

PRACTICE NOTE 5

**STRATEGIC
LITIGATION
OF ENFORCED
DISAPPEARANCES
IN AFRICA**

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REDRESS

Ending torture, seeking justice for survivors

This guide is part of a series of **Practice Notes** designed to support holistic strategic litigation on behalf of torture and enforced disappearance survivors. It is aimed at lawyers, researchers, activists, and health professionals who assist survivors in the litigation process.

This practice note explains what holistic strategic litigation is, and how to do it in the context of enforced disappearances in Africa. It makes suggestions based on academic commentaries, research reports, and practical experience. It will be useful for those new to strategic litigation, to find out more about it, and also for more experienced practitioners, to encourage reflection on how they do it.

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INTRODUCTION

Through strategic litigation, human rights lawyers seek to challenge both the individual act of enforced disappearance and the policies and practices that enabled it to take place. Through this approach you can obtain accountability, and campaign for policy and legal reform to make it more difficult for disappearances to take place in the future. In addition to filing legal cases, strategic litigation also uses other civil society techniques to bring about change, such as advocacy (national, regional, international), activism, and engaging the media, academia and the general public.

With such litigation there is a risk that the interests of the individual survivors of enforced disappearance are side-lined in the attempt to bring about broader change. To avoid this, lawyers and activists should adopt a holistic approach, where all the needs of survivors are provided for, and they have a central role in the litigation and the strategy.

There are many ways to approach the courts to obtain justice and the different forms of redress. Human rights litigation can be used on behalf of an individual survivor of enforced disappearance to hold governments to account before national courts, the regional human rights systems, and the UN Treaty Bodies and Charter based procedures. Criminal law can be used to punish individual perpetrators on a national or international basis, or through universal jurisdiction. Through civil cases, people can sue individuals and companies to prove their responsibility for enforced disappearances and other violations and obtain reparations.

With strategic litigation, civil society seeks to go beyond individual responsibility and individual representation, to ensure there is impact after the legal decision, a community behind the client, and a cause beyond the case. However, change can be slow, and, in many cases, litigation seeks social advances that may take a generation or more to achieve.

This practice note explains what holistic strategic litigation is, and how to do it in the context of enforced disappearances in Africa. It makes suggestions based on academic commentaries, research reports, and practical experience. It will be useful for those new to strategic litigation, to find out more about it, and for more experienced practitioners, to encourage reflection on how they do it. The note covers:

- *A: What is Strategic Litigation?* This explores the concept as well as the potential impacts of strategic litigation.
- *B: The Holistic Approach.* Explaining the importance of providing for all the needs of the survivor and accompanying them through the process.
- *C: What is Enforced Disappearance?* This includes the elements of the definition in international human rights law.
- *D: Legal Avenues to Seek Justice in Africa.* Setting out the different legal paths to seek justice and reparations for enforced disappearances that take place in Africa.
- *E: Evidence.* This includes types of evidence usually admitted in relation to enforced disappearance cases.
- *F: Reparation in Cases of Enforced Disappearance.* Setting out the different reparation measures relevant to redress the harm caused by this crime.
- *G: Searching for the Disappeared.* This includes important considerations to ensure the search is part of litigation and advocacy strategies.
- *H: Drafting Effective Legal Complaints to Regional and UN Bodies.* Including key elements to make legal claims persuasive.
- *I: Further Reading.* Containing a list of additional references on the topics covered in this guide.

WHAT IS STRATEGIC LITIGATION?

Concept

Strategic litigation can be defined as bringing a legal claim with an objective of change beyond the individual case. As such, litigation is “strategic” because it involves selecting those cases with the potential to advance a specific legal, social or human rights change, whether preventing a particular behavior, or requiring authorities to initiate legal and policy reforms, or a general change of attitude. Strategic litigation brings relief to the individual victim/s, as well as to a broader group of affected communities.

The goals of strategic litigation can generally be achieved by combining casework with other civil society techniques, including research, advocacy for structural reforms, outreach and capacity building.

In some situations, deciding not to conduct strategic litigation could be the best course of action. For example, if resources are scarce and other strategies and tools could be more effective, if there is a risk of a negative decision, or if the passage of time could open a more favourable or progressive legal forum.

Potential Impacts

There are a number of ways in which strategic litigation against enforced disappearance can have an impact, beyond the immediate benefit to the survivor or a change in the law. Not all forms of impact will be relevant in a specific context, and lawyers and activists, together with the survivors, will need to deploy different tactics to enhance each impact.

REDRESS has developed a framework for evaluating the impact of strategic litigation against enforced disappearance. This identifies the most frequent impacts that result

from such litigation, and then defines the frequent outcomes that are produced. Not all ten will be relevant for every case.

The ten impacts that are included in the REDRESS impact framework are:

- **Justice.** For many survivors of enforced disappearance and/or their relatives, a declaration that their rights have been violated is why they brought the case, and the finding of a violation may be sufficient satisfaction. This can also come in the form of a public apology.
- **Truth.** Courts can make definitive factual findings, which may be of crucial importance in a campaign for accountability, as well as to ensure the individual and collective right to know what happened to the disappeared. This can be enhanced through strong media coverage of the case.
- **Material.** Specific benefits to the survivors brought about through the litigation can include changes to their situation, employment, health care, education, and financial and non-financial compensation. This may often include physical or psychological rehabilitation.
- **Community.** Beyond the individual survivors, many others in a similar situation are often impacted by a legal decision on a case of enforced disappearance, including by declaring the inapplicability of impunity measures, or contributing to build a historic record of the violations committed.
- **The Movement.** Litigation can energise the movement against enforced disappearance, act as a catalyst for change, empower networks, and encourage new champions and cases.
- **Stakeholders.** Strategic litigation can lead to changes in the attitudes and practice of stakeholders such as politicians, judges, and the police, which is a pre-requisite to change policies and laws.
- **Policy.** Litigation can result in commitments to change policy on enforced disappearance (by the government, police, and courts), including financial commitments.

