

MODULE 3

What is enforced disappearance?

Enforced disappearance is defined by Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) 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 a **refusal to acknowledge** the deprivation of liberty or by **concealment of the fate** or whereabouts of the disappeared person.

Enforced disappearance can amount to crime against humanity if it is perpetrated as part of a widespread or systematic attack against a civilian population.

Enforced disappearance is a complex crime which might violate several fundamental human rights. Some of the key rights that are violated include:

- Right to life
- Right to liberty
- Right to due process and judicial protection
- Right not to be subjected to torture and inhuman, degrading treatment
- Right to security of person and personal integrity
- Right to economic, social and cultural rights.

Enforced disappearance is a **continuous violation**, which means that it starts with the deprivation of liberty of the victim and continues until the victim's whereabouts are established, even if this happens many years or decades later. There is no time limit on how long enforced disappearance lasts; it can be hours, days, or decades.

Who are victims of ED?

The ICPPED defines victims broadly, including the disappeared person and any individual who has suffered as a result of an enforced disappearance. Disappearances can also inflict severe suffering on the families and others close to the victims. The impact of enforced disappearance on the relatives often constitutes a separate violation of the prohibition of torture and ill-treatment.

Enforced disappearance as an act of torture

Enforced disappearance and torture are inextricably connected acts. While not being a condition for the crime of enforced disappearance, victims of enforced disappearance are **subjected to severe harm and suffering** during the period of their disappearance as a result of being placed outside the protection of the law.

In 2003, Mustafa al-Hawsawi was abducted by Pakistani agents and transferred into the custody of the CIA where he was held in a black site until 2006 when he was transferred to Guantanamo Bay, Cuba. During the three years of his secret detention, he was repeatedly subjected to physical and psychological torture.

Beyond what it is stated in the Declaration on the Protection of All Persons from Enforced Disappearance there are no treaties that explicitly refer to enforced disappearance as a form of torture, but multiple human rights bodies and tribunals, including the UN Human Rights Committee (HRC) (e.g. Mojica v. Dominican Republic), the African Commission on Human and Peoples' Rights (ACoMHR) (e.g. Mussie Ephrem v. Eritrea) and the Inter-American Court of Human Rights (IACtHR) (e.g. Goiburú v. Paraguay) recognise that enforced disappearance can constitute torture:

- In Mouvement Burkinabe des droits de l'homme et des peuples v. Burkina Faso, the ACoMHR affirmed that any act leading to enforced disappearance excludes the victim from the protection of the law and causes grave suffering to the victim and their family. It constitutes a violation of the right to the recognition of a person's legal status, the right to freedom and security, and the right not to be subjected to torture or any other ill-treatment.
- The IACtHR in Anzualdo Castro v. Peru affirmed that deprivation of communication in itself constitutes ill-treatment due to the harm caused to the psychological and moral integrity of the person.
- The UN Working Group on Enforced or Involuntary Disappearance (WGEID) in its General Comment on the Right to Truth noted that for the family of the direct victim, the enforced disappearance can **constitute an act of torture**. In particular the WGEID stated that States "cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives."
- The IACtHR, (e.g. Diario Militar case), the ECtHR, (e.g. Kurt v. Austria), and the HRC (e.g. Bousroual v. Algeria) have also confirmed that enforced disappearance causes great suffering to the family members of the disappeared.

Avenues for providing relief to victims of enforced disappearance

Under the ICPPED, States have an obligation to criminalise enforced disappearances (Art.4). However, victims usually face difficulties when accessing justice. The obstacles include the lack of adequate domestic legislation, lack of technical capacity to investigate, and mainly lack of political will to prosecute cases and provide reparations to the victims.

In addition to enforced disappearances, litigation can focus on the link with one or several other human rights violations committed alongside the enforced disappearance.

The case of Mustafa Al-Hawsawi v. Lithuania focused on the torture aspects of his disappearance. His case before the ECtHR focuses on the right to life, prohibition of torture, right to liberty, and respect for private and family life.

Despite the existing challenges, there are avenues victims can use to seek justice at domestic, regional, and international forums. At the UN level, victims can file claims if they have exhausted domestic remedies and satisfy the jurisdictional requirements. Note however that where exhaustion of local remedies is not possible (because remedies are unavailable, ineffective, or there is undue delay), this requirement may be lifted (see *Practice Note on Holistic Strategic Litigation on Enforced Disappearance*).

- The **Committee on Enforced Disappearance** (CED) is able to receive communications from victims whose States have ratified the ICPPED and have made the necessary declaration under Article 31 to allow the CED to receive individual complaints. The number of States that have ratified ICPPED is, however, limited.
- Before the **WGEID**, any person can submit a communication on behalf of a victim of enforced disappearance. The WGEID then sends appeals or general allegation letters to the government of the relevant country urging it to investigate and provide information on the forcibly disappeared person.
- Given that most victims of enforced disappearances are subjected to torture and ill-treatment, the **UN Committee against Torture** (CAT) is another platform where victims can file a claim.
- The **HRC** is another potential avenue as many of the rights breached by an enforced disappearance are covered by the ICCPR. The HRC has dealt with many cases on enforced disappearance.

However, for an individual to file a complaint with CAT or HRC, the State against which the complaint is made must be a party to UNCAT or ICCPR and have consented to the jurisdiction of the CAT or HRC to accept individual claims.

Legal remedies may also be found within regional human rights systems (see also *Module 8: Forum Choice*):

- **Inter-American system.** This includes the Inter-American Commission and Court. It is the only regional system that has a specific convention banning the practice of enforced disappearance. As a result, and given the history of the continent which involved the widespread use of enforced disappearance during the dictatorships of the 70s and 80s, it has the most advanced jurisprudence.
- **European system.** There is no regional convention on enforced disappearance in Europe. There is a substantive body of case law by the ECtHR that can be relied on, linked to other rights set out in the European Convention (right to life, right to liberty, freedom from torture etc.: see above, case of Mustafa al-Hawsawi).

- **African system.** This encompasses the African Commission on Human and Peoples' Rights, the African Court and the ECOWAS Court of Justice. The African system does not have a specific instrument prohibiting the use of enforced disappearance. The Banjul Charter prohibits violations of right to life, freedom from torture, security of person, and a fair trial. The Kampala Convention (Art. 9) specifically prohibits the use of enforced disappearance in the context of internal displacement.

Reparation for victims of enforced disappearance

Victims of enforced disappearance have the right to obtain reparation, including prompt, fair, and adequate compensation (Art.24(4) ICCPED). This means compensation for material and moral damages, restitution, rehabilitation, satisfaction, and guarantees of non-repetition (see *Module 9: Reparation, Module 10: Compensation, and Practice Note on HSL on Enforced Disappearance*).

For victims of enforced disappearance, one key need and form of reparation is the right to truth (Art.24(2) ICCPED). 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 circumstance that can restrict this right. It includes a procedural obligation for the State to conduct an investigation, to share the results, grant access to archives, and protect witnesses and others associated with the investigation. This is essential because of the **continuing nature of the violation**: until the fate or whereabouts of the missing person are established, the harm suffered by the relatives and other victims will not cease. The violation only stops once the person is **released** or **accurate information is disclosed** on their whereabouts. Any other form of reparations will be affected if this primary need is not fulfilled.

Other relief sought might include **orders for the State to search for the disappeared and return them**. In cases where the disappeared individual is no longer alive, it is crucial that the body is returned to the family. According to the IACtHR, this "leads to restore the dignity of the victims." In cases of widespread enforced disappearances, the allocation of resources to locate and exhume burial sites is a key measure.