

## 5. Absence and the Victim of Enforced Disappearance

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**Abstract:** *This chapter provides an in-depth analysis of enforced disappearances in Colombia, focusing on how the absence of victims is ingrained within the crime itself and how their families represent it. Victims are stripped of their political presence, yet they continue to be represented in the public sphere through family activism. Despite the peace agreement signed in 2016, the practice of enforced disappearance persisted, with a reported 2460 disappearances in just the first half of 2020. The chapter delves into the legal framework of enforced disappearance. It explores various strategies that oppressive regimes employ to conceal the existence of enforced disappearances and undermine the credibility of victims and their families. Furthermore, through the analysis of interviews conducted with members of transitional justice institutions and victims' associations, the chapter elaborates on families' public mobilisation, art, and participation in transitional justice mechanisms. Their public displays of private grief seek to enhance solidarity, combat the stigma associated with disappearance, and underscore the ongoing nature of the crime.<sup>1</sup>*

### 1. Introduction

Hannah Arendt defines 'appearance' as 'something that is being seen and heard by others as well as ourselves'.<sup>2</sup> While reality might differ from what appears, appearance constitutes being seen and heard in a political space; consequently, what does not appear does not exist in the political space. Appearing is a condition for political action. Victims of enforced disappearance are made invisible; they do not participate; they have been violently removed from public existence. The victim of a forced disappearance suffers the annulment of the possibility of political presence, although not of their representation. This chapter examines how the activism of families allows for the disappeared to continue being represented in the public sphere.

This chapter analyses how 'absence' is part of the crime of enforced disappearance and how it is represented by the families of the disappeared.

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1 This research was possible thanks to a postdoctoral grant by the FNRS (National Fund of Scientific Research, Belgium) conducted at the Institute of Political Science Louvain-Europe, University of Louvain. The author's current affiliation is at University College Roosevelt, The Netherlands.

2 Hannah Arendt, *The Human Condition* (1st edn, University of Chicago Press 1998) 49.

In 2004, the International Convention for the Protection of All Persons from Enforced Disappearance stated that families are direct victims (Article 24). Relatives are also considered victims of enforced disappearance since their lives are affected by the uncertainty and suffering due to not knowing about the fate of their relatives. A permanent search marks their lives. The relatives of victims of enforced disappearance engage in political action that challenges the notion of the victim of enforced disappearance as absent from the political landscape. The chapter first presents the definitions of enforced disappearance in international humanitarian law and in domestic law in the case of Colombia, which has been selected due to its large number of cases of enforced disappearance. These cases took place during the history of the armed conflict and have been carried out both by state and non-state armed actors. The National Historical Memory Center reports 80 000 disappeared victims between 1970 and 2018.<sup>3</sup> The practice of enforced disappearance continued even after the signing of the peace agreement in 2016. Between January and June 2020, 2460 people were reported as disappeared.<sup>4</sup> Secondly, the chapter discusses the absence of the disappeared victims in terms of forced disappearance and social disappearance. Thirdly, it presents the actions of resistance to the (political) absence of victims of enforced disappearance through collective mobilisation, art/protest, and participation in transitional justice mechanisms. In this chapter, I present and analyse extracts of interviews conducted in 2016, 2019 and 2020 with members of transitional justice institutions and victims' associations in Colombia.

## *2. Enforced Disappearance, and Social Disappearance*

The 1992 Declaration on the Protection of All Persons from Enforced Disappearance ('the 1992 Declaration') was the first international legal instrument to define enforced disappearance. It states that a victim of enforced disappearance is a person who is:

arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government,

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3 'Lo que sabemos de los desaparecidos en Colombia' (Centro Nacional de Memoria Histórica) <<https://perma.cc/VN85-JWGW>>.

4 Pompilio Peña Montoya, 'La desaparición: un crimen que pervive en Colombia' (*Hacemos Memoria*, 29 August 2020) <<https://perma.cc/Z8T4-7S8A>>.

or by organised groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law (emphasis is added).<sup>5</sup>

Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance ('the 2007 Convention') states that:

enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law (emphasis is added).<sup>6</sup>

The definition that appears in the 1992 Declaration highlights the role of the government in its execution, and the 2007 Convention adds to this definition the 'concealment of the fate or whereabouts of the disappeared person' to explain the fact that the crime does not only consist of the removal of their liberty but the ongoing concealment, which requires an additional set of criminal practices. It also highlights that the deprivation of their liberty is not the only fate of the victims of enforced disappearance; other outcomes could also be death, mass graves, and the destruction of their body. The lack of certainty about the whereabouts of the disappeared person is one of the crucial characteristics and effects of enforced disappearance.

