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ARTICLE

"The Purloined Letter": Migrant Disappearances, Systematic Impunity, and States' Risk Awareness

La lettre volée: les disparitions de migrants, l'impunité systématique et la connaissance des risques par les États

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Abstract

The disappearance of migrants, which has reached preoccupying high numbers in recent decades, is related both to the particular vulnerability of migrants traversing dangerous migratory routes and to the high degree of impunity that characterizes investigation and search efforts required. This article argues that the disappearance of migrants at the hands of non-state actors in contexts of systematic impunity and in situations where the state had knowledge or should have had knowledge of a serious risk of such disappearance, but failed to act to prevent it, can be considered to have occurred with the acquiescence of the state. Thus, given that all further elements of the definition of enforced disappearance have been satisfied, this factual situation qualifies as an "enforced disappearance" for the purposes of international human rights law. Key to this demonstration is the concept of knowledge, which is an essential component of acquiescence. This article not only addresses the normative framework of acquiescence and its interpretation by international and regional human rights bodies, including how it relies on the element of state knowledge, but it also examines the extent to which this factor is critical to understanding states' due diligence obligations to prevent, investigate, and sanction human rights obligations, including disappearances. In order to better understand the factors that should be taken into consideration while assessing a state's knowledge of migrant disappearances, including in the context of systematic impunity, it is then suggested to borrow from the international criminal law test related to the concept of "constructive knowledge" and to the doctrine of command responsibility. These considerations should inform a test for assessing whether disappearances of migrants occurring in contexts of systematic impunity can be considered as having been known by the state and as having occurred with its acquiescence and, thus, as constituting "enforced disappearances" under international human rights law.

This text was produced while Anna Rahel Fischer was a fellow at the Intstitut d'Études Internationales de Montréal at the University of Quebec in Montreal in Canada. The quotation in the title is from Edgar Allan Poe, "The Purloined Letter," *The Works of Edgar Allan Poe*, Lit2Go edition (1910), online: <etc.usf.edu/lit2go/147/the-works-of-edgar-allan-poe/5357/the-purloined-letter/>.

Keywords: Human rights; enforced disappearances; migrants; non-state actors

Résumé

Les disparitions de migrants ont atteint des chiffres très préoccupants au cours des dernières décennies et sont liées à la fois à la vulnérabilité particulière des migrants, aux routes migratoires dangereuses qu'ils empruntent et au degré élevé d'impunité qui caractérise les efforts d'enquête et de recherche requis. Cet article soutient que la disparition de migrants aux mains d'acteurs non étatiques dans des contextes d'impunité systématique et dans des situations où l'État avait connaissance ou aurait dû avoir connaissance d'un risque sérieux de disparition, mais n'a pas agi pour l'empêcher, peut être considérée comme s'étant produite avecl'acquiescement de l'État. Ainsi, advenant que tous les autres éléments de la définition de la disparition forcée sont présents, cette situation factuelle devrait pouvoir être qualifiée de "disparition forcée" au sens du droit international des droits de la personne. La clé de cette démonstration repose sur le concept de connaissance, qui est une composante essentielle de l'acquiescement. Cet article aborde non seulement le cadre normatif de l'acquiescement et son interprétation par les organismes internationaux et régionaux de protection des droits humains, y compris la manière dont cette notion s'appuie sur l'élément de connaissance de l'État, mais il examine également dans quelle mesure ce facteur est essentiel pour comprendre les obligations de diligence raisonnable qu'ont États pour prévenir, enquêter et sanctionner les violations des droits humains, y compris les disparitions. Afin de mieux comprendre les facteurs qui devraient être pris en considération lors de l'évaluation de la connaissance qu'a un État des disparitions de migrants, y compris dans un contexte d'impunité systématique, il est suggéré de s'inspirer du critère de droit pénal international lié au concept de "connaissance" et à la doctrine de la responsabilité des commandants. Ces considérations devraient éclairer un test permettant d'évaluer si les disparitions de migrants survenant dans des contextes d'impunité systématique peuvent être considérées comme ayant été connues de l'État et comme s'étant produites avec son acquiescement, constituant ainsi des "disparitions forcées" au sens du droit international des droits de la personne.

Mots-clés: Droits de la personne; disparitions forcées; migrants; acteurs non-étatiques

1. Introduction

In the summer of 2023, three hundred migrants disappeared at sea on their way from Senegal to the Canary Islands, a Spanish territory in the Atlantic Ocean.[1] Last year alone, more than 686 migrants either died or disappeared *en route* to the US-Mexican border.[2] These tragedies are among the many reported by the United Nations (UN) International Organization for Migration (IOM), which considers that, since 2014, more than fifty-eight thousand migrants have either died or gone missing in the process of crossing borders towards an international destination, regardless of their legal status.[3] When disappearances are the act of state agents, they can be considered

[1] "How Many Irregular Migrants Go Missing?" *The Economist* (19 July 2023), online: <www.economist.com/the-economist-explains/2023/07/19/how-many-irregular-migrants-go-missing>.

[2] "US-Mexico Border Is World's Deadliest Land Route for Migrants: IOM," *Al Jazeera* (12 September 2023), online: <www.aljazeera.com/news/2023/9/12/us-mexico-border-is-worlds-deadliest-land-route-for-migrants-iom.

[3] "The Missing Project," *International Organization for Migration*, online: <missingmigrants.iom.int/data>.

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as "enforced disappearances" under international human rights law (IHRL).[4] Disappearances committed by non-state actors (NSAs) do not fall into this category unless the latter are acting with "the authorization, support or acquiescence of the State." Even when disappearances cannot be attributed to public authorities, the state still has a due diligence obligation to prevent, investigate, and sanction such actions.[5]

In this article, we consider the high number of migrant disappearances worldwide as an indicator of the increased foreseeability of risk when migrants cross borders. We submit that, in contexts of systematic impunity and in situations where the state had knowledge or should have had knowledge of a serious risk of migrants disappearing, including, for instance, when migrants are deliberately placed in, or redirected to, dangerous routes and territories — the desert, the ocean, or the mountains, for instance — by migration policies, followed by omissions to prevent such disappearances from taking place, these could then be considered as having occurred with the acquiescence of the state. Therefore, these could be considered "enforced disappearances" under IHRL if all further elements of the definition of enforced disappearance are satisfied. In other words, we argue that, if systematic impunity for migrant disappearances raises to a certain level, and in circumstances where the state "knew or had reason to know" of the risk of the disappearance of migrants and should have taken appropriate measures to prevent such risk from materializing, such actions go beyond a mere violation of Article 3 of the *International Convention for the Protection of All Persons from Enforced Disappearance* (*ICPPED*) or a breach of due diligence and could be qualified as "acquiescence" within the meaning of Article 2 of the *ICPPED*.[6]

This approach relies on a fourfold argument: (1) that disappearances of migrants often occur in contexts of systematic impunity; (2) that states' obligations to prevent and sanction disappearances have, amongst other crucial objectives, the elimination of impunity; (3) that systemic impunity in the context of migrant disappearances is impossible to ignore and therefore should be presumed to be known by the state; and (4) that states omitting to prevent and stop disappearances, even those committed by NSAs in this context, actually acquiesce to the crime, rendering them "enforced disappearances." A key factor in this demonstration is the concept of knowledge, which is an essential component of acquiescence. What a state can reasonably be expected to do may depend on what actual or perceived knowledge it had about the risk of harm, how accurate that knowledge was, and how well it subsequently acted in accordance with that knowledge.

In assessing whether the state knew or should have known that there was a real and imminent risk, the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR) consider whether there was information available in advance that served as evidence on the basis of which it should have determined to take action. However, neither the ECtHR nor the IACtHR have developed a detailed doctrine on the concept of acquiescence in cases of enforced disappearance. In this context, we show how the determination of acquiescence has become linked to the prevention of violations such as enforced disappearances in contexts of widespread violence, systematic impunity, and intersectional forms of

[4]*International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, 2716 UNTS 3 (entered into force on 23 December 2010), art 2 [*ICCPED*]. See also the preamble of the *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc A/RES/47/133 (18 December 1992) [*1992 Declaration*].

[5]*Velásquez Rodríguez v Honduras* (Merits) (1988), Inter-Am Ct HR (Ser C) No 4 [*Velásquez Rodríguez*].

[6]*ICPPED*, *supra* note 4.

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discrimination.[7] Such an extension is based on the premise that states should not deliberatively turn a blind eye to massive rights violations when they were in a position to know the risk that those violations might occur in a particular geographic region because of its specific context. What is legally viewed as a failure of due diligence by states and what is legally considered as acquiescence is therefore determined by interpreting the "deliberative element" of the omission, which, as in traditional cases of failure to exercise due diligence, is composed of a risk-awareness test.

Accordingly, after having discussed the contemporary phenomenon of disappearances of migrants as well as the amplitude and systematic impunity that characterize it, this article will not only address the normative framework of acquiescence and its interpretation by international and regional human rights bodies, including how it relies on the element of state knowledge, but it will also explore how this element is also crucial to understanding states' due diligence obligation to prevent, investigate, and sanction human rights obligations, including disappearances. In order to better comprehend the factors that should be taken into consideration while assessing a state's knowledge of migrant disappearances, including in the context of systematic impunity, the article suggests borrowing from the international criminal law (ICL) test related to the concept of "constructive knowledge" and to the doctrine of command responsibility. These considerations should inform a test to assess whether disappearances of migrants occurring in contexts of systematic impunity can be considered to have been known by the state and as having occurred with its acquiescence and, as such, constitute "enforced disappearances" under IHRL.

2. Systematic impunity in the context of disappearances of migrants

This first section will address the factual, conceptual, and normative characteristics of disappearances that occur in the context of migration and that are characterized by systematic impunity.

A. Migrants disappearing: (enforced) disappearances or missing persons?

Under international human rights law, an enforced disappearance is generally understood as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."[8] Enforced disappearances should thus not be confused with the broader category of "missing persons."[9] Indeed, under international humanitarian law, a missing person is someone whose whereabouts are unknown as a result of armed conflict.[10] The drafting history of

[7] *Velásquez Rodríguez*, *supra* note 5; *Rantsev v Cyprus & Russia*, ECtHR application no 25965/04 (7 January 2010) [*Rantsev*]; *El-Masri v Former Yugoslav Republic of Macedonia* [GC], ECtHR application no 39630/09 (13 December 2012) [*El-Masri*].

[8] *ICCPED*, *supra* note 4, art 2; *1992 Declaration*, *supra* note 4, preamble.

[9] Committee on Enforced Disappearances, *Report of the Committee on Enforced Disappearances on Its Visit to Iraq under Article 33 of the Convention*, Doc CED/C/IRQ/VR/1 (19 April 2023) at para 49ff.

[10] *Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978). See also Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, vol 1: *Rules* (Cambridge: Cambridge University Press, 2005), Rule 117.

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both notions — "enforced disappearances," as an ICL and IHRL category, and "the missing," as a broader international humanitarian law (IHL) category — demonstrates significant differences. According to the UN Human Rights Council, "missing persons" are those unaccounted for as a result of an international or non-international armed conflict[11] through killings, abduction, or capture and incommunicado detention,[12] while, for the International Committee of the Red Cross (ICRC), they are those "whose whereabouts are unknown to their families or, based on reliable information, who are reported missing as a consequence of armed conflict, internal violence or internal disturbances."[13] The category of missing persons is of an altogether broader scope than enforced disappearances.[14]

Enforced disappearances, on the other hand, require three constitutive elements: (1) the deprivation of liberty of a person against their will; (2) by state agents or with their collaboration or acquiescence; and (3) the state's refusal to divulge (or its concealment of) the fate or whereabouts of the victim.[15] The legal concept of "enforced" disappearance thus relies on the participation of public officials or, alternatively, of NSAs acting with the authorization, support, or acquiescence of the state. Short of this element, such acts would merely be considered as "disappearances." In recent years, this dichotomy has been the object of debate amongst victims,[16] human rights institutions, and experts[17] as to the possibility of extending the legal concept of "enforced disappearance" to acts committed by NSAs, particularly since the adoption of the *Rome Statute of the International Criminal Court* (*Rome Statute*), according to which the crime against humanity of "enforced disappearance" can also be committed by a political organization.[18] Early conceptions of enforced disappearances were broader and did not require the involvement of state agents, including the concept suggested by the Human Rights Institute of the Paris Bar Association in 1981,[19] by the UN General Assembly in Resolution 33/173,[20] or by the

[11]Progress Report of the Human Rights Council Advisory Committee on Best Practices on the Issueof Missing Persons, Doc A/HRC/14/42 (22 March 2010) at para 10.

[12]International Committee of the Red Cross (ICRC), *The Missing: Progress Report* (2006) at 2. See also Working Group on Enforced or Involuntary Disappearances (WGEID), *Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Turkey*, Doc A/HRC/33/51/Add.1 (27 July 2016).

[13]ICRC, *Accompanying the Families of Missing persons: A Practical Handbook* (Geneva: ICRC, 2013) at 16.

[14]'Guiding Principles/Model Law on Missing Persons' (2009) at para. 2.1, online: *ICRC* <www.icrc.org/en/document/guiding-principles-model-law-missing-model-law>. See also Committee on Enforced Disappearances, *supra* note 9 at paras 49ff.

[15]Bernard Duhaime & Rhiannon Painter, "International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)" in Christina Binder *et al*, eds, *Elgar Encyclopedia of Human Rights* (Cheltenham, UK: Edward Elgar, 2021) 135.

[16]From a victim's perspective, scholars suggest that the experiences of victims favour a broader concept of enforced disappearance as the actual category of perpetrator — either state authorities, paramilitary groups, or criminal organizations — remains insignificant to the suffering of victims and their families. See Gabriella Citroni & Tullio Scovazzi, eds, *The Struggle against Enforced Disappearance and the 2007 United Nations Conventions* (Leiden: Martinus Nijhoff, 2007) at 278.

[17]Olivier de Frouville, "Trivializing Enforced Disappearances? The Issue of 'Non-State Actors" in Olivier de Frouville & Pavel Sturma, *La pénalisation des droits de l'homme* (Paris: Pedone, 2021) 1.

[18]*Rome Statute of the International Criminal Court*, 17 July 1998, Can TS 2002 No 13 (entered into force 1 July 2002) [*Rome Statute*].

[19]Nicole Questiaux, "Le refus de l'oubli: La politique de disparition forcée de personnes" in Citroni & Scovazzi, *supra* note 16, 268.

[20]United Nations (UN) General Assembly Resolution 33/173 on Disappeared Persons (20 December 1978).

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Organization of American States in 1983.[21] More recently, the Human Rights Committee (HRC) indicated in 2014 that "the term 'enforced disappearance' may be used, in an extended sense, to refer to disappearances initiated by forces independent of, or hostile to, a state party, in addition to disappearances attributable to a state party."[22]

While IHRL still requires that "enforced disappearances" be the acts of state officials, the UN Working Group on Enforced or Involuntary Disappearances (Working Group on Enforced Disappearances) has started treating cases of disappearances committed by NSAs under its humanitarian procedure since 2019,[23] and the Committee on Enforced Disappearances adopted a statement on NSAs and enforced disappearances in March 2023, which recognizes as enforced disappearances acts "perpetrated by a non-State actor exercising effective control and/or government-like functions over a territory."[24] Taking this into consideration, how should one qualify disappearances of migrants? Migrant disappearances often result from them being forced onto dangerous migration routes and thus being increasingly exposed to smuggling networks as well as from illegal practices such as secret detention and summary refoulement by border control personnel.[25] They also stem from high levels of impunity that characterize the criminal and forensic investigation and search efforts to clarify the circumstances of, and establish the truth about, such disappearances. In these contexts, migrants are often pushed back into geographic areas — such as onto the desert, across rivers, and into the sea — that pose a foreseeable risk to their lives.[26] The following analysis starts from the findings by the Working Group on Enforced Disappearances in its 2017 report on enforced disappearances in the context of migration, observing that "migrants leaving countries by boat are often abandoned by smugglers off the coast, sometimes in situations where they are initially prevented by authorities from approaching or disembarking. As a consequence, stranded migrants drown at sea, notably in the Mediterranean, and die or remain missing on land routes through deserts."[27]

In these situations, the Working Group on Enforced Disappearances found that, while these practices do not constitute enforced disappearances *stricto sensu*, they

[21]Inter-American Commission on Human Rights, *Annual Report*, Doc OAS GA Res AG/RES.666 (XIII-0/83) (18 November 1983), preamble at para 4.

[22]Human Rights Committee, *Views* (16 July 2014) in *Durić and Durić v Bosnia and Herzegovina*, ECtHR application no 1956/2010 (16 July 2014) at para 9.3.

[23]Working Group on Enforced or Involuntary Disappearances (WGEID), *Report of the Working Group on Enforced or Involuntary Disappearances*, Doc A/HRC/42/40 (30 July 2019) at para 92. See also *Revised Methods of Work of the Working Group on Enforced or Involuntary Disappearances*, Doc A/HRC/WGEID/1 (February 2023) at paras 32–39.

[24]Committee on Enforced Disappearances, *Statement on Non-State Actors in the Context of the International Convention for the Protection of All Persons from Enforced Disappearances*, Doc CED/C/10 (2 May 2023) at para 18(b).

[25]*FAJ v Greece*, Communication to the Human Rights Committee (August 2021), online: <www.humanrights360.org/wp-content/uploads/2021/09/Communication-to-the-United-Nations-Human-Rights-Committee-in-the-case-of-Faj-against-Greece.pdf>.

[26]See Felipe González Morales, *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and at Sea*: *Report of the Special Rapporteur on the Human Rights of Migrants*, Doc A/HRC/47/30 (12 May 2021).

[27]*Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, Doc A/HRC/36/39/Add.2 (28 July 2017) at para 44.

