants-secret-site.html>; *Small Children Left Drifting In Life Rafts In The Aegean Sea!*, *supra* note 187; *197 People Pushed Back 200 Nautical Miles from Crete to Turkey*, ALARM PHONE (Nov. 27, 2020), <https://alarmphone.org/en/2020/11/27/197-people-pushed-back-to-turkey/>.

<sup>209</sup> CED, *supra* note 4, ¶¶ 26-28.

safeguards for individuals who seek asylum in Greece and in fact removing persons from the protection of the law through their summary expulsion, Greek ‘pushbacks’ satisfy the fourth element of the test.

In sum, Greece’s covert, established and longstanding practice of collective summary expulsions of individuals from the Evros region and from Greek islands in the Aegean Sea are, according to Dimitris Koros, a highly normalized “generalized antiimmigration policy that involves practices constituting racist state crime.”<sup>210</sup> They may also be properly understood as a form of enforced disappearance. Such acts, as a matter of unofficial policy, entail the secret and incommunicado detention of individuals either by state agents or sometimes by non-state actors with the acquiescence of the former. Such individuals are removed from the protection of the law both by the denial of due process safeguards in their detention and deportation, and by being *de facto* barred from accessing asylum procedures. While the disappearance of an individual *after* their ‘pushback’ might not be seen as ‘enforced’ – i.e. directly and intentionally undertaken by a State agent – it would still trigger the jurisdictional state’s obligations, including under the procedural aspects of the right to life, to investigate the disappearance. The State would be obligated to search for and, where needed, engage in interstate cooperation to obtain any information about this person. Greece’s persistent denial of ‘pushbacks’ and concealment of information about whether specific individuals had ever entered Greek territory therefore result in a double disappearance: of Greek officials’ actions, and of a missing person who remains unfound, and most likely deceased.

## 2. Violence at Croatia’s Bosnian and Serbian Borders

The patterns illustrated by Greek officials are strikingly similar to the practices of Croatian officials at their own external EU borders. As an EU member on its way to accession into the Schengen Zone, Croatia serves as the gate to the EU at its borders with Serbia, Montenegro and Bosnia and Herzegovina (BiH). Local and international organizations have increasingly reported systematic ‘pushbacks’ at the Croatian borders with Serbia since 2016<sup>211</sup> and BiH since 2018.<sup>212</sup> The patterns described of how Croatian

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<sup>210</sup> Dimitris Koros, *The Normalization of Pushbacks in Greece: Biopolitics and Racist State Crime*, 10 STATE CRIME 238 (2021).

<sup>211</sup> SELMA BANICH ET AL., MOVING EUR., REPORT ON SYSTEMIC POLICE VIOLENCE AND PUSH-BACKS AGAINST NON-SIA PEOPLE CONDUCTED BY CROATIAN AUTHORITIES 2 (2016), [http://moving-europe.org/wp-content/uploads/2016/01/28.01.2016\\_Report-Police-Violence-and-Push-Backs.pdf](http://moving-europe.org/wp-content/uploads/2016/01/28.01.2016_Report-Police-Violence-and-Push-Backs.pdf); *Thousands Stranded as New Arbitrary Border Restrictions Expose Refugees to Violence*, MEDECINS SANS FRONTIERES (Feb. 23, 2016), <https://www.msf.org/greecebalkans-thousands-stranded-new-arbitrary-border-restrictions-expose-refugees-violence>.

<sup>212</sup> *Report of the European Union Agency for Fundamental Rights on Periodic Data*

police treat and summarily expel asylum seekers closely mirror the behaviors of the Hellenic border forces, and both can be seen as branches of the same umbrella policies of EU crackdowns on migration. Like Greece, Croatia has received a substantial and increasing amount of financial and technical support from the EU for its border management, without adequate monitoring mechanisms in place for how its EU funding is managed.<sup>213</sup> Unlike Croatia, the Commission has not yet forced Greece to establish a border-monitoring mechanism.<sup>214</sup>

The patterns that arise from testimonies, as well as audiovisual material collected by independent investigators and other organizations, begin with the apprehension of migrants near the border or in the interior of the country, including deep in forests and on the streets of Zagreb. Croatian police routinely racially profile and then apprehend and detain individuals in either formal or informal detention centers.<sup>215</sup> Often, officers will bring them to a police station, where they take their fingerprints and/or photographs and force individuals to sign forms in foreign languages without a translator.<sup>216</sup> Police officers consistently deny asylum seekers the right to access Croatia's asylum system and have been reported to routinely lie that asylum is not available in Croatia.<sup>217</sup>

Officers or masked commandos then transport groups in vans, driving in

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*Collection on the Migration Situation in the EU*, at 5 (Feb. 2018), <https://fra.europa.eu/en/publication/2018/migration-overviews-february-2018>; BORDERLINE EUR. ET AL., *FOURTH REPORT ON ILLEGAL PUSHBACKS OF REFUGEES FROM THE REPUBLIC OF CROATIA IN THE PERIOD FROM JUNE 2017 TO FEBRUARY 2018*, at 6 (Feb. 28, 2018), [http://welcome.cms.hr/wp-content/uploads/2018/02/Fourth-Report-on-Illegal-Pushbacks\\_01032018.pdf](http://welcome.cms.hr/wp-content/uploads/2018/02/Fourth-Report-on-Illegal-Pushbacks_01032018.pdf).

<sup>213</sup> See Apostolis Fotiadis, *Croatia Drags Heels on Border-Monitoring Mechanism to Prevent Migrant Abuses*, REPORTING DEMOCRACY (Feb. 11, 2021), <https://balkaninsight.com/2021/02/11/croatia-drags-heels-on-border-monitoring-mechanism-to-prevent-migrant-abuses>.

<sup>214</sup> *Id.*; see also Apostolis Fotiadis, *Croatia's New Border-Monitoring Mechanism Seen as 'Toothless' and 'Ineffective'*, BALKAN INSIGHT (Oct. 12, 2021), <https://balkaninsight.com/2021/10/12/croatias-new-border-monitoring-mechanism-seen-as-toothless-and-ineffective/>.

<sup>215</sup> See generally, e.g., ARE YOU SYRIOUS? ET AL., *5TH REPORT ON PUSHBACKS AND VIOLENCE FROM THE REPUBLIC OF CROATIA: ILLEGAL PRACTICES AND SYSTEMIC HUMAN RIGHTS VIOLATIONS AT EU BORDERS* (2019), [https://www.cms.hr/system/article\\_document/doc/597/5\\_5TH\\_REPORT\\_ON\\_PUSHBACK\\_S\\_AND\\_VIOLENCE\\_20052019.pdf](https://www.cms.hr/system/article_document/doc/597/5_5TH_REPORT_ON_PUSHBACK_S_AND_VIOLENCE_20052019.pdf).

<sup>216</sup> See, e.g., ARE YOU SYRIOUS? & WELCOME! COLLABORATIVE, *REPORT ON ILLEGAL AND FORCED PUSH BACKS OF REFUGEES FROM THE REPUBLIC OF CROATIA 3* (2017), <https://areyousyrious.medium.com/report-on-illegal-and-forced-push-backs-of-refugees-from-the-republic-of-croatia-3f8c50ca10c1> (noting different ways officers harass, intimidate, and abuse detainees).

<sup>217</sup> See, e.g., *id.* at 684, 708; CPT, *infra* note 218, at 15.

violently erratic ways with extreme heat or air conditioning, frequently causing the detained individuals to vomit.<sup>218</sup> After arriving in the forest, the armed officials routinely subject them to severe beatings and physical attacks, exposure to police dogs, forced undressings and strip searches, and various forms of humiliation and intimidation.<sup>219</sup> Throughout the ‘pushbacks’, personal belongings including phones, documentation, and clothing are confiscated or destroyed, and officers frequently force individuals to return to BiH or Serbia wearing only underwear.<sup>220</sup> Testimonies have also included reports of sexual assault and mock executions.<sup>221</sup>

In the last stage of the ‘pushback’, Croatian officers force individuals to walk back into Serbia or BiH, which sometimes involves crossing a deep river on foot.<sup>222</sup> Most of these ‘pushbacks’ occur at night, but journalists and hidden cameras have also captured footage of what appears to be Croatian police forcing groups of migrants across the green border to BiH in broad daylight.<sup>223</sup>

In most cases of Croatian ‘pushbacks’, migrants are apprehended by

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<sup>218</sup> See, e.g., CPT, Report to the Croatian Government on the visit to Croatia carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 14 August 2020, at 15, CPT/Inf (2021) 29, <https://rm.coe.int/1680a4c199>.

<sup>219</sup> *Id.*; see also, e.g., OHCHR, Croatia: Police Brutality in Migrant Pushback Operations Must Be Investigated and Sanctioned – Un Special Rapporteurs, OHCHR (June 19, 2021), <https://www.ohchr.org/en/news/2020/06/croatia-police-brutality-migrant-pushback-operations-must-be-investigated-and>.

<sup>220</sup> See, e.g., Croatia: Fresh Evidence of Police Abuse and Torture of Migrants and Asylum-Seekers, AMNESTY INT’L (June 11, 2020), <https://www.amnesty.org/en/latest/news/2020/06/croatia-fresh-evidence-of-police-abuse-and-torture-of-migrants-and-asylumseekers/>.

<sup>221</sup> 2 THE BLACK BOOK OF PUSHBACKS 680 (Hope Barker & Milena Zajović eds., Border Violence Monitoring Network 2020); see also *All Migrants Respect Police, But the Police Say No Respect*, BVMN (Aug. 15, 2020), <https://www.borderviolence.eu/violence-reports/august-15-2020-0100-beyond-d1-in-croatia/>; DANISH REFUGEE COUNCIL, REPORT ON BOSNIA AND HERZEGOVINA: BORDER MONITORING MONTHLY SNAPSHOT 1-2, 4, 6 (2020), [https://drc.ngo/media/kbyjrc2v/border\\_monitoring\\_monthly\\_snapshot\\_october2020\\_final.pdf](https://drc.ngo/media/kbyjrc2v/border_monitoring_monthly_snapshot_october2020_final.pdf).

<sup>222</sup> 2 THE BLACK BOOK OF PUSHBACKS, *supra* note 221, at 693, 741, 751.