- **Legal.** Litigation can bring changes in legal standards, whether through case law or legislation, such as the criminalisation of enforced disappearance in national criminal codes.
- **Governance.** Litigation can trigger practical changes to the relevant procedures, budgets, and institutions, although this tends to take time.
- **Social.** Beyond the specific case, litigation can result in changes in the tolerance of and response to enforced disappearances and/or other human rights violations in the country or region concerned.

See the Practice Note on Evaluation of Impact for more information on this framework.

Case study: La Cantuta (Peru)

Facts. Enforced disappearance in 1992 of nine students and one professor at the National University (“La Cantuta”), in Peru. The crime was committed during the internal armed conflict in Peru by the “Grupo Colina”, an affiliated body of the National Intelligence Service.

Legal Action. The relatives of the victims sought justice in Peru, but due to the amnesty laws in place, those responsible for the enforced disappearances were released. The relatives then decided to take the case before the Inter-American Commission on Human Rights, and later to the Inter-American Court of Human Rights. The Court issued a landmark judgement in 2006 in favour of the victims.

Other civil society techniques. After the disappearance of the victims, their relatives and the organisations supporting them launched a national and international campaign seeking justice and the truth about the fate of their loved ones, involving communications, advocacy, demonstrations, and public events, among others.

Impact for the victims. As an outcome of the case before the Inter-American Court, the relatives of the disappeared in La Cantuta were awarded material and non-material reparations, a public apology, a public memorial site, and other forms of reparations.

Broader impact. This case (together with the Barrios Altos case) resulted in the reversal of the amnesty laws in Peru, contributing to the fight against impunity in this and many other cases in the country. The case led to the conviction of former President Alberto Fujimori and that of four high ranking members of “Grupo Colina”. Finally, the case became emblematic in Latin America and beyond, in the fight against impunity for cases of enforced disappearance, particularly on the inapplicability of amnesty laws to such cases.

Legal and Non-Legal Techniques

To be most effective, strategic litigation should take into account the national context in which the violations take place, and should include a wide range of legal and non-legal techniques. This approach can ensure that, regardless of the result of legal claims, collective efforts contribute to achieving the long-term objectives of the campaign against enforced disappearances.

Filing a case and issuing a press release does not make a case strategic. Casework must be combined with other civil society techniques such as public education, advocacy at the national and international level, activism and media work. Since an organisation might not have the capacity to deploy all of these techniques, working in coalition with others can yield better results.

Some of the tools often used to conduct strategic litigation challenging enforced disappearance are:

- **Legal claims.** In many African countries, there is an official denial that enforced disappearances take place. In addition to contributing to the impacts mentioned in the previous section, preparing legal claims to a courtroom standard creates a body of persuasive evidence that can quickly make it difficult for those denials to have any credibility.
- **National advocacy.** Advocacy at the national level can highlight the existence of a practice of enforced disappearances. Additionally, public awareness and publicity can often prevent the materialisation of the crime.

- **Regional Advocacy.** The African Commission on Human and Peoples' Rights (ACHPR) is a regional body that provides opportunities for human rights defenders and civil society organisations to raise awareness about human rights violations in the respective countries or in individual cases. States are required to submit regular reports on the implementation of the African Charter. When the State is being reviewed, NGOs can submit shadow reports. Further, civil society can also submit written communications to the ACHPR, including to its special rapporteurs and working groups, which can directly engage with States and request information. Finally, civil society organisations with observer status can participate in the ACHPR's sessions, suggest issues for inclusion in the agenda, conduct side events, and other advocacy activities. The African Court of Human and Peoples' Rights (ACtHPR) is another platform to advance the debate on enforced disappearance. Civil society organisations can request the Court for an advisory opinion to interpret international law or provisions of the Charter. Civil society organisations can also file a complaint of human rights violations but the State against whom allegations are filed must have consented to the Court's jurisdiction.
- **United Nations Advocacy.** Activists should make full use of the international mechanisms to complement their legal claims. Reports and statements from UN bodies can be immensely powerful when submitted as evidence in a legal proceeding, or where their recommendations match the remedies that are asked for in a case. Additionally, international advocacy can engage the human rights movement to highlight the situation in a given country and amplify the voices of victims. The UN offers several opportunities to advocate on behalf of victims of enforced disappearances.
 - Treaty bodies, such as the Committee on Enforced Disappearances or the Committee against Torture, accept individual communications in relation to States' parties to the relevant treaties, if those States have accepted the Committee's competence to hear such communications. Further, States' parties are obliged to submit regular reports on the implementation of the relevant treaties. Civil society can submit information to the treaty bodies for consideration during the review process. Finally, civil society

can participate in the sessions of the treaty bodies and hold formal and informal meetings with their members.