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have been considered to be tantamount to disappearances.[28] This statement demonstrates that disappearances of migrants occur as a result of acts and omissions by state agents and criminal networks, or of the collusion between the two, as a consequence of the externalization and securization of borders and "policies of extraterritoriality,"[29] or of simple abandonment and negligence by states, in violation of their obligation "to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released, [to] take the necessary measures to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release."[30]

Although there is increasing information on the number and scale of these cases of disappearances — migrant disappearances may indeed represent the highest number of disappeared persons worldwide — there is little access to justice, truth, and reparation, perpetuating the cycle of widespread impunity.[31] Moreover, as the practice of (enforced) disappearance takes place in secrecy and migrants often remain undetected for fear of deportation, it remains difficult to capture the scale and scope of enforced disappearance in the context of migration.[32] The visibility and legal registration of migrant disappearances as enforced disappearances might further be compromised by the fact that their context departs from the traditional historical association of enforced disappearances with authoritarian and totalitarian regimes, such as the Latin American dictatorships in the 1960s, 1970s, and 1980s, thus forcing the adoption of a new frame of perception towards this phenomenon.[33]

Addressing impunity in the context of disappearance is a key guiding principle of the *ICPPED*, which is relevant to the elaboration of situations of state acquiescence and due diligence.[34] Impunity constitutes not only an important starting point for risk awareness in relation to situations of enforced disappearance, but it also represents an aggravating factor as to the attribution of state responsibility for this type of crime. Indeed, as indicated by the Working Group on Enforced Disappearances, "[t]here is a direct link between enforced disappearance and migration, either because individuals migrate as a consequence of the threat or risk of being subjected to enforced disappearances in their country or because they disappear during their migratory journey or in the country of destination."[35]

[28]*Ibid* at paras 4, 44 (considering that such instances be "tantamount to disappearances or may facilitate disappearances because they render the finding or identification of missing persons very difficult").

[29]UN Secretary-General, *Unlawful Death of Refugees and Migrants*, Doc A/72/335 (15 August 2017) at 2.

[30]*ICPPED*, *supra* note 4, art 21; *1992 Declaration*, *supra* note 4, art 11.

[31]"US-Mexico Border World's Deadliest Migration Land Route" (12 September 2023), online: *International Organization of Migration* <www.iom.int/news/us-mexico-border-worlds-deadliest-migration-land-route>.

[32]"Migrants at High Risk of Enforced Disappearances," *VOA News* (13 September 2017), online: <www.voanews.com/a/un-migrants-enforced-disappearances/4027657.html>.

[33]See Bernard Duhaime "Enforced Disappearances in the Contemporary World: The Recent Contributions of the United Nations Working Group on Enforced or Involuntary Disappearances" in Maria Giovanna Bianchi & Monica Luci, *The Crime of Enforced Disappearance: Between Law and Psyche* (London: Routledge, 2023) 19.

[34]*ICPPED*, *supra* note 4, preamble. See Marthe Lot Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearances* (Antwerp: Intersentia, 2012).

[35]*Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, Doc A/HRC/36/39/Add.2 (28 July 2017) at para 51.

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Migrant disappearances are often reported taking place in a context of negligence and disregard for the rule of law and legal safeguards aimed at protecting rights and the lack of accountability for the alleged violations. The migration context is frequently described in regional case law as being characterized by racialized forms of violence, including racial profiling,[36] poverty, and *de jure* and *de facto* situations of vulnerability[37] due to the migratory journey and associated traumatic experiences,[38] the lack of prospects for redress and accountability for human rights violations, including a lack of effective and prompt investigation,[39] a lack of procedural safeguards,[40] common situations of removal of the victim's protection from the law[41] through the clandestine (re-)expulsion by national and regional border police,[42] and detention in unofficial detention centres without access to legal counsel or the outside world.[43]

In this context, UN special procedure mechanisms have denounced that the disappearance and death of migrants crossing international borders seems to be accepted by states as an "assumed risk of irregular travel."[44] According to some, migrants are considered to have voluntarily placed themselves at risk, although the notion of consent to smuggling is becoming increasingly criticized.[45] Moreover, legal scholars have observed that the lack of adequate data on the missing contributes to the maintenance of "quasi-generalized regimes of impunity," whereas the reluctance to identify disappeared migrants amounts to "strategic negligence" in some regions.[46] Similarly, the Working Group on Enforced Disappearances stated in its 2017 report that "systematic situations of impunity regarding the abduction and detention of migrants by private actors, including smugglers or traffickers, could be considered in certain circumstances as a form of acquiescence and, as such, constitute enforced disappearance."[47] This seems to indicate that a specific degree of systematicity of impunity in relation to migrant disappearances may be considered as one of the modes of attribution that is applicable to enforced disappearances in Article 2 of the *ICCPED* — namely, acquiescence. The conceptual and normative scope of systemic impunity should thus be considered in detail.

[36] *FAJ v Greece*, supra note 25 at para 16.

[37] *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 (17 September 2003), Inter-Am Ct HR (Ser A) No 18 at paras 112–13 [*Juridical Condition and Rights*].

[38] *MSS v Belgium and Greece* (Judgment), ECtHR application no 30696/09 (21 January 2011) at para 232.

[39] *FAJ v Greece*, *supra* note 25.

[40] *AH v Serbia and North Macedonia* and *AH v Serbia*, ECtHR application no 60417/16 and 79749/16 (5 April 2022).

[41] *Hirsi Jamaa and Others v Italy*, ECtHR application no 27765/09 (23 February 2012).

[42] Human Rights Committee, *Boucherf v Algeria*, Communication no 1196/2003 (30 March 2006) at para 9.2.

[43] *FAJ v Greece*, *supra* note 25 at para 147.

[44] Agnes Callamard, "The Global Compact on Safe, Orderly and Regular Migration: Recommendations to Respond to Disappearances of Migrants" (2018), Working Paper at 2.

[45] UN Office on Drugs and Crime (UNODC), *Smuggling of Migrants by Sea* (2011) at 33; *Human Rights of Migrants*, Doc A/71/285 (4 August 2016) at para 54.

[46] Thomas Spijkerboer, "Policy Conclusions" (12 May 2015), online: <www.borderdeaths.org/?page_id=295; A/72/335 2>.

[47] *Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, Doc A/HRC/36/39/Add.2 (28 July 2017) at para 42.

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B. Systemic impunity and its consequences

The current situation of migrant disappearances demonstrates that impunity is a widespread phenomenon. Leading forensic anthropologists speak about a crisis in identifying and tracing recovered migrant bodies.[48] Several authorities in Spain, Italy, and Greece refuse to disclose registers of identified bodies,[49] while migrant bodies found at the US-Mexico border were allegedly cremated without identification and dumped into the Pacific Ocean by border personnel.[50] The Collectif des Familles de Disparu(e)s en Algérie presented before the UN Human Rights Council cases of sub-Saharan migrants who disappeared in Algerian detention facilities because they were not properly registered, while state authorities refused to disclose their fate, a practice that removes migrants from the protection of the law.[51]

Moreover, smuggling networks demonstrate an increasing degree of collusion with state officials.[52] In Libya, the UN Support Mission in Libya (UNSMIL) confirms the widespread collusion between state institutions, local officers, and smuggling networks.[53] UNSMIL has suggested that the interception of migrant boats by Libyan coast guards entailed disappearances. In Turkey, the complicity or at least connivance between state authorities and NSAs in disappearing migrants has been reported.[54] In addition, law enforcement practices make traffickers turn to abduction strategies while rendering migrants more dependent on smugglers,[55] which was reported along the Italian, Spanish, and Maltese coasts.[56] In Cyprus, migrants were reported to be intercepted and consequently left adrift at sea without further investigation.[57] At the Colombian-Venezuelan border, the lack of effective investigations and binational cooperation to address cases of cross-border disappearances, including of migrants, by armed NSAs was observed.[58] In particular, the push- and pull-back of migrants

[48]See José Pablo Baraybar, Inés Caridi & Jill Stockwell, "A Forensic Perspective on the New Disappeared: Migration Revisited" in Roberto C Parra, Sara C Zapico & Douglas H Ubelaker, eds, *Forensic Science and Humanitarian Action: Interacting with the Dead and the Living* (New York: John Wiley & Sons, 2020) 102; Robin Reineke, *Naming the Dead: Identification and Ambiguity along the US-Mexico Border* (PhD dissertation, University of Arizona, 2016).

[49]Amelie Tapella, Giorgia Mirto & Tamara Last, "From Institutional Carelessness to Private Concern" (2016) 5 Intrasformazione 1 at 68.

[50]Reineke, *supra* note 48 at 223.

[51]UN Refugee Agency & Association for the Prevention of Torture and the International Detention Coalition, *Monitoring Immigration Detention: Practical Manual* (Geneva: UN Human Rights Council, 2014) at 20.

[52]International Organization of Migration (IOM), *Migrant Smuggling Data and Research* Geneva: IOM Press, 2016) at 7.

[53]Office of the UN High Commissioner for Human Rights, *Detained and Dehumanised: Report on Human Rights Abuses Against Migrants in Lybia* (13 December 2016), online: <www.ohchr.org/Documents/Countries/LY/DetainedAndDehumanised_en.pdf>.

[54]*Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Turkey*, Doc A/HRC/33/51/Add.1 (27 July 2016) at para 14.

[55]International Commission on Missing Persons, *Missing Migrants Program for the Mediterranean Region*, Doc DG.1370.1.doc (15 January 2018) at 2.

[56]UNODC, *Smuggling of Migrants: Global Review and Annotated Bibliography of Recent Publications* (2011) at 26.

[57]Doc AL CYP 2/2021 (12 July 2021)

[58]Doc AL VEN 9/2020 (4 December 2020)

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frequently results in cases of migrant disappearances[59] as well as in chain refoulements that put migrants at high risk of being forcibly disappeared during their transit and upon arrival at their destination.[60]

These cases demonstrate a lack of *ex officio*, prompt, and effective investigations, transnational cooperation between the countries of origin, transit, and destination, the failure to inform family members of the search, the absence of forensic investigation in accordance with international standards such as the 2016 *Minnesota Protocol on the Investigation of Potentially Unlawful Death*,[61] and the failure to repatriate human remains and provide adequate reparation to family members.[62] These cases further illustrate that disappearances of migrants occur structurally as well as on a large scale and are characterized by a *modus operandi* that, given its embeddedness in systemic situations of impunity, shows characteristics tantamount to enforced disappearance, according to the assessment by the Working Group on Enforced Disappearances.

Since the *ICPPED*'s preamble stipulates that the combat of impunity is its central aim, the convention's interpretation should take into consideration this specific objective, in accordance with Article 31(2) of the 1969 *Vienna Convention on the Law of Treaties.*[63] As shown below, the relevance of impunity for potential attribution of state responsibility has been confirmed by the jurisprudence of regional courts. For example, in the case *La Cantuta v Peru*, the IACtHR confirmed that the gravity of the crime in contexts of high levels of impunity "fostered and tolerated by the absence of civil liberties and the inefficacy of legal institutions to cope" with enforced disappearances is relevant as a determinant of a breach of state obligations.[64] The question put before the IACtHR in this case was whether Peru had complied with its duty to investigate, prosecute, and punish the perpetrators of the events in *La Cantuta*, considering that the remains of two of the ten disappeared students had been identified, while the others remained undiscovered at the time of the judgment.

The IACtHR found that a delay of investigations of fourteen years since the perpetration of the events that led to the enforced disappearance of the victims had exceeded the period of time that can be considered reasonable and that the absence of the main defendants from the trial had contributed to the maintenance of a situation of generalized impunity.[65] It held that the "generalized situation of impunity for

[59]See *FAJ v Greece*, *supra* note 25. See also "Press Release: Enforced Disappearances Report to UN Committee on Enforced Disappearances," *Border Violence*, online: <www.borderviolence.eu/15638-2/>; ""Enforced Disappearance and Expulsion at Greece's Evros Borders," *Global Legal Action Network* online: <www.glanlaw.org/enforced-disappearance-greece>.

[60]*Ilias and Ahmed v Hungary*, (Judgment), ECtHR application no 47287/15 (21 November 2019).

[61]*Minnesota Protocol on the Investigation of Potentially Unlawful Death: The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, 2016.

[62]Doc AL SLV 1/2021 (16 April 2021).

Doc GTM 4/2021 (16 April 2021); Doc HND 2/2021 (16 April 2021); Doc MEX 5/2021 (16 April 2021).

[63]*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37 (entered into force 27 January 1980); Diane Orentlicher, *Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Doc E/CN.4/2005/102/Add.1 (8 February 2005); *Enforced or Involuntary Disappearances*, Doc A/HRC/Res/7/12 (27 March 2008) at paras 4(d), 5(c), 6(a)(d)(e).

[64]*La Cantuta v Peru* (Merits, Reparations, and Costs), (2006) Inter-Am Ct HR (Ser C) No 162 at para 92.

[65]*Ibid* at paras 149, 147.

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egregious human rights violations" intensified the duty to carry out a prompt, serious, impartial, and effective *ex officio* investigation into the disappearances.[66] Furthermore, the fact that the violations in question were perpetrated in a context of widespread and systematic attacks against sectors of the civilian population was taken as a decisive indicator that established the awareness of the state of those acts and its ultimate failure of protection towards the victims.[67] Furthermore, "the need to eradicate impunity reveal[ing] itself to the international community as a duty of cooperation among States for such purpose" was considered among the elements required to combat impunity.[68] The IACtHR concluded that impunity combined with non-compliance with protection and investigation obligations exacerbates the international responsibility of the state.[69] Ultimately, the failure to identify human remains and the failure to search for such remains played a critical role in the perpetuation of impunity and determining state responsibility.[70] In related cases of violations of the right to life, the widespread climate of impunity constituted an aggravating factor in finding that the state had failed in complying with its due diligence obligations.[71]

The existence of a context of systematic impunity can thus have several legal consequences, including being an aggravating factor when assessing a state's obligations — among them the obligations of preventing, investigating, and sanctioning violations with due diligence — and can also constitute a crucial element in assessing whether acts of NSAs have occurred with the acquiescence of the state, as discussed in the next two sections.

3. State acquiescence and human rights obligations

In light of the fact that the combat of impunity is a guiding principle of the *ICCPED*, endemic cycles of impunity point to forms of acquiescence that can make the state responsible for the commission of enforced disappearances. The *ICPPED* identifies as forms of responsibility "authorization, assistance, or acquiescence" that render a disappearance attributable to the state as an enforced disappearance under Article 2. For our purposes, it is instructive to consider the lowest threshold among the forms of imputation — "acquiescence" — followed by forms of systematic omission by the sState, particularly the structural absence of investigation. Acquiescence denotes consent inferred from a juridically relevant silence or inaction based on its principle *qui tacit consentire videtur si loqui debuisset ac potuisset* — he who keeps silent is held to consent if he must and can speak.[72] The former UN special rapporteur on torture and the UN special rapporteur on extrajudicial, summary or arbitrary executions confirm that repeated omissions, including laws and policies that place individuals in avoidable abusive circumstances, constitute acquiescence, as does systematic inaction

[66]*Ibid* at paras 110, 130.
[67]*Ibid* at paras 95–96.
[68]*Ibid* at para 160.
[69]*Ibid* at para 116.
[70]*Ibid* at paras 230–35.
[71]See *Myrna Mack Chang v Guatemala*, (2003) Inter-Am Ct HR (Ser C) No 101 at paras 152, 158, 138, Reasoned Opinion of Judge Cançado Trindade.
[72]Nuno Sérgio Marques Antunes, "Acquiescence," *Max Planck Encyclopedias of International Law* (September 2006) at para 2.

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in the face of an endemic pattern of such violations.[73] These views are relevant as a subsidiary means of establishing legal rules. In certain contexts where the state has failed to pursue complaints of specific risks of enforced disappearance when action would have been required, inaction can be construed as acquiescence, often interpreted as a form of "willful blindness."[74] However, the distinction between acquiescence and the breach of states' duty of due diligence remains unclear in light of universal and regional jurisprudence and needs to be further defined.

A. Acquiescence and the UN experts on enforced disappearances

While the Working Group on Enforced Disappearances indicated in its 2017 report that "systematic situations of impunity regarding the abduction and detention of migrants by private actors, … could be considered in certain circumstances as a form of acquiescence and, as such, constitute enforced disappearance," the Committee on Enforced Disappearances, in its 2022 report on its visit to Iraq, indicated that

> [a]cquiescence means that the state knew, had reasons to know, or ought to have known of the commission or of the real and imminent risk of commission of an enforced disappearance by persons or groups of persons, but: (a) has either accepted, tolerated, or given consent, even implicitly, to this situation; (b) has deliberately, and in full knowledge by action and omission, failed to take measures to prevent the crime and to investigate and punish the perpetrators; (c) has acted in connivance with the perpetrators, or with total disregard for the situation of the potential victims, facilitating the actions of the non-State actors who commit the act; or (d) has created the conditions that allowed their commission. In particular, there is acquiescence within the meaning of Article 2 when there is a known pattern of disappearances of persons and the State has failed to take the measures necessary to prevent further disappearances, to investigate and to bring the perpetrators to justice.[75]

B. Acquiescence considering analogies with the Convention against Torture

The structure of the *ICPPED* draws heavily on the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (*CAT*).[76] The latter implies acquiescence as a form of attribution of acts by private actors to the state under its definition of torture in Article 1. According to the Committee against Torture, when state agents have reasonable grounds to believe that torture is

[73]Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Doc A/HRC/7/3 (15 January 2008) at para 68; Callamard, *supra* note 44 at 1.

[74]Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009) at 204.

[75]Committee on Enforced Disappearances, *supra* note 9 at para 52.

[76]*Report Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, Pursuant to Paragraph 11 of Commission Resolution 2001/46*, Doc E/CN.4/2002/71 (8 January 2002) at para 45; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Can TS 1987 no 36 (entered into force 26 June 1987) [*CAT*].

