

3-1-2022

The Global Practice of Systematic Enforced Disappearances of Children in International Law: Strategies for Preventing Future Occurrences and Solving Past Cases

Jeremy J. Sarkin
Harvard HLS Affiliates Account, Jeremy.Sarkin@gmail.com

Elisenda Calvet Martinez
University of Barcelona, elisendacalvet@ub.edu

Follow this and additional works at: <https://scholarship.law.edu/lawreview>



Part of the [Comparative and Foreign Law Commons](#), [Criminal Law Commons](#), [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), and the [Transnational Law Commons](#)

Recommended Citation

Jeremy J. Sarkin & Elisenda Calvet Martinez, *The Global Practice of Systematic Enforced Disappearances of Children in International Law: Strategies for Preventing Future Occurrences and Solving Past Cases*, 71 Cath. U. L. Rev. 33 (2022).

Available at: <https://scholarship.law.edu/lawreview/vol71/iss1/7>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

The Global Practice of Systematic Enforced Disappearances of Children in International Law: Strategies for Preventing Future Occurrences and Solving Past Cases

Cover Page Footnote

*Jeremy Julian Sarkin is an Invited Professor of Law, Principal Researcher, and member of CEDIS at NOVA University of Lisbon Law School, Lisbon, Portugal, and Research Fellow at the Department of Criminology at the University of the Free State, South Africa. He is an attorney in South Africa and an attorney in the State of New York, USA. He has undergraduate and postgraduate law degrees from the former University of Natal (today UKZN), a Master of Laws degree from Harvard Law School and a Doctor of Laws degree on comparative and international law. He is a former acting judge in South Africa and a former Chair-Rapporteur of the United Nations Working Group on Enforced or Involuntary Disappearances. ** Elisenda Calvet Martínez is an Associate Professor of Public International Law and coordinator of the legal clinic on the fight against impunity at the University of Barcelona. She is a law graduate from the Pompeu Fabra University and has a PhD in Law from the University of Barcelona. She has worked at the Spanish Red Cross, the Inter-American Court of Human Rights (Costa Rica) and at the Office of the United Nations High Commissioner for Human Rights (Switzerland). Her main lines of research are transitional justice, human rights, international humanitarian law and international criminal law. She is a member of the Historical Memory Commission of the Barcelona Bar Association (ICAB) and a member of the Scientific Committee of the Observatory on the Enforced Disappearances of Children, of the Rovira i Virgili University, Tarragona.

THE GLOBAL PRACTICE OF SYSTEMATIC ENFORCED DISAPPEARANCES OF CHILDREN IN INTERNATIONAL LAW: STRATEGIES FOR PREVENTING FUTURE OCCURRENCES AND SOLVING PAST CASES.

Jeremy Sarkin and Elisenda Calvet Martinez⁺

The aim of this article is to first investigate and understand the widespread and systematic practice of enforced disappearances against children around the world, with a key purpose being to show that it is a regular occurrence. The article reviews the systematic disappearances of children in their historical context, beginning from the Second World War. A variety of country examples – some historical and some contemporary – are discussed to indicate the widespread nature of the practice. The variety of cases is used to understand why states participate in such practices and why children specifically are targeted as victims of enforced disappearances. However, it has not been possible to consider all situations where such disappearances have occurred because there are so many. The article then examines the international legal framework to deal with the scourge of enforced disappearances of children. The laws and processes in international human rights law (IHRL), international humanitarian law (IHL) and international criminal law (ICL) are considered in turn. Thus, the article assesses what the problems with the law are and what can be done to make the law and processes able to prevent and deal with disappearances. It also provides a range of recommendations and solutions for how to improve the situation of the systematic disappearance of children.

⁺ *Jeremy Julian Sarkin is an Invited Professor of Law, Principal Researcher, and member of CEDIS at NOVA University of Lisbon Law School, Lisbon, Portugal, and Research Fellow at the Department of Criminology at the University of the Free State, South Africa. He is an attorney in South Africa and an attorney in the State of New York, USA. He has undergraduate and postgraduate law degrees from the former University of Natal (today UKZN), a Master of Laws degree from Harvard Law School and a Doctor of Laws degree on comparative and international law. He is a former acting judge in South Africa and a former Chair-Rapporteur of the United Nations Working Group on Enforced or Involuntary Disappearances.

^{**} Elisenda Calvet Martínez is an Associate Professor of Public International Law and coordinator of the legal clinic on the fight against impunity at the University of Barcelona. She is a law graduate from the Pompeu Fabra University and has a PhD in Law from the University of Barcelona. She has worked at the Spanish Red Cross, the Inter-American Court of Human Rights (Costa Rica) and at the Office of the United Nations High Commissioner for Human Rights (Switzerland). Her main lines of research are transitional justice, human rights, international humanitarian law and international criminal law. She is a member of the Historical Memory Commission of the Barcelona Bar Association (ICAB) and a member of the Scientific Committee of the Observatory on the Enforced Disappearances of Children, of the Rovira i Virgili University, Tarragona.

INTRODUCTION	35
I. ENFORCED DISAPPEARANCES OF CHILDREN: A GLOBAL AND SYSTEMATIC PRACTICE.....	38
A. <i>Nazi Germany and its Lebensborn Project in Other Countries</i>	40
B. <i>Spain</i>	41
C. <i>Guatemala</i>	43
D. <i>El Salvador</i>	44
E. <i>Argentina</i>	46
F. <i>Southern Cone: Operation Condor</i>	47
G. <i>Timor-Leste</i>	47
H. <i>Turkey</i>	49
I. <i>Israel</i>	50
II. REASONS BEHIND ENFORCED DISAPPEARANCES OF CHILDREN.....	51
III. THE NEED TO REFORM THE INTERNATIONAL LEGAL FRAMEWORK AND PROCESSES	55
IV. THE PROTECTION OF CHILDREN FROM ENFORCED DISAPPEARANCE IN INTERNATIONAL HUMAN RIGHTS LAW	57
A. <i>The UN Declaration on Enforced Disappearance (1992)</i>	58
1. <i>The Law</i>	58
2. <i>Problems and Solutions</i>	59
B. <i>The UN Convention on Enforced Disappearance (2006)</i>	61
1. <i>The Law</i>	61
2. <i>Problems and Solutions</i>	62
C. <i>The Inter-American Convention on Forced Disappearance (1994)</i>	65
1. <i>The Law</i>	65
2. <i>Problems and Solutions</i>	66
D. <i>Other International Human Rights Treaties</i>	67
1. <i>The Law</i>	67
2. <i>Problems and Solutions</i>	70
V. THE PROTECTION OF CHILDREN FROM ENFORCED DISAPPEARANCE IN INTERNATIONAL HUMANITARIAN LAW	73
A. <i>The Law</i>	77
1. <i>The Geneva Conventions of 1949</i>	77
2. <i>Additional Protocols of 1977</i>	79
3. <i>Customary IHL</i>	81
B. <i>Problems and Solutions</i>	82
1. <i>The Geneva Conventions of 1949</i>	82
2. <i>Additional Protocols of 1977</i>	85
3. <i>Customary IHL</i>	87
VI. THE PROTECTION OF CHILDREN FROM ENFORCED DISAPPEARANCE IN INTERNATIONAL CRIMINAL LAW	89
A. <i>Enforced Disappearance of Children as Genocide by Forcibly Transferring Children from One Group to Another</i>	92
1. <i>The Law</i>	92

2. Problems	94
3. Solutions	95
B. <i>Enforced Disappearance of Children as a Crime Against Humanity</i> ..	96
1. <i>The Law</i>	96
2. Problems	98
3. Solutions	99
C. <i>Overall Solutions for ICL to Impact the Systematic Disappearances of Children</i>	100
CONCLUSION.....	101

INTRODUCTION

Children have been used for centuries as targets of conflict¹ or as a means to gain some advantage in political disputes or conflicts.² This targeting is still happening on a systematic basis in the twenty-first century in places like China and the United States.³ In China, hundreds of thousands of Uyghur children are being detained and re-educated because their Muslim culture is seen as problematic by the Chinese state.⁴ They are being separated from their families as a way to disrupt the next generation of Uyghurs and to make them more compliant with the will of the State.⁵ In the United States, the Trump administration purposefully separated the children of undocumented migrants from their families and kept them in atrocious conditions as a means to deter families from going to the United States.⁶ Targeting children for political ends⁷ is by no means a new strategy—it was used during the Nazi era when children from various countries were taken to Germany and given new names and identities.⁸

1. See CHILDREN AND VIOLENCE: POLITICS OF CONFLICT IN SOUTH ASIA 19 (Bina D’Costa ed., 2016); see, e.g., Helen Brocklehurst, *Who’s Afraid of Children?: Children, Conflict and International Relations* (2006) (providing examples of children targeted in conflict).

2. KIM HUYNH ET AL., CHILDREN AND GLOBAL CONFLICT 33, 255 (2015). It is noted, for example, that Tutsi children were specifically targeted during the Rwandan genocide. Other examples are identified throughout this article below.

3. See, e.g., Zainab Raza, *China’s ‘Political Re-Education’ Camps of Xinjiang’s Uyghur Muslims*, 50 ASIAN AFF. 488, 494 (2019); Adrian Zenz, *Sterilizations, IUDs, and Mandatory Birth Control: The CCP’s Campaign to Suppress Uyghur Birthrates in Xinjiang*, JAMESTOWN FOUND., June 2020, at 1–3; Craig B. Mousin, *Rights Disappear When US Policy Engages Children as Weapons of Deterrence*, 21 AMA J. ETHICS 58, 59 (2019).

4. Raza, *supra* note 3; Zenz, *supra* note 3 at 11.

5. Raza, *supra* note 3 at 494–95; see also Zenz, *supra* note 3 at 2–3 (describing other steps being taken to reduce the number of children).

6. Mousin, *supra* note 3, at 60–61.

7. However, images of child suffering are also used for political reasons and in the media for effect. See Helen Berents, *Apprehending the “Telegenic Dead”: Considering Images of Dead Children in Global Politics*, 13 INT’L POL. SOC. 145, 145 (2019).

8. Tara Zahra, *‘A Human Treasure’: Europe’s Displaced Children between Nationalism and Internationalism*, 210 PAST AND PRESENT 332, 345 (2011).

Enforced disappearances are a tool used to destroy and obliterate the ethnic, religious, linguistic, and other types of identities of victims.⁹ The enforced disappearance of children from their biological families during armed conflict, occupation, authoritarian regimes, and even at times in democratic states has been a widespread practice over at least the last century.¹⁰ For example, it occurred as a systematic practice during the Second World War, as will be highlighted in this article.¹¹ On occasion, high-profile children have been targeted for political reasons because of their status in that community, such as the Panchen Lama of Tibet, who was enforceably disappeared together with his family by the Chinese government who admit they took them but will not reveal their whereabouts.¹²

There is a critical need to focus on the overall problem of systematic child disappearances. Despite being a systematic practice, abductions of children have often been treated by national, regional, and international courts as isolated cases and therefore seen as ordinary crimes with a limited statute of limitations, resulting in most cases brought by relatives searching for their disappeared children being shelved. In this sense, most of the literature dealing with disappeared children is country-specific—for example, Argentina and the efforts of the organization Grandmothers of the Plaza de Mayo in the search for their grandchildren—and deals with the issue from an anthropological, sociological, and psychological perspective.¹³ Very few authors have addressed this practice from a comparative international legal perspective. This is despite the fact that this phenomenon cannot be only dealt with at a state level, as it is mostly the state, or its agents, that carry out such disappearances, and the state is thus unlikely to deal with the problem.

There is a need to focus on these cases much more by the international community as generally the majority of such children are not found and not returned to their families. The effect of such cases on both the family and the children is severe. It is likely that children who are victims of forced disappearances will “experience feelings of loss, abandonment, intense fear, uncertainty, anguish, and pain,” depending on their age and other specific

9. Jeremy Sarkin & Grażyna Baranowska, *Why Enforced Disappearances are Perpetrated Against Groups as State Policy: Overlaps and Interconnections Between Disappearances and Genocide*, 2 CATÓLICA L. REV. 11, 13–14 (2018).

10. See, e.g., Sarkin & Baranowska, *supra* note 9, at 18.

11. See discussion *infra* Part I; see also Sarkin & Baranowska, *supra* note 9, at 31.

12. Sarkin & Baranowska, *supra* note 9, at 13.

13. See, e.g., Michale J. Lazzara, *Kidnapped Memories: Argentina's Stolen Children Tell Their Stories*, 12 J. HUM. RTS. 319, 321 (2013); Karen Smith Rotabi, *Child Adoption and War: 'Living Disappeared' Children and the Social Worker's Post-Conflict Role in El Salvador and Argentina*, 57 INT'L. SOC. WORK 169, 173 (2014); Elizabeth S. Barnert et al., *Long Journey Home: Family Reunification Experiences of the Disappeared Children of El Salvador*, 37 HUM. RTS. Q. 492, 497 (2015).

conditions.¹⁴ Just as seriously, this crime also encompasses the falsification, concealment, and destruction of documents attesting the “true” identity of these children, who are often registered directly with the “new” family name, which prevents them from knowing the truth about their “adoption,”¹⁵ finding their biological parents and accessing justice.¹⁶ Enforced disappearance thus entails serious violations of human rights, such as the right to identity, the right to a name, and the right to protection of the family.

The aim of this article is to first investigate and understand the widespread and systematic practice of enforced disappearances against children, with a key purpose being to show that it is a regular occurrence. The article reviews the systematic disappearances of children in their historical context, beginning from the Second World War.¹⁷ A variety of examples—some historical and some contemporary—are discussed to indicate the widespread nature of the practice. A variety of cases are used to understand why states participate in such practices and why children specifically are targeted as victims of enforced disappearances. However, it has not been possible to consider all the situations where such disappearances have occurred because there are so many.

The article then examines the international legal framework to deal with the scourge of enforced disappearances of children.¹⁸ The laws and processes in international human rights law (IHRL), international humanitarian law (IHL), and international criminal law (ICL) are considered in turn. Thus, the article assesses the problems with the law and what can be done to make the law and processes able to prevent and deal with disappearances. It also provides a range of recommendations and solutions for how to improve the situation of the systematic disappearance of children.

14. Human Rights Council, General Comment on Children and Enforced Disappearances Adopted by the Working Group on Enforced or Involuntary Disappearances as its Ninety-Eighth Session (31 Oct. – 9 Nov. 2012), ¶ 6, U.N. Doc. A/HRC/WGEID/98/1 (Feb. 14, 2013).

15. Forced adoptions have been common place around the world sometimes on a systematic basis. Often they are done by repressive states who sometimes trafficked the children abroad. One example of a country examining such practices is Chile, which during its dictatorship had possibly 20,000 forced adoptions. A number of reunions have occurred recently. See Ernesto Londoño, *‘Time We Can’t Get Back’: Stolen at Birth, Chilean Adoptees Uncover Their Past*, N.Y. TIMES (Dec. 17, 2021), <https://www.nytimes.com/2021/12/17/world/americas/chile-adoption-pinochet.html?referringSource=articleShare>.

16. Human Rights Council, General Comment on Children and Enforced Disappearances Adopted by the Working Group on Enforced or Involuntary Disappearances as its Ninety-Eighth Session (31 Oct. – 9 Nov. 2012), ¶ 9, U.N. Doc. A/HRC/WGEID/98/1 (Feb. 14, 2013).

17. See discussion *infra* Part I.

18. See discussion *infra* Part III; see also G.A. Res. 61/177, at 1 (Dec. 20, 2006).

I. ENFORCED DISAPPEARANCES OF CHILDREN: A GLOBAL AND SYSTEMATIC PRACTICE

This article uses the definition of enforced disappearance contained in the International Convention for the Protection of All Persons from Enforced Disappearance.¹⁹ There it is defined as:

[T]he arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.²⁰

A key component in a disappearance is the role of the state or people acting for the state.²¹ Critically, non-state agents usually cannot, from a definitional point of view, carry out such a crime (the exception being in terms of the Rome Statute of the International Criminal Court (ICC), which includes a “political organization[]” as perpetrator).²² They can carry out acts that are analogous to the international crime of enforced disappearance.²³ Usually, widespread abductions of children are carried out by the state.²⁴ However, non-state actors also abduct people, including children, to get people to work for them, such as child soldiers, or for reasons of obtaining ransoms or gaining publicity for their political cause.²⁵ This article only focuses on state acts.

While the term “missing person” is often used in this context, it is incorrect to use this term for acts where people are intentionally taken. The term that should

19. G.A. Res. 61/177, at 2 (Dec. 20, 2006).

20. G.A. Res. 61/177, at 2 (Dec. 20, 2006).

21. See Jeremy Sarkin, *Why the Prohibition of Enforced Disappearance has Attained Jus Cogens Status in International Law*, 81 NORDIC J. INT'L L. 537, 548–49 (2012) (explaining that while most states have committed to international laws against enforced disappearances, the obligations placed on states are often not met).

22. Jeremy Sarkin, *Respecting and Protecting the Lives of Migrants and Refugees: The Need for a Human Rights Approach to Save Lives and Find Missing Persons*, 22 INT'L J. HUM. RTS. 207, 210 (2018).

23. See, e.g., Jeremy Sarkin, *The Need to Deal with All Missing Persons Including Those Missing as a Result of Armed Conflict, Disasters, Migration, Human Trafficking, and Human Rights Violations (Including Enforced Disappearances) in International and Domestic Law and Processes*, 8 INTER-AM. EUR. HUM. RTS. J. 112, 129 (2016).

24. See, e.g., Rep. of the Working Group on Enforced or Involuntary Disappearances, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Mission to El Salvador, ¶ 23, U.N. Doc. A/HRC/7/2/Add.2 (Oct. 26, 2007).

25. See, e.g., Megan Hirst & Ann Linnarsson, *Children and the Commission for Reception, Truth and Reconciliation in Timor-Leste*, 3 (UNICEF Innocenti Research Centre, Working Paper No. 2010-7, 2010), https://www.unicef-irc.org/publications/pdf/iwp_2010_07.pdf.

be used is “enforced disappearance.”²⁶ A missing person is often associated with armed conflict, but that term should also be used where a person cannot be located because of a non-deliberate act such as a disaster, illness, or some other similar event.²⁷ Even if a disappearance has occurred during times of conflict, the term “disappearance” ought to be used if the state or its agents perpetrated the act purposefully in accordance with the definition in the Convention.²⁸ However, the broader issue of missing children, who cannot be found as a result of conflict, migration, human rights violations, trafficking, organized crime, disasters, or other causes, is outside the scope of this article. There is sometimes overlap between a disappearance and other crimes that may have occurred, including genocide, crimes against humanity, ethnic cleansing, slavery, and human trafficking. Some of those issues will be dealt with below.

This section examines a variety of countries’ practices with the systematic disappearance of children. Not every country where this has happened is discussed because there are so many examples. The focus of this article is also on practices aimed at children. This article does not discuss practices against people in general. For example, the processes in Australia regarding so-called “stolen children”²⁹ or in Canada against indigenous children in residential schools³⁰ will not be dealt with in this section.³¹ However, the taking of children was extremely common during the colonial era. In fact, there was a case in Belgium in 2021 where a number of such children sought reparations for being taken from their families during the colonial era and sent to Belgium.³² There will, however, be reference made to the Canadian and Australian case studies

26. Jeremy Sarkin, *Respecting and Protecting the Lives of Migrants and Refugees: The Need for a Human Rights Approach to Save Lives and Find Missing Persons*, 22 INT’L J. HUM. RTS. 207, 209–10 (2018).

27. Jeremy Sarkin, *Why Victimology Should Focus on All Victims, Including All Missing and Disappeared Persons*, 25 INT’L REV. VICTIMOLOGY 249, 250, 255 (2019).

28. Jeremy Sarkin, *The Need to Deal with All Missing Persons Including Those Missing as a Result of Armed Conflict, Disasters, Migration, Human Trafficking, and Human Rights Violations (Including Enforced Disappearances) in International and Domestic Law and Processes*, 8 INTER-AM. EUR. HUM. RTS. J. 112, 128–29 (2016).

29. See generally DAVID B. MACDONALD, *THE SLEEPING GIANT AWAKENS: GENOCIDE, INDIAN RESIDENTIAL SCHOOLS, AND THE CHALLENGE OF CONCILIATION* 100–04 (2019); Bianca Nogrady, *Historical Separations Still Affect Indigenous Children*, 570 NATURE 423 (2019).

30. See generally Ruth Amir, *Cultural Genocide in Canada? It Did Happen Here*, 7 ABORIGINAL POL’Y STUD. 103 (2018).

31. It is important to note that tremendous abuses continue today against children in a variety of settings, especially towards children of vulnerable groups, including indigenous communities all over the world. See, e.g., Gladson Dungdung et al., *Indigenous Children Are Still Dying in Boarding Schools*, SCI. AM. (Nov. 9, 2021) <https://www.scientificamerican.com/article/indigenous-children-are-still-dying-in-boarding-schools/>.

32. Elian Peltier, *Torn From Parents in the Belgian Congo, Women Seek Reparations*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/11/03/world/europe/belgium-congo-kidnapping.html#:~:text=The%20women%20%E2%80%94%20Monique%20Bintu%20Bingi,the%2019th%20century%20to%20Congo’s.>

when dealing with the reasons for targeting children and cases of enforced disappearances of children amounting to genocide.

A. Nazi Germany and its Lebensborn Project in Other Countries

During the Second World War, thousands of children were separated from their parents as a result of massive migrations, bombings, and deportations.³³ “Aryan” children were also kidnapped from occupied territories by the Nazis between 1939 and 1944 and sent back to Germany to be “Germanized.”³⁴ Many of these stolen children were Polish (about 20,000)³⁵ and were brought to the Lebensborn (“Spring of Life”) agency to select those who were “racially desirable” and provide them with new names and birth certificates.³⁶ Himmler, who directed this mass kidnapping system, stated in October of 1943: “What happens to a Russian, a Czech, does not interest me in the slightest. What the nations can offer in the way of good blood of our type, we will take. If necessary, by kidnapping their children and raising them here with us.”³⁷ The U.S. Military Tribunals concluded in the *RuSHA Case (Main Race and Resettlement Office)* that many Czech, Polish, Yugoslav, and Norwegian children were taken from their parents or guardians and classified according to their “racial value” and that “numerous birth certificates were falsified and German names were given to those children selected for Germanization.”³⁸ However, after the end of the war, the abducted kidnapped children were not sent back to their real families.³⁹ It was argued this was not in the children’s best interests, and only between ten and fifteen percent of Polish children were repatriated.⁴⁰

The Lebensborn project of the Nazis expanded to other countries like Austria, Belgium, Denmark, France, Luxembourg, Norway, and Poland.⁴¹ Of these

33. Tara Zahra, *Lost Children: Displacement, Family, and Nation in Postwar Europe*, 81 J. MOD. HIST. 45, 45 (2009).

34. Zahra, *supra* note 8, at 332, 340; Michelle Mouton, *Missing, Lost, and Displaced Children in Postwar Germany: The Great Struggle to Provide for the War’s Youngest Victims*, 48 CENT. EUR. HIST. 53, 54 (2015).

35. Susanne Urban, *Unaccompanied Children and the Allied Child Search: ‘The right . . . a child has to his own heritage’*, in *THE YOUNG VICTIMS OF THE NAZI REGIME: MIGRATION, THE HOLOCAUST AND POSTWAR DISPLACEMENT* 277, 279 (Simone Gigliotti & Monica Tempian eds., 2016).

36. *I.R.O. and the Missing Children*, 23 SOC. SERV. REV., 98, 99 (1949).

37. *Judgment: War Crimes and Crimes Against Humanity*, Nuremberg Trial Proceedings, Vol. 3 (Int’l Mil. Trib. Dec. 11, 1945), <http://avalon.law.yale.edu/imt/12-11-45.asp>.