<sup>223</sup> ‘Unverifiable Information from Unknown Migrants’? – First Footage of Push-backs on the Croatian-Bosnian Border, BVMN (Dec. 16, 2018), <https://www.borderviolence.eu/proof-of-push-backs/>. Footage taken by an anonymous group, said to have been recorded between 20 September 2018 and 10 October 2018 by hidden cameras in the forest near Lohovo, appears to capture 54 ‘pushback’ events, in daylight hours alone, affecting 368 individuals and including small children. BVMN, PROOF OF PUSH-BACKS ON THE BORDER OF CROATIA AND BOSNIA-HERZEGOVINA 4-5 (2018), [https://yallayallaeurope.files.wordpress.com/2018/12/Proof\\_of\\_push-backs.pdf](https://yallayallaeurope.files.wordpress.com/2018/12/Proof_of_push-backs.pdf).

uniformed Croatian police and then detained incommunicado in a police vehicle and informal or formal detention center without access to legal counsel or means of recourse against their detention or expulsion.<sup>224</sup> Because the uniformed Croatian officers conduct these deprivations of liberty as authorized agents of the State, and work in direct collaboration with the masked commandos who are involved, it can be determined that the Croatian officers indeed maintain effective control over the ‘pushbacks’. Most Croatian ‘pushbacks’ will therefore generally establish the first and second elements of the enforced disappearance test.

Like Greece, Croatia has continually denied that the practice of ‘pushbacks’ exists in their country and that State actors are involved.<sup>225</sup> The Ministry of Interior has categorically dismissed allegations, including after a whistleblower from the Croatian police wrote to the Croatian Ombudswoman confessing in a published letter to having summarily expelled roughly 1000 migrants.<sup>226</sup> As in the Greek context, Croatia’s sweeping denial of the practice and concealment of relevant information thus satisfies the third element of the test.

‘Pushbacks’ undertaken by the Croatian authorities aim to remove the affected refugees, asylum seekers, and other migrants from the protection of the law, both during the course of the operation and as a result of their removal from the EU. In arbitrarily detaining individuals incommunicado, including in clandestine informal detention facilities, and confiscating or destroying their cell phones, Croatian police remove the affected individuals from access to legal counsel and other outside communication while they are detained. By actively preventing individuals from registering asylum claims during the course of the ‘pushback’, the officials strip them of their fundamental rights, including the right to access asylum. By expelling individuals into BiH or Serbia and thereby preventing them from seeking suspensive remedies, officials effectively remove all individuals who are summarily expelled from the protection of the law in Croatia and the EU. By

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<sup>224</sup> BVMN, REPORT ON TORTURE AND CRUEL, INHUMANE, OR DEGRADING TREATMENT OF REFUGEES AND MIGRANTS IN CROATIA IN 2019, at 19-20, 23-24 (2020), <https://www.borderviolence.eu/wp-content/uploads/CORRECTEDTortureReport.pdf>.

<sup>225</sup> See Lorenzo Tondo, *Croatia Denies Migrant Border Attacks After New Reports of Brutal Pushbacks*, THE GUARDIAN (Oct. 23, 2020), <https://www.theguardian.com/global-development/2020/oct/23/croatia-denies-migrant-border-attacks-after-new-reports-of-brutal-pushbacks>; Steffen Lücke & Nicole Vögele, *Croatia Conducts Illegal Pushbacks of Vulnerable Migrants*, DER SPIEGEL: INT’L (June 25, 2021), <https://www.spiegel.de/international/europe/croatia-conducts-illegal-pushbacks-of-vulnerable-migrants-a-d8e5cb0f-e425-4d7e-a1dd-f51b8c760731>.

<sup>226</sup> *No Institutional Reaction to Alleged Illegal Police Treatment of Migrants*, NOVOSTI (July 25, 2019), <https://www.ombudsman.hr/en/no-institutional-reaction-to-alleged-illegal-police-treatment-of-migrants/>.

destroying documentation, such as passports and IOM registration cards for Bosnian IOM camps,<sup>227</sup> Croatian authorities strip affected individuals of their legal identity and of recognition before the law and the rights that flow therefrom. Further, by forcing detainees to sign paperwork waiving their rights without a translator, Croatian police remove individuals from the protection of the law both during their detention and regarding future remedies. In all of these common facets of Croatian ‘pushbacks’, the State removes migrants, asylum seekers, and refugees from the protection of the law and thereby establishes the fourth element of enforced disappearance.

To summarize, Croatia has undertaken an organized campaign of collective summary expulsion as a means of militant border governance and prevention of the registration of asylum claims. Such forced expulsions involve the apprehension and detention of individuals by and/or with the acquiescence of Croatian state actors, thus establishing the first two elements of the test. The Croatian government continues to deny allegations of ‘pushback’ operations, thereby fulfilling the third element.<sup>228</sup> The practice effectively removes all affected migrants, asylum seekers, and refugees from the protection of the law both during their deprivation of liberty and as its intended result thereafter, satisfying the fourth element. As such, in many cases, Croatia’s practice of ‘pushbacks’ to BiH and Serbia may be properly understood as a form of enforced disappearance.

### 3. Italy and the Central Mediterranean

The above summaries of Greek and Croatian practices illustrate how the use of extreme border violence at the EU’s external borders, under the guise of so-called deterrence policies, result in the disappearance of migrants from Europe at scale. This practice also spans far beyond these cases, including wider networks of EU cooperation with third countries and the systematic repression of humanitarian actors in the Central Mediterranean. European coastal states of the Mediterranean, such as Malta and Italy in particular, systematically engage in ‘pushbacks’ by proxy from European shores, territorial seas, and the international waters of the Mediterranean Sea, forcing migrants back into Libya in order to reduce arrivals to Europe. Such egregious practices are part of a broader deterrence regime that also manifests through refusals of disembarkation at European ports, denial of calls for rescue at sea, criminalization and active prosecution of humanitarian search and rescue organizations and their crew members, and various informal and non-transparent cooperation arrangements with highly-contentious Libyan actors. These cooperation agreements, which include significant amounts of EU funding and capacity building, directly support the Libyan Coast Guard’s

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<sup>227</sup> See, e.g., 2 THE BLACK BOOK OF PUSHBACKS, *supra* note 221, at 1099, 1101.

<sup>228</sup> See Tondo, *supra* note 225.

apprehension and forced return of migrants attempting to flee Libya by sea, bringing them back to deplorable conditions of detention and exposing them to torture, trafficking, modern slavery and sexual violence.<sup>229</sup>

As compared to the U.S. policies in the Sonoran Desert, Europe's abandonment, unprotection and endangerment policies in the Central Mediterranean are significantly more complex. They involve a range of jurisdictions and multiple international regional and domestic legal regimes, and they are implemented by Libyan and European governments with the help of private actors.<sup>230</sup> Yet, from the perspective of the law of enforced disappearances, they are fundamentally and materially alike. Both fulfill the first and second elements of the definition, as they are orchestrated at the policy level by State actors and implemented by agents of the State. In the Central Mediterranean, European actors pursue spatial policies of deterrence through reckless endangerment, abandonment and unprotection at sea. Weber and Pickering refer to the abuse of indirect movement obstacles, such as environmental factors, as "strategies of non-arrival."<sup>231</sup> The fourth element of the definition is also fulfilled: like the U.S. policies in the borderlands, Europe's deterrence policy in the Mediterranean also causes – by design and in effect – the removal of individuals from the protection of the law.

The most difficult element to establish to support the view that these are policies of *enforced* disappearance is the third element of the test: that the affected individuals are at some point under the custody of the disappearing authority – either directly or indirectly, by virtue of the administrative control exercised over them – which chooses not to register and treat their detention in accordance with normal procedures and guarantees afforded to all persons. European coastal states routinely engage in a range of practices of unprotection in the Mediterranean predicated on policies of "externalization, outsourcing or privatization of agency and, therefore, responsibility," as Schindel aptly remarks.<sup>232</sup> As Müller and Slominski demonstrate, citing Giuffré and Moreno-Lax, Italy has used administrative distancing and remote orchestration with Libya as an attempt to evade its legal obligations (including those under the ECHR) to protect persons on the move.<sup>233</sup> But

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<sup>229</sup> See Thomas Gammeltoft-Hansen & James C. Hathaway, *Non-Refoulement in a World of Cooperative Deterrence*, 53 COLUM. J. TRANSNAT'L L. 235, 250-52, 255-56 (2015).

<sup>230</sup> See, e.g., *Privatised Pushback of the Nivin*, FORENSIC ARCHITECTURE (Dec. 18 2019), <https://forensic-architecture.org/investigation/nivin>.

<sup>231</sup> LEANNE WEBER & SHARON PICKERING, *GLOBALISATION AND BORDERS: DEATH AT THE GLOBAL FRONTIER* 27 (2011).

<sup>232</sup> Estela Schindel, *Deaths and Disappearances in Migration to Europe: Exploring the Uses of a Transnationalized Category*, 64 AM. BEHAV. SCI. 389, 400 (2020).

<sup>233</sup> See Patrick Müller & Peter Slominski, *Breaking the Legal Link But Not the Law? The Externalization of EU Migration Control Through Orchestration in the Central Mediterranean*, 28 J. EUR. PUB. POL'Y 801, 806, 809 (2021) (citing Mariagiulia Giuffré &

through this intricate logistical collaboration, and within the broader framework of financial, technical, and operational support given to Libya, Italy's operative involvement has a decisive influence over Libyan actions. As such, Italy is responsible for the violations of the ECHR which result from the Libyan authorities' actions in these migration deterrence operations.<sup>234</sup> Through such long-standing cooperation, Italian and EU authorities have "invested vastly, to establish a Libyan [Search and Rescue] and interdiction capacity so [the Libyan actors] can assume responsibility for rescue (and disembarkation)."<sup>235</sup> These frameworks have also created a large-scale refoulement and containment regime that unlawfully deprives those crossing the Mediterranean from their right to leave any country.<sup>236</sup>

The Italian authorities, and specifically Italy's Maritime Rescue Coordination Center (MRCC), are in most cases those to receive and respond to distress calls at sea. To establish that Italy's following actions constitute an enforced disappearance, it would need to be shown that these authorities are also those who make the instant and policy-based administrative decision to redirect and facilitate the interception of migrant boats in distress by the Libyan Coast Guard (LYCG). It is such actions that have decisive influence over the personal security and right to life of those who are intercepted by the LYCG, forcibly transferred onto a LYCG vessel, and returned to Libya. As such, the broader strategy designed by Italian authorities and the specific decisions taken by the Italian MRCC in Rome, which directly result in LYCG's apprehension and refoulement of individuals at sea, could reasonably be seen as having authority tantamount to a power that deprives individuals of their liberty. Through Italy's cooperation agreement with Libya, Italy's funding and capacity building of the LYCG, and the MRCC's decisions to assign distress calls to the LYCG rather than responding with Italian vessels, Italy places the affected migrants outside the protection of the law, dismissing Italy's own duty to rescue and intentionally arranging for the migrants to enter custody of the abusive LYCG. Irrespective of whether this

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Violeta Moreno-Lax, *The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows*, in RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW 82, 82-108 (Satvinder Singh Juss ed., 2019)).

