

Q&A
ACHPR GUIDELINES
ON ENFORCED
DISAPPEARANCES IN AFRICA



REDRESS

Ending torture, seeking justice for survivors

On 13 May 2022, the African Commission on Human and Peoples' Rights (ACHPR) adopted the Guidelines on Enforced Disappearances in Africa (EDA Guidelines) at its 71st Ordinary Session in Banjul, The Gambia.

This Q&A addresses the key concepts and terminology, the main contexts in which enforced disappearance (ED) happens in Africa, the rights infringed upon by this crime, the main obstacles faced by victims seeking justice, and the States' obligations.

WHY ARE THE GUIDELINES IMPORTANT?

The EDA Guidelines constitute the first legal document addressing enforced disappearance in the African continent.

ED has been recognised as a severe crime with consequences that go beyond the life of the disappeared. Their families and society as a whole are also affected. The prohibition of ED is absolute. Thus, the adoption of this legal instrument to provide guidance and support to African countries towards effectively protecting and preventing against ED is a significant step.

In recent years, the ACHPR has brought this issue to light and underscored the prevalence of this crime in the region. In 2018, the ACHPR adopted [Resolution ACHPR/Res. 408 \(LXIII\)](#) to extend the mandate of the Working Group on Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa to include ED. As such, the Working Group monitors situations of ED, collects information and data, undertakes studies to assess the regional dimension of the issue, advises the Commission on urgent measures to address ED, and collaborates with diverse stakeholders at the national and international levels. Building on this resolution, in 2020 [the Commission mandated the Working Group](#) to draft Guidelines on ED to eradicate it as a practice and to advance the rights of victims and their families.

In drafting the Guidelines, the ACHPR has drawn from existing legal instruments that protect the rights of ED victims and their families, including the African Charter on Human and Peoples' Rights (Banjul Charter), as well as related protocols, principles, guidelines, and general comments.¹ Other regional instruments contain provisions that proscribe this practice, such as Article 9 of the Kampala Convention which prohibits the use of ED in the context of internal displacement, and Article 28C of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice which bars ED as a crime against humanity.

1 Article 1(2)(i) of the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children of the International Conference of the Great Lakes explicitly prohibits ED of women and children as a crime against humanity. In addition, the Principles and Guidelines on Human and Peoples Rights While Countering Terrorism In Africa expressly ban subjecting anyone to ED. Principle 43 of the African Commission's Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa also urges States to "establish mechanisms, including within existing independent oversight and monitoring mechanisms, for the prompt, impartial and independent inquiry of disappearances..." See further, The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; the Guidelines on the Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa; General Comment No. 3 on the Right to Life.

WHAT IS ENFORCED DISAPPEARANCE?

The Guidelines define ED as a crime prohibited under international law and affirm the right of all persons not to be subjected to it, even in exceptional circumstances such as a state or threat of war, internal political instability, counter-terrorism activities, any other public emergency, or when used by foreign States. The Guidelines recognise the continuous nature of ED and that it can amount to a crime against humanity when committed as part of a widespread or systematic attack on civilians.

Following the definition enshrined in other international instruments, the Guidelines define ED as:

“The arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by an absence of information or the refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, thereby placing them outside the protection of the law.”

Three elements are essential to meet the definition of ED:

- ▶ The person is deprived of their liberty against their will by State agents, persons, or groups whose actions are supported or condoned in some way by the State.
- ▶ The State refuses to acknowledge the deprivation of liberty or to disclose the fate or whereabouts of the disappeared person.
- ▶ The disappeared person is placed outside of the protection of the law.

KEY CONCEPTS

Victims: The Guidelines define the victims of ED broadly to include not only the disappeared person, but also any other individual who has suffered harm as the direct result of an ED. As such, ED also constitutes a violation of the rights of the families, their loved ones, and any other person who has suffered as a result of an ED.

Short-term disappearances: There is no minimum time limit for a disappearance to qualify as an ED for which the States concerned bears responsibility. As such, “short-term disappearances” can result from the unacknowledged deprivation of liberty which puts the individual concerned outside the protection of the law, even if only for a limited amount of time.

Non-State actors: The EDA Guidelines constitute the first soft law instrument that expressly acknowledges that acts which would amount to ED can be committed by non-State actors operating without the authorisation, support, or acquiescence of the State. The Guidelines highlight that State parties have an obligation to investigate, punish and redress the harm caused by any such acts carried out by non-State actors. This is of great importance as victims’ rights must be upheld no matter who the perpetrator is.