The notion of disappearance has not only been used to describe a criminal act but to explain the broader phenomenon of 'social disappearance'. This term, coined by Gatti, is used to refer to the social dynamics and institutions

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5 UNCHR 'Declaration on the Protection of All Persons from Enforced Disappearance' (28 February 1992) E/CN.4/RES/1992/29 <<https://perma.cc/QHB3-UXGN>>.

6 UNGA 'International Convention for the Protection of All Persons from Enforced Disappearance' (20 December 2006), adopted by General Assembly resolution 61/177 on 12 January 2007, <<https://www.refworld.org/docid/47fdfaeb0.html>> accessed 19 November 2022.

that produce marginalisation and exclusion.<sup>7</sup> People at the margins of society are excluded due to their ethnicity, race, sexual orientation or social class. This position leaves them vulnerable to armed state actors and to illegal armed actors, such as in the case of migrants crossing deserts and trafficked women, among others. Victims of social disappearance ‘may not be forcefully made to disappear through a paramilitary commando, but denied the protection of the state through other means, or by mere inaction’.<sup>8</sup> Although social and forced disappearances describe different types of practices, they are similar in terms of accountability. Schindel argues that this type of marginalisation creates existences detached from legal inscription and civil protection: ‘these cases bring about the conjunction of absence from state records and from its obligations, invisibility from mainstream society, and pervasiveness of modes of existence in which people often navigate between legality and illegality and mostly endure extreme material conditions.’<sup>9</sup> Both social and forced disappearance also have in common the ‘absence’ as a means to deter people from state legal protection.

### *3. International Framework regarding the definition of Enforced Disappearance*

The crime of enforced disappearance continues in countries such as Syria, China, The Democratic Republic of Congo, Mexico, Sri Lanka, Pakistan, Zimbabwe, and Colombia.<sup>10</sup> Forced disappearance has been used as a tool of terror, particularly by governments trying to repress political opponents or by armed groups and is one of the many tactics of control used by states across the globe. Enforced disappearance committed under a ‘state of exception’, when the state suspends constitutional protections and uses extra-legal sovereign violence to defeat a possible threat, is less common.

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7 Gabriel Gatti, ‘The Social Disappeared: Genealogy, Global Circulations, and (Possible) Uses of a Category for the Bad Life’ (2020) 32(1) *Public Culture* 25.

8 Estela Schindel, ‘Mobility and Disappearance: Transregional Threads, Historical Resonances’ in Schindel Estal and Gabriel Gatti (eds), *Social Disappearance. Explorations Between Latin America and Eastern Europe* (Forum Transregionale Studien 2020) 22.

9 *ibid.*, 23.

10 Amnesty International, ‘Enforced Disappearances’ <<https://perma.cc/JWK9-8BSJ>>; ‘A Closer Look at Abductions and Forced Disappearances Across the Globe (*ReliefWeb*, 28 August 2020)’ <<https://perma.cc/XX8Q-G75E>>.

However, enforced disappearance is not an ‘aberration’ or an extreme form of the state of ‘exception’ but rather a logical consequence of sovereignty as a politics of erasure. Bargu, following Agamben, argues that enforced disappearance is a form of invisible violence that is not exceptional but part of an ‘*invisible penal architecture*’.<sup>11</sup> The ‘insurgent’s body becomes the surface upon which sovereignty imprints its mark – a mark written with an ink that erases itself as well as the surface out of existence.’<sup>12</sup>

Although with limited enforcing power, international law establishes norms and customary practices to deter the violence moved by sovereign will. It also imposes on states the obligation to continuously search for the disappeared in order to alleviate the permanent suffering caused by victims’ continuous absence (Guiding Principle 7, 2019).<sup>13</sup> According to the Guiding Principles (2019), the continuous nature of the obligation to search only comes to an end when the person is found. If the person is found alive, he or she should be placed under the protection of the law. If the person is not found alive he or she should be properly identified and returned to the family in a dignified manner. The search does not stop with the identification or punishment of the perpetrator. According to this view, the crime of forced disappearance is not affected by a particular statute of limitations or by the principle of non-retroactivity ‘since this is a crime that is still being committed’.<sup>14</sup>

State actors have often perpetrated the practice of enforced disappearance in order to silence a group of people that were considered to be a threat to their power. The systematic use of these practices was initially documented in Nazi Germany and South America, where this strategy was insidious during the Dirty War in Argentina, resulting in the disappearance of 30 000 civilians. The Inter-American Commission on Human Rights (IACHR) devoted special attention to the situation in Chile and Argentina in the 1970s. In September 1979, the IACHR’s visit to Argentina led to finding large and systematic evidence of forced disappearances, and ‘it

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11 Banu Bargu, ‘Mobility and Disappearance: Transregional Threads, Historical Resonances’ (2014) 23(1) *Qui Parle, Special Dossier: Rethinking Sovereignty and Capitalism* 35.