<sup>234</sup> See Violeta Moreno-Lax, *The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model"*, 21 GERMAN L. J. 385 (2020).

<sup>235</sup> *Id.* at 390.

<sup>236</sup> For a case that mobilizes these arguments on containment and the right to leave, see Press Release, ASGI, Complaint to the UN Human Rights Committee Over the Role of Italy, Malta, and Libya in Violating the Right to Leave Libya, Resulting in Denial of the Rights of Asylum Seekers (July 24, 2020), <https://sciabacaoruka.asgi.it/en/complaint-to-the-un-human-rights-committee-over-the-role-of-italy-malta-and-libya-in-violating-the-right-to-leave-libya-resulting-in-denial-of-the-rights-of-asylum-seekers/>.

functional conception of deprivation of liberty aligns with current legal doctrine, the limits of this rigidity in the present definition of enforced disappearances is separate and independent of Italy's (and EU institutions') basic duties of protection and investigation commensurate with their level of involvement in the theater of mass disappearance of migrants in the Central Mediterranean.<sup>237</sup>

### III. ENFORCED DISAPPEARANCES OF MIGRANTS WITHIN THE TERRAIN OF ACCOUNTABILITY

The law of enforced disappearances, we have shown, can capture both certain instances and (unofficial) policies of extreme border violence. States in the 'Global North' are particularly prone to use policies that have the effect of disappearing migrants at their fault lines with the 'Global South', or along the global color line.<sup>238</sup> The U.S. Border Patrol stated that its vision for the Prevention Through Deterrence policy is to reduce entries across the southern border in part to "safeguard our immigration heritage."<sup>239</sup> In the European context, policies of disappearance are being implemented at the EU's external borders by countries who serve as the buffer zones separating rich European countries from non-European ones. The countries which act as Europe's "gatekeepers" are heavily funded to pursue the EU's agenda of curbing migration to Europe. European Commission President Ursula von der Leyen thanked Greece for being "our European *aspida* [shield] in these times" after Greek police deployed tear gas to keep hundreds of migrants from entering the land border.<sup>240</sup> It is no coincidence or mistake that these patterns of enforced disappearance of migrants are implemented by 'Global North' countries where they border the 'Global South.' The occurrence of enforced disappearance as a side effect (or tool) of border management is inextricably linked to matters of race, ethnicity, nationality and class, *inter alia*.

In the limited scope of this paper, we have sought to provide a starting point for understanding acts of border violence as enforced disappearance by analyzing the doctrine in the American and European contexts. But the case

<sup>237</sup> See Sara Lodi, *The Mediterranean Sea and the Right to Know About the Fate of Missing Relatives: Access to Justice for Families of Missing Migrants*, 3 SOAS L. J. 103, 105, 114, 118 (2016) (discussing migrant families' right to know); see also Stefanie Grant, *Irregular Migration and Frontier Deaths: Acknowledging a Right to Identity*, in ARE HUMAN RIGHTS FOR MIGRANTS? 48, 54 (Marie-Bénédicte Dembour & Tobias Kelly eds., 2011).

<sup>238</sup> See generally W. E. B. DU BOIS, *THE PROBLEM OF THE COLOR LINE AT THE TURN OF THE TWENTIETH CENTURY* (Nahum Dimitri Chandler ed., 2014).

<sup>239</sup> U.S. BORDER PATROL, *supra* note 146, at 2.

<sup>240</sup> Jennifer Rankin, *Migration: EU Praises Greece as 'Shield' After Turkey Opens Border*, THE GUARDIAN (Mar. 3, 2020), <https://www.theguardian.com/world/2020/mar/03/migration-eu-praises-greece-as-shield-after-turkey-opens-border>.

studies that may illuminate the problem are certainly far from exhausted; for example, Australia's use of offshore migrant processing centers and clandestine removal most certainly warrants a similar analysis to the American and European cases considered in this paper.

As the WGEID has already accepted, many states' policies and practices of criminalizing migration "have created a situation which exposes [migrants] to heightened risks of becoming victims of human rights violations, including enforced disappearances."<sup>241</sup> Enforced disappearance is, as Banu Bargu puts it, both an "agglutinative human-rights violation" that "violates different rights both simultaneously and serially" and also a "concentric human-rights violation" affecting the disappeared and others, including the family and the public at large.<sup>242</sup> But does this legal analysis mean that the norm against enforced disappearances can help real-life victims of border violence in securing accountability? This is still far from clear. First, we should point out that some of the policies described above do not strictly fulfill the elements of the existing legal definition of an enforced disappearance, which has traditionally addressed acts that are directly executed by State agents. However, an effects-based analysis would reveal that many if not most cases of 'pushbacks' would likely fit this definition. While the original *purpose* behind the legal prohibition on enforced disappearances is not imminently applicable to all policies of illegalized migration, there is an undeniable cumulative effect of many such policies which entail the abandonment, unprotection and reckless endangerment of countless lives in the Central Mediterranean, Aegean Sea, the vast wilderness of the Evros region, and indeed many other borderscapes. The perpetration of such policies at scale, as the WGEID has already observed, has "created a situation which exposes migrants to heightened risks of becoming victims of human rights violations, including enforced disappearances."<sup>243</sup> In such situations, the burden of proof for individual cases of disappearance is more easily reversed, and the widespread occurrence of such acts triggers the State's obligation to investigate and prosecute, as well as other states' duties of international cooperation and mutual assistance.

The question of whether the enforced disappearances category can be helpful does not only turn on the legal validity of the allegation. The likely resistance, especially from states, to the application of the law of enforced disappearances to the migration context makes it necessary to go beyond a technical application of the law and venture into moral arguments, priorities and commitments. Further, even when a certain interpretation of the law is

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<sup>241</sup> WGEID Rep. in the Context of Migration, *supra* note 98, at 1.

<sup>242</sup> Banu Bargu, *Sovereignty as Erasure: Rethinking Enforced Disappearances*, 23 QUI PARLE 35, 43 (2014).

<sup>243</sup> WGEID Rep. in the Context of Migration, *supra* note 98, ¶ 80; *see also* Schindel, *supra* note 232, at 389, 399.

legally valid and morally preferable, it may suffer insurmountable political challenges on its way to enforcement. Indeed, justice and accountability, understood in the broadest sense, have legal as well as both moral and political aspects.<sup>244</sup> The demands of justice for such policies and structures of state-sponsored vulnerability extend beyond the retributive justice of individual prosecutions, to family-driven and structurally-oriented processes of restorative and transformative justice, that can drive the legal and political recognition of migrants' bare existence, access to their rights and ultimately also other certain entitlements. Locating the enforced disappearances of migrants within the terrain of accountability, and contributing to the category's usefulness for advocates, involves legal, moral and political arguments.

#### A. Doctrinal Dilemmas

Before moving to a discussion of the morality and politics of our argument, response is due to a few related legal objections. One is that the enforced disappearances framework was never intended for policies concerning the enforcement of borders, which should be countered by reference to legal instruments aimed to protect migrants and refugees.<sup>245</sup> Even when those involve extreme violence against migrants crossing borders, they are different from the legal contexts in which the customary obligation emerged and led to the framing of the prohibition in the ICPPED. Enforced disappearances, the objection may be, are an *anti-authoritarian policy* often born in a context of political repression. They are intended for policies of despots and tyrants who seek to crush political dissent amongst primarily local constituencies.

There is something to this objection. Reviewing the negotiation records (*travaux préparatoires*) of the ICPPED, one encounters many examples concerning political dissenters in Latin America and beyond. In the jurisprudence of international and regional courts, the law of enforced disappearance is applied to those who have been disappeared by the state, or private actors that benefit from its support, on the basis of their group identity, including ethnic, cultural or sexual.<sup>246</sup> Their most visible common denominator, it seems, is that they concern individuals who have been abducted as part of a systemic practice and often unofficial policy of repression of a social group that is seen to pose a threat. As we observe above,

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<sup>244</sup> See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).

<sup>245</sup> For a comprehensive review of these, see generally VINCENT CHETAIL, INTERNATIONAL MIGRATION LAW (2019). See also Duhaime & Thibault, *supra* note 1, at 572-75 ("There is no specific legal instrument that deals with enforced disappearances of migrants.").

<sup>246</sup> See ICPPED, *supra* note 3, art. 2.

the effects of these egregious policies of state violence on an entire group of society are central to the political environment in which the prohibition was developed and in the context of which it emerged as a norm of international law.<sup>247</sup> Whereas the interpretation of an international law rule should be informed by the *ordinary meaning* of the treaty provisions,<sup>248</sup> the historical context in which the prohibition was coined and its past applications are secondary sources of guidance applicable to contexts that were not contemplated by its drafters. The significance of past applications and historical record is even less relevant to an argument that relies on the prohibition's customary status in international law (which is crucial for our argument on U.S. practices).<sup>249</sup> Indeed, Article 13 of the ICPPED, discussed above, expressly removes the prohibition from the context of politics, by providing that an enforced disappearance is not a "political offense" for the purposes of extradition.<sup>250</sup>

Even if the expressed views of states (*opinio juris*) emphasize that the prohibition remains applicable in states of emergency and similar circumstances – such as the Greek law's definition of enforced disappearance, which includes acts committed also "in the context of abnormal situations affecting the institutions of the State"<sup>251</sup> – the constitutive elements of such acts under IHRL's contemporary definition do not pose such a requirement.<sup>252</sup> According to this broader customary rule,

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<sup>247</sup> The IACtHR has held that owing to the particular gravity of enforced disappearance the corresponding obligation to punish and investigate those responsible has attained the status of *jus cogens*. *Goiburú v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 84 (Sept. 22, 2006); *Anzualdo-Castro v. Peru*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 202, ¶ 59 (Sept. 22, 2009); *Radilla-Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 209, ¶ 139 (Nov. 23, 2009); *see also* Trindade, *supra* note 70, at 507-08; Jeremy Sarkin, *Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law*, 81 NORDIC J. INT'L L. 537, 546 (2012).

<sup>248</sup> Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

<sup>249</sup> *See* Panos Merkouris, *Interpreting Customary International Law: You'll Never Walk Alone*, THE THEORY, PRAC., & INTERPRETATION OF CUSTOMARY INT'L L. (forthcoming 2022).

<sup>250</sup> ICPPED, *supra* note 3, art. 13; *see also* SCOVAZZI & CITRONI, *supra* note 32, at 300.

