

Enforced Disappearances -
An Information Guide for Human Rights
Defenders and CSOs

Developed by
Zimbabwe Lawyers for Human Rights (ZLHR)
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List of Acronyms

ACHPR	African Charter on Human and Peoples' Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT	United Nations Convention Against Torture or Inhuman or Degrading Treatment
CED	International Convention for the Protection of All Persons from Enforced Disappearances
CED	International Convention for the Protection of All Persons from Enforced Disappearances
CEH	Historical Clarification Commission
EULA	End User License Agreement
HRC	Human Rights Committee
HRD	Human Rights Defender
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-Governmental Organisations
OAS	Organisation of American States
OHCHR	Office of the High Commissioner on Human Rights
SPT	Subcommittee on Prevention of Torture
UNDP	United Nations Development Programme
Unicef	United Nations Children's Fund
UNWGEID	United Nations Working Group on Enforced or Involuntary Disappearances
UPR	Universal Periodic Review
ZHRC	Zimbabwe Human Rights Commission

Acknowledgments

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About Zimbabwe Lawyers for Human Rights

Zimbabwe Lawyers for Human Rights (ZLHR) is a not for profit human rights organisation whose core objective is to foster a culture of human rights in Zimbabwe as well as encourage the growth and strengthening of human rights at all levels of Zimbabwean society through observance of the rule of law. ZLHR is committed to upholding respect for the rule of law and the unimpeded administration of justice, free and fair elections, the free flow of information and the protection of constitutional rights and freedoms in Zimbabwe and the surrounding region. It keeps these values central to its programming activities. ZLHR is a membership organization consisting of over 200 legal practitioners and law students with an interest in, and affinity for, human rights protection and promotion drawn from around Zimbabwe. Membership is steadily increasing.

Vision

To be a world-class organisation that promotes a culture of human rights, equality and respect for the rule of law for a just and democratic society in Zimbabwe.

Mission

To protect and defend human rights through sustainable litigation, education and advocacy which contributes positively to a culture of tolerance and adherence to democratic values and practices.

Aims and Objectives

The aims and objectives of ZLHR shall be to foster a culture of human rights in Zimbabwe and to encourage the growth and strengthening of human rights at all levels of Zimbabwean society. This shall include but not be limited to the following:

- To strive to protect, promote, deepen and broaden the human rights provisions in the Constitution of Zimbabwe.
- To strive for the implementation and protection in Zimbabwe of international human rights norms as contained in important sub-regional and international human rights instruments.

- To strive for the adoption of a Southern African Development Community (SADC) Charter on Human Rights and to develop and/or strengthen the implementing mechanisms.
- To endeavor to find common ground with and work alongside other Zimbabwean groups, organisations, activists and persons who share a broadly similar concern for and interest in human rights.
- To liaise and work with other human rights groups wherever situated but particularly in Southern Africa, and especially those closely linked to the legal profession.
- To do all other things necessary to promote and protect human rights, the rule of law and separation of powers in Zimbabwe and the region.

Work

ZLHR assists all victims of human rights violations by providing the following services free of charge:

- Legal advice
- Legal representation
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- Research

ZLHR holds Observer Status with the African Commission on Human and People's Rights, provides secretarial services to the Human Rights Committee of the SADC Lawyers Association and has affiliate status with the International Commission of Jurists.

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Preface

This publication speaks about enforced disappearances and underscores why it is an important issue of human rights concern globally. It begins by seeking to demystify the phenomenon of ‘disappearance’ itself, exploring the various circumstances in which people disappear, thereby disaggregating the various scenarios into categories of disappearance. Upon explanation of the various categories, enforced disappearances are then problematised and thereafter become the primary focus of the publication, with definitions, historical background and details on the key associated human rights issues being given. After that, there is a detailed elaboration on the local, regional and international instruments that outlaw enforced disappearances and seek to ensure that states across the world protect their citizens from it. The publication then delves into personal as well as organizational safety tips for human rights defenders and civil society organisations whose members are at risk of enforced abductions. There are also discussions on possible responses to both the risk and reality of enforced disappearances, including local, regional and international advocacy as well as legal pathways to follow in seeking justice for disappeared persons. This publication makes very simplified and easy-to-understand reading on enforced disappearance, with the anticipation that human rights defenders and human rights CSOs will find it a useful tool and work at minimising the risk of enforced disappearance.

1.0 Understanding the Phenomenon of Disappearance

1.1 Defining Enforced Disappearance

As defined under Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, the phenomenon of “enforced disappearance” is considered to be *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 places such a person outside the protection of the law*ⁱ.

Amnesty Internationalⁱⁱ seeks to bring further simplification to this rather technical definition and give what they term the ‘human story’. What basically happens therefore in an enforced disappearance is that a person or persons disappear from their loved ones and their community, with state officials (or someone acting with state consent) abducting them from the street, from their home or any other place and detaining them incommunicado i.e. is permitted no contact with the world outside the place of detention or incarceration. In a majority of the cases, the state (or its agents) denies any knowledge over the whereabouts of the disappeared person or persons or refuses to say where they are. Now save for just a few lucky ones, victims of enforced disappearance are often never released and their fate would remain unknown. Even if they escape death and are eventually released, the physical and psychological scars stay with them for life.