12 *ibid.*, 62.

13 Committee on Enforced Disappearances, Guiding Principles for the Search for Disappeared Persons (28 August 2019).

14 Maria Clara, Galvis Patiño and Rainer Huhle, ‘The Rights of the Victims of Enforced Disappearance Do Not Have an Expiration Date’ (*Opinio Juris*, 7 July 2020) <<https://perma.cc/UCV2-QWHH>>.

also found clandestine detainees in an official prison'.<sup>15</sup> The demand for this crime to be addressed was high in the region, where families of the disappeared and other human rights associations were particularly active in insisting on the recognition of this complex form of human rights violation.

Furthermore, according to the Article 7 of the Rome Statute enforced disappearance of persons is included among crimes against humanity when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack. Article 7, para. 2 (i), defines the crime as:

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time (emphasis is added).<sup>16</sup>

The goal of the Rome Statute is that crimes against humanity, among other crimes, are tried, proving a crime against humanity requires providing evidence of a special intent. Consequently, the definition of enforced disappearance used in the Rome Statute emphasises intention, while the 1992 and 2007 definitions emphasise the lack of protection of the law as a consequence of forced disappearance. When a victim is being unjustly retained, and their retention, their fate, or whereabouts are concealed, he or she is factually removed from the protection of the law. The victim's absence produces uncertainty and harm. This removal occurs independently of the intention of the perpetrator.

The international legislation recognises enforced disappearance only when it is committed by a state agent. There is a particular type of harm caused by a crime of this nature when it is perpetrated by the state. When a state agent carries out the disappearance of a person, it does not only harm the person directly, but it has the enhanced effect of breaking the trust in the state because the perpetrator uses the state apparatus to make the disappearance occur and continue. For example, between 1983 and 1992,

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15 Reed Brody and Felipe González, 'Nunca Más: An Analysis of International Instruments on "Disappearances"' (1997) 19(2) Human Rights Quarterly 365, 368.

16 UNGA, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, <<https://www.refworld.org/docid/3ae6b3a84.html>> accessed 20 November 2022.

close to 3000 cases of forced disappearance of alleged terrorism suspects took place in Peru's central southern Andes.<sup>17</sup> Isaias-Rojas explains that this practice was more a form of state rule than a crime. Members of the official security forces arrested civilians citing the law and promised their relatives that they would return the person when their investigation was over. The testimonies of relatives of victims of enforced disappearance reveal how members of the state repeatedly promised them '*mañana vienes*' (you come tomorrow) for an answer about the location of the victim, but tomorrow would become 'never'.<sup>18</sup> The bureaucratic landscape was used to *disappear the disappearance*, to neglect it and to erode the reliability of the witnesses.<sup>19</sup> Rojas-Perez observes how rumour, suspicion, insinuation, and culpability were the signature of the state, casting suspicion on the relatives:

'The authorities insinuated that the disappearance could not be a random event; that if the victim was missing, it certainly was because he or she was involved in terrorism – the presupposition being, of course, that only terrorists ended up being disappeared at the hands of the state.'<sup>20</sup>

In sum, the mere removal of the person from the public or their absence is not enough to define it as enforced disappearance. The 2007 Convention establishes state authorship as a crucial element. The clandestine nature of the crime makes it difficult to prove, and the access to bureaucracies and other resources is such in the case of the state that it makes it into a particular type of crime of its own. The Rome Statute presents the intention of the state agent as a decisive variable. Disappearance is not the same as absence, but absence is an essential component of this crime.

There are also a number of instances not covered by the Rome Statute or by the 2007 Convention, such as the acts of enforced disappearance occurred in the Middle East and North African (MENA) states, where only six countries are bound by the Rome Statute.<sup>21</sup> For example, the International Commission on Missing Persons (ICMP), an intergovernmental organisation that addresses the issue of persons missing as a result of

17 Isaias Rojas-Perez, *Mourning Remains: State Atrocity, Exhumations, and Governing the Disappeared in Peru's Postwar Andes* (Stanford University Press 2017) 121.

