

2021

THE FORGOTTEN VICTIMS: ENFORCED DISAPPEARANCE IN AFRICA

The Struggle of
Victims of Enforced
Disappearance to obtain
Justice, Truth and
Reparations



REDRESS

Ending torture, seeking justice for survivors



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Algerian mothers of disappeared people attend a sit-in outside the government human rights office in Algiers to demand the return of their loved ones or information about their fate.

WHO WE ARE

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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LIST OF ACRONYMS

| | |
|---------------|--|
| ACHR | American Convention on Human Rights |
| ACHPR | African Commission on Human and Peoples' Rights |
| CAT | Convention Against Torture |
| CED | UN Committee on Enforced Disappearances |
| ECtHR | European Court of Human Rights |
| ECHR | European Convention on Human Rights |
| ECOWAS | Economic Community of West African States |
| ED | Enforced Disappearance(s) |
| EU | European Union |
| GNA | Government of National Accord |
| HRC | Human Rights Council |
| HRCt | UN Human Rights Committee |
| IACHR | Inter-American Commission on Human Rights |
| IACTHR | Inter-American Court of Human Rights |
| ICCPR | International Covenant on Civil and Political Rights |
| ICRC | International Committee of the Red Cross |
| ICPPED | International Convention for the Protection of All Persons from Enforced Disappearance |
| IHL | International Humanitarian Law |
| IOM | International Organisation for Migration |
| NSS | South Sudan's National Security Service |
| OHCHR | Office of the High Commissioner for Human Rights |
| WGEID | UN Working Group on Enforced or Involuntary Disappearances |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNGA | UN General Assembly |

1 EXECUTIVE SUMMARY AND RECOMMENDATIONS



© Reuters/Alamy Stock Photo

An Algerian mother of a disappeared person shows a photograph of her son at SOS Disparus office in Algiers.

Enforced Disappearance (“ED”) is 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.¹

ED has been used as a tool of oppression all over the world in the context of internal armed conflicts, to oppress the population, to silence opposition and dissent, and to discriminate against minorities, among other things.

The use of ED in Africa can be traced back to colonial times when many colonial governments disappeared freedom fighters in order to silence them. Today, many African States use ED in a range of contexts against different groups of people, from human rights defenders to ethnic minorities, migrants and opposition leaders.

While it is clear that ED has been prevalent in the continent, the precise scale of the practice is difficult to assess. Many African States refuse to acknowledge the occurrence of ED, do not keep an official record of the crime and the victims, and are reluctant to investigate when it takes place. Many victims decide not to report the disappearance for fear of reprisals, lack of independence and due process of the authorities in the country, and insufficient awareness of the legal remedies available at the national, regional and international levels.

The absence of political will and awareness among African States to address ED is also reflected in the lack of adequate legal frameworks at the national level to prevent and protect against this crime. As a result, victims in Africa are left to face the consequences of the crime with no prospect of securing redress.

At the regional level, ED has historically not featured prominently on the agenda of the African Commission on Human and Peoples’ Rights, the continent’s principal human rights body. Yet, this has changed in

recent years as the African Commission has taken a number of decisive steps to raise awareness of the pervasiveness of this practice, as well as the need to eradicate it in the region.

Based on the findings of this report, we make the following recommendations:

- The relevant United Nations bodies should engage and follow up on ED in Africa, possibly by way of a thematic report by the Working Group on Enforced or Involuntary Disappearances (“WGEID”) given the invisibility of the practice.
- The African Commission of Human and Peoples’ Rights (“ACHPR”) should take steps to adopt as soon as possible guidelines for African States on the necessary measures to prevent and protect against ED.
- The ACHPR, the African Court on Human and Peoples’ Rights (“AfCHPR”), and the ECOWAS Court should adopt a practice of considering existing international standards, commentary and jurisprudence when dealing with cases of ED and when carrying out their other promotion and protection activities.
- African States should consider the ratification of the International Convention on the Protection of All Persons from Enforced Disappearance (“ICPPED”) and take all measures necessary to prevent and protect against ED in accordance with international and national guidelines.
- African States should empower victims and those organisations assisting them to strengthen their capacity to seek justice, truth and reparations, and to enhance their ability to co-ordinate with other victims to conduct advocacy nationally and regionally.
- Civil Society Organisations, victims’ groups and their representatives should promote solidarity networks with the aim of strengthening regional platforms to assist victims in their advocacy and efforts to seek justice and reparations. Solidarity can maximise impact at the regional level to eradicate ED in Africa.

1 International Convention for the Protection of All Persons from Enforced Disappearance (“ICPPED”), Article 2; Rome Statute of the International Criminal Court, Article 7; Inter-American Convention on Forced Disappearance of Persons, Article II.

2

INTRODUCTION AND METHODOLOGY



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Ibrahim Al Obeidi and his brother Fathallah hold a picture of their brother Salem, who disappeared at the hands of Libya's internal security forces on the 15th of February 1994. He was later murdered at the Abu Salim prison.

This report considers the practice of ED in Africa, exploring the contexts in which it takes place, the existing international and regional legal and policy frameworks in place to prevent and respond to ED, as well as the gaps in those frameworks that prevent the eradication of ED in Africa.

Section 3 of the report sets out the key legal concepts and definitions referred to throughout the report. Section 4 addresses the underreporting of ED in Africa, as well as the context in which the crime takes place, focusing on trends, affected communities and recurring perpetrators. Section 5 explores the definition of ED in international law, taking into account the developments in the African human rights system, as well as from a comparative perspective. Section 6 analyses the shortcomings and progress made as part of taking steps to protect against ED at the regional level, as well as gaps, challenges and existing good practices in African States in relation to the obligations to prevent, protect, investigate and provide reparations in cases of ED.

This report is based on research and activities carried out by REDRESS and its partners – Lawyers for

Justice in Libya (Libya), Zimbabwe Lawyers for Human Rights (Zimbabwe), the African Center for Justice and Peace Studies (Sudan), and MENA Rights Group (Algeria) – under the three-year project *Combating Enforced Disappearances in Africa*. The project adopts a human rights-based and victim-centred approach to challenge ED in the African continent by strengthening national and regional frameworks to combat the crime.

The process of preparing the report combined desk-based research with input received from REDRESS' partners on the views and needs of victims of ED. Additionally, the conclusions of four baseline studies and policy discussions carried out by our partners in Algeria, Libya, Zimbabwe and Sudan were incorporated into the report, particularly in relation to the main legal and policy gaps to prevent and protect against the crime in Africa. While the report benefits from detailed input in relation to these four 'focus' countries, it draws on existing research to offer a regional overview of ED in Africa. As such, further input was obtained from various meetings and events with regional and international experts, as well as with practitioners in Africa.

3

RELEVANT CONCEPTS AND DEFINITIONS



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The wife and children of Itai Dzamara, a Zimbabwean journalist and peaceful pro-democracy activist, held a vigil in Harare following his disappearance on 9 March 2015.

The prohibition on ED in international human rights law

The UN General Assembly adopted the Declaration on the Protection of all Persons from Enforced Disappearance in 1992 (the “**1992 Declaration**”). Whilst not binding on States, it was the first formal signal from the UN that ED is a human rights violation distinct from other human rights violations and, in that regard, it sets out clear standards for all States to adhere to in order to prevent, protect against and punish the perpetrators of ED.²

Building on the 1992 Declaration, the UN General Assembly adopted the **ICPPED** in 2006, entering into force in 2010. It defines 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 a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such person outside the protection of the law*”.³ This is the most commonly used definition in international law.⁴

Key concepts and issues in the human rights regime

Victims: The ICPPED defines the term “victim” as the disappeared person and any other individual who has suffered harm as the direct result of an ED.⁵ As such, in the context of ED, the term “victim” encompasses a broad definition that includes the relatives or dependents of the person who has disappeared (i.e. the immediate victim) and persons who have suffered harm in intervening to assist victims in distress, or to prevent victimisation.⁶

Non-State actors: The involvement of States in ED is one of the essential elements of this crime. However, increasingly in recent decades, non-State actors have resorted to the use of acts which are analogous to ED. At the time of publishing this report, discussions are ongoing within and between treaty bodies at international and regional levels as to the appropriate legal principles to be applied to such acts and such perpetrators. Additionally, ED can be committed by “de facto authorities”, such as rebel and insurgent groups, which exercise prerogatives that are comparable to those normally exercised by legitimate governments.⁷

“Short-term disappearances”: There is no minimum time limit for a disappearance to qualify as an ED. As such, “short-term disappearances” can result from the unacknowledged deprivation of liberty which puts the individual concerned outside the protection of the law for a limited amount of time.⁸

Relationship with International Humanitarian Law

The term “missing person” is usually considered to be broader than that of “person subjected to enforced disappearance”. The ICRC has drafted guidelines on the concept of “missing person” or “person unaccounted for”, meaning a person reported missing in connection with an international armed conflict, civil war or internal violence or unrest.⁹ In some situations, missing persons can also be victims of ED, and often these two terms are used interchangeably. However, while “missing person” does not always imply the commission of a crime, ED is always a crime, one that requires State involvement and a crime that constitutes violations of multiple human rights.¹⁰

2 UN General Assembly (“UNGA”), Declaration for the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992.

3 International Convention for the Protection of All Persons from Enforced Disappearance (“ICPPED”), Article 2.

4 See, for example, Jurgen Schurr, Position Paper on the Rationale for Guidelines on Enforced Disappearance in Africa, finalised on 13 December 2016, para. 27.

5 ICPPED, Article 24(1).

6 UN Human Rights Committee (“HRCt”), Report of the Working Group on Enforced or Involuntary Disappearances (“WGEID”) (A/HRC/22/45), 28 January 2013, paras. 51 and 52.

7 For example, the WGEID noted in 2019: “For a number of years, the Working Group has been receiving information about increasing instances of abductions carried out by non-State actors, which may be tantamount to acts of enforced disappearances. In light of its humanitarian mandate and the fact that the victims of these acts do not have any remedy to address their plight, the Working Group has decided to document cases concerning enforced or involuntary disappearances allegedly perpetrated by non-State actors that exercise effective control and/or government-like functions over a territory”, Report of the WGEID (A/HRC/42/40), 30 July 2019, para. 94.

8 Report of the WGEID (A/HRC/42/40), 30 July 2019, para. 90; Committee on Enforced Disappearances (“CED”), Views approved by the CED under article 31 of the Convention for communication No. 1/2013; *Yrusta v. Argentina*, CED/C/10/D/1/2013, para. 10.3.

9 International Committee of the Red Cross (“ICRC”), Guiding Principles/Model Law on the Missing, 2009, Article 2(1).

10 Council of Europe, Commissioner for Human Rights, Missing Persons and Victims of Enforced Disappearance in Europe, Issue Paper, March 2016, pp. 17-18.

Further, ED can amount to a crime against humanity if carried out as part of a systematic and widespread attack against a civilian population.¹¹ In the context of international and non-international armed conflicts, States are required to prevent instances of missing

persons and ED with respect to persons deprived of their liberty by establishing mechanisms to account for and register such persons, and allow for visits.¹² Further, under IHL, States have an ongoing obligation to search for the missing and investigate such cases.¹³

11 Rome Statute of the International Criminal Court, Article 7(1).

12 Customary IHL, ICRC: Rule 98, *Enforced disappearance is prohibited*; ICRC: Rule 123, *The personal details of persons deprived of their liberty must be recorded*.

13 Customary IHL, ICRC: Rule 117, *Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate*.

4 THE CONTEXT OF ED IN AFRICA



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Wall displaying pictures of those killed and missing since the conflict against Libyan leader Muammar Gaddafi began, near the courthouse in Benghazi in 2011.

Underreporting and lack of official data

The use of ED has been a widespread problem on the continent since colonial times and continues to be prevalent today. The full extent to which this practice takes place is difficult to assess since governments often deny existing and past instances of ED, which has caused a lack of official data and significant underreporting and recording of the crime. Furthermore, the ICPPED does not require States to publish data on the numbers of ED within their borders (and in any event, the ratification of the ICPPED amongst African States has been patchy, as discussed in section 6 below¹⁴).

The WGEID has noted that factors contributing to underreporting include a fear of reprisals, weak administration of justice, ineffectual reporting channels, institutionalised systems of impunity, poverty, illiteracy, language barriers, a practice of silence and restrictions on the work of civil society.¹⁵ The remainder of this sub-section briefly surveys the data that is currently available, and the subsequent sub-sections describe the factors enabling and contributing to the prevalence of the crime in Africa.

UN data

The WGEID 2020 report noted a total 46,271 cases of ED which were under active consideration, of which around 4,783 (10.3%) occurred in African countries.¹⁶ Most of the outstanding cases on the continent derive from Algeria (3,253), Egypt (308), Burundi (238) Sudan (177), Morocco (153), and Ethiopia (113).¹⁷ The table below sets out the number of cases of ED in Africa under consideration as outlined in the WGEID 2020 report.¹⁸

While these numbers provide a reliable account of cases reported to the WGEID, they fail to reflect the

full scale of the practice of ED in Africa. In particular, the WGEID noted as far back as 2005 that:

“The Working Group remains concerned that while Africa has been racked by armed conflicts over the last decade, at the same time it is the region with the fewest reported cases of enforced or involuntary disappearances. The Working Group suspects that it is dealing with an underreported phenomenon of disappearances. Underreporting was also noted this year in the Working Group’s country visit report on Colombia and it certainly exists in other countries, but the African case is particularly dramatic. The unfolding humanitarian disaster in Darfur, Sudan, is a striking, but not unique, example of this phenomenon.”¹⁹

African Commission

In 2018, the African Commission adopted a resolution to expand the mandate of the Working Group on Arbitrary Killings to include ED and in particular to include collecting information and keeping a database of reported instances of ED in Africa.²⁰ It is hoped that by fulfilling this mandate, the African Commission’s database will assist with raising awareness of the prevalence of ED in Africa, particularly given that the African Working Group has recently acknowledged that underreporting is an issue.²¹

Civil society

The concern about underreporting is borne out by the reports of various civil society organisations in the region. For instance:

- The estimated number of individuals who were disappeared during Algeria’s lengthy civil war varies between organisations and has never been confirmed by an independent authority.²²

14 As at the time of writing, only 17 African States have ratified the ICPPED, namely: Benin, Burkina Faso, Central African Republic, Gabon, Gambia, Lesotho, Malawi, Mali, Mauritania, Morocco, Niger, Nigeria, Senegal, Seychelles, Togo, Tunisia and Zambia. In addition, 17 African States have signed but not yet ratified it, namely: Algeria, Angola, Burundi, Cameroon, Cape Verde, Chad, Comoros, Congo, Eswatini, Ghana, Guinea-Bissau, Kenya, Madagascar, Mozambique, Sierra Leone, Uganda and United Republic of Tanzania; United Nations Treaty Collection, 16: International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, New York.

15 WGEID, A/HRC, 30/38, dated 10 August 2015, page 20.

16 HRC, Report of the WGEID, A/HRC/45/13, 7 August 2020, Annex II.

17 *Ibid.*

18 *Ibid.*

19 HRC, Civil and Political Rights, including the questions of disappearances and summary executions (E/CN.4/2006/56), 23 February 2006, para. 593.

20 ACHPR/Res. 408 (LXII) 2018, Resolution on the expansion of the mandate and composition of the Working Group on Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa to include enforced disappearances.

21 ACHPR/Res. 448 (LXVI) 2020, Resolution on the Drafting of Guidelines for the Protection of All Persons from Enforced Disappearances in Africa, preamble.

22 Various figures, ranging from 7,000 to 20,000 have been put forward as the total number of disappeared persons (see for example International Commission on Missing Persons (ICMP), Algeria, 9 November 2014; Algeria Watch, Information sur la situation des droits humains en Algérie, June 2012; Justice and Reconciliation Project, The Right to Know, 13 August 2015).

Cases of ED in Africa under consideration by the WGEID by country

| Country | Number of ED under consideration |
|----------------------------------|----------------------------------|
| Algeria | 3,253 |
| Burundi | 238 |
| Cameroon | 16 |
| Central African Republic | 3 |
| Chad | 23 |
| Congo | 89 |
| Democratic Republic of the Congo | 48 |
| Egypt | 308 |
| Equatorial Guinea | 8 |
| Eritrea | 63 |
| Ethiopia | 113 |
| Gambia | 13 |
| Guinea | 37 |
| Kenya | 88 |
| Libya | 58 |
| Mauritania | 6 |
| Morocco | 153 |
| Mozambique | 3 |
| Namibia | 2 |
| Nigeria | 7 |
| Rwanda | 25 |
| Seychelles | 3 |
| Somalia | 1 |
| South Africa | 2 |
| South Sudan | 3 |
| Sudan | 177 |
| Togo | 10 |
| Tunisia | 13 |
| Uganda | 15 |
| Zimbabwe | 5 |

- In Zimbabwe, official statistics are not available but civil society organizations estimate that, throughout the 1980s, more than 20,000 people were forcibly disappeared as a result of the massacres perpetrated by the Zimbabwe National Army against the Ndebele population.²³ Additionally, there is an underreporting due to fear of reprisals, caused by the widespread context of attacks on victims and human rights defenders who report the crime to the authorities²⁴.
- In Libya, the available statistics confirm that ED occurs but the magnitude is still unclear. The “Ministry of Martyrs and the Missing” with the “International Commission on Missing Persons” put the number of missing persons during the Gaddafi era and the 2011 uprising to be around 10,000.²⁵ Further, the UN Support Mission in Libya in its report, *Behind Bars*, estimates that thousands of persons are being held in detention facilities run by militia and the fate of many of those in the facilities remains unknown.²⁶
- The latest report from the WGEID notes that in the last four decades, they received only 394 reports of ED in Sudan.²⁷ However, considering the widespread nature of torture and enforced disappearances used by the regime of former President Al-Bashir, this number is believed to be much higher. Only during the violent crackdown on peaceful

23 Zimbabwe Lawyers for Human Rights, *Enforced Disappearances – An Information Guide for Human Rights Defenders and CSOs*, January 2016.

24 HRW, *World Report 2021, Zimbabwe, Abuses, Ill-Treatment, and Torture*.

25 International Commission on Missing Persons, *Where We Work, Libya*.

26 *Ibid.*

27 The Report of the WGEID (A/HRC/45/13), 7 August 2020, p. 32.

protesters which took place on 3 June 2019, over a dozen protesters disappeared and their fate is still unknown.²⁸

Primary contexts

Despite the lack of statistics, the circumstances in which ED occurs are clear. Governments deploy ED as a means to exert pressure during times of armed conflict and civil unrest, as part of “security and counter-terrorism”-related operations, and in the context of managing migration and internal displacement. Additionally, ED is used to silence the opposition, to deter dissent and to instill fear in the population as a way to hold on to power. Human rights advocates, political opposition, union leaders, journalists and minority groups are often targeted.

The following sub-sections explore in detail the context in which ED occurs in Africa, and the profile of those targeted.

ED during armed conflict and civil unrest

Many ED in Africa have occurred, and continue to occur, in the context of armed conflict, above and beyond the large – and increasing – numbers of persons who are reported missing as a result of armed conflict.²⁹

While ED also occurs outside of armed conflict, the collapse of the rule of law in the midst of conflict and the lack of political will or ability to hold perpetrators accountable can exacerbate or create the conditions for the commission of ED.³⁰

As the case studies included in this report illustrate, ED has been systematically employed in conflicts and situations of political violence throughout Africa for decades. For example:

- In South Africa, political violence resulted in the disappearance of more than 2,000 people, the majority of whom were disappeared between 1985 and 1994 in the Transvaal and Natal regions, where apartheid-era political violence was concentrated.³¹ Reflecting common patterns of ED in conflict, over 90% of the disappeared in South Africa are male, and more than 70% are under the age of 36.³² Most (70%) were members of liberation movements, and fewer than 10% were security force members or supported pro-government movements, reflecting the fact that most disappearances were conducted by the government in an effort to quell political violence or dissent.³³
- Similarly, widespread ED was conducted during the “Ethiopian Red Terror,” when thousands of people were arbitrarily arrested, tortured, and disappeared. The count of those disappeared varies widely, but most reports agree that tens of thousands of Ethiopians were impacted by disappearances during the period from 1974 to 1991.³⁴ Political opponents of the Derg, Ethiopia’s military junta that controlled the government from 1974–1978, were arrested *en masse*, and many were disappeared; Amnesty International estimated that 30,000 political detainees were held in prisons by the end of 1978, and that many (the precise numbers are unknown) were ultimately disappeared.³⁵ The majority of detainees and disappeared were young people, who are now referred to as Ethiopia’s “lost generation.”³⁶
- In Sudan, the former Al-Bashir regime deployed the use of ED to quell military uprisings and civil unrest in various parts of the country. In Darfur, the Janjaweed, a government supported militia, was deployed to target the uprisings of the non-Arab population, resulting in thousands of civilians being murdered, displaced and disappeared.³⁷
- In Algeria, during the civil war in the 1990s, approximately 8,000 persons were forcibly disappeared.

28 African Center for Justice and Peace Studies (“ACJPS”), *Enforced Disappearance in Africa: Baseline Study for Sudan*, September 2020, p. 22.

29 See UN Security Council, Resolution 2474, UN Doc S/RES/2474 (2019) (discussing the issue of missing persons as a result of armed conflict).

30 *Ibid.*

31 Truth and Reconciliation Commission, *Report of the Human Rights Violations Committee: Abductions, Disappearances, and Missing Persons*, Vol. 6, Sec. 4, Chap. 1, at para. 37.

32 *Ibid.*

33 *Ibid.*

34 Human Rights Watch, *Ethiopia: Reckoning Under the Law*, December 1994, Volume 6, No. 11.

35 Marshet Tadesse Tessema, *Prosecution of Politicide in Ethiopia: The Red Terror Trials* 14 (2018).

36 Jacob Wiebel, “Let the Red Terror Intensify”: Political Violence, Governance and Society in Urban Ethiopia, 1976–78, 48 *Int’l J. of African Historical Studies* 13 (2015).

37 Report of the International Commission of Inquiry on Darfur to the United Nation Secretary-General, 25 January 2005, Geneva, p. 39.

