

Addressing a forgotten struggle: Victims of enforced disappearance in Africa

Eva Nudd¹ and Alejandra Vicente²

Key points of interest

- Enforced disappearance in Africa takes place in a widespread manner, yet it is grossly underreported.
- Enforced disappearance is used by many African countries to suppress dissent, target migrants, or in the context of internal armed conflicts and the fight against terrorism, among other situations.
- While enforced disappearance has historically not been a focus of attention by the African Commission on Human and Peoples' Rights, the Commission has taken steps to produce guidelines that assist States in eradicating this practice on the continent.

Abstract

Introduction: Enforced disappearance in Africa occurs on a daily basis and no one is immune from becoming a victim. The practice, which drew attention since the decolonization process, continues today.

Method: this article is the result of desk-based and field research conducted by the authors and local partners in Algeria, Zim-

babwe, Sudan and Libya as part of a wider project¹.

Results: Governments routinely use enforced disappearance as a tool to oppress the opposition and instil fear among the population in order to retain power. It is also used in the context of migration, as well as in many other contexts and against a variety of victims. As enforced disappearance is a crime committed by State officials with an interest in concealing it, the statistics on its prevalence are limited and do not show the full extent of the crime in Africa. Further, the lack of political will to acknowledge the use of this practice means that many African States lack policies and laws to prevent, investigate and punish the perpetrators of enforced disappearance. Given these gaps, impunity for enforced disappearances is widespread. In the last two years, the African Commission on Human and Peoples' Rights adopted two resolutions raising awareness of the crime and paving the way for drafting and adopting specific guidelines to address this crime, which would be a first step in setting

1 The authors have been working on enforced disappearances in Africa for the last two years, implementing a project aimed at raising awareness and bringing justice to victims, with a specific focus on Algeria, Libya, Sudan and Zimbabwe. The paper reflects the desk and field research conducted as part of that project.

1) Legal Adviser. REDRESS.

2) Head of Law. REDRESS.

up a holistic framework to eradicate enforced disappearances on the continent.

Keywords: enforced disappearance, impunity, justice, Africa, victims

Introduction

Enforced disappearance has been used as a tool of oppression all over the world. Governments have used enforced disappearances in the context of internal conflicts, to frighten the population, silence opposition and dissent, placing people outside the protection of the law and causing unbearable suffering to the victims and their families.

While it might have taken place before in Africa, the use of enforced disappearances has drawn attention since colonial times when many colonial governments tortured and disappeared freedom fighters in order to silence them. Since then many African States have deployed this practice in a range of different contexts and against different groups of victims from human rights defenders to ethnic minorities, migrants and opposition leaders among others.

While enforced disappearances have been prevalent in the continent, the extent to which this practice takes place is difficult to assess. Many States refuse to acknowledge the occurrence of enforced disappearance, 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 enforced disappearances is also reflected in the lack of adequate legal frameworks at the na-

tional level to prevent and protect against this crime. As a result, victims of enforced disappearance in Africa are left to face the consequence of the crime with no prospect of finding little or any relief.

Historically, at the regional level, enforced disappearances did not feature prominently on the agenda of the African Commission of Human and Peoples' Rights ("ACHPR"), the continent's principal human rights body. Yet, this has changed in recent years as the ACHPR has taken a number of decisive steps to raise awareness on the prevalence and pervasiveness of this practice, as well as the need to eradicate it in the region.

In the following sections, we first address the different contexts in which enforced disappearance takes place in Africa, as well as the groups or someone of the main populations generally affected. Then, we turn to analyse the international, regional and national legal frameworks on the prohibition of enforced disappearances in Africa, highlighting gaps and opportunities to address the crime. Finally, we conclude by pointing to the steps that the ACHPR is taking to provide African States with guidelines to eradicate this practice from the continent.