18 *ibid.*, 122.

19 *ibid.*, 128.

20 *ibid.*, 131.

21 MENA: Middle East and North African countries consist of Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates, and Yemen.

armed conflicts, violations of human rights, and natural disasters, estimates that between 250 000 and one million Iraqis have been missing since 2003.<sup>22</sup> Other cases that are not included are those committed by non-state actors. In practice, there has been increasing use of enforced disappearance as a legal category to describe this practice when committed by non-state actors. Calls for a reformulation of the conceptualisation of enforced disappearance in international law are met with mixed reactions. On the one hand, there is the tension that an ampliation of the term will make it less effective. On the other hand, victims of enforced disappearance by non-state actors have weaker legal protection than victims of enforced disappearance committed by state actors because the crimes they have suffered cannot be covered by international law.<sup>23</sup> For those reasons, in 2019, the Working Group on Enforced or Involuntary Disappearances (WGEID) decided to expand its mandate to include limited situations of disappearances by non-state actors.<sup>24</sup> The WGEID opened up its definition to the disappearance of migrating individuals in transit and in destination countries, which are a considerable group of people vulnerable to the crime of disappearance, although not committed directly by state actors.<sup>25</sup> In 2021, the WGEID continued to review acts committed by non-state actors that are the *de facto* authorities.<sup>26</sup> These non-state actors are entities that exercise at least some effective authority over some territory within a state. They ‘intend to

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- 22 OMCT, ‘Families of Disappeared Still Awaiting Justice throughout the Middle East’ (*World Organization against Torture*, 30 August 2021) <<https://perma.cc/6CPS-BZL7>>.
  - 23 Anna Srovin Coralli, ‘Non-State Actors and Enforced Disappearances Defining a Path Forward’ (2021) Working Paper Geneva Academy 1 <<https://perma.cc/K3SP-QTZ5>>; see also Amrei Müller, ‘Can Armed Non-state Actors Exercise Jurisdiction and Thus Become Human Rights Duty Bearers?’ (2020) 20 Human Rights Law Review 269.
  - 24 The Working Group is composed of five independent experts of balanced geographical representation. Together, they investigate individual cases and produce reports and opinions in order to assist families in determining the fate or whereabouts of their family members who are reportedly disappeared. The group serves as a channel of communication between family members of victims of enforced disappearance and other sources reporting cases of disappearances, and the Governments concerned.
  - 25 United Nations, ‘Report of the Working Group on Enforced or Involuntary Disappearances’ (2016) A/HRC/33/51 <<https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F33%2F51&Language=E&DeviceType=Desktop&LangRequested=Fa>lse> accessed 7 July 2023.
  - 26 ACNUDH, ‘Working Group on Enforced or Involuntary Disappearances Concludes its 125th Session’ (2021) <<https://perma.cc/5X6M-HQW9>>.



represent the state of which it partially or completely controls the territory in the capacity of official government'.<sup>27</sup>

#### 4. Domestic Legislation: the Colombian Case

The practice of enforced disappearance was in place for decades during the internal armed conflict. The disappearance of persons deemed a threat to the state was often justified under Article 28 of the 1886 Colombian constitution, which stated that:

This provision does not prevent that even in time of peace, but having serious reasons to fear a disturbance of public order, persons against whom there are serious indications that they are undermining public peace be apprehended and detained by order of the government and with the prior opinion of the ministers.<sup>28</sup>

In Colombia, the state of exception was used for over 40 years. This was a juridical instrument that provided a legal framework for the war. As a result, Colombia, which is not traditionally considered an authoritarian state in the same vein as the regimes experienced in Argentina, Uruguay or Chile, had an authoritarian legal framework that operated in a democratic context. For example, the armed forces had wide competencies that were legitimate under the 1886 constitution: 'Article 170 of the Charter creates the Courts-Martial and the Military Tribunals for the military criminal jurisdiction as an integral part of the branch of public power in charge of administering justice'.<sup>29</sup>

Although there were some previous attempts at typifying the crime of enforced disappearance, it was until a new constitution was adopted in 1991 that Colombia started to prohibit enforced disappearances (Article 12).<sup>30</sup> Furthermore, Colombia is a signatory to the Inter-American Convention

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27 Jonte Van Essen, 'De Facto Regimes in International Law' (2012) 28(74) Utrecht Journal of International and European Law 31.

