

The responsibility of the states in the due process of enforced disappearance cases¹

La responsabilidad de los Estados en el debido proceso de los casos de desaparición forzada

Sauddy Barros-Gálvis

United Nations Development Programme, Bolonia, Italia

sauddy.barros@studio.unibo.it

<https://orcid.org/0009-0005-6884-1580>

Amílcar Rodríguez-Reyes

Escuela superior de administración pública - ESAP, Barranquilla, Colombia

amilcars.rodriguez@esap.edu.co

<https://orcid.org/0000-0002-9707-684X>

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Abstract

Objective: to assess the responsibility of the States in the due process of enforced disappearance cases. Method: this research adopts a qualitative -documentary approach based on the analysis of court decisions, normative instruments, and institutional reports. A legal-comparative method and a case study are used to contrast Inter-American and European approaches to enforced disappearance and procedural guarantees. Results: significant differences between the two systems are identified. In addition, the Inter-American Court adopts a restorative and victim-centered approach, while the European Court prioritizes minimum procedural guarantees, such as effective investigation and strict evidentiary rigorous standards of evidence. In the case of Colombia, institutional gaps persist in investigation research and reparation. Conclusions: this combination of the transformative dimension of the Inter-American Court with the procedural rigour of the European Court would make it possible to strengthen state responsibility in conflict contexts.

Keywords: comparative jurisprudence, due process, enforced disappearance, state responsibility, transitional justice.

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Resumen

Objetivo: evaluar la responsabilidad de los Estados en el debido proceso de los casos de desaparición forzada. **Método:** esta investigación tomó un enfoque cualitativo-documental con base en el análisis de sentencias, instrumentos normativos y reportes institucionales. Se emplean el método comparativo jurídico y el estudio de caso para contrastar enfoques interamericanos y europeos en materia de desaparición forzada y garantías procesales. **Resultados:** se identifican diferencias significativas entre ambos sistemas. Adicionalmente, la Corte Interamericana adopta un enfoque restaurativo y centrado en las víctimas, mientras el Tribunal Europeo prioriza garantías procesales mínimas, como la investigación efectiva y estándares de prueba rigurosos. En el caso colombiano, persisten brechas institucionales en la investigación y reparación. **Conclusiones:** esta combinación de la dimensión transformadora de la Corte Interamericana con la rigurosidad procesal del Tribunal Europeo permitiría fortalecer la responsabilidad estatal en contextos de conflicto.

Palabras clave: desaparición forzada, debido proceso, jurisprudencia comparada, justicia transicional, responsabilidad estatal.

Introduction

Under international human rights law (IHRL), enforced disappearance is one of the most egregious crimes law (Kyriacou, 2025), especially in situations of systematic repression and internal conflict (Sandoval, 2025), since it commits the State to its duty to research, punish and make full reparation (Political Constitution of Colombia [P.C.], 1991). Among the most critical legal challenges in such cases is the consistent failure to ensure due process, both for victims and their relatives, as well and for the accused in transitional justice mechanisms (Bernal-Pulido, 2014).

This article explores the responsibility of States for due process (DP) violations in cases of enforced disappearance, drawing on the jurisprudence of the IACtHR and the European Court of Human Rights (ECtHR). The comparative analysis is based on legal standards and interpretations developed by both Courts, aiming to identify convergences and divergences that shape international accountability frameworks.

As a reference point, the article examines the Colombian case of Operation Orion, a large-scale military intervention carried out in Medellín in 2002, which led to numerous international human rights (IHR) violations, including enforced disappearances, arbitrary detentions, and extrajudicial executions (Law 975, 2005; Barros-Galvis, 2024).

The case exemplifies the complexities and limitations of transitional justice (TJ), as well as the struggle to harmonize domestic legal responses with international obligations (Amnesty, 2004; United Nations, 2006).

The research adopts a qualitative, critical, and documentary methodology, analyzing legal instruments, jurisprudence, and institutional reports. Through this approach, the article seeks to contribute to the academic and legal debate on how regional human rights systems interpret state obligations in the face of enforced disappearance, and what lessons can be drawn for the improvement of TJ processes in Latin America and beyond (Avellaneda, 2024).

Ultimately, the article argues that integrating the restorative and victim-centered perspective of the IACtHR with the procedural rigor of the ECtHR could lead to more effective and comprehensive models of State accountability. Such integration is particularly relevant for Colombia and other nations undergoing transitions from conflict to peace, where DP and access to justice remain fragile pillars of democratic consolidation.