- Civil society can also engage with the UN human rights mechanisms through the Universal Periodic Review (UPR) process. All members of the United Nations have their human rights records reviewed on a regular basis by the Human Rights Council. Every five years States must present a report to the Council on the fulfilment of their human rights obligations. Civil society organisations can present shadow reports outlining the human rights situation in the respective country as input during the review process.
- Finally, enforced disappearances can be brought to the attention of the UN Special Procedures. The Special Procedures are human rights experts with the mandate to advise on specific human rights issues or situations. They can act on individual cases brought to their attention, by sending urgent appeals and allegation letters to States. They can also issue press statements, raising public awareness and putting pressure on States in specific situations or cases. Their mandate allows for country visits, holding hearings to speak publicly about enforced disappearance in a particular country and working with governments to address the crime. In relation to enforced disappearances, the UN Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur on Human Rights Defenders and the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-repetition, are especially relevant.
- **Community organising.** When acting on behalf of a group, there is greater ability to connect the cases to a community and to enhance their impact. Victims and survivors' groups and networks can become a powerful and persuasive voice in the campaign against enforced disappearance.

- **Capacity Building for Judges and Lawyers.** Raising awareness and building the capacity of the lawyers on international human rights law is essential to increase the understanding of the law, build up a meaningful body of experts to litigate human rights cases and obtain better outcomes for clients.

Case study: Mothers of Plaza de Mayo (Argentina)

Facts. During the “Dirty War” in Argentina (1976-1983), the military government disappeared, tortured and killed anyone they saw as “subversives”, including political opponents of the regime. Many of the dissenters were students and young people, who turned into the main target of enforced disappearances.

As a reaction to the disappearance of their children, in 1977 a group of mothers began to meet each Thursday in the Plaza de Mayo in Buenos Aires, the site of Argentina’s government. They requested access to their children and their freedom. The meeting of the mothers was the first public condemnation of the disappearances committed by the regime.

Over time, the group of mothers grew despite their different backgrounds. In their weekly demonstrations they carried photos of their disappeared children. Later they wore white scarves on their heads, symbolising peace.

Impact. Through their activism, the mothers drew awareness and significant national and international attention to the practice of enforced disappearance in Argentina. Their activism triggered the involvement of foreign governments, as well as international human rights groups and bodies, including the United Nations. That triggered the documentation and investigation of individual cases.

Since then, the Madres de Plaza de Mayo remain a driving force against impunity for crimes committed by the military regime, in the efforts to locate the remains of their disappeared children, and in finding their grandchildren born in captivity. Their movement has become a symbol in the fight against enforced disappearances worldwide.

- **Media and communications.** Survivors and activists can use media and communications tools to raise awareness about the crime of enforced disappearance in a specific country. A communications strategy could also be useful to highlight a particular case of arbitrary arrest with a view to pressure the authorities and prevent the materialisation of the crime. The voices of the victims can be amplified through media techniques both at the national and international level. In some contexts, media work can prevent attacks against the relatives of the disappeared, yet in other situations, this work might not be possible or desirable due to the safety situation and risks involved for those supporting the case.

Case study: Arbitrary arrest of human rights defenders (Egypt)

Facts. In November 2020, the Egyptian authorities arbitrarily arrested three human rights defenders of the Egyptian Initiative for Personal Rights (EIPR). One of the defenders was detained incommunicado in a security facility for 12 hours before being transferred to the Supreme State Security Prosecution (SSSP). Another defender was arrested and taken to an unknown location, before being transferred to the SSSP for interrogation. The arrests took place in the context of increasing attacks against the EIPR.

Advocacy. A few days after the arrests, more than 50 regional and international civil society organisations issued a strong statement urging the immediate and unconditional release of the three defenders by the Egyptian authorities. This and other advocacy efforts prompted the Office of the High Commissioner for Human Rights and several United Nations Special Rapporteurs to issue statements seeking the release of the defenders.

Media and solidarity actions. This case got the attention of celebrities such as Emma Thompson, Stephen Fry, Scarlett Johanson, Joseph Finnes and others, condemning the events on their social media channels and calling for the Egyptian authorities to release the defenders.

Impact. Following the national and international pressure on the Egyptian authorities, the three defenders were released on 4 December 2020.

A HOLISTIC APPROACH

Enforced disappearance is a particularly egregious crime that strips the disappeared of all of their rights. The crime causes profound suffering to the relatives and friends of the disappeared, who are left with the uncertainty of not knowing what happened to their loved ones and whether they are still alive. Very often, this suffering extends for many years and decades, causing great harm to individuals, families, groups and societies.

Seeking truth, justice and reparations often leads to attacks against the relatives of the disappeared and others who support them. They can face physical attacks, arrests, stigmatisation and smear campaigns, and other violations that in some cases result in internal displacement and even exile. Additionally, during the investigation, victims often experience re-victimisation by the authorities, especially where the facts are denied or the victim is blamed for the disappearance.

Despite the above, strategic litigation in itself can bring positive relief to victims, empowering them to act and bring change and contributing to their rehabilitation. Practitioners must adopt a holistic approach to strategic litigation, through which all of the needs of the survivor are provided for as they are accompanied through the process.

Accompaniment and Victim Centrality

In the context described above, lawyers and activists must work closely with survivors and their communities to accompany them throughout strategic litigation, which can be very lengthy.