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committed — for instance, by witnessing or foreseeing those circumstances — and fail to prevent those acts, they can be considered as "authors, complicit or otherwise responsible for consenting and acquiescing in such impermissible acts."[77] Although the *CAT*'s threshold of requiring actual knowledge of circumstances is higher than required in the *ICPPED*, this reflection by the Committee against Torture has been applied especially in cases of trafficking and abduction.[78] Considering the intrinsic link between rights' violations such as torture and enforced disappearances, it points to possible legal analogies in relation to the *ICPPED*'s provisions.[79]

While the *CAT* did not cover purely private acts of violence, the drafters' decision to insert the phrase "consent or acquiescence" meant that, when officials adopt a "passive attitude" towards practices considered amounting to torture, the state's failure to "ensure protection from such treatment by law" can be considered acquiescence.[80] For instance, when minority groups are threatened or attacked by private individuals, the Committee against Torture considered that acquiescence consists in the fact that the lack of "adequate prevention and diligence" on the part of the authorities "further encourages such private violence."[81] In its 2002 decision in the *Dzemajl* case, the Committee against Torture found that the Yugoslav authorities had condoned a mob attack on a Roma settlement by failing to take adequate measures to protect the residents during the attack and by subsequently conducting an inadequate investigation in which none of the perpetrators were brought to justice.[82] Legal scholars also suggest that the interpretation of acquiescence under the *CAT* encompasses the idea that officials acquiesce to torture if they fail to meet their legal responsibility under international law to take effective preventive measures.[83] This precedent therefore relates the failure to comply with due diligence obligations to a form of "acquiescence."[84]

In subsequent cases, the Committee against Torture also noted that the following elements are indicative of the state's need to take further "effective preventive measures," including prompt and effective law enforcement responses to allegations, awareness campaigns for prevention, and support services for victims.[85] These elements indicate that, despite some laws and other measures being taken to combat rights abuses, (1) these violations persist and are only investigated and prosecuted to a limited extent; (2) law enforcement officials fail to view crimes as serious and

[77] *General Comment No 2: Implementation of Article 2 by State Parties*, Doc CAT/C/GC/2/CRP 1/rev.4 (23 November 2007) at para 18 [emphasis added].

[78] Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge: Cambridge University Press, 2011) at 251.

[79] *Ibid* at 250.

[80] *Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commision on Human Rights Resolution 1985/33*, Doc E/CN.4/1986/15 (19 February 1986).

[81] *Report of the Special Rapporteur, Sir Nigel Rodley, Submitted pursuant to Commission on Human Rights Resolution 2000/43*, Doc E/CN.4/2001/66 (25 January 2001).

[82] *Dzemajl v Yugoslavia*, Case no 161/2000, UN Doc CAT/C/29/D/161/2000 (2002) at paras 2.1–2.27, 9.1–9.5.

[83] Jon Bauer, "Obscured by 'Willful Blindness': States Preventive Obligations and the Meaning of Acquiescence under the Convention against Torture" (2021) 52:2 Colum HRLR, 738 ff.

[84] *Ibid*, arts 4–9, 12–14, 782; Rhonda Copelon, "Gender Violence as Torture: The Contribution of CAT General Comment No 2" (2008) 11 NY City L Rev 229 at 254–55.

[85] UN Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention*, UN Doc CAT/C/GRC/CO/5-6 (27 June 2012) at paras 23–24.

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investigate them vigorously; (3) judges are unduly lenient, uphold discriminatory laws, or fail to take action to address societal structures and values that favour human rights violations; and (4) political leaders make statements that dehumanize members of certain groups.[86] If these measures were not undertaken, state actors would be seen to be acquiescing in the abuse. In this sense, the notion of acquiescence extends not only to certain actions by state officials or to a rather explicit institutional link between state and NSAs but also to societal structures that entrench systems of discrimination. According to the Committee against Torture, acquiescence would therefore be inextricably linked to a failure to prevent serious human rights violations.[87]

C. Acquiescence within the jurisprudence of the ECtHR

In cases of enforced disappearance, the ECtHR did not use the concept of acquiescence as a trigger for attributing state responsibility.[88] In cases of arbitrary killings, the failure to respond to unlawful acts by private actors has resulted in state responsibility based on acquiescence only when NSAs were clearly performing state functions or were supported by the state.[89] While the concept of acquiescence in the context of ECtHR jurisprudence was initially assessed on the basis of violations of the right to life in contexts where NSAs were operating, it has recently been further developed in relation to case law on extraterritorial rendition, which imply the illegal transfer and transnational abduction of a person[90] as well as cases related to human trafficking.[91] In these cases, it can be observed that the court is moving from an understanding of acts by state authorities that faciliated these violations as a breach of the state's procedural obligations to a more active consideration of the context and patterns of similar pre-existing violations in a given region as well as the moments of contact (interception) between state authorities and victims, increasingly using a risk awareness test as an attribution for levels of state collaboration such as acquiescence.

In *Yaşa v Turkey*, the applicant, who was the seller of a pro-Kurdish newspaper, was shot at, and his uncle was killed, by unidentified persons. It was alleged that the

[86]See *Relevance of the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Context of Domestic Violence*" UN Doc A/74/148 (12 July 2019); *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*," UN Doc A/HRC/31/57 (5 January 2016); *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak*, UN Doc A/HRC/7/3 (15 January 2008).

[87]This standard is particularly developed in relation to the non-refoulement principle in migration contexts. For asylum and removal procedures, the refugee definition has long been interpreted to cover harms inflicted by private groups or individuals that a country's government is unable or unwilling to control. In this context, acquiescence of a public official requires that the public official, prior to the activity constituting torture, has awareness of such activity and thereafter breaches their legal responsibility to intervene to prevent such activity. The presence of "acquiescence" as an attribution element in the *CAT* definition of torture therefore opens the possibility of its interpretation in the context of due diligence. *CAT*, *supra* note 76. See UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) at para 65; Bauer, *supra* note 83 at 782.

[88]*Uçar v Turkey* (Judgment), ECtHR application no 52392/99 (11 April 2006) at paras 106–07.

[89]*Acar ao v Turkey*, ECtHR application no 36088/97 (24 May 2005) at paras 83–84 [*Acar and Others*].

[90]*Enforced or Involuntary Disappearances*, Doc A/HRC/48/57 (4 August 2021) at iv.

[91]*Rantsev*, *supra* note 7.

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campaign of attacks against pro-Kurdish newspapers at the time was carried out with the acquiescence or direct participation of agents of the state.[92] However, the ECtHR found that the existence of a report outlining the general situation of attacks and violence against the pro-Kurdish newspaper did not contain material that identified the perpetrators — namely, the members of the Turkish security forces — with sufficient precision.[93] In the court's view, the report had to be specific to the case rather than providing general information about the circumstances in south-east Turkey at the time of the attacks in order to find that the perpetrators had acted with the acquiescence of the state authorities. Rather, the ECtHR found that the state had violated its procedural obligations to conduct effective and prompt investigations since it did not carry out any adequate investigative steps after having received a complaint regarding the crime.[94] Similarly in the *Mahmut Kaya* case, the applicant's brother, suspected of aiding members of the Kurdistan Workers Party (Partiya Karkerên Kurdistanê [PKK]) members, was found shot dead by NSAs.[95] Although the ECtHR stated that strong inferences could be drawn that the perpetrators were known to the authorities, including the fact that the victims were transported over 130 kilometres through several checkpoints, the ECtHR did not comment further on the state's acquiescence to the violation of the right to life but, rather, demonstrated that the state had violated the procedural limb of the right to life by failing to take adequate preventive measures.

In *Acar and Others v Turkey*, village guards stopped a minibus, forced the villagers in the bus out, and shot at them, killing six and wounding nine villagers.[96] In this case, the ECtHR held that, given the failure of the gendarmes to react to the unlawful activities of the village guards, who were considered to be civilian volunteers in a quasi-police function, it "supports a strong inference of acquiescence in those activities." Therefore, it attributed the responsibility to the state based on acquiescence for having breached the right to life.[97] Decisive factors for this assessment consisted in the fact that guards enjoy an official position, with duties and responsibilities as military or security forces in their unit, that there existed a relationship of supervision and accountability with the village head, and that their salaries, aids, and indemnities were paid from state authorities.[98]

In subsequent cases, acquiescence was interpreted in terms of control of state authorities over the individuals in question at the moment of the offences. The case of *Cyprus v Turkey* concerned alleged violations of the rights of Greek-Cypriot missing persons and their relatives, arising out of the military operations that were conducted in northern Cyprus in 1974, the continuing division of the territory of Cyprus, and the activities of the Turkish Republic of Northern Cyprus.[99] The logic that led to the conclusion of acquiescence concerned the fact that, since Turkey exercises effective

[92] *Yaşa v Turkey*, (Judgment), ECtHR application no 22495/93 (2 September 1998) at paras 2, 83 [*Yaşa*].
[93] *Ibid* at para 96.
[94] *Ibid* at para 100.
[95] *Mahmut Kaya v Turkey*, (Commission Report), EctHR application no 22535/93 (23 October 1998) [*Mahmut Kaya*].
[96] *Acar and Others*, *supra* note 89 at para 11.
[97] *Ibid* at paras 85–86.
[98] *Ibid* at para 83.
[99] *Cyprus v Turkey* (GC), (Judgment), ECtHR application no 25781/94 (10 May 2001) at paras 13–14, 18 [*Cyprus*].

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overall control over Northern Cyprus, its responsibility could not be limited to the actions of its own soldiers or officials in Northern Cyprus. It also had to account for the actions of the local administration, which remains in power because of Turkey's military and other support.[100] While the ECtHR acknowledged that the circumstances were life-threatening and that many disappearances were in fact committed by Turkish forces and Turkish-Cypriot paramilitaries, as stated by Turkish officials at the time, this was not enough to find that the Turkish state had acquiesced in the commission of these disappearances.[101] The general context of hostilities, including outside the combat zones, was considered "insufficient to establish the respondent State's liability for the deaths of any of the missing persons."[102] From this logic, it follows that acquiescence would need to be supported not only by considerations of the general context, regardless of how clearly that context is considered life-threatening, but also by evidence of the specific circumstances of a particular case.

In *Ilascu and Others v Moldova and Russia*, the ECtHR considered acquiescence in the case of recognition by the state with respect to the acts of self-proclaimed authorities who are not recognized by the international community.[103] An acquiescent attitude by Russia in the violations committed by NSAs consisted in the issuance of identity cards and customs stamps as well as continuing financial, military, political, and economic support.[104] In the following cases, the ECtHR conceived of acquiescence as being related to effective control through military involvement as well as other indicators such as financial support of NSAs by state actors and economic and political dependence on the state.[105] Crucially, in these cases, the ECtHR took into account the assumption that the persons concerned had died or disappeared at the hands of state authorities, due to the specific pattern of the widespread practice of extrajudicial killings and enforced disappearances that characterized the context of the cases, together with pervasive levels of impunity due to the failure to investigate. The ECtHR confirmed the assumption that, unless the state had been able to provide explanations about the fate and whereabouts of the disappeared, it should have demonstrated that it had followed up the complaints with prompt and effective investigations.[106] The general context of killings and enforced disappearances was thus gradually given more importance in establishing acquiescence.

Rantsev v Cyprus and Russia concerned the death of a women in the context of trafficking in persons in Cyprus. Oxana Rantsev, a Russian national, entered Cyprus on an "artist" visa to work in a cabaret in Limassol. Shortly after starting work, she decided to return to Russia and left the accommodation provided to her by her employer. She was then arrested in an alcoholic state by the local police, who called her employer to pick her up from the local police station. The police refused to take her into custody as they saw no legal grounds for her further detention. As a result,

[100] *Ibid* at para 78.

[101] *Ibid* at para 129.

[102] *Ibid.*

[103] *Ilascu and Others v Moldova and Russia* (GC), ECtHR application no 48787/99 (8 July 2004) at para 318 [*Ilascu and Others*].

[104] *Ibid* at para 329.

[105] *Chiragov and Others v Armenia* (Judgment), ECtHR application no 13216/05 (16 June 2005) at paras 169, 182–83.

[106] *Er and Others v Turkey*, ECtHR application no 23016/04 (31 July 2012) at paras 66–79; *Alikhanovy v Russia*, ECtHR application no 17054/06 (28 August 2018) at paras 70–75.

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Rantsev was taken to the flat of her employer's employee, where she fell from the balcony at night and was found dead by neighbours the next morning.[107] The ECtHR found that, after checking Rantsev's immigration status, the police should have let her leave independently instead of handing her over to her alleged trafficker.[108] Crucially, acquiescence was assessed in relation to a moment of control — namely, her interception at the police station — at which point the victim was under the protection of the police as a guarantor of her rights before being returned to the source of risk.

In several cases involving religiously motivated crimes, the ECtHR considered discrimination as a factor underlying acquiescence by state authorities. In *Begheluri and Others v Georgia*, the ECtHR reflected on the acts of religiously motivated violence against a community of Jehovah's Witnesses by an orthodox extremist group, combined with the tolerance and indifference on the part of the state authorities.[109] The ECtHR did not only consider that state agents placed roadblocks on all the main roads at which the Jehovah's Witnesses were stopped and assaulted,[110] but it also indicated that the offences could not have been committed without the acquiescence by the state, which was proven by the presence of the Zugdidi police and other state agents in and around the village where the attacks occurred at the time when they occurred.[111] In this regard, the ECtHR considered the general treatment of the Jehovah's Witnesses in Georgia at the time of the crimes as well as the specific evidence provided.[112] The failure to prevent the offence as well as the level of discrimination already present against the targeted group figured in the considerations of the degree of complicity and acquiescence. This standard has been applied in subsequent cases concerning religiously motivated attacks.[113]

El-Masri v Macedonia concerned the acquiescence of Macedonian authorities in the rendition practice by Central Intelligence Agency (CIA) operatives. The ECtHR considered the combined elements of the presence of Macedonian authorities when the rendition occurred — namely, that the aircraft with which the victim was taken from Skopje airport to Afghanistan was surrounded by armed Macedonian security guards — as well as the failure of these state authorities to prevent it from occurring.[114] The ECtHR held that the state must be directly responsible for a violation of Article 3 of *European Convention on Human Rights*[115] because "its agents actively facilitated the treatment and then failed to take measures which, in the circumstances of the case, would have been necessary to prevent it."[116] The ECtHR held then that the

[107] *Rantsev*, *supra* note 7.

[108] *Ibid* at para 323.

[109] *Begheluri and Others v Georgia*, ECtHR application no 28490/02 (7 October 2014) at para 102 [*Begheluri and Others*].

[110] *Ibid* at para 110.

[111] *Ibid* at para 111.

[112] *Ibid* at paras 107, 73–78.

[113] See also *Sindicatul "Păstorul cel Bun" v Romania* (GC), ECtHR application no 2330/09 (9 July 2013) at para 77; *Tsartsidze and Others v Georgia*, ECtHR application no 18766/04 (17 January 2017) at paras 78, 86–87; *Identoba and Others v Georgia*, ECtHR application no 73235/12 (12 May 2015) at para 77; *MC and AC v Romania*, ECtHR application no 12060/12 (12 April 2016) at para 124.

[114] *El-Masri*, *supra* note 7 at para 21.

[115] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[116] *Ibid* at para 211.

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Macedonian authorities "actively facilitated [the victim's] subsequent detention, … despite the fact that they were aware or ought to have been aware of the risk of that transfer."[117] Although the ECtHR appeared to apply a risk awareness test usually associated with the compliance of due diligence obligations, it found that Macedonia was responsible for the actions of foreign officials on the basis of acquiescence, meaning that this attribution test was mobilized for assessing levels of state colaboration.[118]

A very similar reasoning, oscillating between direct attribution of the crime through acquiescence and the failure to comply with positive due diligence obligations, was pronounced in two subsequent rendition cases.[119] In *Al Nashiri v Poland*, concerning the extraordinary rendition of Abd al-Rahim Al Nashiri and Zayn Al-Abidin Muhammad Husayn in 2003 from Poland to the US Naval Base in Guantanamo Bay by the CIA, the ECtHR considered that it was unlikely that the Polish officials had witnessed or known exactly what had happened inside the secret detention facility in Poland that was operated by the CIA. However, the acts could be attributed to the state "because [the latter] knew of the nature and purposes of the CIA's activities on its territory at the material time and cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory."[120] Poland allowed the CIA to use its airspace and airport and provided logistics and services, including special security arrangements, a special procedure for landings, ground transportation for the CIA teams with detainees, and base security for the secret detentions.[121] Similarly, in *Abu Zubaydah v Lithuania* and *Al Nashiri v Romania*, the ECtHR found that, by enabling the CIA to transfer the applicants out of Lithuania and Romania respectively to other detention facilities, the domestic authorities had exposed them to a foreseeable serious risk of further ill-treatment and had acquiesced in several rights violations related to extraordinary renditions carried out by the CIA.[122] On the basis of their own knowledge of the CIA activities deriving from Romania's and Lithuania's complicity in the High-Value Detainees Program and from publicly accessible information on treatment applied in the context of the "war on terror" to terrorist suspects in US custody, the ECtHR considered that authorities must have been aware of the serious risk of treatment contrary to the prohibition of torture occurring in the CIA detention facility on Romanian and Lithuanian territory.[123]

On the basis of these last cases, it is critical to note that the ECtHR has applied the criterion of foreseeability and awareness of risk, which is usually employed in due diligence cases, in order to establish that the state had acquiesced in the offences in question. In the view of the non-exhaustive ECtHR case law discussed, acquiescence by implication appears to be elaborated (though not necessarily found) on the basis of

[117] *El-Masri*, *supra* note 7 at 211.

[118] *Ibid* at para 239.

[119] *Al Nashiri v Romania*, ECtHR application no 33234/12 (31 May 2018); *Abu Zubaydah v Lithuania*, ECtHR application no 46454/11 (31 May 2018).

[120] *Ibid* at paras 441–43, 509.

[121] *Al Nashiri v Poland and Husayn (Abu Zubaydah) v Poland*, ECtHR application no 7511/13 (24 July 2014) at para 176 [*Al Nashiri v Poland and Husayn*].

[122] *Abu Zubaydah v Lithuania*, ECtHR application no 46454/11 (31 May 2018) at paras 642 [*Abu Zubaydah*]; *Al Nashiri v Poland and Husayn*, *supra* note 121 at paras 594–95.

[123] *Al Nashiri v Poland and Husayn*, *supra* note 121 at para 677; *Abu Zubaydah*, *supra* note 122 at para 642.

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the following elements: (1) the function of NSAs acting with powers and responsibilities closely linked to state forces;[124] (2) considerations of effective control by continuing financial, military, political, and economic support;[125] (3) the presence of state forces in conjunction with the failure to prevent violations of the rights of victims;[126] (4) the presence of state authorities in the commission of the violation combined with the facilitation of the means to carry out the violation and the transfer of the person into the hands of other state authorities reported to have committed human rights violations in circumstances similar to those of the person concerned;[127] and (5) a combination of control by arresting or intercepting a person and placing that person (back) in a situation of heightened danger as evidenced by reports of the general context of the situation.[128]

The attribution of responsibility on the basis of acquiescence appears to take into account the general context of the violation of rights when it is a serious omission in a situation of structural violation or a clear "pattern" of disappearances. However, the general context must be considered together with other elements or point to a concrete violation of the rights of the victim in question.[129] Importantly, the intertwining of a risk awareness test with the attribution of acquiescence shows not only a convergence between the finding of acquiescence and a lack of due diligence but also how the failure to take preventive measures in situations of proven heightened risk contributes as an element that is crucial to the finding of acquiescence.