Legal and theoretical framework

The issue of enforced disappearances has been examined within IHR law through diverse normative instruments and institutional mechanisms (Gómez, 2022). Among the main legal references are the Convention for the Protection of All Persons from Enforced Disappearance (ONU, 2006), the American Convention on international human rights (ACHR) (Organization of American States [OAS], 1978), and the European Convention on International Human Rights (ECHR) (Council of Europe, 1950). Each of these frameworks has been subject to interpretation and implementation by their corresponding regional judicial bodies (Bernal-Pulido, 2014).

The IACtHR has conceptualized enforced disappearances as a violation of fundamental rights in multiple and prolonged forms, whose character is not exhausted at the time of arrest but extends until the victim's fate is determined, if not, this constitutes a violation of the obligations under Articles 3, 4, 5 and 7 of the ACHR (ONU, 2006; Uprimny and Saffon, 2005), which refer to freedom, welfare and protection of life.

In contrast, the ECtHR tends to approach enforced disappearances (ED) primarily through procedural guarantees under the right to life and the exclusion of torture, which refer to arts. 2 and 3, respectively, of the ECHR (OAS, 1994). While it recognizes the seriousness of the phenomenon, its jurisprudence often focuses on evidentiary thresholds and State failure to conduct effective investigations, rather than on the autonomous nature of the disappearance itself (Chaiერი, 2021).

This divergence reflects broader differences in legal traditions and institutional mandates. The Inter-American System for the Protection of Human Rights (IASPHR) prioritizes the rights of victims, together with truth, comprehensive compensation, and the development of elements to reduce recidivism. In contrast, the European system places greater emphasis on the procedural obligations of the state and the crucial importance of legal stability.

Both systems acknowledge that rape is a persistent issue that has a devastating impact on individuals, families, and communities.

Due process in international human rights law (IHRL)

DP is a cornerstone in the protection of fundamental rights, particularly in contexts where state power can lead to abusive practices such as enforced disappearances. In IHRL, this principle is explicitly enshrined in instruments such as the International Covenant on Civil and Political Rights (ICCPR), the ACHR and the ECHR (OAS, 1978; Council of Europe, 1950).

On the other hand, since the case law of the IACtHR has broadened the concept of due process so that it is no longer limited to traditional minimum guarantees such as the possibility of defence and judicial impartiality but also incorporates the right to full participation of victims and their relatives in all legal proceedings. (IACtHR, 2005; Uprimny and Saffon, 2006). This approach recognizes that, in contexts of systematic violence or armed conflict, access to justice is not limited to the prosecution of perpetrators but requires conditions of truth, full compensation and the establishment of safeguards to prevent the occurrence of violations. (De Greiff, 2009; Martínez, 2018).

The ECtHR, while sharing certain fundamental principles, maintains a more restrictive interpretation of due process in cases of enforced disappearance, focusing especially on Art. 6 of the ECHR, which states that every individual has the right to be tried fairly and openly by an impartial court established by law (Council of Europe, 1950).

However, most cases of disappearance have been dealt with under articles 2, 3 and 13, where the emphasis is on the state's duty to effectively investigate and provide adequate legal remedies (Grover, 2014; Shelton, 2015; Saavedra, 2024). Comparative legal doctrine has pointed out that these differences reflect not only institutional contrasts, but also different legal traditions: the IASPHR with a tendency towards a transformative justice, and the European system with an inclination towards formal legality and legal certainty (Sadurski, 2012; Bernal-Pulido, 2014). Both offer valuable contributions, but also present limitations when faced with the complexity of transitional justice processes in Latin America (Teitel, 2000; Centro Nacional de memoria histórica, 2013; Saavedra, 2024).

In this sense, it is necessary to recognize that due process as a substantive and procedural right, applicable both in the trial of those responsible and in the effective assurance of the individuals concerned. This involves, among other things, ensuring real access to justice, removing institutional barriers and ensuring that judicial procedures are geared towards the full protection of human dignity (Alston and Goodman, 2013; Chaieri, 2021).

Comparative reflections: complementary approaches to state responsibility

Although the two courts take different approaches, their jurisprudence reflects a common recognition of the gravity and complexity of enforced disappearances. The IASPHR, with its emphasis on truth, memory and reparations, provides a more holistic model of justice, particularly relevant in transition contexts such as Latin America. The European system, although more limited in scope, offers strict procedural safeguards which can strengthen liability.