<sup>251</sup> Art. 322C(4) CC, which provides that the limitation period of the crime is suspended when the crime is committed under a state of unlawful Authority. *See* GREEK NAT'L COMM'N FOR HUM. RTS., *Observations by the Greek National Commission for Human Rights (GNCHR) on Greece's Initial Report on the Implementation of the International Convention for the protection of all Persons from Enforced Disappearance*, at 15 (Nov. 29, 2018), [https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/GRC/INT\\_CED\\_IFL\\_GRC\\_42378\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/GRC/INT_CED_IFL_GRC_42378_E.pdf).

<sup>252</sup> Recall that IHRL, unlike ICL, does not require intent, or *mens rea*. *See* Rome Statute, *supra* note 3, art. 30. That said, several of the policies above do, *prima facie*, meet the requirement of intent. For example, it is hard to think of unintended U.S.-style policies of child

individual instances of ‘pushbacks’ may fall under the category of enforced disappearances irrespective of whether they are part of a formal system or state-initiated policy of authoritarian oppression. But this is commonly a case-by-case determination which, in most circumstances, is only made possible through an effects-based analysis. As Howard Davis and Melanie Klinkner have highlighted, the (non-criminal) preventative orientation towards enforced disappearances under IHRL allows us to focus not only on the acts themselves, but also on the policies and circumstances of structural violence that lead to disappearances.<sup>253</sup> The historical record of the prohibition’s application also holds examples of governments creating cross-border infrastructures to extradite those they suspect of political crimes, which may amount to enforced disappearances.<sup>254</sup> In the 1970s, Latin American countries such as Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay carried out such operations: “a multilateral agreement was signed in 1975 by these States under which they coordinated their actions in what has become known as Operation Condor. In many cases, the final outcome of these secret abductions was enforced disappearance.”<sup>255</sup>

It would be erroneous to assume that policies of disappearance are necessarily a *symptom* of authoritarian rule, instead of also being *constitutive* of it, given the state and non-state networks that emerge and thrive as a result of certain clandestine strategies of border enforcement.<sup>256</sup> There is no requirement that the government that perpetuates enforced disappearances is authoritarian *per se*, but rather that the use of enforced disappearances is itself authoritarian and is indicative of the nature of a government’s regime. This is reflected clearly in the *travaux préparatoires* of the ICPPED, which describe several types of regimes that have committed enforced

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separation; similarly, the Greek practice of abducting migrants in public thoroughfares and then abandoning sending them adrift in the Aegean in unnavigable life-rafts is almost certainly premeditated.

<sup>253</sup> Davis & Klinkner, *supra* note 1, at 686-87. In their own language: “Migrants may face abduction for political reasons, disappear in the context of smuggling or trafficking or through disorganized or clandestine detention or deportation. Such disappearances do not necessarily exemplify deliberate state policy in the ‘Nacht und Nebel’ tradition, but it is clear that state responsibility for creating conditions for enforced disappearance can be found in the corrupt behaviour of officials and their complicity in smuggling and trafficking, official indifference, policies of ‘push back’ which encourage more dangerous behaviour by migrants and policies of detention and return and the use of unofficial camps and the agencies of non-state actors, create the conditions for forced disappearance.” *Id.* (citation omitted).

<sup>254</sup> As Duhaime & Thibault, *supra* note 1, have pointed out, both historically and at present many migrant disappearances are concluded by governments who seek their political opponents’ “[e]migration.” *Id.* at 576.

<sup>255</sup> *Id.* (citation omitted).

<sup>256</sup> Tazzioli & De Genova, *supra* note 1, at 868, 871 (arguing that “kidnapping” has been “a strategy of border governmentality” and a “tactic for governing human mobility”).

disappearances. For example, some parties held that “enforced disappearances constituted acts of collective terror, aimed not only at individuals or their families, but at society as a whole.”<sup>257</sup> For families and loved ones, as those who are “affected by disappearances” and thus granted the status of victims,<sup>258</sup> such acts are “crimes of suspended time,” the result of “organized not knowing” and deception.<sup>259</sup> What do parents separated from their children feel, not knowing where they have been taken to, if not “suspended time?”<sup>260</sup> Shahram Khosravi thus discusses the way in which deportation policies result in “stolen time.”<sup>261</sup> These ideas of terror and suspended or stolen time, resulting from the denial of constitutional protections and rule of law guarantees applicable to detention and deportation, precisely explain how enforced disappearances come to form a certain kind of authoritarianism whenever they are used, and can therefore apply equally to the context of extreme border violence. Contemporary border spaces have regrettably often transformed into areas of authoritarianism.<sup>262</sup>

Further, as described above, the emergence of the prohibition out of the Latin American experiences sought to counter policies directed disproportionately against large populations of civilians, including farmers, indigenous groups and children.<sup>263</sup> The prohibition was, from its inception, more broadly oriented towards egalitarianism and the rule of law, and against the abuse of power by state institutions in response to perceived threats to national security. In the present context of border violence too, we see the need for the law to protect persons on the move from being deprived of their basic and full rights. States often assert that immigration is a social and political threat and justify repressing it through racialized social policies, such as those promoted by the European Commissioner for the Protection of

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<sup>257</sup> Bernard Kessedjian (Special Rapporteur on Civil and Political Rights, Including the Question of Enforced or Involuntary Disappearances), *Rep. of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of all Persons From Enforced Disappearances*, ¶ 17, U.N. Doc. E/CN.4/2003/71 (Feb. 12, 2003).

<sup>258</sup> *Id.* ¶ 83; ICPPED, *supra* note 3, art. 24.

<sup>259</sup> *Id.* ¶ 21.

<sup>260</sup> *Id.*; *cf.* Tazzioli & De Genova, *supra* note 1, at 875 (“Indeed, kidnapping not only decelerates migrant mobilities and forces migrants into conditions of indefinite waiting, but also more fundamentally contributes to disrupting migrants’ lives and seizing their autonomous time.”).

<sup>261</sup> See Shahram Khosravi, *Stolen Time*, RADICAL PHIL. 2.03, Dec. 2008, at 38, 41. <https://www.radicalphilosophy.com/article/stolen-time>.

<sup>262</sup> Tazzioli & De Genova, *supra* note 1, at 869 (indicating how right-wing vigilantes “have taken the matter of kidnapping migrants into their own hands” – which is a characteristic dynamic under authoritarian rule).

<sup>263</sup> See, e.g., SCOVAZZI & CITRONI, *supra* note 32.

the European Way of Life (formerly called the ‘migration commissioner’ of the European Commission).<sup>264</sup>

From this perspective, there is much in common between, for example, current disappearances of Latin American migrants en route to the United States and the historical disappearances of Guatemalan peasants in their own country. Gurmendi expressed this basic insight elegantly:

Using the term enforced disappearance in those cases where the US “lost track” of migrant children is important, because it forces the American people to put the policy in its true perspective and gravity. Separating families is in itself a cruel policy that violates the rights of migrants. Forcefully disappearing a subset of these children reveals the levels of inhumanity the policy entails, comparable in shape and form to the despicable practices of dictatorships such as Videla’s Argentina and Pinochet’s Chile. If the United States is to take responsibility for the harm it has caused these children and their families, a good place to start is to call it what it is.<sup>265</sup>

A final objection that we anticipate concerns the feasibility that the WGEID and CED would find states indirectly responsible for enforced disappearances where their policies and practices of abandonment, unprotection and endangerment – like those operative in the Central Mediterranean and Sonoran Desert – strand migrants in life-endangering conditions. Specifically in relation to ‘pushbacks,’ the WGEID has maintained that where migrants disappear as “an involuntary but direct consequence of the actions of the State, for instance in the case of pushback,” these “may not, strictly speaking, be enforced disappearances, [but] they may nevertheless equally trigger State responsibility in the context of the Declaration.”<sup>266</sup> In a further report, the WGEID held that the key to preventing the enforced disappearances of migrants is operating official detention and deportation procedures, including by detaining individuals only in officially recognized places, permitting their access to communication with loved ones and legal counsel, and ensuring that any deportation is “formally documented and undertaken in accordance with the law” and that their release is verifiable and “in conditions in which their physical integrity and ability to fully exercise their rights are assured.”<sup>267</sup> It thereby follows that the overall patterns of ‘pushbacks’ taking place at the borders of the United States, Greece and Croatia most probably fulfill the core constituent elements of the prohibition, where the State routinely

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<sup>264</sup> See, e.g., HARSHA WALIA, BORDER AND RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 122 (2021); see also Pat Rubio Bertran, *supra* note 109.

<sup>265</sup> Gurmendi, *supra* note 127, at 3.

<sup>266</sup> WGEID Rep. in the Context of Migration, *supra* note 98, ¶ 82.

<sup>267</sup> *Id.* ¶ 63, 74-75, in accordance with Articles 10-11 of the Declaration.

practices illegal detention and expulsions that remove entire groups of individuals from the protection of the law, in circumstances of active State concealment and denial, and in ways that expose them to hostile environments. While it may be more complicated to apply the definition of enforced disappearance to the spatial policies in the Sonoran Desert and Central Mediterranean, and although a per-case effects-based analysis would be needed to make a determination of a direct case of enforced disappearance, the State's indirect actions and omissions in such spatial policies of endangerment should at least trigger investigative and structural reform obligations. This has yet to be the case, but numerous legal challenges are currently pending before EU institutions and UN bodies against several EU states, including Italy, Croatia and Greece, seeking accountability for policies of illegal 'pushbacks' that both condition and cause migrant disappearances.<sup>268</sup>

Amid these legal challenges are a series of applications to the ECtHR, as well as two individual complaints against Croatia and Greece for 'pushbacks' argued to constitute enforced disappearances, which were brought before the UN Human Rights Committee in 2019 and 2020 respectively.<sup>269</sup> The Greek National Commission for Human Rights, as well as Human Rights Watch and the Border Violence Monitoring Network, made submissions to the Committee on Enforced Disappearances (CED) in June 2020 ahead of Greece's first reporting cycle since it became a state party to the ICPPED in July 2015.<sup>270</sup> The Committee's concluding observations on Greece, released on 12 April 2022, state that it is "concerned about the reportedly high number of migrants who have disappeared in Greek waters of the Mediterranean and the Evros river" and about "the significant obstacles that family members of disappeared migrants face in order to search for and locate their loved ones" such as the non-functionality of the DNA database.<sup>271</sup> The Committee recommended that Greece "[r]edouble its efforts to prevent and investigate

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<sup>268</sup> See, e.g., Ombudsman Inquiry Opened on How European Commission Seeks to Ensure Protection of Fundamental Rights in Border Management Operations by Croatian Authorities, Eur. Ombudsman (Nov. 9, 2020), <https://www.ombudsman.europa.eu/en/news-document/en/134797>.