Enforced disappearance in Africa: widespread but invisible

Over the last forty years, the United Nations Working Group on Enforced or Involuntary Disappearance ("WGEID") has assisted those affected by enforced disappearance to ascertain the whereabouts of their loved ones. Yet, from all the cases reported worldwide to the WGEID, only 10% accounts for cases originating in Africa. In its latest report, the WGEID noted that of a total 46,271 cases of enforced disappearance in the world under active consideration, 4,784 occurred in African countries, with the majority of

the outstanding cases coming from Algeria (3,253), Egypt (308) Sudan (177), Morocco (153), and Ethiopia (113) (UN Human Rights Council, 2020, pp. 18-14).

While these numbers provide a reliable account of cases reported to the WGEID, they fail to reflect the scope of the practice of enforced disappearance in Africa. The WGEID has pointed out that it “*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*” (UN Economic and Social Council, 2006, para. 593).

For example, in Rwanda, where possibly a million people disappeared in 1994, the WGEID has only received around 25 cases from the country (Sarkin, 2015).

Despite this underreporting, the available data suggests that enforced disappearances in Africa are widespread, as shown below.

While enforced disappearances are typically committed by State officials, or by others with the tolerance or acquiescence of the State, in recent decades both State and non-State actors have been disappearing and abducting people in a variety of contexts. Many persons disappear during armed conflicts. In South Sudan, a country ravaged by war for decades, many people remain unaccounted for. In 2020, the International Committee of the Red Cross (“ICRC”) reported more than 5,000 individuals whose fate is still not determined in South Sudan (ICRC, 2020). Additionally, thousands of people have been missing and disappeared in Nigeria, either by Boko Haram fighters or by the Nigerian security forces fighting them. With almost 23,000 people reported missing before the ICRC, Nigeria holds first place on the number of reported missing - most of

them minors - in Africa and worldwide (ICRC, 2020).

Inter-ethnic conflicts provide another context in which enforced disappearances have been committed, as illustrated by South Africa, where as many as 2,000 people might have disappeared during the Apartheid years (Sarkin, 2015).

Enforced disappearances are further used in many African countries to suppress the regime’s critics and any political opposition in the run up to or post-election period. In Zimbabwe, election cycles are often associated with a rise of enforced disappearances against opposition leaders. Most famously, in 2008, during the disputed election between Robert Mugabe and Morgan Tsvangirai, the Zimbabwe NGO Forum documented 137 disappearances, while in the 2013 elections, 30 people were reported forcibly disappeared (Zimbabwe Lawyers for Human Rights, 2016).

Additionally, some African States use enforced disappearance under the pretext of fighting terrorism, security operations and policing. In Kenya, police and military routinely disappear individuals suspected of links to the terrorist group Al-Shabab. In 2007, for example Kamilya Tuweni, a resident of the United Arab Emirates, was arbitrarily arrested while traveling to Kenya by members of the Kenyan counter-terrorism forces, and transferred to undisclosed locations in a number of East African countries for two and half months. In 2009, Tuweni brought a claim for extradition against the Kenyan authorities, which was recently dismissed by the Kenyan High Court and is pending appeal (REDRESS, 2009). In 2016, Human Rights Watch documented 34 cases of enforced disappearances in Nairobi and North-eastern Kenya (HRW, 2019).

The fear of enforced disappearances, poor economic conditions and lack of opportunities force thousands of Africans every year to seek

refuge in other countries or to seek a better life in Europe or elsewhere. Yet, the journey further exposes migrants to enforced disappearances, torture and other human rights violations. The International Organization for Migration recorded 3,689 missing migrants since the beginning of 2020, almost half of whom originated from the African continent (IOM, 2021). The statistics often include both those who go missing and those who are forcibly disappeared, but the WGEID has explored the connection between enforced disappearance and migration, noting it can occur in the form of abduction for political or other reasons, in the context of detention or deportation processes or as a consequence of smuggling and/or trafficking. The disappearance of migrants has been reported in Tanzania - in relation to Burundian refugees (HRW, 2020) - as well as Sudan (Dabanga, 2017; Mendez, S., 2012) and Libya (IOM, 2020), among other countries in Africa (The New Humanitarian, 2021).