The Colombian case of Operation Orion shows the difficulties in effectively applying inter-American and European standards, despite having abundant documentation and provisional measures, the Colombian State has exhibited major shortcomings in identifying and sanctioning those accountable (Angarita et al., 2018). In addition, the absence of concrete judicial actions by national authorities reflects a structural violation of international due process standards (Abello-Galvis and Arevalo-Ramirez, 2022; Vilela, 2025). Despite considerable efforts by the community, non-governmental organizations and organizations, problems persist and in many cases conflicts and violence have been exacerbated, resulting in the displacement of millions of people, this has even led the Colombian government to live a humanitarian crisis that has not been managed properly.

Social programs aimed at assisting victims and communities affected by the conflict have been repeatedly underutilized and poorly implemented, leaving internally displaced persons (IDPs) struggling to rebuild their lives in a hostile and neglected environment, despite having as objective to avoid more situations like the above mentioned because what is sought is to be able to protect the protection of the population in the future (Amnesty International., 2004; Cervantes et. al., 2024).

Methodology

This article follows a qualitative and analytical approach, rooted in a critical reading of legal instruments, jurisprudential developments, and institutional reports related to enforced disappearance (Fernández, 2015; Avellaneda, 2024). Within the field of legal research, qualitative approaches allow for the interpretation of normative frameworks and judicial reasoning, facilitating a deeper understanding of how international courts construct legal standards in complex human rights cases (Hernández-Sampieri and Mendoza, 2018; Cobos and González, 2020).

The objective is to assess State responsibility for DP violations in cases of ED before the IACtHR and the ECtHR but also to understand the normative evolution and interpretation of due process within this legal framework. In this sense, the study adopts a doctrinal legal research perspective, focusing on the systematic examination of legal norms, judicial decisions, and scholarly interpretations relevant to international human rights law (McConville & Chui, 2017).

The methodological design is based on a documentary and jurisprudential analysis, since the first provides elements that serve as guidelines for research (Martínez et. al., 2023; Vizcaíno et.al., 2023) and the jurisprudential to summarize, analyze and generate specific comments (Cifuentes et. al., 2023), which focuses on primary sources such as the decisions of the IACtHR and the ECtHR, complemented by international treaties, regional conventions, IHR reports, and relevant doctrinal sources.

This type of analysis is widely used in human rights scholarship because it allows researchers to examine the interpretation and application of international norms by judicial bodies (McConville & Chui, 2017). The articulation of these materials facilitates a deeper understanding and more precise assessment of the findings (Hurtado, 2000a, 2010b).

The study adopts a comparative case law method, enabling a contrast between the legal reasoning and standards adopted by both courts concerning the rights of victims, procedural guarantees, and the scope of State obligations. Comparative legal analysis has become a relevant methodological tool in international human rights research, as it allows scholars to identify convergences, divergences, and normative influences between regional human rights systems (Siems, 2018).

A special emphasis is placed on the Colombian case of Operation Orion, which serves as an illustrative example of how ED occur in practice, and how domestic legal responses may fall short in aligning with international standards.

The data collection did not involve direct fieldwork or interviews but relied entirely on publicly accessible legal documents, jurisprudential records, and scholarly analysis. This approach is consistent with doctrinal legal research, where the primary objective is to interpret legal norms and judicial reasoning rather than to generate empirical data through field-based methodologies (McConville & Chui, 2017). This allows for a normative and critical reflection on the challenges posed by enforced disappearance to transitional justice systems and the principle of due process.

The study aims to contribute to existing academic discussions by offering an inter-systemic comparison that highlights both convergences and tensions between the IACtHR and the ECtHR approaches to State responsibility in cases of enforced disappearance. By situating the analysis within broader debates on international accountability and procedural guarantees, the article provides an original contribution to the scholarship on enforced disappearance and the development of evidentiary standards in international human rights adjudication (De Greiff, 2009; Shelton, 2015).

Results

This section highlights the contrast between guarantees of due process. It draws on the legal reasoning developed by both courts to identify interpretative trends, normative tensions, and the broader implications for State accountability in contexts of systematic HR violations.

The IACtHR approach: a victim-centered interpretation

The IACtHR has progressively developed a rich and complex jurisprudence on enforced disappearances, framing them not merely as isolated acts but as multiple, continuing, and composite human rights violations. This doctrinal evolution underscores the autonomous nature of enforced disappearance, which the Court defines through three interrelated elements: the arrest of a person, the concealment of the site or its location, and the refusal of the State to acknowledge these facts (Morelos and Chavez, 2020; Barros, 2024).