Victims and survivors must be placed at the centre of the process, taking a leading role in deciding the strategy and expressing their needs and expectations. Sometimes the goals of the lawyers and the victims may not align, and it is important the victim's

desires are respected. The role of lawyers and activists should be to provide the expertise required to channel those decisions into effective legal and non-legal actions. This will require structuring the legal team to have the capacity to actively consult and support the survivors throughout the lifetime of the case.

Psychosocial and Medical Support

Considering the serious harm caused by enforced disappearance, victims must have access to ongoing support to cover their psychological, medical or social needs. Those supporting the victims must ensure that the well-being of individuals is considered and costed when planning the strategy. This may mean collaborating with NGOs who specialise in providing such support to survivors of torture and enforced disappearance.

Other Forms of Support

Due to the risks that often exist when fighting impunity in enforced disappearance cases, other forms of support might involve protection measures - legal and practical, including relocation when necessary - and assistance in the development of advocacy, rights-knowledge and other skills. This may again require collaboration with specialist NGOs, and a sufficient budget.

Featured profile: Nassera Dutour (Algeria)

Nassera's son, Amine, was disappeared in Algeria in 1997 after the Algerian authorities arrested him. He was 21 years old at the time of his disappearance. He was supposed to meet his friends, but he never made it. Instead, a white car waited for him outside his house. He was forced to get in and has not been heard from since then.

At the time of his disappearance, Nassera was living in France. She went back to Algeria immediately and searched for Amine every day for six months, with no results. She became very sick and had to return to France. From France, Nassera continued her search

for Amine, bringing the case to the attention of international NGOs and submitting a communication before the United Nations Working Group on Enforced and Involuntary Disappearance. Nasseria realised that her case was not isolated but was part of a systematic practice of disappearances by the Algerian authorities. In 1999, she founded the organisation *SOS Disparus* to help thousands of victims in her situation and has been advocating and working on this issue ever since.

Nasseria and other members of *SOS Disparus* have faced violent dispersal, arrests and harassment by the authorities.

Nasseria continues to be a leading voice nationally and internationally on the plight of Algerian victims of enforced disappearance.

WHAT IS ENFORCED DISAPPEARANCE?

According to the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), enforced disappearance is defined by three cumulative elements:

- The deprivation of liberty against the will of the person;
- The involvement of government officials, either directly or by tolerance or acquiescence; and,
- The refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person.

Long or short term. There is no minimum time limit for a disappearance to qualify as such. The crime can result from the incommunicado detention of an individual, even if for a limited amount of time, as long as the State refuses to acknowledge the whereabouts of the individual.

Permanent and continuous crime. Enforced disappearance is a permanent and continuous violation, which means that it starts with the deprivation of liberty of the victim and extends until the victim's whereabouts are established, even if this happens many years or decades later.

Enforced disappeared or missing? Enforced disappearance should be distinguished from the term "missing person", which refers to a person reported missing in connection with an international armed conflict, civil war or internal violence or unrest. The term is also used in relation to victims of national catastrophes or deadly accidents. In some situations, missing persons can also be victims of enforced disappearance, if the elements of the crime are present.

Enforced disappearance is a complex crime that involves the violation of a wide range of fundamental human rights. While the list of rights breached is not exhaustive, enforced disappearance often violates or threatens to violate the following rights:

- Right to life
- Right to liberty
- Right not to be subjected to torture and ill-treatment
- Right to recognition of the legal status of the victim before the law
- Right to economic, social and cultural rights.

Victims of enforced disappearance. According to the ICPPED, “victims” are those who have disappeared as well as any individual who has suffered harm as a direct result of an enforced disappearance. Victims include:

- Those disappeared
- Relatives
- Friends

and possibly others, including:

- Lawyers, activists and those assisting victims
- Communities, peoples and groups to which the disappeared belongs
- Others that have suffered harm as a direct result of the crime.

LEGAL AVENUES TOWARDS JUSTICE FOR ENFORCED DISAPPEARANCE IN AFRICA

Habeas Corpus

A writ of *habeas corpus* (or similar legal remedy) is used to bring a detained person before a judge/court to determine if the person's detention is lawful. As such, *habeas corpus* and *amparo* reviews are key to get information on the whereabouts of detainees, ensure their right to personal liberty and prevent the commission of enforced disappearances.

Criminal Investigation and Prosecution

The most appropriate remedy in cases of enforced disappearance is a criminal investigation. The investigation must be aimed at establishing the circumstances in which the crime was committed and the identity and degree of involvement of those responsible, and at obtaining a criminal prosecution, trial and eventual punishment of all the perpetrators of an enforced disappearance.

The obligation to investigate an enforced disappearance is an international obligation under human rights treaties (including the ICPPED), and also under customary international law. This means that all African States, regardless of whether they have ratified the ICPPED, must carry out a prompt, impartial and independent investigation when an enforced disappearance takes place.

While the obligation to investigate lies with the State, lawyers and activists accompanying the victims often push for domestic prosecution of enforced disappearances. In such cases, lawyers work with victims, gather evidence of the crime, report the crime, and/or provide evidence to national authorities where appropriate. Lawyers have a role in supporting victims through the process and, in certain cases, in representing victims as civil parties in criminal proceedings.