D. Acquiescence within the jurisprudence of the IACtHR

The IACtHR has developed a useful standard for attributing state responsibility based on the concept of acquiescence, particularly in the context of paramilitary structures, with a comparatively strong institutional link to the state.[130] In *Blake v Guatemala*, the IACtHR indicated that

> the civil patrols enjoyed an institutional relationship with the Army, performed activities in support of the armed forces' functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision. … The Court declares that the acquiescence of the State of Guatemala in the perpetration of such activities by the civil patrols indicates that those patrols should be deemed to be agents of the State.[131]

Acquiescence was proven through structural collusion between state actors and NSAs —namely, the "institutional relationship" between the civil patrol who had

[124]See *Acar and Others*, *supra* note 89.

[125]See *Ilascu and Others*, *supra* note 103.

[126]See *Begheluri and Others*, *supra* note 109.

[127]See *El-Masri*, *supra* note 7; *Al Nashiri v Poland*, ECtHR application no 28761/11 (24 July 2014); *Al Nashiri v Romania*, ECtHR application no 33234/12 (31 May 2018); *Abu Zubaydah v Lithuania*, ECtHR application no 46454/11 (31 May 2018).

[128]See *Rantsev*, *supra* note 7.

[129]See *Yaşa*, *supra* note 92.

[130]*Blake v Guatemala* (Merits) (1998), Inter-Am Ct HR (Ser C) No 57 at paras 76, 78 [*Blake*]; *Report of the Working Group on Enforced or Involuntary Disappearances*, Doc A/HRC/7/2 (10 January 2008) at 10.

[131]*Blake*, *supra* note 130 at para 78.

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disappeared Nicholas Blake and its ties to the state. This was proven by the exchange of equipment and the obedience to the orders of the Guatemalan army.

Similarly, in *Velásquez Rodríguez v Honduras*, the IACtHR developed a more expansive notion of acquiescence as a possible form of attribution of an act to the state. The case concerned the disappearance of Manfredo Velazquez in 1981 in the context of many other disappearances in the same period in the same geographical region and with similar patterns. The Honduran authorities had not initiated any investigation or criminal proceeding to hold the perpetrators accountable. The IACtHR stated that

> [a]n investigation had to be with an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are *aided* in a sense by the government, thereby making the State responsible on the international plane.[132]

What was further considered in this context was the inability of the procedures and legal structures of the state of Honduras to carry out effective and prompt investigations.[133] The IACtHR stated that the mere existence of a normative legal system does not satisfy this obligation but that the actual conduct of the state must also be directed towards the effective guarantee of the full and free exercise of human rights in practice.[134]

Importantly, the court also held that a state could be held responsible for enforced disappearances irrespective of whether all levels of the government in question were aware of the commission of the crimes and irrespective of the absence of specific orders issued by the authorities in this regard.[135] While the judgment alluded to acquiescence, it finally held the state responsible based on its failure to comply with due diligence obligations. One of the possible readings of this judgment, therefore, is that, similar to the assessment of acquiescence in the context of the *CAT*, discussed above, it expands the concept of acquiescence and brings its threshold closer to the breach of due diligence obligations, as it takes responsibility for omission — that is, the failure to fulfill positive obligations — as the qualifying indicator of "aiding" through the absence of investigations. In the *Case of the 19 Merchants v Colombia*, concerning enforced disappearances and extrajudicial executions of nineteen individuals by a paramilitary group, the IACtHR blurred the lines between the concepts of state acquiescence and of due diligence obligations.[136] The IACtHR noted the delay in taking legislative action against former "self-defence groups."[137] At the time of the

[132] *Velásquez Rodríguez*, *supra* note 5 at para 177 [emphasis added].

[133] *Ibid* at para 178.

[134] *Ibid* at para 167.

[135] *Ibid* at para 183, 188. See also *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Decision), African Commission on Human and Peoples' Rights no 245/2002 (May 2006) at paras 141–60.

[136] *Case of the 19 Merchants v Colombia* (Judgment) (2004), Inter-Am Ct HR (Ser C) No 109 at paras 84(b)(c), 86(a), 118 [*Case of the 19 Merchants*].

[137] *Ibid* at para 120.

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commission of the crime, the authorities knew that the "paramilitary" group operating in the region had exercised significant control over the region and allowed them to operate while failing in their duty to monitor the region.[138] On the day of the disappearance, law enforcement officers let the merchants pass at a military checkpoint into the region where they were consequently disappeared by the members of the paramilitary group.[139] The IACtHR held that the Colombian army had acquiesced in the crime since they were present at a meeting that was held with the paramilitary group that killed the nineteen tradesmen and were found to have agreed to the plan to kill them and seize their merchandise and vehicles.[140] However, it found that the state had violated its due diligence obligations regarding the right to life rather than considering direct attribution of the offence to the state based on acquiescence.[141]

Another way to assess acquiescence involves examining the state's cumulative omissions. The case of *Mapiripán Massacre v Colombia* involved the torture, extra-judicial killing, and enforced disappearance of Mapiripán residents by paramilitary forces who took control of the village by facilitating equipment, including uniforms reserved only for the Colombian military, short- and long-range weapons, and high-frequency radios, as well as transportation from the airport when they arrived to the village by Colombian military forces.[142] The IACtHR found that "the qualification of Colombia's acts as acquiescence derived from the fact that the concerned geographical area was under the control of the State failing to protect the local population."[143] The delay in state forces arriving in the village three days later to take control and monitor the village when the paramilitaries had already destroyed much of the available evidence of their crimes, as well as the failure to investigate and punish those responsible, led to the attribution of state responsibility. The IACtHR referred to the fact that international responsibility was engaged for acts by private individuals in cases in which, through actions or omissions by state agents when they are in the position of guarantors, the state does not fulfill its *erga omnes* obligations embodied in Articles 1(1) and 2 of the *American Convention on Human Rights*.[144] As in the case of *19 Merchants*, the IACtHR relied on the historical existence of links between paramilitaries and members of the security forces in similar cases,[145] on the fact that the military was stationed in villages close to the place where the massacre took place,[146] on the planning of the massacre through "logistic preparatory work," on the failure to protect the population of Mapiripán from those acts,[147] on the attempt to cover up the actions by the paramilitary,[148] and on the obstruction of full identification in a context of widespread impunity.[149]

[138] *Ibid* at para 86(c).
[139] *Ibid* at para 136.
[140] *Ibid* at paras 85(b), 135.
[141] *Ibid* at para 156.
[142] *Mapiripán Massacre v Colombia* (Judgment) (2005), Inter-Am Ct HR (Ser C) No 143 at para 96.34 [*Mapiripán Massacre*].
[143] *Ibid* at para 110.
[144] *American Convention on Human Rights*, 21 November 1969, 1144 UNTS 123 (entered into force 18 July 1978).
[145] *Mapiripán Massacre*, *supra* note 142 at para 96.19.
[146] *Ibid* at para 96.20.
[147] *Ibid* at para 96.43
[148] *Ibid* at para 96.45.
[149] *Ibid* at paras 96.47, 236.

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Here, the IACtHR considered both the state's omission as well as effective positive attitudes enabling paramilitary forces to achieve their objective since, without such assistance, they would undoubtedly not have been able to act. Considering that the IACtHR had concluded on Colombia's acquiescence on the basis of the coordination of actions and omissions between the state and private actors, aimed at the commission of the massacre, that, although it was perpetrated by paramilitary groups, it could not have been carried out without the assistance of the Colombian military forces.[150] This observation gave rise to a "but for" test that was reiterated in the similar Colombian case of *Operación Génesis*, where the IACtHR found that the state had acquiesced to some of the crimes committed, which were then based on the fact that it considered untenable a hypothesis in which the wrongful act could have been carried out without state assistance.[151]

In *Vereda de la Esperanza v Colombia*, the IACtHR took a clearer position regarding the classification of the acts of states as acquiescence. Similar to the *19 Merchants* case, the IACtHR contemplated the structural relationship between the paramilitary and state agents.[152] The case concerned twelve disappearances over several years in a region, widely marked by paramilitary violence. The IACtHR concluded that there was collusion between the state forces and paramilitary groups, considering the fact that the latter were able to circulate freely in a region supposedly controlled by the Colombian army; the provision of training, weapons, and ammunition to the NSAs by the army; the fact that the paramilitary forces provided means of transport to members of the army who did not have their own vehicles; and the fact that meetings were held between senior military commanders and the paramilitaries, several of which took place inside military bases.[153] However, after having established this general structural relationship between the state and NSAs in the region, the IACtHR suggested that "a general situation of collaboration and acquiescence is not sufficient, but it is necessary that in the specific case, the acquiescence or collaboration of the State is apparent in the circumstances of the case."[154] Considering, in addition, "the absence of reports describing hostilities between the Army and the paramilitary forces operating in the area, and … the paramilitary forces' movements along the Bogotá-Medellin highway without being intercepted," the IACtHR found that the enforced disappearances were attributable to the state based on the "collaborative relationship" between the military forces and the paramilitary forces.[155]

In the case of *Omeara Carrascal et al. v Colombia* on the extrajudicial execution of two persons and the disappearance of M. Omeara Miraval, the IACtHR reiterated the need for the context of violence to have a connection to facts *sub judicie*.[156] Similarly, in *Isaza Uribe y otros v Colombia*, the IACtHR assessed the connection between a specific case of disappearance and the context of violence in which paramilitaries had

[150] *Ibid* at para 123.

[151] *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia* (2013), Inter-Am Ct HR (Ser C) No 270 at para 280 [*Operation Genesis*].

[152] *Vereda de la Esperanza v Colombia* (Judgment) (2017), Inter-Am Ct HR (Ser C) No 341 at paras 68–10 [*Vereda la esperanza*].

[153] *Ibid* at para 151.

[154] *Ibid* at para 152.

[155] *Ibid* at paras 167–68.

[156] *Ibid* at para 179.

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persecuted members of trade union groups.[157] Given that the victim was affiliated with one of these organizations, the IACtHR imputed his disappearance to the state by acquiescence.[158] Hence, the position of the individual towards the (para-)military counted, especially if the trade union group was previously reported being targeted by third parties with the support of the state.

Recently, in the *Case of Members and Militants of the Patriotic Union v Colombia*, which dealt with the systematic extermination of the Patriotic Union by an alliance formed of various right-wing political groups, elements of the agro-industrial sector, and paramilitary groups between 1984 and 2006, the IACtHR considered that these acts constituted a form of systematic extermination of the political party and its members and activists, which was characterized by modes of action carried out directly by numerous agents of the state as well as by NSAs acting through the tolerance, acquiescence, or collaboration of the state.[159] In the IACtHR's view, the repeated omissions of state authorities to prevent, investigate, and punish these crimes did not constitute a form of indirect participation but, rather, actively caused certain violations by ensuring their repetition.[160] The systematic tolerance, and the quantity and seriousness of the acts, as well as their duration and extent, thus caused a generalized violation of Colombia's obligation to respect the rights contained in the *American Convention on Human Rights*.[161]

Concluding, the IACtHR seems to have elaborated a wider notion of acquiescence in its case law, encompassing the following elements that would need to be related to the specific circumstances of the case *sub judicie*: (1) tolerance and the obstruction and failure of investigation;[162] (2) institutional or collaborative relationships between NSAs and state actors,[163] particularly if proven in the context in which the paramilitary groups were operating[164] and if a historical relationship between these entities could be established;[165] (3) the exercise of significant control over the region by the state allowing NSAs to operate and circulate freely while state actors failed in their duty to monitor the region;[166] (4) letting NSAs pass into a region that was known for the violence committed by these NSAs towards the individuals living in this area;[167] (5) the presence of the state actors[168] prior to the commission of the offence in the same geographical area where the NSAs had committed the crime;[169] (6) a high degree of causality indicating that the offence could not have been committed without the tolerance of the state actor;[170] (7) the lack of a judicial process that would clearly

[157] *Omeara Carrascal et al v Colombia* (Judgment) (2018), Inter-Am Ct HR (Ser C) No 368 at paras 123–41.

[158] *Isaza Uribe y otros v Colombia* (Judgment) (2018), Inter-Am Ct HR (Ser C) No 364 at paras 142–43 [*Isaza Uribe y otros*].

[159] *Case of Members and Militants of the Patriotic Union v Colombia* (Judgment) (2022), Inter-Am Ct HR (Ser C) No 455 at paras 202ff, 244ff [*Case of Members and Militants*].

[160] *Ibid* at para 265.

[161] *Ibid* at para 282.

[162] *Velásquez Rodríguez*, *supra* note 5.

[163] *Blake*, *supra* note 130.

[164] *Mapiripán Massacre*, *supra* note 142.

[165] *Case of the 19 Merchants*, *supra* note 136.

[166] *Ibid*; *Vereda la esperanza*, *supra* note 152.

[167] *Case of the 19 Merchants*, *supra* note 136.

[168] *Mapiripán Massacre*, *supra* note 142.

[169] *Operation Genesis*, *supra* note 151.

[170] *Ibid.*

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determine the criminal responsibilities;[171] and (8) more direct forms of acquiescence such as the provision of training, weapons, and ammunition as well as the means of transportation by state actors[172] and collaboration in the planning of the crime.[173]

Most importantly, (9) these accumulated omissions — namely, the failure to protect a vulnerable population — may be a decisive element to ascertain acquiescence when the context of the state is driven by a reported pattern of violence emerging from NSAs and a structural relationship between the state and the NSAs proven through various reports and indicators of collaboration.[174] Similarly, (10) there was the repetition of omissions, the systematic tolerance, and the quantity and seriousness of the acts as well as their duration and extent.[175] Furthermore, (11) the individual position of the victim as belonging to, or being affiliated with, a group that has been reportedly targeted by NSAs constitutes a factor that figures into the attribution of state responsibility through acquiescence.[176]

Additionally, one should take into consideration that, in *López Soto y otros v Venezuela*, a case concerning the abduction, deprivation of liberty, and physical, sexual, and psychological torture of the victim by a private actor, and the persisting impunity for these acts, the IACtHR established that failure to prevent and its resulting impunity would be elements decisive for finding a violation of the state's due diligence obligation, while support and tolerance would indicate, under specific circumstances, that the state would have acquiesced in the commission of the crime. While the court did not elaborate in detail, it appears to have drawn a distinction between attribution of state responsibility based on acquiescence and the state's failure to comply with due diligence obligations, relying on the existence of direct supportive actions or "deliberative inaction."[177]

4. Due diligence in the prevention, investigation, and sanction of human rights violations

As indicated previously, understanding better the standard of due diligence in the prevention, investigation, and sanction of human rights violations is of particular relevance when addressing disappearances of migrants for several reasons. Indeed, even where the acts themselves cannot be directly attributed to the state because it could not be established that the perpetrators acted with the assistance, authorization, or acquiescence of state officials, state responsibility may be invoked on the basis of its failure to comply with due diligence obligations.[178] This encompasses the duty to protect—that is, either the failure to prevent a violation or the failure to respond adequately to it. A state's duty to take preventive measures depends on whether it is aware of a situation of real and immediate risk for a specific individual or group of individuals and what reasonable possibilities exist to prevent or avoid

[171] *Kawas Fernández v Honduras* (Judgment) (2009), Inter-Am Ct HR (Ser C) No 196.

[172] *Vereda la Esperanza*, *supra* note 152.

[173] *Ibid.*; *Mapiripán Massacre*, *supra* note 142; *Vereda la Esperanza*, *supra* note 152; *Case of the 19 Merchants*, *supra* note 136.

[174] *Mapiripán Massacre*, *supra* note 142.

[175] *Case of Members and Militants*, *supra* note 159.

[176] *Isaza Uribe y otros*, *supra* note 158.

[177] *López Soto y otros v Venezuela* (Judgment) (2018), Inter-Am Ct HR (Ser C) No 362 [*López Soto y otros*].

[178] *Velásquez Rodríguez*, *supra* note 5.

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this risk.[179] Due diligence encompasses not only turning a blind eye to the practice of (enforced) disappearance (when it is known to exist) but also situations where officials, while not entirely passive, fail to do all that can reasonably be expected of them.

Due diligence operates at both the individual and systemic levels. At the individual level, when officials learn that a person is at imminent risk of harm, they must take reasonable steps to prevent the harm and, if it occurs, take all appropriate steps to investigate, prosecute, and punish the perpetrator. At the systemic level, on the other hand, states have an obligation to change laws or policies that contribute to a problem of widespread torturous violence or impede efforts to protect victims. Nevertheless, due diligence is an obligation of means, not of results. It requires public officials to take action within their powers and responsibilities that is reasonably likely to prevent and remedy breaches of the primary rules to which the specific due diligence obligations relate.[180] However, if the measures taken prove ineffective in addressing the persistence of impunity, the state must revise its approach and expand its efforts. Importantly, in this context, the persistence of widespread abuses may be evidence that the state is not doing enough to address the problem.[181]

As previously explained, this obligation can be analyzed at the light of the context in which the disappearance occurs—in particular, when it takes place in a situation of systematic impunity. It is submitted that, in certain contexts, state omissions in the prevention, investigation, and sanction of disappearances in a context of systematic impunity can go beyond a mere violation of the due diligence standard but can also constitute a convincing element indicating that the state knew of the pattern of disappearances and acquiesced to it, rendering such disappearances "enforced disappearances," as suggested by the Working Group on Enforced Disappearances in 2017.[182]

A. Due diligence in the jurisprudence of the ECtHR

Throughout its case law, the ECtHR has focused on the concept of primary protection, which guarantees the victim's substantive right *ex post facto* through investigation. Crucially, its jurisprudence establishes a procedural obligation that requires states to undertake an effective investigation into alleged breaches of the ECtHR. In cases of human rights violations without evidence of collusion with state agents, the duty to investigate is considered to be the procedural limb of the substantive right in question, which the state would violate when not initiating effective investigations.