28 Article 28, incise 20, the 1886 Colombian Constitution. See also: Centro Nacional de Memoria Histórica, *Normas y Dimensiones de La Desaparición Forzada En Colombia* (Tome I, Imprenta Nacional 2014) 53–54.

29 Centro Nacional de Memoria Histórica, *Normas y Dimensiones de La Desaparición Forzada En Colombia* (Tome I, Imprenta Nacional 2014).

30 'No one will be subjected to forced disappearance, torture or cruel, inhuman or degrading treatment or punishment', article 12 of the Political Constitution of Colombia (1991).

on Forced Disappearance of Persons, as well as the Rome Statute. In 2000, the country introduced Law 589 that presented the judicial framework for criminal investigations and the search for the whereabouts of the victims. This law explicitly criminalises the act of enforced disappearance and includes those acts committed by non-state actors. The Penal Code (Art 165) defined enforced disappearance as:

the person ... who deprives another individual of his/her liberty, conceals them and refuses to acknowledge the deprivation of liberty or give information on the whereabouts of the person, thus removing that person from the protection of the law.<sup>31</sup>

Initially, the law only referred to those perpetrators who were members of an illegal group, but this was changed by the Constitutional Court's judgement C-317 of 2002 to include any particular actor.<sup>32</sup>

As a result of the humanitarian crisis brought by the massive crime of enforced disappearance, a number of institutions in charge of registering and searching for the disappeared were created. In 2007, the mandate (Decree 929 of 2007) for the National Commission for the Search of Disappeared Persons ('Search Commission') was created. The Search Commission formally included the Association of Families of Detained and Disappeared Persons (ASFADDES).<sup>33</sup> The National Search Plan (NSP) brought a better structure to the search for the disappeared and counted on the input of specialised non-governmental organisations such as EQUITAS. The most recent strategies are born out of the Peace Agreement between the government and the Fuerzas Armadas Revolucionarias de Colombia (FARC) signed in 2016, ie, the Search Unit for Disappeared People (SUDP), the Special Jurisdiction for Peace, and the Truth and Clarification Commission.<sup>34</sup> Although the SUDP is a humanitarian office in charge of the search for the disappeared, the other mechanisms also deal with the crime of forced disappearance. For example, one of the cases of the Special Jurisdic-

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31 Colombian Criminal Code, Article 165, Forced Disappearance.

32 Colombian Constitutional Court, Judgement C-317, 2 May 2002, MP Clara Inés Vargas.

33 Asfaddes, 2023, Nuestra Historia <<https://perma.cc/6X8D-3D9S>>.

34 Unidad de Búsqueda de Personas dadas por Desaparecidas, 2023 <<https://ubpdbusquedadesaparecidos.co/>>.

tion for Peace is the ‘Deaths unlawfully presented as combat casualties by State agents’, which also covers cases of forced disappearance.<sup>35</sup>

### 5. *The Social Effects of Enforced Disappearance*

Enforced disappearance was the preferred tool of states that wanted to silence or eradicate any sign of organised opposition. The effects of this crime do not only affect the direct victim but also their relatives and their communities. Enforced disappearance was used against vulnerable communities that had been stigmatised as allies of the subversion, as had occurred during the Dirty War in Argentina and Chile. The state sought to create the political incapacitation of the opposition. Disappearance, together with torture, was used as a tool of state terror. Its effects created silence through fear, broke the trust in the institutions of the state, severely damaged the social fabric and affected the structure of society.<sup>36</sup>

The crime of enforced disappearance exerts multiple human rights violations simultaneously. According to the Inter-American Court of Human Rights, enforced disappearance goes against the article that forbids the crime in itself.<sup>37</sup> Forced disappearance also violates a person’s dignity, personal freedom, the right to the protection of personal integrity, the protection against inhuman treatment (Art 5.1 and 5.2 American Convention of Human Rights), the right to life, the right to personal and legal safety. Enforced disappearance not only harms the direct victims but also their relatives, the groups that they belonged to, and society in general. It creates ontological insecurity since there is no certainty about the location of the victim, and it prevents the relatives from using the palliative resource of funerals since the remains are not found. In the absence of evidence or recognition that the victim has suffered any violation of their rights, it prevents the victim from being recognised as a victim under the law and consequently their rights are not protected.

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35 Jurisdicción Especial para la Paz. 2023. Caso 03. Asesinatos y desapariciones forzadas presentados como bajas en combate por agentes del Estado <<https://perma.cc/9DQA-2P4Z>>.

36 Francisco Ferrandiz and Antonius C G M Robben, *Necropolitics: Mass Graves and Exhumations in the Age of Human Rights* (University of Pennsylvania Press 2015).