38. The RuSHA Case, *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* Vol. 4, 599, 613 (1946-1949) (these volumes are commonly known as the “Green Series”).

39. RITA ARDITTI, *SEARCHING FOR LIFE: THE GRANDMOTHERS OF THE PLAZA DE MAYO AND THE DISAPPEARED CHILDREN OF ARGENTINA* 125 (1999).

40. ARDITTI, *supra* note 39, at 125–26; Urban, *supra* note 35.

41. Soledad Torrecuadrada García-Lozano, *Los Derechos Humanos de Los Hijos de Los Soldados Alemanes Tras La Segunda Guerra Mundial. El Caso de Noruega* [*The Human Rights of*

countries, “Norway turned out to be very important to the project due to the consideration [that] Norwegian women as racially acceptable—being descendants of the Vikings.”⁴² Therefore, German soldiers were allowed to both have relations and marry them, “although [the latter was] subject to the final approval of the Führer himself, who could veto the celebration of the marriage.”⁴³ Between 1940 and 1945, between “10,000 and 12,000 children were born in Norway from a Norwegian mother and a German father,” 500 of them in Lebensborn centers.⁴⁴ These children “were referred to as ‘war children’ (*krigsbarn*).”⁴⁵ In many cases, the mothers of these “war children” were marginalised, had great difficulties in obtaining employment,” and were unable to provide for the education of their children.⁴⁶ Many times, “their children were placed for adoption, in foster homes or institutions.”⁴⁷

B. Spain

In Spain, from July 1936 through December 1951, which spanned the Spanish Civil War and Franco’s subsequent dictatorship, 114,226 Spanish people were disappeared.⁴⁸ An estimated 30,000 *hijos de los rojos* (“children of reds,” referring to children of the Republican faction) were abducted by the Francoist state agency *Auxilio Social* (Social Aid) and taken to state orphanages, where they were physically and psychologically abused. They were taken from their families to “save them from the degenerative environment of their leftist parents.”⁴⁹ To legitimize the abduction of Republican children, Franco adopted a law on March 30, 1940, which established the length of time children could remain in prison with their mothers.⁵⁰ After a child reached three years of age, the state could legally remove the child from the mother’s custody.⁵¹ This was part of a program developed by the psychiatrist Vallejo-Nágera⁵² called

the Children of German Soldiers After World War II. The Case of Norway], 35 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL 181, 189 (2019).

42. *Id.*

43. *Id.*

44. Thiermann v. Norway, App. No. 18712/03, Eur. Ct. H.R. 2–3 (2007).

45. *Id.* at 1, 3.

46. *Id.*

47. *Id.*

48. Rep. of the Working Group on Enforced or Involuntary Disappearances: Mission to Spain, ¶ 6, U.N. Doc. A/HRC/27/49/Add.1 (July 2, 2014) (noting the number could not be confirmed by official inquiries).

49. Omar G. Encarnación, *Justice in Times of Transition: Lessons from the Iberian Experience*, 56 INT’L STUD. Q. 179, 181 (2012).

50. Deirdre Finnerty, *The Republican Mother in Post-Transition Novels of Historical Memory: A Re-Inscription into Spanish Cultural Memory?* in *MEMORY AND CULTURAL HISTORY OF THE SPANISH CIVIL WAR*, 217–18 (Aurora G. Morcillo ed., 2014).

51. *Id.*

52. Colonel Antonio Vallejo Nágera was chief of the military psychiatric services under Franco and is commonly known as the “Mengele of Franco.” Antonio Maestre, *Vallejo-Nágera, El Mengele de Franco, y la estirpe desigual de Rajoy*, LAMAERA (Mar. 2, 2014), <https://>

“positive eugenics,” which forcibly separated children from their mothers with the aim of improving the “Hispanic” race by protecting the family environment.⁵³

Children were not only separated from their “leftist” parents, but many of them were also illegally adopted by Francoist families.⁵⁴ This was in part promoted by a decree enacted by Franco on December 4, 1941, which allowed the government to legally change the names of children who had been repatriated or whose parents could not be easily found.⁵⁵ In practice, the Republican parents did not claim their children because of fear of retaliation or because they had lost track of their children after they were sent in exile to be protected from the Civil War.⁵⁶ Therefore, this law extended the physical separation between parents and children eliminating any connection at all, as often families were not alerted of these name changes.⁵⁷ It has been estimated that possibly more than 300,000 children were stolen during the forty-year dictatorship of Franco.⁵⁸ This was a practice that continued fifteen years after democracy was re-established until the law was changed in the 1990s to allow adopted children to know the names of their biological parents.⁵⁹ Thus, the “stolen children” practice evolved over the years, and what had started as a policy of repression of Republican people in order to exterminate the “Republican gene” ended up as a program of illegal adoptions and trafficking of children.

www.lamarea.com/2014/03/02/vallejo-nagera-el-mengele-de-franco-y-la-estirpe-desigual-de-rajoy/.

[I]n 1917, he was sent as an attaché to the Spanish Embassy in Berlin where he learned the language that later allowed him to approach the Nazi eugenic theories and become a fervent admirer of Nazism. Upon his arrival in Spain in 1930, he directed a series of psychiatric clinics and during the Civil War he became the top leader of the Francoist Psychiatric Services, where he would develop his supremacist and eugenic theories.

Id.

53. Rafael Huertas, *Spanish psychiatry: the Second Republic, the Civil War, and the aftermath*, 35 INT’L J. OF MENTAL HEALTH 54, 58 (2006).

54. Sebastian Faber, *Revis(it)ing the Past: Truth, Justice, and Reconciliation in Post-Franco Spain, a Review - Article (Second Part)*, 59 REVISTA HISPÁNICA MODERNA 141, 142 (2006).

55. Dean Allbritton, *Recovering Childhood: Virulence, Ghosts, and Black Bread*, 91 BULL. OF HISP. STUD. 619, 623 n.4 (2014).

56. Michael Richards, *Ideology and the psychology of war children in Franco’s Spain, 1936–1945*, in CHILDREN OF WORLD WAR II: THE HIDDEN ENEMY LEGACY, 117–19, 123–28, (Kjersti Ericsson & Eva Simonsen eds., 2005).

57. *Id.* at 125.

58. Vincent Druliolle, *The Struggle for Recognition of the Stolen Children and the Politics of Victimhood in Spain*, in THE POLITICS OF VICTIMHOOD IN POST-CONFLICT SOCIETIES 77, 84 (Vincent Druliolle & R. Brett eds., 2018).

59. Marta Trenado Díaz, *The Cases of ‘Stolen Children’ in Spain and Ireland: Curtailing the Most Suitable Legal Framework on the Fight for ‘Real’ Identities*, EUR. MASTERS DEGREE IN HUM. RTS. AND DEMOCRATISATION, UNIV. COIMBRA, 1, 35 (2014).

C. Guatemala

One of the more recent examples of the systematic practice of enforced disappearance in Latin America occurred in Guatemala.⁶⁰ It is estimated that there were tens of thousands of children who disappeared during the armed conflict that took place between 1960 and 1996.⁶¹ The Office of Human Rights of the Archdiocese of Guatemala's report *Hasta Encontrarte* ("until I find you") found that some of these children were related to civilians who were not combatants or were from internally displaced communities, while others were the "children or relatives of leaders of social and religious groups and groups sympathetic to the insurgent groups."⁶²

The National Commission to Locate Disappeared Children of Guatemala was specifically created in 2001 to find missing children who were illegally adopted or separated from their families.⁶³ It reported that approximately 5,000 children had disappeared.⁶⁴ Most cases were never resolved due to the nature of the crime, but also because of the difficulties of trying to access records and documents.⁶⁵ Military bases, orphanages, and shelters have refused to give out information, and Guatemala neither had the laws to allow missing children to be more easily found nor enough resources allocated to do so.⁶⁶ Many successful cases of finding a child's whereabouts came down to the efforts of the families or non-governmental agencies, which have done a lot of work to compensate for the lack of effort on the part of the state.⁶⁷ By 2003, the Inter-American Commission of Human Rights (IACHR) expressed concern about the high rate of adoptions in Guatemala because it can be a lucrative network for trafficking children.⁶⁸ This is true generally, as trafficking can occur anywhere if there are no proper laws that establish and protect children during processes of adoption.

The Inter-American Court of Human Rights ("IACtHR") has heard numerous cases from Guatemala concerning disappeared children. One of the most well-

60. Angelina Snodgrass Godoy, *Lynchings and the Democratization of Terror in Postwar Guatemala: Implications for Human Rights*, 24 HUM. RTS. Q. 640, 642 (2002).

61. Caroline M. Coope & Sally Theobald, *Children at Risk of Neglect: Challenges Faced by Child Protection Practitioners in Guatemala City*, 30 CHILD ABUSE & NEGLECT 523, 526 (2006).

62. Justice and Social Inclusion: The Challenges of Democracy in Guatemala, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.118, doc. 7 rev. 1 ¶ 377 (2003).

63. Quinche Ramírez & Manuel Fernando, *Estándares regionales e internos para los procesos de paz y de reinserción en Colombia [Normative International and National Standards of Transitional Justice for Peace Processes in Colombia]*, 7 ESTUDIOS SOCIO-JURÍDICOS 355, 380 (2005).

64. Justice and Social Inclusion, *supra* note 62, at ¶ 378.

65. *Id.*

66. *Id.*

67. Amnesty Int'l, *Guatemala: "Disappearances": Briefing to the UN Committee Against Torture*, AI Index AMR 34/044/2000, at 6 (Nov. 30, 2000).

68. Justice and Social Inclusion, *supra* note 62, at ¶ 331.

known cases is the Case of *Molina Theissen v. Guatemala* in 2004.⁶⁹ This case concerned the detention of a fourteen-year-old boy by armed officials the day after his sister's escape from a military base.⁷⁰ In its verdict, the court reaffirmed that states have special duties to protect children.⁷¹ It noted that a state's duty is compounded and that it has particular responsibilities for breaches because what occurred was a part of the state's practice of conducting enforced disappearance that was conducted, including on children, mainly by proxies of the security forces.⁷²

Today, Guatemala's laws criminalize enforced disappearance.⁷³ Usefully, they go beyond international law because they also include the conduct of non-state actors.⁷⁴ There is also no amnesty for the crime of enforced disappearance in terms of the National Reconciliation Law of 1996.⁷⁵

D. El Salvador

Children were also specifically targeted during El Salvador's civil war, which began in 1980.⁷⁶ It is estimated that there were more than 75,000 deaths during the conflict.⁷⁷ Reports suggest that enforced disappearances, which started even before the armed conflict, affected an estimated 8,000 people.⁷⁸ The Truth Commission reports that more than 5,500 persons were subjected to enforced disappearances.⁷⁹ There were about 1,100 documented cases of disappeared children as of 2014.⁸⁰ It was noted that:

Pro-Búsqueda estimates that government troops and their allied security forces were responsible for the disappearances of children in 52 percent of their documented cases while the FMLN was responsible

69. *Theissen v. Guatemala*, Judgment, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 108, ¶ 2 (July 3, 2004).

70. *Id.* at ¶¶ 2, 30.

71. *Id.* at ¶ 67.

72. *Id.* at ¶ 41.

73. Susan Kemp, *Guatemala Prosecutes Former President Ríos Montt*, 12 J. INT'L CRIM. JUST. 133, 135 n.9 (2014).

74. *See id.* at 135–36.

75. *Id.* at 133, 151 n. 129.

76. Rep. of the Working Group on Enforced or Involuntary Disappearances, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Mission to El Salvador, ¶¶ 13, 23, U.N. Doc. A/HRC/7/2/Add.2 (Oct. 26, 2007).

77. *Id.* at ¶ 13.

78. *Id.* at ¶ 21.

79. *Id.* at ¶ 24.

80. Patricia Eugenia Granados De Fröhlich, *El Salvador, Una Deuda Pendiente Con Sus Niños Y Niñas [El Salvador, a Pending Debt to its Boys and Girls]*, NÜRNBERGER MENSCHENRECHTSZENTRUM, 10 (Aug. 2014), <http://menschenrechte.org/wp-content/uploads/2014/08/articulo-Patricia-Granados-para-Web.pdf>.

for 8 percent. The group further estimates that over 65 percent of the children who disappeared were under the age of seven.⁸¹

The *Serrano Cruz Sisters* judgment by the IACtHR⁸² represents a big step in acknowledging the past human rights abuses in El Salvador. It required the state to adopt a set of measures that aimed at dealing with the enforced disappearance of children, mainly through a national commission for finding children, investigations to convict perpetrators of this crime, and the creation of a national genetic database that would aid in identifying members of families.⁸³ However, El Salvador did not recognize the jurisdiction of the court and so failed to comply with these measures.⁸⁴ This was a continuation of the state's past practice.⁸⁵ In 1993, the President signed the General Amnesty Law for the Consolidation of Peace, instead of promoting policies and a culture intent on addressing past human rights abuses and dealing with this kind of crime, especially the enforced disappearances of children.⁸⁶ It gave amnesty to all that were involved in criminal activities during the armed conflict between 1980 and 1992,⁸⁷ and it remained in effect until the Salvadoran Supreme Court repealed it in 2016.⁸⁸ There were no cases of people being convicted for the crime of disappearance.⁸⁹

Nevertheless, in 2010 the government decided to create a National Search Commission for Children Disappeared During the Internal Armed Conflict following the request of the IACHR in the case of *Serrano Cruz Sisters*, which represented a new hope for families of forcibly disappeared children.⁹⁰ One of the conditions of the Commission's mandate was to work closely together with civil society and non-governmental organizations (NGO), which would translate into a wide network to find the children.⁹¹ By the end of 2019, the Commission had reported 319 registered cases and 92 solved cases.⁹² The Commission has

81. Michele Harvey-Blankenship et al., *Genetic Tracing, Disappeared Children and Justice* 11 (UNICEF Innocenti Research Centre, Working Paper, IWP 2010-12, 2010), https://www.unicef-irc.org/publications/pdf/iwp_2010_12.pdf.

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

83. Harvey-Blankenship et al., *supra* note 81, at 14.

84. *Id.* at 15, n.46–48.

85. *See id.* at 15.

86. *Id.* at 10.

87. *Id.*

88. Tihomir Gigorevic, *El Salvador: Supreme Court Overturns Civil War Amnesty Law*, INSERBIA NEWS (Jul. 20, 2016), <https://web.archive.org/web/20160721112208/http://inserbia.info/today/2016/07/el-salvador-supreme-court-overturns-civil-war-amnesty-law/>.

89. Patricia Eugenia Granados De Fröhlich, *supra* note 80, at 10.

90. Fabián Salvioli, *Preliminary Observations from the Official Visit to El Salvador by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, U.N. OFF. OF THE HIGH COMM'R HUM. RTS. § 2 (May 3, 2019).

91. *Id.*

92. *Id.*

been functioning well and has established novel approaches for searching, psychosocial care, as well as conducting reunions for the families.⁹³

E. Argentina

Military governments have used disappearances as a form of repression by the state and as a way of sowing chaos and terror, with the main objective of eliminating the existing opposition.⁹⁴ This can be seen in Argentina, especially between the years 1976 and 1983.⁹⁵ Amnesty International published a list of 2,665 disappeared Argentines, which later grew to 3,600 disappeared individuals.⁹⁶ Several reports say the true number is around 30,000, including young children and pregnant women, who were taken to detention centers where they were tortured and killed.⁹⁷ These women “were kept alive until they gave birth,” at which point their newborn children would be handed over to be raised by military families.⁹⁸ Estimates suggest there were at least 500 such cases.⁹⁹ Sons and daughters were abducted because their fathers and mothers opposed the military government.¹⁰⁰ *Nunca Más* (“Never Again”), a report of the Commission on the Disappearance of Persons (CONADEP), which was created to investigate human rights abuses during the military government, concluded that children were abducted and delivered to military families supposedly to be in the best interest of the child’s welfare.¹⁰¹ Children whose mothers were detained when they were born were removed to prevent them from becoming the next generation of “subversives.”¹⁰² Thus, many individuals and family members of individuals considered politically subversive became disappeared persons.¹⁰³ An Argentinian general recognized “the leaders of the ‘dirty war’ were afraid that the children of the disappeared would grow up hating the

93. *La Comisión de Búsqueda y la tarea de reconstruir la verdad sobre las personas desaparecidas en El Salvador*, DUE PROCESS OF LAW FOUNDATION (DPLF), at 5 (Apr. 2018), http://www.dplf.org/sites/default/files/la_comision_de_búsqueda_y_la_tarea_de_reconstruir_la_verdad.pdf.

94. ANN MARIE CLARK, DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS 70 (2001).

95. ARDITTI, *supra* note 39, at 215.

96. CLARK, *supra* note 94, at 80.

97. Although, the total number of disappeared individuals is contested, official accounts range from 12,000 to 20,000. Ari Gandsman, “A Prick of a Needle Can Do No Harm”: *Compulsory Extraction of Blood in the Search for the Children of Argentina’s Disappeared*, 14 J. LATIN AM. CARIBBEAN ANTHROPOLOGY 162, 163 n.1 (2009).

98. *Id.* at 162–63.

99. *Id.*

100. See, e.g., CLARK, *supra* note 94, at 87.

101. Harvey-Blankenship et al., *supra* note 81, at 4.

102. *Id.* at 3.

103. *Id.*

Argentine Army because of the fate of their parents.”¹⁰⁴ The disappearance policy caused numerous illegal adoptions, even by the perpetrators of the crime.¹⁰⁵ It also led to the struggle of the grandmothers of the disappeared grandchildren to find their loved ones, a movement known as the “Grandmothers of the Plaza de Mayo.”¹⁰⁶

F. Southern Cone: Operation Condor

There were also enforced disappearances of children in the framework of Operation Condor, which was the codename given to the alliance between the security forces and the military and intelligence services of the dictatorships of the Southern Cone in Latin America during the 1970s in their struggle and repression against people designated “subversive elements.”¹⁰⁷ The clandestine operations included the theft, suppression, or substitution of identity and illicit appropriation of children, for which pregnant women were detained in the framework of the aforementioned operations and kept alive.¹⁰⁸ In many cases, newborn or captive children were handed over to military families, police, or third parties after their parents were disappeared or executed.¹⁰⁹

G. Timor-Leste

The issue of systematic enforced disappearances of children has also affected Timor-Leste.¹¹⁰ In its final report, *Chega!, the Timor-Leste truth commission, the Comissão de Acolhimento, Verdade e Reconciliação* (CAVR) estimated that around 835 enforced disappearances occurred during the occupation of the territory by Indonesia.¹¹¹ However, it is believed that approximately 4,000 children were abducted and taken to Indonesia,¹¹² although this number could be as high as 4,500.¹¹³ Some were “forcibly removed from their families, some

104. TULLIO SCOVAZZI & GABRIELLA CITRONI, THE STRUGGLE AGAINST ENFORCED DISAPPEARANCES AND THE 2007 UNITED NATIONS CONVENTION 16 (2007).

105. *Id.* at 17.

106. *See generally*, ARDITTI, *supra* note 39.

107. *See, e.g.*, *Goiburú v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 153, ¶¶ 61(5)–(6) (Sept. 22, 2006); *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 221, ¶ 44 (Feb. 24, 2011).

108. *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 221, ¶ 61 (Feb. 24, 2011).

109. *Id.*

110. *See generally*, HELENE VAN KLINKEN, MAKING THEM INDONESIANS: CHILD TRANSFERS OUT OF EAST TIMOR (2012).

111. COMM’N FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE, 7.2 *Unlawful Killings and Enforced Disappearances*, in *CHEGA! THE REP. OF THE COMM’N FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE: EXECUTIVE SUMMARY* 1, 5 (2005).

112. Rep. of the Working Group on Enforced or Involuntary Disappearances on the Mission to Timor-Leste, U.N. Doc. A/HRC/19/58/Add.1, ¶ 21 (Dec. 26, 2011).

113. A 2001 study conducted by the International Refugee Council, UN High Commissioner for Refugees (UNHCR), and Student Solidarity Council estimated that a total of 2,400 children had

with ostensible approval from their families, others through clear deception or kidnapping. So widespread was this practice that, in the end, it became formal and systematic enough to involve military authorities, religious institutions, and government authorities.”¹¹⁴ It is reported that children, usually between eight and fourteen years old, were abducted by the Indonesian military to be part of a military operation called Tenaga Bantuan Operasi.¹¹⁵ However, children were also separated from their families and recruited by armed groups or targeted for rape and sexual exploitation.¹¹⁶ They were used by both sides of the conflict, either as servants and soldiers in the Indonesian army because it was not necessary to pay them and they could be used to commit crimes, or in the resistance because they attracted less suspicion from the Indonesian armed forces.¹¹⁷ Some also allege that children were part of mass murders and were buried in common graves with many other individuals.¹¹⁸ The CAVR notes that “[t]he struggle for control of Timor-Leste was partly played out in the battle for its children. Children became victims, perpetrators, assistants[,] and observers in the political conflicts that engulfed Timor-Leste from 1974.”¹¹⁹ As mentioned above, some sources state that these children worked as servants and child laborers in Indonesia.¹²⁰

The joint Indonesia–Timor–Leste Commission on Truth and Friendship (CTF) recommended the governments of Indonesia and Timor-Leste “work together to acquire information/form a commission about disappeared people and cooperate in gathering data and providing information.”¹²¹ Furthermore, the CTF recommended that such a commission be tasked with “identify[ing] the

been taken. A UNHCR representative suggested that as many as 4,534 children were taken. COMM’N FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE, 7.8 *Violation of the Rights of the Child*, in CHEGA! THE REP. OF THE COMM’N FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE 76, 78 (2005).

114. The HAK Ass’n and Asia Just. and Rts., *Submission to the UN Comm. on the Rights of the Child for its Consideration of the Second and Third Periodic Reports of Timor-Leste*, at 2 (Feb. 3, 2015), https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/TLS/INT_CRC_NGO_TLS_20027_E.pdf.

115. Sisto dos Santos, *From a Dark and Brutal History: Enforced Disappearances in Timor-Leste*, 75 FOCUS 2, 2(2014).

116. Megan Hirst & Ann Linnarsson, *Children and the Commission for Reception, Truth and Reconciliation in Timor-Leste*, 3 (UNICEF Innocenti Research Centre, Working Paper No. 2010-7, 2010), https://www.unicef-irc.org/publications/pdf/iwp_2010_07.pdf.

117. *Id.*

118. See, e.g., Hum. Rts. Council, Rep. of the Working Group on Enforced or Involuntary Disappearances on the Mission to Timor-Leste, U.N. Doc. A/HRC/19/58/Add.1, ¶ 36 (2011).

119. COMM’N FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE, 7.8 *Violation of the Rights of the Child* in CHEGA! THE REP. OF THE COMM’N FOR RECEPTION, TRUTH, AND RECONCILIATION TIMOR-LESTE 76, 98 (2005).

120. *A Reunion for Timor-Leste’s Stolen Children*, ASIA JUST. AND RTS. (May 19, 2016), <http://asia-ajar.org/2016/05/reunion-stolen-children-timor-leste/>.

121. PER MEMORIAM AD SPEM: FINAL REPORT OF THE COMMISSION OF TRUTH AND FRIENDSHIP (CTF) INDONESIA - TIMOR-LESTE xx (2008).

whereabouts of all Timor-Leste children who were separated from their parents and . . . notify[ing] their families.”¹²² Nonetheless, the two governments have made little progress.¹²³

However, much has been done over the last few years through the work of Asia Justice and Rights (AJAR), an NGO working with the National Commission on Human Rights (Komnas HAM) and the *Provedoria Dos Direitos Humanos e Justica*.¹²⁴ About 150 cases of the whereabouts of the Timor-Leste children in Indonesia have been resolved, with 80 of them being reunited with their families in Timor-Leste.¹²⁵ The cases that were resolved concerned children taken from the age of five to their early teens.¹²⁶ They had no contact with their families for anywhere between twenty and forty years depending on when they were taken during the period of occupation of the country.¹²⁷ Usefully, the Timor-Leste government has shouldered the cost of the reunion visits (about 35,000 USD per visit), and the Indonesian government has paid for domestic flights from where they are living to go to Bali, where they are prepared for re-entry in Timor-Leste.¹²⁸ Further reunifications have been halted during the COVID-19 pandemic because of travel restrictions.¹²⁹

However, the tremendous progress made on these disappearances in recent times decades after they occurred shows what can be done by even small civil society organizations with the courage and commitment to finding such children and how government can support these initiatives.