Finally, enforced disappearance is often used as a method to discriminate against marginalized populations and to silence human rights defenders seeking to hold States accountable for failing to uphold human rights obligations. In the last few years, female political leaders in particular have become victims of enforced disappearance. In Libya, Siham Sergawi, who was critical of the military offensive in Tripoli, was forcibly taken from her home by an armed militia on 17 July 2019. More than two years later, her whereabouts are unknown, and the perpetrators remain at large (Lawyers for Justice in Libya, 2020). In Zimbabwe, in May 2019, three female opposition leaders were arrested and shortly thereafter disappeared for several days. When they re-appeared, they revealed that they had been tortured and sexually assaulted. Instead of launching an investigation into their disappear-

ance, the Zimbabwean government charged the three women with lying to the police and faking their own abduction and their trial is currently pending (BBC News, 2020).

Who are the main victims of enforced disappearance in Africa?

The International Convention for the Protection of All Persons from Enforced Disappearance ("ICPPED") and the UN Working Group on Enforced or Involuntary Disappearances defines victim as the disappeared person and also any individual who has suffered harm as the direct result of enforced disappearance. Victims of enforced disappearance are therefore defined broadly and include those who suffered the crime directly as well as all other individuals affected by it. While some victims of enforced disappeared are unaccounted for a short period of time, others are never found.

In Africa, victims originate from all groups within society and all ages. Human rights defenders, journalists, political leaders and union leaders, as well as anyone who dissents from the views of governments or challenges the political *status quo* often become victims of enforced disappearances.

Civilians often become victims for example as a result of civil wars ravaging the continent in several countries. The opposing sides of the conflict target civilians whom they deem to be supporters of the other party. In Algeria, during the civil war in 1990s, the government forcibly disappeared several thousand civilians whom they deemed to be supporters of the Islamic regime (MENA Rights Group, 2020, p. 16). In Sudan, the Al-Bashir regime forcibly disappeared civilians to stop support for the militias and used the terror of enforced disappearance to ensure compliance. Following a fact-finding mission to Sudan, the UN Commission of Inquiry into Darfur, in its 2005 report, noted that "the most serious cases of

enforced disappearance involved disappearance of civilians by security and military apparatus” (African Centre for Peace and Justice Studies, 2020).

Women and children are also victims of enforced disappearance. As mentioned earlier, three female opposition leaders in Zimbabwe and a member of parliament in Libya were all forcibly disappeared in recent years. In Sudan, women and children have been abducted for the purpose of slavery or as part of a strategy to ethnically cleanse the population within the different armed conflicts. The WGEID, in its 1995 report, reported instances of abduction noting that, “the Popular Defence Forces of the Government of 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” (UN Economic and Social Council, 1996, para. 404).

Human rights defenders, students, and union leaders who are dissatisfied with the political status quo and use their voices to oppose the government often meet disappearance. In Sudan, the government relied heavily for instance on the use of ‘ghost houses’ to hold political opponents, providing perfect cover for torture and incommunicado detentions (African Centre for Peace and Justice Studies, 2020). In Zimbabwe, the government has relied on short-term disappearances to silence the opposition. In 2008, two employees of Zimbabwe Peace Project, Ms. Jestina Mukoko, the executive director, and Mr. Broderick Takariwa, the provincial coordinator, were forcibly disappeared and held incommunicado for about three weeks before they were brought before a judge. They both showed signs of torture and ill treatment (OMCT, 2009). In 2018, Dr. Peter Magombeyi led the doctors and nurses protesting for increased wages and working conditions.

He was forcibly disappeared for several days, until he appeared outside Harare (RFI, 2019).