Continuing nature of enforced disappearance: ED is a continuous violation of human rights and a permanent crime which commences upon the arrest, abduction, or any other form of deprivation of liberty by, or with the authorisation, support, or acquiescence of, a State, especially when such deprivation of liberty is later unacknowledged, and extends until the victim’s fate and whereabouts are established. Hence, for as long as there is a concealment of the fate and whereabouts of the disappeared person against their will, an ED continues.

Multiple violations of human rights: ED results in the violation of several fundamental rights and renders the victim defenceless. As victims of ED are placed outside the protection of the law and left at the mercy of their captors, they often suffer multiple human rights violations ranging from torture, sexual violence, and, sometimes, execution.

‘Missing’ or ‘disappeared’: The Guidelines distinguish between “disappeared” and “missing persons” by stating that a missing person is largely referred to mean, in the humanitarian context, someone who is reported missing in connection with an international armed conflict, civil war, internal violence or unrest. In some situations, missing persons can also be victims of ED and often these two terms are used interchangeably. However, while the term “missing person” does not indicate the commission of a crime, ED is always a crime and results in the violation of fundamental rights protected by different national, regional, and universal norms and instruments.



HOW PREVALENT ARE ENFORCED DISAPPEARANCES IN AFRICA?

In the African continent, the practice of ED has been used since colonial times to silence freedom fighters. Nowadays, ED is used in diverse contexts against different groups of people, from human rights defenders to ethnic minorities, migrants, journalists, lawyers and opposition leaders.

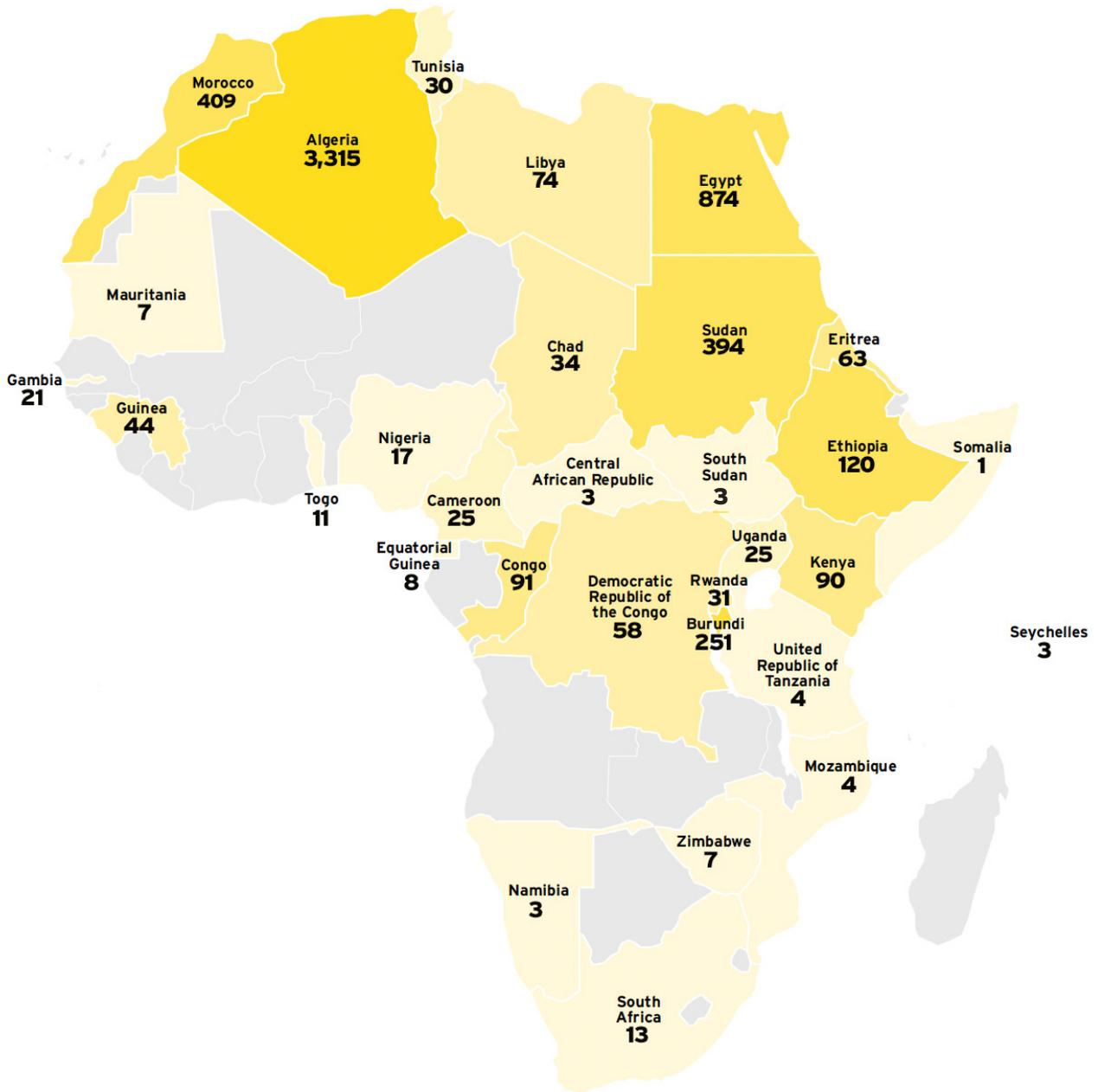
Many individuals are disappeared during armed conflicts and civil unrest, during electoral periods, and in the context of large migration and internal displacement (see, for instance, in the contexts of Algeria, Libya, Sudan and Zimbabwe). More recently, the fight against terrorism and security and policing operations have become backdrop to and setting used by African States to commit acts of ED.