1.2 Why the Particular Focus on Enforced Disappearance?

What is clear therefore from the definition and explanation above of what entails enforced disappearance is the primary responsibility of the State (by commission or omission). This is where enforced disappearance differs with other forms of disappearance, for instance when a person disappears voluntarily, disappearance due to accidents, disasters or conflicts and also disappearance as a consequence of common crimes.

Now without necessarily trivialising the gravity of the other forms of disappearance, particularly the non-voluntary types, what is most disconcerting with enforced disappearances is that duty bearers who are supposed to be protectors of citizens become the perpetrators themselves. Indeed, in cases when private actors are responsible and the State is not involved, neither directly nor indirectly, its duty would still be to find the disappeared person and to prosecute the perpetrators in accordance with the law. Now if liability lies primarily with the State, the question then becomes, who will protect the citizens?ⁱⁱⁱ Indeed while this forms a critical angle to why enforced disappearances should be a matter of concern, another angle is manifest in the effects of enforced disappearances. To initiate the discussion on effects of enforced disappearances, a historical context would be useful as a means of emphasis, as given in the next section:

2.0 Origins of Enforced Disappearances – A brief historical context

It is generally believed that the practice of enforced disappearance began with the *Nacht und Nebel Erlass* (Night and Fog Decree) created by Adolf Hitler in 1941. Persons from the occupied territories were seized and taken to Germany where they were executed. In the meantime, the whereabouts of the missing persons remained unknown to their families as well as to the public.^{iv} The intentions of this decree was in fact made clear in a letter in which Wilhelm Keitel, the Chief of the German Armed Forces High Command, stated that for crimes against the Reich “...*the Führer thinks that in the case of such offences life imprisonment, even life imprisonment with hard labour, is regarded as a weakness. An effective and lasting deterrent can be achieved only by the death penalty or by taking measures which leave the family and the population uncertain of the fate of the offender. The deportation to Germany serves this purpose...*” (emphasis added).

The fact that the main aim of the decree and the practice of seizing persons and having them disappeared was to be deterrent, and to create “*uncertainty over the fate of the prisoner among their relatives and acquaintances*” was also elaborated on in a letter by the Chief of the German Security Police in 1942.^v Such practice was believed to have a deterrent effect and there was no risk of creating a martyr.

Such was the understanding that Hitler had of the effect enforced disappearance would have on relatives and the community of the disappeared, hence making use of it as a strategy.

As contended by the author Linghammar (2008), it was not until the 1960s and 1970s that enforced disappearance became more widely practised, this time by the Latin American military regimes such as in Guatemala and Brazil. Notably, it was also the Latin American Non-governmental Organisations (NGOs) that began to refer to the practice with the term “enforced disappearance” *per se*. It is also recorded that the Inter-American Commission on Human Rights as well as the UN Commission of Human Rights first brought up the practice of enforced disappearance to attention in the 1970s.^{vi} By making some persons disappear, the regimes managed to create an atmosphere of fear that helped to control the society and to undermine the political opposition.^{vii}

For instance during the Pinochet era in Chile, thousands were disappeared, with some having been killed and buried in unmarked graves, while some were thrown in the ocean or the rivers and others dumped on the streets at night. Guatemala’s Historical Clarification Commission (CEH) registered 6,159 victims of enforced disappearance.^{viii} In Argentina alone, an estimated 30,000 people were disappeared between 1976 and 1983.^{ix}

Scholars therefore argue that while enforced disappearance might have started with the *Nacht Und Nebel Erlass* in Germany, the practice was certainly popularised by the military regimes in Latin America. It is also because of the history of enforced disappearance in Latin America that it was in the same region where its criminalisation first emerged, with the Organisation of American States (OAS) spearheading the efforts.^x In fact it is also noted that laws that were created in this region in response to the atrocities related to enforced disappearances (that will be discussed in a latter section of this publication) then influenced crafting of related laws at the global scale.^{xi}

2.1 Enforced Disappearances Still Pervasive

Unfortunately cases of enforced disappearances are still pervasive outside the

traditional problem regions, with the practice being reported in more than 85 countries globally. Since its inception in 1980, the United Nations Working Group on Enforced or Involuntary Disappearances (UNWGEID) has reportedly documented over 54,000 cases.^{xii} Sri Lanka is estimated to have had more than 30,000 cases since the 1980s, with similar numbers in Guatemala and Colombia for the same period. More recently in 2003 and 2004, Nepal is reported to have had the world's highest number of new cases of disappearance. Successive al-Assad regimes in Syria have also used disappearances as a tool of fear since the 1970s^{xiii}. In Mexico, more than 26 000 people were reported missing or disappeared between 2006 and 2012^{xiv}. Even in Africa, in countries such as South Africa hundreds of activists went missing after being detained by apartheid security forces, with internal disturbances in countries such as Zimbabwe (during the Gukurahundi era^{xv} and later during spates of disputed elections) and Rwanda (during the genocide era or 1994) accounting for thousands of enforced disappearances. Countries in continued conflict such as the Congo, Libya, Burundi, Mali, Tunisia and many others continue to record numerous cases of enforced disappearances, It is also unfortunate that disputed elections, dictatorships, armed conflict and ethnic violence are the main drivers of enforced disappearances in Africa even to the present. Olivier de Frouville, Chair and Rapporteur of the UN Working Group on Enforced or Involuntary Disappearances is on record as having described enforced disappearance as a technique of terror, a criminal act used among other things as tool by repressive regimes to simply terrorise the civilian population into obedience^{xvi}.