Reporting on the government often exposes journalists to enforced disappearance, torture and other human rights violations. This is the case of Jean Bigirimana, a Burundian journalist who has been disappeared since 2016, allegedly after being arrested by the National Intelligence Service (Amnesty International, 2020). Cameroonian journalist Samuel Wazizi was detained incommunicado without access to his family for 300 days. He was arrested in August 2019 by the police on the suspicion that he was supporting the English-speaking separatist groups and he died in government custody a year later, although his body was never returned to his family (Al Jazeera, 2020). In April of 2020, a radio journalist, Ibraimo Abu Mbaruco, was forcibly disappeared in Mozambique on his way home from the radio station. The information obtained shows that he was disappeared by the military forces, but the Mozambique government denies any involvement (VOA, 2020).

Similarly, Ethiopian authorities use the practice of enforced disappearances against a wide range of individuals in addition to protesters, including human rights and political activists. On 9 June 2005, police arrested Mr. Chernet Tadesse at his home. He was mandated by the Ethiopian Human Rights Council (“EHRCO”) to report on human rights violations perpetrated by police against protesters in Addis Ababa in May 2005. When his family and friends inquired about his whereabouts, the police refused to provide any information. He was eventually released on 4 July and charged with trying to overthrow a legitimate government by force (OMCT, 2005). In Sudan, during the year of protest that led to the downfall of Omar Al-Bashir, State security agencies resorted to violence and forced disappearance to disperse the protestors. During

the 3rd June 2019 massacre, the Rapid Service Forces used live ammunition to attack the protestors, killing 127 protestors and disappearing more than 100 (Dabanga, 2020).

What is the impact of enforced disappearance on victims?

Enforced disappearances leave long-lasting material and psychological impacts on victims. The suffering of the victims of enforced disappearances is horrific and can last months, years or decades. Many relatives devote their lives to uncovering the truth of what happened to their loved ones. The uncertainty of whether the person is alive or dead causes severe trauma and suffering to those left behind. International law recognises that the anguish of the victims and their families can amount to torture or ill treatment. The suffering serves ‘as a double form of torture, in which victims are kept ignorant of their own fates, while family members are deprived of knowing the whereabouts of their loved ones.’ (Sarkin, 2013). As such, enforced disappearance leaves many family members experiencing feelings of helplessness, depression, and anxiety; relationship conflict; and somatisation. (Boss, 2002).

While men are predominately the ones who are forcibly disappeared, women and children often bear the burden of this crime. They are the ones who lead the search for the victims and the fight for justice and truth. Considering the stereotypes and gender roles that still exist in many African societies, female victims experience differentiated forms of trauma. Women relatives of the disappeared confront intersecting economic, social, and psychological harm in different ways than male relatives. Women experience more severe poverty and victimization when the disappeared is the family’s main or even sole breadwinner. (ICTJ, 2015)

Who are the perpetrators?

While enforced disappearance requires State involvement, in recent decades, non-State actors have resorted to the use of acts which are analogous to enforced disappearance. However, 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, enforced disappearance 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 (WGEID, 2019).

In Africa, enforced disappearance is committed by a wide range of State actors and by non-State actors acting with the tolerance and acquiescence of public officials. Acts that would amount to enforced disappearances are also committed by non-State actors across the continent.

State security agencies, police and military are the main perpetrators of this crime. For example, in Libya, the profile of perpetrators includes the State security agencies, militias operating with the consent of the government or independent militias. The Eastern part of Libya has been controlled by Libyan Arab Armed Forces, supported by the Interim government led by the Field Marshal Khalifa Hafta. The west of the country is governed by the internationally recognized Government of National Accord and its affiliated militias. All of these groups have been accused of committing gross human rights violations, including torture and enforced disappearances (Lawyers for Justice in Libya, 2020).

In Algeria, during the civil war in the 1990s, the different branches of State security forces unleashed terror on the population following the 1992 disputed elections in which the Islamic Salvation Front defeated

the governing party. The special anti-terrorism unit and ordinary units of security forces forcibly disappeared people all over Algeria and held many in *incommunicado* detention, where they were exposed to torture, forced disappearances and other human rights violations (MENA Rights, 2020).