By highlighting this composite character, the Court distinguishes enforced disappearance from other human rights violations and positions it as a phenomenon with profound implications for both procedural and substantive rights.

A defining feature of the IACtHR approach is its victim-centered orientation. Since the landmark case of Velásquez (IACtHR, 1988), the Court has established that enforced disappearance represents a multiple violation of the rights set forth in the ACHR, ranging from the right to life, liberty, and personal integrity to judicial protection. Crucially, the Court emphasized that the violation does not cease with the act of arrest but persists until the status of the missing individual is confirmed. In this sense, the IACtHR recognizes that enforced disappearance generates continuous procedural violations suffered not only by the disappeared person but also by their relatives.

The Court has consistently affirmed that the rights to judicial guarantees and effective legal redress (Arts. 8 and 25) are linked to the obligations of the State to investigate, prosecute and punish whoever is appropriate. In cases such as Gomes Lund et al. (IACtHR, 2010), the Court reiterated that States cannot invoke amnesties, statutes of limitation, or other domestic measures to evade accountability in disappearance cases. This jurisprudence strengthens the notion that due process in the IASPHR is not limited to formal guarantees for the accused but encompasses the procedural rights of victim as well as those of their family (IACtHR, 2007).

Beyond individual cases, the IACtHR has also framed due process as a collective and societal right, recognizing the structural harm caused by impunity. The denial of justice in disappearance cases undermines democratic institutions, erodes public trust in the rule of law, and perpetuates cycles of silence and violence (Fletcher and Weinstein, 2002; Dempster, 2019). By connecting the right to truth with collective memory and historical clarification, the Court's jurisprudence seeks to repair both the victims and the social fabric affected by systematic violence.

This victim-centered interpretation makes the Inter-American approach particularly significant in TJ contexts such as Latin America. By demanding truth, accountability, and prevention mechanisms, the Court has advanced a transformative vision of due process that transcends individual litigation and aims at structural reform.

In doing so, the IACtHR positions itself as both a judicial body and a mechanism of democratic reconstruction, offering an expansive model of State responsibility in cases of enforced disappearance.

The European approach: procedural safeguards and evidentiary thresholds

The ECtHR has traditionally addressed enforced disappearances through a procedural and evidentiary perspective, grounding its analysis primarily in Arts. 2, 3, and 13 of the ECHR (Council of Europe, 1950). Unlike the Inter-American Court (IACtHR), the ECtHR has generally avoided treating enforced disappearance as an autonomous violation, situating it instead within the broader framework of the State's procedural obligations.

A central feature of the European approach is the importance attached by the Court to evidential standards as a mechanism for protecting legal certainty. In this context, a high level of proof is required to ensure that there are sufficient and convincing elements before responsibility can be attributed to the State (ECtHR, 1999). This insistence has reinforced procedural rigour, but it has also been criticized for restricting the recognition of structural or systematic patterns of disappearance, especially in contexts of protracted internal conflict (Sadurski, 2012). Despite these limitations, the ECtHR has made important contributions to minimum due process guarantees in disappearance cases. It has required States to ensure family members' access to information regarding investigations, to protect their procedural participation, and to guarantee effective remedies under Article 13 (Jenks, 2010).

In this way, the Court has extended the scope of due process to include the procedural rights of family members of missing persons, albeit in a narrower manner than in the IASPHR. Overall, the European approach reflects a balance between procedural integrity and State sovereignty. Its insistence on rigorous evidentiary standards and impartial investigations strengthens the credibility and universality of IHR adjudication. Despite the Court's reluctance to explicitly recognize enforced disappearance as a systemic or autonomous violation limits its transformative impact in societies affected by mass violations. Thus, while the European model provides legal precision and procedural safeguards, it often falls short in addressing the broader historical and collect dimensions inherent to enforced disappearance.

Discussion

The comparative analysis between the Inter-American and ECtHR reveals essential differences in how each system conceptualizes and addresses enforced disappearance and due process violations. These distinctions are not merely doctrinal they reflect broader institutional, historical, and normative frameworks that shape the role of IHR adjudication in holding States accountable. As highlighted in the scholarship on transitional justice, these differences reflect the ways in which regional systems respond to historical patterns of authoritarianism and armed conflict (Teitel, 2000; De Greiff, 2009). In this sense, the interpretation of due process in disappearance cases cannot be understood solely through procedural doctrine but must also be situated within broader debates on accountability, memory, and democratic reconstruction.