Civil Claims

Victims can also pursue civil litigation seeking to prevent enforced disappearances and get a determination of responsibility, restitution, and other forms of reparation. Civil claims have different procedural rules depending on the jurisdiction, but the burden of proof in civil claims is generally lower than in criminal cases, requiring the individual to prove by a balance of probabilities that violations occurred.

Case study: Disappearance of Jestina Mukoko (Zimbabwe)

Facts. In December 2008, Jestina Mukoko, a Zimbabwean journalist and human rights activist, was forcibly disappeared from her home. A week after Jestina's disappearance, the Zimbabwean High Court ordered the police to conduct an investigation, but the police did not comply with the court order. Jestina remained disappeared for three months until she was released on bail.

Legal Action. Following Jestina's release, Zimbabwe Lawyers for Human Rights and Zimbabwe Peace Project took legal action against the State in relation to Jestina's disappearance. The State did not carry out any prosecution of individuals responsible for Jestina's disappearance.

Impact. In 2017, the High Court of Zimbabwe ruled that those who had illegally arrested Jestina could be held liable in their own individual capacities. The High Court ordered the Zimbabwean State to pay monetary compensation for the abduction, incommunicado detention and torture that Jestina suffered at the hands of State officials.

Human Rights Claims

Lawyers representing victims of enforced disappearance can also consider regional and international human rights claims as avenues for strategic litigation. These typically require that domestic proceedings have been exhausted in the national jurisdiction, unless it can be shown that judicial remedies were not effective or that

there was undue delay. However, some human rights mechanisms are willing to accept claims directly without exhausting domestic remedies, such as the Economic Community of West African States' (ECOWAS) Court of Justice.

Reverse Burden of Proof. When submitting human rights claims related to enforced disappearance, the victim bears the burden of proof to show a prima facie case of enforced disappearance. This requires the victim to present 'an arguable case', including arguments and some evidence showing that the victim has been subjected to enforced disappearance. The burden of proof shifts to the State in a number of contexts, including when:

- a) The specific enforced disappearance can be linked to a widespread or systematic practice of the State to use enforced disappearances, which follows an identifiable pattern. In those instances, if the victim (his/her relatives or representatives) can show that the case fits that context and pattern, a presumption exists that the person has been disappeared and it is for the State to clarify the whereabouts of the victim.
- b) When the disappeared victim was last seen under the control of the State or in a State-run detention facility or location.
- c) When the State is not contesting the crime of enforced disappearance, has control over the evidence of enforced disappearances, and fails to investigate or provide information on the whereabouts of the disappeared.

Enforced disappearance is a continuous violation of several fundamental rights - some of which are non-derogable - enshrined in many human rights treaties.

Enforced disappearance engages the following human rights:

- Right to life
- Right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment

- Right to liberty
- Right to a fair trial and corresponding judicial guarantees
- Rights to information, opinion and expression, association and assembly
- Right to freedom of movement and right to asylum
- Economic, social and cultural rights
- Right to truth
- Right to dignity
- Right to identify and the right to recognition of the legal status of a person before the law
- Right to an effective remedy, including reparation and compensation.

African Regional Human Rights Mechanisms

Within the African Human Rights system, cases of enforced disappearance can be filed before the ACHPR, the ACtHPR and the ECOWAS Court.

- a) Under its protection mandate, the ACHPR can accept complaints from individuals, NGOS, and groups of individuals who believe their rights have been violated under the African Charter on Human and Peoples' Rights (African Charter).
- b) The ACtHPR has jurisdiction to hear cases involving enforced disappearance and other human rights violations in relation to the 30 African States that have ratified the Protocol to the African Charter on the Establishment of the Court. However, in such cases, only the ACHPR can refer cases to the ACtHPR. Additionally, six States have authorised the ACtHPR to hear complaints submitted directly by individuals or NGOs with observer status before the ACHPR. These States are Burkina Faso, Gambia, Ghana, Malawi, Mali, and Tunisia.

- c) The ECOWAS Court has the competence to hear individual complaints of alleged human rights violations, including rights deriving from the UDHR, the African Charter, and the International Covenant on Civil and Political Rights (ICCPR). However, only individuals whose countries are members of the ECOWAS can file a complaint within the court.

	Add. Protocol/ Declaration Acquired	Hears Complaints from Individuals	Hears Complaints from NGOs	Hears Complaints from States	May Order Interim Measures	Exhaustion of Domestic Remedies Required	Time Limits
ACHPR		✓	✓	✓	✓	✓	✓
ACTHPR	✓	✓	✓	✓	✓	✓	✓
ECOWAS		✓	✓		✓		

United Nations Human Rights System

Victims of enforced disappearance can submit their complaints to the relevant UN human rights and treaty monitoring bodies. The individual complaints can only be filed after the exhaustion of domestic remedies and only when the State Party has ratified the relevant treaty and accepted the competence of the specific treaty body to review individual complaints. There are several avenues within the UN system that victims can use to pursue justice, including those below.

- a) *The Human Rights Committee (HRC)* is an 18-member body of experts tasked with monitoring State Parties' compliance with the ICCPR. The Committee may consider individual communications regarding violations of the ICCPR by any States that are party to the Optional Protocol to the Covenant. 116 States have ratified the Optional Protocol so far. Some States have lodged reservations limiting the HRC's competence to examine particular complaints, despite having ratified the Optional Protocol.