In Sudan, the security forces, including the notorious National Intelligence and Security Service (“NISS”) have forcibly disappeared political opponents, students, minorities, journalists and anyone who they deemed to be a threat to the regime of former President Omar Al-Bashir (The African Centre for Justice and Peace Studies, 2019).

In Zimbabwe, the police and State security agents have used enforced disappearances during election cycles and as a tool to control the oppression in other times. One example is the case of activist Itai Dzamara, a known critic of President Mugabe, who has reportedly been abducted by State security agents since 9 March 2015. Despite a High Court ruling ordering the State authorities to investigate Mr. Dzamara’s disappearance, no evidence exists to suggest that such investigation was ever carried out. Mr. Dzamara’s whereabouts remain unknown (HRW, 2016). During the Covid-19 pandemic, the government has cracked down on dissent, forcibly disappearing any voices of the opposition. Like in the previous cases, the government denies involvement and fails to carry out any investigations, while pointing fingers at foreign entities (DW, 2020).

Rampant impunity and lack of national legal frameworks to eradicate enforced disappearances

In most African countries where enforced disappearances occur, members of the security apparatus and non-State actors acting with State tolerance operate with total impunity.

One of the main reasons for the prevailing impunity is the lack of political will to investigate the officials, as well as the policy and legal gaps that allow for enforced disappearances to fester, leaving victims feeling frustrated and abandoned.

The ICPPED, the main international treaty banning the practice of enforced disappearances, was adopted in 2006 by the United Nations General Assembly and came into force in 2010. Since the Convention was adopted, only 18 out of 54 African countries have ratified the Convention and another 17 have signed on to it. The ICPPED outlines specific obligations that State parties must undertake to prevent, prosecute and provide reparations for enforced disappearance.

Specifically, Article 4 of the ICPPED notes the State party’s obligation to take the necessary measures to ensure that enforced disappearance constitute an offence under its criminal law. However, from those African countries that have ratified the ICPPED, only Senegal and Burkina Faso have incorporated, or are in the process of incorporating, legislation into their domestic system that uses a definition of enforced disappearance aligned with that of the Convention. Senegal has stated that it is in the process of reforming its Criminal Code to include a new section on enforced disappearance and a definition aligned to that of the ICPED (UN Committee on Enforced Disappearances, 2017). Burkina Faso amended its legislation in 2018 to broadly follow the definition of enforced disappearances envisaged in the Convention (Burkina Faso Loi N°025-2018/AN Portant Code Pénal, Article 523-4).

Further, only a handful of African States have adopted legislation to criminalize enforced disappearance as a crime against humanity, including Senegal, the Central Africa Republic, Benin, Gabon, Mali, Niger, South

Africa, Sudan and Ethiopia. Out of the 17 countries that have ratified the ICPPED, only Mali, Niger and Senegal have passed domestic legislation criminalizing enforced disappearance as a crime against humanity (IHL Database, 2020, Part IV).

The review of domestic laws shows that most of the States lack laws criminalizing enforced disappearance. Further, if the states have laws in place, the definition, often does not correspond with that under the ICPPED. In Libya, a country that has yet to ratify the Convention, the criminal code lacks a proper definition of enforced disappearances. Law No. 10 of 2013, that criminalizes torture, forced disappearances and discrimination, does not provide a clear definition of enforced disappearance and, instead, conflates it with kidnapping and abduction rather than recognising it as a separate crime (Lawyers for Justice in Libya, 2020).

In addition to the lack of adequate legal frameworks, amnesties and other forms of impunity are used to prevent victims from obtaining truth and justice. Impunity for crimes committed by State agents or under the cover of the State, not only entails the failure to punish those responsible for the crimes, but it also impedes the clarification of the facts, resulting in cover-up, and even the falsification of the facts to protect the perpetrators (Sarkin, 2013).