2.2 Effects of Enforced Disappearances

Indeed it goes without saying that enforced disappearances are a brutal practice that violates a number of internationally recognised human rights as set out in the International Covenant on Civil and Political Rights (ICCPR)^{xvii} and the International Covenant on Economic, Social and Cultural Rights (ICESCR)^{xviii} as well as in other major international human rights instruments. The following civil or political rights may be infringed upon in the course of a disappearance:

- The right to recognition as a person before the law;

- The right to liberty and security of the person;
- The right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment;
- The right to life, when the disappeared person is killed;
- The right to a fair trial and to judicial guarantees;
- The right to an effective remedy, including reparation and compensation;
- The right to know the truth regarding the circumstances of a disappearance.

Disappearances can also involve serious breaches of other international instruments, such as the Standard Minimum Rules for the Treatment of Prisoners, approved by the United Nations Economic and Social Council in 1957, as well as the Code of Conduct for Law Enforcement Officials and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly in 1979 and 1988, respectively. Disappearances also generally, by extension result in the violation of various economic, social and cultural rights. Furthermore, an enforced disappearance can also have a particularly negative impact on the enjoyment of such rights by family members. The absence of the family's main breadwinner, particularly in less affluent societies, frequently leaves the family in such dire straits that a number of the rights enumerated in the International Covenant on Economic, Social and Cultural Rights cannot be realised, such as:

- The right to protection and assistance to the family;
- The right to an adequate standard of living;
- The right to health;
- The right to education.

Indeed the serious economic hardships, which usually accompany a disappearance, are most often borne by women, and it is women who are most often at the forefront of the struggle to resolve the disappearance of family members. In this capacity they may suffer intimidation, persecution and reprisals. When women are themselves direct victims of disappearance, they become particularly vulnerable to sexual and other forms of violence. Children can also be victims, both directly and indirectly. The disappearance of a child is a clear contravention of a number of provisions of the Convention on the Rights of the Child,

including the right to a personal identity. The loss of a parent through disappearance is also a serious violation of a child's human rights^{xix}.

2.3 Why Enforced Disappearances Continue to Happen

As noted by one leading activist against enforced disappearances, *"...the problem of forced disappearance [...] is all the more serious since its perpetrators are virtually certain of not being punished"*^{xx}.

The same point is reinforced by the United Nation's Working Group on Enforced and Involuntary Disappearances (which will be detailed on later in the publication), whereupon it states *"...impunity is perhaps the single most important factor contributing to the phenomenon of disappearance."*^{xxi}

What the above statements simply point towards is the fact that enforced disappearances continue to happen as a result of perpetrators not being brought to account for their actions due to the state being complicit in such acts. This thereby denies victims access to justice and recourse in most of the cases.

The sustained armed conflicts and persistence of despotic regimes (especially in Africa and the middle east) as well as the war on terror^{xxii} unfortunately continue to be leading drivers of enforced disappearances in this modern era.

3.0 Importance of Legal Framework to Deter Enforced Disappearances

The historical account of enforced disappearances and its effects in terms of human rights violations discussed above go on to underscore the imperative for legal instruments that would not only create measures to prevent enforced disappearances from occurring again, but also to end the impunity and make perpetrators accountable for their actions. Without doubt, perpetrators of human rights violations, whether civilian or military, become all the more irresponsible if they are not held to account before a court of law. To that effect therefore, universal legal instruments and criminalisation of enforced disappearance become an important deterrent to States in which the phenomenon still remains

rampant. As further supported by the author Nowak (2006),

“...universal jurisdiction in clearly defined individual cases of enforced disappearance, with appropriate punishment, will constitute the most effective measure to deter the practice of enforced disappearance in the future.”^{xiii}

The next section of this publication details international laws that relate to prevention of enforced disappearances, protection of potential victims as well as safeguarding their human rights that are sure to be violated through enforced disappearance.

3.1 International Treaties and Covenants that Address Enforced Disappearances¹

3.1.1 The Four Geneva Conventions of 1949

The Geneva Conventions of 1949 are four treaties that set international humanitarian standards in the context of armed conflicts. The four treaties laid down rules for situations of war as well as legal safeguards for assuring the protection of individuals from violence. These rules aim to primarily protect those people who do not take part in the fighting such as civilians, medical staff, aid workers as well as those who can no longer fight such as wounded or sick persons, shipwrecked troops or prisoners of war. Two Additional Protocols were adopted to the Conventions in 1977, with the first and the second one elaborating on differences between international and non-international conflicts respectively. The most recent supplement to the Geneva Conventions, Additional Protocol (III) of 2005 created a third internationally recognised protective emblem: the ‘red crystal’, which joined the red cross and the red crescent as the only emblems recognised by nations signifying the protected status of individuals or objects bearing them during armed conflict. Indeed, The Geneva Conventions and its Protocols are universal in scope; almost all countries of the world have accepted them.