In cases that concerned the right to life, the jurisprudence of the ECtHR tends to conclude that constructive knowledge in the form of general awareness of the existence of general troublesome patterns of violations is not sufficient for the purpose of applying protective operational measures. The landmark case that

[179]*Case of the Hacienda Brasil Verde Workers v Brazil* (Judgment) (2016), Inter-Am Ct HR (Ser C) No 318 at para 323 [*Hacienda Brasil Verde Workers*].

[180]Lisa Grans, "The State Obligation to Prevent Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: The Case of Honour-Related Violence" (2015) 15 Human Rights L Rev 695 at 705, 717–18.

[181]Bauer, *supra* note 83 at 817.

[182]*Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, Doc A/HRC/36/39/Add.2 (28 July 2017) at para 42.

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established the "awareness" test used to elaborate the failure to comply with due diligence obligations was *Osman v United Kingdom*.[183] The case concerned the killing of an individual by a private actor. The ECtHR found that there was no violation of the right to life because the applicant had not "established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk."[184]

In *Kılıç v Turkey*, in which the applicant's brother was assassinated by NSAs for working for a newspaper, the ECtHR found a substantive as well as procedural violation of the right to life. Prior to the killing, the applicant's relative had requested the authorities to take measures to protect him and other people working for the newspaper, referring to attacks on others associated with the media.[185] While the ECtHR could not established beyond a reasonable doubt that any state agent or person acting on behalf of the state authorities was involved in the killing, it ascertained that the authorities had failed to comply with their positive obligation to protect the applicant's brother from a known risk to his life.[186]

In the aforementioned case of *Yaşa v Turkey*, the fact that the preliminary investigation only lasted two days, no copies that documented the progress of further investigations were retained, and the investigations had not produced any tangible result after five years,[187] the ECtHR found that the state had violated its procedural obligations to conduct effective and prompt investigations. The reporting of a number of attacks involving killings on journalists, newspaper kiosks, and distributors of pro-Kurdish newspapers in the region should have prompted the investigative authorities to consider the possibility of the state's connivance, a hypothesis that should have been pursued in further criminal proceedings.[188]

Similarly, in the aforementioned *Mahmut Kaya* case, the ECtHR considered that there were rumors of contra-guerrillas being involved in targeting those suspected of supporting the PKK, and it was undisputed that a significant number of killings had occurred.[189] As a consequence, the ECtHR found that the state authorities were aware, or ought to have been aware, that the applicant's brother found himself in a situation of immediate and real risk. The lack of accountability of members of the security forces and the ineffectiveness of criminal law protection due to the transfer of similar cases to administrative councils was considered to be a serious defect of the prevention measures.[190] Here, the investigations were considered ineffective in part because the autopsies were incomplete.

[183]*Osman v United Kingdom* (Judgment), ECtHR application no 23452/94 (28 October 2010) at para 121 [*Osman*].

[184]*Ibid.* In this case, the European Court of Human Rights (ECtHR) concluded that various cryptic threats uttered by the perpetrator could not reasonably be construed as threats against the lives of family so that the police could not have been held responsible for not arresting the perpetrator in the first place. Therefore, the police were not considered to have failed to carry out its positive obligation to take preventive operational measures to protect individual whose life at risk from criminal acts of another individual. See also *Kılıç v Turkey (*Judgment), ECtHR application no 22492/93 (28 March 2000) at para 63 [*Kılıç*].

[185]*Kılıç*, *supra* note 184 at paras 10, 65.

[186]*Ibid* at para 64.

[187]*Yaşa*, *supra* note 92 at paras 101, 103.

[188]*Ibid* at para 106.

[189]*Mahmut Kaya*, *supra* note 95 at para 67.

[190]*Ibid* at para 91.

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The precedents indicate that state authorities' awareness of a real and imminent danger can be verified by the combination of two factors: (1) that victims had already alerted state authorities that they were in a situation of immediate and real risk, either because of their profession or their political or social status, and (2) that there were reports demonstrating a sequence of killings under similar circumstances, along with reports on the collusion between state and NSAs, all in the same geographic area.

In the aforementioned case of *Cyprus v Turkey*, the threshold that the ECtHR considered to prompt the state obligation to enact investigations was if there was "proof of an arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening."[191] Importantly, a simple contribution to the investigative steps by international organizations active in the region could not discharge the state from complying with its procedural obligations.[192] The reasoning in relation to risk assessment exercise that emerged in the *Osman* case was also applied to cases of enforced disappearances. In the *Osmanglü* case and the *Nesibe Haran* case, the ECtHR confirmed that the duty to prevent requires states to act upon the possibility that a crime may potentially occur, regardless of whether it was perpetrated by NSAs. In the *Osmanglü* case, it was considered that disappearances in the same region at the relevant time could be regarded *per se* as life-threatening.[193] These circumstances combined with the receipt of several threats prior to the disappearance and the immediate inquiry at the local police by the father of the disappeared person should have prompted the awareness of the state of a real and immediate risk, which should have taken reasonable measures. In the *Nesibe Haran* case, the ECtHR considered that "the mere fact that the authorities were informed of the killing of the applicant's husband gave rise *ipso facto* to an obligation under the right to life to carry out an effective investigation into the circumstances surrounding the death."[194] Similarly, in *Medova v Russia*, the ECtHR reasoned that, by failing to thoroughly verify the identity of the captors and to properly record the detention, the authorities had failed in their obligation to prevent the offences.[195]

In these cases, the ECtHR focused on (1) circumstances of the disappearance; (2) characteristics and vulnerability of the victim; and (3) preceding threats. Crucially, it considered widespread and systemic abductions as indications of previous threats that could have prompted awareness.[196] The case *Sakine Epőzdemir and Others v Turkey*, concerned the killing of a lawyer of a pro-Kurdish political party against the general background of the "unknown perpetrators killings" in Turkey. The ECtHR found no violation of the right to life since the authorities did not know specifically that the lawyer's life was at risk. However, the Joint Partly Dissenting Opinion of Judges Nebojsa Vučinič and Paul Lemmens stated that it was the authorities' "duty to assess the general situation, characterised by a climate of terror against Kurdish leaders, and to draw the appropriate conclusions with respect to the

[191] *Cyprus*, *supra* note 99 at para 132.
[192] *Ibid* at para 135.
[193] *Osmanoglü v Turkey*, ECtHR application no 48804/99 (24 January 2008) at para 54 [*Osmanoglü*].
[194] *Nesibe Haran v Turkey*, ECtHR application no 28299/95 (6 October 2005) at para 66.
[195] *Medova v Russia*, ECtHR application no 25385/04 (15 January 2009) at paras 89, 76, 90, 97.
[196] *Osmanoglü*, *supra* note 193 at para 75.

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persons belonging to the targeted group."[197] Considering that the victim was at risk of being killed by sympathizers of the state authorities, in which context collusion between NSAs and state actors in killings had often been proven, the two dissenting judges indicated that "[t]o require [the victim] to ask for protection from the Turkish authorities amounts to requiring him to enter a hostile environment to beg for help."[198]

Similar factors were considered in cases related to domestic violence. The ECtHR held, in *Opuz v Turkey*, that officials violated the prohibition of torture by failing to protect a woman from severe domestic violence at the hands of her partner. The fact that the victim's relative filed several complaints, stating that her life was in immediate danger, was decisive for the authorities to know about the victim's situation.[199] In *Halime Kilic v Turkey*, a substantive violation of the right to life was found in relation to the failure by state authorities to account for a foreseeable risk of fatal injuries combined with a persistent climate of impunity for women in relation to domestic violence, which led to a finding of discrimination.[200] The case concerned the killing of a woman by her husband after having filed a criminal complaint alleging domestic violence and repeated requests for protection measures. The ECtHR found that the state had the obligation to take account of the particularly precarious and vulnerable psychological, physical, and material situation of the victim by supporting her to find shelter.[201] In the context of discrimination, the ECtHR held that, by regularly turning a blind eye to the repeated acts of violence and death threats against victims, the state authorities had created a climate conducive to such violence, leaving the victims helpless and unprotected.[202] In both cases, the ECtHR considered that the measures adopted by the state were ineffective to prevent and sanction the crimes.

In certain situations, particular geographical or environmental conditions can influence the type of protective measures that states should adopt to prevent foreseeable risks to materialize. The case of *Budayeva et al v Russia* concerned the failure by authorities to implement land-planning and emergency-relief policies in the light of a foreseeable risk of a mudslide in a town where mudslides had been reported yearly during the 1930s.[203] In 2000, the applicants' village was struck by a succession of mudslides that killed her husband and severely injured her children and destroyed her home and belongings. The ECtHR held the state was liable for not complying with its duty to prevent natural disasters in relation to the failure to set up a warning system and the failure to investigate state responsibility in relation to the death of the applicant's husband. The risk assessment was elaborated in relation to the origin of the threat and the extent to which the risk was susceptible to mitigation.[204] Importantly, there was no regulatory framework, land-planning policies, or specific safety measures in place. Structures, such as technical equipment, that could have prevented the mudslides had not been adequately maintained. Importantly, the

[197]*Sakine Epőzdemir and Others v Turkey*, ECtHR application no 26589/06 (1 December 2015) at para 3, Joint Partly Dissenting Opinion of Judges Vučinič and Lemmens.
[198]*Ibid* at para 4.
[199]*Opuz v Turkey* (Judgment), ECtHR application no 33401/02 (9 June 2009) at para 132, 152.
[200]*Halime Kilic v Turkey*, (Judgment), ECtHR application no 63034/11 (28 June 2016) at paras 102, 113.
[201]*Ibid* at para 100.
[202]*Ibid* at para 120.
[203]*Budayeva and Others v Russia*, (Judgment), ECtHR application no 15339/02 (20 March 2008) at para 24.
[204]*Ibid* at para 109.

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awareness of immediate risks due to reporting by scientists and the previous occurrence of mudslides should have prompted the establishment and implementation of a legislative and policy framework, for which failure the state had not complied with its duty to protect the right to life.[205]

Similarly, in *Öneryildiz v Turkey*, the ECtHR found that the availability of practical information pointing to a threat to the local population's physical integrity was a decisive factor to consider when assessing the state's obligation to prevent.[206] The case concerned an accidental methane explosion through the decomposition of waste in an urban dump. As in *Budayeva*, reports by expert bodies had alerted the government of the risk existing due to the location's lack of conformity with the applicable technical requirements and the *Environment Act* in place at the time, long before the explosion, and had requested the local authorities to take relevant preventive measures.[207] The ECtHR held that this was sufficient to highlight the reality and the immediacy of the risk and that, considering that the site continued to operate nonetheless, the risk could have only increased.[208] In contrast to *Budayeva*, the local authorities promptly opened investigations and the issuance of expert reports in addition to criminal investigations that resulted in the finding of liability for negligence against the relevant city mayors.[209] The ECtHR found that the obligation to take all appropriate steps to safeguard the right to life entailed "the primary duty of the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life" and that "this obligation indisputably applie[d] in the particular context of dangerous activities."[210] In light of the imposition of minimum penalties on the local authorities and their subsequent suspension, the ECtHR found that the full accountability of state authorities was not sought.[211]

In *Rantsev v Cyprus and Russia*, the ECtHR considered that there was a violation of the *European Convention on Human Rights* when the authorities failed to take appropriate measures within their powers to remove the person from that situation or risk.[212] This suggests that to assess the awareness of a risk one should take into account the proximity of the victim to the risk.[213] Here, the ECtHR considered that "there were sufficient indicators available to the police authorities, against the general backdrop of trafficking issues in Cyprus, for them to have been aware of circumstances giving rise to a credible suspicion that Ms Rantsev was at real and immediate risk of being a victim of trafficking or exploitation."[214] This gave rise to a positive obligation to investigate without delay and to take all necessary operational measures to protect Oxana Rantsev.

[205] *Ibid* at paras 27, 78, 102, 108, 109

[206] *Öneryildiz v Turkey* (Judgment), ECtHR application no 48939/99 (30 November 2004) at para 98.

[207] *Ibid* at para 90.

[208] *Ibid* at para 86.

[209] *Ibid* at para 87.

[210] *Ibid* at paras 89, 90.

[211] *Ibid* at para 75.

[212] *Rantsev*, *supra* note 7. See also *Osman*, *supra* note 183 at paras 116–17; *Mahmut Kaya*, *supra* note 95 at paras 115–16.

[213] See Lene Guercke, *Protecting Victims of Disappearances Committed by Organised Criminal Groups: State Responsibility in International Human Rights Law and the Experiences of Human Rights Practitioners in Mexico* (PhD dissertation, KU Leuven, 2021) at 115–16, 182.

[214] *Rantsev*, *supra* note 7 at para 296.

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In conclusion, the ECtHR may use several factors to assess whether a state should have known of a particular risk: (1) the general context of violence at the time of the commission of the offence (for example, life-threatening circumstances demonstrated by a pattern of enforced disappearances in conflict-like circumstances or a climate of impunity and discrimination against a particular vulnerable group in which the state routinely turns a blind eye to ongoing violations), as previously reported by persons close to the victims or expert bodies; (2) the state's duty of oversight over a particular situation arising from that context; (3) the positionality of the victim and the specific vulnerability that derived from it — that is, belonging to a target group on the basis of socio-economic status, gender, and age or political affiliation; (4) the proximity of the victim to the risk and its origin and immediacy; (5) the duration of the disappearance that increases the risk and the duration between the first signs indicating a particular risk and the moment of violation; (6) the geographical characteristics of the location where the crime was committed; (7) the documented conduct of the offender; and (8) whether complaints had been previously brought to the attention of the state authorities (unless where the latter are colluding with the culprit NSAs).

In considering whether a state has complied with its positive obligations, the ECtHR also took into account three different temporal stages: (1) deficiencies in the legal and administrative infrastructure prior to the commission of the crimes, including whether a general administrative framework was in place given the particular context of dangerous activities; (2) the investigative steps taken after the commission of the crime to search for and identify victims, including the failure to identify forensic material; and (3) failures in the criminal investigation after the identification of the perpetrators, including whether the perpetrators were held fully accountable.

B. Due diligence in the jurisprudence of the IACtHR

Similar to the ECtHR, the case law of the IACtHR has frequently reiterated that an illegal act that is contrary to human rights, and that is initially not directly imputable to a state, can lead to the international responsibility of the state not because of the act itself but, rather, because of the lack of due diligence to prevent the violation or to respond to it, as required by international law.[215] In its 2003 *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants*, the court established that the general obligation to ensure the exercise of rights has an *erga omnes* character carrying specific obligations that states have to fulfill to benefit the persons under their respective jurisdictions, "irrespective of the migratory status of the protected persons."[216] The advisory opinion further recognized that states had to put in place "special measures to ensure the protection of the human rights of migrants" due to the latter' specific situation of vulnerability deriving from historical contexts, "by *de jure* (inequalities between nationals and aliens in the laws) and *de facto* (structural inequalities) situations," and racial discrimination.[217] States are obliged to take

[215] *Velásquez Rodríguez*, *supra* note 5 at para 172; *Godínez Cruz v Honduras* (Judgment) (1989), Inter-Am Ct HR (Ser C) No 181 at paras 182, 187.

[216] *Juridical Condition and Rights*, *supra* note 37 at para 109.

[217] *Ibid* at paras 112–13.

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positive action to reverse or sustainably change discriminatory situations in their society that disadvantage a particular group of persons. The case law of the IACtHR assists in further stressing the importance of factors such as intersectionality, structural and systematic discrimination, and compounded victimhood, which constitute elements useful to assess due diligence obligations in relation to migrant disappearances.

Besides its importance for acquiescence, as illustrated above, the *Case of Velazquez Rodriguez v Honduras* reiterates that the state's obligation to ensure or to guarantee consists in organizing "the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[218] Addressing the relevance of the context of impunity while assessing the duty to prevent, the IACtHR established that "subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violations of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case."[219]

In *Pueblo Bello Massacre v Colombia*, state responsibility was not established in relation to acquiescence, but Colombia was held accountable for the failure to comply with its duty to prevent foreseeable disappearances and extrajudicial executions committed by paramilitary actors, in relation to an "awareness risk test."[220] In this context, the IACtHR took a needs-based approach. It considered that the obligations to guarantee and ensure the rights in the *American Convention on Human Rights* have to be determined according to the particular protection needs of the subject concerned.[221] On the basis that (1) the state could or should have known the risk and (2) had a "reasonable opportunity" to prevent this risk from materializing, the acts were attributable to the state on the basis of the latter's failure to protect the population.[222] Colombia was found to be aware of the specific regional dangers due to the adoption of several legislative measures to prohibit, prevent, and punish the activities of the self-defence or paramilitary groups.[223] This awareness of danger accentuated the state's obligations of prevention and protection in the zones where the paramilitary groups were present.[224]

The "reasonable opportunity" to prevent the risk was elaborated in relation to the notion of control over the area of Pueblo Bello at the time of the offences. Although the ability of the state was limited due to "a critical situation of public order that made it impossible to cover all its territory,"[225] the state had an adequate opportunity to prevent the risk and did not do so, as evidenced by the mobilization of a significant number of people in the Pueblo Bello zone as well as the forced transport of residents of the village by paramilitary groups to a region outside of it, which shows that the state did not take adequate measures to control the available routes in the area.[226]

[218] *Velásquez Rodríguez*, *supra* note 5 at para 166.
[219] *Ibid* at para 175.
[220] *Pueblo Bello Massacre v Colombia* (Judgment) (2006), Inter-Am Ct HR (Ser C) No 140.
[221] *Ibid* at paras 111, 117. See also *Hacienda Brasil Verde Workers*, *supra* note 179 at para 316.
[222] *Ibid* at para 140.
[223] *Ibid* at paras 125, 183.
[224] *Ibid* at para 126.
[225] *Ibid* at para 121.
[226] *Ibid* at paras 138, 140.

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In the situation of armed conflict, the state was in a "special position of guarantor."[227] The IACtHR also considered the relation of causality between the omissions by the state that facilitated the commission of the offence by paramilitary actors since, if there had been effective protection by the state, the offences could not have taken place.[228] It did not consider the absence of specific complaints regarding attacks and intimidation by the inhabitants of Pueblo Bello as a factor that could diminish the state's ability to be aware of a specific danger and its obligation to protect the population in question.[229] However, the proximity of a military base in the neighboring village was not considered to prove acquiescence by state agents in the commission of the offences.