In many cases, those who had been disappeared, but then reappeared months or even years later, reported having been tortured, and having witnessed the extrajudicial killings of fellow detainees.³⁸ An estimated 43,000 men were held *incommunicado* in camps without due process. While many of these men were released and returned to their homes, often having been ill-treated or tortured, others disappeared from their camp or shortly after their original release.³⁹

bi, Kenya. The UN Panel of Experts on South Sudan issued a report in late April 2019 stating that it was “highly probable” that the NSS killed the two men in South Sudan, but the South Sudanese and Kenyan governments have both denied having knowledge of their whereabouts.⁴³

ED in the context of migration and internal displacement

Despite a well-established link between ED and migration, the issue has gained little attention from governments and the international community. Owing to the transnational character of ED in migration, as well as the involvement of criminal groups (such as smugglers or traffickers), blame and responsibility is often placed elsewhere.⁴⁴

ED can itself be a cause of migration, with many individuals fleeing their home country due to fear of persecution and/or in light of the social and economic consequences of an ED.⁴⁵ At the same time, the migratory journey itself can heighten the risk of exposure to ED. There are many factors contributing to the perilous nature of migratory journeys, including the lack of safe or legal migration routes, the militarisation of borders, the arrest and detention of undocumented migrants, and the lack of safeguards in immigration detention or lack of enforcement of such safeguards.⁴⁶ Crucially, as the WGEID has highlighted, “*the discourse and language used to address the issue of migration and, in particular, to characterize migrants, notably those with irregular status, associating them with security threats and criminality places them in a situation of increased vulnerability, thus exposing them further to violence and human rights violations, including enforced disappearance.*”⁴⁷

The adoption by States of excessively rigid migration policies focused on deterrence encourages the use of

Case study Amine Dutour



Amine Dutour disappeared during the Algerian civil war when he was 21 years old.⁴⁰ On 30 January 1997, Amine was taken away by unidentified men, who are presumed to have been intelligence service agents, in a white car parked in front of his house, and has not been heard from since. His mother, Nasseria Dutour, founded the Coalition of the Families of the Disappeared in Algeria in 1999, helping victims of enforced disappearances in the country to seek justice, find information on the whereabouts of their loved ones, and obtain reparations.

Other allegations of ED in the context of political violence or civil unrest include the discovery of secret detention facilities and mass graves in Burundi⁴¹ and the violent crackdown on peaceful protests in Ethiopia⁴². States also seek to disappear prominent critics or activists who are outside their territorial jurisdiction but are not necessarily migrants or individuals seeking refugee or asylum status in another country. In January 2017, for example, agents from South Sudan’s National Security Service (“NSS”) kidnapped two critics of the government – Dong Samuel Luak, a lawyer and human rights activist, and Aggrey Ezbon Idri, a member of the political opposition – in Nairo-

38 *Ibid.*

39 Algeria-Watch, *Les Déportés des camps du Sud, une plaie qui continue de saigner*, 26 July 2010. See also *Comite Justice pour l’Algérie, Les Détentions Arbitraires: Dossier No. 4*, May 2004.

40 The International Center for Transitional Justice, “Only truth could heal this pain”: Algerian women speak of their search for the disappeared, 3 August 2016; Amnesty International, *The disappeared in the Mena: Neither dead nor alive*.

41 UN WGEID, Report of the Working Group on Enforced or Involuntary Disappearances A/HR/33/51, 28 July 2016, paras.85-87.

42 UN OHCHR, UN experts urge Ethiopia to halt violent crackdown on Oromia protesters, ensure accountability for abuses, 21 January 2016.

43 Amnesty International, *South Sudan: Investigate Apparent 2017 Killing of Activists*, 30 April 2019.

44 UN WGEID, Report on enforced disappearances in the context of migration, A/HRC/36/39/Add.2, 28 July 2017.

45 *Ibid.*

46 Bernard Duhaime and Andréanne Thibault, *Protection of migrants from enforced disappearance: A human rights perspective*, International Review of the Red Cross, August 2017, at p. 578; see also Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, *Unlawful death of refugees and migrants*, 15 August 2017, at paras 10 to 13; see also UN/ECOWAS, *Release Report on Gambia Migrant Massacre* where more than 50 detained Ghanaian and other West African migrants were killed, 24 January 2019, Geneva.

47 UN WGEID, *Enforced disappearances in the context of migration*, *supra* note 44, at para. 67.

less travelled and more dangerous routes.⁴⁸ The Migration Data Portal noted that more than two-thirds of refugees and migrants surveyed in Libya and half of those surveyed in West Africa between May 2017 and September 2019 used a smuggler on their journey.⁴⁹ Many smuggling or trafficking operations are facilitated, directly or indirectly, by State agents (such as border and immigration officials, law enforcement officials, members of the armed forces, or port authorities).⁵⁰ One such smuggling network has been identified in Egypt and Sudan, whereby a combination of smugglers, traffickers, and local government officials work together to capture and sell Eritrean migrants.⁵¹ Similarly, State actors in Libya have reportedly collaborated with criminal gangs involved in smuggling and trafficking who have established detention centres and are, in practice, responsible for controlling the flow of migrants throughout the country.⁵² As reported by the UN, when migrants are intercepted by the Libyan Coast Guard during their migratory journeys, they are typically transferred to these detention centers or to other private houses and farms, where the risk of ED is high.⁵³ Bodies have allegedly been dumped and abandoned by smugglers in Libya,⁵⁴ and bodies in Tunisia were allegedly dumped into mass graves without being identified.⁵⁵

States' deterrence policies have come under scrutiny for putting migrants in danger.⁵⁶ Increased EU spending in Africa to reduce the number of migrants crossing the Mediterranean – and in particular in Libya, where the EU has outsourced some functions of migration management to Libyan authorities – has been criticized by human rights organisations as “*fuelling a criminal economy of exploitation and traffic.*”⁵⁷ Furthermore, EU anti-smuggling laws have been used to

prosecute humanitarian actors seeking to rescue or otherwise protect migrants in danger.⁵⁸ The phenomenon of “privatised pushbacks”, whereby the Libyan coastguard requests assistance from merchant ships rather than humanitarian rescue boats so that the migrants are returned to Libya, has been viewed as an intentional tactic to circumvent the principle of non-refoulement.⁵⁹

The interception, “pushback” and deportation of migrants to their countries of origin or another country can result in ED, particularly where migrants are returned to the custody of State agents without any guarantee of their safety.⁶⁰ The WGEID has examined several cases of pushbacks leading to ED:

- In 2007, several cases dealing with the alleged disappearance of Algerian “Harraga” migrants travelling by boat in Tunisian territorial waters on their way to Italy were referred to the WGEID.⁶¹
- More recently, Spanish authorities are reported to have handed migrants over to Moroccan authorities without following procedures to ensure their safety.⁶²
- Sudan, as a major transit country for migrants travelling to Europe, has repeatedly returned Eritrean migrants in disregard of its obligations under international law.⁶³

Further, a denial of due process guarantees in immigration detention facilities heightens the risk of exposure to ED, with immigration detention considered as one of the most opaque areas of public administration.⁶⁴ As noted above, Libyan detention facilities

48 *Ibid*, at para. 66.

49 Migration Data Portal, Smuggling networks along the Central Mediterranean Route, 14 October 2020.

50 Bernard Duhaime and Andréanne Thibault, *supra* note 46, at p. 584.

51 UN WGEID, Enforced disappearances in the context of migration, *supra* note 44, at para. 38.

52 *Ibid*, at para. 39.

53 *Ibid*, at para. 39; UN News, UN rights office concerned over migrant boat pushbacks in the Mediterranean, 8 May 2020.

54 UN WGEID, Enforced disappearances in the context of migration, *supra* note 44, at para 45; International Organization for Migration (“IOM”), Fatal Journeys, Volume 2, Identification and Tracing of Dead and Missing Migrants (Geneva, 2016), p. 20.

55 UN WGEID, Enforced disappearances in the context of migration, *supra* note 44, at para 45; IOM, Fatal Journeys, Volume 2, Identification and Tracing of Dead and Missing Migrants, *supra* note 54, p. 33.

56 UN OHCHR, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 2012, paras 8 and 13.

57 The Guardian, EU Rebuked for €36bn Refugee Pushback Gambit by Patrick Wintour, 20 June 2018.

58 UN HRC, Report of the Special Rapporteur of the Human Rights Council on Extra-judicial, Summary or Arbitrary Executions, Saving Lives is Not a Crime, A/73/314, 7 August 2018.

59 The New York Times, Privatized Pushbacks: How Merchant Ships Guard Europe by Patrick Kingsley, 20 March 2020.

60 Bernard Duhaime and Andréanne Thibault, *supra* note 46, at pp. 580–583.

61 *Ibid*. at p. 581.

62 *Ibid*.

63 Dabanga, Sudan Deports Another 36 Eritrean Migrants, 20 September 2017; Committee to Protect Journalists, For Exiled Eritreans in Sudan, fear Greater than most by Sheryl Mendez, 19 June 2012.

64 UN WGEID, Enforced disappearances in the context of migration, *supra* note 44, at para. 23.

are often run jointly by State and non-State actors, and migrants often aren't registered or provided with access to a lawyer or other procedural guarantees.⁶⁵

*the transit or destination State to the State of Origin so that 'political' migrants can be located within the host State's territory.*⁶⁶

Case study Tariku Asefa



Tariku Asefa was born in Eritrea but moved to Sudan with his father when he was very young. In 2010, his father was arrested by Sudanese authorities for not having a residence permit and handed over to Eritrean authorities.

Tariku Asefa has not heard from his father since then. Tariku Asefa tried to escape Sudan several times as he was worried that he would be returned to Eritrea. In 2014, he finally left Khartoum in a lorry packed with people heading to Libya. On the way, they were transferred from one smuggler to another. Eventually Tariku Asefa was captured by an Arabic-speaking group who took him into a detention centre in what he thought was Benghazi. However, he was never registered. People operating the center dressed like soldiers and told him that the only way he would be released was if he paid a ransom.

In the centre, he slept in a cell with 50 other people without proper ventilation. People, including Tariku Asefa, were often required to undertake forced labor, including carrying heavy loads. Those who could not pay a ransom were often beaten with heavy plastic piping. Tariku Asefa was regularly beaten until he lost consciousness. He tried to escape once but upon his capture he was beaten with a hose and deprived of food and water. 14 months after being detained, a friend of his father paid the ransom, and Tariku Asefa was released and eventually made his way to the UK in 2015.

In its 2013 report, the WGEID notified Egypt of a number of cases relating to Egyptian individuals who were allegedly captured in the United Arab Emirates and forcibly returned to Egypt.⁶⁷ More recently, Human Rights Watch reported that Tanzanian authorities have gravely abused at least 18 Burundian refugees and asylum seekers since late 2019, with many having been forcibly disappeared and their whereabouts unknown.⁶⁸ The report indicated that there may have been collusion between State agents from the two countries.

Despite the large numbers of confirmed or alleged cases of ED of migrants, the WGEID has not documented any instances in which States or non-State actors have been held accountable.⁶⁹ One key issue is that “...the claims and participation of relatives living in the country of origin are hampered by both distance and lack of cooperation on the part of the authorities of the country where the disappearance occurred.”⁷⁰

ED in the context of extraordinary renditions, counterterrorism and security operations

The use of counter-terrorism operations to excuse or justify human rights violations is a well-known phenomenon.⁷¹ As the WGEID has noted, “States are utilising high-handed security measures in places where the State is under the false and pernicious belief that they are a useful tool to preserve national security and combat terrorism and organised crime.”⁷² There are many examples of the use of arbitrary detention and subsequent disappearances against those perceived as sympathisers or collaborators with known extremist groups in the region.⁷³ Such counterterror-

Collusion between States to capture and return migrants to their country of origin also increases the risk of ED. The WGEID has noted that this “*modus operandi* often involves the provision of intelligence by

65 UN WGEID, Enforced disappearances in the context of migration, *supra* note 44, at para. 24.

66 UN WGEID, Enforced disappearances in the context of migration, *supra* note 44, at paras. 15–19.

67 UN WGEID, Enforced disappearances in the context of migration, *supra* note 44, at para. 18.

68 Human Rights Watch (“HRW”), Tanzania: Burundian Refugees ‘Disappeared,’ Tortured, Halt Forced Returns; Investigate Police, Intelligence Services, 30 November 2020, Nairobi.

69 UN WGEID, Enforced disappearances in the context of migration, *supra* note 44, at para. 50.

70 UN WGEID, Enforced disappearances in the context of migration, *supra* note 44, at para. 51.

71 See for example UN HRC, Joint study on Secret Detention of the Special Rapporteur on Torture & other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on the Promotion and Protection of Human Rights & Fundamental Freedoms while Countering Terrorism, the Working Group on Arbitrary Detention & the Working Group on Enforced or Involuntary Disappearance, A/HRC/13/42, 19 February 2010; International Service for Human Rights, *Egypt: Counter-terrorism measures should not be used to cover up human rights violations*, 16 March 2018.

72 UN WGEID, Enforced disappearances in the context of migration, *supra* note 44, at para. 110.

73 Protection International, *Kenya: Set up judicial inquiry into hundreds of enforced disappearances and killings*, last accessed 15 May 2021. Further, a comprehensive study on global practices in relation to secret detention in the context of counter-terrorism was published in 2010 and provides further detail on the widespread use of secret detention and ED by, among other states, Algeria, Libya, the DRC, Sudan and Zimbabwe pursuant to counter-terrorism laws or operations (Joint Study on Secret Detention, *supra* note 71, paras. 216 to 226, paras. 233 to 237 and paras. 251 to 281).

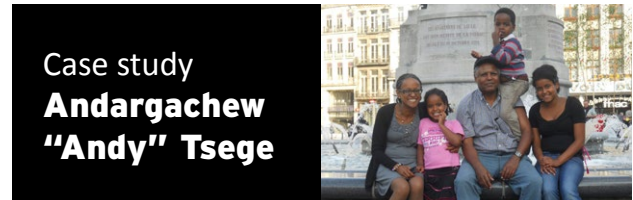
ism operations may involve the arrest of suspected individuals without warrant, often by State agents or security officers who are not uniformed or fail to identify themselves.⁷⁴ For example:

- In Kenya, organisations have documented numerous cases of ED of individuals suspected of ties to Al-Shabab by military and police units, including the Directorate of Military Intelligence.⁷⁵ The Kenya National Commission on Human Rights has documented at least 100 cases of extrajudicial killings and ED of such individuals.⁷⁶
- Similarly, in Cameroon and Nigeria, security forces have disappeared hundreds of men and boys suspected of association with Boko Haram.⁷⁷
- In recent years, the Egyptian Supreme State Security Prosecution has, under the expansive definition of “terrorism,” disappeared peaceful protestors, opposition and human rights defenders.⁷⁸ This follows concerns raised by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism in 2009 about the Egyptian government’s use of exceptional powers to pursue terrorism offences and the use of unofficial detention facilities.⁷⁹ The WGEID and the Special Rapporteur on Torture sent an urgent communication to the Egyptian government in 2009 regarding the ED of 16 persons who were believed to have been abducted by the State Security Intelligence agents.⁸⁰

Hatem Al Fathi Al Marghani was secretly detained by the Libyan Security Services from December 2004 to March 2005.⁸¹ During the secret detention, he was not informed of charges against him nor brought before a judge. He was apparently detained for his public statements that the Libyan authorities deemed to endanger State Security.⁸²

Many States, including African States, collaborated with US officials during the “War on Terror” between 2003 and 2008 to capture and render detainees to

those officials. Mohammed al Asad was one such detainee, who was transferred by Tanzanian officials to Djibouti in 2003, where it is believed he was detained by CIA officials at a secret location, interrogated, subjected to ill treatment and later transferred to another secret detention site.⁸³



Case study
**Andargachew
“Andy” Tsege**

Andargachew “Andy” Tsege, a UK citizen and a prominent figure in Ethiopian opposition politics, was tried in absentia under an anti-terrorism proclamation in Ethiopia in 2009 and in 2012, and was sentenced to death in the first trial and to life imprisonment in the second.⁸⁴ Neither trial followed due process.

On 23 June 2014, Andy was abducted while transiting through an airport in Yemen by what are believed to be Yemeni intelligence officers acting on the orders of Ethiopian authorities. Andy was rendered to Ethiopia and held in solitary confinement and incommunicado in an unknown location for over a year. It was not until around July 2015 that Andy was transferred to Kality federal prison in Addis Ababa.

On 4 February 2015, REDRESS, along with fellow human rights organisation Reprieve, submitted a complaint on behalf of Andy and his family to the African Commission on Human and Peoples’ Rights, calling for Andy’s immediate release and repatriation to the UK. On 29 May 2018, Andy was released from prison after receiving a pardon from the Ethiopian Government.

© Free Andy Tsege Campaign

In addition to those violations perpetrated by the members of State security forces, ED may also be conducted by local law enforcement and police forces as part of “anti-crime” campaigns. In the Democratic Republic of Congo in late 2013, the government initiated “Operation Likofi”, in which police officers forcibly disappeared at least 33 young men and teenage boys as part of an effort to end crime by members of organised crime gangs (“kuluna”).⁸⁵ As noted by Human Rights Watch, “Operation Likofi reinforced a climate of fear in Kinshasa... many who were targeted

74 HRW, *Deaths and Disappearances: Abuses in Counterterrorism Operations in Nairobi and in Northeast Kenya*, 20 July 2016.

75 HRW, Kenya: Events of 2015.

76 *Ibid.*

77 Amnesty International, *Where Are They? Their Loved Ones Deserve to Know*, 2018. See also HRW, Nigeria: Events of 2017.

78 Amnesty International, *Egypt: State Security Prosecution operating a sinister tool of repression*, 27 November 2019.

79 *Ibid.*, paras. 222 to 223.

80 *Ibid.*, paras. 224 to 225.

81 UN HRC, Joint Study on Secret Detention, *supra* note 71, para. 142.

82 UN HRC, Joint Study on Secret Detention, *supra* note 71, para. 235.

83 UN HRC, Joint Study on Secret Detention, *supra* note 71, para. 157.

84 REDRESS, Andargachew ‘Andy’ Tsege, Case Report dated 2017.

85 Human Rights Watch, *Operation Likofi: Police Killings and Enforced Disappearances in Kinshasa*, Democratic Republic of Congo (Nov. 17, 2014).

had nothing to do with the kuluna. Some were street children, while others were youth falsely accused by their neighbours in unrelated disputes. Some happened to be in the wrong place at the wrong time.”⁸⁶

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Case study **Kamilya Mohammedi Tuweni**



Kamilya Mohammedi Tuweni, a United Arab Emirates citizen and businesswoman, was kidnapped by Kenyan counter-terrorism forces in 2007 after being mistaken for an Al-Qaeda operative.⁸⁷ She was kept in secret detention in four different East African countries for more than two months.

During this time, Kamilya endured beatings, was asked for bribes, was threatened with rape and narrowly escaped being sold for drugs. At one point, Kamilya was held in a jail located in a war zone in Somalia with encroaching airstrikes. She feared for her life as she endured the sound of falling bombs and nearby gunfire. Kamilya was released on 23 March 2007 in Ethiopia.

To this day, Kamilya does not officially know why she was arrested as she was never charged. Kamilya believes she was mistaken for an Al-Qaeda operative, as she was arrested in the context of a sweeping operation against Somali “terrorist suspects” that the Kenyan government orchestrated that year during the so-called “War on Terror” in conjunction with the US. On 11 June 2009, represented by REDRESS, Kamilya brought a claim before the Kenyan High Court for relief, seeking a clear finding of Kenya’s responsibility for her treatment. More than 10 years later, the case is still pending before the Kenyan Court.

The use of ED by non-State actors

There are many examples of non-State actors carrying out acts analogous to ED in Africa, particularly during armed conflicts or civil unrest. For example, in 2019, armed separatists in Anglophone Cameroon kidnapped hundreds of people, including students and members of the clergy, though nearly all have been released after family members or school authorities paid a ransom

(between \$170 and \$2,500).⁸⁸ In another well-publicised case, Boko Haram abducted and disappeared 276 schoolgirls in Chibok, Nigeria, many of whom have not been released or found.⁸⁹ Another 100 schoolgirls were subsequently kidnapped by Boko Haram in 2018.⁹⁰ In total, the group is estimated to have abducted more than 1,000 girls since 2013.⁹¹ Despite Cameroon being a signatory to the ICPPED and Nigeria having ratified it, State authorities in both countries have not yet taken adequate steps to punish the perpetrators and provide reparations to victims. As noted in section 4 above, there is no unified approach to accountability for these acts at international and regional levels, and this paper focuses on the obligations of States in the context of ED. However, the commission of acts analogous to ED by non-State actors in Africa is nevertheless a concerning trend that warrants further attention.

Population groups affected by ED

Victims of ED range from political opposition leaders, human rights defenders and activists, journalists, union workers, ethnic minorities, women and children, as well as migrants and internally displaced persons (as analysed in sub-section 5.4 above). This section explores how ED impacts each of these groups in Africa.

Political opposition and human rights defenders

In the Baseline Study Countries, political opposition leaders and human rights defenders have been the target of ED by States, often for peacefully expressing their views that are considered critical to one side of the conflict.⁹²

- In Zimbabwe, the colonial British government targeted freedom fighters, while the post-colonial government has used the practice of ED to silence the political opposition, usually during the run-up to the elections.⁹³ For example, the 2008 election was marred with massive violence against human rights defenders and political opposition, with the government detaining incommunicado several political activists who were charged with terrorism

⁸⁶ *Ibid.*

⁸⁷ REDRESS, Kamilya Mohammedi Tuweni, Case Study Report dated 2009; REDRESS, *Case of victim of mistaken identity during “War on Terror” begins before the Kenyan High Court*, 14 September 2015.

⁸⁸ HRW, *Cameroon: New Attacks on Civilians by Troops, Separatists*, 28 March 2019, Nairobi.

⁸⁹ HRW, *Nigeria: 5 Years after Chibok, Children Still at Risk, Many Still Unaccounted For; Abductions Continue*, 15 April 2019.

⁹⁰ *The Guardian*, *Boko Haram Returns More than 100 schoolgirls kidnapped last month* by Ruth Maclean and Isaac Abrak, 21 March 2018.

⁹¹ *The Telegraph*, *UN Says Boko Haram Has Kidnapped More than 1000 Girls Since 2013*, 13 April 2018.

⁹² LFJL, *Unforgotten: Enforced Disappearance in Libya*, September 2020.