¹ **Aim for Human Rights (2009):** Using Law Against Enforced Disappearances. Practical Guide for Relatives of Disappeared Persons and NGOs. Utrecht, the Netherlands

3.1.1.1 What provisions are relevant to disappearances?

Without explicitly utilising the term ‘enforced disappearances’, there is no doubt that many of the provisions under the conventions and their Additional Protocols (which form the basis of international humanitarian law) aim to prevent enforced disappearances in the context of an armed conflict. In fact, the scope of international humanitarian law is much broader. This body of law contains numerous rules that are applicable to persons that are missing as a result of an armed conflict; ‘the persons subjected to an enforced disappearance’ can constitute one category of ‘missing persons’.

3.1.2 The Rome Statute

The Rome Statute was adopted in 1998 and established the International Criminal Court (ICC). It lays down the Court’s structure, jurisdiction and functions. The Rome Statute and the Court were established with the objective of bringing to justice persons that have committed genocide, crimes against humanity, grave breaches of international law, war crimes and other serious international crimes. The ICC is a court of last resort and thus it will not take action when a case is investigated or prosecuted by a national judicial system, unless the national proceedings are not genuine.

3.1.2.1 Provisions relevant to enforced disappearances

Article 7(1) (i) of the 1998 ICC Statute does recognise and provides that “[e]nforced disappearance of persons” constitutes a crime against humanity.

3.1.3 The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is one of the most fundamental human rights treaties of the UN system. The ICCPR lays down provisions that strengthen the protection of civil and political rights set forth in the Universal Declaration of Human Rights of 1948. Two optional protocols have been drafted to the ICCPR, the first founding the individual complaint mechanism, the second aiming to abolish the death penalty. The ICCPR also provides for the establishment of the Human Rights

Committee (HRC), whose primary role is to monitor the implementation of the ICCPR. Indeed the ICCPR is ratified by many countries in the world (including Zimbabwe which ratified in 1991) and is close to being universally accepted.

3.1.3.1 What provisions are relevant for enforced disappearances?

The ICCPR does not contain a specific right to be protected against enforced disappearance but other rights protected by the Covenant are relevant for protecting from enforced disappearances and assisting victims.

While the ICCPR does not speak expressly to enforced disappearances as a phenomenon, it speaks to protection of other rights that have a direct link with enforced disappearances, as outlined below:

- The right to life (art. 6);
- The prohibition of torture, cruel, inhuman or degrading treatment or punishment (art. 7);
- The right to liberty and security of person (art. 9);
- The right of detainees to be treated with humanity and respect for the dignity (art. 10);
- The right to recognition as a person before the law (art. 16), and;
- The right of children to special measures of protection (art. 24).

3.1.4 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

The Convention Against Torture is an international human rights treaty that aims to prevent torture and other cruel, inhuman or degrading treatment or punishment. The definition encompasses the suffering caused by enforced disappearances to the detained persons as well as to the relatives. The Convention requires States to take effective measures to prevent torture within their borders, and forbids States to return people to their home country if there is reason to believe they will be tortured. The Convention lays down an absolute prohibition of torture and requires parties to take effective measures to prevent it. It also provides for the establishment of its own monitoring mechanism, the Committee Against Torture (CAT)

3.1.4.1 What provisions are relevant to enforced disappearances?

Next to defining and prohibiting torture, the Convention urges State parties to take effective measures to prevent any act of torture. Such measures include for instance:

- Ensuring that torture is a criminal offence within domestic laws
- Preventing impunity for offenders in torture cases, including incorporation of a legal framework to try or extradite offenders;
- Guarantees for prompt investigation of any allegation of torture;
- Prohibition of use of evidence that was produced by torture, and
- The prohibition of deportation, extradition or refoulement of people to countries when there are substantial grounds for believing they will be tortured.

3.1.5 The Optional Protocol on the Convention Against Torture

In order to complement the Convention Against Torture in its aim to prevent torture, an optional protocol was adopted. The Optional Protocol obliges States to set up independent national mechanisms for the prevention of torture and ill-treatment at the domestic level and creates the Sub-committee on Prevention of Torture (SPT).

3.1.5.1 What provisions are relevant to enforced disappearances?

The Optional Protocol establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty. These visits would be undertaken by the Sub-committee on Prevention of Torture (SPT), which is especially mandated to conduct visits to places of detention without any prior authorisation. The Subcommittee has unrestricted access to all places of detention, their installations and facilities and to all relevant information relating to the treatment and conditions of detention of persons deprived of their liberty. The SPT must also be granted access to persons deprived of their liberty to have private interviews with them, without witnesses, and to any other person who in the SPT's view may supply relevant information.