<sup>269</sup> See *Push-Backs in Croatia: Complaint before the UN Human Rights Committee*, EUR. CTR. FOR CONST. & HUM. RTS. [ECCHR], <https://www.ecchr.eu/en/case/push-backs-croatia-complaint-un-human-rights-council/> (last visited Jan. 22, 2022).

<sup>270</sup> See *Status of Reports by Country*, OHCHR, <https://www.ohchr.org/Documents/HRBodies/CED/StatusRatificationReportsUnderConvention.xlsx> (last visited Jan. 27, 2021). Note that Greece has not recognized the Committee's competence under Articles 31 and 32 and will need to consent to a visit under Article 33.

<sup>271</sup> See CED, Concluding Observations on the Report Submitted by Greece Under Article 29(1) Of the Convention, ¶¶ 26-27, U.N. Doc. CED/C/GRC/CO/ (Apr. 12, 2022).

the disappearance of migrants.”<sup>272</sup> Our hope is that the WGEID and CED can make determinations that would extend the formal and practical benefits of this legal framework to these extremely violent, organized, and highly clandestine forms of border policing by holding that they constitute policies and practices that condition and cause enforced disappearance. Such findings would surely be fruitful to the ongoing efforts to hold Greece accountable for systemic breaches of EU law,<sup>273</sup> in a similar manner to the infringement procedure the European Commission commenced in the case of Hungary, and which is also relevant to several other EU Member States engaged in systemic ‘pushbacks’ such as Croatia and Poland.

### *B. Moral Foundations*

But why push to interpret the enforced disappearance prohibition for the protection of migrants, if other legal interpretations which condemn border violence are already valid in current legal practice? Beyond the legal reasons, there are moral reasons for this too, which are rooted in the idea that every person should enjoy the right to recognition and equality before the law. The enforced disappearances prohibition can operationalize this fundamental notion of universal equality of persons before the law.

The universalism offered by the human rights framework has often failed to protect migrants.<sup>274</sup> For Jaya Ramji-Nogales, the reasons for this failure are to be located, first, in the human rights framework’s individualism.<sup>275</sup> But as political theorist Ayten Gündoğdu compellingly shows, “disappearances” may offer a way out of this radical individualism. Her analysis in this context does not rely on the law of enforced disappearances, but rather on an embodied, experiential or “phenomenological” account of how they work. Calling border deaths enforced disappearances, she says, “brings to view an ineluctably *intersubjective* understanding of the lives that are lost and forced to disappear, taking us beyond the violation of the individual right to life and alerting us to the social fabric from which these lives are violently torn.”<sup>276</sup>

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

<sup>273</sup> On the pending infringement procedure complaint against Greece before the European Commission, see, for example, *Rights Groups Press European Commission to Investigate Violations of EU Law in Greece over Treatment of Migrants*, OXFAM INT’L (Sept. 22, 2020), <https://www.oxfam.org/en/press-releases/rights-groups-press-european-commission-investigate-violations-eu-law-greece-over>.

<sup>274</sup> See generally Jaya Ramji-Nogales, *Undocumented Migrants and the Failures of Universal Individualism*, 47 VAND. J. TRANSNAT’L L. 699 (2014).

<sup>275</sup> *Id.* at 703.

<sup>276</sup> Ayten Gündoğdu, *Forced Disappearances: A Critical Phenomenology of Border Deaths 26* (unpublished manuscript) (on file with the authors) [hereinafter Gündoğdu, *Forced Disappearances*] (emphasis added); see also Ayten Gündoğdu, *Border Deaths as Forced Disappearances: Frantz Fanon and the Outlines of a Critical Phenomenology*, 5 PUNCTA J.

For Gündoğdu, this special aspect of an analysis centering on disappearances has to do with its necessary engagement with the relationships that a person on the move embodies: “It reminds us that the body cannot be reduced to a datum in statistics, biometrics, and forensics and that it should instead be understood in its ineluctable relationality to other bodies in the world.”<sup>277</sup>

Like Gündoğdu, we are at best cautiously optimistic about the potential of international law to offer solutions. That the law of enforced disappearances can indeed ensure accountability, where other legal vocabularies have failed to do so, is far from clear. Efforts to advance accountability against border violence have in recent years turned beyond the traditional tools of refugee law and human rights law to criminal law, tort law and the law of the sea.<sup>278</sup> Although important victories have been won,<sup>279</sup> it has been difficult to counter the larger reality of systemic border violence and impunity. This is not only due to extra-legal political barriers, but indeed the structure of the law itself. Not only do international laws that govern movement give preference to states’ sovereign interests, state interpretive practices often take advantage of legal technicalities and ‘loopholes’ to obfuscate their control and relinquish responsibility over the ways in which borders and asylum systems inherently expose migrants to grave violence,<sup>280</sup> render survivors of such violence rightless,<sup>281</sup> and “relegat[e] those who lack authorization to travel to precarious personhood – one that can be undermined, incapacitated, or revoked in multitudinous ways.”<sup>282</sup>

Contrary to other bodies of law, the law of enforced disappearances does not construct a survivor as an atomized individual who can only make claims for their own self.<sup>283</sup> Individual claims are generally represented by NGOs, states and other recognized non-state actors, but the law of enforced disappearances adds to these the unique and fundamental entity of the family and of other loved ones, who are not only mere representatives but also

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<sup>277</sup> Gündoğdu, *Forced Disappearances*, *supra* note 276, at 26.

<sup>278</sup> For international criminal law, see generally Agnès Callamard (Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions), *Rep. on Unlawful Death of Refugees and Migrants*, U.N. Doc. A/72/335 (Aug. 15, 2017). See also Costello & Mann, *supra* note 6.

<sup>279</sup> Costello & Mann, *supra* note 6, at 33.

<sup>280</sup> See, e.g., Gammeltoft-Hansen & Hathaway, *supra* note 229, at 240-41.

<sup>281</sup> See generally AYTEN GÜNDOĞDU, *RIGHTLESSNESS IN AN AGE OF RIGHTS* (2015).

<sup>282</sup> Gündoğdu, *Forced Disappearances*, *supra* note 276; cf. Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 *EUR. J. INT’L L.* 347 (2018).

<sup>283</sup> The story we often hear about international law in the 20th and 21st centuries is about states and individuals. Ramji-Nogales ties human rights universalism to individuals. See Ramji-Nogales, *supra* note 274, at 747-50.

standalone rights-holders and claimants.<sup>284</sup> The law of enforced disappearances suggests that when someone is rendered rightless, their family members can still impose obligations on state authorities which directly stem from their plights by allowing for the transferability of the claim among family members. This subfield of international human rights law recognizes both the salient standing of daughters, sons, spouses, and siblings and their capacity to exercise an actionable right by speaking on behalf of their loved ones when the latter are removed from the protection of the law.<sup>285</sup> These legal rights give legal life to the presence of the disappeared in the life-experiences and memories of their loved ones. They cast meaning into the mold of anti-impunity discourses, which may otherwise ring hollow.<sup>286</sup> This basic belonging to family also resonates with many migrants' lived experiences,<sup>287</sup> whether the family remains intact throughout the journey or is severed or shattered and remains an object of longing.<sup>288</sup>

The transferability of the claims, as a matter of law, also extends to all those who are "affected by the disappearance," such as fellow travelers, and grants them the status of *victims* who retain the right to know about what happened to the disappeared.<sup>289</sup> While many unauthorized migrants in need of protection often travel with family members, others do so in groups of unrelated migrants coming from similar locations, as Distretti observes, in "a tactic of self-protection from the threat of what in legal terms could be categorized as an enforced or involuntary disappearance."<sup>290</sup> In comparison with loved ones of the disappeared, fellow travelers may initially not have the most access to information that could assist in the identification of the missing individual.<sup>291</sup>

<sup>284</sup> On the sometimes-overlooked role of the family in transnational law, see generally, for example, Isailovic, *supra* note 28.

<sup>285</sup> The family has a recognized legal status specified in ICPPED, *supra* note 3, arts. 18, 20, 24.

<sup>286</sup> See generally, e.g., ANTI-IMPUNITY AND THE HUMAN RIGHTS AGENDA (Karen Engle et al. eds., 2016).

<sup>287</sup> See the moving description in JASON DE LEÓN, THE LAND OF OPEN GRAVES: LIVING AND DYING ON THE MIGRANT TRAIL 274 (2015).

<sup>288</sup> See, e.g., *id.* 258-59.

<sup>289</sup> ICPPED, *supra* note 3, art. 24. See also Lodi, *supra* note 237, at 103-05, 111-16.

<sup>290</sup> Distretti, *supra* note 1, at 118.

<sup>291</sup> As summarized by the Missing Persons Project of the International Committee of the Red Cross:

It is much harder for a family to pin down the time someone went missing on a long migratory journey as the search may straddle multiple borders and sets of officials, with no obvious starting point. There is a need for transnational cooperation. Socio-economic pressures often lead to migration in the first place, and the loss of potential breadwinners exacerbates hardship for the family. Those with key information may not be family members but those on the same migratory journey. Religious, ethnic, linguistic and

The ICPPED is the first human rights treaty to explicitly codify the right to truth and information,<sup>292</sup> which can be claimed by relatives, co-travelers, as well as other interested parties such as civil society groups and third party States.<sup>293</sup> The beneficiaries of this right to know and its accompanying state-incumbent obligations also include members of the public in the disappearing state, especially where such cases are systematically concealed and denied and reporting is seldom possible.<sup>294</sup> Article 12 of the Convention, which the CED considers of particular relevance to the migration context, provides for procedures, infrastructure, and cooperative frameworks to enable survivors and families' right to report, and mandates the jurisdictional state's obligation to undertake an investigation – including when a report is filed in another country, and in some cases in an *ex officio* capacity, that is on their own motion on the basis of information that is less likely to be publicly known and reported.<sup>295</sup>

State parties are required to provide for the availability of informational remedies at the domestic level, including by keeping official registries and records of persons deprived of liberty, their right to remedy, and access to information about such persons to those “with a legitimate interest.”<sup>296</sup> If the whereabouts and fate of the disappeared remain unknown,<sup>297</sup> the failure to investigate, provide information about the circumstances of an enforced disappearance and ultimately prosecute those responsible in a timely manner, amounts to a continuous violation, in theory, even after the person's return to the disappearing state.<sup>298</sup> In other words, this framework has the unique ability to capture the crucial moral significance Gündoğdu identifies in “the social fabric from which these lives are violently torn”<sup>299</sup> and the systemic harm it produces that is carried by families, other loved ones and sometimes also entire communities. The recognition of the family as a rights-bearing

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other discrimination across borders can hinder the search.