- b) *The Committee on Enforced Disappearance (CED)* comprises of ten independent experts who monitor the implementation of the ICPPED. Article 31 of the Convention provides for the Committee to receive individual complaints from victims of enforced disappearance, but only if the State ratified the Convention and consented to the competence of the Committee to receive individual complaints. Check the list on the [United Nations website](#).
- c) *The Committee against Torture (CAT)* is a committee of ten international experts who monitor the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Individuals can file an individual complaint if the State party ratified the treaty and consented to the Committee's jurisdiction under Article 22. Check the list on the [United Nations website](#).
- d) *The UN Working Group on Enforced or Involuntary Disappearances (WGEID)* was established in 1980 with a mandate to examine questions relevant to enforced disappearances and provide assistance to the families in determining the fate or whereabouts of their relatives. The WGEID accepts individual reports of disappearances. Upon receipt of a communication, the Working Group can forward a communication within 1-2 days to the Ministry of Foreign Affairs of the country concerned if the case is less than three months old. If the disappearance is reported after three months, the WGEID may authorise communication to the State requesting it to carry out investigations and inform the Group of the results. It is possible to submit individual communications to the Working Group in relation to any country, regardless of whether it has ratified the ICPPED. Further, it is not necessary to exhaust domestic remedies before communicating with the WGEID. The communications issued by the Working Group can help establish facts and the whereabouts of the victim, but do not make a finding of State responsibility or issue reparations.

EVIDENCE

Evidence is essential when building a legal claim, in order to prove that the crime of enforced disappearance occurred. Lawyers must consider the required elements to prove offences under the relevant national and international laws, and the variety of sources available to build the case. The sources of evidence include victim statements, statements from witnesses, expert reports, documents, video or audio recordings, medical reports, physical and forensic evidence, and various forms of media, including newspapers and secondary sources.

When documenting cases of enforced disappearance, lawyers and forensic experts will find useful guidance in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) and the Minnesota Protocol on the Investigation of Potentially Unlawful Death.

What evidence is needed depends on the type of proceeding and the burden of proof required.

As stated above, in criminal cases, it is necessary to prove ‘beyond reasonable doubt’ that the accused has committed the crime.

In relation to civil and human rights claims, in principle the victim has the burden to present a prima facie case of enforced disappearance. However, there are a number of situations where the burden of proof shifts, as outlined previously, and it is upon the State to clarify the whereabouts of the disappeared.

Additionally, given the complexity of enforced disappearance, it is accepted by most human rights courts and bodies that when direct evidence has been destroyed or altered, circumstantial evidence, presumptions and indicators are of great significance to the investigation.

Courts and human rights bodies have accepted the following type of evidence in cases of enforced disappearance

- Victim's testimony
- Testimony of witnesses
- Forensic evidence, i.e. DNA evidence, telephone data analysis, satellite imagery, etc.
- Testimony of experts to provide evidence on patterns of enforced disappearance in a particular country
- Government documents and reports
- Various forms of media, including newspaper articles, videos, press releases
- Secondary reports, i.e. NGO reports, UN reports and States' human rights reports, reports of Truth and Reconciliation Commissions

The evidence presented should be reviewed as a whole and not in isolation. The evidence that is useful to prove enforced disappearance can be divided into three categories:

- a) evidence used to support a finding of a context, State pattern or practice of enforced disappearances;
- b) evidence used to support a finding of an individual enforced disappearance linked to a State pattern or practice; and
- c) evidence used to support a finding of an individual enforced disappearance when no State pattern of disappearances has been established. The evidence should prove that there was: (a) a deprivation of liberty; (b) the deprivation of liberty was carried out by the State or others acting on behalf of the State, or with its acquiescence or tolerance, and; (c) the refusal of the government to provide information on the whereabouts of the victim.

Case study: Habré's conviction for enforced disappearances (Chad)

Hissène Habré was the President of Chad from 1982 to 1990. His regime was characterised by widespread human rights abuses and atrocities. After lengthy political and judicial battles, Habré was brought to trial in Senegal, facing charges of crimes against humanity, including torture, enforced disappearances, and war crimes. On 30 May 2016, the Extraordinary African Chambers in the Senegalese Court system found Habré guilty of crimes against humanity, war crimes and torture.

The Prosecutors relied on a variety of evidence to prove the charges, including:

- Findings of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories
- Victims' testimonies
- Testimonies of insiders who worked with Ex-President Habré
- Documents from the Documentation and Security Directorate (DSS), including a list of prisoners, interrogation reports, and death certificates
- Direct communication from DSS to Habré on the status of 898 detainees
- Forensic anthropology reports
- NGO reports
- Command structure evidence

REPARATION IN CASES OF ENFORCED DISAPPEARANCE

In cases of enforced disappearance, strategic litigation will be aimed at obtaining reparations that redress the harm caused to the individual victims, as well as obtaining changes that will prevent the occurrence of this crime in the future. The right to an effective remedy is a well-established right under international law. The ICPPED stipulates in Article 24(4) that: “[E]ach State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.” The five forms of effective reparation recognised at the international level include restitution, rehabilitation, satisfaction, compensation and guarantees of non-repetition. Reparations can be both for the victims themselves and their relatives. They can also be collective or individual.

In cases of enforced disappearance, restitution could include the recovery of identity, restoration of liberty or return to one’s place of residence. Yet, in many cases of disappearance, given the irreversible nature of the harm, restitution is not possible.