3.1.6 The 1992 UN Declaration for the Protection of All Persons from Enforced Disappearances

This non-binding declaration was adopted by the General Assembly of the United Nations in 1992. It was the first universal legal instrument that focuses specifically on enforced disappearances. To quote directly, Article 1 of the 1992 UN Declaration on Enforced Disappearance states:

- 1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the UN and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.*
- 2. Any act of enforced disappearance places the persons subjected thereto 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. It also violates or constitutes a grave threat to the right to life*

3.1.6.1 What provisions are relevant to enforced disappearances?

The Declaration explicitly prohibits States to practice, permit or tolerate enforced disappearances and urges States to take measures to prevent enforced disappearances by for instance:

- Ensuring that enforced disappearances are a criminal offence
- Effectively preventing impunity for those committing enforced disappearances;
- Guaranteeing a prompt, thorough and impartial investigation of any allegation; the prohibition of extradition of people to countries where they are at risk of being disappeared
- Keeping detention records updated; recognising enforced disappearances as a continuing crime, and
- Guaranteeing the rights of victims and their families to claim compensation in disappearance cases.

3.1.7 The International Convention for the Protection of All Persons from Enforced Disappearances (CED)

The International Convention for the Protection of All Persons from Enforced Disappearances (CED) is the first universally binding treaty dealing specifically with the subject of enforced disappearances. The CED was adopted in 2006, and is already signed by close to one hundred countries. The Convention came into effect in December 2010.

3.1.7.1 Key provisions with relevance to enforced disappearances

The CED is the strongest and most complete treaty on enforced disappearances yet. Examples of the clear provisions, including the most comprehensive definition yet are as follows:

Article 1

1. No one shall be subjected to enforced disappearance
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

Article 2

For the purposes of this Convention, “enforced disappearance” is considered to be 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.

Article 4

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

Article 5

The widespread or systematic practice of enforced disappearance constitutes a

crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

Article 7

1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties, which take into account its extreme seriousness. Indeed it fills all the main gaps in the legal protection, with a clear binding definition and with its many provisions creates obligations for an urgent investigation to clarify the fate and whereabouts of the disappeared person. The Convention also recommends measures to counter impunity on the part of the States as well as setting standards for cooperation between States for protecting persons from enforced disappearances. The CED also includes many preventive measures, defines victims and gives determination to which rights pertain to these same victims. There is also specific reference to addressing the challenge of children victims of enforced disappearances.

3.2 Regional Instruments Relevant to Enforced Disappearances in Africa

3.2.1 The African Charter on Human and Peoples' Rights (ACHPR)

The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is a regional human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. The Charter covers social, economic and cultural rights as well as civil and political rights and also gives emphasis to the assumption that every person has duties as well as rights in a community and it stipulates rights of individuals as well as of peoples. The Charter establishes the African Commission on Human and Peoples' Rights, whose key roles, among those entrusted to it by the Assembly of Heads of State and Government, include

- the protection of human and peoples' rights
- the promotion of human and peoples' rights
- the interpretation of the African Charter on Human and Peoples' Rights

3.2.1.1 Provisions relevant to enforced disappearances

While The African Charter of Human and Peoples' Rights does not contain

any specific reference to enforced disappearances per se, it finds a lot of relevance for enforced disappearance cases as it protects many of the rights violated during the act. The following provisions of the Charter are the most relevant:

- Guarantee of security of people and their protection by State Parties (art. 1 and art. 23)
- Recognition of equality before the law and equal entitlement to protection of the law (art. 3);
- Respect for life and the integrity of persons and prohibition of arbitrary deprivation of this right (art. 4);
- Respect for the dignity inherent in a human being and to the recognition of his legal status, and all forms of degradation of man, torture, cruel, inhuman or degrading punishment and treatment (art. 5);
- The right to liberty and security, prohibition of the deprivation of freedom, except for reasons and conditions previously laid down by law; in particular, the prohibition of arbitrary arrest[*] or detention (art. 6);
- The individual rights to receive information (art. 9).

3.2.2 The Kampala Convention^{xxv}

The Kampala Convention came into force in 2012 and is formally known as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. It is arguably the world's first continental instrument that legally binds governments to protect the rights and wellbeing of people forced to flee their homes by conflict, violence, disasters and human rights abuses.

3.2.2.1 Provisions relevant to enforced disappearances

The Kampala Convention does have provisions that speak to the issue of enforced disappearances. Article 9 (1) (c) of the Convention states:

“State Parties shall protect the rights of internally displaced persons regardless of the cause of displacement by refraining from, and preventing acts, among others arbitrary killing, summary execution, arbitrary detention, abduction, enforced disappearance or torture and other forms of cruel, inhuman treatment or punishment”.

3.3 The Constitution as an Instrument of Protection and Prevention in Zimbabwe

It is indeed of concern that Zimbabwe as a nation has a long history of enforced disappearances that stretch back to pre-independence days up to present day scenarios where human rights defenders are enforceably disappeared and their whereabouts just unknown. It also remains a matter of concern that Zimbabwe has not ratified key conventions that speak to issues relating to state obligations in as far as prevention of enforced disappearance of citizens is concerned. Such conventions that Zimbabwe has not ratified² include the United Nations Convention Against Torture or Inhuman or Degrading Treatment (CAT), the International Convention for the Protection of All Persons Against Enforced Disappearances as well as the Rome Statute among others.