SHARI EPEL, ICRC MISSING PERSONS PROJECT, REPORT ON THE WORKSHOP: SUPPORTING AND STRENGTHENING WORK WITH RELATIVES OF MISSING PERSONS 12 (2019), [https://reliefweb.int/sites/reliefweb.int/files/resources/Missing\\_Persons\\_Sarajevo\\_Report\\_WEB.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Missing_Persons_Sarajevo_Report_WEB.pdf).

<sup>292</sup> Manfred Nowak, *Torture and Enforced Disappearances*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS: A TEXTBOOK 151, 181-82 (Catarina Krause & Martin Scheinin eds., 2d ed. 2009). On the right to truth, see Nowak, *supra* note 79, ¶ 31.

<sup>293</sup> ICPPED, *supra* note 3, arts. 12, 15.

<sup>294</sup> *See id.* art. 20.

<sup>295</sup> CED, *supra* note 4, ¶¶ 15-17, 22-25.

<sup>296</sup> *Id.* arts. 18, 20.

<sup>297</sup> For example, see *Blake v. Guatemala*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998) regarding continuous crimes, including those committed before ratification.

<sup>298</sup> *See generally* ROBINS, *supra* note 11; BARANOWSKA, *supra* note 11.

<sup>299</sup> Gündoğdu, *Forced Disappearances*, *supra* note 276, at 26.

entity by this framework allows us to step out of the methodological statism of public international law and human rights law and reimagine them with and for survivors and affected communities.<sup>300</sup>

Thanks to the status of the family, even an individual who is, either directly or indirectly, disappeared from the geographic map is not entirely erased from the legal map.<sup>301</sup> This is particularly critical in relation to those ‘released’ from detention in the context of ‘pushbacks’, following even a brief encounter with a state or its proxy agent. Schindel aptly describes this operation as a “form of ‘refoulement’ where unwanted travelers are being pushed back not to a third country but to zones of abandonment to the elements, that far from being ‘natural,’ are politically crafted.”<sup>302</sup> This resonates with Banu Bargu’s observations about *enforced* disappearance as an exclusive sovereign power to engage “violence that seeks not only to eradicate the person who is the target of enforced disappearance but also to erase the fact that the person ever existed.”<sup>303</sup> “The absence of the record,” Bargu remarks, “inheres in the violence of enforced disappearance,”<sup>304</sup> and persists even after their untimely death, making it even less likely that their remains would be located and retrieved by their loved ones. This is an accurate description of the policies that operate in the Sonoran Desert, Central Mediterranean and Evros River borderscapes. De León explains how the environment itself has been utilized and weaponized to continue and increase violence directly inflicted by border enforcement agencies.<sup>305</sup> A key rationale for the mobilization of the legal framework on enforced disappearances is resisting and countering these manifold forms of invisibilization and erasure through rights-claims made on behalf of the disappeared by their loved ones. By distributing both claims and standing rights, the disappeared person’s removal from the protection of the law does not also eliminate their claim to reappear.

This makes the law of enforced disappearances a critical instrument within the larger terrain of public international law, providing a unique opportunity to bypass rightlessness and impunity. It becomes the legal mechanism that offers a more accurate description of the exclusion of migrants from the realm of society and the deprivation of their basic rights through secretive state violence, which entails the concealment of information on the fate of the

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<sup>300</sup> See generally RIGOBERTA MENCHU, I, RIGOBERTA MENCHU: AN INDIAN WOMAN IN GUATEMALA (Elisabeth Burgos-Debray ed., Ann Wright trans., 1983).

<sup>301</sup> On enforced disappearances as a politics of erasure, see Bargu, *supra* note 242, at 35-57.

<sup>302</sup> Schindel, *supra* note 232, at 399.

<sup>303</sup> Bargu, *supra* note 242, at 43.

<sup>304</sup> *Id.* at 40.

<sup>305</sup> DE LEÓN, *supra* note 287, at 274-75 (“[T]he Sonoran Desert did what Border Patrol strategies wanted it to.”).

disappeared, as well as the policies of disappearance. Informational remedies about the whereabouts of such persons are only the most urgent situational form of redress for this phenomenon. Other reparations such as restitution, satisfaction and compensation may also lessen or remove the consequences of the enforced disappearance, including on the right to access asylum procedures. In many cases, those subject to disappearance and torture through expulsion have no choice but to attempt return to their disappearing state to claim asylum, where they are then discouraged from seeking remedies due to risk of reprisals.

Observing the contemporary attacks on the human rights of migrants, we are morally committed to choose a legally valid interpretation that articulates a universal egalitarianism and that does not suffer from the pitfalls of individualist human rights frameworks – and one that seeks to rectify border violence, rather than one that remains indifferent to it. An interpretation that excludes migrants from the scope of “enforced disappearances” thus likely rests on objectionable premises. They stem from an insistence on the traditional foundations of the state and the individual, where the state seeks to eliminate certain identity groups by producing “a body without identity and an identity without body.”<sup>306</sup> In doing so it often relies on its ability to enjoy unjustifiable immunity. The creation of such ‘lawless’ spaces is what, for Mbembe, enables the large-scale fabrication of death.<sup>307</sup> This is perhaps a story more easily squared with historical images of authoritarian rule. But as argued above, authoritarianism should be defined by its illicit policies undertaken in a lawless theater (often through the suspension of the rule of law under a *de facto* state of emergency) and by the inhumanity of their effects, not by its historical images. It may change its form, and today one of its forms is characteristic of state borders.

For years, unauthorized migrants have been suffering authoritarian abuses in many countries, with most courts and tribunals unable to provide them with full and effective remedies. The phenomenon has become so dominant that in 2017, then UN Special Rapporteur Agnès Callamard began her report on the *Unlawful Death of Refugees and Migrants* with resounding language.<sup>308</sup> This entrenched pattern of violence, she said, “can only be described as a human rights and humanitarian crisis. This crisis is characterized by mass casualties globally, a regime of impunity for its perpetrators and an overall tolerance for its fatalities . . . an international crime whose very banality in the eyes of so many makes its tragedy

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<sup>306</sup> GABRIEL GATTI, SURVIVING FORCED DISAPPEARANCE IN ARGENTINA AND URUGUAY: IDENTITY AND MEANING 30 (2014) (citation omitted). See also Schindel, *supra* note 232, at 404 (drawing on Gatti).

<sup>307</sup> See ACHILLE MBEMBE, NECROPOLITICS 33-34 (La Découverte ed., Steven Corcoran trans., 2019).

<sup>308</sup> *Rep. on Unlawful Death of Refugees and Migrants*, *supra* note 278, ¶ 1.

particularly grave and disturbing.”<sup>309</sup> If by including “missing migrants” in the “disappeared” one may effectively counter such “tolerance,” then the extension of the legal framework on enforced disappearances to these realities fully and effectively in the most capacious manner is what should indeed be preferred.<sup>310</sup>

### C. Political Struggles

Perhaps the hardest question is whether this doctrinally and morally compelling application of the law of enforced disappearances is worth pursuing from a consequentialist point of view. In other words, what, if any, are the chances that such an interpretation is not only accepted, but that it could and will actually end up assisting migrant victims in need of legal remedies, and countering systemic border violence? This is mainly a question about the politics of such a framework. Without political feasibility – that is, the acceptability of the implications of this legal reasoning for various stakeholders, including families, national and international institutions, and to the general public – both doctrinal exercise and moral reflection may simply be idle.

The analysis of the family provided above does not only reflect a moral or utopian understanding of the law. It also potentially establishes a source for political power or at least active resistance to domination, led by migrant actors.<sup>311</sup> The basis for the legal interpretation we offer is in fact the real-life ongoing social, political and legal struggles of families of disappeared migrants around the world. Examples of such movements include groups such as Movimiento Migrante Mesoamericano,<sup>312</sup> Caravana de Madres de

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

<sup>310</sup> This is not to disregard the importance of some litigation efforts that have been successful. Recent examples of success in ‘pushback’ cases include, for example, *Affaire D c. Bulgarie*, App. No. 29447/17, Eur. Ct. H.R. (July 20, 2021) (*summarized in English D v. Bulgaria - 29447/17*, Legal Summary, Eur. Ct. H.R. (July 20, 2021), <https://hudoc.echr.coe.int/eng?i=002-13366>); *Shahzad v. Hungary*, App. No. 12625/17, Eur. Ct. H.R. (July 8, 2021); *D.A. and Others v. Poland*, App. No. 51246/17, Eur. Ct. H.R. (July 8, 2021). Such cases may end up being important articulations of principle. But the remedies they provide to individual litigants are limited. By and large, the rights of unauthorized migrants still suffer from a deep enforcement gap. If a valid argument on enforced disappearances can help generate accountability for this mass of global casualties, that in itself provides a moral reason to prefer to interpret it accordingly.

<sup>311</sup> Cf. Tazzioli & De Genova, *supra* note 1, at 877 (describing ways migrants have resisted detention); see generally MAURICE STIERL, *MIGRANT RESISTANCE IN CONTEMPORARY EUROPE* (2019).

<sup>312</sup> MOVIMIENTO MIGRANTE MESOAMERICANO: CARAVANA DE MADRES DE MIGRANTES DESAPARECIDOS, <https://movimientomigrantemesoamericano.org/> (last visited Jan. 27, 2022).

Migrantes Desaparecidos;<sup>313</sup> Comité de Familiares de Migrantes Desaparecidos del Progreso (COFAMIPRO) of Honduras;<sup>314</sup> Comité de Familiares de Migrantes Fallecidos y Desaparecidos de El Salvador (COFAMIDE);<sup>315</sup> and Comité de Familiares de Migrantes Desaparecidos del Centro de Honduras (COFAMICENH).<sup>316</sup> The first Global Summit of Mothers of Missing Migrants, convened in Mexico City in November 2018 by the Mexican NGO network Movimiento Migrante Mesoamericano and the Italian NGO Carovane Migranti, was both a space for informal healing and a platform for claiming their rights, including by issuing a manifesto by the mothers of missing migrants.<sup>317</sup> Carovane Migranti, “inspired by the Central American Caravan of Mothers,” has organized “annual marches across Italy, bringing activists and families of the missing from the French-Italian border at Ventimiglia to Sicily,” and also search missions in Tunisia that take the form of political activism.<sup>318</sup> The ‘Vidas Sin Rastro’ campaign, launched in May 2022 by 102 independent organizations, is the first of its scale to highlight the lack and demand the provision of effective responses guaranteeing the rights of the dead, disappeared and their families at the Southern border of Europe. The campaign’s manifesto, calling for data infrastructure, protocols and agreements for interstate cooperation to be set up for the over hundred thousand individuals perished en route to Europe, was also filed as a complaint to the Spanish Ombudsman.<sup>319</sup>

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<sup>313</sup> See Barbara Sostaita, *The ‘Caravan of Mothers of Missing Migrants’ Is Traveling Through Mexico & Demanding Justice for Their Children*, REMEZCLA (Mar. 12, 2019), <https://remezcla.com/features/culture/caravan-mothers-missing-migrants-trave-mexico-demand-justice/>.