The guarantor position and the notion of control were crucial to the IACtHR's finding that the state had failed to ensure the rights of victims under Article 1 of the *American Convention on Human Rights*. Given the structural relationship between the negligence towards the violations committed by the paramilitary groups and the policy that repeatedly condoned these violations by failing to intervene, "the State itself … created a dangerous situation, which it then failed to control or dismantle," which was understood as continued support for the impunity of the paramilitaries for their actions, ultimately making the state liable for the crimes committed by NSAs.[230] Furthermore, the IACtHR found that investigative flaws undermined the effectiveness of the protection and led to high levels of impunity, which, in turn, led to "the establishment of fertile ground for these groups" and therefore held that the responsibility for those acts was attributable to the state by reason of its failure to comply with its *erga omnes* treaty obligations to guarantee the effectiveness of human rights in relation to private actors.[231] Therefore, the failure to effectively eliminate or resolve the situation of risk caused by the existence of those groups and by its having continued to encourage their actions through impunity figured as aggravating factor in these considerations.

In *González et al. ('Cotton Field') v Mexico*, the IACtHR further elaborated on the awareness risk test already established in the *Pueblo Bello Massacre*, extending it to the consideration of structural patterns of violence and discrimination concerning a particularly vulnerable group of the population — in this case, violence against women.[232] Two stages were identified: (1) when the state failed to act although being aware of the danger prior to the victims' disappearance and (2) when the state sustained the crimes' continuation by not investigating after the offence had occurred and before the victims' bodies had been discovered.[233] Prior to the disappearances, an increased degree of vigilance by state authorities was required in a context of violence. In this case, the disappearances had occurred in the context of recurrent violence towards women in Ciudad Juarez starting in 1993. Awareness of the real and immediate risk to women in the area of Ciudad Juarez was considered to be derived from the extensive reporting on a situation of widespread violence against women by

[227] *Ibid* at para 138.
[228] *Ibid* at para 140.
[229] *Ibid* at para 135.
[230] *Ibid* at para 151.
[231] *Ibid* at para 151.
[232] *González et al ('Cotton Field') v Mexico* (2009), Inter-Am Ct HR (Ser C) No 205 at para 280 [*González et al*].
[233] *Ibid* at para 281.

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national and international mechanisms, the filing of cases of violence against women with international grievance mechanisms and the extraordinary high number of killings of women in this geographical region.[234] In addition, the homicide rate affecting women was disproportionally higher in Ciudad Juarez compared with other cities in proximity to the border of the United States.[235] Moreover, the IACtHR considered various reports outlining that the up-to-date policy methods for prevention had been ineffective.[236] Despite the knowledge of the context of these disappearances and the nature of danger, as family members reported these disappearances to the relevant authorities, no action had been taken by the state authorities. Furthermore, the IACtHR reiterated that human rights violations, including disappearances, are to be contextualized within the historical and political events that have led to their occurrence.[237]

The principles of due diligence required that the procedure be conducted with due regard for the complexity of the facts, the context in which they occurred, and the systematic patterns explaining why the events occurred. In addition, the procedure should have ensured that there were no failures to document evidence or to develop logical lines of investigation.[238] Since this obligation of means is more rigorous, it required that exhaustive search activities be conducted, especially in the first hours and days of the disappearance, and that reporting procedures should have been set up to lead to an immediate effective investigation.[239] The context of violence against women was considered to warrant heightened due diligence in relation to investigative steps and required strengthened local mechanisms in order to carry out "specific search actions."[240] The case *Velásquez Paiz et al. v Guatemala* took a similar approach.[241] This risk awareness test was also applied in the *Case of Yarce et al. v Colombia* concerning the killing of a female human rights defender by private actors and the internal displacement of three other female human rights defenders in the context of the Colombian internal conflict.[242] Knowledge of a specific risk of harm towards the victim due to her activities as a community leader was established through the repeated complaints filed,[243] the issuance of a protection order,[244] the heightening of risk through previous accusation and detention by state authorities,[245] the release of a person that the victim had denounced and the context of systemic violence against female community leaders, which the state had acknowledged in previous reports, and the constant operations of the military.[246] Moreover, in this

[234]*Ibid* at paras 116, 118.

[235]*Ibid* at para 177.

[236]*Ibid* at para 273.

[237]*Case of the Rochela Massacre v Colombia* (Judgment) (2007), Inter-Am Ct HR (Ser C) No 163 at paras 76, 158, 194.

[238]*Ibid* at para 158.

[239]*González et al*, *supra* note 232 at para 283.

[240]*Ibid* at para 284.

[241]*Case of Velásquez Paiz et al v Guatemala* (Judgment) (2015), Inter-Am Ct HR (Ser C) No 307.

[242]*Yarce et al v Colombia* (Judgment) (2016), Inter-Am Ct HR (Ser C) No 325 at paras 194, 243; *Case of IV v Bolivia* (Preliminary Objections, Merits, Reparations and Costs) (2016), Inter-Am Ct HR (Ser C) No 329 [*Case of IV*].

[243]*Ibid* at para 187.

[244]*Ibid* at para 195.

[245]*Ibid* at para 186.

[246]*Ibid* at para 185.

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context, "the situation of displacement ought to be understood as a *de facto* 'situation of particular weakness, vulnerability and defenselessness' giving rise to a 'individual *de facto* unprotected status' likely to create particular and disproportionate harm to women. Such a situation obliges States to adopt positive measures to reverse the effects of this situation of vulnerability."[247]

In the *Case of I.V. v Bolivia*, concerning the forced sterilization of the claimant without informed consent and despite the absence of immediate risk to her life or health, the IACtHR considered that nationality of origin, the situation as a refugee, and the socio-economic status of the presumed victim "had an impact on the magnitude of the harm suffered."[248] The condition as a refugee played an decisive part in the assessment of the intersectional factors of discrimination that the state had to counter in order to comply with its due diligence obligations.[249] The landmark case of *Ximenes Lopes v Brasil*, a case that concerned the death of a person with mental disability in a mental hospital, equally considered elements of discrimination in relation to the assessment of due diligence, such as the specific vulnerability of the victim to discriminatory treatment from the inmates.[250] Similarly, in the case of *Guachalá Chimbó y otros v Ecuador*, which concerned the disappearance of a person with a mental disability while he was in a public mental health centre in the city of Quito, the IACtHR considered that the state, in order to fulfill its due diligence obligations, held special protection duties relating to "any person in a situation of vulnerability."[251]

These cases seem to echo the considerations of a guarantor position of the state in particularly vulnerable situations in the *Pueblo Bello Massacre* case. The right to be free of discrimination holds a material or substantial dimension, which mandates the adoption of positive promotional measures in favour of historically discriminated or marginalized groups, including the duty of the state to correct existing inequalities and confront situations of exclusion and marginalization.[252] Crucially, the IACtHR considered displacement and an existing migratory status as one of the factors that pointed to heightened vulnerability of specific groups of populations, which should have prompted the states' awareness of the specific nature of danger.

Specific vulnerability, as a factor that should have prompted the states awareness of a risk of harm, was also evaluated in relation to structural and historical forms of discrimination, which required a level of exceptional due diligence. In the *Case of the Hacienda Brasil Verde Workers v Brazil*, the IACtHR considered structural discrimination regarding forced labor and the disappearance of two workers inflicted by private actors in the Hacienda Brasil Verde. The workers were from the northwest of the country, which was characterized by extreme poverty with the highest levels of illiteracy and rural unemployment.[253] The IACtHR indicated that, in the case of structural discrimination, it is necessary to consider to what extent the victimization in the specific case reveals about the vulnerability of those who belong to a group.[254]

[247]*Ibid* at para 225, referring to *Mapiripán Massacre*, *supra* note 142 at para 177.

[248]*Case of IV*, *supra* note 242 at para 248.

[249]*Ibid* at para 318.

[250]*Ximenes Lopes v Brasil* (Judgment) (2006), Inter-Am Ct HR (Ser C) No 149 at paras 125, 132.

[251]*Caso Guachalá Chimbó y otros v Ecuador* (Judgment) (2021), Inter-Am Ct HR (Ser C) No 149 at paras 86, 203.

[252]*Ibid* at para 167.

[253]*Hacienda Brasil Verde Workers*, *supra* note 179 at para 112.

[254]*Ibid* at para 341.

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In this context, the IACtHR considered the historic structural discrimination based on the economic status of the victims.[255] For assessing states' awareness in relation to the obligation of prevention and non-discrimination, it took recourse to the test already established in *González et al.*[256] Accordingly, the IACtHR considered a series of shortcomings and the state's negligence regarding the prevention of the occurrence of forced labor as well as the reports filed denouncing the conditions of forced labor and the disappearance of two workers at a local police station after having escaped the Hacienda. The IACtHR noted various complaints filed concerning the existence of a situation similar to slavery in the state of Pará and, specifically, in Hacienda Brasil Verde as well as the subsequent inspections of Hacienda Brasil Verde conducted seven times in the past eleven years.[257] The IACtHR held that states must adopt comprehensive measures to act with due diligence in order to ensure the creation of the conditions required to guarantee that violations do not occur.[258]

Also relevant is the *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v Brazil*, which concerned an explosion in a fireworks factory in which sixty-four Afro-Brazilian workers died, all of them were women and children. First, the IACtHR found that states have the duty to regulate, supervise, and monitor the implementation of dangerous activities that entail significant risks for the life and integrity of the persons subject to their jurisdiction as a measure to protect and preserve their rights.[259] In this context, previous explosions in the factory[260] should have highlighted the risk awareness that should have prompted the state to deploy heightened oversight. The IACtHR established that the omissive conduct by the state authorities failing to comply with their duty of supervision and monitoring had resulted in the violation of the right to life of the victims as a direct consequence of the explosion.[261]

Second, considering that most individuals worked at the factory due to conditions of poverty, the IACtHR noted the "increased risk of human rights violations as a result of the conditions of poverty," finding that the case demonstrated levels of structural discrimination. The intersection of various factors of discrimination (poverty, gender, and ethnicity) converged in the present case and increased the "comparative disadvantages of the presumed victims" while creating a specific form of discrimination due to the observed intersectionality.[262] This signified that the victimization was compounded.[263] In this context, the IACtHR recalled "that structural discrimination refers to conducts that are 'deeply entrenched in social behavior and organization, often involving … indirect discrimination' against certain groups, which is expressed in practices which create relative disadvantages. These practices may appear neutral, but they have a disproportionate impact on discriminated groups."[264]

[255]*Ibid* at para 341 (fourth operative paragraph).
[256]*Ibid* at para 324.
[257]*Ibid* at para 326.
[258]*Ibid* at paras 317, 320.
[259]*Ibid* at para 118.
[260]*Ibid* at para 67.
[261]*Ibid* at para 138.
[262]*Ibid* at paras 186, 188, 191.
[263]*Ibid* at para 198.
[264]*General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, Doc E/C.12/GC/20 (2 July 2009) at para 12.

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Recalling its advisory opinion on the juridical status of migrants, the IACtHR indicated that the obligation to reverse or modify any discriminatory situations that affect a specific group of persons entails "the special obligation of protection that the State must exercise with regard to the actions and practices of third parties that, with its tolerance or acquiescence, create, maintain or encourage discriminatory situations."[265] In this context, it reiterated that the duty to take positive action is bound to a needs-based analysis conditioned by the personal or general condition in which the rights-bearing subjects finds themselves,[266] such as extreme poverty or marginalization.[267] Consequently, the actions by the state should have entailed the implementation of projects, programs, public policies, laws, and regulations that should have reversed the situation of structural discrimination in order to comply with the states' due diligence obligations.[268]

The case of *Jessica Lenahan (Gonzalez) et al. v United States* concerned the killing of the three daughters of the victim by her husband and the failure of the police to prevent the occurrence of the murder despite numerous complaints of the victim on the night in which the girls were kidnapped. The Inter-American Commission on Human Rights considered that "the State's due diligence obligation requires the organization and coordination of the work of the entire State structure to protect" potential victims from harm.[269] Similarly to the *Fireworks Factory in Santo Antônio* case, the ineffectiveness of judicial proceedings to protect a vulnerable group was seen as contributing to forms of discrimination.[270]

In *López Soto and Others v Venezuela*, the IACtHR considered the context of violence against women in Venezuela, drawing on several reports by expert bodies, including UN mechanisms.[271] The knowledge of risk by the state was established by the complaint filed by a relative of the victim.[272] From this moment onwards, the state had the duty to carry out strict due diligence and adopt reasonable actions, including: (1) adopting measures of a general nature at the normative and institutional level and (2) ensuring due diligence in its response to complaints regarding the disappearance or abduction of women.[273] Conversely, this means that, in cases involving vulnerable populations where a specific pattern of violence against them has been demonstrated through expert reports, a complaint must trigger a strict duty of care. The lack of a specialized legal framework to ensure the intervention of duly trained police and judicial officials in the processing and investigation of complaints, as well as the inexistence of specific rules capable of guiding the operators, both in the collection of evidence and in the treatment of the victims in this type of case, were fundamental

[265] *Juridical Condition and Rights*, *supra* note 37 at para 104; *Hacienda Brasil Verde Workers*, *supra* note 179 at para 336.

[266] *Mapiripán Massacre*, *supra* note 142 at paras 111, 113; *Hacienda Brasil Verde Workers*, *supra* note 179 at para 337.

[267] See also *Case of Sayhoyamaxa Indegenous Community v Paraguay* (Judgment) (2006), Inter-Am Ct HR (Ser C) No 125 at para 154.

[268] *Hacienda Brasil Verde Worker*, *supra* note 179 at para 26, Concurring Opinion of Judge L Patricio Pazmiño Freire.

[269] *Ibid.*

[270] *Case of IV*, *supra* note 242 at para 317.

[271] *López Soto y otros*, *supra* note 177 at paras 152, 158, 160.

[272] *Ibid* at paras 143–45, 153, 155–57, 161–65.

[273] *Ibid* at paras 142, 166–69.

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factors that contributed to the failures and omissions found in the investigation process and generated effects of re-victimization.

In summary, the IACtHR adopted a similar approach to risk awareness as the ECtHR but extended it to factors of structural and systemic discrimination, historical marginalization and poverty, and migration, race, and gender. The IACtHR emphasized that it is necessary to consider the extent to which victimization in a specific case reveals the vulnerability of those belonging to a group, which should trigger a heightened awareness of risk on the part of the state. Reports and general complaints about specific patterns of violence supported by expert assessments; the occurrence of a high number of cases of human rights violations, including enforced disappearances in a specific geographic region; the prevalence of natural or man-made hazards affecting the right to life in a specific geographic area; the fact that previous legislation and prevention measures have been ineffective; the control of the area where the disappearance takes place; and the failure to resolve a known situation of risk were decisive in determining whether the state had "reason to know." Situating human rights violations, including enforced disappearances, in the political and socio-economic context was an important element in developing logical investigative approaches.

Furthermore, the IACtHR divided the specific risk awareness required into different time periods. A general context of violence and discrimination against a particularly vulnerable group prior to the human rights violations, including enforced disappearances, was considered to trigger a heightened duty of care, requiring an increased level of vigilance. Prior to the commission of human rights violations, including enforced disappearances, a general awareness of risk was required, necessitating measures of a general nature for the implementation of projects, programs, public policies, laws, and regulations that reverse the situation of structural discrimination and existing forms of violence; regulation, monitoring, and surveillance of situations of reported danger; and regular inspection of areas where dangers may lead to death and disappearance, based on reported incidents. Complaints and the issuance of protective orders prior to the discovery of the remains of the disappeared person required the implementation of comprehensive and strategic search measures, especially in the first hours and days after the disappearance, as well as reporting procedures that lead to an immediate effective investigation.

5. Omission liability, "constructive knowledge," and the doctrine of command responsibility

As demonstrated, acquiescence and due diligence are elaborated in relation to a risk knowledge standard since questions of causation and foreseeability are crucial in assessing whether a violation has occurred. Nevertheless, existing case law regarding a strict distinction between acquiescence and due diligence tends to be opaque or, as shown, conflates the tests applicable to both categories. It is therefore suggested to consider another way of determining when the standards for knowledge or reason to know trigger obligations by looking at the *mens rea* standards in relation to the doctrine of command responsibility in the field of ICL.

First, one should recall that, in order to be held criminally responsible for omissions, there must be a primary duty to act that has been breached by disregard.[274] Many of the

[274] *Ntagerura et al (Cyangugu)* (Appeal Judgment), ICTR-99-46-A (7 July 2006).

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post-Second World War trials suggested that, even in the absence of proof of actual knowledge, a culpable failure to obtain information in the context of the generalized commission of crimes might suffice to trigger conditions in which the superior "should have known" or "had reason to know."[275] However, the distinction between situations where negligence is sufficient to show "reason to know" and situations where willful disregard or constructive knowledge is required in widespread offences is not always clear.[276] The cornerstone of further consideration of knowledge and awareness is Article 28(a)[277] of the *Rome Statute*,[278] which defines a commander's control and which is very similar to the standard provided for in Article 6(1) of the *ICPPED*.[279]

Of course, one should recall the fundamental difference between IHRL and ICL—namely, its focus on the responsibility of states versus individuals. Similarly important are the differences between the human rights violation of enforced disappearance and the international crime of enforced disappearance codified as a crime

[275]See generally Bernard Duhaime, *The Applicability of the Doctrine of Command Responsibility to the Crime of Genocide* (MA dissertation in law, University of Notre Dame, 2001). See also Gideon Boas, "Command Responsibility for the Failure to Stop Atrocities: The Legacy of the Tokyo Trial" in Yuki Tanaka, Tim McCormack & Gerry Simpson, eds, *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden: Nijhoff Publishers, 2011) 404, at 163ff.

[276]Jenny S Martinez, "Understanding Mens Rea in Command Responsibility from Yamashita to Blaskic and Beyond" (2007) 5:3 *J Intl Criminal Justice* 652.

[277]"In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: 1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. 2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[278]*Rome Statute*, *supra* note 18.

[279]"1. Each State Party shall take the necessary measures to hold criminally responsible at least: (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance; (b) A superior who: (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance; (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution; (c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander. 2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance."

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against humanity in the *Rome Statute*'[280] which broadened the scope of responsibility and obligations in relation to enforced disappearance, recognizing this concept for the actions of NSAs.[281] Nevertheless, it is submitted that drawing on international criminal law standards of awareness and foreseeability constitutes a fruitful way to fill the gaps left by existing human rights law jurisprudence on the distinction between acquiescence and due diligence obligations in cases of enforced disappearance.