⁹³ Zimbabwe Lawyers for Human Rights (“ZLHR”), *Enforced Disappearances – An Information Guide for Human Rights Defenders and CSOs*, January 2016, p. 7.

charges, among others.⁹⁴ Those who dare to report their ED are often attacked and criminalized, and many leave the country⁹⁵.

- In Sudan, during the Al-Bashir era, political dissent

was not tolerated and was often met with torturing and forcibly disappearing the opponents.⁹⁶

- In Libya, people cannot peacefully exercise their rights for fear of being forcibly detained.

Case study Movement for Democratic Change



In Zimbabwe, three female opposition leaders and members of Movement for Democratic Change, Joana Mamombe, Cecilia Chimbi and Netsai Marova, were arrested on 13 May 2020 for leading a demonstration over the government's provision of social protection during the Covid-19 lockdown.⁹⁷

When they arrived at the police station, they were taken by unidentified individuals in an unmarked vehicle, and their whereabouts remained unknown for 48 hours. During this time, the police denied that the three individuals were being held in custody. On 15 May 2020, the women were found badly injured on a roadside 60 miles away from where they had been taken. The women reported that they had been beaten, tortured and sexually assaulted. Each of the women was hospitalized.

However, instead of an investigation being launched, whilst the three women were in hospital, they were charged with gathering with intent to promote public violence and breach of the peace. Following this, they were charged with falsifying their own disappearances. The three women were taken to Chikurubi prison before they were eventually granted a strict bail requiring them to surrender their passports and report to the police three days a week.

The trial against the three women commenced in late 2020 and is still ongoing for Cecilia Chimbi and Netsai Marova (Joana Mamombe was deemed unfit to stand trial). To date, the authorities of Zimbabwe have not investigated the disappearance of the three women and the associated violations that they suffered.

Case study Jestina Mukoko



Jestina Mukoko, a Zimbabwean human rights activist and the director of the Zimbabwe Peace Project (a local human rights organisation involved in monitoring and documenting human rights violations in Zimbabwe), was forcibly disappeared on 3 December 2008.⁹⁸ Plain clothes men entered her home, took her by force in front of her son, and pushed her into an unregistered car. Jestina was held incommunicado for three months, during which time she was subjected to various acts of torture.

The Zimbabwe High Court ordered the Zimbabwe Republic Police to conduct an investigation and search for Jestina a week after her disappearance: however, this order was ignored by the police, who continued to deny any knowledge of her whereabouts. On 24 December 2008, it was reported by a State-run newspaper that Jestina had appeared before the Court of Harare on charges of attempting to recruit citizens for military training to try to overthrow the government. She was not given the opportunity to consult with a lawyer. It was only three months after her disappearance, in March 2009, that Jestina was released on bail.

On 28 September 2009, the Zimbabwe Supreme Court dropped all the charges and issued a permanent stay of criminal proceedings against Jestina. In 2018, a Zimbabwean court ordered the government to pay 150,000 USD to Jestina for her abduction, incommunicado detention and the torture she suffered while forcibly disappeared.

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94 UN HRC, Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the Promotion of Protection of Human Rights and Fundamental Freedom while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the working group on Arbitrary detention represented by its vice-chair, Shaheen Sardar Ali; and the working group on enforced or involuntary disappearance represented by its chair, Jeremy Sarkin, A/HRC/13/42, 20 May 2010, para.278.

95 ZLHR, On International Day of the Victims of Enforced Disappearances, end Pervasive Practice of Abductions and Enforced Disappearances, 30 August 2020. See also HRW, World Report 2021, Zimbabwe.

96 ACJPS, Baseline Study for Enforced Disappearance in Sudan, *supra* note 28.

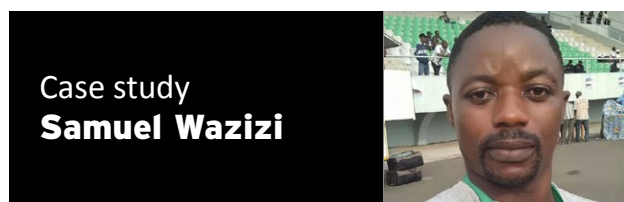
97 Amnesty International, Zimbabwe: Further Information: Opposition activists rearrested: one charged, 21 August 2020; The Guardian, Zimbabwean MDC activists abducted and sexually assaulted by Jason Burke and Nyasha Chingono, 17 May 2020.

98 The Independent, Jestina Mukoko: 'Mugabe's henchmen came for me before dawn' by Daniel Howden, 17 January 2009; BBC News, Tortured Zimbabwe abductees may face prosecution by Shingai Nyoka, 19 May 2020.

Journalists

Another group commonly targeted and disappeared are journalists, who can be disappeared for simply doing their job. Several journalists in Zimbabwe were forcibly disappeared for taking pictures or covering human rights abuses by the government.⁹⁹ Following the expansion of the mandate of the Working Group on Extra-Judicial Killings in Africa to include ED, the group's first reported case of ED concerned Mr. Ibrahim Abu Mbaruco, a community radio journalist at Palma Community Radio in Mozambique, who was allegedly disappeared by soldiers near his house in the town of Palma.¹⁰⁰ The Working Group sent a letter of appeal to the Government of Mozambique urging it to conduct a prompt and impartial investigation into the matter and to hold the perpetrators to account.¹⁰¹

©Samuel Wazizi



Samuel Wazizi, a journalist, was arrested on 2 August 2019 by the Cameroonian government as a result of his coverage of the conflict in Anglophone Cameroon.¹⁰² Samuel was last seen on 7 August 2019 at a police station by his lawyer and his brother, before he was moved to an undisclosed location by the Cameroonian army. Samuel's whereabouts were then unknown for 10 months. It was not until June 2020 that the government of Cameroon admitted that Samuel had died in custody, however they have yet to release Samuel's body to his family. Samuel's family have filed an application before the High Court in Cameroon seeking an inquiry into the arrest, disappearance and death of the journalist.

Civilians

Civilians have also been known to have fallen victim to ED in Africa. During the civil war in Algeria, the victims

of ED were those deemed to be supporting the Islamist regime, including not only the militia but also the civilian population, which was considered the “breeding ground” for armed groups.¹⁰³ Repression was systematic, especially in working-class areas and remote and poor areas affected by terrorism and/or where the Islamic Salvation Front had been victorious in the December 1991 elections. The aim of the systematic repression was to eliminate both armed and civilian Islamist opposition.¹⁰⁴

Ethnic minorities

Further, minorities are often subjected to ED. In Libya, following the fall of Gaddafi in 2011, several tribes such as Tawerghans and Tuareg, who were seen by anti-Gaddafi forces to be loyal to the former regime, were targeted and often became victims of ED. Following the removal of the regime, there were reports that the Libyan interim government authorities removed Tripoli-based Tuareg populations from their homes and held them in detention centres and prisons.¹⁰⁵ Actual or perceived former Gaddafi loyalists, and displaced Tuareg in general, have been subjected to retaliatory attacks, harassment, intimidation, discrimination and other abuses, including ED.¹⁰⁶

Women and children

While men are the most predominant victims of ED, women and children are also subjected to this crime, although the extent of the practice is unknown due to lack of reporting and official information:

- In Zimbabwe, for example, Samantha Kureya, a well-known comedian, was disappeared from her home by unidentified armed men and reappeared a few days later recalling the ordeal where she was forced to drink her own urine and was beaten.¹⁰⁷
- In Egypt, it has been reported that children have been detained, tortured and disappeared in re-

99 In Zimbabwe, Edward Chikombo, a journalist who took pictures of Morgan Tsvangirai being assaulted by the police and subsequently sent them to the international media, was abducted in 2007 and found dead a few days later. Paul Pindani, a journalist with NewsDay newspaper, was abducted and severely beaten by masked assailants in Chinhoyi, in connection with a story relating to the arrest of a ZANU PF member who was alleged to have been involved in a fatal attack on a local businessman. In 2015, Itai Dzamara, a freelance journalist, was abducted in broad daylight. Recently, Samantha Kureya ‘gonyeti’ was abducted for having acted a skit that portrayed human rights violations by the government.

100 HRW, Mozambique: Journalist Feared Disappeared – Locate Ibrahim Abu Mbaruco; Investigate Security Forces Role, 17 April 2020, Johannesburg.

101 ACHPR, Intersessional Activity Report of Commissioner Kayitesi Zainabo Sylvie for the period November 2019 to June 2020, presented at the 66th Ordinary Session of the ACPHR held at Banjul, The Gambia, between 13 July and 7 August 2020; paragraph 28.

102 REDRESS, Samuel Wazizi case: Cameroon should investigate disappearance and death of journalist, 23 September 2020

103 MENA Rights Group, Waiting for Redress: The Plight of Victims of Enforced Disappearances in Algeria (Baseline Study), August 2020, p. 14.

104 MENA Rights Group, Baseline Study of Enforced Disappearance in Algeria, *supra* note 103, p. 14.

105 Australian Government, Department of Foreign Affairs and Trade (“DFAT”) Country Information Report: Libya, 14 December 2018, p. 14.

106 Australian Government, Department of Foreign Affairs and Trade (“DFAT”) Country Information Report: Libya, 14 December 2018, p. 21

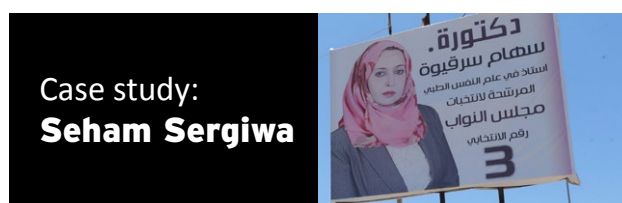
107 The Guardian, Zimbabwean comedian goes into hiding after abduction and beating by Jason Burke, 23 August 2019.

lation to offences they did not commit. Between 2015 and 2018, 12 children have been forcibly disappeared in custody.¹⁰⁸

- In Sudan, women and children have been abducted either for the purpose of slavery or as part of an ethnic cleansing strategy within armed conflicts. As early as in 1995, the WGEID reported instances of abduction of women and children, noting that, “the Popular Defence Forces of the Government of the Sudan have abducted women and children in southern Sudan. These women and children are then reportedly taken to the north where they are compelled to work as slaves”.¹⁰⁹

- From an economic point of view, traditional gender roles contribute to the economic hardship for women after a disappearance.¹¹¹ As men are often the sole or the main source of income, women can experience severe poverty as a result of the disappearance of their male spouse or relative.¹¹² ED can force women into low-paying or insecure jobs, which also increases their risk of exploitation, including sex work. Consequently, they are exposed to greater risk of violence and sexually transmitted diseases.¹¹³ Wives can also be seen as an economic burden by their in-laws in certain cultures¹¹⁴ and as a threat to family property and lineage¹¹⁵ which encourages tension and “intra-familial harassment”.¹¹⁶

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Case study: Seham Sergiwa

In Libya, female politicians have not been spared from attacks and forced disappearances. On 17 July 2019, Seham Sergiwa, a member of Parliament, was abducted from her home by a unit of unidentified gunmen and remains missing today.¹¹⁰ During her abduction, Seham’s husband and son were shot and injured. Shortly before her disappearance, Seham had publicly called for an end to a military offensive on Tripoli being conducted by General Khalifa Hiftar. To date, her family has no information about Seham’s whereabouts or her fate. Whilst the Interim Government opened an investigation into Seham’s disappearance, this has yielded no results.

- After a disappearance, women are often pressured to choose between obtaining the status of widow or remarrying.¹¹⁷ In addition to inter-familial harassment, women are often blamed for the disappearance and are seen to have failed in their duty as a mother or a wife.¹¹⁸
- Without the protection of a father or a husband, women face a higher risk of sexual abuse and violence, including from family members.¹¹⁹ More generally, women are more likely to be victims of direct forms of violence as perpetrators can act with greater impunity, as women are less likely to report a violation or to be believed in their complaint.¹²⁰
- Women face additional challenges in their search for truth because of their lack of access to public services compared to men, especially for indigenous women who don’t speak the dominant language of the country.¹²¹ They are also forced to interact with men to obtain documentation, which can be taboo in some communities.¹²²

Women and children are also indirect victims of ED. As the wives, mothers, daughters and sisters of disappeared men, women are often the faces of the search for their loved ones. Furthermore:

108 Amnesty International, “Egypt: Children face shocking violations including torture and enforced disappearance”, 20 November 2018.

109 Report of the Working Group on Enforced or Involuntary Disappearance, para 404.

110 Amnesty International, Libya: Abducted politician’s fate remains unknown a year on, amid ongoing disappearances, 17 July 2020; HRW, Libya: Abducted Politician Missing 4 Weeks, 16 August 2019, Beirut.

111 International Center for Transitional Justice (“ICTJ”), The Disappeared and Invisible, Revealing the Enduring Impact of Enforced Disappearance on Women by Polly Dewhirst and Amrita Kapur, March 2015, at p. 8.

112 ICTJ, The Disappeared and Invisible, *supra* note 111, at p. 6.

113 Duggan et al., “Reparations for Sexual and Reproductive Violence,” p. 196.

114 ICTJ, The Disappeared and Invisible, *supra* note 111, at p. 8.

115 *Ibid.*

116 Carlos Martín Beristain, The value of memory: Project for the Reconstruction of a Historical Memory in Guatemala, 1998, pp. 24–26.

117 ICTJ, The Disappeared and Invisible, *supra* note 111, at pp. 9

118 ICTJ, The Disappeared and Invisible, *supra* note 111, at pp. 8

119 ICTJ, The Disappeared and Invisible, *supra* note 111, at pp. 9

120 ICTJ, The Disappeared and Invisible, *supra* note 111, at pp.16

121 ICTJ, The Disappeared and Invisible, *supra* note 111, at pp.15

122 ICTJ, Beyond Relief: Addressing the Rights and Needs of Nepal’s Wives of the Disappeared, August 2013, at pp. 13

5

ED AS A COMPLEX AND MULTIPLE CRIME



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Zimbabwean healthcare workers hold a candlelight vigil to protest over the disappearance of Peter Magombeyi, the leader of their union in Harare, Zimbabwe, in September 17, 2019.

ED is a unique and integrated series of acts that represent a continuous violation of several fundamental rights and renders the victim defenceless. ED is particularly serious when committed as part of a systematic pattern or practice which is applied or tolerated by the State.¹²³ The 1992 Declaration defines ED as an offence to human dignity and a violation of the rules of international law guaranteeing, *inter alia*:

- the right to recognition as a person before the law;
- the right to liberty and security of the person; and
- the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.

ED also violates or constitutes a grave threat to the right to life,¹²⁴ right to truth, and economic, cultural and social rights, among others. Despite the fact that ED breaches multiple rights, it is considered a consolidated act and not a combination of distinct acts.¹²⁵

Under international human rights law, ED is a permanent crime and a continuous human rights violation, which starts at the time of abduction and refusal to acknowledge the whereabouts of the victim and extends until the victim's fate or whereabouts are established.¹²⁶ This implies that the State will be responsible for the disappearance of a person as long as their whereabouts are unknown, even if the act took place before the State ratified a particular international treaty.

Considering its gravity, as well as the crime's impact on the victim, their family and other persons directly impacted, the Inter-American Court of Human Rights ("IACtHR") has determined that the prohibition of ED is absolute and should be considered a peremptory norm.¹²⁷ The same Court has also concluded that the obligation of the State to investigate and punish the perpetrators of ED has also reached the status of *jus cogens*.¹²⁸ The *jus cogens* nature of the prohibition of ED, as well as the obligation of the State to investigate and punish ED, was reiterated by the Council of Europe.¹²⁹

The following sub-sections explore in more detail the rights that are often linked to ED, including an overview of existing international, African and comparative jurisprudence. The list of rights included should not be read as exhaustive.

Right to life

The ACHPR has commented that the crime of ED constitutes a serious threat to the right to life¹³⁰ and, where the disappearance results in the person's death, the ACHPR has held that it constitutes both a substantive and a procedural violation of the right to life under Article 4 of the African Charter on Human and Peoples' Rights.¹³¹

According to General Comment No. 36 of the UN Human Rights Committee ("HRCt"), the right to life is the "*supreme right from which no derogation is permitted, even in the situations of armed conflict, and other public emergencies that threaten the life*

123 Inter-American Court of Human Rights ("IACtHR"), Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of 22 September 2009. Series C No. 202, para. 59; HRC, Report of the WGEID, in the context of continuous crime, UN Doc A/HRC/16/48, 26 January 2011, p. 11: The WGEID has noted that, "*even though the conduct violates several rights, including the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment and also violates or constitutes a grave threat to the right to life, the Working Group considers that an enforced disappearance is a unique and consolidated act, and not a combination of acts*".

124 UN General Assembly, Declaration on the Protection of All Persons from Enforced Disappearances, A/RES/47/133, 12 February 1993, Article 1.2.

125 HRC, Report of the WGEID, General Comment on Enforced Disappearance as a Continuous Crime, A/HRC/16/48, 26 January 2011, para. 39.

126 *Ibid.*, para 1.

127 IACtHR, Goiburú et al. v. Paraguay, Merits, Reparations and Costs, Judgment of 22 September 2006, Series C No. 153, para. 84.

128 *Ibid.*, para. 84; Diana Contreras-Garduno and Ignacio Alvarez-Rio, A Barren Effort? The Jurisprudence of the Inter-American Court of Human Rights on Jus Cogens.

129 Council of Europe, Missing persons and victims of enforced disappearance in Europe, March 2016

130 ACHPR, General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life, Article 4, para. 8; HRC, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, CCPR/C/GC/36, 30 October 2018, para. 58.

131 African Charter on Human and Peoples' Rights, Article 4: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." In 2001, the Commission dealt *inter alia* with the ED of two students and a university lecturer in the 1980s and 1990s, whose fate remained unknown at the date of the submission and eventually found a violation of Article 4 (ACHPR, Mouvement burkinabe des droits de l'homme et des peuples v. Burkina Faso, 204/97, 7 May 2001, para. 42); In 2017, in the case of massacres and enforced disappearance in Kilwa (Democratic Republic of Congo), the Commission held that ED constituted a violation to the right to life. The decision relied on the fact that "*victims had not returned to their families almost five years after the incidents*" and on the testimonies of the survivors (ACHPR, Institute for Human Rights and Development in Africa and Others v. Democratic Republic of Congo, Communication 393/10, 18 June 2016, para. 106).

of the nation”.¹³² Both arbitrary killings by the State’s authorities and the failure to prevent and punish deprivation of life by criminal acts constitute violations of the right to life.¹³³ Given that uncertainty as to the condition or fate of the victim is an essential aspect of ED, it is important to consider the standard and burden of proof when trying to establish ED as a violation of the right to life.

Previously the HRcT applied the “*beyond reasonable doubt standard*” of criminal law in respect of the violation of Article 6 of the ICCPR (right to life) and State responsibility was recognised only in cases of proven or presumed death.¹³⁴ The many cases of ED brought before the HRcT since the late 1990s in relation to Algeria helped modify this approach, in conformity with IAcTtHR jurisprudence. In 2011, in *Aouabdia v. Algeria*, the majority of the HRcT found a violation of Article 6 read in conjunction with Article 2(3) (which stipulates the State’s duty to provide an effective remedy to victims of human rights violations), even though it could not be established as a matter of fact that the victim had died.¹³⁵ In 2012, the judgment in *Guezout and ors (on behalf of Kamel Rakik and ors) v. Algeria* relied on a broader interpretation of Article 6 to find that the State’s failure to protect life constituted a direct violation of Article 6(1).¹³⁶

The HRcT has followed this interpretation to find direct violations of Article 6 in its subsequent judgments on cases of ED.¹³⁷

In the leading case of *Velásquez Rodríguez*¹³⁸, the IAcTtHR established that ED constituted a flagrant violation of the right to life.¹³⁹

In order to establish ED as a violation of the right to life, the IAcTtHR recommended the adoption of a

standard of proof “*which considers the seriousness of the charge and which [...] is capable of establishing the truth of the allegation in a convincing manner.*”¹⁴⁰ In particular, the IAcTtHR established that the standard of proof could not be as high as that of a criminal investigation and that the use of circumstantial or presumptive evidence was most important in cases of ED.¹⁴¹

The IAcTtHR also developed an ad hoc approach to the burden of proof. Where ED is widespread or systematic, or follows an identifiable pattern, the IAcTtHR has noted that the initial burden falls upon the petitioner to show that the case was linked to an official practice of disappearance carried out or tolerated by the government. However, after this the burden then shifts to the State, which has to show what happened to the disappeared persons, and that it was not related to any such official practice.¹⁴² While this approach is not limited to the right to life, it has been essential in the finding of a violation of this right in the absence of direct evidence as to the fate of the victim.

Similarly, the IAcTtHR also applies a presumption of death due to an ED when the victim was last seen under the control of the State. The IAcTtHR has held that such a presumption inverts the burden of proof, so that the party that is alleged to have had control over the detained person, generally the State, must prove that the person has not died in their custody.¹⁴³

The European Court of Human Rights (“ECtHR”) has also held that ED constitutes a violation of the right to life under Article 2 of the European Convention on Human Rights. The Court applies a presumption when the victim has last been seen alive in life-threatening circumstances and the respondent State fails to provide a convincing explanation as to his or her fate and

132 UN Human Rights Committee (“HRcT”), General Comment No. 36, Article 6 (Right to life), CCPR/C/GC/36, 3 September 2019, para. 2.

133 HRcT, General Comment No.36, *supra* note 130, para. 7.

134 IAcTtHR, *Bleier v. Uruguay*, Communication No. 20/1978, 29 March 1982.

135 HRcT, *Zarzi (on behalf of Aouabdia and ors) v. Algeria*, Communication No. 1780/2008, 22 March 2011.

136 HRcT, *Guezout and ors (on behalf of Kamel Rakik and ors) v. Algeria*, Communication No. 1753/2008, 19 July 2012, para. 8.4.