H. Turkey

Turkey can also be mentioned concerning children and enforced disappearances. Throughout its history, many people have been targets of this crime, including children.¹³⁰ In particular, this also occurred during what is

122. *Id.*

123. Dian Septiari, *Governments Urged to Find ‘Stolen Children’*, JAKARTA POST (July 14, 2018), <https://www.thejakartapost.com/news/2018/07/14/governments-urged-find-stolen-children.html>.

124. E-mail from Galuh Wandita, Director, Asia Justice and Rights, to author (Aug. 26, 2020, 22:44 WEST) (on file with author).

125. *Id.*

126. Terms of Reference for International Webinar: The Need of Truth and Justice for Victims and Family of Disappeared, Lessons from Asian and Latin America, Asia Just. & Rts. (2021) (on file with author).

127. *Id.*

128. E-mail from Galuh Wandita, Director, Asia Justice and Rights (AJAR), to author (Aug. 26, 2020, 22:44 WEST) (on file with author).

129. *Id.*

130. In spite of the fact that there is no verified data regarding the number of people disappeared in the history of Turkey, one estimate is 1,353 people from the date of the military coup on September 12, 1980. *Türkiye’de Zorla Kaybetmeler Gerçeği [The Reality of Enforced Disappearances in Turkey]*, HAKIKAT ADALET HAFIZA ÇALIŞMALARI MERKEZİ (HAFIZA MERKEZİ), <http://hakikatadalethafiza.org/turkiyede-zorla-kaybetmeler-ve-cezasizliga-dair-temel-bilgiler/turkiyede-zorla-kaybetmeler/#> (last visited Aug. 27, 2021).

termed the Armenian Genocide, which was carried out between 1914 and 1923 by Turkey.¹³¹ During those years, between 100,000 and 200,000 Armenian children were forcibly separated from their families and placed in state-run orphanages or “adopted” by foster families to be later converted to Islam.¹³² This policy of transfer and assimilation was planned and implemented by the Ottoman government.¹³³

In Turkey, between 1926 and 1950, children, especially girls, were taken from their families in small eastern towns by military forces and given to military families in order to raise them in a state of mind that was in harmony with state policies.¹³⁴ These children grew up without knowing their real families, culture, and religion.¹³⁵ Stories of affected families and their struggle to find their daughters have been written about and some made into films.¹³⁶ However, there is still a lack of research about these issues, and it is still difficult to find accurate data.

I. Israel

In Israel, since the 1950s, more than 1,000 mostly immigrant families, often from Yemen, have alleged that their children were taken from them; hence these cases are called the “Yemenite Babies Affair.”¹³⁷ It has been alleged that babies were taken from their tents in absorption and transit camps without the parents’ consent, following the reasoning that the tents did not have adequate conditions for them to live in.¹³⁸ The authorities, later on, represented that the parents had no interest in the babies.¹³⁹ It has also been alleged that babies were taken in hospitals in Israel shortly after they were born.¹⁴⁰ The same has also been claimed by people from the Balkans, North Africa, and other Middle Eastern

131. Edita Gzoyan, Regina Galustyan, & Shushan Khachatryan, *Reclaiming Children after the Armenian Genocide: Neutral House in Istanbul*, 33 HOLOCAUST AND GENOCIDE STUD. 395, 407 n.17 (2019).

132. *Id.* at 395, 397.

133. Keith David Watenpugh, “Are There Any Children for Sale?”: *Genocide and the Transfer of Armenian Children (1915–1922)*, 12 J. HUM. RTS. 283, 291 (2013).

134. NEZAHAT GÜNDOĞAN & KAZIM GÜNDOĞAN, DERSİM’İN KAYIP KIZLARI: “TERTELE ÇENEQU” [LOST GIRLS OF DERSİM] (Tanil Bora ed., 2012); Özcan Ögüt, *A Nightmare in the Deeply Asleep Nation-State: ‘The Ghost Identity’* (2015).

135. İKİ TUTAM SAÇ: DERSİM’İN KAYIP KIZLARI [TWO LOCKS OF HAIR: THE MISSING GIRLS OF DERSİM] (Yapım 13 Film 2010).

136. *Id.*

137. SHOSHANA MADMONI-GERBER, ISRAELI MEDIA AND THE FRAMING OF INTERNAL CONFLICT: THE YEMENITE BABIES AFFAIR 1 (2009).

138. *Id.* at 1–2.

139. *Id.* at 2.

140. Toi Staff, *Israel Opens Database with 400,000 Declassified Documents on Yemenite Children Affair*, TIMES OF ISRAEL (Dec. 28, 2016), <https://www.timesofisrael.com/israel-opens-database-with-200000-declassified-documents-on-painful-yemenite-children-affair/>.

countries.¹⁴¹ While this is not strictly about disappearances—unless the state was somehow involved—these cases have caused much consternation and anguish over the years, despite the fact that Israel has conducted three inquiries into the matter.¹⁴² One of the major problems has been a lack of transparency and information. This has ensured that the issue has remained a vital, ongoing problem for the families affected. To try and deal with the issue, in 2016, Israel declassified 400,000 pages of documents dealing with these cases and made the materials available online in a database to show that there were no removals, but rather that the children died in the hospitals at the time.¹⁴³ The Israeli Prime Minister announced: “Today we right a historic wrong. . . . For close to 60 years people did not know the fate of their children. In a few minutes any person can access the pages containing all the information that the government of Israel has.”¹⁴⁴

II. REASONS BEHIND ENFORCED DISAPPEARANCES OF CHILDREN

Different reasons exist for why states target children for enforced disappearances. The reasons vary from country to country. Although every country’s situation is unique, there are, nevertheless, general trends that can be seen across states. One of the main reasons identified for the practice of the crime of enforced disappearance is to curb political opposition.¹⁴⁵ States are often involved in this crime to suppress groups that are against their ideals and can or potentially will represent a rebellion against the government.¹⁴⁶ The reasoning is that if they eliminate their political opponents, then they can retain power. This translates into the sowing of terror and fear throughout the country in question, with the aim of subduing the will of the population and thus of making them less likely to revolt.¹⁴⁷ The government may use enforced disappearances but may also engage in extrajudicial killings, torture, and other acts of violence.¹⁴⁸ However, while enforced disappearances are usually used as a tool of intimidation, punishment, or revenge,¹⁴⁹ sometimes the main reason is to prevent these children from becoming the next generation of subversive persons.¹⁵⁰ “Children are also targeted . . . to cut the ‘lifeblood’ of the targeted

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Sarkin & Baranowska, *supra* note 9, at 12.

146. *Id.*

147. *Id.* at 12–13, 19.

148. SCOVAZZI & CITRONI, *supra* note 104, at 7–10.

149. *See generally*, Sarkin & Baranowska, *supra* note 9.

150. MONICA FERIA TINTA, THE LANDMARK RULINGS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS ON THE RIGHTS OF THE CHILD: PROTECTING THE MOST VULNERABLE AT THE EDGE 154 (2008) (finding that the children had been “perceived by the State as children from a

group.”¹⁵¹ However, regardless of the purposes and reasons states have for committing this crime, the seriousness of the issue and devastating results do not differ by region or period.

As is reflected in the first part of this article, children are often the objects of enforced disappearance during conflict. In some cases, the disappearances occur in the context of “ethnic cleansing” and can constitute enforced disappearances.¹⁵² In some cases, children are also seen as the spoils of war, such as when they are taken and given to other families.¹⁵³ Thus, children are not merely victims of collateral damage but may be specifically targeted during a conflict.¹⁵⁴ Generally, children tend to be disproportionately affected by armed conflict.¹⁵⁵ Armed groups, some of whom are allied to the state, often use abduction as a modus operandi and force children to be a part of the conflict in varied ways, for example, as child soldiers.¹⁵⁶ Such abductions are often considered enforced disappearances. Moreover, abductions often precipitate additional grave violations, such as the recruitment of children in armed conflicts,¹⁵⁷ which amount to enforced disappearances.¹⁵⁸ Consequently, abducted children may be forced to serve as child soldiers, sex slaves, cooks, assistants, porters, messengers, and spies.¹⁵⁹ Ultimately, children are targeted because they are viewed as obedient and inconspicuous; additionally, the existence of small arms easily enables them to participate in armed conflict.¹⁶⁰

family with a history of ‘terrorist’ connections and as such, ‘deserving’ of the treatment to which they were subjected”).

151. PLIGHT AND FATE OF CHILDREN DURING AND FOLLOWING GENOCIDE 2 (Samuel Totten, ed., 2014).

152. Sarkin & Baranowska, *supra* note 9 at 26.

153. See Chapter VI: A Study About Situation of Minor Children of Disappears Persons who Were Separated from Their Parents and who are Claimed by Members of Their Legitimate Families, ANN. REP. OF THE INTER-AM. COMM’N ON HUM. RTS. 1987-88, Inter-Am. Comm’n on H.R., OEA/Ser.L/V/II.74, doc. 10 rev. 1, § 4 (1988).

154. Ellen Policinski & Kvitoslava Krotiuk, *Editorial: Childhood in the Crossfire: How to Ensure a Dignified Present and Future for Children Affected by War*, 101 INT’L REV. RED CROSS 425, 425 (2019).

155. U.N. Secretary-General, *Children and Armed Conflict*, ¶¶ 5–9, U.N. Doc. A/72/865–S/2018/465 (May 16, 2018).

156. For example, Somalia abducted more than 1,600 children for combat and support roles in 2017. U.N. Secretary-General, *Children and Armed Conflict*, ¶¶ 6, 9, U.N. Doc. A/72/865–S/2018/465 (May 16, 2018).

157. Special Representative of the U.N. Secretary-General, *Children and Armed Conflict*, ¶ 5, U.N. Doc. A/73/278 (July 30, 2018).

158. Human Rights Council, General Comment on Children and Enforced Disappearances Adopted by the Working Group on Enforced or Involuntary Disappearances as its Ninety-Eighth Session (31 Oct. – 9 Nov. 2012), ¶ 3, U.N. Doc. A/HRC/WGEID/98/1 (Feb. 14, 2013).

159. U.N. Secretary-General, *Note on the Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, ¶ 34, U.N. Doc. A/51/306 (Aug. 26, 1996).

160. Jeremy Sarkin, *Integrating Transitional Justice and Disarmament, Demobilisation and Reintegration: The Need to Achieve Rehabilitation, Reintegration and Reconciliation for Child Soldiers and Child Victims of Enforced Disappearances*, in REMEMBER: REHABILITATION,

A 2007 report from the UN Working Group on Enforced or Involuntary Disappearances (WGEID) determined that the State's policy of enforced disappearance of children in El Salvador was a "deliberate strategy within the violence institutionalized by the State during the period of conflict."¹⁶¹ Typically, children were abducted by force during military operations, during executions of family members, or because they were forced to flee the country.¹⁶² Generally, the victims, who were associated with left-wing ideals and opposed the government, were targeted in order to generate terror and to eliminate potential future guerrilla members.¹⁶³ In some cases, children were targeted with the specific purpose of harming and inflicting suffering on their family members as a method of retaliation for political activity.¹⁶⁴

Since 1982, former members of the Salvadoran Armed Forces reported receiving orders to abduct any child they found while carrying out operations.¹⁶⁵ To this effect, the documented cases of enforced disappearances show that eighty-five percent of abductions resulted from the actions of state agents, paramilitary groups, and death squads, while ten percent resulted from the actions of guerrilla members.¹⁶⁶

Children are sometimes targeted because of their gender.¹⁶⁷ Specifically, girls are targeted to act as sex slaves to their captors.¹⁶⁸ This could lead to a situation of forced motherhood since girls usually become pregnant during their captivity in such circumstances.¹⁶⁹ These girls were also internationally trafficked.¹⁷⁰

In other contexts, aboriginal children have been separated from their families to be "educated" in residential schools for the main purpose of breaking their link to their culture and identity.¹⁷¹ This has been the case in Canada, where

REINTEGRATION AND RECONCILIATION OF WAR-AFFECTED CHILDREN 80 (Ilse Derluyn et al. eds., 2012).

161. Rep. of the Working Group on Enforced or Involuntary Disappearances, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Mission to El Salvador, ¶ 23, U.N. Doc. A/HRC/7/2/Add.2 (Oct. 26, 2007).

162. See Patricia Eugenia Granados De Fröhlich, *supra* note 80, at 6–7.

163. *Id.* at 5.

164. SONJA C. GROVER, THE TORTURE OF CHILDREN DURING ARMED CONFLICTS: THE ICC'S FAILURE TO PROSECUTE AND THE NEGATION OF CHILDREN'S HUMAN DIGNITY 130–31 (2014).

165. Patricia Eugenia Granados De Fröhlich, *supra* note 80, at 7.

166. Patricia Eugenia Granados De Fröhlich, *supra* note 80. Pro-Búsqueda, a NGO of El Salvador, estimates that 52 percent of their documented cases are due to actions of the government armed forces, while the FMLN was responsible for 8 percent of their documented cases. Harvey-Blankenship et al., *supra* note 81, at 11.

167. GROVER, *supra* note 164, at 136.

168. *Id.*

169. *Id.*

170. *Id.*

171. TRUTH AND RECONCILIATION COMM'N OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 3–4 (2015).

such measures were part of a “policy to eliminate Aboriginal people as distinct peoples and to assimilate them into the Canadian mainstream against their will.”¹⁷² The same measures occurred in the United States and Australia.¹⁷³ In any case, what persists is the intent to destroy the family by removing members of the next generation “to inflict trauma and humiliation by forcibly transferring the most vulnerable members of the group targeted for destruction or disappearance of their ethnicity.”¹⁷⁴

In Guatemala, the process that began with the 1963 coup d’état continued with the adoption of a new doctrine called the “National Security Doctrine.”¹⁷⁵ This strategy was meant to tackle politically active people by labeling them an “internal enemy” of the state.¹⁷⁶ Figures estimate that eleven percent of the reported enforced disappearance victims in Guatemala were children.¹⁷⁷ Some of the disappeared children have been identified as being related to civilian non-combatants, part of internally displaced communities, or to people in the resistance, while others are reported to be relatives of various social, religious, and militant group leaders.¹⁷⁸ As a result, the Mayan community was systematically killed, effectuating a genocide; the enforced disappearance and killing of children were utilized to ensure that the Mayan community would not continue throughout the generations.¹⁷⁹

The fate and whereabouts of disappeared children vary. Many have been killed.¹⁸⁰ However, in some countries, abducted pregnant women were occasionally kept alive until they gave birth so their babies could be adopted by military families.¹⁸¹ This practice was justified on the basis of protecting the

172. *Id.* at 2.

173. Ruth Amir, *Killing Them Softly: Forcible Transfers of Indigenous Children*, 9 GENOCIDE STUD. & PREVENTION 41, 46 (2015).

174. Panayiotis Diamadis, *Children and Genocide*, in GENOCIDE PERSPECTIVES IV: ESSAYS ON HOLOCAUST AND GENOCIDE 351 (Colin Tatz ed., 2012).

175. COMM’N FOR HIST. CLARIFICATION, GUATEMALA: MEMORIA DEL SILENCIO [GUATEMALA: MEMORY OF SILENCE] 19 (2000).

176. *Id.* at 20.

177. Amnesty Int’l, *Guatemala: “Disappearances”: Briefing to the UN Committee Against Torture*, at 24, AI Index AMR 34/044/2000 (Nov. 30, 2000).

178. OFICINA DE DERECHOS HUMANOS DEL ARZOBISPADO DE GUATEMALA, HASTA ENCONTRARTE: NIÑEZ DESAPARECIDA POR EL CONFLICTO INTERNO ARMADO EN GUATEMALA [UNTIL WE FIND YOU: CHILDREN DISAPPEARED BY THE INTERNAL ARMED CONFLICT IN GUATEMALA] 61 (2000).

179. SCOVAZZI & CITRONI, *supra* note 104, at 18.

180. *Id.* at 19.

181. Gandsman, *supra* note 97, at 163.

child's best interests.¹⁸² Some babies were put up for adoption, many times to foreign families, such as in Guatemala,¹⁸³ El Salvador,¹⁸⁴ and Canada.¹⁸⁵

It is important to note that, many times, children are victims of this crime in connection with their parents or relatives, and autonomous reasons cannot be identified. The General Comment on Children and Enforced Disappearances¹⁸⁶ adopted by the WGEID¹⁸⁷ identifies three situations in which children are victims of enforced disappearances: first, when the child is subjected to enforced disappearance; second, when the child is born during the captivity of the mother in a detention center; and third, when a parent, relative or legal guardian is subjected to enforced disappearance, thus affecting the child.¹⁸⁸ The report also identifies other situations, such as when the state is involved in activities that assist in child trafficking, sexual exploitation, child labor, and the recruitment of child soldiers.¹⁸⁹ Some reports observe that when family members are targeted because they are or may be members of the opposition, their children can also be targeted.¹⁹⁰ These children are targeted either because they are present at the moment of the abduction or because they are witnesses to the crime, but mainly because they could become political opponents in the future.¹⁹¹

III. THE NEED TO REFORM THE INTERNATIONAL LEGAL FRAMEWORK AND PROCESSES

The next part of the article seeks to understand what can be done to deal with the many cases of systematic, enforced disappearances of children from an international law perspective. The argument focuses not only on the prevention of such disappearances, but also on the return of these "stolen" children to their families of origin, which has often proven difficult, and on the persistence of impunity for perpetrators.

Despite the existence of a constellation of rules in international law aimed at protecting children from enforced disappearance, there are still numerous instances of massive abductions of children that occur, as can be seen from the

182. Harvey-Blankenship et al., *supra* note 81, at 4.

183. Amnesty Int'l, *Guatemala: "Disappearances": Briefing to the UN Committee Against Torture*, 13–14, AI Index AMR 34/044/2000 (Nov. 30, 2000); *Justice and Social Inclusion: The Challenges of Democracy in Guatemala*, Inter-Am. Comm'n H. R., OEA/Ser.L/V/II.118 Chapter VI – The Status of Children, ¶¶ 355–363 (Dec. 29, 2003).

184. Patricia Eugenia Granados De Fröhlich, *supra* note 80, at 8–9.

185. Dale C. Spencer, *Extraction and Pulverization: A Narrative Analysis of Canada Scoop Survivors*, 7 SETTLER COLONIAL STUD. 57, 61 (2017).

186. Drafted while the first author was Chair-Rapporteur of the WGEID.

187. Human Rights Council, General Comment on Children and Enforced Disappearances Adopted by the Working Group on Enforced or Involuntary Disappearances as its ninety-eighth session (31 Oct.–9 Nov. 2012), U.N. Doc. A/HRC/WGEID/98/1 (Feb. 14, 2013).

188. *Id.* at ¶ 2.

189. *Id.* at ¶ 3.

190. SCOVAZZI & CITRONI, *supra* note 104, at 15–16.

191. *Id.*

preceding sections.¹⁹² The perpetrators are never punished, and states are also never held responsible.¹⁹³ The problem is not only that the content of the law is insufficient to really prevent such occurrences, but also that courts infrequently apply the law.¹⁹⁴ In order to improve the protection of children from enforced disappearances, the law needs reform in both its content and in the way the courts interpret and apply it.

Therefore, the next part of the article reviews the question of children and enforced disappearances and children in the context of IHRL, IHL and, ICL. Each section reviews what the law is, what the problems are, and what needs to be reformed in each of these areas. One aspect of reform that will be discussed in each section is the need for courts, both internationally and domestically, to apply the law on enforced disappearances more often and in ways that bolster the protections for children.¹⁹⁵ It is argued that international courts, tribunals, treaty bodies,¹⁹⁶ and others need to be more robust in applying the law, both to reduce the opportunities for children to be disappeared, but also to educate and guide national courts so that they can play a larger role in relation to these matters.¹⁹⁷ In addition, it is argued that states need to do more in domestic law, both to domesticate international law and to take more steps to prevent such occurrences.¹⁹⁸

We also argue that the enforced disappearance of children may constitute genocide when children are forcibly transferred from one group to another with the intent to destroy a particular racial, ethnic, national, or religious group. This interpretation needs to be given more credence and focus. Furthermore, there ought to be more connections made between systematic cases of enforced disappearances of children and crimes against humanity or genocide. Such cases usually do qualify under the definitions of these two crimes. We argue that the Rome Statute of the ICC, as well as other statutes of other international and hybrid courts, while containing the crimes of genocide and crimes against humanity, again, are too limited in their scope.

192. See discussion *supra* Part I.

193. Jeremy Sarkin, *The 2020 United Nations Human Rights Treaty Body Review Process: Prioritising Resources, Independence and the Domestic State Reporting Process Over Rationalising and Streamlining Treaty Bodies*, INT'L J. HUM. RTS. 1, 3, 5 (Oct. 9, 2020).

194. *Id.* at 4.

195. See discussion *infra* Parts IV and V.

196. Jeremy Sarkin, *The 2020 United Nations Human Rights Treaty Body Review Process: Prioritising Resources, Independence and the Domestic State Reporting Process Over Rationalising and Streamlining Treaty Bodies*, INT'L J. HUM. RTS. 6–8 (Oct. 9, 2020) (analyzing the process to review and reform treaty bodies).

197. G.A. Res. 47/133, art. 6 (Dec. 18, 1992).

198. G.A. Res. 47/133, art. 9 (Dec. 18, 1992).

IV. THE PROTECTION OF CHILDREN FROM ENFORCED DISAPPEARANCE IN INTERNATIONAL HUMAN RIGHTS LAW

Two international instruments adopted by the General Assembly of the United Nations, the 1992 Declaration on the Protection of all Persons from Enforced Disappearance (UN Declaration)¹⁹⁹ and the 2006 Convention for the Protection of All Persons from Enforced Disappearance (UN Convention),²⁰⁰ focus on the subject of enforced disappearances. At a regional level,²⁰¹ the Inter-American Convention on Forced Disappearance (Inter-American Convention), adopted in 1994 within the American Organization of States, is the only treaty dealing with the practice of enforced disappearances.²⁰² Within the Council of Europe, the Parliamentary Assembly proposed in 2012 the adoption of a European treaty, but ultimately, the Committee of Ministers disregarded this option to avoid duplication of instruments.²⁰³

Therefore, this section analyses the three international instruments mentioned above, focusing on the specific provisions about children to determine their scope and their problems in practice, and then proposing solutions to improve the prevention and sanctioning of the enforced disappearance of children. The section then briefly touches the International Covenant on Civil and Political Rights of 1966 (ICCPR),²⁰⁴ the Convention on the Rights of the Child of 1989 (CRC),²⁰⁵ and three regional instruments—the European Convention on Human Rights of 1950 (ECHR),²⁰⁶ the American Convention on Human Rights of 1969 (ACHR),²⁰⁷ the African Charter on Human and Peoples' Rights of 1981 (ACHPR),²⁰⁸ and the African Charter on the Rights and Welfare of the Child of

199. G.A. Res. 47/133, Declaration on the Protection of All Persons from Enforced Disappearance (Dec. 18, 1992).

200. G.A. Res. 61/177, International Convention for the Protection of All Persons from Enforced Disappearance (Dec. 20, 2010).