<sup>314</sup> COFAMIPRO, <https://www.cofamiprohonduras.org/> (last visited Jan. 27, 2022).

<sup>315</sup> COFAMIDE, <http://cofamide.blogspot.com/> (last visited Jan. 27, 2022).

<sup>316</sup> Blanca Marilyn Castro et al., *Comité de Familiares de Migrantes del Centro de Honduras (COFAMICENH)*, ECOLOGIES OF MIGRANT CARE (Nov. 19, 2017), <https://ecologiesofmigrantcare.org/el-comite-de-familiares-de-migrantes-del-centro-de-honduras-cofamicen/>.

<sup>317</sup> See Marta Sánchez Dionis, *Resisting Invisibility: Mothers of Missing Migrants, Border Criminologies*, UNIV. OF OXFORD FAC. OF L.: BORDER CRIMINOLOGIES BLOG (Dec. 18, 2018), <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/12/resisting>; see also Encarni Pindado, *Manifiesto de la Cumbre Mundial de Madres de Migrantes Desaparecidos*, MOVIMIENTO MIGRANTE MESOAMERICANO: CARAVANA DE MADRES DE MIGRANTES DESAPARECIDOS (Nov. 5, 2018), <https://movimientomigrantemesoamericano.org/2018/11/05/manifiesto-de-la-cumbre-mundial-de-madres-de-migrantes-desaparecidos/>.

<sup>318</sup> Sánchez Dionis, *supra* note 317.

<sup>319</sup> *Vidas Sin Rastro*, LA ASOCIACIÓN PRO DERECHOS HUMANOS DE ANDALUCÍA (May 10, 2022), <https://www.apdha.org/vidas-sin-rastro/>. See for the campaign manifesto in English: Statewatch, Spain: Launch of the “Vidas sin rastro” campaign, for the rights of the dead and missing migrants at the Southern border (May 10, 2022),

There are real signs that such transnational organizing is successfully shifting public discourse and mobilizing both governments and international bodies to address the global phenomenon of disappeared migrants by confronting the structures and actors that disappear them. In response to families' and civil society's mobilization across at least four Latin American states, a transnational mechanism (Mecanismo de Apoyo Exterior Mexicano de Búsqueda e Investigación ("MAE")) was established in Mexico in 2015 and promised to facilitate the investigation of cases of missing migrants.<sup>320</sup> Operating as yet without U.S. cooperation, this mechanism is limited in what it can achieve when it comes to investigating disappearances in the U.S. borderlands or in the U.S. detention system.<sup>321</sup> Although there is much work still to be done to fully activate the transnational mechanism based in Mexico, it is currently the only such transnational mechanism of its kind – itself insufficient, but a tangible model which other existing political-legal campaigns can also demand.

The urgent need for better access to informational remedies thus remains. Those disappeared through state violence are searched for and found primarily by families and humanitarian volunteers. In the United States, they must circumvent CBP's barriers to information.<sup>322</sup> Indeed, as reported by La Coalición de Derechos Humanos and No More Deaths, "It's hard enough for any family to deal with the disappearance of a loved one, but being lied to, calls getting dropped, being stonewalled, and treated rudely—being given the bureaucratic run-around when trying to get a search initiated—is such a torturous aggravation of that pain."<sup>323</sup> The U.S. government's purported attempts to improve families' tracing efforts have fallen short. In 2015, CBP launched the Arizona Missing Migrant Initiative (AMMI) as a response to demands for help finding those who had disappeared in the Sonoran Desert.<sup>324</sup> But according to La Coalición de Derechos Humanos and No More Deaths, the AMMI has "instead serve[d] to *deflect* families and humanitarian

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<https://www.statewatch.org/news/2022/may/spain-launch-of-the-vidas-sin-rastro-campaign-for-the-rights-of-the-dead-and-missing-migrants-at-the-southern-border/>. Similar efforts, soon to be publicized, are currently being undertaken in relation to the Greek-Turkish border by the de:border collective.

<sup>320</sup> See Gabriella Citroni, *The First Attempts in Mexico and Central America to Address the Phenomenon of Missing and Disappeared Migrants*, 99 INT'L REV. RED CROSS 735, 747, 748-49, 752 (2017).

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

<sup>322</sup> THE DISAPPEARED REPORT PART III, *supra* note 137, at 46, 61 ("You know, it's common to have news stories about these bodies being found, but they're found by us—these wacky, DIY, volunteer groups . . . There's no systematic search, there's no agencies out there doing any sweeps. We're the wealthiest country in the world . . . and we just leave them out there." (quoting James Holeman, volunteer with Águilas del Desierto)).

<sup>323</sup> *Id.* at 48.

<sup>324</sup> *Id.* at 42, 53.

volunteers from direct contact with government agents charged with conducting borderlands search and rescue,” and “actually obstruct[s] community-based efforts to locate those in distress.”<sup>325</sup> Blanket denials of access to territory and information pose similar challenges for those whose loved ones disappear in Europe. For family members of missing migrants who lack legal residence or other authorization to enter the EU themselves, the search for informational remedies in person can range from precarious to impossible. On at least (and likely many more than) two occasions, family members who have come to search for missing loved ones at Greece’s borders have themselves been subjected to enforced disappearance.<sup>326</sup>

Part of the success behind the mobilizing efforts of families in the Americas could be attributed to their relative social closeness, with many affected families residing in the connected countries of Mexico and the Northern Triangle, and with many (though not all) speaking Spanish as a common language.<sup>327</sup> By contrast, the families of migrants who disappear en route to Europe tend to represent a much wider swath of origin countries and languages. Families of Europe’s disappeared migrants often live throughout Africa, the Middle East, South Asia and Southeast Asia, and therefore cannot create the same regionally and linguistically cohesive organizing community; one that has also played such a role in the rich historical trajectory of family-led mobilizing in the Americas.

For years, international authorities and experts, including then Special Rapporteur on extrajudicial killings Agnès Callamard, as well as scholars and civil society, have brought attention to the massive scale of killing that is taking place in the Central Mediterranean and how the sea has been turned into a mass grave.<sup>328</sup> The difficulty, from a formal perspective on legal responsibility, is to pin down the wrongful actions or omissions of both EU institutions’ approach to migration and those of specific EU Member States, like Italy and Malta, which are charged with its implementation.<sup>329</sup> Yet,

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<sup>325</sup> *Id.* at 53.

<sup>326</sup> See, e.g., John Washington, “‘I Didn’t Exist’: A Syrian Asylum-Seeker’s Case Reframes Migrant Abuses as Enforced Disappearances,” *THE INTERCEPT* (Feb. 28, 2021), <https://theintercept.com/2021/02/28/enforced-disappearances-asylum-migrant-abuse/>; see also Angelidis, *supra* note 183.

<sup>327</sup> See *THE DISAPPEARED REPORT PART III*, *supra* note 137, at 71.

<sup>328</sup> See *Rep. on Unlawful Death of Refugees and Migrants*, *supra* note 278, ¶ 8.

<sup>329</sup> See, on the structural shortcomings of the EU’s approach to migration, Violeta Moreno-Lax et al., *The EU Approach on Migration in the Mediterranean*, requested by the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (Jun. 2021) [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL\\_STU\(2021\)694413\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf). See, on member state responsibility in international law, Giuseppe Pascale, *Is Italy Internationally Responsible for the Gross Human Rights Violations against Migrants in Libya?*, 56 *QUESTIONS INT’L L.* 35 (2019).

regional actors and states have not yet taken any dedicated steps to address this matter. Much of the work is being done at the very local level and on a very small scale by civil society actors.

Since 2015, initiatives like the Mediterranean Missing Project<sup>330</sup> have documented both patterns of migrant disappearances and the structural challenges faced by family members seeking information, remedies, and access to loved ones' remains.<sup>331</sup> As international authorities, the IOM and ICRC have critically contributed to the incipient application of the enforced disappearances framework to the migration context. Both the IOM's Missing Migrants Project and the ICRC's Missing Migrants and Restoring Family Links projects have had a certain impact in keeping records and advocating with local authorities,<sup>332</sup> despite a looming shortage in transnational cooperation of the kind at least formally achieved through Mexico's MAE.<sup>333</sup> Still, there is a lingering unwillingness of states to investigate and trace persons gone missing.<sup>334</sup> Officials across borders actively conceal and deny such information, and so the primary sources of recorded information are usually other migrants, relatives and in some cases local communities. In 2018, Italy, Malta, Cyprus and Greece began a Joint Process through the International Commission on Missing Persons (ICMP), to improve interstate cooperation and "the utility of available data and enhancing forensic and other technical capabilities," but this process has yet to yield any concrete results.<sup>335</sup>

Since family-led movements to gain information about migrants who

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<sup>330</sup> MEDITERRANEAN MISSING: UNDERSTANDING NEEDS OF FAMILIES AND OBLIGATIONS OF AUTHORITIES, <http://www.mediterraneanmissing.eu/about/> (last visited Jan. 27, 2022).

<sup>331</sup> See, e.g., MEDITERRANEAN MISSING PROJECT, MISSING MIGRANTS: MANAGEMENT OF DEAD BODIES IN LESBOS - GREECE COUNTRY REPORT (2016), <https://missingmigrants.iom.int/sitreps/missing-migrants-management-dead-bodies-lesbos-greece-country-report>.

<sup>332</sup> See, e.g., *Hellenic Parliament, ICRC Address Humanitarian Needs of Missing Migrants, Families*, ICRC (May 10, 2019), <https://www.icrc.org/en/document/hellenic-parliament-icrc-address-humanitarian-needs-missing-migrants-families>.

<sup>333</sup> EPEL, *supra* note 291, at 12.

<sup>334</sup> See MARTA SÁNCHEZ DIONIS ET AL., INT'L ORG. FOR MIGRATION, FAMILIES OF MISSING MIGRANTS: THEIR SEARCH FOR ANSWERS, THE IMPACTS OF LOSS AND RECOMMENDATIONS FOR IMPROVED SUPPORT - COUNTRY REPORT: SPAIN 28-29 (2021), <https://publications.iom.int/books/families-missing-migrants-spaintheir-search-answers-impacts-loss-and-recommendations-improved>.