37 ‘Libertad de pensamiento y de expresión’ (2021) 16 Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos <<https://perma.cc/X8WG-YFYU>>.

The crime of enforced disappearance generates uncertainty. The case *Anzualdo-Castro v. Peru*, presented by the Inter-American Court on 22 September 2009, highlights the effects of uncertainty on victims:

[...] in cases of forced disappearance of persons, the victim is placed in a situation of legal uncertainty that prevents, impedes or eliminates the possibility of the individual to be entitled to or effectively exercise his or her rights in general, in one of the most serious forms of non-compliance with the State's duties to respect and guarantee human rights.<sup>38</sup>

The state, through its legal mechanisms, recognises the victim as a disappeared victim, which means that the victim has specific rights and is the subject of specific protocols. These mechanisms correspond to what Isaías-Rojas calls *necro-governmentality of postconflict*.<sup>39</sup> The government creates intelligible interpretations of unspeakable atrocities in order to create 'a controlled version of the past'. Enforced disappearance is a socio-legal construction that names a condition that is full of uncertainties. Instead of having the crime of disappearance defined by the victim's relatives' suffering or experience of distrust towards the government, the crime is defined in terms of the relationship of the victim to the state.

Cath Collins argues that the legal definition of enforced disappearance is an exercise in administering the absence, in naming the limbo in which the non-dead, not-there victim exists.<sup>40</sup> It is important for the victim's relatives to open up the definition of disappearance and the social dimensions of said crime to encompass its complex variety of dimensions.

In addition to the complex character of the offence, it is not possible to fully leave the effect of enforced disappearance in the past. It is an ongoing crime that does not stay in the past: it starts from the moment in which the victim was detained and removed from the system that protected their rights, and it lasts while the action of removal and their fate continues to be concealed, and the victim continues to be disappeared. This ongoing crime affects how the victims' relatives live their lives, which is often embedded in an exhausting ongoing search. The temporality of the state is different from that of the relatives. The state can live on through its institutions, but the lifespan of relatives is different, is limited and is more urgent.

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38 *Anzualdo-Castro v. Peru*, 2009, IACHR, Ser. C No. 202, para. 101.

39 Isaías-Rojas (n 17) 18.

40 Cath Collins, 'The Reemergence of the Disappeared, the Role of Remains and the Forensic Gaze' (2020) 13(3) *Memory Studies* 322, 323.

In an interview with a psychologist, who had worked with 30 cases of forced disappearance involving elderly people, he argued that:

One of our patients had died, and it was terrible for us because we had to find other ways to dignify [recognise] her struggle. We searched among her relatives because nobody had documented her search [for the disappeared victim]. She had been looking for her nephew (not even her son!) for over 25 years, 25 years and nobody else asked, nobody else looked for him, nobody took the case, nobody asked for him. She asked for compensation; she lived in conditions of extreme poverty.<sup>41</sup>

The temporality of the crime of enforced disappearance is twofold: it involves an ongoing crime and an ongoing search. In the case of Colombia, where the conflict lasted for over five decades, a temporality perspective involves an intergenerational component. Once the relatives who are searching for the disappeared victims die, their work in pursuing the search, but also the representation of the absent victims, runs the risk of dying with them.

The complexity of the crime of enforced disappearance relies on its concealment and denial by state institutions. Consequently, it is in the aftermath of dictatorships and authoritarian regimes that transitional justice mechanisms can bring the secrecy of the crimes to light. Exhumations and the knowledge obtained by forensic experts working on mass graves reveal the extent of the atrocities.<sup>42</sup> Truth commissions shed light on the participation of state actors in these crimes. Reparations aim to recognise the harm caused to the relatives. Despite the efforts to overcome the legacy of suffering and harm caused by forced disappearance, decades later, the clashing narratives about the past continue, demonstrating the horror that pervades societies after the use of enforced disappearance as a systemic and widespread practice. Even in the context of post-transition, the legacy of the state terror of enforced disappearance has a prominent effect on society. Protests and political confrontations continue. Robben explains this situation in the case of Argentina as ‘a sign of the unmistakable characteristics

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41 (Personal interview, 2019).