137 HRcT, *Larbi v. Algeria*, Communication No. 1831/2008, 25 July 2013, para. 8(4); HRcT, *Mihoubi (on behalf of Mihoubi) v. Algeria*, Communication No/1874/2009, 7 January 2014, para. 7(4); in *Yuba Kumari Katwal v. Nepal*, the HRcT found that the lack of effective investigation by Nepal into the killing of the victim constituted a violation of Article 6; in *Chhedulal Tharu and others v. Nepal*, the HRcT found a violation of Article 6 as Nepal failed in its duty to protect the lives of the victims’ relatives; in *Miriam Iricelda Valdez et al. v. Mexico*, the HRcT found a violation of Article 6 in respect of Mexico’s failure to submit information showing that it had taken measures to protect the life of the victim while he was detained by State authorities; see also HRcT, *María Eugenia Padilla García and others v. Mexico*, Communication No. 2750/2016, 13 September 2019, para. 9(6).

138 IAcTtHR, *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4, para. 157.

139 IAcTtHR, American Convention on Human Rights (“ACHR”), Article 4: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”

140 *Ibid.*, para. 129.

141 *Ibid.*, para. 131.

142 *Ibid.*, para. 124-126.

143 IAcTtHR, *Radilla-Pacheco v. Mexico*, Judgment of 23 November 2009, paras. 47 and 48.

whereabouts.¹⁴⁴ Until 2000, the ECtHR required the applicant to prove beyond reasonable doubt that the victim had died before the Court would find a violation of the right to life under Article 2. However, in *Timurtas v. Turkey*, the ECtHR lowered the standard by dismissing the need for direct evidence and instead permitted the use of circumstantial evidence to establish a violation of the right to life.¹⁴⁵ This approach was confirmed in *Cicik v. Turkey*, in which the Court held that circumstantial evidence would suffice for finding a violation of the right to life.¹⁴⁶

Right to be free from torture and inhuman and degrading treatment

International jurisprudence recognizes that ED constitutes a form of torture or other cruel, inhuman or degrading treatment, both in respect of the disappeared person and of their relatives.¹⁴⁷ As stated in Article 1(2) of the 1992 Declaration:

*“Any act of enforced disappearance places the persons subjected there outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.”*¹⁴⁸

The prohibition of torture is enshrined in Article 5 of the African Charter.¹⁴⁹ While the ACHPR has not issued comments or guidelines on ED as an act of torture, in *Mouvement burkinabe des droits de l’homme et des*

peuple v. Burkina Faso, the Commission established a violation of Article 5 in relation to the disappearance of persons suspected or accused of plotting against the authorities.¹⁵⁰ Moreover, in the case of *Liesbeth Zegveld and Messie Ephrem v. Eritrea*, the ACHPR considered that, “[o]f itself, prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment”.¹⁵¹

Similarly, the HRcT recommends that States take steps to prohibit incommunicado detention.¹⁵² The UN Committee against Torture held that “*detaining persons indefinitely without charge constitutes per se a violation of the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]*.”¹⁵³

The HRcT has also held that the incommunicado detention of victims for a certain period of time was, in itself, a form of torture and ill-treatment, and therefore constituted a violation of Article 7 of the ICCPR (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment).¹⁵⁴ For instance, in the case of *Brahim El-Boathi*, an Algerian soldier who disappeared after being held incommunicado between 1994 and 2000, the HRcT considered that “*the degree of suffering caused by being detained without contact with the outside world for an indefinite period*” amounted to a violation of Article 7.¹⁵⁵

According to the IACtHR, the mere subjection of an individual to prolonged isolation and deprivation of communication in itself is cruel and inhuman treatment.¹⁵⁶ The IACtHR presumes that in such circumstances, the suffering of the disappeared person has reached a min-

144 European Court of Human Rights (“ECtHR”), *Bazorkina v. Russia*, App. No. 69481/01, 27 July 2006, paras. 110-112.

145 ECtHR, *Timurtas v. Turkey*, App. No. 23531/94, 13 June 2000, para. 82.

146 ECtHR, *Varnava and Others v. Turkey*, Appl. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, 18 September 2009, para. 143.

147 International Commission of Jurists (“ICJ”), *Enforced Disappearance and Extrajudicial Execution: The Rights of Family Members, A Practitioners’ Guide*, Geneva, July 2016, p. 13; N.B., the ECtHR is an exception among the international mechanisms that deal with ED where it does not find a violation of the prohibition of torture with regard to disappeared persons, Article 3 European Convention on Human Rights (“ECHR”), but only with regard to the relatives.

148 UNGA, Declaration on the Protection of all Persons from Enforced Disappearances, *supra* note 2, Article 1(2).

149 African Charter, *supra* note 131, Article 5: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”

150 ACHPR, *Mouvement burkinabe des droits de l’homme et des peuples v Burkina Faso*, *supra* note 131, para. 44.

151 ACHPR, *Liesbeth Zegveld and Messie Ephrem v. Eritrea*, 250/2002, 2003, para. 55.

152 HRcT, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 11.

153 UN Committee Against Torture (CAT), *UN Committee against Torture: Conclusions and Recommendations, United States of America*, 25 July 2006, CAT/C/USA/CO/2, para. 22.

154 International Covenant on Civil and Political Rights (“ICCPR”), Article 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”

155 HRcT, *El-Boathi v Algeria*, Communication No. 2259/2013, 16 May 2017, para. 7.6.

156 IACtHR, *Velásquez Rodríguez v Honduras*, Judgment, 29 July 1988, para. 187.

imum level of severity that amounts to ill-treatment even without additional evidence that the person is/was ill-treated. According to the IACtHR, “it is inherent in human nature that all those subjected to...enforced disappearance experience intense suffering, anguish, terror and feelings of powerlessness and insecurity.”¹⁵⁷

Ill treatment and torture in relation to the relatives of the disappeared

The ACHPR has not explicitly established a violation of Article 5 of the African Charter for the relatives of victims. However, in the *Kilwa* decision, the Commission acknowledged that the massive human rights violations perpetrated in Kilwa had violated the dignity of Kilwa’s population.¹⁵⁸ As a consequence, the Commission ordered damages to be paid to the relatives of the victims, and adequate psycho-social assistance to be granted to them and other inhabitants of Kilwa impacted by the events.¹⁵⁹

While the African Commission has very little jurisprudence on ED, the broad definition of “victim” adopted by the ACHPR in the *Zongo* case could be helpful in establishing a wide scope of victims in cases of ED.¹⁶⁰ In this case, the ACHPR established that the notion of victims should not necessarily be limited to first-line heirs, but might also include other close relatives of the deceased who have suffered moral prejudice as a result of the human rights violation.¹⁶¹ The ACHPR supported the view that the victims should be determined on a case-by-case basis.¹⁶² The causal link between the wrongful act and the moral prejudice for these relatives¹⁶³ can be presumed, without the need of proof. The ACHPR considers the particular harm experienced by the individual or collective without discrimination.¹⁶⁴

The HRCt has consistently acknowledged that ED amounts to a violation of Article 7 of the ICCPR and has granted reparations to the relatives of the victims.¹⁶⁵ For instance, in the case of *Bousroual v. Algeria*, where the applicant was the wife of an Algerian teacher arrested in 1994, the Committee noted “the anguish and stress caused to the author by the disappearance of her husband and the continued uncertainty concerning his fate and whereabouts” and found a violation of Article 7 of the Covenant with regard to her husband as well as herself.¹⁶⁶ Moreover, in *Icic v. Bosnia and Herzegovina*, the HRCt considered that forcing a relative to declare their loved one dead constitutes inhuman and degrading treatment in violation of Article 7.¹⁶⁷

Acceptance that the distress and suffering of the victims’ relatives amounts to torture and ill-treatment has been crucial in establishing them as victims in cases of ED.¹⁶⁸ Relying on the fact that the anxiety and grief caused by ED of a family member constitutes “suffering that reaches the threshold of torture”,¹⁶⁹ the WGEID has acknowledged that “both the disappeared person and those who have suffered harm as a result of the disappearance are to be considered victims of the enforced disappearance and are therefore entitled to obtain reparation.”¹⁷⁰

The IACtHR has specifically made clear that there exists a presumption of harm in relation to first-line relatives of the victim of ED. It recognises that “this Court [...] can presume a harm to the right to mental and moral integrity of direct family members of victims of certain violations of human rights by applying a presumption *iuris tantum* regarding mothers and fathers, daughters and sons, husbands and wives, and permanent companions.”¹⁷¹ It is therefore for

157 IACtHR, *Goiburú et al. v. Paraguay*, Judgment, 22 September 2006, para. 157.

158 ACHPR, *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo*, Communication 393/10, 18 June 2016, para. 152.

159 *Ibid*, para. 154.

160 ACHPR, *Norbert Zongo et al. v. Burkina Faso*, Application No. 013/2011, Judgment on Reparations, 5 June 2015.

161 *Ibid*, para. 46.

162 *Ibid*, para. 49.

163 *Ibid*, para. 55.

164 ACHPR, General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 2017, para. 16.

165 HRC, *Maria del Carmen Almeida de Quinteros v. Uruguay*, Communication No. 107/1981, 21 July 1983, para. 14; *Katombe L. Tshishimbi v. Zaire*, Communication No. 542/1993, 25 March 1996, para. 5.5; *Rosario Celis Laureano v. Peru*, Communication No. 540/1993, 25 March 1996, para. 8.5; *Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, 31 July 2003, para. 9.5; *Louisa Bousroual v. Algeria*, Communication No. 992/2001, 30 March 2006, para. 9.8.

166 HRC, *Louisa Bousroual v. Algeria*, Communication No. 992/2001, 30 March 2006, para. 9.8.

167 HRCt, *Icic et al. v. Bosnia and Herzegovina*, Communication No. 2028/2011, 30 March 2015, para. 9.7.

168 See ICPPED, Article 24(1): “For the purposes of this Convention, “victim” means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”

169 WGEID Report, General Comment on the right to the truth in relation to enforced disappearances A/HRC/16/48 of 26 January 2011, para.4.

170 Report of the WGEID, A/HRC/22/45, 28 January 2013, paras. 51 and 52.

171 IACtHR, *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, Judgment of 24 November 2010, para. 235.

the State in question to disprove the presumption that these direct family members suffered harm as a result of the ED.

In its jurisprudence, the IACtHR has adopted the broadest approach to this principle, considering that the children and siblings of disappeared persons, who were not born when the disappearance occurred, may be considered victims of ED. In the *Gudiel Alvarez* case, the Court stated that, “*the fact that they had to live in an environment of suffering and uncertainty owing to the failure to determine the whereabouts of the disappeared victims prejudiced the integrity of the children who were born and lived in this situation.*”¹⁷²

Further, while the IACtHR will not extend the presumption of harm beyond direct family members, it is possible for others to prove that they have suffered harm as the result of the ED of the victim.¹⁷³

The jurisprudence of the ECtHR also indicates that relatives of disappeared persons may themselves be victims of a violation of Article 3 of the ECtHR. For instance, in *Kurt v. Turkey*, the Court found that the mother of the victim had been “*left with the anguish of knowing that her son has been detained and there was a complete absence of official information as to his subsequent fate. His [the detainee’s] anguish has endured over a prolonged period of time.*”¹⁷⁴ In assessing the potential violation, the ECtHR considered the proximity of the family relationship, the circumstances of the relationship, the extent to which the relative witnessed the events in question, and the involvement of the family member in attempts to obtain information on the disappearance.¹⁷⁵ However, the ECtHR has found that family members born after the ED of their relatives do not fall within the threshold of Article 3, in contrast with the IACtHR.¹⁷⁶

Freedom from arbitrary detention and arrest

The right to liberty and prohibition of arbitrary arrest and detention is enshrined in all international human rights instruments. As ED usually starts with the arrest of the victim, followed by his/her incommunicado detention, it constitutes a clear violation of the right to liberty.

This right is enshrined in Article 6 of the African Charter.¹⁷⁷ In the case of *Malawi Africa Association v. Mauritania*, the ACHPR held that the detention of hundreds of people without charge or trial, the fate of many of whom remained unknown, constituted a “*massive violation of Article 6*”.¹⁷⁸

The ECOWAS Court has also recognised violations of Article 6 of the African Charter in an ED Context. In *Chief Ebrimah Manneh v. The Republic of The Gambia*, a reporter was arrested by plain clothed state police at his place of work.¹⁷⁹ The individual was not told which law his arrest related to, was held incommunicado and was never formally tried with any offence.¹⁸⁰ The court held that this was clearly “*contrary to the rules enshrined in Article 6*”.¹⁸¹ The court indicated that the text of Article 6 suggests a presumption of innocence in favour of liberty of the individual.¹⁸² Therefore any deprivation needs to be constrained by reasons and conditions laid down by law.¹⁸³

The HRCt case law on ED in Algeria has consistently established a violation of Article 9 of the ICCPR (Liberty and Security of Person). In *Khirani v. Algeria*, the Committee relied on the fact that the victim “*was arrested without a warrant and without being informed of the reasons for his arrest; that he was at no point informed of the criminal charges against him; that he was not brought before a judge or other judicial authority to challenge the legality of his detention, which remains indefinite*” to find a violation of Article 9.¹⁸⁴

172 IACtHR, *Gudiel Álvarez (“Military Journal”) v. Guatemala*, Series C No. 253, 20 November 2012, para. 287; *Contreras et al. v. El Salvador*, Series C No. 232, 31 August 2011, para. 122

173 IACtHR, *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, *supra* note 171, para. 235.

174 ECtHR, *Kurt v. Turkey*, Appl. No. 15/1997/799/1002, 25 May 1998, para. 133.

175 ECtHR, *Ipek v. Turkey*, para. 181; *Osmanoglu v. Turkey*, App. No. 48804/99, 24 January 2008, para. 96; *Sangariyeva and Others v. Russia*, App. No. 1839/04, 29 May 2008, para. 90.

176 IACtHR, *Gudiel Álvarez (“Military Journal”) v. Guatemala*, Series C No. 253, 20 November 2012, para. 287

177 African Charter, *supra* note 131, Article 6: “Every individual shall have the right to liberty and to the security of the person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

178 ACHPR, *Malawi Africa Association v Mauritania*, Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98, 11 May 2000, para. 114.

179 ECOWAS Court, *Chief Ebrimah Manneh v The Republic of The Gambia*, Judgment ECW/CCJ/JUD/03/08, 5 June 2008, para 18.

180 ECOWAS Court, *Chief Ebrimah Manneh v The Republic of The Gambia*, *supra* note 179, para 19.

181 ECOWAS Court, *Chief Ebrimah Manneh v The Republic of The Gambia*, *supra* note 179, para 23.

182 ECOWAS Court, *Chief Ebrimah Manneh v The Republic of The Gambia*, *supra* note 179, para 26.

183 ECOWAS Court, *Chief Ebrimah Manneh v The Republic of The Gambia*, *supra* note 179, para 27.

184 HRCt, *Khirani (on behalf of Ouaghliissi and ors) v Algeria*, Communication 1905/2009, 26 March 2012, para. 7.7.

Since the first ED cases in Latin America, both the IACtHR¹⁸⁵ and the HRCt have recognised that ED constitutes a violation of the right to liberty and security of the person, respectively enshrined in Article 7 of the American Convention on Human Rights and Article 9 of the ICCPR.¹⁸⁶

The ECtHR considers ED primarily as an aggravated violation of the right to liberty (Article 5 ECHR).¹⁸⁷ The ECtHR has found a violation of Article 5 in every case of ED before it.¹⁸⁸

Right to recognition as a person before the law

The right to recognition as a person before the law is enshrined in Article 6 of the Universal Declaration of Human Rights and Article 16 of the ICCPR, Article 5 of the African Charter, and Article 3 of the American Convention on Human Rights. The 1992 Declaration established in Article 1.2 that ED infringes the right to be recognised as a person before the law:

*“Any act of enforced disappearance places the persons subjected thereto outside the protection of the law [...] It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law [...]”*¹⁸⁹

The African Charter jointly considers the prohibition of torture and right to be recognised as a person before the law in Article 5. Closely connected to the “respect for the dignity inherent in the human person”, the recognition of the legal status of the person was found to be violated for the victims of ED in the *Mouvement Burkinabé* case.¹⁹⁰

In its case law on ED, the HRCt has consistently found that the intentional removal of a person from the protection of the law constitutes a refusal to recognise him or her as a person before the law, particularly if the efforts of his or her relatives to obtain access to potentially effective remedies have been systematically impeded.¹⁹¹

Similarly, the WGEID has clarified that, “[e]nforced disappearances entail the denial of the disappeared person’s legal existence and, as a consequence, prevent him or her from enjoying all other human rights and freedoms.”¹⁹² The violation of the right to recognition as a person before the law lasts until the fate or the whereabouts of the person have been determined.¹⁹³

While the IACtHR did not find a violation of Article 3 of the IACHR (Juridical Personality) in early cases of ED, they reconsidered their position in *Anzualdo Castro v. Peru* in 2009 to acknowledge that the crime constitutes an automatic violation of this right “to juridical personality”.¹⁹⁴ This jurisprudence has remained unchanged in all later cases related to ED.

Right to a fair trial

ED violates the right to a fair trial both with respect to the victim and their relatives. The right to a fair trial as defined in Article 14 of the ICCPR (Article 14) includes different guarantees for individuals, such as the right to equality before the courts; the right to a fair and public hearing by a competent, independent and impartial tribunal; the right of compensation in cases of miscarriage of justice in criminal cases; and the right to remain free from being tried or punished again for an offence for which an individual has already been finally convicted or acquitted.¹⁹⁵

185 IACtHR, *Velásquez Rodríguez v Honduras*, *supra* note 156, para.155.

186 IACtHR, *Velásquez Rodríguez v Honduras*, *supra* note 156, paras.155 and 187; HRCt, *Bleier Lewenhoff v Uruguay*, Communication No. 30/1978, 29 March 1982, para.15.

187 For instance, in *Kurt v Turkey*, *supra* note 174, the Court found a violation of the right to liberty with respect of the applicant’s son who had disappeared at the hands of the security forces, but the Court did not find any additional violations of the rights enshrined in the ECHR. See also Council of Europe, PACE, ‘Enforced Disappearances: Report of the Committee on Legal Affairs and Human Rights by M. Pourgourides’, 19 September 2005, Doc. 10679). ECtHR, *Kurt v. Turkey*, *supra* note 174, para. 129; *Çiçek v. Turkey*, Appl. no. 25704/94, 27 February 2001, para. 156.

188 Council of Europe, ‘Missing persons and victims of enforced disappearance in Europe’, *supra* note 10, p. 38.

189 UNGA, Declaration on the Protection of all Persons from Enforced Disappearances, *supra* note 2, Article 1(2).

190 ACHPR, *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo*, *supra* note 158, para. 44.

191 See for instance, HRCt, *Basnet v. Nepal*, Communication No. 2164/2012, 12 July 2016, para. 10.9; *Khirani v. Algeria*, Communication No. 1905/2009, para. 7.8; *Zarzi v. Algeria*, Communication 1780/2008, 22 March 2011, para. 7.9; *Grioua v. Algeria*, Communication 1327/2004, 10 July 2007, para. 7.8.

192 WGEID Report, General Comment on the right to recognition as a person before the law in the context of enforced disappearances, A/HRC/19/58/Rev.1, 2 March 2012, para. 2.

193 *Ibid*, para. 4.

194 IACtHR, *Anzualdo Castro v. Peru*, Series C, No. 202, 22 September 2009, para. 101.

195 ICCPR, *supra* note 154, Article 14.

The right to family life and economic, social and cultural rights

Article 7 of the African Charter establishes that every individual has the right to have their case heard, which includes the right to an appeal to competent national organs, the right to be presumed innocent, the right to defence and the right to be tried within a reasonable time by an impartial court.¹⁹⁶ In the *Kilwa* case, the ACHPR considered that the absence of a fair trial against the perpetrators of the violations constituted a violation of Article 7. In particular, the fact that the victims were interrogated in the absence of their counsel and in a language they did not understand constituted a violation of the right to defense under Article 7(1)(c) of the Charter.¹⁹⁷ Similarly in the *Chief Ebrimah Manneh* case it was held that detaining an individual without trial or without levelling an offence against them for over a year was contrary to the rules enshrined in Article 7.

In its jurisprudence on ED, the HRCt rarely considers the violation of the right to a fair trial *per se*. Instead, the absence of a fair process and the arbitrary nature of the punishment suffered by the victims are more often addressed under the violation of the right to be recognised as a person.¹⁹⁸ On the other hand, the Committee generally holds that the impunity of the perpetrators and obstacles that prevent the applicants from bringing legal proceedings at the domestic level constitute a violation of the right to effective remedy. The HRCt has found a violation of Article 14 when the applicant proved that the victim of ED had been denied access to justice and subjected to an unfair judicial process.

The IACtHR has also frequently found violations of Article 8, which guarantees the right to a fair trial, and Article 25, which protects the right to judicial protection, taken together with Article 1.1 (obligation to respect rights) in cases involving ED, including where the disappearance took place before the recognition of its jurisdiction by a respondent State.¹⁹⁹ The IACtHR has also recognised that ED might violate the procedural rights of family members of the disappeared persons.²⁰⁰

While acknowledging the suffering of the next-of-kin and the relatives of the disappeared persons, the case law of the HRCt on ED has not generally addressed the right to family life. This may be because the consequences of the disappearance for the relatives are most often addressed as forms of ill-treatment and torture and violations of the right to effective remedy. The right of family life has not been addressed in the context of ED by the African Commission.

The WGEID has found that ED entails the violation of the right to family life and several economic and social rights.²⁰¹ Women are most impacted by ED as wives, mothers, sisters or daughters of male victims.²⁰² The WGEID has recognised that ED necessarily deprives people of economic, social and cultural rights through placing them outside the protection of the law.²⁰³ ED divests people of access to employment²⁰⁴ and deprives children of their right to education.²⁰⁵

In addition to the impact on the disappeared person, the WGEID has found that ED affects the economic, social and cultural rights of the direct victim's family. Because of traditional gender roles, male victims are often the sole "breadwinner" of the family: their disappearances therefore result in loss of income.²⁰⁶ Additionally, the disappeared person's family may be ostracised from their community, owing to false allegations of criminal conduct and fears of associating with targets of an ED.²⁰⁷

The WGEID has also identified that those who lack economic, social and cultural rights are at an increased risk of becoming victims of ED. People living in poverty are often unable to access legal advice or shelter, which results in their particular vulnerability to ED.²⁰⁸

196 African Charter, *supra* note 131, Article 7.

197 Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo, *supra* note 158, para. 124.