A. Omission liability

Aiding and abetting in a crime can occur by omission. In past decades, due diligence obligations and the classification of acquiescence oftentimes refer to omissions by state or private actors that can be attributed to the state. As mentioned earlier, in the *Velásquez Rodríguez v Honduras* case, the IACtHR famously declared that the state "aided in a sense" private parties in the commission of enforced disappearances due to the lack of effective and prompt investigation.[282] Under ICL, an omission that has a substantial effect on the perpetration of the crime can be a physical element of aiding,[283] along with the subjective element that requires the aider to have knowledge that their actions contribute to the commission of the crime. For instance, omissions to prevent a specific violation, combined with the choice to be present at the crime scene, is considered to be a "positive step" that may contribute towards the crime and therefore constitute aiding and abetting.[284] Under ICL, a superior who omits to prevent or punish his subordinate's criminal acts may thus be held criminally responsible, which is also known as omission liability.

Where there is a legal duty to act, an omission to do what is legally required may result in criminal responsibility.[285] Superior responsibility usually encompasses that there exists a relationship of subordination or effective control of the superior over its subordinates, actual or constructive knowledge of the subordinates' commission of the crime, a failure to prevent the commission of the crime, and, crucially, causation, meaning that the omission "increased the risk of the commission of the crime."[286] In post-Second World War trials, such as *Araki and Others*, the US military tribunals considered that, if a commander who "knew or should have known" about the commission of crimes but failed to stop them or to "take adequate steps" to prevent future crimes, they should be held liable.[287] In *Karl Brand and Others* and in *Pohl and Others*, the US military tribunal required actual knowledge of the misdeeds of the

[280] *Rome Statute*, *supra* note 18, art 7-l-I.

[281] De Frouville, *supra* note 17 at paras 3–4.

[282] *Velásquez Rodríguez*, *supra* note 5 at para 177.

[283] *Prosecutor v Tihomir Blaskic*, Appeal Chamber (Appeal Judgment), IT-95-14-A (29 July 2004) at para 46 [*Blaskic*, Appeal Chamber].

[284] *Prosecutor v Jean Mpambara* (Trial Judgement), ICTR-01-65-T (11 September 2006) at para 22.

[285] *Prosecutor v Naser Oric* (Appeal Judgment), IT-03-68-A (3 July 2008) at para 43; *Prosecutor v Andre Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe* (Appeal Judgement), ICTR-99-46-A (7 July 2006) at para 334; *Blaskic*, Appeal Chamber, *supra* note 283 at para 663.

[286] *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08 (2009) at para 425.

[287] *United States et al v Araki Sadao et al*, reprinted in US Naval War College, *Trials of War Criminals, International Military Tribunal for the Far East*, vol 46 (29 April 1946).

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subordinates.[288] In the *Hostages Case*, the tribunal required "proof of a causative, overt act or omission from which a guilty intent can be inferred" as well as knowledge by the army commander of the crimes committed by the subordinates for proving the liability of the defendants for their failure to prevent or punish.[289] In *Wilhelm Leeb and Others*, the tribunal noted that "it must be a personal neglect amounting to a wanton, *immoral disregard* of the action of his subordinates amounting to acquiescence … the occupying commander must have knowledge to these offenses and acquiesce or participate or criminally neglect to interfere in their commission."[290] In this case, it was noted that an officer who merely stands by while his subordinates execute a criminal order of his superiors that he knows is criminal incurs liability for this offence.[291] This meant that, in these instances, the standards for knowledge would need to meet the higher threshold of willful/immoral disregard in cases of omission liability.

At the time of the judgments of the US military tribunals, omission liability had a specifically high threshold because it could be easily considered to call for positive obligations that were altogether too intrusive in the autonomous sphere of the individual and therefore challenged the liberal paradigm underlying most criminal systems.[292] Furthermore, omission had to be balanced with the requirement to perform what is in the realm of the possible based on the defendants' capacity of action.[293] Rather than looking at causality, the decisive assessment concerned whether or not the defendant could have prevented the event.[294]

B. "To know": actual knowledge

Actual knowledge refers to "the awareness that the relevant crimes were committed or about to be committed."[295] Actual knowledge can be proven by recourse to circumstantial evidence in determining whether a superior, despite pleas to the contrary, in fact must have possessed the requisite knowledge. In this context, factors such as the number of illegal acts, the type of illegal acts, the scope of illegal acts, the time during which the illegal acts occurred, the number and type of troops involved, the logistics involved, if any, the geographical location of the acts, the widespread occurrence of the acts, the tactical tempo of operations, the *modus operandi* of similar illegal acts, the officers and staff involved, and the location of the commander at the time were taken as indicia.[296]

[288] *Karl Brand and Others*, reprinted in *Trials of War Criminals before Nuernberg Military Tribunals, under Control Counsel Law No 10, Nuernberg*, vol 1 (October 1946 – April 1949) at 1011–12.

[289] *Hostage Case*, US Military Tribunal, Nuremberg, Judgment of 19 February 1948, reprinted in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law no. 10*, vol XI/2 (October 1946 – April, 1949) at 1261.

[290] *United States v Wilhelm von Leeb et al*, reprinted in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law no 10*, vol XI (1950) at 1230, 1303. See Jamie Allan Williamson, *Some Considerations on Command Responsibility and Criminal Liability* (June 2008) at 543–45 [emphasis by author].

[291] *Ibid* at 305.

[292] Michael Duttweiler, "Liability for Omission in International Criminal Law" (2006) 6 ICLR 1 at 24.

[293] *Ibid* at 25.

[294] *Ibid* at 31.

[295] *Taylor* (Judgment), SCSL-O3-01-T (18 May 2012) at para 497.

[296] *Mucic et al ("Celebici")*, Trial Chamber (Judgment), IT-96-21-T (16 November 1998) at para 386 [*Celebici*].

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Knowledge was also presumed when the offences committed were "so widespread and public that it would have been impossible" to be unaware of them.[297] Moreover, it was significant that the position of command of the superior, either *de jure* or based on evidence of *de facto* control without, however, a formal commission or appointment,[298] depended on the temporal and geographical proximity in which the superior was situated with the occurrence of the offence in order to assess if they had actual knowledge of the offences committed. The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Aleksovski* case noted that "the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indicium that he had knowledge of the crime, *a fortiori* if the crimes were repeatedly committed."[299]

C. "To have reason to know": constructive knowledge

Constructive knowledge refers to the notice of a fact that a person is presumed by law to have known, regardless of whether they actually did know, since such knowledge is obtainable by the exercise of reasonable care. This doctrine allows for a commander to be held criminally liable for crimes committed by their subordinates if they were in a position to prevent crimes committed by forces under their effective control and knew or should have known that the crime would be committed. This standard was more extensively debated in the jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) and the ICTY. Article 7(3) of the respective statuses refers to the standard "if he knew or had reason to know" and "failed to take the necessary and reasonable measures to prevent such acts."[300] In this context, "reason to know" meant that a superior had general information in his possession that put him on notice of possible unlawful acts.[301]

Crucially, in the *Blaskic* case, the Trial Chamber of the ICTY held that no specific information about unlawful acts committed is required.[302] In the *Bagilishema* case, the Appeals Chamber of the ICTR also stated that the "had-reason-to-know" standard consisted in the fact that the accused had "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates."[303] The necessity of being in possession of information — albeit general — which alerts to a specific risk of violations was also confirmed in the *Kronelaj* case.[304] The nature of

[297] *Karemera and Ngirumpatse*, Trial Chamber III (Judgment), ICTR-98-44-T (2 February 2012) at para 1530.

[298] *Prosecutor v Delalic and Others*, IT-96-21-A (20 February 2001) at 195 [*Delalic and Others*].

[299] *Aleksovski*, Trial Chamber (Judgment), IT-95-14/1-T (25 June 1999) at para 80. See also *Naletilic and Martinovic*, Trial Chamber (Judgment), IT-98-34-T (31 March 2003) at para 72; *Stakić*, Trial Chamber II (Judgment), IT-97-24-T (31 July 2003) at para 460 [*Stakić*, Trial Chamber].

[300] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, 25 May 1993, (1993) 32 ILM 1159 at 36, annex; *Statute of the International Criminal Tribunal for Rwanda*, 1994, (1994) 33 ILM 1598.

[301] *Prosecutor v Bagilishema*, Trial Chamber (Judgment), ICTR-95-1A-A (3 July 2002) at para 28.

[302] *Blaskic*, Trial Chamber (Judgment), IT-95-14-T (3 March 2000) at para 324 [*Blaskic*, Trial Chamber].

[303] *Bagilishema*, Appeal Chamber (Appeal Judgment), ICTR-95-1A-A (3 July 2002) at para 28 [*Bagilishema*, Appeal Chamber].

[304] *Krnojelac*, Appeal Chamber (Appeal Judgment), IT-97-25-A (17 September 2003) at paras 154–55 [*Krnojelac*, Appeal Chamber].

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information was supposed to correspond to "alarming information" requiring further investigation.[305] However, subsequent cases drawing on the *Čelebići* judgment suggested a step back to a narrower understanding of the "had-reason-to-know" standard rejecting that a superior could be held liable for the neglect of acquiring knowledge of the acts of the subordinates.[306]

Information considered to be triggering such duty to investigate included reports on crimes, the superiors' failure to punish past unlawful acts of its subordinates,[307] past criminal behaviour of subordinates, the geographical location of the acts, the widespread occurrence of the acts, the tactical tempo of the operations, and the *modus operandi* of similar illegal acts.[308] Importantly, for civilian superiors, the threshold of the "to-know" standard is slightly higher than the one used for military supervisors. For the latter, standard that they must have known or "consciously disregarded" information that indicated the occurrence of a crime by their subordinates was interpreted as referring to the existence of a specific choice: the superior chose not to consider or act upon relevant information.[309] The International Criminal Court's interpretation therefore goes further than considerations by the ICTY and ICTR "by which the information need merely put the superior on notice of possible unlawful acts by his subordinates."[310] In the *Taylor* trial, the Special Court for Sierra Leone's Trial Chamber stated that "[t]he superior may not be held liable for failing to acquire … information [t] put them on notice of a risk] in the first place. However, it suffices for the superior to be in possession of sufficient information, even general in nature, written or oral, of the likelihood of illegal acts by subordinates. The superior need only have notice of a risk that crimes might be carried out and there is no requirement that this be a strong risk or a substantial likelihood."[311]

One of the major standards established was putting the superior on notice of a specific risk. This was confirmed by the *Celebici* judgment, in which the Appeal Chamber of the ICTY stated that "a superior will be criminally responsible through the principles of superior responsibility *only if information was available to him* which would have put him on notice of offences committed by subordinates."[312] This was considered to be a stricter understanding of circumstances that triggered the

[305]*Ibid* at para 59.

[306]The Trial Chamber in the *Hadžihasanović and Kubura* stated that "the mental element for 'had reason to know' is determined only by reference to the information in fact available to the superior and that it is sufficient for the information to be of a nature which, at least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were or were about to be committed." *Hadzihasanovic and Kubura*, Trial Chamber (Judgment), IT-01-47-T (15 March 2006) at paras 95–96.

[307]*Strugar Pavle* (Appeal Judgment), IT-01-42-A (17 July 2008) at para 301 [*Strugar Pavle*].

[308]*Delalic and Others*, *supra* note 298 at para 386, citing *Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council*, UN Doc S/1994/674 (27 May 1994).

[309]*Prosecutor v Clément Kayishema and Obed Ruzindana* (Trial Judgment), ICTR-95-1-T (21 May 1999) [*Kayishema and Ruzindana*].

[310]See also Jamie Allan Williamson, "Some Considerations on Command Responsibility and Criminal Liability" (2008) 90 Intl Rev Red Cross870.

[311]*Taylor*, Trial Chamber II (Judgment), SCSL-O3-01-T (18 May 2012) at paras 498–99.

[312]*Prosecutor v Delalić, Mucić, Delić, and Landžo* (Appeal Judgment), IT-96-21-A (20 February 2001)at para 241 [emphasis added; footnote omitted]. The standard as interpreted in the *Delalić* appeal judgment has been applied in the *Bagilishema*, Appeal Chamber, *supra* note 303 at para 42, and in the *Krnojelac*, Appeal Chamber, *supra* note 304 at para 151.

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"had-reason-to-know" standard as the superior was not required to actively search for information.[313] While the Appeal Chamber was opposed to understanding "neglect" as being part of the indices to evaluate the standard of "had reason to know," it confirmed that a superior would be liable "for failing to take necessary and reasonable measures to prevent or to punish."[314] The Appeal Chamber contended that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought."[315] In *Strugar*, the Appeal Chamber of the ICTY found that the knowledge of the "substantial likelihood" or the "clear and strong risk" that subordinates are about to commit violations is sufficient in order to comply with the requirement to have reason to know.[316] Not the requirement of the superior to be on notice of a strong risk but, rather, the lower threshold of "sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry" was considered sufficient for the scope of the "reason-to=know" standard.

Moreover, the availability of a means to know constituted a crucial element in several cases. In *Stakić*, the Trial Chamber of the ICTY indicated that "[k]nowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so."[317] This position was affirmed by the Appeal Chamber of the ICTY in *Čelebići*, in which it stated that, if the commander "had the means to obtain the knowledge," such knowledge could be presumed.[318] If a superior fails to obtain further information, even though they have the means to do so, it can be assumed that they had "reason to know." However, the superior's duty to make further enquiries only arises from the time the admonitory information is available to them, and the failure to obtain such information in the first place does not in itself trigger liability.[319]

Ultimately, in the *Bemba* case, another pivotal point for the assessment of the "had-reason-to-know" standard was impunity — namely, the failure to punish past crimes committed by the same group of subordinates as an "indication of future risk."[320] In the *Brđanin* case, the failure to carry out their duty to exercise control was considered sufficient to prove knowledge.[321] Legal scholars argue that, in relation to control and vigilance, even negligent ignorance of the offences can be a source of accountability for the supervisor.[322] The latter will be held accountable for their failure to take the necessary measures to prevent or punish the offences

[313]Roberta Arnold, "Article 28: Responsibility of Commanders and Other Superiors" in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Munich: Beck, 2008) 795.

[314]*Mucic et al ("Celebici")*, Appeal Chamber (Appeal Judgment), IT-96-21-A (20 February 2001) at para 226 [*Celebici*, Appeal Judgment]. This was also upheld in *Blaskic*, Appeal Chamber, *supra* note 283 at para 62.

[315]*Bagilishema*, Appeal Chamber, *supra* note 303 at para 35.

[316]*Strugar Pavle*, *supra* note 307 at para 304.

[317]*Stakić*, Trial Chamber, *supra* note 299.

[318]*Celebici*, Appeal Judgment, *supra* note 314 at para 226.

[319]ICTY, *Sainovic et al*, Trial Chamber (Judgment), IT-05-87-T (26 February 2009) at para 120.

[320]*Bemba, PTC II, Decision on the Confirmation of Charges*, ICC-01/05-01/08-424 (15 June 2009) at paras 432–34.

[321]*Brdanin*, Trial Chamber II (Judgment), IT-99-36-T (1 September 2004) at para 720.

[322]Chantal Meloni, *Command Responsibility in International Criminal Law* (The Hague: TMC Asser, 2010) at 185.

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that they negligently ignored. Importantly, this approach reiterates the element of due diligence as a way to assess the knowledge requirement. In the *Blaskic* case, an important standard for assessing knowledge was whether the superior had fulfilled their duties of due diligence. The Trial Chamber of the ICTY stated that, "if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him."[323] However "where the absence of knowledge is the result of negligence in the discharge of his duties," the commander was considered liable for the offence in question.[324] And, yet, references to negligence were interpreted as "confusing" as there would be no clearly defined standard for criminal negligence in obtaining information in the first place.[325] The threshold of the "had-reason-to-know" standard therefore was the higher threshold of culpable or willful disregard or willful blindness rather than negligence.[326]

D. Failure to take reasonable measures to prevent or punish the commission of crimes

In relation to the reasonableness of the measures that need to be taken to prevent or punish the commission of crimes, the ICTY declared that reasonable measures to be taken depend on the circumstances but must include all measures within the superior's material ability, capacity, and competency going beyond his formal powers.[327] It has taken this position on the basis of an assessment of effective control. Considering that the failure to take all reasonable measures is evaluated taking into account the superior´s power to prevent or repress the commission of the crimes by their subordinates,[328] what is decisive is when the superior can be considered to hold a specific capacity that justifies that they are under a duty to act.

In *Blaskic*, the defendant was convicted on the basis of Article 7(1) of the *Statute of the ICTY* for ordering the crimes and failing to take the necessary and reasonable measures that would have allowed these crimes to be prevented or the perpetrators thereof to be punished.[329] The Appeal Chamber regarded the position of command along with the number, type, and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the commander at the time as indicia of the accused's knowledge.[330] The Trial Chamber stated that "ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge

[323]*Blaskic*, Appeal Chamber, *supra* note 283 at para 332.
[324]*Ibid.*
[325]*Ibid* at para 63; *Bagilishema*, Appeal Chamber, *supra* note 303 at para 35.
[326]*Blaskic*, Appeal Chamber, *supra* note 283 at para 63.
[327]Ibid at para 147; *Krajisnik*, Appeal Chamber (Appeal Judgment), IT-00-39A (17 March 2009), at paras 193–94.
[328]*Delalic and Others*, *supra* note 298 at 395.
[329]*Blaskic*, Trial Chamber, *supra* note 302 at p 269.
[330]*Blaskic*, Appeal Chamber, *supra* note 283 at para 57; *Blaskic*, Trial Chamber, *supra* note 302 at para 307.