42 Sandra Milena Ríos Oyola, ‘Dignification of Victims Through Exhumations in Colombia’ (2021) 22(4) *Human Rights Review* 483.

of a society that had not yet come to terms with the massive trauma in its recent past'.<sup>43</sup>

The process of restoring the disappeared victims' political presence, legal rights, and dignity implies the restoration of their legal rights, challenging their alleged absence in the public and political arena. This is a space that is not granted by the state to the victims as passive receptors of the state's recognition. The political process led by the associations of relatives creates the space that identifies and names the absence of their disappeared relatives and a space for their political representation. In South America, one way in which the disappeared regain political representation has been through the political mobilisation of their families; some of the most prominent groups are Las Madres de la Plaza de Mayo, Abuelas (Grandmothers), HIJOS (SONS), Familiares de Desaparecidos y Detenidos (Families of the Disappeared and Detained), Hermanos (Brothers) and Ex-detenido Desaparecido (Ex-detained Disappeared).

## 6. *Representing the Disappeared Victims' Absence*

The families are victims in their own right since they have continuously been harmed by the uncertainty and continuous grief of their disappeared loved ones. Nevertheless, one of the central elements for understanding how victims of forced disappearance are represented in the public and legal arenas is through families' activism. On this matter, Bargu claims that:

The struggles of the families of the disappeared to make the disappeared visible, to keep alive the memory of those who have been subjected to the erasing violence of the state, are crucial in this regard. It is through their agency that the disappeared insistently establish their presence and point to the profound impossibility of sovereignty's ultimate closure into a totality.<sup>44</sup>

Kovras, in his comparative international work with cases of massive forced disappearance, argues that 'the innovative mobilisation of the families of the disappeared shaped the mechanisms of contemporary transitional jus-

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43 Antonius C G M Robben, *Political Violence and Trauma in Argentina* (University of Pennsylvania Press 2005) 35.

44 Bargu (n 11) 66.

tice'.<sup>45</sup> These mechanisms range from the judicial response that prioritises criminal responsibility to the administrative and humanitarian response that prioritises finding the disappeared victims' remains or knowing their fate. The activism of families of the disappeared has had an essential role in advancing the recognition of the crime of enforced disappearance as a complex human rights violation and a crime against humanity.

From a sociological perspective, the families' public representation of their private grief has contributed to creating broader sentiments of solidarity towards the disappeared, combating the stigma that concealed the disappearance, and highlighting the ongoing character of the crime. The activism of grassroots organisations working for the disappeared (through grassroots memorials, political activism, legal battles, participation in search commissions, and public protest) bring emotions such as grief from the private to the public sphere. Humphrey and Valverde call this process 'political mourning' or 'a protest against unjust and untimely death'.<sup>46</sup> It defines the movement from private grief to public grief in order to demand accountability from the state. An added consequence of these works of political mourning is their challenge to the alleged absence of the disappeared victim. These works aim to reinstate the disappeared victims' presence in the public sphere.

In what follows, I present three different elements related to the representation of the absence of the disappeared victims by their families based on interviews with relevant stakeholders in Colombia. Most of the interviews have been analysed through thematic analysis techniques, and they have been selected from a sample of over fifty semi-structured interviews in a larger project on 'How do Transitional Justice Measures Contribute to the Restoration of Victims' Dignity'. I have analysed these acts of public mourning as demands of transitional justice from below, where the vernacularisation of the language of human rights and transitional justice is used by social movements.

The first element is related to the problem of representation. The families of the disappeared victims represent those directly affected (themselves, the disappeared victim) but also a more abstract notion of the victim. Those who are relatives of others who are part of their group of victims or associa-

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45 Iosif Kovras, *Grassroots Activism and the Evolution of Transitional Justice: The Families of the Disappeared* (CUP 2017) 84.

46 Michael Humphrey and Estela Valverde, 'Human Rights, Victimhood, and Impunity: An Anthropology of Democracy in Argentina' (2007) 51(1) *Social Analysis: The International Journal of Social and Cultural Practice* 179, 181.

tion, but also of those who could not participate in the mobilisation. The relatives represent their own relatives who have forcefully disappeared, but also the rest who remain anonymous and whose families are not actively looking for them. One of the members of the *Salón del Nunca Más* in Granada Antioquia, whose brother was disappeared, commented that:

I am not speaking for me, I speak for everyone, because there are many disappeared, in the cemetery who are NN [No Name]; here three bodies have been recovered as remains of false positives, this year and in the past.<sup>47</sup>