198 HRCt, *Millis v Algeria*, Communication no. 2398/2014, 28 June 2018, para. 9.

199 IACtHR, *Serrano-Cruz Sisters v. El Salvador*, Series C No. 118, judgment of 1 March 2005.

200 IACtHR, *Blake v. Guatemala*, Series C No. 27, judgment of 24 January 1998.

201 Report of the WGEID, E/CN.4/1492 of 31 December 1981, paras. 165 et seq.

202 Report of the WGEID, A/HRC/30/38/Add.5, 9 July 2015, para. 23.

203 Report of the WGEID, *supra* note 202, para. 74.

204 Report of the WGEID, *supra* note 202, para. 18.

205 Report of the WGEID, *supra* note 202, para. 22.

206 Report of the WGEID, *supra* note 202 para. 23.

207 Report of the WGEID, *supra* note 202, para. 23.

208 Report of the WGEID, *supra* note 202, paras. 8, 9 and 12.

The IACtHR has adopted the broadest approach on the right to family life in the context of ED, by considering that the crime engaged the rights of the family under Article 17 of the American Convention, which enshrines the right to family life.²⁰⁹ When it was relevant, the IACtHR also found a violation of the rights of the child under Article 19 of the American Convention.²¹⁰ Thus, in the case of the disappearance of two young children, the Serrano-Cruz Sisters, in El Salvador, the Court stated that the “*lack of diligence in the investigation and determination of the whereabouts [of the victims] constitutes a violation of the rights protected by Article 17 of the Convention.*”²¹¹ The Court also found a violation of Article 19 for failing to take any measure to return the children to their family.

In *Gelman v. Uruguay*, the IACtHR dealt with the rights of stolen/abducted children and noted that States were obligated to ensure the protection of the family and guard against unlawful or arbitrary interference in the family life of the children.²¹²

The ECtHR has found violations of Article 8 in several ED cases. In the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*, the ECtHR held that “*the interference with the applicant’s right to respect for his private and family life was not in ‘accordance with the law’*”.²¹³ The ECtHR recognised that the broad notion of private life extended to situations of deprivation of liberty, and that an essential objective of Article 8 is the protection from arbitrary interference by public authorities.²¹⁴

Right to an effective remedy

The right to a remedy for gross human rights violations is a well-established norm of international law.

Pursuant to Article 8 of the UDHR, “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights guaranteed him by the constitution or law.”²¹⁵ Other human rights treaties codify this right, including the ICCPR and the CAT,²¹⁶ and regional bodies have also endorsed the right to a remedy in their charters.²¹⁷ 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.”²¹⁸

The main State obligations in relation to the right to an effective remedy include: ensuring that victims have effective remedies through appropriate judicial and administrative mechanisms; promptly and effectively investigating allegations of violations through independent bodies; prosecuting those responsible for the violations; and providing reparation to victims, including reparation.²¹⁹

The HRCt has systematically found a violation of the right to an effective remedy, either alone or read in conjunction with the ICCPR.²²⁰ Blanket amnesties for gross human rights violators have also been considered by the HRCt as a contravention of Article 2(3) of the ICCPR, which stipulates the State’s duty to provide an effective remedy to victims of human rights violations.²²¹

Most ED entails a violation of the right to effective remedy in respect of both the disappeared persons and the relatives. The ECtHR has repeatedly held that ED constitutes a violation of the right to an effective remedy under Article 13 of the Convention (Right to an effective remedy), read in conjunction with Articles 2 and 3. The ECtHR has made clear that: “*where*

209 ACHR, *supra* note 139, Article 17.

210 ACHR, *supra* note 139, Article 19.

211 IACtHR, *Serrano-Cruz Sisters v El Salvador*, Serie C No. 118, 23 November 2004, para. 90; See also IACtHR, *Gelman v Uruguay*, 24 February 2011, para. 312.

212 IACtHR, *Gelman v Uruguay*, Judgment, Series C No. 221, 24 February 2011.

213 ECtHR, *El-Masri v the Former Yugoslav Republic of Macedonia*, Appl. No. 39630/09, 13 December 2012, para. 249.

214 ECtHR, *El-Masri v the Former Yugoslav Republic of Macedonia*, *supra* note 213, para. 249; ECtHR, *Raninen v Finland*, Appl. No. 152/1996/771/972, 16 December 1997, para. 63; ECtHR, *Kroon and Others v the Netherlands*, Appl. No. 18535/91, 27 October 1994, para. 31.

215 Universal Declaration of Human Rights (“UDHR”), Article 8.

216 ICCPR, Articles 2(3), 9(5), 14(6); CAT, *supra* note 153, Article 14.

217 ECHR, Article 13; ACHR, Article 25; African Charter, Articles 7, 21.

218 ICPPED, Article 24.

219 OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147, 16 December 2005, para. 3.

220 See e.g. *Tharu et al. v. Nepal*, Communication No. 2038/2011, CCPR/C/114/D/2038/2011, 21 October 2015; *Dovadzija et al. v. Bosnia and Herzegovina*, Communication No. 2143/2012, CCPR/C/114/D/2143/2012, 10 November 2015; *Ičić et al. v. Bosnia and Herzegovina*, Communication No. 2028/2011, CCPR/C/113/D/2028/2011, 20 August 2015; *Zarzi (on behalf of Aouabdia and ors) v Algeria*, Merits, Communication No. 1780/2008, CCPR/C/101/D/1780/2008, 22 March 2011.

221 ICCPR, Article 2(3).

relatives have an arguable claim that a member of their family has disappeared at the hand of the authorities, or where a right with as fundamental an importance as the right to life is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation, capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure.”²²²

The use of military courts

- A separate but related issue concerns the competence of military tribunals to adjudicate on cases of ED. Article IX of the Inter-American Convention on Forced Disappearance of Persons provides that “[p]ersons alleged to be responsible for the acts constituting the offence of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.”
- This is supported by the jurisprudence of the IACtHR, which has stated that: “when the military courts assume jurisdiction over a matter that should be heard by the ordinary courts, the right to the natural judge is violated as is, a fortiori, due process; this, in turn, is intimately linked to the right to access to justice itself. As the Court has previously established, the judge in charge of hearing a case must be competent, independent and impartial”.²²³
- In a statement on the competence of military tribunals, the UN Committee on Enforced Disappearances (“CED”) reaffirmed that “military jurisdiction ought to be excluded in cases of gross human rights violations, including enforced disappearance”.²²⁴

Other obligations by States to ensure an effective remedy

- The ICPPED requires States to abide by a series of obligations, including to codify ED as a separate criminal offence under their domestic legislation;²²⁵ to thoroughly investigate allegations of ED;²²⁶ to establish jurisdiction over the offence of ED;²²⁷ and to establish effective guarantees for persons deprived of their liberty.²²⁸
- The HRCt and the IACtHR have both developed jurisprudence on the positive obligation to adopt legislative measures. For instance, in the case of *Molina Theissen v. Guatemala*, the IACtHR reaffirmed that “States Parties are under the obligation to adopt legislative or other measures required to make the rights and liberties protected by said Convention effective.”²²⁹ Similarly, the HRCt has urged States to modify their legislation to ensure that:
 - the perpetrators of ED are prosecuted and punished, in situations where this crime is not explicitly defined in domestic criminal law;²³⁰
 - relatives of disappeared persons have access to the investigation of the crime of ED;²³¹ and
 - relatives of the victims of ED are not required to obtain death certificates for the victim as a condition of receiving social benefits and relief.²³²
- Individual remedies in cases of ED often include conducting an effective investigation into the disappearance of the victim and providing the family with detailed information about its results; releasing the victim immediately if he/she is still being held incommunicado; if the victim is deceased, returning his/her remains to his/her family; prosecuting, trying and punishing those responsible for the violations that were committed; providing ade-

222 ECtHR, *Tanis and others v. Turkey*, Appl. No. 65899/01, 2 August 2005, para. 235; see also ECtHR, *Aksoy v. Turkey*, Appl. No. 100/1995/606/694, 18 December 1996, para. 98.

223 IACtHR, *19 Comerciantes v. Colombia*, Judgment, 5 July 2004, para. 167; See also *Masacre de Pueblo Bello v. Colombia*, judgment of 31 January 2006, para. 189; *Masacre de Mapiripan v. Colombia*, judgment of 15 September 2005, para. 202.

224 Committee on Enforced Disappearances (“CED”), Report of the Committee on Enforced Disappearances on its Eighth Session, February 2015, Geneva.

225 ICPPED, Article 4.

226 *Ibid*, Article 12.

227 *Ibid*, Article 9.

228 *Ibid*, Article 17.

229 IACtHR, *Molina Theissen v. Guatemala*, Series C No. 108, 3 July 2004, para. 89.

230 HRCt, *Ram Kumar Bhandari v. Nepal*, Communication No. 2031/2011, para. 10; *Basnet v. Sri Lanka*, Communication No. 2051/2011, para. 10.

231 HRCt, *Hero v. Bosnia and Herzegovina*, Communication No. 1966/2010, 27 November 2014, para. 11; *Kozljak v. Bosnia and Herzegovina*, Communication No. 1970/2010, 1 December 2014, para. 11.

232 HRCt, *Hero v. Bosnia and Herzegovina*, Communication No. 1966/2010, 27 November 2014, para. 11.

quate compensation to the family, and the victim if he/she is still alive. In their case law, both the HRCT and the African Commission have also indicated general remedies to prevent similar violations in the future.²³³ A more detailed analysis of remedies in the context of ED will be provided below, under the “Reparation” heading.

Right to truth

The African human rights jurisprudence is scarce on the right to truth. The Commission’s “Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance in Africa” provides for the right to truth as part of the right to an effective remedy by a competent national tribunal which includes access to the factual information concerning the violations.²³⁴ In its “Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa”, the Commission provides for an expansive definition of the right to truth and the duties of States to ensure that individuals receive information on the violations. In particular, it states that everyone shall have the freedom to seek, receive, use and impart information.²³⁵

The Commission has also expressly linked Article 9 of the African Charter, the right to free expression to the right to truth, and has stressed that, “States shall not withhold information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to life, personal liberty, and security.”²³⁶

The HRCT case law has, however, contributed to defining the scope of the right to truth. In the case of *Quinteros v. Uruguay*, in 1983, the HRCT found that the applicant had “the right to know what has hap-

pened to her daughter”, and that, due to the high level of “anguish and stress” caused by the disappearance and ongoing uncertainty, she too was a victim of the violation suffered by her daughter, in particular of article 7 of the ICCPR.²³⁷

Since its first report in 1981, the WGEID has acknowledged the right to truth as an autonomous right.²³⁸ The Inter-American Commission of Human Rights also contributed greatly to developing a doctrine on this right.²³⁹ The right to truth was gradually extended from the context of ED to other serious human rights violations, such as torture and extra-judicial executions, in the case law and resolutions of various bodies at the international and regional levels.²⁴⁰

In 2006, Article 24(2) of the ICPED enshrined the right to truth for the first time in an internationally binding treaty:

“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.”

In its General Comment on the right to truth, the WGEID defined it as “the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s)”.²⁴¹ The right to truth in relation to ED is an absolute right and no legitimate aim or exceptional circumstances can be invoked by the State to restrict it.²⁴² This absolute nature results from the continuing nature of ED and from the fact that the “anguish and sorrow” caused by an ED amounts to torture.²⁴³

233 See for instance HRC, *El Boathi v Algeria*, Communication No. 2259/2013, 16 May 2017, para. 9; ACHPR, *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo*, Communication 393/10, 18 June 2016, para. 154.v.

234 ACHPR, *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*, 2003, para. (b)(iii) of Part C.

235 ACHPR, *Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa*, Part 12(A), Right of Access to Information and the right of truth. The Principles emphasise that, “States shall not withhold information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to life, personal liberty, and security” and “State authorities shall not withhold information for the purpose of precluding accountability of States or individuals, or to preclude victims from securing a remedy to gross human rights violations or serious violations of international humanitarian law”.

236 *Ibid*, p. 37.

237 HRCT, *Quinteros v Uruguay*, Communication No 107/1981), 21 July 1983, para. 14.

238 Report of the WGEID, *Question of Human Rights of all persons subjected to any form of Detention or Imprisonment*, E/CN.4/1435, 26 January 1981, para. 187.

239 OHCHR, *Study on the right to the truth*, Report of the Office of the United Nations High Commissioner for Human Rights, E/CN.4/2006/91, 8 February 2006, para. 8.

240 See case law at OHCHR, *Study on the right to the truth*, *supra* note 239; HRCT, *Right to the truth*, Res. 2005/66 of 20 April 2005.

241 Report of the WGEID, *General Comment on the right to truth*, A/HRC/16/48, 26 January 2011, para. 3.

242 *Ibid*, para. 4.

243 Declaration, 5th Preambular Paragraph and Paragraph 1(2).

The State's obligations to ensure the right to truth are mainly procedural and include the obligation to investigate until the fate and the whereabouts of the person have been clarified, the obligation to have the results of these investigations communicated to the interested parties, the obligation to provide full access to archives and the obligation to provide full protection to witnesses, relatives, judges and other participants in any investigation.²⁴⁴

The African Commission has noted that the obligation to investigate provides for a full and public disclosure of the truth.²⁴⁵ In several decisions, the ACHPR has ordered States to carry out investigations into the atrocities to clarify the events. In *Malawi African Association and others v. Mauritania*, the ACHPR recommended that the government “*arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared and to bring and identify to book the authors of the violations perpetrated.*”²⁴⁶ In another case, the Commission, directly addressing the issue of disappeared persons, called on the State to promptly carry out an independent investigation to clarify the fate of the victims and to take all diligent measures to prosecute and punish the perpetrators.²⁴⁷

There is some evidence of best practice in this space: one mechanism used to investigate ED and ensure the victims' right to truth is that of truth commissions. Truth and reconciliation commissions are non-judicial bodies tasked with determining the facts, root causes and impacts of past human rights violations in a specific country and establishing a clearer historical record of the conflict.²⁴⁸ They provide an opportunity for victims and their families to discover the truth about the crime, the perpetrators or whereabouts and fate of their loved ones. However, the outcome and impacts of truth commissions vary depending on their mandate, duration, legal powers, and ability to refer cases for prosecution and name the perpetrators. The political context in which the truth commissions are set up can shape

the success of these mechanisms. Some examples include:

- The Gambian Truth, Reconciliation and Reparations Commission was established by an act of Parliament and is empowered to investigate human rights violations. It convenes public hearings at which victims, witnesses and perpetrators are invited to testify. The Commission's mandate includes establishing and making known the fate of victims.²⁴⁹
- In Senegal, former Chadian president Hissène Habré was tried before a special court in relation to thousands of cases of, *inter alia*, torture, arbitrary detention and disappearances. The investigative judges conducted an extensive 19-month-long investigation which included taking statements from witnesses and working with the 1992 Chadian Truth Commission. Habré was convicted of crimes against humanity, war crimes and torture in May 2016, a decision subsequently upheld by an appeal court.²⁵⁰

However, there are several obstacles affecting such mechanisms, for instance:

- In Kenya, the Truth and Justice Reconciliation Commission established in 2008 to investigate human rights violations committed since the country's independence to 2008, experienced several difficulties, including political obstacles preventing implementation of any recommendations, and the processes that followed being marred with corruption and debates about fairness.²⁵¹
- The Truth and Reconciliation Commission of South Africa noted the prevalence of ED as a State tool to dispose of political opponents and recognised that ED was carried out by both State and non-State actors. However, despite this recognition the Truth Commission failed to identify the fate or whereabouts of 477 victims, even though the Commission

244 Declaration, Article 13, para. 3

245 ACHPR, General Comment No.4 on the African Commission on Human and Peoples' Rights: The Right to Redress for Victims of Torture and other cruel, inhuman or degrading punishment or treatment (Article 5), paras 44 and 68.

246 *Malawi Africa Association v Mauritania*, Comment Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, African Commission on Human and Peoples' Rights, 11 May 2000.

247 ACHPR, *Instituto de Direitos Humanos e Desenvolvimento na Africa e outros v. Democratic Republic of Congo*, June 2016; English version.

248 Skaar E., *Transitional Justice for Human Rights: The Legacy and Future of Truth and Reconciliation Commissions*. International Human Rights Institutions, Tribunals, and Courts. International Human Rights. 2018. Springer, Singapore.

249 HRC, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 9 July 2020, para 36.

250 Amnesty International, *Hissène Habré appeal ruling closes dark chapter for victims*, 27 April 2017.

251 Kenya Transitional Justice Network, *Summary: Truth, Justice and Reconciliation Commission Report*, August 2013, at p. 3.

noted that “*the resolution of disappearance cases is perhaps the most significant piece of unfinished business for the commission.*”²⁵²

- In 2003, Algerian President Abdelaziz Bouteflika created an Ad Hoc Inquiry Commission in Charge of the Question of Disappearances to address the fate of more than 7,000 persons who disappeared during the Algerian civil war in the 1990s. The Commission, however, suffered several pitfalls. First, the findings of the Commission were never made public. The subsequent adoption of Ordinance No. 6-01 in February 2006 granted amnesty to the security forces and Islamic militias for most crimes, including ED. Pursuant to the Ordinance No. 6-01, the families were awarded reparations only upon presentation of a death certificate and giving up claims to seek truth about the fate of their loved ones. As a result, many families chose not to participate since they wanted to know the fate of their loved ones.²⁵³
- The Moroccan Equity and Reconciliation Commission had the mandate to investigate disappearances and arbitrary detention between 1956 and 1999. The Commission determined the fate of 742 people, including 66 victims of ED.²⁵⁴ The numbers, however, do not reflect the real number of victims or the truth about the use of ED during the prescribed period. The Commission itself noted that the limitations it faced in obtaining the truth included limitations of certain oral testimonies and their fragility, the deplorable state of national archives, or the inadequate co-operation of certain authorities, whereby certain officials gave incomplete answers regarding cases they were questioned about, while certain former, retired officials refused altogether to contribute to the efforts to reveal the truth.²⁵⁵

The CED in its Guiding Principles for the Search for Disappeared Persons highlights elements on the right to truth. The CED emphasises that the search for a

disappeared person should: be governed by a public policy; follow a differential approach taking into account the particular needs of the relevant persons; respect the right to participation; begin without delay; be a continuing obligation; be conducted on the basis of a comprehensive strategy; be organised efficiently; use information in an appropriate manner; be co-ordinated; be linked to the criminal investigation; be carried out safely; be independent and impartial; and be governed by public protocols.²⁵⁶ The principles highlight States’ obligations to search through consolidating good practices in searching effectively for disappeared persons.

Among the regional courts, the IACtHR has the most developed case law concerning the right to know the truth, both as a right that States must respect and ensure, and a measure of reparation. Since its first ruling on ED in *Velásquez Rodríguez*,²⁵⁷ the IACtHR has affirmed that the violation of “*the right of the victim’s family to know his fate and whereabouts*” entails a form of cruel and inhuman treatment for the nearest relative, in violation of Article 5 of the ACHR.²⁵⁸ In its subsequent judgments, the IACtHR has recognised the right to truth as an individual right, in its individual and collective dimension.²⁵⁹

The IACtHR also approaches the right to truth as a remedy, taking together Article 1 of the ACHR and the State’s obligation to investigate human rights violations, to punish those responsible, and to fight against impunity, established in Articles 8 and 25 of the IACHR.²⁶⁰ In 2001, in *Barrios Altos v. Peru*, the Court considered that the right to truth was also correlated to the rights to a fair trial (Article 8) and judicial protection (Article 25) of the IACHR.²⁶¹ A number of other IACHR judgments have confirmed the right of the victims’ relatives to know the truth, while continuing to subsume it under the above-mentioned rights.²⁶²

The ECtHR in *El Masri v. The Former Yugoslav Republic of Macedonia* stressed the importance of the right

252 Jay D. Arson, *The Strengths and Limitations of South Africa’s Search for Apartheid-Era Missing Persons*, Issue 2, July 2011, pp. 262–281.

253 United States Institute of Peace, *Commission of Inquiry: Algeria*, 21 September 2003

254 Kingdom of Morocco, *Summary of the Final Report, National Commission for Truth, Justice and Reconciliation*, p. 12

255 Kingdom of Morocco, *Summary of the Final Report*, *supra* note 254.

256 ICPPED, *Guiding Principles for the search for disappeared persons*, CED/C/7, 8 May 2018.

257 IACtHR, *Velásquez Rodríguez v. Honduras*, *supra* note 156, para. 181

258 IACtHR, *Rochac Hernández & Others v. Salvador*, Ser. C No. 285, 12 December 2013, para. 122.

259 See for example *Anzualdo Castro v. Peru*, Series C No. 202, 22 September 2009, paras. 118, 119, 168 and 169.

260 IACtHR, *Bámaca-Velásquez v. Guatemala*, Series C No 91, 25 November 2000, para. 73f, paras. 200-201.

261 IACtHR, *Barrios Altos v. Peru*, Series C No. 83, 14 March 2001; ICJ, *Enforced Disappearance and Extrajudicial Execution: The Rights of Family Members. A Practitioner’s Guide No. 10*, p. 127.

262 IACtHR, *Blanco Romero et al. v. Venezuela*, Series C No. 138, 28 November 2005, para. 62; *Case of Servellón García et al. v. Honduras*, Judgment of 21 September 2006. Series C No. 152, para. 76; *Case of the Pueblo Bello Massacre v. Colombia*. 31 January 2006, Series C No. 140, para. 220.

to truth, not only to the victim and their family, but to other victims of similar crimes and for the general public, who have the right to know what had happened.²⁶³ The ECtHR highlighted the obstacles that exist, such as impunity, that deters States and state authorities from investigating to the fullest extent.

Documenting human rights violations is essential to ensuring that the right to truth is upheld. However, African States emerging from conflicts and violent re-

gimes often do not have the political will, capacity or mechanisms to store and access records and archives. The archives are not only a practical tool for storing the documentation and evidence, but they also play an essential role in addressing issues of accountability and truth. The African Union Transitional Justice Framework specifically addresses the importance of archives within the context of the right to truth, as a vehicle to preserve the records of human rights violations and provide access to such information.²⁶⁴

263 ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia*, *supra* note 215, para. 191.