201. See Jeremy Sarkin, *The Role of Regional Systems in Enforcing State Human Rights Compliance: Evaluating the African Commission on Human and People's Rights and the New African Court of Justice and Human Rights with Comparative Lessons from the Council of Europe and the Organization of American States*, 1 INTER-AM. EUR. HUM. RTS. J. 199, 206–12 (2008) (outlining the existence and growth of regional systems for enforcing broader human rights).

202. The convention was adopted by the Organization for American States General Assembly in Belém do Pará, 9 June 1994, and entered in force 28 March 1996. Organization of American States, Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529.

203. Comm. on Legal Affs. & Hum. Rts., *International Convention for the Protection of all Persons from Enforced Disappearance*, Eur. Parl. Doc. 12880, ¶ 61 (Feb. 23, 2012).

204. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

205. Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1456.

206. European Convention on Human Rights, Council of Europe, Mar. 11, 1950 (last amend. Aug. 1, 2021), https://www.echr.coe.int/Documents/Convention_ENG.pdf.

207. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673.

208. African Charter on Human and Peoples' Rights, Jun. 27, 1981, 1520 U.N.T.S. 217.

1990 (ACRWC) with children.²⁰⁹ Even though there is no specific mention of the term “enforced disappearances” in these laws, these treaties have nevertheless been interpreted to deal with this issue because it is seen as a violation of multiple human rights.²¹⁰

While these international human rights instruments might not initially have been conceived to deal with enforced disappearances, including of children, they are today read to include prohibitions against such acts. There are also other laws and processes that deal with enforced disappearances, but those are outside the scope of this paper.²¹¹ One issue of importance is that while the word “protection” is used throughout international law, the responsibility to protect has come to the fore over the last two decades at least, and the reality is that protection does not really provide an assurance that people and children are not harmed.²¹² More needs to be done to protect people by ensuring that when harm befalls people, international law provides the processes to step in such cases.²¹³ The United Nations and other organizations at international, regional and, sub-regional levels need also to ensure that protection occurs not in law and theory only.

A. The UN Declaration on Enforced Disappearance (1992)

1. The Law

The UN Declaration was the first international instrument to deal with enforced disappearances as a global phenomenon that constitutes an affront to human dignity.²¹⁴ The fact that the text was adopted without a vote in the UN General Assembly reflects the consensus of the international community on

209. African Charter in the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

210. See, e.g., Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 153–58 (July 29, 1988).

211. See also Jeremy Sarkin, *The Responsibility to Protect and Humanitarian Intervention in Africa*, 2 GLOB. RESP. TO PROTECT 371, 373 (2010); Jeremy Sarkin, *Why Security Council Reform Is Essential for R2P to Actually Impact the Global Level of Atrocity Crimes*, 1 CAN. J. ON RESP. TO PROTECT 62, 63–64 (2019).

212. See Jeremy Sarkin, *The Responsibility to Protect and Humanitarian Intervention in Africa*, 2 GLOB. RESP. TO PROTECT 371, 387 (2010); Jeremy Sarkin, *Why Security Council Reform Is Essential for R2P to Actually Impact the Global Level of Atrocity Crimes*, 1 CAN. J. ON RESP. TO PROTECT 62, 64 (2019).

213. Jeremy Sarkin, *Refocusing Transitional Justice to Focus Not Only on the Past, but also to Concentrate on Ongoing Conflicts and Enduring Human Rights Crises*, 7 J. INT'L HUMANITARIAN LEGAL STUD. 294, 329 (2016).

214. See generally Manuel Hinojo Rojas, *Al Hilo de La Declaración de 1992 de La Asamblea General de Las Naciones Unidas Sobre La Protección de Todas Las Personas Contra Las Desapariciones Forzadas [In Line with the 1992 Declaration of the United Nations General Assembly on the Protection of All Persons from Enforced Disappearance]*, 12 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL 491 (1996).

outlawing this practice.²¹⁵ The Declaration “not only prohibits disappearances but sets forth various measures which States should take to ensure that disappearances do not occur, or, if they do occur, which should be taken to investigate and punish them.”²¹⁶ Article 20 of the UN Declaration refers expressly to children and recognizes two situations of the enforced disappearance of children, the abduction of children whose parents were subjected to enforced disappearance and of children born during their mother’s enforced disappearance.²¹⁷ This detailed provision was mostly based on a proposal of the Latin American Federation of Associations of Relatives of Detainees-Disappeared (FEDEFAM).²¹⁸ In addition, Article 20 establishes that states should adopt measures to search for these children, recover their identities, and return them to their families of origin.²¹⁹ The UN Declaration emphasizes that States should make sure that adoption procedures can be reviewed or annulled if they originated in enforced disappearance.²²⁰ Finally, Article 20 also underscores that abducting children and altering or suppressing documents that attest to their true identity is an “extremely serious offence,” which should be punished by domestic courts.²²¹

2. *Problems and Solutions*

While the UN Declaration has a very detailed provision on children, it focuses on children of “disappeared” parents, but does not include children subjected to enforced disappearances themselves.²²² This is probably because the adoption of this instrument was largely based on the Latin American experience.²²³ Although the UN Declaration is considered in international law as soft law and therefore, is non-binding, it is still an important instrument because it sets the international standards on enforced disappearances and serves as a guide to states on how to deal with this heinous practice.²²⁴ While the WGEID is entrusted with monitoring the implementation of the UN Declaration, it has not paid enough attention to the systematic practice of the enforced disappearance of children. The first two reports of the WGEID dealt with “disappearances of

215. *Id.* at 497.

216. Reed Brody, *Commentary on the Draft UN “Declaration on the Protection of All Persons from Enforced or Involuntary Disappearances”*, 8 NETH. Q. HUM. RTS. 381, 384 (1990).

217. G.A. Res. 47/133, art. 20 (Dec. 18, 1992).

218. Reed Brody & Felipe González, *Nunca Más: An Analysis of International Instruments on “Disappearances”*, 19 HUM. RTS. Q. 365, 395–96 (1997).

219. G.A. Res. 47/133, art. 20 (Dec. 18, 1992).

220. *Id.*

221. *Id.*

222. G.A. Res. 47/133 (Dec. 18, 1992).

223. Ariel Dulitzky, *The Latin-American Flavor of Enforced Disappearances*, 19 CHI. J. INT’L L. 423, 440 (2019).

224. Rep. of the Working Group on Enforced or Involuntary Disappearances, ¶¶ 164–72, U.N. Doc. E/CN.4/1492 (Dec. 31, 1981); *see also* Rep. of the Working Group on Enforced or Involuntary Disappearances, ¶¶ 170–72, U.N. Doc. E/CN.4/1435 (Jan. 26, 1981).

women . . . and children” together, not considering children targeted as such but only as a consequence of the detention of their mother or the “disappearance” of their parents.²²⁵ In 2012, the WGEID issued a General Comment on Children and Enforced Disappearances but did not refer to the widespread and systematic nature of this practice.²²⁶

While the WGEID’s role is fundamentally humanitarian and it does not directly investigate individual cases or establish individual or state responsibility, but simply transmits information between states and families, it has no geographical or temporal limitations like the UN treaty bodies.²²⁷ Consequently, the WGEID can deal with cases from any country, regardless of whether they have ratified the international treaties about enforced disappearances. Therefore, the WGEID should pay more attention to the systematic enforced disappearance of children in its dialogue with states, in its reports, including its annual reports, and in its country visits. It must make appropriate recommendations to states to prevent and sanction this crime in the light of the UN Declaration. It must also deal more with the consequences of cases where children have been made to disappear forcibly, especially if the cases are systematic in nature. The WGEID should also monitor states’ compliance and be more robust in taking steps where states are not conforming to what is needed. In addition, more cooperation needs to occur between the WGEID and the Committee on Enforced Disappearances (CED) on substantive matters concerning individual states. At a regional and domestic level, a range of institutions, including human rights courts such as the IACtHR and European Court of Human Rights (ECtHR), as well as national courts, should apply Article 20 of the UN Declaration more often when dealing with cases of enforced disappearance of children to address the complexity of the crime better. There needs to be an increase in education and training in general and more steps taken when the Declaration is not followed. States need to do much more as well to prosecute and discipline non-compliance within their borders. More is needed to ensure that rules on places of confinement are in place and that independent visits to such places are done regularly and unannounced.

225. Rep. of the Working Group on Enforced or Involuntary Disappearances, ¶¶ 170–72, U.N. Doc. E/CN.4/1435 (Jan. 26, 1981); *see also* Rep. of the Working Group on Enforced or Involuntary Disappearances, ¶¶ 164–72, U.N. Doc. E/CN.4/1492 (Dec. 31, 1981).

226. Human Rights Council, General Comment on Children and Enforced Disappearances Adopted by the Working Grp. on Enforced or Involuntary Disappearances at its Ninety-Eighth Session (Oct. 31 – Nov. 9 2012), U.N. Doc. A/HRC/WGEID/98/1 (Feb. 14, 2013).

227. Elisenda Calvet Martínez, *The International Convention for the Protection of All Persons from Enforced Disappearance*, in *INTERNATIONAL HUMAN RIGHTS LAW IN A GLOBAL CONTEXT*, 515, 516 (Felipe Gómez Isa & Koen de Feyter eds., 2009).

*B. The UN Convention on Enforced Disappearance (2006)**1. The Law*

In 2006, the UN Convention became the first international treaty to specifically address the practice of enforced disappearance of children at the international level.²²⁸ This constituted a major step forward in their protection.²²⁹ The UN Convention went further than the UN Declaration by including in Article 25(1)(a) three types of situations that entail the enforced disappearance of children:

The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance.²³⁰

Moreover, Article 25(1) of the UN Convention establishes that the enforced disappearance of children encompasses two types of conduct: (a) the “wrongful removal” of children and (b) “[t]he falsification, concealment and destruction of documents that prove the true identity of these children.”²³¹ Based on Article 20 of the UN Declaration to a great extent, the UN Convention’s main innovative aspect was the express recognition of the right to preserve or re-establish the identity of children, including their nationality, name, and family relations.²³²

Hence, the importance of the difference between the terms “adoption” and “appropriation” should be emphasized in adoptions where the biological parents give free consent, in contrast to the parents of the child who disappeared or was born in captivity were in no position to exercise their rights.²³³ The terminology was the subject of debate during the drafting of the UN Convention.²³⁴ The underlying issue here was that enforced disappearance of children not “only” encompasses the “kidnapping” of children but also implies the falsification of his or her true identity and the imposition of a “new” affiliation.²³⁵

Additionally, the UN Convention establishes three major obligations for states: the duty to prevent and sanction enforced disappearances of children; the duty to search for, identify and return “kidnapped” children to their family of

228. *Id.* at 518.

229. *Id.*

230. G.A. Res. 61/177, art. 25 (Dec. 20, 2010).

231. *Id.*

232. G.A. Res. 61/177 (Dec. 20, 2010).

233. ARDITTI, *supra* note 39, at 139.

234. There was a discussion as to whether to use the terms “enlèvement” or “appropriation” in French or “abduction” in English; the final decision was to use the term “soustraction” in French and “wrongful removal” in English, keeping “apropiación” for the Spanish version. Comm. on Hum. Rts., Rep. of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance, ¶ 116, U.N. Doc. E/CN.4/2005/66 (Mar. 10, 2005).

235. *Id.*

origin; and the duty to establish a system to review or annul the process of adoption when it has its origin in an enforced disappearance.²³⁶ As a general obligation, the Convention provides, in Article 25(3), that states should cooperate with and “assist one another in searching for, identifying and locating [kidnapped] children.”²³⁷

2. Problems and Solutions

Although the UN Convention is the major international treaty dealing with enforced disappearances, and it contains the most complete protection of children, it is the second least ratified human rights convention of the nine core treaties within the UN system with only sixty-four State Parties.²³⁸ It is further weakened by the fact that only about a third of the sixty-four states have recognized the competence of the CED to receive individual and inter-state complaints.²³⁹ Therefore, it is urgent that more states ratify the UN Convention and make the necessary declarations. This would allow a much more robust protection of children, and people in general, from enforced disappearances.

Moreover, States Parties to the UN Convention and the CED should also be encouraged to implement the UN Convention in such a way as to realize its full potential. This includes adopting legislation that outlaws enforced disappearance of children. The examination of the state reports by the CED shows that many of the States Parties have not codified the crime in domestic law, as required by Article 25.²⁴⁰ While it is important that the CED supervise the passing of legislation concerning the wrongful removal of children by the States Parties, it is also crucial that it emphasizes the fulfillment of the other state obligations regarding children established by the UN Convention. For instance, the adoption of measures aimed at preventing enforced disappearance of children, the establishment of specific procedures to search for, identify, and return the kidnapped children to their families of origin, and the setting of a specific procedure to review or annul an adoption when it originated in an

236. G.A. Res. 61/177, art. 25 (Dec. 20, 2010).

237. *Id.* at ¶ 3.

238. *Status of Ratifications of International Convention for the Protection of All Persons from Enforced Disappearance*, UNITED NATIONS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-16&chapter=4&clang=_en. The least ratified within the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990 with fifty-six state parties. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, U.N. Treaty Series, Dec. 18, 1990.

239. *Status of Ratifications*, *supra* note 238.

240. See Comm. on Enforced Disappearances, Concluding Observations on the Rep. Submitted by Austria Under Article 29 (1) of the Convention, ¶¶ 24–25, U.N. Doc. CED/C/AUT/CO/1 (July 6, 2018); Comm. on Enforced Disappearances, Concluding Observations on the Rep. Submitted by Portugal Under Article 29 (1) of the Convention, ¶¶ 26–27, U.N. Doc. CED/C/PRT/CO/1 (Dec. 5, 2018); Comm. on Enforced Disappearances, Concluding Observations on the Rep. Submitted by Tunisia Under Article 29 (1) of the Convention, ¶¶ 33–34, U.N. Doc. CED/C/TUN/CO/1 (May 25, 2016).

enforced disappearance, with the aim of encouraging States Parties to adopt a child-sensitive approach when implementing the rights and obligations of the UN Convention.²⁴¹

Furthermore, the CED has preventive functions that could be used more effectively to tackle the systematic enforced disappearance of children.²⁴² Among these is the procedure established in Article 30 by which relatives or any person with a legitimate interest may ask the Committee to take urgent action to seek a disappeared person.²⁴³ Since 2012, the CED has received more than 600 petitions,²⁴⁴ and the list of the names under this procedure is published in the annual reports and on the Office of the United Nations High Commissioner for Human Rights website.²⁴⁵ However, the victims are not classified by age; therefore, it is not possible to determine if children are being targeted.²⁴⁶ The CED should divide the list of names into categories, with one category being children, in order to determine the existence of a systematic or widespread pattern of enforced disappearance of children. As a further preventive function, Article 33 of the UN Convention gives the CED the possibility to carry out on-site visits to a State Party in the event of serious violations of the UN Convention.²⁴⁷ Article 34 allows the CED to issue urgent appeals to the UN General Assembly in the event of widespread or systematic enforced disappearances in the territory under a State Party's jurisdiction.²⁴⁸ So far, the CED has only requested one visit to a State Party²⁴⁹ but has never issued an

241. Comm. on Enforced Disappearances, Concluding Observations on the Rep. Submitted by Peru Under Article 29 (1) of the Convention, ¶¶ 34–35, U.N. Doc. CED/C/PER/CO/1 (May 8, 2019).

242. See Rep. of the Comm. on Enforced Disappearances of its Fifteenth and Sixteenth Sessions, ¶¶ 33–57, U.N. Doc. A/74/56 (2019); Comm. Enforced Disappearances, List of Registered Requests for Urgent Actions, UN HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx> (last visited Oct. 12, 2021).

243. G.A. Res. 61/177, art. 30 (Dec. 20, 2010).

244. Rep. of the Comm. on Enforced Disappearances of its Fifteenth and Sixteenth Sessions, ¶ 33, U.N. Doc. A/74/56 (2019); Comm. Enforced Disappearances, List of Registered Requests for Urgent Actions, UN HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx> (last visited Oct. 12, 2021).

245. *Id.*

246. *Id.*

247. Comm. on Enforced Disappearances, International Convention for the Protection of All Persons from Enforced Disappearance, art. 33(1) (2006), <https://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx> (“If the Committee receives reliable information indicating that a State Party is seriously violating the provisions of this Convention, it may, after consultation with the State Party concerned, request one or more of its members to undertake a visit and report back to it without delay.”).

248. *Id.* at art. 34.

249. The CED has requested a visit to Mexico since 2013 due to the increasing number of enforced disappearances in the country. Rep. of the Comm. on Enforced Disappearances of its Fifteenth and Sixteenth Sessions, ¶ 60, U.N. Doc. A/74/56 (2019). The visit finally took place from 15 to 27 November 2021. Comm. Enforced Disappearances, UN HUM. RTS. OFF. OF THE HIGH

urgent appeal.²⁵⁰ Therefore, the Committee should take more advantage of these mechanisms to draw attention to cases of systematic enforced disappearances of children so that states can adopt the necessary measures to stop them and prevent future recurrence.

Another problem with the Convention is that other international human rights courts, such as the IACtHR and ECtHR, do not apply the UN Convention enough when they deal with enforced disappearance in general and of children in particular.²⁵¹ This will be dealt with below.

Because of the principle of non-retroactivity, the UN Convention cannot be applied to enforced disappearances that occurred before its entry in force for the State Party,²⁵² despite the continuous nature of the crime, which leaves many cases of enforced disappearance of children outside the scope of the UN Convention.²⁵³ However, the ECtHR, when dealing with cases of enforced disappearances, has extended its *ratione temporis* jurisdiction by determining that the state was violating the procedural obligation to carry out an effective investigation of the disappearances under Article 2 of the ECtHR.²⁵⁴ According to the Court, this procedural obligation persists as long as the fate or whereabouts of the disappeared person is not clarified and the ongoing failure to investigate constitutes a continuing violation of Article 2 of the ECtHR.²⁵⁵ This interpretation could be applicable, *mutatis mutandis*, to the UN Convention since the disappearance of children is a continuing violation that only ceases upon the restitution of the true identity of the child.²⁵⁶ The CED should find more ways to bring all cases within its jurisdiction and act more robustly on those matters. The WGEID General Comment is instructive in this regard and written to provide some guidance to the CED.²⁵⁷

Moreover, the fact that many states have not codified the crime of enforced disappearance of children in their domestic law²⁵⁸ makes it more difficult to

COMM'R, <https://www.ohchr.org/EN/HRBodies/CED/Pages/VisitMexico.aspx> (last visited Dec. 31, 2021).

250. See U.N. Charter art. 35, ¶ 1 (providing procedure for a Member of the UN to bring a dispute).

251. See discussion *infra* Sections IV.C and IV.D.

252. G.A. Res. 61/177, art. 35 (Dec. 20, 2010).

253. Jeremy Sarkin, *Enforced Disappearance as Continuing Crimes and Continuing Human Rights Violations*, in *THE REALIZATION OF HUMAN RIGHTS: WHEN THEORY MEETS PRACTICE* 389, 405 (Yves Haeck et al. eds., 2013).

254. *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 5, 37 (2001).

255. *Varnava v. Turkey*, 2009-V Eur. Ct. H.R. 4, 39 (2009).

256. *Gelman v. Uruguay*, Merits and Reparations, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶131 (Feb. 24, 2011).

257. Report of the Working Group on Enforced or Involuntary Disappearances, ¶ 39, U.N. Doc. A/HRC/16/48 (Jan. 26, 2011). This was drafted while the first author was Chair-Rapporteur of the WGEID.

258. Many states have not codified the crime in general let alone for children specifically. See Jeremy Sarkin, *Putting in Place Processes and Mechanisms to Prevent and Eradicate Enforced Disappearances Around the World*, 38 *SOUTH AFRICAN YEARBOOK OF INT'L L.* 1, 23 (2013). See

conduct investigations of these cases because they instead apply ordinary crimes such as homicide, illegal detention, or the crime of supposition of birth, which have short statutes of limitations.²⁵⁹ These ordinary crimes also do not cover the complexity of enforced disappearance of children and do not take into consideration the systematic and widespread nature of the crime.²⁶⁰ Therefore, it is important that states not only ratify the UN Convention but also fully implement it by sanctioning enforced disappearance of children under criminal law with penalties that take into account the extreme seriousness of the crime and all the characteristics of this offense, and that they review their adoption laws to maximize the protection of children from enforced disappearance. It is also necessary for states to ensure that their criminal laws provide that systematic or widespread cases of enforced disappearances also qualify as crimes against humanity and that prosecutions take place when such cases occur. This will be dealt with further below in the sections on ICL and IHL.²⁶¹

C. The Inter-American Convention on Forced Disappearance (1994)

1. The Law

This regional treaty was negotiated in parallel with the UN Declaration and was a response to the massive number of enforced disappearances that have occurred in Latin America, especially in the 1970s and 1980s.²⁶² It strengthened the international standards regarding enforced disappearances developed until then by the IACHR through its case law.²⁶³ Surprisingly, the Inter-American Convention does not contain any reference to the “national” enforced disappearance of children, which had been a systematic practice in many Latin American countries for decades.²⁶⁴ Instead, Article XII only refers to international cooperation between States Parties “in the search for, identification, location, and [restitution of children] . . . removed to another state or detained therein as a consequence of the forced disappearance of their parents

also Jeremy Sarkin, *Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law*, 81 NORDIC J. INT’L L. 537, 570 (2012).

259. Jeremy Sarkin, *Putting in Place Processes and Mechanisms to Prevent and Eradicate Enforced Disappearances Around the World*, 38 SOUTH AFRICAN YEARBOOK OF INT’L L. 1, 23 (2013).

260. Jeremy Sarkin, *Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law*, 81 NORDIC J. INT’L L. 537, 570 (2012).

261. See discussion *infra* Parts V and VI.

262. FELIPE GONZALEZ MORALES, SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: TRANSFORMACIONES Y DESAFÍOS [INTER-AMERICAN HUMAN RIGHTS SYSTEM: TRANSFORMATIONS AND CHALLENGES] 235 (Tirant lo Blanch ed., 2013).

263. *Id.* at 239–40.

264. Organization of American States, Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529.

or guardians.”²⁶⁵ Article 19 of the draft Inter-American Convention had a more detailed provision that required states “to prevent and sanction the appropriation of children of disappeared parents or children born during their mother’s clandestine captivity and their release to other families for irregular adoption.”²⁶⁶ Furthermore, this provision required states to codify in domestic law “crimes involving the alteration of, or the suppression of proof, of the civil status of any person and the abduction of minors.”²⁶⁷ Unfortunately, those provisions contained in the draft version of Article 19 were omitted, leaving out any reference to the review of the adoption procedures or the duty to prevent and sanction enforced disappearance of children.²⁶⁸ This considerably reduced the effectiveness of the Convention. The exclusion of NGOs from the drafting process is one of the reasons that the text was weakened.²⁶⁹

2. Problems and Solutions

The Inter-American Convention on Forced Disappearances has seldom been applied in cases before the IACtHR because the provision on enforced disappearances of children is inadequate and does not cover all the elements of the crime.²⁷⁰ This has sometimes been the case because the state concerned was not a party to the Convention.²⁷¹ In the others, the Court has only used Articles I and II.²⁷² These refer to the general obligations of the State Parties and the definition of enforced disappearance.²⁷³ In practice, the Inter-American Convention has been inadequate to deal with cases of children because it only

265. Organization of American States, Inter-American Convention on Forced Disappearance of Persons, art. XII, June 9, 1994, 33 I.L.M. 1529, art. XII.

266. *Chapter V.II: Draft Inter-American Convention on Forced Disappearance of Children*, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1987-88, Inter-Am. Comm’n on H. R., OEA/Ser.L/V/II.74, doc. 10 rev.1, art. 19 (1988).

267. *Id.*

268. Reed Brody & Felipe González, *Nunca Más: An Analysis of International Instruments on “Disappearances”*, 19 HUM. RTS. Q. 365, 395–96 (1997).