In the IASPHR, the jurisprudence of the IACtHR has become a powerful tool of resistance and memory in post-authoritarian and post-conflict societies. Its decisions often go beyond the immediate case to construct narratives of truth and structural reform, reinforcing a vision of justice that is victim-centered and reparative. This approach is particularly significant in Latin America, where legal systems have long struggled to ensure that victims of state violence have effective access to justice.

Authors such as Uprimny and Saffon (2005), Bernal-Pulido, (2014) and Gómez (2022) have emphasized that the Inter-American system has played a decisive role in expanding the concept of due process beyond traditional guarantees, incorporating the rights of victims and their families to truth, justice, and reparations.

Conversely, the ECtHR has developed a more technically consistent but procedurally bounded approach. Its focus on the duty to investigate and its high evidentiary thresholds ensure legal certainty but often fail to address the deeper historical and political dimensions of enforced disappearance. As a result, its decisions may have limited transformative impact in societies facing persistent impunity or systemic violations. This procedural orientation reflects the broader legal tradition of the European human rights system, which has historically prioritized legal certainty, institutional balance, and evidentiary rigor in the adjudication of human rights violations (Sadurski, 2012; Shelton, 2015; Vilela, 2025).

Colombia, through the lens of Operation Orion, exemplifies the tensions between formal transitional justice mechanisms and structural impunity. Despite the creation of truth commissions, special jurisdictions, and national reparations programs, The State's limitations in guaranteeing justice in emblematic cases such as the disappearances that occurred in Medellín in 2002 exposes the fragility of these mechanisms. As highlighted in the thesis, victims continue to face obstacles in accessing judicial remedies, institutional resistance, and lack of effective participation.

Empirical and historical analyses of the Colombian armed conflict have similarly shown that the persistence of impunity in cases of disappearance is closely linked to institutional weaknesses and the limited capacity of national judicial systems to investigate complex crimes committed during armed conflict, as mentioned by the National Center of Historical Memory (2013) and Angarita et al., (2018).

The IACtHR emphasis on truth and memory could offer a critical counterbalance to Colombia's formalism, while the European Court's insistence on procedural guarantees could help reinforce the due process rights often neglected during conflict and peacebuilding. A hybrid model, informed by both systems, may provide a more complete framework for evaluating and strengthening State accountability.

However, there is growing discussion in the literature on transitional justice where, for effective accountability mechanisms, Both strong procedural safeguards and a victim-centered understanding of justice are needed to address the structural consequences of mass human rights violations (De Greiff, 2009; Alston and Goodman, 2013).

Finally, the discussion raises broader questions with respect to the role of IHR law in domestic transitions. Can international jurisprudence meaningfully influence national legal orders plagued by inertia, corruption, or complicity? What mechanisms exist to ensure implementation beyond declaratory judgments? These questions reiterate the need for the implementation of international standards at the national level, particularly in societies emerging from prolonged violence.

Conclusion

In the light of international law, enforced disappearances remain one of the most notorious and complex problems of the IHR. From the experience of the IACtHR and the ECHR, its legal treatment poses important challenges in terms of limits and mechanisms to protect due process guarantees, the imputation of responsibility to the State and the safeguarding of the rights of the persons concerned.

This article has shown that while both regional systems recognize the gravity and ongoing nature of enforced disappearance, they differ significantly in their interpretative frameworks. The Inter-American approach, grounded in a victim-centered and transformative vision of justice, seeks to restore dignity and truth to survivors and their families, often requiring structural reforms from States. The European approach, meanwhile, prioritizes procedural integrity and evidentiary consistency, providing essential safeguards but often lacking a reparative or historical dimension.

The Colombian case of Operation Orion illustrates the consequences of failing to integrate these frameworks in a meaningful way. Despite the existence of TJ institutions, the persistence of impunity and weak enforcement mechanisms reveals a structural gap between international standards and domestic implementation. Victims of enforced disappearance in Colombia continue to face legal and institutional barriers, undermining their right to justice and reinforcing cycles of silence and fear.

As a contribution to the academic and legal debate, this article advocates a hybrid model of due process that draws on the strengths of both systems. Such a model would integrate the transformative justice and truth-seeking orientation of the IACtHR with the procedural rigor of the ECtHR. This synthesis could guide more effective accountability mechanisms in post-conflict societies, where legal certainty and moral recognition are equally necessary.

Ultimately, enforced disappearance not only tests the resilience of domestic legal systems; furthermore, it challenges the legitimacy of IHR law. Bridging the normative and practical divides between courts, States, and victims is not only a legal obligation it is a moral imperative.

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