International law as well as the ACHPR recognize that amnesty laws that prevent the State from conducting an investigation, prosecution and punishment of perpetrators of human rights violations are not compatible with State's due diligence obligations (ACHPR, *Kwoyelo v Uganda*). Yet, amnesties and other measures preserve the impunity prevalent in the continent.

For example, in Algeria, more than three decades after the civil war many victims and

their families continue to live in anguish not knowing the fate of their loved ones or having avenues to justice due to amnesty laws passed in 2005. In particular, Ordinance No. 06-01 granted blanket amnesty from prosecution to security and state-armed groups. Over 30 Algerian victims filed cases with the UN Human Rights Committee which has repeatedly called on the Algerian government to repeal the Ordinance as it breaches the victims' right to an effective remedy (Khirani, Mihoubi and Guezout).

Similarly in Zimbabwe, following its independence, the government passed Amnesty Ordinance No.3 of 1979 and Amnesty Ordinance No. 12 of 1980 to prevent prosecutions and investigations of any human rights violations committed during the liberation war, including killing, rape, assault or torture (Zimbabwe Human Rights NGO Forum, 2019).

While some countries have set up Commissions to investigate human rights violations, the implementation of the recommendations of these Commissions is still pending, contributing to the climate of impunity and leaving victims with no hope for justice. In Morocco, two Commissions were set up to deal with the country's past human rights violations. In 1999, King Mohammed IV gave the Indemnity Commission a six-month mandate to indemnify victims of enforced disappearances and arbitrary detention (Slymovics, 2001). In 2004, the King issued a decree creating the Equity and Reconciliation Commission with a mandate to investigate enforced disappearances and arbitrary detention between Morocco's independence in 1956 and 1999, to rule on reparation requests pending before the former Independent Commission of Arbitration (created in 1999), and to determine "the responsibility of the state organisms or any other party" (US Institute of Peace). The report while determining the fate of 742

victims of enforced disappearances, did not mention individuals responsible for these violations and until today no one has been prosecuted for the crimes (US Institute of Peace).

Regional legal framework: a slow approach to face a grave crime

At the regional level, the African Union has not adopted a treaty banning enforced disappearances and offering guidance to States on how to eradicate this practice.

While the African Charter on Human and Peoples' Rights ("the Charter") does not specifically prohibit the use of enforced disappearances, several rights that are often violated in the commission of this crime are protected under the Charter. Among others, Article 4 protects the right to life; Article 5 prohibits torture and cruel, inhuman and degrading treatment; Article 6 protects the right to personal liberty and protection from arbitrary arrest, while Article 7 provides for the right to fair trial.

Further, while the Charter does not contain an explicit prohibition of enforced disappearance, several regional treaties, focusing on specific issues incorporate provisions that prohibit this practice. Article 9 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention") specifically calls on States to protect the rights of internally displaced persons by refraining from, and preventing, a number of acts, including enforced disappearances, arbitrary killings, torture and other human rights violations.

In addition to the Kampala Convention, enforced disappearance as a crime against humanity is prohibited by Article 28C(1)(i) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights ("Malabo Protocol"). The relevant provisions mirror the provisions in

the Rome Statute of the ICC. The Malabo Protocol was adopted on 27 June 2014 and will enter into force once it has been ratified by 15 Member States. At the time of writing, 15 States had signed the Malabo Protocol, and no State had ratified it (African Union, 2019). Article 1(2)(i) of the Protocol on the Prevention and Suppression of Sexual Violence against Women and Children of the International Conference of the Great Lakes ("SV Protocol") specifically prohibits enforced disappearance of women and children as a crime against humanity. The SV Protocol entered into force on 30 November 2006 and is binding on the 12 States parties to the 'Great Lakes Pact.'²

Despite the scarce caselaw on the issue, the absence of a specific instrument on enforced disappearances has not dissuaded the ACHPR from addressing the crime. To the contrary, in the Principles and Guidelines on Human and Peoples Rights While Countering Terrorism in Africa ("Counterterrorism Guidelines"), adopted in 2015, the Commission expressly prohibits subjecting anyone to enforced disappearances and no exceptional circumstances may be invoked to justify violating this prohibition (ACHPR, 2015, p. 22).