Compensation is an important element of the right to an effective remedy, yet it is not sufficient in itself as a form of reparation and should be associated with other measures.

Rehabilitation is an essential component of reparation, and should include medical and psychological care, in addition to legal and social services, both to the disappeared and his or her family.

Satisfaction measures include the disclosure of the whereabouts of the disappeared, the identities of abducted children, and assistance in the recovery, identification, and reburial of the bodies, in accordance with the wishes of victims and cultural practices. Other forms of satisfaction include a judicial decision, public apologies, memorial sites, and recognising the dignity of victims and their relatives, including by avoiding attacks and stigmatisation against them.

Guarantees of non-repetition refer to measures that the State should undertake to prevent the future recurrence of enforced disappearances. These include criminalising enforced disappearance, providing training to law enforcement officials, and other measures that strengthen the rule of law in a specific country. Other measures include public education programmes and media campaigns to sensitise the general public.

Courts and human rights bodies have accepted the following type of evidence in cases of enforced disappearance

Reparations must be:

Accessible. Authorities must ensure that victims have access to reparations and are aware of, or have information on, reparations. Authorities must eliminate any obstacles that would prevent victims from accessing reparations.

Adequate. Reparations must be appropriate and proportionate to the gravity and circumstances of the violations.

Victim-centred and non-discriminatory. Reparations should take into account the unique harm suffered by the victims of enforced disappearance and their wishes and expectations on how that harm can be redressed. Reparations should be holistic, consider a gender perspective, and include the physical, psychosocial, economic, social and cultural dimensions of harm.

Reparations can have both individual and collective character. Collective reparations respond to the collective harm or harm caused to the society or a particular group. Monuments and memorials commemorating the violations send a powerful signal of recognition and contribute to ensuring the collective memory.

A particular feature of reparations for victims of enforced disappearance is the right to truth. This right provides that victims should know the truth regarding the circumstances of the disappearance, the progress and result of the investigation, the fate of the disappeared person, and the identity of the perpetrators. The right

to truth about the whereabouts of the disappeared is an absolute right and there is no legitimate State reason or exceptional circumstances that can restrict this right. It includes a procedural obligation for the State to conduct an investigation, share its results, grant access to archives, and protect witnesses and others associated with the investigation.

Case study: Kilwa massacre (DRC)

In the Kilwa decision issued by the ACHPR in 2017, the Commission found the government of the Democratic Republic of Congo responsible for a massacre of 70 people. The ACHPR noted that the State had violated nine human rights provisions of the African Charter, including by committing extrajudicial executions, torture, arbitrary arrests, disappearances and forced displacement, amongst others.

In a ground-breaking decision, the ACHPR ordered the government of DRC to provide the following reparations:

- Pay \$4.36 million to the victims and their families
- Issue a public apology
- Conduct investigations into the disappearance of the victims
- Re-bury victims from mass graves to appropriate graves and with dignity
- Construct a memorial for the victims
- Provide trauma counselling
- Rebuild schools, hospital and roads

SEARCHING FOR THE DISAPPEARED

In enforced disappearance cases, an essential component of strategic litigation should be to push the relevant authorities to search for the disappeared. Article 24 of the ICPPED prescribes the State obligation to search, locate and release the disappeared, or return the remains in case of death. In transborder cases, Article 15 of the ICPPED obliges States to cooperate and ensure mutual legal assistance in searching for victims of enforced disappearance.

While the obligation to search for the disappeared is part of the State obligation to investigate, it should not be limited to the investigation. States shall take all necessary steps to find the disappeared.

The CED, in its Guiding Principles for the Search for Disappeared Persons, has highlighted best practices to search for a disappeared person effectively. The search should:

- Be conducted under the presumption that the individual is alive;
- Be respectful of human dignity;
- Be governed by a public policy and coordinated by an appropriate body;
- Follow a differential approach, taking into account the particular needs and vulnerabilities of victims;
- Respect the right of victims to participate and begin without delay;
- Ensure that the search continues until the fate of the disappeared is established with certainty;
- Be conducted on the basis of a comprehensive strategy that considers all reasonable hypothesis;

- Use information in an appropriate manner, by setting up registers and databases on disappeared persons;
- Be linked to the criminal investigation;
- Ensure the safety of victims, witnesses and others during the process;
- Be independent and impartial, and be governed by public protocols.

The obligation to search is a continuous obligation. It only ends when the fate of the individual is established or their whereabouts are identified.

While the obligation to search lies with the State, victims and those accompanying them often play a key role in establishing the circumstances in which enforced disappearances occurred.

Case study: Disappearance of 43 students in Ayotzinapa (Mexico)

Facts. On 26 September 2014, 43 students from Ayotzinapa were forcibly disappeared by Mexican security forces.

Action. The initial investigation was marred by irregularities, resulting in the release of 78 persons of those initially accused, due to lack of evidence and irregularities in their detention, including confessions obtained through torture.

A new Prosecutor was appointed in 2019 and a special unit was created to investigate the case. Since then, new arrests of State officials have taken place.

In July 2020, the Prosecutor's Office announced that forensic scientists at the University of Innsbruck (Austria), had identified the remains of one of the 43 disappeared students. This was the first identification made in the case in more than five years. Given the location where the remains were found, the identification of the victim proved that the students were not disappeared by criminal gangs (as initially held by State officials), but by State security forces (as held by the families of the students).