264 African Union Transitional Justice Framework (“ATJF”), Archives and the right to truth.

6

GAPS IN THE LEGAL AND POLICY FRAMEWORK TO PREVENT AND ERADICATE ED IN AFRICA



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A woman holds a picture of her missing son as she demonstrates with 300 other mothers outside the Algerian Justice ministry in 2020 to demand information about the fate of their love ones.

The aim of this section is to outline the legislative, policy, and practice gaps at the international and regional level to protect against and prevent ED in Africa. It is split into two sections. The first part sets out the international and regional level framework that currently exists. The second part focuses on highlighting the areas that a comprehensive ED framework should cover, and examples of the gaps that States should be aiming to close, as well as the challenges that African countries face closing these gaps.

The existing legal frameworks dealing with ED in Africa

The international frameworks

The 1992 Declaration was adopted by the UN General Assembly (UNGA) in an effort to give specificity to the issue of ED and the steps that States should be taking to prevent it.²⁶⁵

The ICPPED came into force in 2010 and outlines the legal obligations of States to protect, prevent, prosecute and provide reparations to victims of ED (see sub-section 4.1.2 above). At the time of writing, 17 African countries have ratified the ICPPED.

Finally, the Rome Statute of the International Criminal Court defines ED, but recognises it in the context of the narrower scope of crimes against humanity (i.e. to the extent carried out as part of a widespread and systematic attack against a civilian population). To date, 33 African States are parties to the Rome Statute.²⁶⁶

The regional frameworks

Regarding Africa-specific instruments, the African human rights system currently does not have a single legal instrument on ED; indeed, the ACHPR does not expressly address ED in any of its guidance.

As a result, in many countries, justice in respect of ED can only be sought regionally with reference to relevant “overlapping” rights that are already enshrined in the African Charter on Human and Peoples’ Rights or domestic legislation. These include, for example, Articles 4, 5, 6 and 7 of the African Charter (i.e. the right to life, freedom from torture and inhumane treatment, right to liberty and security of person, and a right of recognition before the law).

In addition, the following regional instruments and commitments are relevant to victims of ED in Africa, albeit the enforceability of some of these instruments remains patchy and inconsistent:

- Article 9(1)(c) of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the “**Kampala Convention**”) obliges State parties to protect the rights of internally displaced persons by refraining from, and preventing, the following acts, amongst others, “*arbitrary killing, summary execution, arbitrary detention, abduction, enforced disappearance or torture...*”²⁶⁷ At the time of writing, 31 countries have ratified the Kampala Convention.²⁶⁸ The Kampala Convention is legally binding on the States that have ratified it.
- Article 4(g) of the Economic Community of West African States (“**ECOWAS**”) Treaty, whilst not specifically providing a distinct avenue for preventing ED, incorporates the African Charter on Human and Peoples’ Rights.²⁶⁹ This provision of the Treaty binds the member States to “*affirm and declare adherence*” to the “*recognition, promotion and protection*” of the rights found in the African Charter when pursuing the objectives of the ECOWAS Treaty.²⁷⁰ To further this objective, the ECOWAS Court has jurisdiction to provide for relief for human rights violations deriving from the African Charter, the UDHR and the ICCPR.²⁷¹ There are, however, no ECOWAS specific legal instruments relating to ED.

265 Please refer to paragraphs 4.1.1 and 6.1.1 above for more detail on the 1992 Declaration, which is of persuasive and aspirational value, but is not binding on States.

266 International Criminal Court, The State Parties to the Rome Statute, accessed 17 May 2021.

267 UNHCR, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted on 23 October 2009, Article 9 (1) (c).

268 African Union, List of countries which have signed, ratified or accepted the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 18 June 2020.

269 Economic Community of West African States (“**ECOWAS**”), Revised Treaty, Article 4.

270 ECOWAS currently consists of the following 15 member states: Benin, Burkina, Cabo Verde, Côte d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. The objectives of ECOWAS are wide ranging. Its overarching aim is to increase integration between the member states. This is done through a number of avenues, such as economic activities, as well as social and cultural matters.

271 ECOWAS, Supplementary Protocol A/SP.1/01/05 of 19 January 2005 on the Court of Justice, Article 4. Noting that a requirement for the ECOWAS Court to have jurisdiction is that the individual bringing the claim must not have a separate action pending before another international court.

- Article 28C(1)(i) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the “**Malabo Protocol**”) recognises ED as a crime against humanity.²⁷² The relevant provisions mirror the provisions in the Rome Statute of the International Criminal Court. As at the time of writing, 15 countries have signed the Malabo Protocol, however no States have ratified it.²⁷³ The Malabo Protocol will be legally binding once ratified.
- The Protocol on the Prevention and Suppression of Sexual Violence against Women and Children of the International Conference of the Great Lakes (the “**SV Protocol**”) specifically prohibits ED of women and children as a crime against humanity.²⁷⁴ The SV Protocol applies to the States of the Great Lakes Region that have ratified the Pact on Security, Stability and Development in the Great Lakes Region, being, at the date of this paper, at least Burundi, the Central African Republic, the Democratic Republic of Congo, Kenya, Republic of Congo, Rwanda, Tanzania and Uganda.²⁷⁵
- The Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa prohibiting ED, state: “*No persons shall be subject to enforced disappearance. No exceptional circumstances whatsoever can be invoked as a justification for violating this prohibition.*”²⁷⁶
- The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the “**Arrest Guidelines**”) set out in detail the States’ obligation to provide people with the rights of life, dignity, equality, security, a fair trial and an independent judiciary.²⁷⁷ The Arrest Guidelines specifically mention disappearances, urging States to set up mechanisms with independent oversight and monitoring.
- The Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa urge States to

adhere to safeguards in the context of detention and arrest.²⁷⁸ These include the right to *habeas corpus*, to inform the families of the arrest of a person, and refer to the need for States to adopt laws that would hold officials accountable if they refuse to provide information about the individual’s whereabouts.

However, the principles and guidelines listed in the four previous paragraphs are non-binding on individual States and do not offer victims a direct route to redress in the event of ED. Despite references to ED in the instruments listed above, the ACHPR should adopt a specific instrument in respect of ED to provide guidelines to African States in order to eradicate ED.

The national frameworks

There is at present no centralised database that purports to gather information on steps taken by African States to criminalise ED. It is therefore challenging to assess the progress of States in implementing national frameworks to combat this phenomenon.

However, what is clear is that at the national level, most African States lack specific laws that prevent or criminalise ED. Three of the four focus countries in this paper (Sudan, Algeria and Zimbabwe) have not yet introduced specific domestic legislation explicitly criminalising and defining ED (see the table below). Of those African countries that have ratified the ICPPED, only Burkina Faso, Senegal, Morocco and Tunisia have incorporated, or have stated that they are in the process of incorporating, legislation into their domestic system that criminalises ED:

- Burkina Faso amended its legislation in 2018 to broadly follow the definition of ED in the ICPPED.²⁷⁹
- Senegal has stated that it is in the process of reforming its Criminal Code to include a new sec-

272 African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014.

273 African Union, List of countries, *supra* note 272.

274 International Conference on the Great Lakes Region, Protocol on the Prevention and Suppression of Sexual Violence against Women and Children, 30 November 2006, Article 1 (2) (i).

275 There is no up-to-date database monitoring the status of the ratifications which are outstanding, but these eight states ratified the Pact within two years of its signing, and this triggered the entry into force provisions. Under the provisions of the SV Protocol, States which have ratified the Pact are automatically bound by the SV Protocol.

276 ACHPR, Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa.

277 ACHPR, Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines), 2017.

278 ACHPR, Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, 2003.

279 Burkina Faso: Loi N°025-2018/AN, Article 523-4.

tion on ED and a definition aligned to that of the ICPPED.²⁸⁰

- A draft bill to update the Moroccan Penal Code, including by criminalising ED, is currently in the process of being finalised (proposals for amendments to the draft code were tabled in January 2020).²⁸¹
- Tunisia previously reported that it would be establishing a committee to draft a bill on ED, however, to date it has not succeeded in implementing ED into domestic criminal law.²⁸²

Progress in this area is slow, and even in States where specific laws do exist or have been proposed, the definition of ED often does not align with that of the ICPPED.²⁸³ For example:

- The draft bill to update the Moroccan Penal Code

as at 2016 fails to provide that ED is a continuous offence.²⁸⁴

- Whilst Libya has implemented laws criminalising ED, its definition of ED lacks several key elements of the ICPPED’s definition (see the table below).

Further, even in States where relevant laws exist to criminalise ED, in practice, the procedural safeguards relating to arrest and detention are often violated, meaning that the risk of those in State custody being subjected to ED continues to exist.

The below table sets out the position of ED under the national laws of the four countries which are the focus of this report. Of these countries, only Sudan has recently ratified the ICPPED but has not yet deposited an instrument of ratification,²⁸⁵ and Algeria has signed but not ratified the Convention.

| Country | Extent to which national legislation deals with ED |
|---------|---|
| Sudan | Sudan does not have explicit criminal laws prohibiting ED. The Criminal Procedure Act 1991, while explicitly prohibiting torture of an accused person, does not provide a definition of torture nor an appropriate penalty. ²⁸⁶ While the Criminal Procedure Act 1991 now recognises that torture can be inflicted both physically and psychologically and provides some safeguards to prevent ED, including registration of the arrest and informing the judge or relevant authority within 24 hours of the arrest, ²⁸⁷ practical and procedural safeguards are still inadequate. ²⁸⁸ |
| Algeria | In Algeria, the Constitution does not specifically prohibit torture or ED. The criminal code of Algeria, while prohibiting torture, does not provide a definition aligned with the Convention against Torture. ²⁸⁹ Penalties for the commission of torture range from 5 to 10 years but if committed before murder, the sentence increases to between 10 and 20 years’ imprisonment. If torture is committed by a public official, then penalties range from 10 to 20 years or life imprisonment. ²⁹⁰ |

280 United Nations, International Convention for the Protection of All Persons from Enforced Disappearance, Committee on Enforced Disappearances Twelfth session, Replies of Senegal to the list of issues in relation to the report submitted by Senegal under article 29 (1) of the Convention, paragraph 11.

281 Amnesty International, UPR Working Group, Submission for the UN Universal Periodic Review, 27th Session of the UPR Working Group, April/May 2017; Medias 24, *Projet de code de peines: Les amendements enfin déposés*, 12 January 2020

282 CED/UN Country report, 2014; ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law*, 2019)

283 “... 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 authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such person outside the protection of the law.” It is, however, worth noting that Senegal has stated that it is in the process of reforming its Criminal Code to include a new section on ED and a definition aligned to that of the ICPPED. The definition of ED under the Criminal Code of Burkina Faso as amended in 2018 broadly follows the wording in the ICPPED.

284 Amnesty International, Morocco: Submission to the United Nations Human Rights Committee 118th Session, 17 October-14 November 2016, p. 6.

285 REDRESS, *Sudanese Government Approves Ratification of Key Treaties on Torture and Enforced Disappearance*, February 2021.

286 REDRESS, *Further Historic Changes Made to Sudanese Laws*, 16 July 2020.

287 African Center for Justice and Peace Studies, *Enforced Disappearance in Africa: Baseline Study for Sudan*, September 2020, p. 26.

288 REDRESS, *Further Historic Changes Made to Sudanese Laws*, *supra* note 286.

289 MENA Rights Group, *Waiting for Redress: The Plight of Victims of Enforced Disappearances in Algeria (Baseline Study)*, *supra* note 103.

290 US Bureau of Democracy, Human Rights and Labour, *2020 Country Reports on Human Rights Practices: Algeria*.

| Country | Extent to which national legislation deals with ED |
|----------|---|
| Zimbabwe | <p>In Zimbabwe, neither the Constitution nor criminal laws specifically refer to ED as a crime. However, the Constitution of 2013 has enshrined a number of rights which seek to protect individuals from harmful conduct such as ED. Section 49 of the Constitution enshrines the right to personal liberty, which includes that a person cannot be detained without a trial and cannot be deprived of his/her personal liberty arbitrarily or without just cause.</p> <p>Additionally, Section 53 of the Constitution prescribes freedom from torture or cruel, inhuman or degrading treatment or punishment, stating that no person may be subjected to physical or psychological torture or cruel, inhuman or degrading treatment or punishment.²⁹¹ Further, the legislation on kidnapping, which criminalises the deprivation of freedom of bodily movement, intending to cause such deprivation, or realizing that there is a real risk or possibility that such deprivation may result,²⁹² provides for a sentence of life imprisonment with the option of a fine in some circumstances.²⁹³</p> |
| Libya | <p>Libyan legislation specifically prohibits ED and torture, but the definition of ED is not in line with that recognised under International Law. Article 1 of Law No. 10 of 2013 criminalises torture, forced disappearances and discrimination stating, “Whoever kidnaps or detains a human being or deprives the same of any of his personal freedoms, whether by force, threats or deceit, shall be punished with imprisonment.”²⁹⁴ This notably lacks essential elements in the ICPPED definition, namely (i) the involvement of agents of the state or those acting with the support of the State, (ii) a refusal to acknowledge the deprivation of liberty or concealment of the person’s fate, (iii) which places such person outside the protection of the law.</p> |

Only a small number of States recognise ED as a crime against humanity. Out of the 17 States that have ratified ICPPED, only Mali, Niger, South Africa and Senegal have adopted legislation to criminalise enforced disappearance as a crime against humanity.²⁹⁵

Otherwise, certain elements of the ED framework can be found in States’ military guidance, for example, in Chad, Kenya, and Madagascar, an obligation to search for missing persons and/or to notify families of victims is codified in respective guidance to the military:

- Chad’s Military Instructor’s Manual (2006) states: “Searches must be carried out to trace missing persons.”²⁹⁶
- Kenya’s LOAC Manual (1997) provides: “As soon as circumstances permit or, at least, at the end of

*active hostilities, each Party to the conflict must search for persons who have been reported missing by the adverse Party.”*²⁹⁷

- Madagascar’s Military Manual (1994) states that missing persons must be searched for.²⁹⁸

However, it is clear from the above that there is a real need to revisit and codify the offence of ED. African States are therefore encouraged to ratify the ICPPED and to adopt the guidelines on ED expected to be published in due course by the African Commission, in accordance with its resolution in 2020, in order to effectively prevent and protect against ED on the continent.²⁹⁹ The following paragraphs set out the specific obligations which must be codified, and, where appropriate, highlights gaps and shortcomings in existing legislation, policy and practice.

291 ZLHR, Enforced Disappearances, *supra* note 93, p. 24.

292 Criminal Law (Codification and Reform) Act, Chapter 9:23, Act 23/2004, Section 93 (1) (a).

293 Criminal Law (Codification and Reform), *supra* note 292, Section 93 (1).

294 LFJL, Unforgotten: Enforced Disappearance in Libya, *supra* note 92, p. 12.

295 According to the IHL Database, 2020, Part IV: Under Mali’s Penal Code (2001), “enforced disappearance” is a crime against humanity; according to Niger’s Penal Code (1961), as amended in 2003, “abduction of persons followed by their disappearance” is a crime against humanity; South Africa’s ICC Act (2002) reproduces the crimes against humanity listed in the 1998 ICC Statute, including the “enforced disappearance of persons”; Senegal’s Penal Code (1965), as amended in 2007, lists “the abduction of persons followed by their disappearance” as a crime against humanity “when committed on the occasion of a widespread or systematic attack against any civilian population.” Burundi (Law on Genocide, Crimes against Humanity and War Crimes (2003)) and the Congo (Genocide, War Crimes and Crimes against Humanity Act (1998)) also recognise ED as a crime against humanity when committed as part of a widespread or systematic attack against any civilian population.

296 IHL Database, 2020, Part IV.

297 *Ibid.*

298 *Ibid.*

299 ACHPR, Resolution on the Drafting of Guidelines for the Protection of All Persons from Enforced Disappearances in Africa *supra* note 21.

Obligation to prevent and protect from ED

The basic starting point is that States shall take necessary measures to prevent acts of ED, including by adopting legislation, policies and practices that promote the protection of human rights. Under this duty, States must take necessary measures to prevent acts of ED, including by ratifying conventions and adopting suitably detailed and comprehensive legislation, policies and practices that promote the protection of human rights and expressly recognise and address ED, putting a framework in place that ensures that the deprivation of liberty is carried out in accordance with human rights standards, providing the necessary training to relevant authorities, and ensuring that ED constitutes an offence under domestic criminal law.

States shall also, in accordance with their obligations under international human rights and humanitarian law, protect those in their territory or under their jurisdiction against unlawful violence, including ED.³⁰⁰ States shall similarly protect victims and those assisting them from harassment or any other form of intimidation.³⁰¹ The obligation to protect is wide-ranging and encompasses a broad range of rights that must be protected, such as *inter alia* the right to life, the prohibition against torture and ill-treatment, right to liberty and security of the person, right to a fair trial and right to liberty.

Articles 4, 6 and 7 of the ICPPED prescribe steps for States to take to prevent ED. According to Article 4, States shall adopt laws to criminalise ED. Articles 6 and 7 oblige States to adopt laws to hold perpetrators accountable and ensure that penalties reflect the seriousness of the offence.³⁰² The definition of ED adopted should be compatible with the elements of Article 2 of the ICPPED.³⁰³

Best practice as identified by the UN includes ensuring that ED is codified as a crime even where it does not amount to a crime against humanity under the Rome Statute of the International Criminal

Court, Article 7(1) (see sub-section The international frameworks above). This approach may be followed by establishing:

- two separate offences, as it is the case in Panama and Uruguay; or
- one offence that is sufficiently broad to cover both isolated and widespread acts, as in, for example, Bolivia, Colombia and Mexico, among others.³⁰⁴

The explicit characterisation of ED as a continuous offence in Guatemala, Uruguay and Nicaragua's domestic legislation has enabled tribunals to convict in cases where the offence had begun before the offence was codified.³⁰⁵

However, as established at sub-section The national frameworks above, at the time of writing, only a small number of African States have passed, or are proposing to pass domestic legislation criminalising ED, and even where such legislation does exist, the definition of ED often does not align with that of the ICPPED and is missing certain key elements, such as the characterisation of ED as a continuous offence. There is clearly a demonstrative legal gap to States fulfilling their obligations to prevent ED.

The obligation to search and co-operate

The ICPPED provides the obligation to adopt appropriate measures to search for, locate and release disappeared persons, and, in the event of death, to locate, respect and return their remains.³⁰⁶

In terms of best practice, the search should begin without delay as soon as there is an indication that a person has been disappeared and should continue until the victim is found or his or her whereabouts are known.³⁰⁷ Further, the search should be independent and impartial and should not be carried out by individuals who may have been involved in the commis-

300 This obligation links to the obligation under Article 6 of the African Charter, see sub-section 6.2.3. above.

301 See discussion of African Charter, Article 5 (*Prohibition of torture and ill-treatment*) and Article 6 (*the right to liberty and security of the person*) of the African Charter in sub-sections 6.2.3 and 6.3.2 above; and ACHPR, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Part 1(b), 2015.

302 CED, International Convention for the Protection of All Persons from Enforced Disappearance.

303 ICPPED, Concluding observations on the report submitted by Spain under article 29, para. 1 of the Convention, CED/C/ESP/CO/1, 12 December 2013, para. 9; ICPPED, Concluding Observations on the report submitted by Belgium, CED/C/BEL/CO/1, 24 September 2014, para. 11; and ICPPED, Concluding Observations on the report submitted by Germany on, CED/C/DEU/CO/1, 10 April 2014, Para. 7.

304 Report of the WGEID, Best practices on enforced disappearances in domestic criminal legislation, A/HRC/16/48/Add.3, 28 December 2010, para. 19.

305 *Ibid*, para. 34.

306 ICPPED, Article 24 (3).

307 ICPPED, Guiding Principles for the search for the disappeared, *supra* note 256.

sion of the disappearance. The relatives of the victims and their legal representatives should be part of the search and have access to information and be allowed to participate at all stages of the search.³⁰⁸

The 1992 Declaration provides that each State shall ensure that the competent authority has the necessary powers and resources to conduct investigations effectively, to ensure that persons involved in the search are protected from retaliation and that the findings of the results are made available to all those involved.³⁰⁹

Given the ongoing nature of the crime of ED, the State has a continuing obligation to carry out investigations as long as the fate of the victim remains unclarified.³¹⁰

Related to the points above, forensic expertise is essential in helping to identify the victims of ED. Proper exhumation, DNA analysis and repatriation are all important to provide the relatives with the necessary closure and the right to truth and information as to what happened to their loved ones. According to the Guiding Principles for the Search for Disappeared Persons, it is the responsibility of the competent authorities to make use of appropriate forensic methods and professional expertise to search for and locate the disappeared person.³¹¹

The competent authorities should use at their disposal tools to find the individual or identify his or her remains through DNA analysis and the family must be involved in every step of the process.³¹²

While States are required to use all available resources, including DNA analysis and international co-operation, they may not always have the necessary resources. However, while the competent authorities may not always possess the relevant expertise, they shall collaborate with civil society organisations and scientists who may assist the authorities in carrying out the search for the disappeared.³¹³

- For example, in Zimbabwe, in 1999 and 2001, Amani Trust led the exhumation of 20 bodies of victims of the Gukuharundi massacre to provide for their proper burial. In Nbelele culture, the burials are important rituals, during which the tears of the living and the proper period of mourning allow for the release of the soul of the victims and allow him/her to rest.³¹⁴ Individuals who have not been given a proper burial are in “*an unhappy state of limbo and burial releases them*” but “*when a rural community’s desire to reclaim their dead was placed at the center of healing processes, reburials had transformative outcomes at the individual, family and community levels.*”³¹⁵

- Similarly, South Africa’s Truth and Reconciliation Commission undertook at least 50 exhumations with the aim of establishing the ultimate fate of the disappeared and providing relief to the families of victims.³¹⁶ Successful exhumations by the Commission permitted the delivery to the families of the physical remains of their relatives so that the remains could be buried according to the families’ chosen ceremonies. In the case of Ms Phila Portia Ndwandwe, who had been abducted by members of the Port Natal Security Branch, forensic examination of her exhumed remains revealed how she had died, thereby dispelling the belief that she had joined the security forces. In addition, press reports on Ms Ndwandwe’s exhumation led to her son meeting his grandparents for the first time.³¹⁷

However, despite the utility and importance of exhumations, the success of these investigations can be limited by issues such as the contamination and disturbance of mass graves and the related lack of mass grave protection guidelines,³¹⁸ inadequate consideration of a culturally appropriate reburial or a failure to recognise the place of reburial as a site of significance and memorialisation for families and communities.³¹⁹ Ineffective exhumations were seen in Rwanda when the International Criminal Tribunal for Rwanda-commissioned excavations of mass graves

308 *Ibid.*

309 UNGA, Declaration on the Protection of All Persons from Enforced Disappearances, A/RES/47/33, 9 February 1993, Article 13 (2), (3) and (4)

310 UN WGEID, General Comment on the Right to Truth in Relation to Enforced Disappearances.

311 CED, Guiding Principles for the search for disappeared persons, CED/C/7. 8 May 2019.

312 UN WGEID, General Comment on the Right to Truth in Relation to Enforced Disappearances.

313 UN WGEID, General Comment on the Right to Truth in Relation to Enforced Disappearances.

314 Tamara Hinan, *Exhuming Norms and Comparing Investigations of Forced Disappearances*, 24 October 2018.

315 Tamara Hinan, *Exhuming Norms and Comparing Investigations of Forced Disappearances*, supra note 314.

316 Human Rights Violations Committee, Abductions, Disappearances and Missing Persons, p. 556.

317 *Ibid.*, p. 550.