Other relevant instruments adopted by the ACHPR that are directly relevant for the prohibition of enforced disappearances on the continent include a range of Guidelines and General Comments.

For example, the African Commission's Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa ("the Luanda Guidelines") of 2014, which are designed to assist States in ensur-

² States parties are Angola, Burundi, Central African Republic, DRC, Republic of Congo, Kenya, Rwanda, Sudan, Uganda, Tanzania, Zambia, South Sudan.

ing human rights compliance in the context of arrest, police custody and pre-trial detention, specifically urge States, in Principle 43, to “establish mechanisms, including within existing independent oversight and monitoring mechanisms, for the prompt, impartial and independent inquiry of disappearances, extra-judicial executions, deaths in custody...”.

Further, the ACHPR’s General Comment No.3 on the right to life, adopted in November 2015, which provides further clarity on the Commission’s interpretation of the scope of Article 4 of the African Charter, is an important instrument in the context of enforced disappearance. For instance, it provides that “where a State or its agent has ...forcibly caused a person to disappear and that person’s fate remains unknown, in addition to the violation of other rights, a violation of the right to life has occurred” (para. 8). It explicitly provides that “States shall take appropriate measures to investigate cases of enforced disappearances committed by persons or groups acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.” A failure to investigate and to hold accountable individuals will constitute a violation of Article 4 in and of itself, in particular where there is a “tolerance of impunity” (para. 15). The General Comment further sets out that “accountability also encompasses measures such as reparation, ensuring non-repetition, disciplinary action, making the truth known, institutional review and, where applicable reform. States must ensure that victims have access to effective remedies for such violations” (para. 17). It highlights that States should “provide necessary information on places of detention, the identity and age of those detained, as well as the authorities responsible” (para. 36).

Finally, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance

in Africa adopted in 2003, and the Guidelines on the Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, adopted in 2002, set out a wide range of safeguards that States shall adhere to in the context of arrest and detention. These safeguards are similar to those that States should put in place to prevent enforced disappearance as envisaged in the ICPED.

The ACHPR and the African Court, the two adjudicators of human rights violations in the regional system, have yet to issue a decision where the prohibition of enforced disappearances features prominently.

In the few cases touching upon enforced disappearance, the Commission has found the States concerned to be in violation of Articles 5, 6 and 7 of the African Charter, breaching the prohibition of torture, the right to liberty, the protection against arbitrary arrest and the right to a fair trial. In 2017, the African Commission held in the Kilwa case against the government of the Democratic Republic of Congo that enforced disappearances constitute a violation of the right to life since the “victims had not returned to their families almost five years after the incidents” (*Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo*, para. 106). The Commission ordered the Congolese government to take all necessary measures to investigate and prosecute the State personnel responsible for the atrocities, including the State agents and employees of the Anvil Mining Company. Further, the Commission urged the government to undertake several reparations related to enforced disappearances, including the exhumation of the bodies buried in mass graves, and measures to carry out dignified burials, and to identify and compensate the victims and their families (ICJ, 2017).

Similarly, in *Mouvement Burkinabe des Droits de l’Homme et des Peuples v Burkina*

Faso, the Commission found that the disappearance of persons suspected or accused of plotting against the instituted authorities constitute a violation of Articles 5 and the 6 of the African Charter. In *Liesbeth Zegveld and Mussie Ephrem v Eritrea*, the ACHPR found that holding 11 persons *incommunicado* and without charge and no access to their families or lawyers resulted in violations of Articles 6 and 7(1) of the Charter. Finally, in *Malawi African Association and others v Mauritania*, in finding a violation of Article 6, the Commission recommended the government of Mauritania to arrange for the commencement of an independent enquiry in order to clarify the fate of persons considered as disappeared, and to identify and bring to book the authors of the violations perpetrated at the time of the facts arraigned.

