

The global problem of enforced disappearances: “Outside all protection of the law”

Written statement submitted by Lawyers' Rights Watch Canada, non-governmental organization in special consultative status. Submitted to the UN Human Rights Council 9 August 2023. Peacemakers Trust, The 29 Principles, Network of Chinese Human Rights Defenders (CHRD), Colombian Caravana, Memorial Human Rights Defence Centre, NGOs without consultative status, also share the views expressed in this statement.

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1. Secretary-General António Guterres has noted that the crime of enforced disappearance is “used across the world as a method of repression, terror, and stifling dissent... Lawyers, witnesses, political opposition, and human rights defenders are particularly at risk.”[1] He noted that the *Convention for the Protection of all Persons against Enforced Disappearances* (Convention or ICPPED) is indispensable to help “tackle this cowardly practice,” calling all States to ratify it.
2. While enforced disappearance affects hundreds of thousands of people in at least 85 countries,[2] the Convention has only 72 States Parties (98 signatories).[3]
3. In 2020, the Chair of the Committee on Enforced Disappearances (CED) noted that “...disappearances are perpetrated around the world, with the daily number climbing towards 1,000 a day. One thousand people disappeared, completely cut from the world.”[4]
4. The consequence of the crime of enforced disappearance is to cut off the disappeared from all access to legal representation, judicial remedies, and their families.[5] Victims of enforced disappearance include those directly harmed,[6] particularly family members who suffer unrelenting anguish and uncertainty about the fate and whereabouts of disappeared loved ones.[7] Family members who are denied information and legal assistance are deprived of their right to know the truth[8] about what has happened to their loved ones. Short-term enforced disappearances are no exception.[9]
5. Enforced disappearance violates multiple rights[10] guaranteed by the more widely ratified *International Covenant on Civil and Political Rights* (ICCPR), including rights to liberty, freedom from torture and ill-treatment, integrity of family life, protection of the law, access to legal representation, judicial oversight and remedies, and often the right to life.[11] Enforced disappearance violates the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (UNCAT).[12] Enforced disappearance is not specifically mentioned in the ICCPR or UNCAT.
6. Enforced disappearance violates customary international law[13] as a jus cogens crime[14] requiring erga omnes responsibility to prevent, investigate, and remedy the crime, including ensuring accountability of perpetrators. States’ may fulfil their erga omnes responsibility in part by implementing the 1992 *Declaration on the Protection of all Persons from Enforced Disappearance* (Declaration) and by ratifying and implementing the ICPPED.

Rampant impunity

7. The Working Group on Enforced Disappearances (WGEID) notes “rampant” impunity for enforced disappearance.[15] Lack of widespread ratification of the Convention contributes to impunity by allowing normative gaps in treaty protection around the world. States that have not ratified the Convention lack specific, binding standards to impel and guide domestic laws, policies, and practices. Such countries also lack legitimacy to intercede with other States regarding enforced disappearance.
8. The WGEID identified obstacles[16] to universal ratification of the Convention, including:
 - a. insufficient progress towards domestic “codification of enforced disappearance as a separate criminal offence;”
 - b. domestic laws with definitions that deviate from the Declaration or the Convention and dilute State responsibility;
 - c. anti-terrorism laws that fail to acknowledge the absolute prohibition on enforced disappearance or that lack procedures for timely and effective judicial remedies;
 - d. lack of prompt, independent, thorough, and effective investigations;
 - e. inadequate records and data bases of disappeared persons and investigative progress;
 - f. inadequate measures to preserve and investigate mass graves and burial sites;
 - g. impunity for reprisals against witnesses, relatives, and legal representatives of the disappeared.

Definition of enforced disappearance includes State acquiescence

9. The Convention defines enforced disappearance 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 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 a person outside the protection of the law.

10. The WGEID confirms that systematic impunity for disappearances perpetrated by private actors “could be considered in certain circumstances as a form of acquiescence.”[17] The Inter-American Court of Human Rights states that a State’s pattern of failure of due diligence to conduct complete, impartial, and effective investigations of disappearances may amount to acquiescence.[18]

A continuous crime: “Every minute counts...”