269. *Id.* at 375.

270. See, e.g., *Serrano Cruz Sisters v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 174 (Mar. 1, 2005); *Contreras v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶¶ 218–19 (Aug. 31, 2011); *Rochac Hernández v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 285, ¶¶ 93–96 (Oct. 14, 2014).

271. *C.f.* *Serrano Cruz Sisters v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 25 (Mar. 1, 2005); *Contreras v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 6 (Aug. 31, 2011); *Rochac Hernández v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) No. 285, ¶ 15 (Oct. 14, 2014).

272. *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 76 (Feb. 24, 2011) (invoking Article XII, but finding that it did not apply to the merits of the case).

273. *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 76 (Feb. 24, 2011).

refers to international cooperation between states, and it does not deal with the review of the adoption procedures or the duty to prevent and sanction this practice at the state level. To improve the application of the Inter-American Convention, both the IACHR and the IACtHR should interpret it in the light of Article 20 of the UN Declaration and Article 25 of the UN Convention to reinforce the protection of children from enforced disappearance. Although the IACHR played a key role in reporting the systematic practice of enforced disappearances in Latin America in the 1970s and 1980s and in the drafting of the Inter-American Convention, more effort is needed to put the Convention into practice when dealing with children.²⁷⁴

D. Other International Human Rights Treaties

Besides these three international human rights instruments, which contain specific provisions for enforced disappearances of children, there are other international human rights treaties that can be applied to protect children from this heinous practice. These include, for instance, the ICCPR, CRC, ECHR, ACHR, ACHPR, and ACRWC.²⁷⁵

1. The Law

The ICCPR recognizes in Article 23 that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State,” and provides in Article 24 that states must take specific protection measures in the case of children, in addition to recognizing that every child has the right to have a name and to acquire a nationality.²⁷⁶

The CRC establishes in Article 7 that every child has the right from birth to a name, to know his parents, and to be cared for by them.²⁷⁷ The Committee on

274. On December 4, 2019, the IACHR referred to the IACtHR the case of the Julien-Grisonas Family v. Argentina. *See* Julien-Grisonas Family v. Argentina, Case 13.392, Inter-Am. Comm’n H.R., Report No. 56/19, OEA/Ser.L/V/II.172, doc. 65 (2019). The case is about enforced disappearances within the Operation Condor, which includes the wrongful removal of two children who were moved clandestinely to Chile and abandoned in Plaza O’Higgins in Valparaiso on December 22, 1976. *Id.* ¶ 37–40. The IACHR barely touches on the Inter-American Convention on Forced Disappearances, article I and III, which refer to the obligation to codify the crime in domestic law and to sanction the authors of the crime. *Id.* ¶ 204.

275. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1456; European Convention on Human Rights, Council of Europe, Mar. 11, 1950 (last amended Aug. 1, 2021), https://www.echr.coe.int/Documents/Convention_ENG.pdf; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673; African Charter on Human and Peoples’ Rights, Jun. 27, 1981, 1520 U.N.T.S. 217; African Charter in the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990).

276. International Covenant on Civil and Political Rights, art. 23–24, Dec. 19, 1966, 999 U.N.T.S. 171.

277. INETA ZIEMELE, ARTICLE 7: THE RIGHT TO BIRTH REGISTRATION, NAME AND NATIONALITY, AND THE RIGHT TO KNOW AND BE CARED FOR BY PARENTS 26 (André Alen et al. eds., 2007).

the Rights of Child has considered that the term parents “includes biological parents and that the child has the right to know, as far as possible, who they are.”²⁷⁸ In Article 8, the Convention provides that states undertake to respect “the right of the child to preserve their identity, including nationality, name and family relationships in accordance with the law without unlawful interference.”²⁷⁹ The CRC was ground-breaking in introducing the provision on the right to preservation of identity, commonly known as the “Argentinian Article,” as it was proposed by the Argentinian government during the drafting of the Convention, based on the experience of the Grandmothers of the Plaza de Mayo in the search for the children kidnapped during the military dictatorship in that country.²⁸⁰ Additionally, the CRC recognizes in Article 9(1) the right to family life and provides that states must “ensure that a child shall not be separated from his or her parents against their will.”²⁸¹ In Article 9(4), it provides that when the separation of the child from his or her parents is a consequence of the detention of the latter, states must inform those who may be concerned about the whereabouts of the child, always taking into account the best interests of the child.²⁸² Finally, the Convention establishes in Article 11 that “States Parties shall take measures to combat the illicit transfer and non-return of children abroad.”²⁸³

The ECHR has one main provision that protects children from enforced disappearance, namely the right to respect for private and family life in Article 8.²⁸⁴ It provides that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.²⁸⁵

This provision is interpreted broadly by the ECtHR when dealing with cases of children.

Likewise, the ACHR foresees in Article 19 that every child has the right to “measures of protection required by his condition as a minor on the part of his family, society, and the state,” without being subject to arbitrary or abusive interference, and protects the right to the family by requiring the state not only

278. *Id.*

279. Lisa Avery, *A Return to Life: The Right to Identity and the Right to Identify Argentina's "Living Disappeared"*, 27 HARV. WOMEN'S L. J. 235, 271 (2004).

280. *Id.*

281. Convention on the Rights of the Child art. 9, ¶ 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

282. Convention on the Rights of the Child art. 9, ¶ 4, Nov. 20, 1989, 1577 U.N.T.S. 3.

283. Convention on the Rights of the Child art. 11, ¶ 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

284. European Convention on Human Rights, Council of Europe, art. 8, Mar. 11, 1950 (last amended Aug. 1, 2021), https://www.echr.coe.int/Documents/Convention_ENG.pdf.

285. *Id.* at ¶ 2.

to implement measures for the protection of children directly but also to promote the development and strength of the family.²⁸⁶ The ACHR also recognizes the right to a name in Article 18, the right to nationality in Article 20, and the right to protection of the family in Article 17(1).²⁸⁷ The protection of the family and the rights of children, embodied in Articles 17 and 19 of the ACHR, are considered by the IACtHR to be “non-derogable fundamental rights that cannot be suspended” under any circumstance.²⁸⁸ The ACHR “is the only binding international human rights instrument that prohibits suspension of [the States Parties’] international obligations” regarding children.²⁸⁹

Furthermore, the ACHPR²⁹⁰ establishes in Article 18 that the family “shall be the natural unit and basis of society,” and that the family must “be protected by the State which shall take care of its physical . . . and moral [health].”²⁹¹ Finally, the ACRWC is worth mentioning since it complements the CRC and seeks to adapt it to the reality of children in Africa.²⁹² Article 6 recognizes the right of the children to a name from his birth, to be registered immediately after birth, and to acquire a nationality, which “constitute the pillars of a person’s identity.”²⁹³ Although the name is probably the best way to identify a person, the African Committee of Experts on the Rights and Welfare of Child has explained that in some societies, “a name can even indicate the social, cultural or religious group (ethnicity, tribe or religion) an individual belongs to.”²⁹⁴ Furthermore, the ACRWC deals with the protection of the family in Article 18 and establishes the right of children to live with their parents in Article 19 in similar terms to the CRC.²⁹⁵

286. American Convention on Human Rights, art. 19, Nov. 22, 1969, 1144 U.N.T.S. 17955.

287. *Id.* at art. 17 ¶ 1, 18, 20.

288. *Rochac Hernández v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 108 (Oct. 14, 2014).

289. *The Rights of the Child in the Inter-American Human Rights System*, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.133, doc. 34 ¶ 49 (2008).

290. African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217.

291. *Id.* at art. 18.

292. African Charter on the Rights and Welfare of the Child, pmbl., OAU Doc. CAB/LEG/24.9/49 (1990).

293. African Charter on the Rights and Welfare of the Child, art. 6, OAU Doc. CAB/LEG/24.9/49 (1990); Afr. Comm. of Experts on the Rts. and Welfare of the Child, *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child* [OAU], Doc. ACERWC/GC/02 art. 6, ¶ 23 (Apr. 16, 2014).

294. Afr. Comm. of Experts on the Rts. and Welfare of the Child, *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child* [OAU], Doc. ACERWC/GC/02, ¶ 39 (Apr. 16, 2014).

295. African Charter on the Rights and Welfare of the Child, art. 18–19, OAU Doc. CAB/LEG/24.9/49 (1990).

2. Problems and Solutions

While these international human rights instruments do not deal specifically with enforced disappearance of children, they offer protection through various rights that have been associated with and read as including a prohibition against enforced disappearances. These include the right to recognition as a person before the law; the right to liberty and security of the person; the right not to be subjected to torture and other cruel, inhuman, or degrading treatment or punishment; the right to life; the right to identity; the right to a fair trial and to judicial guarantees;²⁹⁶ the right to an effective remedy, including reparation and compensation;²⁹⁷ and the right to know the truth regarding the circumstances of a disappearance.²⁹⁸ Enforced disappearances also generally violate various economic, social, and cultural rights for both the victims as well as their families, such as the right to protection and assistance to the family, the right to an adequate standard of living, the right to health, and the right to education.²⁹⁹

However, other rights are particularly relevant in the case of enforced disappearance of children, such as the right to a family life, the right to a name, the right to identity, and the right to a nationality. Also important are issues around group rights, such as those of minorities and indigenous people, as they are usually the most vulnerable, and it is often the case that children who are disappeared belong to such groups.³⁰⁰

The enforced disappearance of children necessarily entails a separation of minors from their parents and constitutes an arbitrary interference with family life. These international human rights instruments have a common approach to protecting families. For one, the incorporation of the right to identity in IHRL is an important development since the existing national laws have proved inadequate for addressing the problem of kidnapped children and ensuring their return to their families of origin.³⁰¹ It must also be noted that the issues concerning the return of “stolen” children to their biological families are often beset with problems. In some cases, boys and girls (now adults) who have discovered that they were adopted illegally refuse to do DNA tests because of the implication of possibly having to report their “adoptive” parents, who may

296. Human Rights Council, General Comment on Children and Enforced Disappearances Adopted by the Working Grp. on Enforced or Involuntary Disappearances at its Ninety-Eighth Session (Oct. 31 – Nov. 9 2012), U.N. Doc. A/HRC/WGEID/98/1 (Feb. 14, 2013).

297. See Jeremy Sarkin, *Reparation for Past Wrongs: Using Domestic Courts Around the World, Especially the United States, to Pursue African Human Rights Claims*, 32 INT’L J. LEGAL INFO. 426, 438 (2004).

298. Jeremy Sarkin, *Promoting the Rights of Victims in Under-Resourced Places by Using Science and Technology, That Can Be Used by Ordinary People, To Deal with Human Rights Violations: Bolstering the Right to the Truth*, 42 LIVERPOOL L. REV. 339, 342 (2021).

299. See Sarkin & Baranowska, *supra* note 9, at 33.

300. See *e.g.*, *Id.*

301. George A. Stewart, *Interpreting the Child’s Right to Identity in the U.N. Convention on the Rights of the Child*, 26 FAM. L. Q. 221, 221–22 (1992).

go to prison. In addition, it is also sometimes the case that they do not want to contact their biological family because they have grown up in another environment and love their “adoptive” family. These situations pose a dilemma about the extent to which a state can force a person to undergo a DNA test to reveal his or her true identity and to what extent the collective right to the truth is above the individual’s right to privacy.³⁰² On the one hand are the right to privacy, the right to physical integrity, and the right not to testify against their parents, and on the other, the interest of society to know the truth and to prosecute the crime of enforced disappearance of children.³⁰³ The defense of the “adoptive” parents has often been against returning the abducted children to their biological families to avoid a second trauma for the victims.³⁰⁴ For the Grandmothers of the Plaza de Mayo, the recovery of the right to identity is non-negotiable, and, therefore, they are in favor of returning the abducted children to their families of origin.³⁰⁵

Although the right to identity is only embodied in Article 8 of the CRC, international human rights tribunals have recognized this right through their case law.³⁰⁶ Unfortunately, the Committee on the Rights of Child has not had the opportunity to apply this right when dealing with individual petitions.

At the same time, the right to protection of the family is codified, in one way or another, in most domestic legal systems. However, often the international and domestic tribunals examining cases on enforced disappearance of children do not enforce all the rights available to them. The adoption of a family rights approach to dealing with cases of enforced disappearances of children—especially the right to a family life, the right to a name, and the right to an identity—would enable the courts and treaty bodies to overcome the current limitations to deal with these cases. In this respect, tribunals and human rights mechanisms should apply the various human rights violated in a broader and more all-encompassing way in cases of enforced disappearance of children in order to better address the complexity of the crime.

302. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1996, “Guarino, Mirta s/ querela,” sentencia, Fallos (319: 3370) (Arg.).

303. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1996, “Guarino, Mirta s/ querela,” sentencia, Fallos (319: 3370) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 30/9/2003, “Vázquez Ferrá, Evelin Karina/incidente de apelación,” Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2003-326-3758) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court], 11/8/2009, “Gualtieri Rugnone de Prieto, Emma Elidia y otros s/ sustracción de menores de 10 años, causa (46/86A) (Arg.).

304. Ari Edward Gandsman, *Retributive Justice, Public Intimacies and the Micropolitics of the Restitution of Kidnapped Children of the Disappeared in Argentina*, 6 INT’L J. TRANSITIONAL JUST. 423, 424 (2012); MATILDE HERRERA & ERNESTO TENEMBAUM, *IDENTIDAD DESPOJO Y RESTITUCIÓN* [IDENTITY DISPOSAL AND RESTITUTION], 151, 227 (Abel Madariaga, ed. 2007).

305. Gandsman, *supra* note 304, at 425.

306. See *infra* Section IV.

The Human Rights Committee, the IACtHR, and the ECtHR have developed extensive jurisprudence on enforced disappearances in general; however, there have been few cases involving children.³⁰⁷ While both regional courts often use the general definition of enforced disappearances contained in Article 2 of the UN Convention, they hardly ever apply Article 25, which includes the specific elements and state obligations in the case of children.³⁰⁸ The few cases of enforced disappearance of children before the Human Rights Committee predate the UN Convention; still, they do not refer to the UN Declaration.³⁰⁹ Surprisingly, the Committee on the Rights of Child has not yet dealt with any cases of enforced disappearance of children. Part of the problem is that few of these cases are brought to these bodies, which means that more education is needed to ensure that victims can bring such cases and that NGOs and lawyers have the capacity and skills to do so. Still, the cases brought before the IACtHR are relevant as they deal with the systematic practice of this crime committed in times of armed conflict and authoritarian regimes and comprise a broad spectrum of human rights violated, including family rights.³¹⁰

To also improve the protection of children, especially against systematic cases, more interactions between universal and regional human rights instruments are needed. This is required because the different systems for the protection of human rights are interrelated and complement each other in developing international human rights standards.³¹¹ This means that the international human rights tribunals and treaty bodies should interpret the human rights treaties in the light of the different instruments dealing with enforced disappearances and those dealing with children's rights to strengthen and expand the protection of children from this despicable practice.

307. See, e.g., OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL, *Mónaco de Gallicchio v. Argentina*, Communication No. 400/1990, at 48, U.N. Doc. CCPR/C/OP/5, U.N. Sales No. 04.XIV.9 (1995); *Atachahua v. Peru*, Judgment Under the Optional Protocol of the International Covenant on Civil and Political Rights, Communication No. 540/1993, ¶ 3.2, U.N. Doc CCPR/C/56/D/540/1993 (1996); *Jovanović v. Serbia* (No. 2), No. 21794/08, Eur. Ct. H.R., ¶ 42 (2013); *Thiermann v. Norway*, App. No. 18712/03, Eur. Ct. H.R., 2–3 (2007); *Serrano Cruz Sisters v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 2 (Mar. 1, 2005); *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 ¶ 2 (Feb. 24, 2011); *Contreras v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 232, ¶ 2 (Aug. 31, 2011); *Rochac Hernández v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. ¶ 1(a) (Oct. 14, 2014).

308. G.A. Res. 61/177, art. 25 (Dec. 20, 2010).

309. See e.g., *Aboussedra v. Libyan Arab Jamahiriya*, Communication No. 1751/2008 (2010). It did refer to the Declaration to highlight the issue of the right to an identity in *Kimouche v. Algeria* Human Rights Comm., Comm. no. 1328/2004 (2007).

310. The Rights of the Child in the Inter-American Human Rights System, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.133, doc. 34, art 21–22 (2008).

311. The Rights of the Child in the Inter-American Human Rights System, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.133, doc. 34 ¶ 52 (2008).

At the same time, the use of all these international instruments dealing with enforced disappearances and children to interpret the ACHR, ECHR, and ICCPR must also guide domestic courts so that they can play a greater role in these issues. There is a general lack of understanding of the tools and procedures available to deal with these cases. International and domestic courts need better knowledge and understanding of how enforced disappearances fall within the rubric of IHRL, even if not specifically mentioned. More awareness and training for prosecutors, judges, lawyers, and civil society, as well as legislators, state officials, and others, will enable them to be active and equipped to deal with disappearances, especially those of children.

V. THE PROTECTION OF CHILDREN FROM ENFORCED DISAPPEARANCE IN INTERNATIONAL HUMANITARIAN LAW

IHL is a branch of international law that establishes the rules concerning how wars can be fought.³¹² In addition, IHL also protects persons who are not, or are no longer, taking part in hostilities (like civilian population, humanitarian personnel, soldiers hors de combat, or prisoners of war) by limiting the means and methods of warfare during armed conflict.³¹³

The first Geneva Convention dates from 1864,³¹⁴ which was further developed by the Hague Regulations in 1907 and other treaties.³¹⁵ The main rules of contemporary IHL are embodied in the four Geneva Conventions of 1949 and the Additional Protocols.³¹⁶ Initially, IHL was conceived as a body of

312. Yishai Beer, *Revisiting ad bellum Proportionality: Challenging the Factors Used to Assess It*, 97 INT'L L. STUD. 1500, 1504 (2021).

313. Russell Buchan, *The Rule of Surrender in International Humanitarian Law*, 51 Israel L. Rev. 3, 17 (2018).

314. Geneva Convention (I) for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 129 Consol. T.S. 361.

315. See Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Hague Convention, art. 21, Jul. 29, 1899; The Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 9, Oct. 18, 1907; The Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Oct. 18, 1907, 36 Stat. 2396, 1 Bevans 711; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, art. 1, July 27, 1929, 47 Stat. 2074; Geneva Convention (III) Relative to the Treatment of Prisoners of War, July 27, 1929, art. 1, 47 Stat. 2021.

316. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

law regulating inter-state armed conflicts,³¹⁷ with only Common Article 3 of the four Geneva Conventions applying to non-international armed conflict.³¹⁸ Thus, in 1977 the protection of the civilian population improved not only in the context of international armed conflicts, but also in non-international armed conflicts with the adoption of the two Additional Protocols.³¹⁹

“The legal protection of children was introduced in [IHL only] after the Second World War.”³²⁰ The absence of any means to identify the children abducted and detained during Second World War prevented them from being reunited with their biological families.³²¹ This led the international community, and specifically, the International Committee of the Red Cross (ICRC), to propose the adoption of effective measures to prevent these situations.³²² In 1939, the ICRC, together with the International Union for Child Welfare, prepared a draft Convention for the Protection of Children; however, this project was paralyzed by the outbreak of the Second World War.³²³ Then, “[i]n 1946, a Draft Convention for the Protection of Children in the Event of International Conflict or Civil War was submitted by the Bolivian Red Cross.”³²⁴ However, ultimately, instead of adopting a separate treaty, the substantive provisions were incorporated in the 1949 Geneva Conventions.³²⁵ To limit the impact of war, the Geneva Conventions provide children both the general protection given to the civilian population and special protection as children.³²⁶ When children take part in hostilities, they lose the general protection as part of the civilian

317. M. Sassoli et. al, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, in 1 OUTLINE OF INT’L HUMANITARIAN L. at 9 (3rd ed. 2006).

318. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

319. Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 51, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 111, 1125 U.N.T.S. 3.

320. Denise Plattner, *Protection of Children in International Humanitarian Law*, 24 INT’L REV. RED CROSS ARCHIVE 140, 140 (1984).

321. *Id.*

322. INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 185 (Jean S. Pictet ed., 1958).

323. *Id.*

324. *Id.* at 186.

325. RED CROSS, *supra* note 322, at 186.

326. Int’l Comm. of the Red Cross, *Commentary of 1987 on Art. 77 of the Additional Protocols of June 9, 1977 to the Geneva Conventions of August 12, 1949*, 900 (June 8, 1987).

population but keep the special protection as children.³²⁷ Despite these provisions, in 2019 the UN reported that around 25,000 grave violations were committed against children in armed conflict, more than half of them by non-state actors.³²⁸

Although “the protection of children in armed conflicts was one of the earliest concerns of the international law on the rights of the child,” the level of protection in practice was actually quite minimal.³²⁹ The Hague Regulations of 1899 and 1907 included the protection of the family in a broad sense, stating that “[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”³³⁰ The principle of respecting the family was included irrespective of the need for additional protection for children, especially when separated from their families in times of armed conflict.³³¹ In 1924, the League of Nations adopted the Geneva Declaration of the Rights of the Child, which recognized for the first time the existence of rights specific to children, including the right to development, assistance, relief, and protection, but had no specific reference to protection in the context of armed conflict.³³² This seemingly had little effect in practice, as seen by the fact that so many violations continued to be committed against children all over the world, including during conflict.³³³

When it comes to enforced disappearance, this is not really a term used in IHL.³³⁴ Rather, IHL tends to refer to “missing persons,” whereas IHRL primarily uses “enforced disappearances.”³³⁵ The terms “missing” or “persons unaccounted for” can be considered to be broader than the term “enforced disappearance” and to refer, in the context of armed conflict or internal violence,

327. Int’l Comm. of the Red Cross, *Commentary on Art. 4 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (1949).

328. U.N. Secretary-General, *Children and Armed Conflict*, ¶ 5, U.N. Doc. A/74/845-S/2020/525 (June 9, 2020).

329. Geraldine Van Bueren, *The International Legal Protection of Children in Armed Conflicts*, 43 INT’L & COMPAR. L. Q. 809, 810 (1994).

330. The Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, art. 46, Oct. 18, 1907; Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Hague Convention, art. 46, July 29, 1899.

331. *Geneva Declaration of the Rights of the Child*, League of Nations (Sept. 26, 1924).

332. *Geneva Declaration of the Rights of the Child*, League of Nations (Sept. 26, 1924) (establishing that “[t]he child must be the first to receive relief in times of distress”).

333. Int’l Comm. of the Red Cross, *The Missing: Action to Resolve the Problem of People Unaccounted for as a Result of Armed Conflict or Internal Violence and to Assist their Families*, TheMissing/Conf/03.2003/EN/90, at 57 (Feb. 19–21, 2003).

334. See, e.g., *id.* at 17 (discussing the impact of disappearances on IHL without using the legal terminology). See also Jeremy Sarkin, *The Need for a New Paradigm in International Law to Provide International Protection: Learning the Lessons from Past Processes and Designing a Mechanism to Assist Victims of Arbitrary Detentions and Enforced Disappearances in Syria*, 10 INT’L HUMAN RTS. L. REV. 1, 6 (forthcoming 2021).