It is however noteworthy that while the country's laws do not speak explicitly about enforced disappearances, key provisions are found in the Zimbabwean constitution (under Chapter 4) that articulate the protection of fundamental human rights and freedoms that are violated by enforced disappearances. These include:

- The right to life (s48)
- The right to personal liberty (s49)
- The rights of arrested and detained persons (s50)
- The right to human dignity (s51)
- The right to personal security (s52)
- Freedom from torture or cruel, inhuman or degrading treatment or punishment (s53)
- The right to a fair hearing (s69)
- The rights of accused persons (s70)^{xxvi}

These rights and freedoms as enshrined in the country's constitution therefore create strong basis for the state being obligated to ensure that citizens are protected from human rights violations such as those characteristic of enforced disappearances.

² 'Ratification' is an act by which a State signifies an agreement to be legally bound by terms of a particular treaty.

4.0 Pathways for Interventions Against Enforced Disappearances

As noted in an earlier section in this booklet, enforced disappearances continue to happen in many countries across the world. Human rights defenders and activists continue being exposed to risk of being disappeared through the work they do, with those in Zimbabwe also not being an exception. It would therefore be instructive to discuss pathways for interventions against enforced disappearances, as undertaken in this section:

4.1 International Level

4.1.1 The United Nations Working Group on Enforced or Involuntary Disappearances (UNWGEID)

The Working Group on Enforced or Involuntary Disappearances was established by the UN Commission on Human Rights in 1980 with the objective to investigate questions related to enforced or involuntary disappearances. Initially, the UNWGEID had primarily a humanitarian mandate, with its mandate broadened in 1992 after the adoption of the Declaration for the Protection of All Persons from Enforced Disappearances. The Human Rights Commission assigned a monitoring function to the Working Group and as a result, the UNWGEID can today also be considered a monitoring body.

Among its key functions, the Working Group is tasked to assist families in determining the fate or whereabouts of their family members who are reportedly disappeared. In that humanitarian capacity, the Working Group serves as a channel of communication between family members of victims of enforced disappearance and other sources reporting cases of disappearances, and the Governments concerned. For this purpose the Group receives, examines and transmits to Governments reports of enforced disappearances submitted by relatives of disappeared persons or human rights organisations acting on their behalf. The Working Group requests Governments to carry out investigations and to inform the Working Group of the results. The Working Group follows up those requests of information on a periodic basis. Those cases remain open

in the Working Group's database until the fate or whereabouts of the person is determined. The UNWGEID accepts cases from any country in the world. Furthermore, it is not necessary to exhaust domestic procedures before submitting the case to the UNWGEID. Cases of disappearances can be submitted by relatives of disappeared persons or by organisations acting on their behalf^{xxvii}. The Working Group however does not investigate individual cases itself, neither does it formulate judgments, order sanction, or carry out exhumations. Through its set out roles and responsibilities nevertheless, the UNWGEID plays a critical role in terms of monitoring and following through on enforced disappearance cases as well as being a pivotal communication channel between families of victims, other non-state actors responding to enforced disappearances and the government concerned. The working group's critical role can thus never be over-emphasised.

4.1.2 Committee on Enforced Disappearances (CED Committee)

The Committee on Enforced Disappearances (CED Committee) was established after the International Convention for the Protection of All Persons from Enforced Disappearances (CED) entered into force on 23 December 2010. The Committee was set up with a mandate to monitor the compliance of State parties with the Convention. The CED Committee also channels urgent requests to seek for disappeared persons, review periodic reports, individual and inter-State complaints, as well as being allowed to undertake field enquiries and bring situations of widespread and systematic enforced disappearance to the attention of the General Assembly. This committee creates an important pathway for international engagement regarding local level enforced disappearance cases in the various States. Indeed, like for a number of other thematic human rights issues, the Committee on Enforced Disappearances and the Working Group on Enforced or Involuntary Disappearances co-exist side-by-side and seek to collaborate and coordinate their activities with a view to strengthen the joint efforts to prevent and eradicate enforced disappearances^{xxviii}.

4.1.3 The Universal Periodic Review

The Universal Periodic Review (UPR) is a unique process that involves a re-

view of the human rights records of all UN Member States. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed.

The UPR was created through the UN General Assembly on 15 March 2006 by resolution 60/251, which established the Human Rights Council itself. It is a cooperative process, which, by October 2011, has reviewed the human rights records of all 193 UN Member States. Currently, no other universal mechanism of this kind exists. The UPR is one of the key elements of the Council which reminds States of their responsibility to fully respect and implement all human rights and fundamental freedoms. The ultimate aim of this mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur.

The Universal Periodic Review (UPR) mechanism^{xxix}

The Universal Periodic Review (UPR) is a unique mechanism of the Human Rights Council (HRC) aimed at improving the human rights situation on the ground of each of the 193 United Nations (UN) Member States. Under this mechanism, the human rights situation of all UN Member States is reviewed every 4-5 years. 42 States are reviewed each year during three Working Group sessions dedicated to 14 States each. These three sessions are usually held in January/February, May/June and October/November. The result of each review is reflected in an “outcome report” listing the recommendations the State under review (SuR) will have to implement before the next review.