11. The Declaration, provides that enforced disappearance is a “continuing offence as long as perpetrators continue to conceal the fate and whereabouts of persons who have disappeared.”[19] The Convention confirms the “continuous nature” of the crime.

12. The WGEID affirms that an enforced disappearance “begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.”[20] The WGEID, with the Committee on Enforced Disappearances (CED), insist that:

“There is no time limit, no matter how short, for an enforced disappearance to occur. Every minute counts when a person is placed outside the protection of the law. And when a person has disappeared, every minute of anguish spent by his or her relatives without news of him or her is too much...”[21]

Prosecution of crimes against humanity

13. The *Rome Statute of the International Criminal Court* (Rome Statute)[22] narrows the scope of enforced disappearances eligible for ICC prosecutions:

- a. The Rome Statute includes enforced disappearances as a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”
- b. For purposes of ICC prosecutions, enforced disappearance is defined as:

“... the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, **with the intention** of removing them from the protection of the law **for a prolonged period of time**” (emphasis added).

14. Unlike the Rome Statute, the Convention

- a. indicates no minimum period of time; and
- b. indicates that removal of the victim from protection of the law is a consequence of the crime, rather than an essential element of mens rea.

15. Instead of using the definition in the Convention, the draft treaty on crimes against humanity (CAH) has replicated the definition in the Rome Statute.[23] The OHCHR and WGEID have recommended that the draft definition of enforced disappearance in the draft treaty on CAH be changed to remove the elements of the definition not found in the ICPPED.[24]

Disappearances or obstruction of lawyers and defenders

Lawyers or human rights defenders have been subjected to enforced disappearances or obstruction of their advocacy on behalf of the disappeared in numerous countries on which LRWC or endorsing organizations have conducted advocacy, including the following countries whose situations are described in the Annex linked at endnote 25.[25]

- Afghanistan
- Canada
- Cambodia
- China
- Colombia
- Iran
- Lao PDR
- Myanmar
- Philippines
- Russian Federation
- Saudi Arabia
- South Sudan
- Sri Lanka
- Sudan
- Thailand
- Türkiye
- United States

The importance of universal ratification: Recommendations

16. Enforced disappearances strike at the heart of the rule of law – equal protection of the law. The Declaration and subsequent General Assembly resolutions confirm a global consensus on the importance of the ICPPED. Lack of progress towards universal ratification of the ICPPED undermines this consensus. States that join and implement the ICPPED increase their legitimacy to advocate on enforced disappearances. Countries adopting universal jurisdiction to prosecute enforced disappearances could directly reduce global impunity.

17. Council members and observer States are urged to:

- a. Ratify the ICPPED;
- b. Adopt and implement laws criminalizing enforced disappearance, including universal jurisdiction;
- c. Conduct prompt, independent, impartial, and effective investigations of all disappearances according to WGEID standards;^[26]
- d. Ensure that families of the disappeared, and lawyers and defenders advocating on their behalf, are protected from reprisals or obstruction;
- e. Support the incorporation of the ICPPED definition of enforced disappearances in the draft treaty on crimes against humanity.

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3. UNTC, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&clang=_en.

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5. WGEID, A/HRC/16/48/Add.3, 28 December 2010, <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/16/48/Add.3&Lang=E>.
6. ICPPED, Article 24.1.
7. UN Chronicle, 30 August 2022, <https://www.un.org/en/un-chronicle/other-victims-enforced-disappearance>.
8. E/CN.4/2002/71, 8 January 2002, paras. 77-80, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=E/CN.4/2002/71&Lang=E>.
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12. UNVFVT, 2011, http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf.
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15. A/HRC/51/31, *ibid*, para. 82.
16. A/HRC/51/31/Add.3, paras. 48-58, *supra* note 13.
17. A/HRC/36/39/Add.2, para 42, <https://www.undocs.org/en/A/HRC/36/39/Add.2>.
18. Inter-American Court of Human Rights, *La Cantuta v. Perú*, 2006, https://corteidh.or.cr/docs/casos/articulos/seriec_162_ing.pdf.
19. Declaration, Article 17, <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-protection-all-persons-enforced-disappearance>.
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21. CED, WGEID, *supra* note 9.
22. Rome Statute, <https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court>.
23. ILC, 2019, http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/7_7_2019.pdf&lang=EF
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