335. *The Missing*, *supra* note 333, at 18.

to persons who go missing as a result of hostilities.³³⁶ People go missing for “a wide variety of circumstances, such as [internal] displacement, . . . being killed in action during armed conflict, or forcibly or involuntarily disappearing.”³³⁷ The “missing” also refers to other people who cannot be found because of issues such as migration, disasters, organized crimes, terrorism, and a range of other events.³³⁸ Therefore, the “missing” can commonly be defined as those persons whose families are “without news of them as a result of armed conflict[,] [] internal violence,” or other events that cause their whereabouts not to be known.³³⁹

Problematically, the term missing children has often been used to refer to only “unaccompanied children” or “separated children” as a result of armed conflict.³⁴⁰ In 2019, the UN Security Council adopted a resolution on Persons Reported Missing during Armed Conflict and stressed the importance of parties to armed conflict dealing with “cases of children reported missing as a result of armed conflict, and to take appropriate measures to search for and identify those children.”³⁴¹ Hence, the term “missing” here is being used not to define a crime but rather to refer to the case when a person’s whereabouts are unknown in the context of armed conflict.³⁴² The problem is that states often hide behind armed conflict in order not to respond to the acts of enforced disappearance they have committed.³⁴³ In the context of armed conflict, enforced disappearances can be part of a policy of “ethnic cleansing,” genocide, war crimes, or crimes against humanity.³⁴⁴ At the end of hostilities, the issue of missing persons is sometimes included in peace agreements.³⁴⁵ Thus, “the issue of missing persons may

336. *Id.*

337. *Id.* at 59.

338. Sophie Martin, *The Missing*, 84 REVUE INTERNATIONALE DE LA CROIX-ROUGE/INT’L REV. RED CROSS 723, 723 (2002).

339. *Id.* at 724.

340. Greene, Karen Shalev, and Federica Toscano. “Summit report: best practices and key challenges on interagency cooperation to safeguard unaccompanied children from going missing.” (2016) 19.

341. S.C. Res. 827, ¶ 4 (May 25, 1993).

342. Jeremy Sarkin, *The Need to Deal with All Missing Persons Including Those Missing as a Result of Armed Conflict, Disasters, Migration, Human Trafficking, and Human Rights Violations (Including Enforced Disappearances) in International and Domestic Law and Processes*, 8 INTER-AM. EUR. HUM. RTS. J. 112, 115, 128 (2016).

343. See Jeremy Sarkin et al., *Bosnia and Herzegovina: Missing Persons from the Armed Conflicts of the 1990s: A Stocktaking*, INT’L COMM’N ON MISSING PERSONS 8 (2014), https://www.icmp.int/wp-content/uploads/2014/12/StocktakingReport_ENG_web.pdf.

344. See, e.g., *id.* at 22.

345. For example, the 1995 Dayton Peace Accords, Annex 6 of which contains an Agreement on Human Rights between the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, and the Republic of Srpska. See Jeremy Sarkin et al., *Bosnia and Herzegovina: Missing Persons from the Armed Conflicts of the 1990s: A Stocktaking*, INT’L COMM’N ON MISSING PERSONS 28–29, (2014), https://www.icmp.int/wp-content/uploads/2014/12/StocktakingReport_ENG_web.pdf.

become part of the struggle for control and power, a matter for political bargaining.”³⁴⁶ In addition, if people disappear as a result of the violation of IHL, IHRL, or domestic law, the perpetrators may have an interest in not providing information in order to avoid possible prosecution.

The issue of the enforced disappearance of children is dealt with marginally in IHL. There are provisions to protect civilians in general, specific provisions to protect children, and provisions that deal with them as missing persons. Therefore, this section analyzes IHL dealing with children, especially as it affects enforced disappearances. It also deals with matters concerning the missing so far as the ways that IHL deals with prevention and processes to search for them. This is done to determine the scope of the provisions. The problems in practice are then examined. Finally, solutions are proposed to improve the situation regarding enforced disappearances of children during conflict and to prevent and deal with the circumstances in which they disappeared.

A. The Law

1. The Geneva Conventions of 1949

The four Geneva Conventions of 1949 are the core instruments of IHL and contain a wide range of provisions to protect people who do not take part in hostilities (civilians, medical, and humanitarian personnel) and those who no longer participate in hostilities.³⁴⁷

The First and Second Geneva Conventions refer to the protection of wounded, sick, and shipwrecked soldiers during an armed conflict at land and sea.³⁴⁸ The Third Geneva Convention deals with prisoners of war.³⁴⁹ The most important and innovative is the Fourth Geneva Convention, which focuses extensively on the protection of the civilian population, for the first time in IHL.³⁵⁰

The protection of children is only touched on briefly in the Third Geneva Convention, which establishes that the detaining power will take into consideration the age in the treatment and labor of prisoners of war.³⁵¹ Thus, it is only in the Fourth Geneva Convention that we find several provisions

346. Int’l Comm. of the Red Cross, *The Missing: ICRC Progress Report*, at 12 (Aug. 2006).

347. Hans-Peter Gasser, Int’l Comm. of the Red Cross, *Extract from Int’l Humanitarian Law: Introduction* (Paul Haupt Berne ed., 1933), § 2 (Jan. 11, 1998).

348. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

349. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

350. Gasser, *supra* note 347.

351. Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 16, 49, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

enshrining the protection of children in international armed conflict.³⁵² As part of the civilian population, children are entitled to the general protection of civilians, such as the establishment of hospitals and safety zones, protection in the event of an evacuation, and consignment of medical supplies, food, and clothing.³⁵³

The Fourth Geneva Convention does not contain specific provisions on missing persons but protects children from enforced disappearance through the protection of the unity of the family.³⁵⁴ Therefore, when children are orphaned or separated from their families, Article 24 requires states to take the necessary measures to ensure that they are not abandoned and are identified by identity discs or other means.³⁵⁵ In the case of scattered families, the Fourth Geneva Convention establishes that states must facilitate family news to restore their links.³⁵⁶

Besides the provisions on child welfare and dispersed families contained in the Fourth Geneva Convention, it is also relevant to highlight Article 27, which refers to the treatment of the protected persons—such as children—in the territories of the parties to the conflict and occupied territories.³⁵⁷ This article establishes that the “[p]rotected persons are entitled, in all circumstances, to respect for . . . their family rights” and to be treated with humanity.³⁵⁸ This article constitutes the basis of all the other provisions of the Convention.³⁵⁹ Thus, this provision protects the family and home from arbitrary interference, and the respect for family rights requires “not only that family ties must be maintained, but further that they must be restored should they have been broken as a result of wartime events.”³⁶⁰ IHL also prohibits the occupying power from making any modification to the personal status of children.³⁶¹ In the event of changes in the status of persons deprived of liberty, such as births, they must be communicated to the official information bureau, which the parties must set up at the outbreak of hostilities or in the event of occupation.³⁶² Moreover, IHL provides that members of the same family, particularly parents and children, must be kept together in the same internment center and establishes measures to

352. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 14, 17, 23–24, 38, 50, 82, 89, 94, 132, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

353. *Id.* at art. 14, 17, 23–24, 50, 89.

354. *Id.* at art. 82.

355. *Id.* at art. 24.

356. *Id.* at art. 25–26.

357. *Id.* at art. 27.

358. *Id.*

359. Orna Ben-Naftali & Noam Zamir, *Whose ‘Conduct Unbecoming’? The Shooting of a Handcuffed, Blindfolded Palestinian Demonstrator*, 7 J. INT’L CRIM. JUST. 155, 163 (2009).

360. Int’l Comm. of the Red Cross, *Commentary of 1958 on Art. 27 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 202–03 (1949).

361. Geneva Convention (IV), *supra* note 352, at art. 50.

362. *Id.* at art. 136.

ensure food, hygiene, medical attention, education, and recreation for children.³⁶³

The grave breaches of the Fourth Geneva Convention include acts against protected persons, such as “wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement,” among others.³⁶⁴ Children, as protected persons, can be considered to be included in the grave breaches, despite there being no specific reference to them as victims.³⁶⁵

Regarding non-international armed conflicts, Common Article 3 of the four Geneva Conventions protects children as “[p]ersons taking no active part in the hostilities,” thereby providing for the general protection of the civilian population.³⁶⁶ This provision prohibits acts of “violence to life . . . mutilation, cruel treatment, and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment;” however, no specific reference to children or to the missing is made.³⁶⁷

2. *Additional Protocols of 1977*

Children, as part of the civilian population, are not permitted to be the object of a direct attack during armed conflict, according to the principle of distinction between civilians and combatants.³⁶⁸ This principle has been generally accepted as a rule of law since the Hague Conventions of 1899 and 1907.³⁶⁹ Furthermore, Additional Protocol I grants newborn babies the same protection as that offered to the wounded and sick³⁷⁰ and establishes that families interned or detained must be held in the same place to keep the family unit together.³⁷¹

In 1974, the UN General Assembly recognized, for the first time, the rights of relatives to know the fate of missing persons in armed conflict as a basic human need and established that states had to take the necessary measures to guarantee

363. *Id.* at art. 24, 50, 82, 85, 89, 91, 94, 127. Although the protection is similar as the prisoners of war, the situation of internment of civilians is of a different nature because they are detained as a mean of precaution, not because they were part in the hostilities. *Cf.* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

364. Geneva Convention (IV), *supra* note 352, at art. 147.

365. *See id.* at art. 146.

366. *Id.* at art. 3, ¶ 1.

367. *Id.*

368. Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, 51 ¶¶ 1–2, June 8, 1977, 1125 U.N.T.S. 3. *See* Fikire Tinsae Birhane, *Targeting of Children in Non-International Armed Conflicts*, J. CONFLICT AND SEC. L. 377 (2021).

369. Sandra Singer, *The Protection of Children During Armed Conflict Situations*, 26 INT’L REV. OF THE RED CROSS 133, 142 (1986).

370. Protocol I, *supra* note 368, at art. 8.

371. *Id.* at art. 75 ¶ 5.

this right to the greatest extent possible.³⁷² Thus, while the Geneva Convention provisions refer to dispersed families and the importance of re-establishing contact, Additional Protocol I goes a step further by recognizing the rights of families to know the fate of their relatives and by establishing that parties to the conflict must search for the missing persons and share relevant information about their fate with the aim of reuniting families.³⁷³

Additional Protocol I expands the special protection of all children in territories of states involved in a conflict by including some provisions from the Fourth Geneva Convention, which applied to occupied territories.³⁷⁴ Specifically, Article 77 is a breakthrough because it establishes the prohibition of direct participation of children in armed conflict and child recruitment in international armed conflict.³⁷⁵ In addition, this provision establishes the protection of children from sexual assault and requires that parties in conflict provide care and aid to them.³⁷⁶ In the case of evacuation, Additional Protocol I has a specific provision, which states that children can only be temporarily evacuated for health or safety reasons, with the written consent of their parents or legal guardians.³⁷⁷

Additional Protocol I expanded the grave breaches of the Geneva Conventions in the context of international armed conflict “by adding new grave breaches without undermining the pre-existing offences.”³⁷⁸ For instance, Additional Protocol I proscribes directly targeting the civilian population or launching an indiscriminate attack affecting the civilian population with the knowledge that such an attack will cause excessive loss of life or injury to civilians are prohibited acts.³⁷⁹ Furthermore, the Additional Protocol refers to “the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” as being grave breaches.³⁸⁰ However, the Additional Protocol does not include a specific reference to children or enforced disappearance as a grave breach of IHL.³⁸¹

Furthermore, in the context of non-international armed conflict, children have fundamental guarantees of protection and respect for their person in all

372. G.A. Res. 3220, ¶¶ 2, 4 (Nov. 6, 1974).

373. Protocol I, *supra* note 368, at arts. 32, 33, 74.

374. *Id.* at art. 77; *see also* Int’l Comm. of the Red Cross, *Commentary of 1987 on Art. 77 of the Additional Protocols to the Geneva Conventions of 12 August 12 1949, and Relating to the Protection of International Armed Conflicts (Protocol I)*, 8 June 1977, 898–99 (1987).

375. Protocol I, *supra* note 368, at art. 77, ¶ 2.

376. *Id.* at art. 77.

377. *Id.* at art. 78, ¶ 1.

378. Yves Sandoz, *The History of the Grave Breaches Regime* 7 J. INT’L CRIM. JUST. 657, 676 (2009).

379. Protocol I, *supra* note 368, at art. 85, ¶ 3.

380. *Id.* at art. 85, ¶ 4.

381. *See generally id.*

circumstances as part of the civilian population. To this end, Additional Protocol II expands the protection of Common Article 3 of the Geneva Conventions by establishing in Article 4(3) that children must be provided with care and aid and must receive an education.³⁸² Regarding the missing, the same Article 4(3)(b) establishes that states must facilitate the reunification of temporarily separated families.³⁸³ Finally, Additional Protocol II also advances the protection of children in internal armed conflicts by prohibiting, in Article 4(3)(d), the recruitment of children under fifteen years old or their forced participation in hostilities.³⁸⁴ Despite its many advances in the protection of children in non-international armed conflict, Additional Protocol II ultimately did not include any war crimes because states were still unwilling to recognize universal jurisdiction for the repression of crimes committed in such contexts.³⁸⁵

3. Customary IHL

Customary IHL applies in both international and non-international armed conflicts. This is particularly relevant because, in practice, states have gone beyond treaty law and expanded the rules applicable to international armed conflict to contexts of non-international character, thereby filling an important gap.³⁸⁶ Although IHL treaties do not refer expressly to enforced disappearance as such, it is considered that this crime threatens to violate an array of customary IHL rules, such as the prohibition of arbitrary deprivation of liberty, the prohibition of torture and other cruel or inhuman treatment, and the prohibition of murder.³⁸⁷

Customary IHL grants special respect and protection to children affected by armed conflict.³⁸⁸ These customary rules on the protection of children include, among others: “protection against all forms of sexual violence; separation from adults while deprived of liberty, unless they are members of the same family; access to education, food and health care; evacuation from areas of combat for

382. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4, ¶ 3, Dec. 7, 1977, 16 I.L.M. 1442. See Susetyo, Heru, *International Humanitarian Law in Internal Armed Conflict: Implementing Common Article 3 and Additional Protocol II to the Geneva Conventions to Internal and Horizontal Conflicts in Indonesia*, 3 J. HUKUM HUMANITER 751, 759–60 (2019) (Indon.). See also Sandesh Sivakumaran, *Armed Conflict-Related Detention of Particularly Vulnerable Persons*, 94 INT’L L. STUD. 39, 51 (2018).

383. Protocol II, *supra* note 382, at art. 4, ¶ 3.

384. *Id.* at art. 4, ¶ 3.

385. Yves Sandoz, *The History of the Grave Breaches Regime* 7 J. INT’L CRIM. JUST. 657, 672–73 (2009).

386. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES, at xxxv (2005).

387. *Id.* at 481.

388. *Id.* at 479–80.

safety reasons; [and] reunification of unaccompanied children with their families.”³⁸⁹

Additionally, customary IHL refers to persons missing as a result of armed conflict and establishes that the parties “must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.”³⁹⁰ Moreover, the respect of family life is also a customary rule applicable to both international and non-international armed conflict, which implies “the maintenance of family unity, contact between family members and the provision of information on the whereabouts of family members.”³⁹¹

Given that it entails multiple violations of IHL rules protecting the civilian population and children and constitutes violations of the duty of the parties to the conflict to respect family life and to account for persons missing as a result of armed conflict, enforced disappearance can be considered prohibited under customary IHL, both in international and non-international armed conflict.³⁹² This prohibition entails a duty to investigate cases of enforced disappearance, the obligation to prevent it through the registration of persons deprived of liberty, and visits undertaken by humanitarian organizations such as the ICRC.³⁹³

B. Problems and Solutions

1. The Geneva Conventions of 1949

While it is important to highlight that the four Geneva Conventions are universally ratified, which reflects the broad state endorsement of these standards of protection of children in times of armed conflict, the reality is that massive violations of IHL are being committed all around the world.³⁹⁴

There are important gaps when dealing with enforced disappearances of children in this context. Despite the seriousness of the precedent of the Lebensborn children during the Second World War and the systematic abduction of children in Latin America during the armed conflicts in the 1960s, the issue of disappearances “seems to have been ignored” in the development of the rules

389. *Id.* at 481 (internal citations omitted).

390. *Id.* at 421.

391. *Id.* at 379–82.

392. *Id.* at 340.

393. Gloria Gaggioli, *International Humanitarian Law: The Legal Framework for Humanitarian Forensic Action*, 282 *FORENSIC SCI. INT’L* 184, 191 (2018).

394. Jeremy Sarkin, *The Need to Reform the Political Role of the African Union in Promoting Democracy and Human Rights in Domestic States: Making States More Accountable and Less Able to Avoid Scrutiny at the United Nations and at the African Union, using Swaziland to Spotlight the Issues*, 26 *AFRICAN J. INT’L AND COMPAR. L.* 84, 84–86 (2018).

of IHL.³⁹⁵ The Geneva Conventions remain silent on abduction and enforced disappearance of children, resulting in the fundamental flaw of IHL in regard to the protection of children in armed conflict.³⁹⁶ The primary focus of the Fourth Geneva Convention is the protection of persons in the hands of a party to an international armed conflict or an occupying power of which they are not nationals, excluding the state's own nationals from the definition of protected persons to circumvent interfering in internal affairs of the state.³⁹⁷ This "reflects the traditional State-centric, reciprocity-based approach of the laws of war."³⁹⁸ Unfortunately, in cases of enforced disappearance of children in armed conflict, the question of nationality has been irrelevant, as both nationals and non-nationals of a party to the conflict can become victims. More attention should thus be paid to the protection of children in all circumstances, regardless of their nationality. Although the Additional Protocols expanded the protection of children beyond occupied territories, IHL should be more robust in the protection of children in order to prevent violations against them in armed conflicts, such as enforced disappearances, especially considering that many of these violations are committed by non-state armed groups.

When "children [are] separated from their parents . . . in the context of armed conflicts, [they] are in a situation of special vulnerability."³⁹⁹ "[T]heir appropriation, with different objectives, is often considered a normal consequence of the armed conflict or" as something intrinsic to it.⁴⁰⁰ States should guarantee children's protection and survival, as well as adopt measures aimed at family reunification.⁴⁰¹ As mentioned above, Article 24 of the Fourth Geneva Convention establishes that children under twelve years should wear "identity discs" or any other means of identification.⁴⁰² Although this can eventually help families reunite in the context of armed conflict, this type of measure seems ineffective in cases of enforced disappearance, where the perpetrators intentionally falsify the identity of children, seeking to make it impossible for wrongfully removed children to find and return to their families of origin.⁴⁰³ This was the case of children kidnapped for "Germanisation" during the Second World War, who, after the conflict ended, did not have any

395. NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 243 (2d ed. 1999).

396. See generally, INT'L COMM. OF THE RED CROSS, COMMENTARY: (IV) GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean S. Pictet ed., 1958) (omitting any discussion of children who have been disappeared during conflict).

397. *Id.*

398. Theodor Meron, *The Humanization of International Law*, in 3 THE HAGUE ACADEMY OF INTERNATIONAL LAW MONOGRAPHS 34 (2006).

399. *Contreras v. El Salvador*, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R.(ser. C) No. 232, ¶ 86 (Aug. 31, 2011).

400. *Id.*

401. *Id.*

402. INT'L COMM. OF THE RED CROSS, COMMENTARY, *supra* note 396, at 184.

403. *Id.* at 185–86.

documentation and most of the time did not remember their origins, such as their nationality, religion, or language.⁴⁰⁴ The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has recommended that states take “all necessary legislative, administrative, and other measures to ensure that children are registered immediately after birth and that they and their parents or guardians have prompt and free access to their birth certificates.”⁴⁰⁵ States should be encouraged to take these types of measures, which aim at preventing the falsification of children’s identity and their recruitment under the age permitted by international law.

Moreover, the restoration of kidnapped children to their families of origin after the end of armed conflict is often difficult and a subject of political controversy, as happened with the return of the “Germanized” children during the Second World War, as a result of which children’s fates became a battleground in the early Cold War.⁴⁰⁶ In these situations, the return of children to their biological families raises the question of what is in the best interest of the child. From an ethical perspective, leaving these children in the hands of German families or institutions could be perceived as condoning the criminal policies of the Nazis.⁴⁰⁷ However, the return of these children to their families of origin is often an arduous task and could also face opposition from the children themselves, besides political considerations.

IHL is problematic because it deals with the “missing,” which refers to persons “whose families are without news of them” as a result of armed conflict or internal violence.⁴⁰⁸ While the rules and mechanisms established by IHL can be effective in cases where there is no intentional concealment of the whereabouts of the disappeared persons, they are not adequate in cases of enforced disappearance of children.⁴⁰⁹ The provisions of IHL to protect separated children during armed conflict are limited and insufficient to prevent the systematic wrongful removal of children. The focus should not only be on missing children or “persons unaccounted for” in times of armed conflict but should also consider cases targeting children, such as enforced disappearances. This implies not only adopting a humanitarian approach to find the disappeared children but also promoting justice by encouraging states to prosecute the perpetrators of this crime to prevent future repetition. Children in armed conflict should be regarded as “bridges of peace or zones of peace,” and the protection

404. Dan Stone, *The Politics of Removing Children: The International Tracing Service’s German Foster Homes Investigation of 1948*, 30 CONTEMP. EUR. HIST. 76, 80 (2021).

405. *Hansungule v. Uganda*, Communication 1/2005, Decision, ¶ 81 (Afr. Comm. of Experts on the Rts. and Welfare of the Child Apr. 15, 2005).

406. Stone, *supra* note 404, at 78–79.

407. *Id.* at 80.

408. Int’l Comm. Red Cross, *The Missing and Their Families: Documents of Reference*, 4478/ICRC/A4/EN, at 6 (Feb. 2004).

409. See U.N. ESCOR, 40th Sess., 19th mtg., at 12, U.N. Doc. E/CN.4/Sub.2/1988/19 (Aug. 22, 1988).

of children should be understood as a common concern of the parties to a conflict, regardless of political differences.⁴¹⁰ Unfortunately, in practice, the military strategies of parties to armed conflict often prevail over the protection of children.

Furthermore, the Geneva Conventions do not proscribe enforced disappearance of children as a war crime. Article 147 of the Fourth Geneva Convention provides that “inhuman treatment” against protected persons constitutes a grave breach of the Convention.⁴¹¹ This provision can be interpreted as not being limited to only physical injury, but as also including measures “which might cut the civilian internees off completely from the outside world and in particular from their families.”⁴¹² Considering that children’s ties with their families of origin are completely broken in cases of enforced disappearance, these cases should be interpreted by international and domestic courts as amounting to grave breaches of IHL. This would be in line with the interpretation given by international criminal courts, which have considered enforced disappearances as other inhuman acts.⁴¹³

2. *Additional Protocols of 1977*

One of the major developments of the adoption of the Additional Protocols of 1977 is the advancement in the protection of children in armed conflict and the incorporation for the first time of the prohibition on recruiting and enlisting children both in international and non-international armed conflicts.⁴¹⁴ While this is an important step for the protection of children, much more attention has been paid to child soldiers compared to other violations that children face during armed conflicts.⁴¹⁵ In the context of armed conflict, the enforced disappearance of children is combined not only with recruitment but also with other forms of exploitation, such as “participation in hostilities, sexual exploitation or abuse, forced labour, hostage-taking and indoctrination.”⁴¹⁶ The Worst Forms of Child Labour Convention, adopted by the International Labor Organization in 1999, provides that “forced or compulsory recruitment of children for use in armed

410. Geraldine Van Bueren, *The International Legal Protection of Children in Armed Conflicts*, 43 INT’L. & COMP. L. Q. 809, 818 (1994).

411. Int’l Comm. of the Red Cross, Commentary, *supra* note 396, at 596–98.

412. *Id.* at 598.

413. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 566 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) (considering enforced disappearances in the context of crimes against humanity). *See also* discussion *infra* Part VI.

414. Van Bueren, *supra* note 410, at 813–14.

415. *Id.* at 812–13.