The second element is related to the legitimacy of the representation of the disappeared victims provided by the families. Since the representation is not only validated by their character as relatives of the disappeared, but they also represent those who are not their direct relatives, their legitimacy comes in terms of their expertise. Throughout their work of decades searching for the disappeared, families have obtained important and strong knowledge and networks with national and international humanitarian organisations. Camilo Delgado, member of the national truth commission, *Comisión para el Esclarecimiento de la Verdad – CEV*, explains the importance of the families' expertise:

you can see the relatives speak in a very very technical manner, they have enough arguments and vocabulary to be understood by a civil servant. These were women that used to work in the fields, or were housewives, now they are completely empowered... it should not be necessary, some of them have found their children but others have not yet.<sup>48</sup>

The findings presented by the families are introduced in the mechanisms of transitional justice, such as the historical memory commissions. The following is an extract of an interview with a member of the National Center for Historical Memory (NCHM):

Generally [in the context of] forced disappearances, they [the authorities] say that he [the victim] did not leave, that he fell in combat. In this case they [the authorities] had said that he [the soldier victim] had left with the guerrilla. But [the truth was] that he was a soldier and the comrades had disappeared him, then of course...

S: his own comrades?

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47 (Personal Interview, 2016).

48 (Personal Interview, 2019).



NCHM: yes, I remember that it was a matter of personal problems between the commander and him, they disappeared him in a specific place and...

S: did you discover that truth?

NCHM: she told us [his mom].

S: then she had already found out.

NCHM: yes of course, we do that report in 2013, 2014, so she told us about her entire search journey.<sup>49</sup>

The third element is related to the impact of the mobilisation carried by the relatives of the disappeared to other sectors of civil society, creating transnational memory movements. For example, the activist group *Dexpierte* promotes the memorialisation of the disappeared through street art and graffiti. Ana Maria, a member of this group, explains:

When we began with Dexpierte, to work on the faces of the disappeared or those killed by the state, it began first as a personal wish, that is, our first intervention we painted Jaime Garzón, Nicolás Neira victim of the Mobile Anti-Disturbances Squadron or Escuadrón Móvil Antidisturbios (ESMAD), Jaime Pardo Leal, Carlos, the one who was the manager of the courthouse cafeteria and we painted it on 32<sup>nd</sup> street and Caracas street. We began to call them memory actions in the street. The references we had were, let's say the actions that were carried out in Argentina, for example, marking of public space or that were carried out in Guatemala, etc.<sup>50</sup>

These three elements (inclusion, expertise, influence) allow the broadening of the actions of representation of the victims of forced disappearance by their relatives. The relatives mobilise for victims who are not only their direct relatives; they include other victims of these crimes. They become experts, and their expertise validates their work and is included in other forms of transitional justice, such as historical memory commissions and truth commissions. Most of them influence other civil society movements beyond their national borders.

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49 (Personal Interview, 2019).

50 (Personal Interview, 2019).

## 7. Conclusion

Victims of enforced disappearance are not absent victims. Their removal from the protection of the law is both a reason and a consequence of the practice of enforced disappearance. Victims of enforced disappearance are also often victims of social disappearance; they are already located at the margins of society, suffering a lack of protection from the state. They are forcefully disappeared to silence their voice, particularly when they are considered to be a threat or opposition to the government. Forced disappearance is an additional form of state violence or the result of violence from non-state armed actors. Victims of enforced disappearance are in a liminal state of being and not being absent. The label of enforced disappeared as it appears in international law and in domestic law is a form of managing the suffering of victims, of naming a situation that is deemed ongoing and unspeakable.

The crime of enforced disappearance is ongoing; this characteristic provides it with a particular temporality that demands further exploration. In a context of prolonged conflict such as the Colombian conflict that has lasted over five decades, it is possible to talk about different generations of disappeared victims (direct victims and their relatives). Victims of enforced disappearance have met different levels of recognition by the state. They may have been ignored or prosecuted during the violent dynamics of the conflict; they may have been sequentially ignored by the state. In the later stages, the mobilisation of the families of the disappeared has been recognised, and their expertise has given them legitimacy. Their work has influenced other social movements and other areas of civil society, which has created a broader dimension of representation for the victims of enforced disappearance.

The activism of the families calls for the ongoing search not only of their sons, daughters, or other direct relatives but the search for all those who have disappeared in a particular context, either in the hands of the state (ie Argentina, Chile) or non-state actors (ie Mexico, Colombia). The legitimacy and power of the movement come from their bonds and public grief, which is directly affected by the disappearance of their loved ones. However, the effectiveness of their permanence in the public and political sphere comes from their authority as experts and their identification with other groups of victims of enforced disappearance. These bonds with dif-

ferent groups of civil society could strengthen the representation of the otherwise absent victims in the future.