318 Melanie Klinkner, *Towards mass-grave protection guidelines*, Human Remains and Violence, Volume 3, No. 1, 2017, pp. 52 – 70.

319 Bournemouth University, *The Bournemouth Protocol on Mass Grave Protection and Investigation*, 2020, p. 14.

had to be halted amid criticism for a lack of cultural appropriateness and doubts about the forensic methodology employed.³²⁰ The 2008 Rwandan law that all reburials occur at State genocide memorials also interfered with the accepted norm of returning remains to the deceased's family.³²¹

Finally, we note that States have an obligation to co-operate and provide each other with mutual assistance for the purpose of investigating ED, assisting victims of ED in searching for, locating and releasing the victims and, in the event of death, in exhuming and identifying their remains.³²²

Search, identification and restitution of children

In Africa, there are no official records of how many children have been subjected to ED. It is estimated that there are approximately between 4,000 and 6,000 children born of war in Northern Uganda³²³. They are vulnerable due to their lack of legal documentation and face further abuses of their human rights, such as child labour, sexual exploitation and human trafficking. The International Center for Transitional Justice recommended that Uganda revise its national identity registration policy to become more inclusive of children born of war.³²⁴ When searching for disappeared children, the authorities should take into account the vulnerability of children, including their age and loss of identity. For new-born and very young children, the authorities should take into account the fact that their identification documents may have been altered and that they may have been taken from their families, given a false identity and handed over to a children's institution or another family for adoption. These children and adolescents,

who may by now be adults, should be searched for, identified and have their identity restored.³²⁵

Latin America brings some good experiences in this area. The IACtHR has found that children who are victims of ED require special measures of protection, including the right to an identity that encompasses the right to nationality, name and to family relationships.³²⁶ In Argentina, a group of activists known as the *Abuelas de Plaza de Mayo* successfully lobbied for laws to find and identify stolen children during the Argentinean dictatorship. The legislation included the establishment of:

- a National Genetic Data Bank, to be used to identify stolen children;
- the National Commission of the Right to Identity, to enable the restitution of disappeared children; and
- DNA testing of anyone suspected of being a stolen child.³²⁷

The obligation to investigate, prosecute and punish ED

States have a duty to carry out prompt, impartial and independent investigations into all cases of ED. This obligation has attained the status of *jus cogens* and as such, cannot be waived by States.³²⁸

This means, amongst other things, that where there are reasonable grounds for believing that a person has been subjected to ED, the State should investigate even if no formal complaint has been made.³²⁹ Investigations should be prompt, impartial, independent, and carried out with diligence and must be aimed

320 International Commission on Missing Persons ("ICMP"), *Rwanda*; Tamara Hinan, *Exhuming Norms and Comparing Investigations of Forced Disappearances*, 24 October 2018.

321 Tamara Hinan, *Exhuming Norms and Comparing Investigations of Forced Disappearances*, *supra* note 314.

322 African Charter, Article 1; ICPPED, Articles 14 and 15.

323 International Law Blog, *Transitional Justice in Uganda: The Dilemma of Children Born of War*, 24 July 2020.

324 International Law Blog, *Transitional Justice in Uganda: The Dilemma of Children Born of War*, 24 July 2020.

325 ICPPED, *Guiding Principles for the search for disappeared persons*, CED/C/7, 8 May 2019.

326 IACtHR, *Gelman v. Uruguay*, Merits and Reparations, Inter-Am Ct. H.R., Series C No. 221, 24 February 2011.

327 Rae, Marie, *Truth at Any Cost? Law's Power to Name Argentina's Disappeared Grandchildren*, Onati Socio-Legal Series, 2017.

328 UNGA, *Question of enforced or involuntary disappearances*, A/RES/55/103, 4 March 2001; HRC, *Forced or involuntary disappearances*, Resolution 21/4, 27 September 2012; IACtHR, *Anzualdo Castro v. Peru*, Judgment of 22 September 2009, para. 59; *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, Judgment of 24 November 2010, para. 137; IACtHR, *Almonacid Arellano and others v. Chile*, Judgment of 26 September 2006, para. 99.

329 ICPPED, Article 12.2; UNGA, *Declaration on the Protection of All Persons from Enforced Disappearance*, Article 13(1); UNGA, *Body of Principles for the Protection of All Persons under Any Form of Detention*, Res. 43/173, 9 December 1988, Principle 34; UNGA, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Rule 57.

at discovering the truth, and at bringing the perpetrators of the act to justice.³³⁰ Steps must be taken to ensure that complainants, witnesses, relatives of disappeared persons, legal counsel, and participants in the investigation are protected from ill-treatment or intimidation arising from their involvement.³³¹

States have a duty to ensure that the investigating authorities have access to required documents and other information, and that all relevant evidence is collected, reviewed, and safeguarded. Where applicable, States should also grant the necessary authorisations to allow the authorities access to places of detention, or other places of interest, where there are reasonable grounds to believe that the disappeared person may be present.³³²

Furthermore, States must make sure that mechanisms are in place and accessible to allow victims, witnesses, or interested parties to formally participate in ED proceedings, and that the safety of all parties is guaranteed. If required, the State should put protective measures in place and/or provide appropriate guarantees in relation to safety measures.³³³

Investigations into ED attributed to the armed forces or to the police must be carried out by civilian bodies linked to the ordinary courts of justice, and not the military courts or military police.³³⁴

The ICPPED provides that State parties should take the necessary measures to criminalise ED,³³⁵ adopt measures to hold perpetrators accountable and pass appropriate penalties for the crime. Articles 9 and 14 provide that States should take up the necessary measures to establish jurisdiction over the

crime of ED and shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of ED.³³⁶ Mutual legal assistance shall include, amongst other things, assisting victims of ED in searching for, locating and releasing the victims and, in the event of death, in exhuming and identifying their remains.³³⁷ States shall also provide each other with mutual assistance in the search for, identification, and return of minors who have been removed to another State or detained as a consequence of the ED of their parents or guardians.³³⁸ To achieve these ends, States shall establish a competent authority and enter into appropriate co-operation agreements to facilitate effective co-operation across borders.³³⁹

States have a duty to impose sanctions that are proportionate to the seriousness of ED. However, States may apply mitigating circumstances to participants of ED where such people have aided investigations, such as where they have helped to find the victim alive, provided information that clarifies the ED of a person, or identified the perpetrators.³⁴⁰

However, in practice, despite provisions that call on African governments to conduct prompt and independent investigations, many victims do not receive justice as the governments have failed to carry out the investigations, leaving many victims wondering about the fate of their loved ones.

To the extent that States do not have an existing framework in place that fully captures and codifies the above obligations, such framework must be established.

330 ICPPED, Concluding observations on the report submitted by Spain under Article 29, para. 1, CED/C/ESP/CO/1, 12 December 2013, para. 12; ACHPR, *Osorio Rivera and Family v. Peru*, Judgment of 26 November 2013, para. 178; *the Masacre de Pueblo Bello v. Colombia*, Judgment of 31 January 2006, para. 143; Human Rights Committee, Concluding Observations, *Peru*, CCPR/CO/70/PE of 15 November 2000, para. 8; *Chile*, CCPR/C/CHL/CO/5, 18 May 2007, para. 9; *Guyana*, CCPR/C/79/Add.121, 25 April 2000, para. 10.

331 ICPPED, Article 12.1.

332 ICPPED, Article 12.3.

333 See e.g. ICJ, *Enforced Disappearance guide*, *supra* note 147, at pp. 117-228.

334 HRCt, Concluding Observations on *Cameroon*, CCPR/C/79/Add. 116, 4 November 1999, para. 20; *Sudan*, CCPR/C/79/Add. 85, 19 November 1997; *Algeria*, CCPR/C/Add. 95, 18 August 1998, paras. 6, 7 and 9; *Peru*, CCPR/C/70/Add. 67 (25 July 1996), para. 22; Report of the WGEID, E/CN.4/1994/26, 22 December 1993, para. 86.

335 ICPPED, Article 4.

336 ICPPED, Articles 9 and 14

337 African Charter, Article 1; ICPPED, Articles 14 and 15.

338 ICPPED, Article 25(3), Inter-American Convention on Forced Disappearance of Persons, Article XII.

339 ICPPED, Guiding Principles for the Search for Disappeared Persons, *supra* note 256.

340 ICPPED, Article 7; Inter-American Convention on Forced Disappearance of Persons, Article III.

Case study Algeria



Maamar Ouaghlissi was working at the national railways company in Algeria on 27 September 1994, when he was approached by three plain clothes officers, claiming to be from the security services (Al-Amn). The officers, who provided no explanation or warrant, asked Mr Ouaghlissi to follow them in his vehicle, accompanied by two officers. This is the last time that he was seen.

Immediately following his disappearance, his family sought information from the police headquarters, gendarmerie brigades and various barracks in the city, all of which denied holding Mr Ouaghlissi in custody. In the same year, Mr Ouaghlissi's father lodged a complaint with the prosecution service, but an investigation was never initiated.

Despite all the efforts made by the family to know his fate, it was only after eight months that Mr Ouaghlissi's wife learned, via a released prisoner, that he was being detained at the barracks of Mansura, which was run by the Intelligence and Security Department. Whilst the barracks denied that they were holding Mr Ouaghlissi, up until 1996 his wife and relatives continued to receive reports from released prisoners that he was being held there.

In 1998, another complaint was lodged with the prosecution service, yet still no investigation was launched. In May 2000, Farida Khirani was provided with an official report from the gendarmerie stating that "the investigations carried out have not been able to determine the whereabouts of the person concerned." No details of the nature of the investigations or the authority involved were given. In 2006, as a result of her efforts to obtain an official certificate of disappearance from the gendarmerie so that she could receive welfare support for her family, Mr Ouaghlissi's wife was given an "official certificate attesting to a disappearance under the circumstances arising from the national tragedy", although no investigation had been carried out by the gendarmerie that issued the certificate.

The family eventually filed a case with the Human Rights Committee, which, in 2012, found that grave human rights violations had been committed by the Algerian government, who had violated article 2 (3) of the ICCPR (in conjunction with article 6 (1); article 7; article 9; and article 10). HRcT held that the Algerian government was under an obligation to provide Mr Ouaghlissi's wife with an effective remedy, including by (i) conducting a thorough and effective investigation into the disappearance of Mr Ouaghlissi; (ii) providing his wife with detailed information about the results of the investigation; (iii) freeing Mr Ouaghlissi immediately if he was still being detained incommunicado; (iv) if he was dead, handing over his remains to his family; (v) prosecuting, trying and punishing those responsible for the violations committed; and (vi) providing adequate compensation for his family for the violations suffered and for Mr Ouaghlissi if he were alive. To date, however, the Algerian government has not complied with the HRcT's decision.

Amnesties, pardons and statutes of limitations

International law provides safeguards to ensure that amnesties and prescriptions are not unlawfully used for purposes of obtaining impunity of perpetrators of ED.³⁴¹ When legal measures such as amnesties are used for illegitimate purposes of obtaining impunity, it is considered a "fraudulent administration of justice" by doctrine and jurisprudence.³⁴²

Indeed, since the *Barrios Altos* case against Peru in 2001, the IACtHR has declared that amnesty provisions, statutes of limitations and other measures designed to prevent the investigation and punishment of those responsible for serious and non-derogable human rights norms, including ED, are prohibited.³⁴³

Amnesties and similar measures that prevent the investigation, prosecution and punishment of perpetrators of ED have been declared incompatible with

³⁴¹ ICJ, Guidelines on Enforced Disappearances, p. 208.

³⁴² *Ibid.*

³⁴³ IACtHR, *Barrios Altos v. Peru*, Merits, Judgment of 14 March 2001, Series C, No. 75; *La Cantuta v Peru*, Merits, Reparations and Costs, Judgment of 29 November 2006, Series C, No. 162. In subsequent judgments, the IACtHR reiterated that domestic amnesty laws are contrary to international law and the jurisprudence of the IACtHR is without effect (IACtHR, *Gelman v Uruguay*, Merits and Reparations, Judgment of 24 February 2011, paras. 250-303.)

the African Charter by the African Commission³⁴⁴ and with States' obligation to punish such crimes under International Law.³⁴⁵

The Commission has noted that, "*African states in transition from conflict to peace should at all times and under any circumstances desist from taking policy, legal or executive/administrative measures that in fact or in effect grant blanket amnesties, as that would be a flagrant violation of international law.*"³⁴⁶

Although not specifically in the context of ED, the ACHPR has asserted its role in awarding reparation to victims of human rights violations, including by overcoming the existence of amnesty laws at the domestic level:

"An amnesty law adopted with the aim of nullifying suits or other actions seeking redress that may be filed by the victims or their beneficiaries... cannot shield that country from fulfilling its international obligation under the Charter."³⁴⁷

Many African countries have deployed transitional justice mechanisms to move societies from dictatorship and address past violations. However, in many instances States have chosen peace over justice, leaving victims of human rights violations unable to obtain justice for their violations.

For example, in Algeria, Ordinance No. 06-01 granted blanket amnesty from prosecution to security and state-armed groups.³⁴⁸ The HRCt held that this Ordinance should not impede the enjoyment of the

right to an effective remedy for victims of torture and ED. In cases such as *Khirani*, *Mihoubi* and *Guezout*, members of the HRCt repeatedly criticised this approach in their separate opinions, considering that, since ordinance No. 06.01 breached Article 2(2) of the ICCPR, the HRCt should have specifically recommended that Algeria repeal or review it.³⁴⁹ This view was then adopted by the HRCt in more recent cases. Since *El-Boathi* in 2017, the HRCt has consistently requested Algeria to review or repeal the provisions of Ordinance No. 06-01 that are incompatible with the ICCPR, to ensure that the rights enshrined in the Covenant can be enjoyed fully in Algeria.³⁵⁰

In Zimbabwe, following a struggle for independence, the authorities passed two amnesty ordinances – Amnesty Ordinance No. 3 of 1979 and Amnesty Ordinance No. 12 of 1980 – granting amnesty to all those who participated in the liberation struggle of then Rhodesia. The amnesty covered any human rights violations committed, such as killing, rape, assault or torture.³⁵¹

In Libya, under Law No. 6 of 2015, all Libyans who committed offences from 15 February 2011 until 7 September 2015 are eligible for a general amnesty which even applies to "those most responsible" for the crimes. However, this is not a blanket amnesty, in that certain crimes are excluded from its reach. These excluded crimes include ED and torture, terrorism, sexual crimes, drug smuggling and corruption crimes. Nonetheless, the crimes excluded from the amnesty law do not correspond to all of Libya's obligations under international law, and the 2015 law provides a

344 ACHPR, General Comment No. 4 on the Right to Redress for Victims of Torture and other Cruel, Inhuman or Degrading Punishment or Treatment, para. 28; ACHPR, *Thomas Kwoyelo v. Uganda*, Communication 431/12, 17 October 2018, paras. 288-289. See also UNGA, Declaration on the Protection of All Persons from Enforced Disappearance, Article 18; UN ESC, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, E/CN.4/2005/102/Add.1, 8 February 2005, Principle 24; UN Security Council, Resolution No. 1120 (1997), 14 July 1997; UN Security Council, Resolution 1315 (2000) Sierra Leone (14 August 2000); ICRC, Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts, Article 6(5).

345 ICJ, Guidelines on Enforced Disappearances, p. 213; Louise Joinet in his report on amnesty law, when discussing the possibility whether crimes against humanity should be subjected to amnesties, specifically noted the prohibition of such practice. The report stated that "in the case of torture, involuntary or forced disappearances or extrajudicial executions, - the infringement of the human condition is such that the right of oblivion may become a right to impunity". Louis Joinet, Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights. Preliminary Report, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1985/16 Rev.1, 1985, Geneva; ACHPR, *Thomas Kwoyelo v. Uganda*, Communication 431/12 [2018] ACHPR 129, 17 October 2018, pp. 288 – 289, 293.

346 ACHPR, *Thomas Kwoyelo v. Uganda*, Communication 431/12 [2018] ACHPR 129, 17 October 2018, para. 293. See, also, ECtHR, *Margus v. Croatia*, Application No. 4455/10, 27 May 2014, para. 139, where the ECtHR observed that the applicant had been improperly granted an amnesty for acts that amounted to grave breaches of fundamental human rights protected under Articles 2 and 3 of the Convention. The Court observed that granting amnesty in respect of international crimes is "increasingly considered to be prohibited by international law".

347 ACHPR, *Malawi Africa Association v Mauritania*, Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98, para. 83.

348 Republic of Algeria, Law No. 06-01 on the Prevention of and Fight against corruption, 27 February 2006, Article 45.

349 *Khirani* (on behalf of Ouaghliissi and ors) v Algeria, *supra* note 184; *Mihoubi* (on behalf of Mihoubi) v Algeria, *supra* note 137; *Guezout and ors* (on behalf of Kamel Rakik and ors) v Algeria, *supra* note 136.

350 *El Boathi* v Algeria, Communication No. 2259/2013, CCPR/C/119/D/2259/2013, 16 May 2017, para. 9; *Khelifati v Algeria*, Merits, Communication No. 2267/2013, CCPR/C/120/D/2267/2013, 21 September 2017, para. 8; *Boudjema v Algeria*, Merits, Communication No. 2283/2012, CCPR/C/121/D/2283/2013, 1 December 2017, para. 10; *Millis v Algeria*, CCPR/C/122/D/239/2014, 28 June 2018, para. 9.

351 Zimbabwe Human Rights NGO Forum, Anti Impunity Report 2019, June 2019.

much wider amnesty than previously set out in Libyan transitional laws.³⁵²

In Sudan, the 12 November 2020 Sovereign Council Resolution No. 489 introduced a general amnesty for those who previously carried weapons or participated in military operations in Sudan. Despite the Resolution excluding certain groups from benefiting from the amnesty, including those who have been indicted by the International Criminal Court and those accused of committing serious international crimes or grave human rights violations that fall within the mandate of the Special Criminal Court for Darfur, it may still be incompatible with international law. For example, it is not clear from the Resolution whether those who have committed serious international crimes or grave human rights violations outside Darfur are provided

with amnesty by the Resolution. Further, it is uncertain whether the general amnesty is extended to the armed forces of the Sudanese government. If it is, it may be inconsistent with the Juba Peace Agreement, which includes only political leaders and members of the “armed movements” in its amnesty provisions.³⁵³

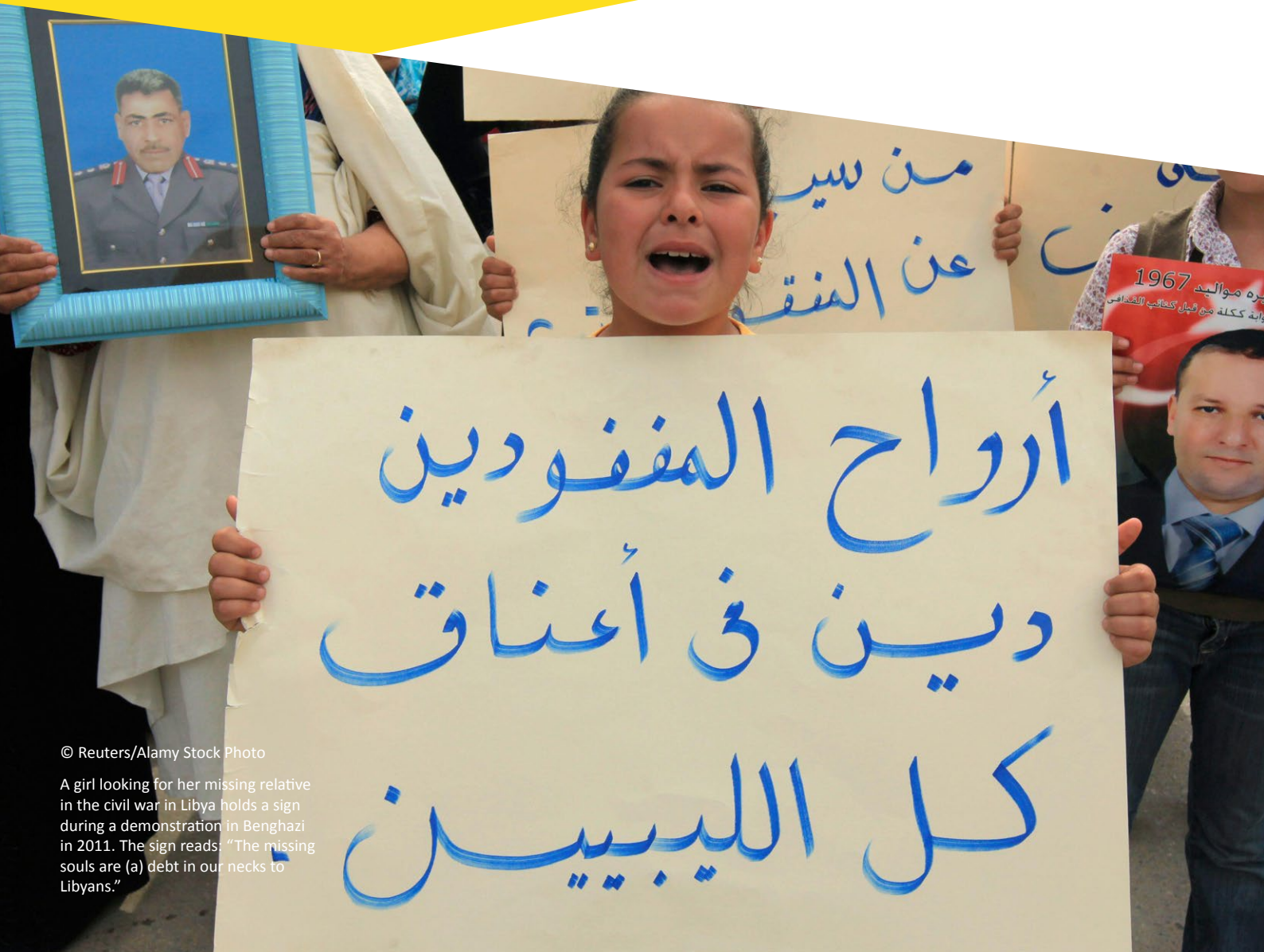
Importantly, ED should not be subject to a statute of limitation, and the passage of time should not be a valid defence or ground for a State to refuse the investigation of an ED, and/or to deny a victim redress in respect of such ED.