<sup>335</sup> STATEMENT ON THE ISSUE OF MISSING MIGRANTS BY REPRESENTATIVES OF CYPRUS, GREECE, ITALY, AND MALTA AT THE CONCLUSION OF THEIR MEETING IN ROME ON 11 JUNE 2018, <https://www.icmp.int/wp-content/uploads/2018/06/icmp-gr-mm-018-5-W-doc-joint-statement-on-the-issue-of-missing-migrants.pdf>. The 2019 statement is available at: <https://www.icmp.int/wp-content/uploads/2019/06/icmp-gr-mm-047-3-doc-joint-statement-2nd-meeting-of-the-joint-process-geconverteerd.pdf>.

disappear en route to Europe are not yet as advanced as in the Americas, further emergent advocacy and research which seeks to name acts of enforced disappearance when they occur could open crucial doors for families who are looking for loved ones. This need is highlighted by the significant contrast observable between the scopes of informational remedies that were provided, for instance, to relatives of Latin Americans disappeared by border violence as compared to those disappeared in other ways. Several investigatory bodies examining forced disappearance in Central America have yet to extend the application of the existing strides to disappearances resulting from border violence. In many cases, this regrettably includes failure to enable families to retrieve their loved ones' remains, and to grant them a dignified burial in accordance with their so-called 'last rights' often claimed by families in line with their religious and cultural customs.<sup>336</sup> The Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys, concluded in May 2018 by a range of stakeholders documenting the lived experience of families of perished and disappeared, is an affirmation of the existing obligations of states and international organizations' in this regard.<sup>337</sup>

Writing about a case concerning an enforced disappearance in Bolivia, former Inter-American Court of Human Rights Judge Antônio Augusto Cançado Trindade described the remedies that the Court provided to the victim: the Court "ordered the respondent state to 'take all necessary measures to locate the mortal remains of the victim and deliver them to his next of kin', in view of 'the continued obstruction of the efforts of the victim's parents and brothers to learn the truth about the facts and find the whereabouts' of the victim, due to 'several *de facto* and *de jure* obstacles attributable to the State, such as the failure to define enforced disappearance as an offense, the negative [sic] of various public authorities to provide information that was not contradictory, and the failure to conduct an effective investigation, during 30 years.'"<sup>338</sup> Today, a judge in a federal or state court in the United States could grant a similar remedy to migrant victims of enforced disappearances by relying on customary international law. In the

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<sup>336</sup> See, e.g., Dianne Solis, *How Missing Migrants Recover Their Identities in Death*, THE DALLAS MORNING NEWS, <https://www.dallasnews.com/news/immigration/2020/01/17/how-missing-migrants-recover-their-identities-in-death/>.

<sup>337</sup> For the Mytilini Declaration, see *Creating a New Framework of Respect for the Rights of Missing & Dead Refugees, Migrants and Bereaved Family Members*, LAST RTS., [http://lastrights.net/LR\\_resources/html/LR\\_mytilini.html](http://lastrights.net/LR_resources/html/LR_mytilini.html) (last visited Jan. 27, 2022). See also *Even After Death* (Refocus Media Labs 2021), <https://refocusmedialabs.org/even-after-death-film> (a forthcoming feature documentary on the experience of handling deceased migrants' bodies on Lesvos as the prelude for the Mytilini Declaration).

<sup>338</sup> Trindade, *supra* note 72, at 515 (quoting *Trujillo Oroza v. Bolivia*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 64, ¶ 72 (Jan. 26, 2000)).

European context, the remedy can be based on both customary and treaty obligations in regional instruments.

From the perspective of the struggle to rectify structural injustice on a global scale, the enforced disappearances framework provides a unique possibility for shedding light not only on the currently invisible ways in which migrants disappear during the fatal journeys they are forced to undertake,<sup>339</sup> but also on the structural, state-sponsored forms of this violence against migrants.<sup>340</sup> The structures of such violence should be appropriately seen as conditioning a pattern of enforced disappearances, such that the Inter-American Court of Human Rights maintained in *Velasquez* in 1988 that the burden of proof is reserved and governments are required to defend their actions in individual cases of disappearance, provided that there is a reasonable basis to believe that the person has been disappeared, even without a formal report.<sup>341</sup> The WGEID and CED are well-positioned to rectify the rightlessness of migrant victims of enforced disappearances. The primary function of the WGEID is to “assist families in determining the fate or whereabouts of their family members who are reportedly disappeared”<sup>342</sup> by coordinating and promoting respect for these by all states, including non-State Parties to the Convention such as the United States.<sup>343</sup> The CED has also stepped up to actively elaborate on the application of this framework to the migration context in a forthcoming General Comment due September 2022. Already, the CED’s 2019 Guiding Principles for the Search for Disappeared Persons require such searches to be based on human dignity and the presumption that the person is alive, and be governed by public policy and respect the right to participation.<sup>344</sup> Principle 9, on the search for disappeared migrants, stresses the need to account for the unique nature of their “particular vulnerability” when designing public policies and strategies to search for them.<sup>345</sup> To address current protection gaps for disappeared

<sup>339</sup> Schindel, *supra* note 232, at 397-98; *see also, e.g.*, ALARM PHONE SAHARA, <https://alarmphonesahara.info/en/>.

<sup>340</sup> Duhaime & Thibault, *supra* note 1, at 575 (travelling without documentation hampers investigative efforts).

<sup>341</sup> *See* CED, *supra* note 4, ¶¶ 16-17; *see also* Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 122-27, 138 (July 29, 1988), [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf).

<sup>342</sup> *About the Mandate*, U.N. HIGH COMM’R FOR REFUGEES: WGEID, <https://www.ohchr.org/en/special-procedures/wg-disappearances> (last visited Jan. 27, 2022).

<sup>343</sup> *See* BOSTON UNIVERSITY HUMAN RIGHTS CLINIC, MISSING MIGRANTS IN THE UNITED STATES: INTERNATIONAL RESPONSIBILITY, THE SEARCH FOR ACCOUNTABILITY AND LEGAL LACUNAE (Aug. 30, 2021), <https://www.bu.edu/law/files/2021/11/Missing-Migrants-in-the-United-States.-BU-Clinic-Report.pdf>.

<sup>344</sup> CED, Guiding Principles for the Search for Disappeared Persons, at 1, U.N. Doc. CED/C/7 (May 8, 2019).

<sup>345</sup> *Id.* at 5-6.

migrants, the WGEID and CED should consider the various direct and indirect forms of their disappearance, including abductions from public thoroughfares, incommunicado incarceration in secret sites, violent border enforcement policies that condition and produce disappearances, and disappearances even after death of those who have perished yet are never found, identified or respectfully buried by loved ones.<sup>346</sup>

The articulation of these forms of social erasure and extreme group-based violence as enforced disappearances through authoritative determinations by international authorities can become critical in satisfying the fundamental demand for accountability, at least partially and as a start. As Weber and Pickering inspiringly observe: “Once the violent implications of these structures are unmasked to potentially critical audiences, the political task of challenging the ideologies that legitimize them, and the competing interests that motivate them, can begin.”<sup>347</sup> The international law on enforced disappearances can contribute to the process of constituting collective interests and identities, both in relation to specific borderlands and in the context of migration globally. It can also further the mobilization of a transnational movement to make such rights claims and effectuate redress in different adjudicative arenas.<sup>348</sup>

#### CONCLUSION

This article has sought to demonstrate that migrant deaths in unknown locations on land and at sea should be treated and redressed as breaches of the international laws that prohibit and protect against enforced disappearances. Such disappearances have become prevalent, if not widespread and in some cases systematic, along the “global color line” between populations considered white and those considered non-white. While the legal prohibition of enforced disappearance was developed in the context of anti-authoritarianism, this context does not preclude the use of the category in a struggle against contemporary border violence. To the contrary, the manifestation of enforced disappearances at global borders serves as one important indication that the form of governance that is in place at global borders is in fact authoritarian.

The article also sought to spell out the practical benefits that advocates can obtain from further exploring and developing the category of enforced disappearances with relation to extreme forms of border violence. When a

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<sup>346</sup> See, e.g., *EVEN AFTER DEATH* (ReFocus Media Labs 2021), <https://refocusmedialabs.org/even-after-death-film>.

<sup>347</sup> WEBER & PICKERING, *supra* note 231, at 95.

<sup>348</sup> Tamara Kay, *Legal Transnationalism: The Relationship between Transnational Social Movement Building and International Law*, 36 *LAW & SOC. INQUIRY* 419, 422-23 (2011).

person is wiped off the physical map, they may remain on the legal map by virtue of their relatives or other affected individuals claiming the right to truth and other remedies on their behalf. They can also make these claims even if the disappeared person has reappeared, seeking redress for the harms endured during the period of unknowing. The law of enforced disappearances is thus unique in recognizing and giving form to the *longue durée* of suffering inflicted on families and entire communities. Through an administrative rather than an exclusively criminal law prism, this set of duties can go a long way in imposing accountability on behalf of a broader global network of survivors of extreme border violence.

Yet condemning the wrong of enforced disappearances is not simply a legal fix for rights that are otherwise vanquished in the larger human rights terrain. Indeed, it is understood to have its own moral significance as a paradigmatic right to be a person that enjoys recognition before the law, independent from the right to life, or various understandings of human dignity. As Jason De León has explained, although disappearance practices are “relatively ‘subtle’ compared to grotesque displays of severed heads and limbs, having no corpse is arguably more sinister in that it robs” whomever is subjected to the act “of voice and agency.”<sup>349</sup> Such a practice therefore “confines the traces of . . . repression purely to the discursive domain”<sup>350</sup> as part of a “politics of erasure.”<sup>351</sup>

As Gündoğdu offers, the plurality of human experience recognized by the disappearance category is fundamental to a non-essentialist and non-foundationalist understanding of universal human equality: “it is not some inherent quality that grounds our personhood, or our status as right-baring subjects, but instead this ongoing process of co-appearance, perception, and acknowledgement in a world defined by the plurality of living beings.”<sup>352</sup> Against a legal environment that has continued to make extreme border violence possible, and has often offered only token remedial possibilities, this article has called to use law in a politics of reappearance.

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<sup>349</sup> DE LEÓN, *supra* note 287, at 71.

<sup>350</sup> *Id.*

<sup>351</sup> Bargu, *supra* note 242, at 57-58.

<sup>352</sup> Gündoğdu, *Forced Disappearances*, *supra* note 276.