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of his duties" and found that "this commander had reason to know within the meaning of the Statute."[331]

However, the Appeal Chamber in *Blaskic* held that measures are to be established on a case-by-case basis and accentuated the material ability of the defendant to take such measures. The Appeal Chamber stated: "Necessary and reasonable measures are such that can be taken within the *competence* of a commander as evidenced by the degree of effective control he wielded over his subordinates. The measure of submitting reports is again an example, applicable "under some circumstances."[332] The ICTY separated the "necessary" requirement from the "reasonable" requirement stating that "'[n]ecessary measures' are those required to discharge the obligation to prevent or punish, in the circumstances prevailing at the time. 'Reasonable' measures are those which the commander was in a position to take in the circumstances prevailing at the time."[333]

In *Prosecutor v Alfred Musema*, the Trial Chamber of the ICTR considered that factors such as legal and financial control, the power to appoint and remove individuals from specific positions in the entity where they are employed, control over vehicles, uniforms or other types of property that were in use for the commission of the crime, places the superior in a position in which they ought to take reasonable measures.[334] Failure to do so, according to this line of reasoning, can be interpreted as acquiescence to the unlawful actions of their subordinates, thereby encouraging further violations and developing a culture of impunity. This is also valid against the backdrop of the fact that the consequences of the actions of a person who is at the top of a military or political hierarchy and holds a position of authority are more severe.[335]

A possible test could therefore be as follows: the superior may be presumed to have known if, among other things and depending on the circumstances of the case: (1) they had general information that put them on notice of offences committed by subordinates or of the possibility of unlawful acts occurring; (2) they had the means to obtain information, which could be oral or written and of a general nature; (3) this available information was sufficient to justify further enquiries or investigations — for example, "sufficiently alarming information" or "information of the likelihood of illegal acts" but no need for the indication of "a strong risk or a substantial likelihood"; (4) they failed in their duty of control and vigilance, which is more demanding considering the superior's position in the military or political hierarchy; and (5) they failed to sanction offences committed in the past that pose a future risk. One should also take into consideration the specific material capacity and competence of the entity that ought to have known about the commission of offences. In the case of military operations — that is, the military superiors involved — the failure to comply with the duty to actively safeguard information, irrespective of the availability of that information at the time of the commission of the offence, is an indication that a form of negligence is sufficient as a basis for liability where the superiors should have known about it but failed to take the necessary and appropriate measures.

[331] *Blaskic*, Trial Chamber, *supra* note 302 at para 332.
[332] *Blaskic*, Appeal Chamber, *supra* note 283 at para 72.
[333] *Blaskic*, Trial Chamber, *supra* note 302 at 333.
[334] *Prosecutor v Alfred Musema* (Judgment), ICTR-96-13-T (27 January 2000) at 880.
[335] *Kayishema and Ruzindana*, *supra* note 309 at 15.

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6. Knowledge of disappearances of migrants in contexts of systematic impunity

As previously documented,[336] many migrants disappear as a result of the direct involvement of state officials — for example, following the arrest and detention, including secret detention, of migrants. In some cases, however, disappearances occur in circumstances that make the involvement of state officials particularly difficult to verify — for example, when state officials are not physically present during the incident that leads to the disappearance. This is the case when migrants disappear during trafficking or smuggling activities by NSAs. It also occurs when migrants are pushed back at the border or "released" by NSAs in geographic areas, or pushed by migration policies into dangerous geographies, such as deserts, remote mountainous areas, or on the high seas, where they are likely to disappear and/or die.[337] While such circumstances may not always equate to enforced disappearances *stricto sensu*, these practice render migrants vulnerable and more likely to become victims of enforced disappearances.[338] This section therefore presents various tests that illustrate under what circumstances state responsibility by action and/or omission can be assumed in relation to these (enforced) disappearances.

We have previously clarified that the concept of acquiescence, as the lowest threshold for collaboration under Article 2 of the *ICPPED* between states and NSAs who make migrants disappear, indicates that the former can also be held responsible for the disappearance of persons under certain circumstances due to deliberate inaction. The case law of the IACtHR is central here, which has not only established that acquiescence may be found when there is a demonstrably close institutional link between NSAs and the state.[339] The IACtHR has also developed a basis — albeit a rather weak one — for extending the concept of acquiescence to cases where the state has failed to prevent crimes committed by NSAs through deliberative omission. In this case, the determination of acquiescence has become linked to the prevention of violations such as enforced disappearances in contexts of widespread violence, systematic impunity, and intersectional forms of discrimination.[340] Such an extension is based on the premise that states should not deliberatively turn a blind eye to massive rights violations when they were in a position to know the risk that those violations might occur in a particular geographic region because of its specific context. As noted above, what is legally viewed as a failure of due diligence by states

[336]Duhaime & Painter, *supra* note 15 at paras 44–45.

[337]For example, in its 2016 report on Turkey, the WGEID expressed concern about information it had received regarding the high number of mass returns of Syrian refugees by the Turkish state. It observed that the Syrian situation increased the likelihood of enforced disappearances occurring and exposed the refugees returned to Syria to greater risks of suffering human rights violations WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Turkey*," Doc A/HRC/33/51/Add.1 (27 July 2016) at para 56.

[338]*Ibid.* See also WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, Doc A/HRC/36/39/Add.2 (28 July 2017) at para 33. In addition, these practices can violate states' non-refoulement obligations and their duty to "take the necessary measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released [and to] to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release" in accordance with Article 21 of the *ICPPED*, *supra* note 4; *1992 Declaration*, *supra* note 4, art 11.

[339]*Blake*, *supra* note 130; *Mapiripán Massacre*, *supra* note 142.

[340]*Velásquez Rodríguez*, *supra* note 5; *Rantsev*, *supra* note 7; *El-Masri*, *supra* note 7.

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and what is legally considered as acquiescence is therefore determined by interpreting the "deliberative element" of the omission, which, as in traditional cases of failure to exercise due diligence, is composed of a risk-awareness test. We have therefore shown that an assessment of the foreseeability of the risk is essential as it forms the basis of an attribution test for both acquiescence and due diligence.

Nevertheless, existing jurisprudence is rather opaque with regard to a strict distinction between acquiescence and due diligence. To address this gap, the former section elaborated on the standard of awareness by drawing on the *mens rea* component of command responsibility as established in international criminal law, looking in particular at constructive knowledge. Based on this elaboration, it is submitted that, if systematic impunity for migrant disappearances, in circumstances where the state "knew or had reason to know" of the risk of disappearance of migrants and should have taken appropriate measures to prevent such risk from materializing, raises to a certain level, such actions go beyond a mere violation of Article 3 of the *ICPPED* or a breach of due diligence and could rather be qualified as "acquiescence" within the meaning of Article 2 of the *ICPPED*.

The preceding legal considerations reveal that elements of intersectional discrimination and structural marginalization of victims must be taken into account when assessing the level of risk awareness that a state should display in a situation of widespread violence as well as the state's position as a guarantor of rights, which entails a duty of heightened vigilance and monitoring of a particular risk situation due to geographical or man-made conditions. Consequently, as indicated by the Committee on Enforced Disappearances in 2022,[341] classifying migrant disappearances as the result of "deliberate inaction" when there is "information about the likelihood of illegal acts" such as the disappearance of migrants in the context of widespread violence could be considered an enforced disappearance under international law, if the other elements of the definition are satisfied. This would impose a number of specific obligations on the state and third states involved.

Given the widespread impunity for enforced disappearances, it is further critical to highlight what obligations state actors have with respect to preventing (enforced) disappearances in the context of corruption, widespread violence, and racial discrimination and under what conditions inaction (both in preventing and responding to disappearances) constitutes acquiescence, thereby rendering the state directly responsible for the act committed. Importantly, the classification of these missing migrants as victims of (enforced) disappearance activates the purview of an added protection framework set forth in international standards for the protection against enforced disappearance, including the provisions outlined in the *ICPPED*, particularly Article 24 of the *ICPPED*, which recognizes the status of victims and obliges states to ensure their right to reparation.

A. Tests

i. Acquiescence

Acquiescence, as proposed, is established in terms of "deliberative inaction" by the state, taking into account the position of control of the state as the guarantor of rights in contexts where widespread violence is reported and the position of the victim

[341] Committee on Enforced Disappearances, *supra* note 9.

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belonging to a particularly vulnerable group or residing in or crossing a particularly dangerous area. In this context, the following test is suggested:

If a relationship can be established between the state and the NSA:

1. function of NSAs acting with powers and responsibilities closely related to those of state forces;
2. control of a geographical area; the presence of state actors prior to the commission of the crime in the same geographical area where the NSAs committed the crime in question, without documented clashes between the two;
3. financial, logistical, and material support (weapons and so on);
4. quasi-institutional relationship between NSAs and state authorities or historical relationship between these entities as the state contributed to the emergence of NSAs;
5. state authorities exercise significant control over the region and allow NSAs to operate and move freely, while they fail in their duty to monitor the region;
6. letting NSAs pass through a region known for the violence perpetrated by those actors against persons living in that area;
7. cooperation in the planning of the crime;
8. absence of a judicial process that would clearly establish criminal responsibility; and
9. a high degree of causality indicating that the crime could not have been committed without the acquiescence of the state actor.

If no link can be established, the context of widespread violence assumes greater importance:

1. failure to investigate in the context of widespread violence;
2. the presence of state authorities in the region where the crime is committed, combined with failure to prevent the crime;
3. failure to prevent the violation when it is known, or should be known, that the person will again be placed in a situation of danger; and
4. a combination of control by arresting or intercepting a person and placing that person back in a situation of increased danger, as indicated by reports of the general context of the situation of a particularly vulnerable group to which the person belongs.

ii. Risk awareness

The intertwining of a risk awareness test with the attribution of acquiescence shows not only a convergence between the finding of acquiescence and due diligence but also how the failure to take preventive measures in situations of proven heightened risk contributes as an element crucial to the finding of acquiescence.[342] Conversely, this means that the risk-awareness test, which is generally used for situations in which breaches of due diligence are found, is also relevant in individual cases as an attribution test for analyzing when the state acquiesced in a crime, depending on the particular circumstances of the case. In particular, taking into account the standard of risk as set forth in the *Osman and González et al.* cases, the "reasonable grounds to believe" or "had-to-know" standard draws on recent jurisprudence on the

[342]See *El-Masri*, *supra* note 7.

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duties of vigilance and monitoring in the context of structural discrimination and compounded victimization. This involves the special position of the state authority, taking into account the specific material capacity and competence of the entity that should have known about the commission of crimes. In addition, since the current jurisprudence makes a rather opaque distinction between due diligence and acquiescence, the elements of omission liability provided for in ICL are taken into account. This assessment is based on a lower threshold for the severity of the information received — namely "information of the likelihood of illegal acts" rather than information requiring a high level of risk to be established. Following the chronological sequence of general and specific risk awareness proposed by the IACtHR, the following elements are suggested:

Prior to the disappearance, the general context of violence based on reports from expert panels and civil society organisations:

- life-threatening circumstances evidenced by a pattern of enforced disappearances in conflict-like circumstances;
- deficiencies in the legal and administrative infrastructure prior to the commission of the crimes, including whether a general administrative framework was in place given the particular context of dangerous activities and whether it was reportedly ineffective;
- legislation and policies enacted to mitigate and prevent the activities of NSAs that already indicate a particular risk;
- factors of systemic impunity and structural and intersectional discrimination and marginalization, including a specific migration status; and
- the state's duty of oversight, control, and vigilance over a particular situation, which arises from this context and is more demanding given the position of state authorities in the military or political hierarchy.

The position of the victim and the particular vulnerability resulting from it — belonging to a target group on the basis of socio-economic status, gender, and age or political affiliation:

1. the geographical characteristics of the place where the crime was committed (dangerous activities of enterprises or a dangerous natural environment);
2. the documented behaviour of the NSA;
3. the proximity of the victim to the risk and its origin and immediacy;
4. the availability of information on the likelihood of illegal acts:
    - state authorities had general information that alerted them to crimes committed by subordinates or to the possibility of unlawful acts;
    - they had the means to obtain information, which could be oral or written and of a general nature (negligence as a breach of the duty to actively seek information);
    - this available information was sufficient to warrant further enquiry or investigation — for example, "sufficiently alarming information" or "information about the likelihood of illegal acts" but no need to state a "strong risk or substantial likelihood"; and
5. state authorities have failed to sanction crimes committed in the past that pose a future risk.

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Before the discovery of bodies/human remains:

1. duration of the disappearance, which increases the risk and the duration between the first signs indicating a particular risk and the time of the violation;
2. whether complaints have previously been brought to the attention of state authorities, the latter condition being cancelled in the case of collusion between non-state and state actors or a general risk situation.

In addition, or alternatively, one could very well envisage that, when migrants disappear in situations of systematic impunity and the state knew or should have known of the risk of such disappearances, the acquiescence of the state to the actions of NSAs could be the object of a rebuttable presumption. This evidentiary mechanism has been used in other models of human rights violations, particularly when dealing with discrimination.[343]

Other procedural innovations could be envisaged to acknowledge the gravity of such situations and incite states to redress these forms of structural problems related to systematic impunity. International adjudicative bodies, for instance, could presume that similar cases ought to receive similar recommendation and refuse to adjudicate individual claims on those topics regarding such countries until the state has remedied the situation, as does the ECtHR in its "pilot-judgment" procedure.[344] A policy-oriented measure that international human rights institutions could also adopt to reach similar objectives to condemn the effects of systematic impunity and strongly encourage states to remedy such structural situations could be to address such dysfunctional problems in annotated "lists" of states that have severe structural problems related to ensuring the rule of law and the basic functioning of human rights, as was done by the Inter-American Commission of Human Rights when it singled out such countries in Chapter IV of its annual report, specifically addressing these forms of structural problems.[345]

7. Conclusion

Calling migrants subjected to enforced disappearance "missing migrants" may misconstrue the obligations that states hold in the face of disappearances as mere options,

[343]For instance, *DH et al v Czech Republic* dealt with the registration by state officials of a disproportionate number of Roma children in special schools for children with intellectual disabilities. *DH et al v Czech Republic* (GC), ECtHR application no 57325/00 (13 November 2007). On this, see Bernard Duhaime & Catherine Lafontaine. "Human Rights and Migrations in the Americas: Revisiting the *Dorzema et al v Dominican Republic* Case" (2013) hors série, Revue québécoise de droit international 449.

[344]See e.g. Jakub Czepek, "The Application of the Pilot Judgment Procedure and Other Forms of Handling Large-scale Dysfunctions in the Case Law of the European Court of Human Rights" (2018) 20:3–4 *Intl Community L Rev* 347.

[345]These include states ruled by governments that have not come to power through popular elections, by secret, genuine, periodic, and free suffrage, according to internationally accepted standards and principles; states where human rights are suspended or the object of a state of emergency or other exceptional measure; states where there are massive and systematic human rights violations; and states where there are temporary or structural situations that seriously affect the enjoyment of human rights, including, for example, grave situations of violations that prevent the proper application of the rule of law; serious institutional crises; processes of institutional change that have negative consequences for human rights; or grave omissions in the adoption of the provisions necessary for the effective exercise of fundamental rights. See e.g. IACHR, *Annual Report* (2012) ch IV, para 6.

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best practices, and recommendations for potential routes of actions when, in fact, these states have legally binding obligations under international law. The trope of "missing migrants" with its attached humanitarian obligations on the part of states and the conceptual link to armed conflict that stands in contrast to the continuous structural forms of violence as disappearance, including enforced disappearance, when persons cross international borders, does not fully grasp the entire complexity and gravity of these disappearances. In light of the widespread impunity for enforced disappearances in the context of migration, it is therefore important to highlight what obligations state actors have with respect to preventing (enforced) disappearances in the context of corruption, widespread violence, and racial discrimination and under what conditions inaction (both in preventing and responding to disappearances) constitutes acquiescence, thereby rendering the state directly responsible for the act committed. Importantly and as discussed, the classification of these missing migrants as victims of enforced disappearance activates the purview of an added protection framework set forth in international standards for the protection against enforced disappearance, including the provisions outlined in the *ICPPED*, particularly Article 24, which deals with the status of the victim and the right to reparation, including restitution, rehabilitation, satisfaction, as well as guarantees of non-repetition.

We note that our analysis has several limitations, the discussion of which would exceed the scope of this article. These limitations include, first, the fact that we only address one constitutive element of the concept of enforced disappearance — namely, the participation, collusion, or acquiescence of state agents. In order to gain a better understanding of enforced disappearance, other elements should also be analyzed, including the deprivation of liberty and the state's denial of information about the person's fate and whereabouts. For example, as far as the element of deprivation of liberty is concerned, further discussion would be useful regarding whether a state has exercised control over migratory routes to a degree that allows the circumstances to be considered a *de facto* deprivation of liberty and which may include not only situations of administrative detention but also the interception practices of vessels carrying persons on the move. Another element that requires further elaboration and falls outside the scope of this article concerns the temporality of disappearance, including the recently documented practice of short-term enforced disappearance.

Second, this article draws on European and Inter-American precedents that are not always limited to practices of enforced disappearance as a primary rule violated but also consider cases relevant to the broader range of rights violations associated with the practice of enforced disappearance, including violations of the right to life, torture, and, in some cases, gender-based violence. We recognize that these differences in the factual makeup of the cases discussed could limit the relevance of the proposed analogies. Finally, as indicated earlier, it is important to recognize that the adoption of the doctrine of command responsibility from ICL into IHRL links relevant standards — and divergent legal ratios — of state responsibility with individual criminal responsibility and criminal evidentiary standards. Nonetheless, the suggested test offers a fruitful way to illustrate the applicable standards of risk awareness and foreseeability to be applied in the context of migrant disappearances. In this way, addressing the stated ICL test provides a meaningful vantage point from which to advance further research on knowledge and evidentiary standards in cases of migrant disappearance.

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Notwithstanding these limitations of the present discussion and the need to further pursue the suggested analysis, this article contributes to deconstructing certain aspects of the human rights problems related to the disappearance of migrants in contexts of systematic impunity. What is of extraordinary importance for the protection against (enforced) disappearances in the context of migration pertains to the change in the legal perception of these crimes. While one might think that such tragedies occur in the blind spots of states, this article has proposed approaches to address a factual situation that is, ultimately, obvious and in urgent need of renewed legal and social optics. Indeed, it is very unlikely that migrants will go missing in such circumstances without state officials knowing about it or, more importantly, without them being required to know about it and then not doing anything. The obvious is sometimes difficult to see, sometimes even when it is right under one's nose, as was the case for Edgar Allan Poe's Purloined Letter.[346]

[346]In this short story by Edgar Allen Poe, investigators are looking for a letter assuming that the culprit would go to great lengths to conceal it. However, the hero Dupin finds the letter by presuming that it would instead be hidden in plain sight.

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