Since 1980, around 6,593 cases and general allegations of ED in Africa have been transmitted to the UN Working Group on Enforced or Involuntary Disappearances (WGEID), an international expert body which examines individual cases. Still, these numbers do not capture the broader reality on the ground as underreporting is widespread in the region.

Some of the reasons for this lack of data include governments' denial of existing and past cases, the fact that the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) does not require States to report on quantitative data, victims' fear of intimidation and reprisals when reporting cases, weak rule of law, lack of adequate domestic laws, and prevalent impunity. Compounding this is the fact that only 18 out of 55 African countries have ratified the ICPPED, the major international treaty that outlaws this practice.

Cases of enforced disappearances reported to the WGEID

1980 - 2022



WHO IS AFFECTED?

Some of the groups affected by this crime in Africa are human rights defenders, political activists and opponents, and journalists, for defying the political status quo and keeping the public informed. Migrants, including asylum seekers, refugees, and internally displaced persons, are also at risk due to discrimination, socio-economic barriers, and other pre-existing factors combined with domestic policies and legislation that seek to limit migration or keep migrants on the margins of society.

Although men are typically the prime target of ED, women and girls, including women human rights defenders, activists, or members of minority groups, suffer heightened discrimination due to their role in society. Moreover, children, boys and youth are also threatened, particularly due to the recruitment of child soldiers in conflict settings.

WHEN AND WHERE DO ENFORCED DISAPPEARANCES OCCUR IN AFRICA?

According to the Guidelines, ED in Africa mostly takes place in the following contexts:

Law enforcement

Often, law enforcement officials disappear people with the government's authorisation in periods of civil unrest or political violence, or fail to prevent the forcible disappearance of individuals abducted by non-State actors.

Non-State actors

A growing trend is the commission of acts analogous to ED by non-State actors without the authorisation, support, or acquiescence of the State. In such situations, States have an obligation to investigate, punish and redress the harm caused by any such acts carried out by non-State actors.

Armed conflict and post-conflict transition

ED commonly takes place in conflict and post-conflict settings. For example, during the Algerian Civil War in the 1990s, approximately 8,000 people were forcibly disappeared. In addition to constituting a grave violation of individual human rights, ED can threaten the peace, security and democratic institutions in countries still weakened by conflict or transitioning from it.

Civil unrest and situations of emergency

Severe restrictions imposed by States on fundamental rights and freedoms in contexts of internal political instability and any other public emergency often result in arbitrary detentions, torture, cruel treatment, executions, and ED, among other breaches.

Counter-terrorism

States have also used ED against those perceived as supporters or collaborators with known extremist groups. Between 2003 and 2008, many States, including African States, cooperated with United States officials during the so-called “War on Terror” to capture alleged suspects and render detainees. This is in spite of their obligations to carry out such operations in accordance with the human rights standards enshrined in the African Charter and other relevant regional instruments.

WHAT ARE THE RIGHTS INFRINGED BY AN ENFORCED DISAPPEARANCE?