To the extent that African States do not have an existing framework in place that fully captures and codifies the above obligations, such framework must be established.

352 International Criminal Court, *The Prosecutor v Saif Al Islam Gaddafi*, Case No. ICC-01/11-01/11, 28 September 2018.

353 REDRESS, *A General Amnesty in Sudan – International Law Analysis*, January 2021.

7 THE OBLIGATION TO PROVIDE REPARATIONS TO VICTIMS



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A girl looking for her missing relative in the civil war in Libya holds a sign during a demonstration in Benghazi in 2011. The sign reads: "The missing souls are (a) debt in our necks to Libyans."

The right to redress for serious human rights violations is a well-established norm of international law.³⁵⁴ The ICPPED provides for the right of victims of ED “to obtain reparation and prompt, fair and adequate compensation.”³⁵⁵ The ACHPR considers reparations to be a form of restorative justice focusing on the needs of victims and the restoration of social equilibrium.³⁵⁶ Reparations have to be “effective” in practice as well as in law.³⁵⁷

Effective reparations in law and lifting legal barriers

The law should allow victims to access reparations, through judicial processes or special administrative bodies.³⁵⁸ Reparations should include judicial remedy; an administrative procedure will not suffice to provide redress.³⁵⁹

States should not enact laws that hinder access to redress, such as amnesties and/or immunities, or short statutes of limitations to prosecute crimes.³⁶⁰ Civil claims for compensation should not be made dependent on penal sanctions imposed on the perpetrators;³⁶¹ similarly the right to reparations should not be made conditional on the death of the victim.³⁶² Reparations should also not be limited to ED which takes place during a specific time frame.³⁶³ Statutes of limitations should not be effective against civil or administrative actions brought by victims seeking reparations.³⁶⁴

Effective reparations in practice

Accessible. Access to reparations for victims of ED “must not be unjustifiably hindered by acts or omissions by the authorities of the respondent State.”³⁶⁵ Information about available remedies should be

354 UDHR, Article 8; ICCPR, Articles 2(3), 9(5), 14(6); CAT, Article 14; ECHR, Article 13; ACHR, Article 25; African Charter, Articles 7, 21; Arab Charter on Human Rights, Article 16. See also: ACHPR, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/02, para. 213; IACtHR, *Gelman v Uruguay*, *supra* note 211, para. 247; *Castillo Páez v. Perú*, Reparations and Costs, 27 November 1998, para. 50: obligation to provide reparations is a customary norm of international law.

355 ICPPED, Article 24(4). This right “covers material and moral damages and, where appropriate, other forms of reparation such as: (a) restitution; (b) rehabilitation; (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition”; Article 24(5); see also ACHPR, *General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, 2017, para. 10.

356 ACHPR, *Study on transitional justice and Human and Peoples’ Rights in Africa: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, 2017, para. 52.

357 See for instance: ACHPR, *General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, 2017, para. 1.

358 WGEID, *General Comment on Article 19 of the Declaration on the Protection of all Persons from Enforced Disappearances*, UN Doc E/CN.4/1998/43, para. 72.

359 HRcT, *Bautista de Arellana v. Colombia*, Communication No. 563/1993, 27 October 1995, para. 8.2; CAT, *General Comment 3*, 13 December 2012, para. 20; ECtHR, *Ramirez Sanchez v. France*, 399, 4 July 2006, paras. 165-166; see also: OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, Annex, 21 March 2006, para. 12; *cf.* ACHPR, *General Comment No. 4 on the African Charter on Human and Peoples’ Rights*, *supra* note 164, 2017, para. 26.

360 HRcT, *General Comment No.31 [80]*, UN Doc. CCPR/C/21Rev.1/Add.13, 26 May 2004, para. 18; CAT, *General Comment 3*, 13 December 2012, paras. 18, 37-43; IACtHR, *Caracazo v. Venezuela*, 29 August 2002, Reparations, para. 119; see also: ICCPR, Article 2(3) and OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, Annex, 21 March 2006, paras. 6-7. In relation to Algeria, the HRcT drew attention to the terms of Ordinance No. 06-01, preventing families from bringing legal claims of ED. It underlined that the Ordinance should not impede the enjoyment of the right to an effective remedy for the victims of torture and ED (HRcT, *Khairani (on behalf of Ouaghlissi and ors) v. Algeria*, Merits, UN Doc. CCPR/C/104/D/1905/2009, 26 March 2012; *Mihoubi (on behalf of Mihoubi) v. Algeria*, Communication No. 1874/2009, UN Doc. CCPR/C/109/D/1874/2009, 7 January 2014; *Guezout and ors (on behalf of Kamel Rakik and ors) v. Algeria*, Merits, Communication No. 1753/2008, UN Doc. CCPR/C/105/D/1753/2008, 19 July 2012; *El Boathi v. Algeria*, Communication No. 2259/2013, UN Doc. CCPR/C/119/D/2259/2013, 16 May 2017, para. 9; *Khelifati v. Algeria*, Merits, Communication No. 2267/2013, UN Doc. CCPR/C/120/D/2267/2013, 21 September 2017, para. 8; *Boudjema v. Algeria*, Merits, Communication No. 2283/2012, UN Doc. CCPR/C/121/D/2283/2013, 1 December 2017, para. 10; *Millis v. Algeria*, UN Doc. CCPR/C/122/D/239/2014, 28 June 2018, para. 9.)

361 WGEID, *General Comment on Article 19, note supra 358*, para. 73; OEA, *Principal Guidelines for a Comprehensive Reparations Policy*, OEA/Ser/L/V/II.131 Doc. 1, 19 February 2008, para. 2.

362 WGEID, *General Comment on Article 19, supra note 358*, para. 74; however, a finding of the death of the victim as a result of the ED should give rise to additional compensation for the dependents; States should “provide for appropriate legal procedures leading to the presumption of death of a similar legal status of the victims which entitles the dependants to exercise their right to compensation”

363 See for instance ICPPED, *Concluding observations on the report submitted by Argentina*, UN Doc. CED/C/ARG/CO/1, 12 December 2013, para. 35.

364 UN ESC, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 2005, Principles 23 and 32; according to the WGEID, “the passing of time should not be an obstacle for the progress of civil demands through the application of statutes of limitations.” (Report of the WGEID, UN Doc. A/HRC/22/45, 28 January 2013, para. 58).

365 ECtHR, *Aksoy v. Turkey*, 18 December 1996, para. 95.

made known to victims and effective access to justice for victims should be ensured.³⁶⁶ This is especially important with regard to vulnerable groups of victims.³⁶⁷ The ACHPR has highlighted that in the case of a change in government, the new government will inherit all reparation obligations of the previous government.³⁶⁸

Adequate. Reparations should be appropriate and proportionate to the gravity of the violation and the circumstances of each case.³⁶⁹ They should also be adequate, effective, comprehensive, speedy and timely.³⁷⁰ The ACHPR considers that failure to provide prompt access to redress is a *de facto* denial of redress.³⁷¹

Victim-Oriented and Non-Discriminatory. States “should address linguistic and literacy barriers” in the context of reparations.³⁷² Reparation programmes should recognise the particular harm suffered by women in the context of ED.³⁷³ The ACHPR aspires to adopt a holistic approach to reparations; and takes a victim-centered approach to redress.³⁷⁴

Forms of reparations

International law recognises five forms of reparations; including compensation, restitution, guarantees of non-repetition, rehabilitation, and satisfaction. The right to truth is entwined with each of these forms of reparations.³⁷⁵ See sub-section above for more on this.³⁷⁶

Compensation. Where damage can be assessed economically, compensation should be provided.³⁷⁷ Compensation has to be adequate; that is, proportionate to the gravity of the violation and to the suffering of the victim and the family.³⁷⁸ Monetary compensation should be granted for physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation and costs required for legal and expert assistance.³⁷⁹ The ACHPR has specified that human lives have no price and as such, reparations must be substantial in order to be adequate.³⁸⁰ This is illustrated by the case of Jestina Mukoko, who was awarded \$150,000 USD by the High Court of Zimbabwe in compensation for the abduction, detention

366 OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, Annex, 21 March 2006, para. 12(a), see also para. 24.

367 UNGA, Special Rapporteur on Torture, Report, UN Doc. A/HRC/7/3, 15 January 2008, paras. 61-62. States should also “take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims” (OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, Annex, 21 March 2006, para. 12(b)).

368 ACHPR, *Achutan v. Malawi*, Communications Nos. 64/92, 78/92, 3 November 1994, para. 12.

369 OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, Annex, 21 March 2006, paras. 15, 18.

370 ACHPR, *General Comment No. 4 on the African Charter on Human and Peoples’ Rights*, supra note 164, 2017; IACtHR, *Mónago Carhuaricra v. Peru*, Case No. 10.826, Report No. 45/00, OEA/Ser.L/V/II.106, doc 3, rev. 1999, Recommendation No. 3; ECtHR, *Paulino Tomás v. Portugal*, Reports of Judgment and Decisions, 2003; Çelik and Imret v. Turkey, Application No. 41993/98, 27 July 2004, para. 59; see also: HRCt, *General Comment no. 32*, UN Doc. CCPR/C/GC/32, 23 August 2007.

371 ACHPR, *General Comment No. 4 on the African Charter on Human and Peoples’ Rights*, supra note 164, 2017, para. 26; Similarly, the IACtHR held that the right to a remedy “refer[s] not only to the mere existence of [...] remedies, but also to their adequacy and effectiveness” (IACtHR, *Velásquez Rodríguez v. Honduras*, 29 July 1988, para. 63; see also IACtHR, *Monago Carhuaricra v. Peru*, Report No. 45/00, 13 April 2000, para. 50.).

372 WGEID, *General Comment on Women Affected by Enforced Disappearances*, UN Doc. A/HRC/WGEID/98/2, 14 February 2013, para. 43.

373 *Ibid.*, para. 39.

374 ACHPR, *General Comment No. 4 on the African Charter on Human and Peoples’ Rights*, supra note 164, 2017, para. 18.

375 IACtHR, *Trujillo Oroza v. Bolivia*, 27 February 2002, Reparations, paras. 114-115; *Bámaca Velásquez v. Guatemala*, 22 February 2002, Reparations, para. 76.

376 OHCHR, *Basic Principles and Guidelines*, supra note 219, para. 24.

377 OHCHR, *Basic Principles and Guidelines*, supra note 219, para. 20.

378 WGEID, *General Comment on Article 19*, supra note 357, para. 73; see also: OHCHR, *Basic Principles and Guidelines*, supra note 219, para. 15. Where monetary compensation is awarded to child victims, States “should take into account the age and maturity of the child and develop an appropriate arrangement for collection,” such as the use of a guardian; WGEID, *General Comment on Children and Enforced Disappearances*, UN Doc. A/HRC/WGEDI/98/1, 14 February 2013, para. 32.

379 WGEID, *General Comment on Article 19*, supra note 357, para. 73; see also: OHCHR, *Basic Principles and Guidelines note supra 219*, para. 20. The IACtHR has established that the pecuniary damages are meant to cover the “loss of, or detriment to, the victims’ income, expenses made as a result of facts and consequences of a pecuniary nature with a causal connection to the facts of the case”; IACtHR, *Bámaca Velásquez v. Guatemala*, Reparations and Costs, 22 February 2002, para. 43; *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, 24 November 2010, para. 298; and *Cabrera García and Montiel Flores v. México*, Preliminary Objection, Merits, Reparations and Costs, 26 November 2010, para. 248. However, damage to one’s “life-plan”, while it should be recognised and compensation provided, is not easily quantifiable; IACtHR, *Loayza Tamayo v. Peru*, Order, 3 February 2001, para. 60.

380 ACHPR, *Institute of Human Rights and Development in Africa and others v. DRC*, Communication 393/10, June 2016, para. 150. In this case, an amount of USD 300,000 was rewarded to each victim for their loss, in addition to other pecuniary damages for the looting of their goods.

and torture caused by State security agents in 2008. The compensation included a \$50,000 USD contribution to her legal costs.³⁸¹

Restitution. Restitution aims at restoring the victim to the original situation they were in before the violation they suffered.³⁸² Forms of restitution include restoring “liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.”³⁸³ For example, where it is not possible to determine the whereabouts of a disappeared person, “declarations of absence by reason of enforced disappearance” should be issued, with the consent of the family, by a State authority, after a certain time has elapsed since the disappearance, in any case no less than one year.³⁸⁴ In any event, the issuance of such a declaration does not relieve the State of the obligation to investigate and search for the whereabouts of the disappeared. As full restitution is not possible in cases of ED due to the “irreversible nature of the harm”, other forms of reparations, such as compensation and rehabilitation, should complement restitution.³⁸⁵

Guarantees of non-repetition. The State must “adopt measures to eradicate the circumstances that permitted the disappearances to occur, and which may permit similar events to occur again.”³⁸⁶ As part of this, States should ensure effective control over their forces, and that all proceedings abide by international human rights standards.³⁸⁷

Rehabilitation. State institutions must provide victims with adequate financial, psychological and legal

counselling, rehabilitation and support services, assistance and information.”³⁸⁸ Rehabilitation also includes “guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to one’s place of residence and similar forms of restitution, satisfaction and reparation which may remove the consequences of the enforced disappearance.”³⁸⁹ Reparation programmes should include access to education for child victims.³⁹⁰ Where a victim accepts such measures of assistance, they cannot be deemed to have waived their right to reparations for the violations they suffered as a result of the ED.³⁹¹

Satisfaction focuses on measures to cease and officially acknowledge the violations. This includes public disclosure of the truth; investigating the whereabouts of the disappeared and assisting in their reburial; official declarations to restore their dignity; public apologies; judicial or other sanctions against the perpetrator; commemorations and tributes; and inclusion of accounts of the violations in educational materials.³⁹² Symbolic reparations are a form of satisfaction and can include commemoration days, reburials and rituals, individual and collective apologies, plaques, tombstones and monuments.³⁹³

Obstacles for accessing effective reparations

Obstacles for victims of ED in Africa attempting to access effective reparations include the lack of political will, absence of proper legal or institutional frameworks and, in particular, the lack of mechanisms for

381 International Federation of Human Rights, *Zimbabwe: State ordered to pay 150,000 USD reparation to Jestina Mukoko*, 12 October 2018.

382 OHCHR, *Basic Principles and Guidelines*, note supra 219, para. 19.

383 *Ibid.*

384 WGEID Report, *General Comment on the Right to Recognition*, supra note 192, para. 6-7. Such a declaration should not put an end to investigations into the whereabouts of the disappeared; *Ibid.*, paras. 7-8.

385 *Report of the WGEID*, UN Doc. A/HRC/22/45, 28 January 2013, para. 55.

386 WGEID, *General Comment on Women Affected by Enforced Disappearances*, UN Doc. A/HRC/WGEID/98/2, 14 February 2013, para. 40; see also: HRC, *El Boathi v. Algeria*, Communication No. 2259/2013, 16 May 2017, para. 9; ACHPR, *Institute of Human Rights and Development in Africa and others v. DRC*, Communication 393/10, June 2016, para. 154.

387 This includes through adequate education, strengthening institutions, protecting human rights defenders and other related professions, promoting mechanisms to prevent and monitor conflicts and their resolution, reviewing and reforming laws contributing to or allowing violations of international standards; OHCHR, *Basic Principles and Guidelines*, note supra 219, para. 23.

388 WGEID, *General Comment on Women Affected by Enforced Disappearances*, UN Doc. A/HRC/WGEID/98/2, 14 February 2013, para. 44; OHCHR, *Basic Principles and Guidelines*, supra note 219 para. 21; see also: ACHPR, *Institute of Human Rights and Development in Africa and others v. DRC*, Communication 393/10, June 2016, para. 152.

389 WGEID, *General Comment on Article 19*, supra note 357, para. 75.

390 WGEID, *General Comment on Children and Enforced Disappearances*, UN Doc. A/HRC/WGEID/98/1, 14 February 2013, para. 33.

391 WGEID Report, *General Comment on the right to recognition*, supra note 192, para. 9, in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. HRC/19/58/Rev.1, 2 March 2012.

392 OHCHR, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147, 16 December 2005, para. 22. In *Gelman v. Uruguay*, Merits and Reparations, 24 February 2011, para. 266, the IACtHR set a period of one year for the State to acknowledge its international responsibility, see also: *Kawas Fernández v. Honduras*, Merits, Reparations and Costs, 3 April 2009, para. 202.

393 WGEID, *General Comment on Women Affected by Enforced Disappearances*, UN Doc. A/HRC/WGEID/98/2, 14 February 2013, para. 41.

claiming compensation where no individual perpetrator is identified. Additional obstacles include the lack of resources for implementation, immunity and amnesty laws, overly restrictive statutes of limitations, corruption, and weak institutions. The ACHPR has observed that victims can struggle to obtain redress because of the lack of effective policies, programmes, administrative measures and institutional arrangements designed to end human rights violations, but also because of the existence of laws allowing such acts.³⁹⁴

In Sudan and Zimbabwe, there is currently no legislation that outlaws ED specifically, leaving victims with no direct avenues to seek justice and reparation.³⁹⁵ Whilst Libyan legislation specifically prohibits ED and torture, the definition of ED is not in line with that recognized under International Law. This hinders access of victims to reparations.

In Algeria, Ordinance No. 06-01 grants blanket immunity from prosecution to security forces and state-armed militia.³⁹⁶ Moreover, relatives willing to pursue litigation and advocacy risk prosecution under article 46 of the Ordinance.³⁹⁷ Similarly, in Sudan, officials largely benefit from legally enshrined immunities.³⁹⁸

This has prevented families of the victims of ED from pursuing legal proceedings before domestic courts in both countries.

In all countries studied, institutions lack independence and/or rule of law, or suffer from a severe lack of resources. For instance, in Libya, institutions have broken down due to conflict and, as a result, the criminal justice system is ineffective and not operational.³⁹⁹ Finally, in all of the countries studied, there is a clear lack of political willingness to pursue cases of ED.

Given the lack of adequate legal and policy frameworks to provide redress to victims of ED in Africa, it is recommended that the ACHPR issues specific guidelines that assist African States in ensuring the right of victims of ED to reparation. Such measures could include the setting up of formal registers and databases to keep a record of the victims of ED with disaggregated data (by age, gender, etc.), including genetic information that assists in the search of the victims; best practices on forensic, technical and scientific means to search for the disappeared; training of law enforcement on the prevention and investigation of ED, and other measures.

394 ACHPR, *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, 2017, para. 14.

395 LFJL, *Unforgotten: Enforced Disappearance in Libya*, supra note 92, p. 12; ACJPS, *Enforced Disappearance in Africa: Baseline Study for Sudan*, September 2020, p. 26; ZLHR, *Enforced Disappearances - An Information Guide for Human Rights Defenders and CSOs*, January 2016, p. 24.

396 MENA Rights Group, *Waiting for Redress: The Plight of Victims of Enforced Disappearances in Algeria (Baseline Study)*, August 2020, p. 25; Algeria, Ordinance no. 06-01, 27 February 2006, Article 45.

397 Republic of Algeria, Law No. 06-01 on the Prevention of and Fight against corruption, 27 February 2006, Article 46, "*the wounds of the National Tragedy to harm institutions of the Democratic and Popular Republic of Algeria, to weaken the state, or to undermine the good reputation of its agents who honourably served it, or to tarnish the image of Algeria internationally, shall be punished by three to five years in prison and a fine of 250,000 to 500,000 DA.*"

398 ACJPS, *Enforced Disappearance in Africa: Baseline Study for Sudan*, September 2020, p. 4.

399 LFJL, *Unforgotten: Enforced Disappearance in Libya*, supra note 92, p. 10.

8

CONCLUSION



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Families of victims of enforced disappearance hold a protest in Algiers to demand that the authorities reveal the fate of their loved ones, disappeared during the 1990s civil war.

This report reviewed the practice of ED in Africa and the circumstances in which it arises and provided an analysis of existing legal and policy frameworks to prevent, prohibit and respond to ED in Africa. As illustrated in this report, there remain numerous policy gaps which enable ED to persist in Africa. Furthermore, existing policy gaps go hand in hand with a lack of awareness and political will among African States to address ED. Further, inadequate record-keeping of incidences of ED and outdated processes and procedures (if any) contribute to the lack of awareness and amplify the effect of ED in Africa. Historically, on the regional level, ED has not been a priority focus of the ACHPR, Africa's principal human rights body. However, the ACHPR has begun to take steps to increase awareness of ED and the need to eradicate it in Africa.

A number of recommendations are made in this report to successfully eradicate the crime of ED in Africa. These recommendations are aimed at addressing the aforementioned gaps in the regional and national legal and policy frameworks. This includes UN engagement on ED in Africa, the adoption of guidelines by the ACHPR on measures necessary for the prevention of ED and the consideration of existing international standards and jurisprudence by regional African courts when dealing with ED. Moreover, this report recommends the ratification of the ICPPED by African States, the empowering of victims and the organisations supporting them and, finally, the promotion of solidarity networks to strengthen regional platforms which assist victims. It is clear that a coordinated and concerted effort at the organisational, national, regional and international level is necessary to bring forward the eradication of the practice of ED in Africa.

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