The UPR is a full-circle process comprised of 3 key stages:

1. Review of the human rights situation of the SuR;
2. Implementation between two reviews (4-5 years) by the SuR of the recommendations received and the voluntary pledges made;
3. Reporting at the next review on the implementation of those recommendations and pledges and on the human rights situation in the country since the previous review.

Three main documents are essentially used to conduct the review of the State as outlined below:

- A National Report of 20 pages prepared by the State concerned on the human rights situation in the country;
- A compilation of ten pages prepared by the Office of the High Commissioner on Human Rights (OHCHR) containing information from treaty bodies, special procedures and UN agencies such as UNDP and UNICEF;
- A summary of ten pages prepared by the OHCHR containing information from the civil society.

Possibilities of Advocacy and Lobby Against Enforced Disappearances in the UPR Process^{xxx}

The UPR process offers unique opportunities for NGOs to advocate and lobby for human rights protection. For example, in the case of States under review perpetrating enforced disappearances, NGOs can campaign, lobby and/or submit information about this practice at these points of the process:

1. Before the session of the Working Group, States are encouraged to prepare information for the UPR process through a broad consultation process at national level. This is an opportunity for NGOs to run a national campaign to attract attention to the most pressing matters and the UPR process. NGO's are also encouraged to submit a report on the human rights record in their countries. Information provided in this report is used to contrast information provided by the State. This creates another opportunity for NGOs to denounce poor human rights policies. NGOs can focus the attention of their State on specific issues by making questions or making recommendations during the session or lobby to obtain specific recommendations to be made.
2. During the review, NGOs can be present during the session, but they are not allowed to take the floor. However, NGOs are allowed to hold parallel events during the session of the Working Group.

3. In the days after the review, NGOs can conduct assessment meetings, in order to evaluate the review and the extent to which some issues have (or not) been addressed, and to prepare the follow-up. Press conferences and press releases on the reviews are also a possibility to bring the attention of the public over the process and the results.
4. During the plenary, it is possible for NGOs to make oral and written statements. NGOs can take the floor for 20 minutes during the plenary session to make a statement. Also written statements can be submitted under any item. Written statements have less impact than the oral ones, but they become official United Nations documents.
5. Last but not least, NGOs can play a great role in monitoring efforts made by governments in the four-year period between two reviews by making UPR recommendations public and making sure they are implemented by the State.

4.2 Regional Level

4.2.1 The African Commission on Human and People's Rights

The African Commission is the monitoring and enforcing body of the African Charter. It is based in Banjul, the Gambia, and usually meets twice yearly for two-week sessions. The African Commission has eleven members, elected by the Assembly of the African Union. They serve in an individual capacity, not as representatives of their governments. The Commission can only make recommendations, not issue legally binding decisions.

However, it still has considerable powers, which do find relevance in calling States to account regarding enforced disappearances. The Commission can:

- Launch an investigation of any human rights issue.
- Review reports that States must submit every two years, detailing the steps they have taken to implement the Charter. The Commission can use background information from NGOs in questioning States about the reports they submit.

- Consider complaints from individuals and NGOs about human rights violations.

4.3 National Level

4.3.1 The Zimbabwe Human Rights Commission (ZHRC)

The Zimbabwe Human Rights Commission, an independent commission set up as provided for under Section 42 of the country's constitution has a national mandate to, among other things,

- Promote the protection, development and attainment of human rights and freedom
- Monitor, assess and ensure observance of human rights and freedoms
Receive and consider complaints from the public and to take such action in regard to the complaints as it considers appropriate
- Protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions
- Secure appropriate redress, including recommending the prosecution of offenders where human rights or freedoms have been violated
- Direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of any such investigation

From the above roles that are within the mandate of the ZHRC, it is clear that there is scope for this institution to provide a pathway for protection of citizens from enforced disappearances, investigate and/or cause the investigation of such cases as well as facilitate access to redress for victims. To that effect, the institution can therefore be approached to report on matters relating to enforced disappearances. While the fact that institution is still fairly young and largely untested in terms of its efficacy (particularly in the context of lack of political will as well as a punitive State in how it deals with perceived political opponents), the existence of the platform does create opportunities in terms of prevention and protection of citizens from enforced disappearances.