ACHPR: steps to address a forgotten struggle

The above discussions highlight that, with the exception of some isolated efforts, the African human rights system has not yet addressed enforced disappearances in a holistic manner, despite the practice being still prevalent in the continent. Recent developments, however, signal a change of approach by the African Commission, reflecting an increased awareness and concern over the crime.

In 2018, the Commission adopted a resolution extending the mandate of its Working Group on the Death Penalty, and Extra-Judicial, Summary or Arbitrary Killing to include enforced disappearances, with a view to collect studies on the phenomena and advise on urgent measures to address the situation of enforced disappearances in Africa. In August 2020, the African Commission adopted another resolution, tasking the Working Group to draft guidelines for the protection of all persons from enforced disappearances in Africa (ACHPR/

RES 448 (LXVI) 2020). The resolution calls on the Working Group to present the guidelines within one year with the aim to improve the situation of victims of enforced disappearances, raise awareness about the practice and contribute to the prevention of this crime on the continent.

The adoption of the guidelines would not only show a real commitment of the Commission to fight against enforced disappearances, but would also serve to address several gaps that allow this practice to continue taking place on the continent.

As addressed in previous sections, most national legal frameworks are not adequate to protect and prevent against enforced disappearances in the region. Further, currently, the existing regional instruments do not fully capture the context and factors for enforced disappearances on the continent. For example, they do not cover enforced disappearance committed specifically during policing or in the context of migration.

The ACHPR's guidelines could serve as a complimentary instrument to existing international and regional norms and obligations and would encourage African States to ratify the ICPED and adopt the measures necessary to prevent enforced disappearances.

The WGEID has recognized that there is a direct link between enforced disappearance and migration (UN Human Rights Council, 2017, para. 81). However, the African human rights system does not currently have a specific legal document that would address the violations of the rights of the migrants. The guidelines could fill this gap, highlighting the transnational nature of migration in the continent and the obligations of States to cooperate in searching for the victims, compiling data on people who go missing in, or while transiting, the countries and carrying out investigations into these violations.

There is also a need for the ACHPR to capture the risk of particularly marginalized and discriminated groups to become victims of enforced disappearances, including women, children, ethnic minorities and migrants.

The nature of enforced disappearance is so heinous that it impacts not just the person who is subjected to the crime but also those who are directly impacted by the disappearances. Women and children are particularly affected by the crime. While men are usually the persons who are forcibly disappeared, women bear the brunt of the impact of the crime. As men are usually the breadwinners of the family, their disappearances place the families in economic difficulties. Further, lack of financial stability hinders children's access to education and health care, marginalizing the victims even further. This is an aspect that the ACHPR could specifically address in the guidelines, noting the impact that enforced disappearances have on women and children and outlining the States' obligations to provide assistance to vulnerable groups.

Finally, the existing documents within the African human rights system do not fully address key aspects of the violations caused by enforced disappearances and, as it currently stands, the caselaw of the ACHPR on this issue remains unclear. Thus, there is a need to address the nature of enforced disappearance as a continuous crime that starts from the moment the person disappears until they are found or their whereabouts identified. The continuous nature of the crime is also closely tied with the right to truth for victims and families. This right encompasses obligations of the State to provide information on the progress and result of investigations, the fate of the victims and the identity of the perpetrators. Finally, the guidelines could address the scope of the right to redress in cases of enforced disappearance.

Conclusion:

The recent steps taken by the ACHPR are of great significance, as they signal a strong commitment to address a heinous crime and offer States much needed guidance on how to eradicate it. If adopted, the guidelines would be a first step forward to creating a holistic framework in addressing enforced disappearances in Africa. This would also acknowledge the plight of thousands of victims of enforced disappearance in the continent and would give them an additional tool to exercise their rights to know the truth, seek justice and obtain reparations.

Acknowledgements

The authors wish to thank Amy Kerr and Lisa Schmidt, legal interns at REDRESS, for their research and editorial assistance.

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