The ACHPR endorses a multiple rights approach to ED by recognising the full range of fundamental freedoms and human rights enshrined in the Banjul Charter and other regional and international instruments that are often breached by an ED. Among other rights, an ED may violate:

- ▶ The right to life (art. 4)
- ▶ The right not to be subjected to torture or other cruel, inhuman and degrading treatment or punishment (art. 5, and arts. 3 and 4 of the Constitutive Act of the African Union)
- ▶ The right to liberty and security of the person (art. 6)
- ▶ The right to a fair trial and judicial guarantees (art. 7)
- ▶ The right to information, opinion and expression, association, and assembly (arts. 9, 10, 11 and 13)
- ▶ The right to freedom of movement and the right to asylum (art. 12(1)(3))
- ▶ The right to truth (art. 9)

- ▶ The right to dignity and the recognition of the legal status of a person before the law (art. 5)
- ▶ The right to an effective remedy, including reparation and compensation (art. 24(c) of the ICCPED)

The EDA Guidelines also recognise the negative impact ED has on economic, social, and cultural rights and the specific harm caused by an ED on women, girls, children, and the families of the disappeared persons. Moreover, the Guidelines affirm the right of all persons not to be subjected to ED and the right of victims and their families to be treated equally and to have their rights upheld without discrimination.

▶ **WHAT ARE THE OBLIGATIONS OF AFRICAN STATES?**

According to the EDA Guidelines, African States have an obligation to:

- ▶ prevent and refrain from committing acts of ED
- ▶ conduct searches for victims who are disappeared
- ▶ investigate, prosecute, and punish those responsible
- ▶ provide redress to victims

To comply with these obligations, the Guidelines encourage African States to ratify the ICCPED, implement domestic legislation to address the crime of ED, and to bring complaints to regional and international bodies. Further, States also have an obligation to facilitate effective cooperation and assistance among themselves and with international bodies.

The duty to prevent and refrain from ED imposes positive and negative obligations on States. On the one hand, States should take all the necessary measures, including adopting legislation, policies, and practices, that promote the protection of human rights and prevent ED from taking place. In cases of deprivations of liberty, States have an obligation to guarantee the rights of the person deprived of liberty and any other person with a legitimate interest in their deprivation, and to ensure that the detention does not result in an ED.

States have a duty to protect, without discrimination, all persons from ED. Thus, any person in the territorial space and jurisdiction of a State, regardless of their nationality or citizenship, should be protected against this unlawful practice.

When there are indications that an ED has been committed, States have a responsibility and an obligation to search, investigate, prosecute, and punish those responsible, irrespective of whether the perpetrators are State or non-State actors. States must take all the necessary measures “to search for, locate and release disappeared persons without delay and, in the event of death, to locate, exhume, identify, respect and return their remains to the relatives.” When doing so, States should carry out efficient, independent, and impartial searches and ensure that victims’ rights to truth, access to information and participation are realised where possible.

If a disappeared person is confirmed dead, States must facilitate, with the assistance of qualified professionals, the chain of custody, collection and preservation of evidence concerning the death, and carry out forensic medical examinations to meet all required standards for the search, exhumation, and identification of bodies.

A prompt, impartial, effective, independent, transparent, and thorough investigation by a competent authority is crucial to discourage future violations and promote accountability, and to ensure that the rights to justice, truth, and reparation are vindicated. According to the EDA Guidelines, an investigation of ED can originate from a formal complaint or by the authorities’ initiative where there are grounds to believe a person has disappeared, and it will continue until the fate and whereabouts of the person are established.

States must ensure the protection of anyone involved in the investigations, including victims and their representatives, witnesses, complainants, and relevant authorities.

Establishing the fate and whereabouts of the disappeared does not absolve the State from its obligation to prosecute and punish the perpetrators.

The EDA Guidelines emphasise the incompatibility of amnesties, immunities, and other measures such as statutes of limitations with the provisions of the Banjul Charter. Once responsibility has been proved, States should impose appropriate sanctions.

Lastly, States must adopt the necessary measures to provide effective, sufficient, and timely remedies to victims, including reparations, involving individual and collective measures. These include measures for restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. Reparations must be proportionate to the severity of the harm suffered by the victim and should take into account cultural factors.

▶ **HOW TO IMPLEMENT THE ED GUIDELINES?**

The adoption of the EDA Guidelines is a pivotal step towards the eradication of this practice in the African continent. Nevertheless, adoption by itself is not enough. African States should take all the necessary measures to implement and disseminate these guidelines.

▶ **CALL TO ACTION**

- ▶ African States are encouraged to adopt legislative, administrative, judicial, and other indispensable measures to implement the EDA Guidelines and to ensure that the rights and obligations enshrined in them are safeguarded.
- ▶ States should ensure that the EDA Guidelines are broadly disseminated among different stakeholders, including State authorities, national human rights institutions, academic institutions, NGOs, and wider society.
- ▶ Training is essential to guarantee that the EDA Guidelines become known to national authorities. States should ensure that all officials providing support to victims of ED, as well as those involved in law enforcement, security and intelligence, migration, and counter-terrorism activities, are effectively trained on the contents and implementation of these guidelines.