Role of the relatives. The relatives engaged the services of the Argentinean Forensic Anthropology Team (EAAF) to conduct expert analysis of the remains. Given the poor conditions of the remains, the EAAF advised to send the remains to a specialised forensic lab in Austria to carry out the identification properly.

DRAFTING EFFECTIVE LEGAL COMPLAINTS TO REGIONAL AND UN BODIES

Human rights complaints allow individuals who have suffered enforced disappearance and other human rights violations to have their cases heard by the relevant regional and international bodies. These include the ACHPR, the ACTHPR, the ECOWAS Court and the UN Treaty bodies and Special Procedures of the Human Rights Council. Each mechanism has its own procedural requirements, as well as advantages and disadvantages that should be considered when choosing which jurisdiction could be more appropriate in a specific case.

Effective human rights claims rely on persuasive and clear legal writing, as well as well-organised evidence.

Human rights claims generally contain the following sections:

- a) Basic personal information about the victim alleging the violations, i.e. name, date of birth, nationality, gender;
- b) Name of the State party against whom the complaint is filed;
- c) Summary of the claim, highlighting the main arguments the victim is presenting, including what the case is about and the summary of the main violations under the respective treaty;
- d) Facts on which the complaint is based, ideally chronologically presented;
- e) Admissibility section, highlighting the steps the victim has taken within the domestic judicial or administrative system to exhaust domestic remedies;
- f) Arguments/Law section, which addresses the main arguments as to why the facts and evidence amount to specific violations;
- g) Remedies section, focusing on reparations that the victim is seeking to redress the violations they endured;

h) Supporting evidence, including medico-legal or psychosocial reports, laws, judicial decisions, witness statements, media reports, etc.

The factual section should explain thoroughly the account of facts on which the complaint is based on. The section should explain the five Ws: when, where, why, who and what.

- a) When did the violations happen? Including the time and date, year and how long the individual was in detention/disappeared;
- b) How was the individual detained or how did the arrest occur? Was the victim informed of their rights? Was the victim visited or examined by a medical professional during the detention? Was the individual brought before the judge or other relevant authorities within the prescribed period of time under the domestic law?;
- c) Where was the individual detained? Including the detention facility or location where the individual was detained;
- d) Who committed the violations against the victim? Were the alleged perpetrators State agents, individuals acting on behalf of the State, or with the cooperation, tolerance or acquiescence of the State?;
- e) Why was the individual forcibly disappeared?;
- f) What injuries did the individual suffer, including factual claims of the abuse (mental and physical injuries)? What was the mental state of the individual pre-enforced disappearance and after enforced disappearance? What investigations, if any, has the government initiated, and what is the result of such investigations?;
- g) What types of harm resulted from the disappearance for the victims, including the relatives of the disappeared?

To file individual complaints at the regional and international forums, the complaint must meet jurisdictional requirements. Each forum has its own requirements but there are a few common ones (many of these do not apply to the WGEID, as outlined above).

- a) The individual must show that the domestic remedies have been exhausted, proving that the victim has used judicial or administrative avenues within the domestic system. This requirement does not apply before the ECOWAS Court;
- b) The claim must be filed within a reasonable time after the exhaustion of domestic remedies;
- c) There are exceptions that allow the victim to file a claim without the exhaustion of domestic remedies, including when the victim can prove that there are no domestic remedies, or that these are futile, and where unreasonable or excessive delays take place.

The legal section should outline specifically the rights that the individual claims were violated within the respective treaty. This section should also outline the legal standard and show how the allegations meet that standard. Further, the claim should outline the evidence and facts to support the claims of human rights violations.

The remedies section highlights the reparations that victim seeks for the violations.

FURTHER READING

On Strategic Human Rights Litigation

- [Open Society Justice Initiative, Strategic Litigation Impacts, Insights from Global Experience, 2018.](#)
- [Open Society Justice Initiative, Legal Writing for Human Rights Claims. Practice Notes.](#)

On the crime of enforced disappearance

- [International Commission of Jurists, Enforced Disappearances and Extrajudicial Executions: Investigation and Sanction. A Practitioners Guide, 2015.](#)

United Nations Working Group on Enforced Disappearances:

- [Standards and Public Policies for an Effective Investigation of Enforced Disappearances. A/HRC/45/13/Add.3, 7 August 2020.](#)
- [Reparations and Enforced Disappearances. A/HRC/22/45, 28 January 2013.](#)
- [General Comment on the Right to Truth in Relation to Enforced Disappearances. A/HRC/16/48.](#)
- [General Comment on the Definition of Enforced Disappearance. A/HRC/7/2, 10 January 2008.](#)

Committee on Enforced Disappearances:

- [Guiding Principles for the Search for the Disappeared Persons. CED/C/7, 8 May 2019.](#)

African Commission on Human and People's Rights:

- [Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003.](#)

- Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), 2015.
- Resolution on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 2008.
- African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 2009.

List of countries that have ratified the following conventions:

- International Convention on the Protection of All Persons from Enforced Disappearance
- Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment

REDRESS is an international human rights organisation that delivers justice and reparation for survivors of torture, challenges impunity for perpetrators, and advocates for legal and policy reforms to combat torture. Our cases respond to torture as an individual crime in domestic and international law, as a civil wrong with individual responsibility, and as a human rights violation with state responsibility.

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