416. Special Representative of the U.N. Secretary-General for Children and Armed Conflict, Practical Guidance for Mediators to Protect Children in Situations of Armed Conflict, at 25 (Feb. 2020), <https://childrenandarmedconflict.un.org/wp-content/uploads/2020/10/Practical-guidance-for-mediators-to-protect-children-in-situations-of-armed-conflict.pdf>.

conflict” is a practice similar to slavery.⁴¹⁷ The fact of equating the recruitment of children with forms of slavery is relevant to the extent that in international law, the prohibition of slavery is a norm of *jus cogens*.⁴¹⁸

The UN Secretary-General has identified six grave violations against children in armed conflict; however, enforced disappearance is only included under the broader category of child abductions.⁴¹⁹ Therefore, in the Secretary-General’s annual reports on children affected by armed conflict, the focus on systematic enforced disappearances is deemphasized.⁴²⁰ The Secretary-General has recognized the inability of IHL and IHRL to protect children and “the lack of capacity and of measures to mitigate harm.”⁴²¹ While such UN initiatives as the inclusion of the protection of children in mediation, peace process, and peacekeeping mandates are good ways of improving this protection, these initiatives should also address enforced disappearances of children to prevent this practice, as well as other serious violations that occur in times of armed conflict. Moreover, the action plans signed between the UN and the parties to conflicts to address and prevent grave violations against children should go beyond child recruitment and deal with enforced disappearances too.⁴²²

Different measures to prevent people going missing in the context of armed conflict may also be applicable to preventing enforced disappearances, such as:

[E]nacting national legislation, ensuring detainee registration, providing appropriate training for armed forces, producing and providing proper means of identification, including for members of armed forces, the establishment of national information bureaus upon the outbreak of an armed conflict, grave registration services and registers of deaths and ensuring accountability as appropriate in cases of missing persons.⁴²³

Furthermore, the UN General Assembly has dealt with the issue of “missing persons” on various occasions.⁴²⁴ Although not referring expressly to enforced

417. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, art. 3, June 17, 1999, 2133 U.N.S.T. 161.

418. Anaise Muzima, *Reimagining the Scope of Children’s Legal Protection During Armed Conflicts Under International Humanitarian Law and International Criminal Law*, 8 W. J. L. STUD., 1, 6 (2018).

419. Special Representative of the U.N. Secretary-General for Children and Armed Conflict, Practical Guidance for Mediators to Protect Children in Situations of Armed Conflict, at 23–25 (Feb. 2020).

420. Action Plans, U.N. SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, <https://childrenandarmedconflict.un.org/tools-for-action/action-plans/> (last visited Aug. 25, 2021).

421. U.N. Secretary-General, *Children and Armed Conflict*, ¶ 7, U.N. Doc. A/74/845-S/2020/525 (June 9, 2020).

422. See Action Plans, U.N. SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, <https://childrenandarmedconflict.un.org/tools-for-action/action-plans/>.

423. S.C. Res. 2474, at 2 (June 11, 2019).

424. G.A. Res. 73/178, Missing Persons (Dec. 17, 2018); U.N. Secretary-General, *Missing Persons*, U.N. Doc. A/63/299 (Aug. 18, 2008).

disappearances, the General Assembly has established that states must ensure a “prompt, impartial and effective investigation[] and prosecut[e] [] offences linked to missing persons,” such as enforced disappearances, to achieve full accountability.⁴²⁵ In this sense, the violation of the families’ “right to know” the fate of their disappeared kin contained in Article 32 of Additional Protocol I may be considered to fall within the prohibition of torture or other ill-treatment, which constitutes a grave breach of IHL.⁴²⁶

3. Customary IHL

Although enforced disappearances are proscribed by customary IHL, the problem of effective implementation persists. Therefore, different international organizations and bodies have adopted policies and guides to prevent and address violations against children in armed conflict. For instance, different regional mechanisms, such as the EU⁴²⁷ and NATO⁴²⁸ have adopted a child protection policy. In 2005, the UN Security Council established a Monitoring and Reporting Mechanism on the grave violations committed against children in times of armed conflict.⁴²⁹ To improve compliance, the ACERWC carried out a Study on the Impact of Conflict and Crisis on Children in Africa⁴³⁰ and drafted a General Comment on Children and Armed Conflict.⁴³¹ Furthermore, the ACERWC has received individual complaints about violations against children in armed conflicts and has adopted different recommendations that address systematic violations.⁴³² For example, continued and safe access to education can help protect children from the impact of armed conflict.⁴³³ These efforts will address and prevent further violations, including enforced disappearances.

Still, the international community must find better ways to improve the implementation of protection measures and to guarantee accountability regarding IHL. The UN Special Representative of the Secretary-General on Violence against Children has identified three important indicators to measure

425. G.A. Res. 73/178, ¶ 2 (Dec. 17, 2018).

426. NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 243 (2d ed. 1999).

427. Guidelines on Children and Armed Conflict (EU) (2008).

428. N. Atlantic Treaty Org., *NATO and Children in Armed Conflict (Fact Sheet)*, (July 2016); N. Atlantic Treaty Org., *The Secretary General’s Annual Report*, 52 (2015).

429. S.C. Res. 1612, ¶¶ 2–4 (July 26, 2005).

430. Afr. Comm. of Experts on the Rts. and Welfare of the Child, *Continental Study on the Impact of Conflict and Crises on Children in Africa*, (Oct. 2016).

431. Afr. Comm. Experts on Rts. and Welfare of Child, *General Comment on Article 22 of the African Charter on the Rights and Welfare of the Child: Children in Situations of Conflict*, (Sept. 2020).

432. Benyam Dawit Mezmur, *Taking Measures Without Taking Measurements? An Insider’s Reflections on Monitoring the Implementation of the African Children’s Charter in a Changing Context of Armed Conflict*, 101 INT’L REV. RED CROSS 623, 626 (2019).

433. Rep. of the Special Representative of the U.N. Secretary-General on Violence Against Children, ¶¶ 8, 12, 106, 128 UN Doc. A/HRC/40/50 (Jan. 9, 2019).

progress on ending violence against children: the development by states of a comprehensive national plan to prevent and address violence; the adoption and implementation of domestic legislation to prohibit all forms of violence and guarantee the protection of children; and the gathering of data to detect risks and children left behind.⁴³⁴ However, it was not until 2015 that the Security Council requested the Secretary-General to include in the annual reports on children and armed conflict those parties to an armed conflict that engage in patterns of abduction of children.⁴³⁵ Since non-state actors are responsible in many cases for the recruitment of and other violations against children during armed conflict, the adoption of agreements between these armed groups and the UN is essential to promoting and guaranteeing the application of IHL rules and limiting the impact of violence against children.⁴³⁶ In order to be effective, these agreements must include a wider range of violations against children in times of armed conflict, such as enforced disappearance, to further advance the respect for and application of IHL by the parties to armed conflict.

As mentioned before, the enforced disappearance of children is not regulated as a separate war crime in treaty law despite its seriousness and systematic practice. The fact that enforced disappearance of children can be considered proscribed in customary IHL, both in international and non-international armed conflicts, fills the gap of the Geneva Conventions and the Additional Protocols, which remain silent on this issue. Still, there are few cases of enforced disappearances of children where courts apply customary IHL, the most important precedent being the *Lebensborn* case.⁴³⁷ In the subsequent Nuremberg proceedings held in 1947, the U.S. Military Tribunal convicted fourteen leading members of the SS for war crimes and crimes against humanity for the kidnapping of alien children in the *RuSHA Case (Main Race and Resettlement Office)*.⁴³⁸ The Nuremberg Military Tribunals concluded that enforced disappearance of children violated family rights under existing IHL.⁴³⁹ On the other hand, the IACtHR has referred to IHL (both to treaty law and

434. Rep. of the Special Representative of the U.N. Secretary-General on Violence Against Children, ¶ 142 UN Doc. A/HRC/40/50 (Jan. 9, 2019).

435. S.C. Res. 2225 (June 28, 2015).

436. Special Representative of the U.N. Secretary-General for Children and Armed Conflict, Practical Guidance for Mediators to Protect Children in Situations of Armed Conflict, at 31 (Feb. 2020). Sixty-two armed groups or armed forces, in fourteen countries, have been listed for one or more violations in the annexes of the Secretary-General's annual report. See *Children and Armed Conflict: Report of the Secretary-General*, U.N. GEN. ASSEMBLY SEC. COUNCIL 1, 39–43 (2019), https://www.un.org/ga/search/view_doc.asp?symbol=S/2019/509&Lang=E&Area=UNDOC.

437. See Sonja Grover, *The Lebensborn Children of Norway and the Silencing of their Voices by an International Court: An Analysis of the 2007 European Court of Human Rights Decision in Werner Hermann Thiermann and others v. Norway*, 5 INT'L J. OF INTERDISCIPLINARY SOC. SCI. 25, 34 (2010).

438. The *RuSHA Case*, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 Vol. 4, 599, 607 (1946-1949).

439. Brian Finucane, *Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War*, 35 YALE J. INT'L L. 171, 180 (2010).

customary rules) when confronting systematic enforced disappearances of children during the internal armed conflict in El Salvador.⁴⁴⁰ The Court took into account the rules of IHL that “aim[] at preserving the family unit and facilitating the search, identification and reunification of families dispersed as a result of armed conflict and, particularly, of unaccompanied and separated children.”⁴⁴¹ Considering the convergence and inter-relationship of IHL and IHRL, it is important to apply humanitarian law to reinforce the human rights protection of children in times of armed conflict.⁴⁴² This holistic approach should be used more often by international and domestic courts when dealing with enforced disappearances in the context of armed conflict.

VI. THE PROTECTION OF CHILDREN FROM ENFORCED DISAPPEARANCE IN INTERNATIONAL CRIMINAL LAW

ICL is part of international law and overlaps at times with IHRL and IHL, in addition to other parts of international law.⁴⁴³ This is important, as while IHRL and IHL often set out what is unlawful, these issues were not originally criminalized there, nor were there processes to prosecute such matters.⁴⁴⁴ Thus, no international prosecutions occurred between Nuremburg and the two ad hoc tribunals,⁴⁴⁵ as there was no ICL statute or mechanism to carry out prosecutions.⁴⁴⁶ The ICL builds on IHL and IHRL and sets out what constitutes international crimes, as well as all the procedural aspects relating to issues like how such crimes ought to be investigated, prosecuted, adjudicated, and sentenced, among other issues. Crucially, aspects of ICL are found in all types of treaties—be they from IHRL, IHL, or other branches of international law—as well as in international customary law.⁴⁴⁷ Many of those treaties are not usually specifically ICL treaties or in customary law specifically, but are rather

440. *Rochac Hernández v. El Salvador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 285, ¶¶ 109–10 (Oct. 14, 2014).

441. *Id.* at ¶ 110.

442. See Jeremy Sarkin, *The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and Their Application Since the Nineteenth Century*, 1 HUM. RTS. & INT’L LEGAL DISCOURSE 1 (2007).

443. See Diego Mejía-Lemos, *Custom in General International Law and International Criminal Law: A Survey of Selected Issues*, 20 INT’L CRIM. L. REV. 805, 821–22, 826–27 (2020).

444. See CONVERGENCES AND DIVERGENCES BETWEEN INTERNATIONAL HUMAN RIGHTS, INTERNATIONAL HUMANITARIAN AND INTERNATIONAL CRIMINAL LAW 1, 4 (Paul De Hert, Stefaan Smis & Mathias Holvoet, eds., 2018).

445. The UN established the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994 respectively.

446. Claire Nielsen, *From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law*, 14 AUCKLAND UNIV. L. REV. 81, 91 (2008).

447. Jeremy Sarkin, *The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and Their Application Since the Nineteenth Century*, 1 HUM. RTS. & INT’L LEGAL DISCOURSE 1, 5–7 (2007).

part of IHL (such as the Geneva Conventions and Additional Protocols, though in fact all Geneva and Hague laws) and IHRL.⁴⁴⁸ Therefore, practically speaking, ICL is really found in the statutes of various criminal tribunals, as will be discussed later.

There are a range of crimes that fall within what is viewed as ICL, but the number of crimes that fall within that rubric is contested.⁴⁴⁹ Regardless, there are several crimes that are viewed as core crimes; these include genocide, crimes against humanity, war crimes, and crimes against peace, partly because they have been codified in the Rome Statute.⁴⁵⁰ Another classification concerns international crimes that are viewed to be *jus cogens* in nature, that is crimes that have reached peremptory status and apply to all regardless of state consent.⁴⁵¹ In this regard, M. Cherif Bassiouni argues that *jus cogens* crimes are “aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture.”⁴⁵² However, in the inter-American human rights system, the IACtHR has found that enforced disappearances are *jus cogens*, and arguably, today, enforced disappearances have reached *jus cogens* status internationally.⁴⁵³

This section looks at how ICL affects enforced disappearances and children. It only focuses on genocide and crimes against humanity because these are the two main crimes that deal with the systematic disappearance of children. The section first touches on cases in which enforced disappearance of children may amount to genocide when it involves a forcible transfer of children from one group to another. The forcible transfer of children entails not only cultural but also physical and biological destruction of the group.⁴⁵⁴ The crime of genocide was first regarded as a category of crimes against humanity in the Statute of the International Military Tribunal of Nuremberg in 1945.⁴⁵⁵ It later attained autonomous status as a specific offense in 1948 with the adoption of the

448. Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 948 (2008).

449. Kevin Jon Heller, *What Is an International Crime: (A Revisionist History)*, 58 HARV. INT'L L. J. 353, 353–54 (2017).

450. Jeremy Sarkin & Juliana Almeida, *Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls*, 36 WISC. INT'L L. J. 518, 525 (2019).

451. M. Cherif Bassiouni, *International Crimes: “Jus Cogens” and “Obligatio Erga Omnes”*, 59 L. CONTEMP. PROBS. 63, 68 (1996).

452. M. Cherif Bassiouni, *International Crimes: “Jus Cogens” and “Obligatio Erga Omnes”*, 59 L. CONTEMP. PROBS. 63, 68 (1996); see also Jeremy Sarkin & Juliana Almeida, *Understanding the Activation of the Crime of Aggression at the International Criminal Court: Progress and Pitfalls*, 36 WISC. INT'L L. J. 518 (2019) (discussing the process to adopt the crime of aggression, the problems with the way it is defined, and when it may be applied in practice).

453. Jeremy Sarkin, *Why the Prohibition of Enforced Disappearance Has Attained Jus Cogens Status in International Law*, 81 NORDIC J. INT'L L. 537, 541 (2012).

454. Payam Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 62 MCGILL L. J. 243, 263 (2016).

455. ANTONIO CASSESE, INTERNATIONAL LAW 248 (2001).

Genocide Convention.⁴⁵⁶ Genocide, in terms of that Convention, now involves a range of acts of deprivation and prevention of life directed against groups, in which individuals are chosen for destruction only because they belong to these groups.⁴⁵⁷ The crime of genocide, as defined in the Convention of 1948,⁴⁵⁸ was later codified in the statutes of the ad hoc international criminal tribunals of the former Yugoslavia (ICTY) and Rwanda (ICTR)⁴⁵⁹ and in the Rome Statute in 1998.⁴⁶⁰

Furthermore, hybrid international criminal tribunals, such as the Special Panels for Serious Crimes in East Timor (SPSC),⁴⁶¹ the Extraordinary Chambers in the Courts of Cambodia (ECCC),⁴⁶² the Extraordinary African Chambers (EAC),⁴⁶³ and the Special Criminal Court for Central African Republic (SCC),⁴⁶⁴ have also incorporated genocide in their statutes.

As this article indicates, enforced disappearances of children are often instances of systematic practice. They may, in certain circumstances, amount to crimes against humanity if committed as part of a widespread or systematic attack directed against any civilian population.⁴⁶⁵ Crimes against humanity were conventionally recognized for the first time in codified form in the Statute of the International Military Tribunal,⁴⁶⁶ although the Statute did not specifically deal with enforced disappearances. The creation of the ICTY and ICTR led to the development of ICL and included crimes against humanity, but the breakthrough was the adoption of the Rome Statute of the ICC, which included enforced

456. ANTONIO CASSESE, *INTERNATIONAL LAW* 252 (2001).

457. Raphael Lemkin, *Genocide as a Crime Under International Law*, 41 AM. J. INT'L L. 145, 147 (1947).

458. G.A. Res. 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide, art. II (Dec. 9, 1948). This resolution is not an ICL instrument itself.

459. S.C. Res. 827 (May 25, 1993); S.C. Res. 955, annex, Statute of the International Tribunal for Rwanda, art. 2, ¶ 2 (Nov. 8, 1994).

460. Rome Statute of the International Criminal Court, art. 6, July 17, 1998, 2187 U.N.T.S. 90.

461. U.N. Transitional Administration in East Timor, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Doc. UTAET/REG/2000/15, § 4 (June 6, 2000).

462. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, Laws on the Establishment, art. 4 (Oct. 27, 2004).

463. Agreement on the Establishment of the Extraordinary African Chambers Within the Courts of Senegal Between the Government of the Republic of Senegal and the African Union, 52 I.L.M. 1024, 1028–29 (2013).

464. Cent. Afr. Rep. Penal Code, art. 152.

465. Jeremy Sarkin & Grażyna Baranowska, *Why Enforced Disappearances are Perpetrated Against Groups as State Policy: Overlaps and Interconnections Between Disappearances and Genocide*, 2 CATÓLICA L. REV. 11, 15 (2018).

466. Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787, 789 (1998).

disappearances as a crime against humanity for the first time.⁴⁶⁷ A conspicuous number of statutes of hybrid international criminal tribunals followed the path of the Rome Statute and included the crime of enforced disappearances as a crime against humanity.⁴⁶⁸ This is the case of the SPSC, EAC, SCC, and Kosovo Specialist Chambers (KSC).⁴⁶⁹

Even though the crime of enforced disappearance as a crime against humanity is recognized in ICL, there is no child-specific crime of enforced disappearance as a crime against humanity. The lack of this crime is an important gap in the protection of children. Systematic, enforced disappearances of children may amount to war crimes, genocide, and crimes against humanity embodied in different ICL instruments. However, for the purpose of this contribution, the focus will be on the crime of genocide and crimes against humanity contained in the Rome Statute, as it reflects customary law and has been widely accepted by the international community.

A. Enforced Disappearance of Children as Genocide by Forcibly Transferring Children from One Group to Another

1. The Law

Genocide is defined in the 1948 Convention as committing one of several acts “with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.”⁴⁷⁰ These acts include:

- (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births

467. See Jeremy Sarkin, *The Role of the International Criminal Court (ICC) in Reducing Massive Human Rights Violations Such as Enforced Disappearances in Africa: Towards Developing Transitional Justice Strategies*, 11 *STUD. ETHNICITY AND NATIONALISM* 130, 133 (2011).

468. See, e.g., U.N. Transitional Administration in East Timor, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Doc. UTAET/REG/2000/15, § 5 (June 6, 2000); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, Laws on the Establishment, art. 5 (Oct. 27, 2004); Agreement on the Establishment of the Extraordinary African Chambers Within the Courts of Senegal Between the Government of the Republic of Senegal and the African Union, 52 *I.L.M.* 1024, 1029 (2013).

469. U.N. Transitional Administration in East Timor, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Doc. UTAET/REG/2000/15, § 5 (June 6, 2000); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, Laws on the Establishment, art. 4 (Oct. 27, 2004); Agreement on the Establishment of the Extraordinary African Chambers Within the Courts of Senegal Between the Government of the Republic of Senegal and the African Union, 52 *I.L.M.* 1024, 1029 (2013); Law on Specialist Chambers and Specialist Prosecutor’s Office, Law No. 05/L-053, art. 13 (Kos.).

470. G.A. Res. 260 (III) A, art. 2 (Dec. 9, 1948).

within the group; (e) Forcibly transferring children of the group to another group.⁴⁷¹

The crime of genocide, as defined in the 1948 Convention, is embodied verbatim in the statutes of the ICTY and ICTR⁴⁷² and the Rome Statute of the ICC.⁴⁷³ Moreover, the statutes of the hybrid international criminal courts of Timor-Leste, Cambodia, Senegal, and the Central African Republic also include the crime of genocide.⁴⁷⁴ Thus, the prohibition of genocide is part of international customary law and is a norm of *jus cogens*.⁴⁷⁵

One of the five acts of the crime of genocide is “[f]orcibly transferring children of the group to another group,” when “committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”⁴⁷⁶ The main aim of “[t]his provision is to prevent children from being torn from their group, and thus, estranged from” their cultural identities, such as their language, traditions, and culture, as well as putting in danger the existence of the group of origin.⁴⁷⁷ The term “forcibly” may include “threats or trauma which [may] lead to the forcible transfer of children from one group to another.”⁴⁷⁸ To constitute an act of genocide, the wrongful removal of one child from the group to which he or she belongs to is enough; it is not necessary to transfer children to another group through adoption, for example.⁴⁷⁹ The inclusion of the act of “forcible transfer of children to another human group”—commonly understood as “cultural genocide”—was the subject of strong debate during the negotiations

471. G.A. Res. 260 (III) A, art. 2 (Dec. 9, 1948).

472. S.C. Res. 827, (May 25, 1993); S.C. Res. 955, annex, Statute of the International Tribunal for Rwanda, art. 2, ¶ 2 (Nov. 8, 1994).

473. Rome Statute of the International Criminal Court, art. 6, Jul. 17, 1998, 2187 U.N.T.S. 90.

474. U.N. Transitional Administration in East Timor On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Doc. UTAET/REG/2000/15, § 4 (June 6, 2000); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, NS/RKM/1004/006, Laws on the Establishment, art. 4, (Oct. 27, 2004); Agreement on the Establishment of the Extraordinary African Chambers Within the Courts of Senegal Between the Government of the Republic of Senegal and the African Union, 52 I.L.M. 1024, 1028–29(2012); Cent. Afr. Rep. Penal Code, art. 152.

475. Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L. J. 2259, 2261–62 (1997).

476. Rome Statute of the International Criminal Court, art. 6, Jul. 17, 1998, 2187 U.N.T.S. 90.

477. GERHARD WERLE & FLORIAN JESSBERGER, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 307 (3d ed. 2014).

478. Prosecutor v. Akayesu, Case No. ICTR-94-4-T, Judgment, ¶ 509 (Int'l Crim. Trib. For Rwanda Sept. 2, 1998); see also INT'L CRIM. CT., *ELEMENTS OF CRIMES* 6 n.12 (2011) (“The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.”).

479. Claus KREß, *The Crime of Genocide Under International Law*, 6 INT'L CRIM. L. REV. 461, 484 (2006) (recognizing that the forcible transfer of a child between groups “may be achieved by confining the child to a location outside the realm of the group from which it comes”).

of the Genocide Convention.⁴⁸⁰ In the end, the prohibition of “cultural genocide” was disregarded, but the forcible transfer of children was kept in the definition of the Genocide Convention.⁴⁸¹ Intersectionality between children and ethnicity led to the inclusion of the forcible transfer of children in the 2007 UN Declaration on Indigenous Peoples’ Rights.⁴⁸²

2. Problems

The limitations of the legal definition of genocide meant that cases of systematic enforced disappearance of children were considered by the international and domestic courts as crimes against humanity and war crimes but not as acts of genocide.⁴⁸³ The definition of genocide has not changed since its adoption in the 1948 Genocide Convention, despite being deeply flawed in that it omits a variety of different groups as potential targets.⁴⁸⁴ Moreover, the intent requirement (*dolus specialis*) has shown itself “to be a significant obstacle . . . in pursuing claims of genocide in general,” by “requiring evidence of a clear purpose on the part of the perpetrator, rather than mere knowledge of the likely consequences.”⁴⁸⁵ In addition, when courts deal with the forcible transfer of the population, they tend to group women, children, and the elderly together without considering violations that specifically affect children.⁴⁸⁶ It is important to mention that the goals of the removal of children are different from the forcible movement of a population. The latter is often related to ethnic cleansing, in which the destruction of the group can be a consequence but is not necessarily the initial aim.⁴⁸⁷

One of the problems that arise is how long the transfer of children from one group to another must last for it to constitute an act of genocide. Some authors argue that the transfer of children must be permanent,⁴⁸⁸ while others consider

480. 1 ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 309–10 (Dinah L. Shelton et al. eds., 2005).

481. Payam Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 62 MCGILL L. J. 243, 261 (2016).

482. G.A. Res. 61/295, art. 7 (Sept. 13, 2007).

483. See, e.g., The RuSHA Case, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 Vol. 4, 599, 609–18 (1946–1949).

484. Colin Tatz, *Genocide in Australia*, 1 J. GENOCIDE RSCH. 315, 316 (1999).

485. Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT’L L. 213, 239 (2003).

486. See, e.g., Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment, ¶ 1 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001) (placing “women, children and elderly people” into a group for analyzing the claims brought against Krstic, which the court continued to do throughout the rest of the judgment without analyzing the children’s claims individually).

487. Isabel Heinemann, “*Until the Last Drop of Good Blood*”: The Kidnapping of “Racially Valuable” Children and Nazi Racial Policy in Occupied Eastern Europe, in GENOCIDE AND SETTLER SOCIETY: FRONTIER VIOLENCE AND STOLEN INDIGENOUS CHILDREN IN AUSTRALIAN HISTORY 244, 258 (A. Dirk Moses ed., Andrew H. Beattie trans., 2004).

488. GERHARD WERLE & FLORIAN JESSBERGER, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 307 (3rd ed. 2014).

this interpretation too restrictive and advocate for taking into consideration the perpetrator's intent to destroy the group by separating its children, regardless of the length of time.⁴⁸⁹ However, Payam Akhavan argues that the permanent separation of children from their families amounts to biological genocide, while temporary or prolonged separation of children constitutes cultural genocide, which would not fit the legal definition of genocide.⁴⁹⁰

A further problem is that genocide is often associated with mass state violence and the physical and biological destruction of a protected group.⁴⁹¹ However, the ICTY has interpreted the element of "destruction" as "not limited to physical or biological destruction of the group's members" by including "transferring children out of the group (or the part) or by severing the bonds among its members."⁴⁹² Yet genocide can be accomplished without killing a single individual; forcible child transfer is one such "physical act that often operates to destroy the group culturally."⁴⁹³ Still, the question of child transfer has not received much attention among genocide scholars⁴⁹⁴ and remains largely unstudied.⁴⁹⁵ The fate of children is often included within the group of victims, but it is not necessarily "treated as a separate and distinct subject of study."⁴⁹⁶

3. Solutions

The forcible transfer of children is often politically motivated and, therefore, falls outside the four protected groups under the definition of genocide. However, some argue that "political groups," besides others, should be considered as falling within the crime of genocide.⁴⁹⁷ Others view that children "as such" should be considered a protected group within the definition of genocide since they belong to "a stable and permanent group."⁴⁹⁸ This could

489. Kurt Mundorff, *Other Peoples' Children: A Textual and Contextual Interpretation of the Genocide Convention, Article 2(e)*, 50 HARV. INT'L L. J. 61, 91 (2009).

490. Payam Akhavan, *Cultural Genocide: Legal Label or Mourning Metaphor?*, 62 MCGILL L. J. 243, 263 (2016).

491. Robert Manne, *Aboriginal Child Removal and the Question of Genocide, 1900–1940*, in GENOCIDE AND SETTLER SOCIETY: FRONTIER VIOLENCE AND STOLEN INDIGENOUS CHILDREN IN AUSTRALIAN HISTORY 217, 238 (A. Dirk Moses ed., 2004).

492. Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgment ¶ 854 (Int'l Crim. Trib. For the Former Yugoslavia Sept. 27, 2006).

493. Mundorff, *supra* note 489, at 117.

494. Ruth Amir, *Killing Them Softly: Forcible Transfers of Indigenous Children*, 9 GENOCIDE STUD. AND PREVENTION: AN INT'L J. 41, 41 (2015).

495. Keith David Watenpugh, *The League of Nations' Rescue of Armenian Genocide Survivors and the Making of Modern Humanitarianism, 1920–1927*, 115 AM. HIST. REV. 1315, 1325 (2010).

496. Vahakn N. Dadrian, *Children as Victims of Genocide: The Armenian Case*, 5 J. GENOCIDE RSCH. 421, 421 (2003).

497. Beth Van Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L. J. 2259, 2261 (1997).

498. Jeffery R. Ray, *Children, Armed Conflict, and Genocide: Applying the Law of Genocide to the Recruitment and Use of Children in Armed Conflict*, 19 BARRY L. REV. 335, 349, 360 (2014).

not only contribute to ending the perpetrators' impunity of this crime, but also have a deterrent effect and prevent future violations. While a change of the legal definition of genocide in conventional international law is not expected, nothing prevents the passing of more protective domestic law or the possibility of the courts giving a wide interpretation of protected groups in relation to the crime of genocide by applying customary law.⁴⁹⁹

Contrary to common belief, the forcible transfer of children is often accompanied by killings of children and the members of the group to which they belong, because the intention of the perpetrators is to destroy the group, whether physically, biologically, or culturally. The UN Office on Genocide Prevention has identified the "[d]evelopment of policies [that] . . . [provide for] the separation or forcible transfer of children belonging to protected groups," as an early warning indicator of "an intent to destroy in whole or in part a protected group."⁵⁰⁰ It is also crucial that courts dealing with a situation of the systematic transfer of a population focus on children to determine whether they were forcibly removed from their group to another group, therefore amounting to genocide. Although the forced separation of children from their families could be initially temporary, it may ultimately last many years or become permanent.⁵⁰¹ Therefore, the courts should not consider the duration of the forcible removal of children as a critical factor to determine the act of genocide.

B. Enforced Disappearance of Children as a Crime Against Humanity

1. The Law

To be considered a crime against humanity, Article 7 of the Rome Statute establishes that the conduct must be "committed as part of a widespread or systematic attack directed against any civilian population," and the perpetrator must know that the conduct was part of this attack.⁵⁰² Most statutes of international criminal tribunals include crimes against humanity, like the ICTY, ICTR, SPSC, Special Court for Sierra Leone, ECCC, EAC, SCC, and KSC, although they do not all include the same type of acts.⁵⁰³

499. For instance, Article 376 of the Guatemalan Criminal Code of 1973 includes within the definition of acts of genocide the "[c]ompulsive displacement of children or adults from the group to another group." PENAL CODE OF GUATEMALA art. 376.

500. U.N. Office on Genocide Prevention and Responsibility to Protect, Framework of Analysis for Atrocity Crimes: A Tool for Prevention, at 19 (2014).

501. *Id.*

502. Rome Statute of the International Criminal Court, art. 7 ¶ 1, Jul. 17, 1998, 2187 U.N.T.S. 90.

503. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Compilation, art. 5, (Sept. 2009); S.C. Res. 1901, art. 3 (Dec. 16, 2009); U.N. Transitional Administration in East Timor, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Doc. UTAET/REG/2000/15, § 5 (June 6, 2000); S.C. Res 1315, Statute of the Special Court for Sierra Leone, art. 2 (Aug. 14, 2000); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed

However, neither the ICTY nor the ICTR recognizes enforced disappearance as a crime against humanity in their statutes.⁵⁰⁴ A major step forward was the inclusion of the enforced disappearance of persons as a crime against humanity in Article 7(1)(i) of the Rome Statute.⁵⁰⁵ This crime has been since expressly embodied in the statutes of the SPSC,⁵⁰⁶ EAC,⁵⁰⁷ SCC,⁵⁰⁸ and KSC.⁵⁰⁹ Thus, it can now be considered that enforced disappearance as a crime against humanity constitutes a norm of international customary law.⁵¹⁰

Virtually all crimes within the jurisdiction of the ICC affect children, but there are some provisions in the Rome Statute that make explicit reference to children.⁵¹¹ These include the war crimes of child recruitment and use, the forcible transfer of children as an act of genocide, and the trafficking of children for enslavement or sexual slavery.⁵¹² However, there is no child-specific crime of enforced disappearance. Therefore, the question that arises is whether enforced disappearance of children can be subsumed under the act of enforced disappearance as a crime against humanity contained in Article 7(1)(i). Taking into consideration the elements of the crime, the Rome Statute may be applicable to enforced disappearance of children because the wrongful removal of children is a systematic practice that normally involves a state structure and a range of institutions such as religious organizations or foster homes.⁵¹³ The perpetrators

During the Period of Democratic Kampuchea, NS/RKM/1004/006, Laws on the Establishment, art. 5 (Oct. 27, 2004); Agreement on the Establishment of the Extraordinary African Chambers Within the Courts of Senegal Between the Government of the Republic of Senegal and the African Union, 52 I.L.M. 1024, 1029 (2013); Cent. Afr. Rep. Penal Code, art. 153; Law on Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-053, art. 13 (Kos.).

504. The ICTY interpreted that enforced disappearances could be subsumed in category of "other inhumane acts" of crimes against humanity. *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment ¶ 566 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

505. Rome Statute of the International Criminal Court, art. 7 ¶ 1, Jul. 17, 1998, 2187 U.N.T.S. 90.

506. U.N. Transitional Administration in East Timor, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, U.N. Doc. UTAET/REG/2000/15, § 5.1(i) (June 6, 2000).

507. Agreement on the Establishment of the Extraordinary African Chambers Within the Courts of Senegal Between the Government of the Republic of Senegal and the African Union, art. 6, ¶ f (defining the crime as "kidnapping of persons followed by their enforced disappearance").

508. Cent. Afr. Rep. Penal Code art. 153.

509. Law on Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-053, art. 13 (Kos.) (including the phrase "crimes against humanity under international law").

510. See generally, Rep. of the Working Group on Enforced or Involuntary Disappearances, U.N. Doc. A/HRC/13/31 (Dec. 21, 2009) (drafted while the first author was Chair-Rapporteur of the WGEID).

511. Int'l Crim. Ct., *Policy on Children*, at 2 (Nov. 2016).

512. Rome Statute of the International Criminal Court, art. 7–8, July 17, 1998, 2187 U.N.T.S. 90.

513. INT'L CRIM. CT., ELEMENTS OF CRIMES 11 (2011).

generally refuse to disclose the fate and whereabouts of the “stolen” children⁵¹⁴ and destroy any documentation that may reveal the true identity of the child.⁵¹⁵ Additionally, the ICC Elements of Crimes provides that “the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose.”⁵¹⁶

Alternatively, the enforced disappearance of children can constitute an act of persecution, which the Rome Statute defines as any act committed “against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, [or] gender.”⁵¹⁷ According to the Elements of Crimes, in the case of persecution as a crime against humanity, “[t]he perpetrator [has to] severely deprive . . . one or more persons of fundamental rights” and “target[] such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.”⁵¹⁸ The Office of the Prosecutor of the ICC considers acts targeting children “on the basis of age or birth may be charged as persecution on ‘other grounds,’” and “that children may also be persecuted on intersecting grounds, such as ethnicity, religion and gender.”⁵¹⁹ Since children are often targeted and deprived of their human rights because they belong to a group for political reasons, enforced disappearance of children could also amount to persecution as a crime against humanity.

2. Problems

Although enforced disappearance is a crime against humanity, both in conventional and customary law, there is no child-specific crime of systematic enforced disappearance in ICL, IHL, or IHRL.⁵²⁰ The consideration of enforced disappearance as a crime against humanity is relevant because it has important consequences, such as the non-applicability of the statute of limitations and the non-acceptance of amnesty laws.⁵²¹ If systematic enforced disappearance is not prohibited under domestic law, then courts have to resort to different ordinary crimes, which generally have short statutes of limitations and do not cover the

514. Susana Kaiser, *In Argentina, New Generations Remember: For Argentines Born After Dictatorship, Public Encounters with the Past Help stitch Together a Memory of the Country's Collective Traumas*, 53 NACLA REP. ON THE AMERICAS 147, 148 (2021).

515. Michale J. Lazzara, *Kidnapped Memories: Argentina's Stolen Children Tell Their Stories*, 12 J. HUM. RTS. 319, 320 (2013).

516. INT'L CRIM. CT., ELEMENTS OF CRIMES 11, n.23 (2011).

517. Rome Statute of the International Criminal Court, art. 7, ¶ 1(h) July 17, 1998, 2187 U.N.T.S. 90.

518. INT'L CRIM. CT., ELEMENTS OF CRIMES 10 (2011).

519. Int'l Crim. Ct., *Policy on Children*, ¶ 51 (Nov. 2016).

520. See, e.g., G.A. Res. 61/177, art. 5, 25 (Dec. 20, 2010) (incorporating the systematic practice of enforced disappearance as a crime against humanity, in article 5, but the referencing children as victims in a separate provision, article 25).

521. ELISENDA CALVET MARTÍNEZ, *DESAPARICIONES FORZADAS Y JUSTICIA TRANSICIONAL [ENFORCED DISAPPEARANCES AND TRANSITIONAL JUSTICE]* 83 (Tirant lo Blanch & Cruz Roja Española eds., 2018).

complexity of the crime, making it more difficult to investigate and prosecute the perpetrators.⁵²²

This has resulted in few cases before international criminal tribunals. To date, the ICC has convicted Lubanga for the war crimes of enlisting and conscripting children under the age of fifteen and using them to actively participate in hostilities, as child soldiers, in the Democratic Republic of the Congo.⁵²³ Despite the fact that the ICC's current investigations comprise enforced disappearances in the situations of Burundi, Venezuela, Guinea, and Ukraine, they do not focus on children.⁵²⁴ In 2016, the Office of the Prosecutor of the ICC made an important effort towards accountability for crimes against children by adopting a Policy on Children, but it does not make any reference to enforced disappearance of children as a crime against humanity.⁵²⁵

3. *Solutions*

The possibility of directly improving the protection of children from enforced disappearance in ICL seems unlikely. Since 2014, the International Law Commission has been working on a draft convention on crimes against humanity, with the main aim being to strengthen legal cooperation among states in the field of prevention and punishment of these crimes.⁵²⁶ This would be a useful opportunity to advance a new definition of crimes against humanity,⁵²⁷ but so far, the International Law Commission has preferred to use the same concept as in Article 7 of the Rome Statute, arguing that it has a wide recognition among states and may avoid future fragmentation of international law.⁵²⁸ This is a missed opportunity to advance the protection of children and includes more child-specific crimes in the current ICL. Nevertheless, in the first draft of the convention, Article 3(4) provides that "[t]his draft article is without prejudice to any broader definition provided for in any international instrument or national law,"⁵²⁹ which allows the maintenance of more protective instruments like the

522. See discussion *supra* Sections VI.A.2 and VI.B.2.

523. Prosecutor v. Dyilo, ICC-01/04-01/06-2842, Judgement, ¶ 1273 (Mar. 14, 2012).

524. Int'l Crim. Ct., *Office of the Prosecutor: Report on Preliminary Examination Activities*, (Dec. 5, 2019).

525. Int'l Crim. Ct., *Policy on Children*, (Nov. 2016).

526. Int'l Law Comm'n., Crimes Against Humanity: Texts and Titles of the Draft Preamble, the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee on First Reading, UN Doc. A/CN.4/L.892 (May 26, 2017).

527. Darryl Robinson, *The Draft Convention on Crimes Against Humanity: What to Do with the Definition?*, in ON THE PROPOSED CRIMES AGAINST HUMANITY CONVENTION 103, 106 (Morten Bergsmo & SONG Tianying eds., 2014).

528. Sean D. Murphy (Special Rapporteur on Crimes Against Humanity), *First Rep. on Crimes Against Humanity*, ¶ 122, U.N. Doc. A/CN.4/680 (Feb. 17, 2015).

529. Int'l Law Comm'n., Crimes Against Humanity: Texts and Titles of the Draft Preamble, the Draft Articles and the Draft Annex Provisionally Adopted by the Drafting Committee on First Reading, art. 3, UN Doc. A/CN.4/L.892 (May 26, 2017).

UN Convention.⁵³⁰ It does not prevent states from passing laws criminalizing the systematic enforced disappearance of children or the international community incorporating this crime in the statutes of future hybrid international criminal tribunals.

By means of interpretation, international courts can apply the current ICL on crimes against humanity to deal with enforced disappearances of children. The Rome Statute provides in Article 21(3) “that the ‘application and interpretation of law . . . [by the Court] must be consistent with internationally recognized human rights.’”⁵³¹ Consequently, the crime of enforced disappearance as a crime against humanity embodied in the Rome Statute should be interpreted in the light of the enforced disappearances instruments and other human rights treaties, including those relating to children, as well as IHL.⁵³² Yet international criminal courts alone cannot provide accountability for crimes targeting children because they need the “support from States, other international organizations, and civil society.”⁵³³

C. Overall Solutions for ICL to Impact the Systematic Disappearances of Children

As this section has noted, there are tremendous weaknesses in ICL. The law is deficient, the processes too complex, and there are too few places to enforce the law that is available. This is compounded by the fact that too few cases of enforced disappearances are brought internationally, never mind cases that specifically affect children.⁵³⁴ There are relatively few domestic cases of enforced disappearances, even in Latin America which has prosecuted relatively more people than in other parts of the world.⁵³⁵ Thus, a much greater concerted effort by all players is needed, including the UN, regional, sub-regional and domestic actors, intergovernmental institutions, courts, commissions, civil society, and the media. More publicity and attention are needed on this issue. In addition, more needs to be done to solve cases that have happened already

530. Comm. on Enforced Disappearances, Statement on the Draft Articles on Crimes Against Humanity Adopted by the International Law Commission, ¶ 2 (June 1, 2018).

531. Jeremy Sarkin, *Reforming the International Criminal Court (ICC) to Achieve Increased State Cooperation in Investigations and Prosecutions of International Crimes*, 9 INT’L HUM. RTS. L. REV. 27, 38 (2020).

532. See, e.g., Public Minister v. Habré, Judgement, ¶ 1471 (Extraordinary African Chamber of Assizes May 30, 2016) (“The Chamber adopted the definition of the Convention for the Protection of All Persons from Enforced Disappearance, which it considers to better reflect the state of customary international law.”).

533. Diane Marie Amann, *The Policy on Children of the ICC Office of the Prosecutor: Toward Greater Accountability for Crimes Against and Affecting Children*, 101 INT’L REV. RED CROSS 537, 548–49 (2019).

534. See discussion *supra* Part III.

535. Ariel E Dulitzky, *The Latin-American Flavor of Enforced Disappearances*, 19 CHI. J. INT’L L. 423, 453–54 (2018).

and to prevent such cases from happening in the future. The obligation to prevent genocide and crimes against humanity is also crucial in this context.

However, ICL needs to be reformed to make it better able to address such cases. Enforced disappearance of children needs to be expressly codified in ICL for it to be a true deterrent. The ICC and other bodies need to focus much more on such cases, as well as find ways to bring more of them to court by adopting a child-centered approach. States must make enforced disappearance a crime under domestic law, ensure that it is not subject to a statute of limitations and that the appropriate penalties are in place. It is also important to consider the non-derogable nature of the offense under any circumstances. States must adopt effective legislative, administrative, and judicial measures to prevent enforced disappearances of children. It is also central that states initiate prompt and impartial investigations when enforced disappearances of children occur, with the aim of returning the kidnapped children to their families of origin and recovering their true identity. More advocacy is needed to advance in the protection of children from enforced disappearances in ICL by considering children as bearers of rights and not just victims.

CONCLUSION

Even though the enforced disappearance of children carried out by states are often systematic practices that often amounts to genocide and a crime against humanity, there has been little attention to these matters.⁵³⁶ As this article shows, international law has not prevented systematic cases of enforced disappearances of children all around the world. The pervasive nature of systematic disappearances in the past, including the recent past, indicates that not enough is being done.⁵³⁷

The systematic disappearance of children can take place in times of armed conflict, like in the case of Guatemala or the Lebensborn program during the Second World War in Germany; in the context of an authoritarian regime, like in Spain or Argentina; or in times of peace, like the aboriginal children sent to residential schools in Canada or Australia for “assimilation.”

Enforced disappearances of children is often a state policy, which has as its aim removing them from their biological parents to curb opposition, having them serve as child soldiers, or destroying their ethnic group. This wide range of reasons for which enforced disappearance might take place means it is important to tackle the phenomenon using different branches of international law, as well as by addressing the different structures that allow the enforced disappearance of children to occur (like armed groups, foster homes, religious institutions, or residential schools).

536. See Jeremy Sarkin, *Dealing with Enforced Disappearances in South Africa (Focusing on the Nokuthula Simelane Case) and Around the World: The Need to Ensure Progress on the Rights to Truth, Justice and Reparations*, 29 *SPECULUM JURIS* 21, 44–45 (2015).

537. See Sarkin & Baranowska, *supra* note 9, at 38.

The enforced disappearance of children involves a violation of a variety of rights that are prescribed in IHRL and IHL. Nowadays, enforced disappearance is recognized as an international crime and wrongful act by international customary law, treaties, and jurisprudence, and its prohibition can be considered a norm of *jus cogens*. However, there is no child-specific crime of systematic enforced disappearance in IHRL, IHL, or ICL. This undermines the protection of children, as states cannot effectively investigate and prosecute the perpetrators of enforced disappearance of children if it is not codified as a separate crime in both domestic and international law.

Therefore, the law needs to be applied in a holistic manner, which includes international instruments dealing with enforced disappearances, conventions on the rights of children, universal and regional human rights treaties, IHL, both conventional and customary, and ICL. States, international organizations, and courts must be more child-sensitive and focus on the protection of children from enforced disappearances in all circumstances. Children are still subject to serious violations during armed conflict, and the forcible transfer of children from one group to another is considered an early warning of the intention to commit genocide. Thus, the protection of children in armed conflict needs to go beyond prevent enlistment and recruitment but include the preclusion of enforced disappearances of children in the UN mediation, peace process, and peacekeeping mandates, as well as in the action plans with the parties to the armed conflict. Moreover, states need to adopt different measures to prevent enforced disappearance of children, such as passing laws proscribing this practice with no statute of limitations, proportionate penalties, implementing measures regarding birth registration to ensure there is no falsification of documents, and to guarantee the true identity of the children, enacting appropriate adoption laws, and exercising adequate control over adoption and foster institutions.

Thus, much more needs to be done on a range of fronts to deal with the problem of enforced disappearance of children.⁵³⁸ Nevertheless, the law is a starting point. It sets the standards and, to some extent, is an educational tool about what is permissible or not. However, more work is still needed to search for and restore the disappeared children to their biological families and to prosecute and punish those responsible for this heinous crime in order to prevent future recurrence.

Because children may be subjected to enforced disappearances for a variety of reasons and because of their fragile position in comparison to adult victims, special attention needs to be given to increasing community awareness about disappeared children. Regardless, enforced disappearances have tremendous effects not only on the people who were subjected to this crime but also on their

538. See Jeremy Sarkin, *Dealing with Enforced Disappearances in South Africa (Focusing on the Nokuthula Simelane Case) and Around the World: The Need to Ensure Progress on the Rights to Truth, Justice and Reparations*, 29 SPECULUM JURIS 21, 44–45 (2015).

families and relatives, especially when victims are children.⁵³⁹ Therefore, more effort by the international community, governments, and civil society is needed, especially to face the crimes perpetrated in the past and make sure that victims' rights are safeguarded.⁵⁴⁰ There are many other potential ways that enforced disappearances can be dealt with better and more extensively. Actors everywhere should be doing more to bring all these rights to bear on enforced disappearances, especially where there are systematic cases of children being disappeared. Much more work is needed to create awareness of this issue and to take action quickly and robustly when disappearances occur. As discussed in the first part of this article, this has often not been the case. Even years after the fact, little has generally been done to resolve these cases.

539. Sarkin & Baranowska, *supra* note 9, at 17.

540. See Jeremy Sarkin, *The Need to Deal with All Missing Persons Including Those Missing as a Result of Armed Conflict, Disasters, Migration, Human Trafficking, and Human Rights Violations (Including Enforced Disappearances) in International and Domestic Law and Process*, 8 INTER-AM. EUR. HUM. RTS. J. 112, 141–42 (2016).