4.3.2 Using the law to challenge illegal State detention of a disappeared person - Habeas Corpus^{xxxii}

Habeas corpus, also known in other jurisdictions as “The Great Writ” refers to a centuries-old legal concept, fundamental in any democracy. This Latin term, literally meaning, “holding the body”, refers to a legal action that a person can bring in order to seek relief against arbitrary and unlawful detention. From its traditional sense in the early days, Habeas corpus represented the idea that the king could not, at his whim, detain whomever he wanted without allowing the detainee the opportunity to stand before a fair court to hear the charges against him or her and to have an opportunity to answer the charges. To that effect therefore, a *Habeas corpus* petition is brought before the courts against the person (s) responsible for holding a detainee and requires that s/he produce the detainee along with the reasons that this person is being held. The petition challenges the legality of the detention based on a legal or a factual error. For instance, the error could be that the detention violates the Constitution. The court then decides if the person is being held lawfully or if the detainee ought to be released. With respect to enforced disappearances therefore, *Habeas corpus* becomes relevant in as far as challenging the legality of the State’s detaining the disappeared person. Human rights lawyers could assist in this regard in the event of an enforced disappearance. In terms of Zimbabwean law, the principle of *Habeas corpus* is enshrined in the country’s constitution under Section 50 (7) (a) which speaks to rights of arrested and detained persons.

In as far as criminal laws are concerned, enforced disappearance is not a specific crime under Zimbabwean law but there is possibility of reporting to the police where perpetrators are known and the lesser offences in the criminal code may be applied, for instance section 47 on murder and section 89 on assault. There are also possibilities of civil remedies through bringing claims for torture and assault among other related claims.

5.0 Strategies to Stay Safe When at Risk of Enforced Disappearance^{xxxiii}

5.1 Being on the look-out for surveillance

- If you are not sure whether you are under surveillance from state agents or not, assume you are and be very aware of what you say and do in order to protect yourself and others
- Discuss with other HRDs what surveillance methods are used in your country, what is the purpose (to collect information? to intimidate? to prepare for an abduction?) - your tactics will change depending on the objective of the perpetrators
- Discuss with your colleagues how you should react if you discover surveillance. For example, if you find a tracking device on your car, should you leave it there or get rid of it? A general rule seems to be – if you spot surveillance, pretend you haven't. If they see you are aware they will at best move further away and be harder to identify, and at worst become violent.
- Have a plan – if an HRD finds a device in their home or car, what should they do? Ignoring it whilst being aware of the implications and behaving accordingly could be the safest option.

5.2 Physical Surveillance (Being Followed)

- Always remember that very professional surveillance operators may work completely unnoticed, so you would need to be extra vigilant as well. Be aware of what is going on in your surroundings all the time (while resisting paranoia of course)
- All surveillance will have a 'start point', which will most likely be your home or work. Always be on the look-out for strange vehicles (including their colours and registration numbers) or people loitering yet looking out of place around your home or work premises
- Do not have a fixed routine. Vary the times and routes you use to go to work, go home, go shopping or to any other places you visit regularly
- Always remember that a vehicle surveillance usually has at least two cars, with one in front, one behind and another likely driving by your car's side. Speeding away from one might not always mean you have eluded those stalking or putting you under vehicle surveillance.
- Drive naturally – don't keep moving your head to look in your rear mirrors

- To check for surveillance, turn into a cul-de-sac or a petrol station to get fuel, but be careful that it looks natural
- To evade surveillance park somewhere and then, in a relaxed way, jump onto public transport if you believe the threat of being abducted is imminent

5.3 Avoid giving too much information on public platforms

Unfortunately, many people innocently reveal information about themselves and their whereabouts, through business cards, giving away numbers and email contacts indiscriminately. Personal profiles on social media platforms such as Facebook can reveal where you are, where you usually hang out, who you usually are with, among other forms of personal information that can make you more vulnerable. The key message here is to exercise discretion in terms of the amount of personal information and routines you put into the public domain, in case such information can be used to either trap you or facilitate abduction/disappearance

Below are a few tips to ensure security as you use social media

- Think carefully about the information you share about yourself, your whereabouts, friends etc.
- Get consent if posting information, documents, pictures and the locations of others
- Make sure your passwords are secure and changed regularly.
- Be careful when accessing your social network account in public internet spaces – only use them if you are sure they can be trusted. Delete your password and browsing history after using a public browser or computer.
- Read and understand the End User License Agreement (EULA), Terms of Use and/or Privacy Guidelines documents. These documents may change in the future, so it is important to revisit them regularly.
- Make sure that you are familiar with the privacy settings of your social network account. Don't rely on the default settings – customise your settings and review them regularly as the service may make changes.

- Use caution when installing applications suggested by social networking services. Use these applications only if you trust their source, understand what information they will expose, and are able to control the outflow of your information

5.4 Abduction / Kidnap

Your protection strategies to avoid abduction / kidnap will include:

- Develop local contacts who can warn you about heightened risks. If you have a good relationship with your neighbours (at work and at home), chances are they are highly likely to tip you off of any event or activities
- Always act on local advice from your trusted contacts
- If you are going to be abducted, you are likely to be under surveillance by the abductors before being taken. They will probably know where you work and where you live and follow you – be alert to any signs of surveillance
- Only let trusted contacts know your travel plans. Avoid routines.
- Blend in as much as possible – consider which is the safest method of transport to do so, and how to dress to avoid attention
- Have an emergency contact who will take measures to find you if you do not check in at certain times during the day
- In times of heightened risk, take steps not to be alone

What to do during the abduction / kidnapping moment

- Stay calm and quiet (the kidnappers may be nervous and inexperienced – your behaviour could trigger violence). It does not make sense to shout or struggle unless you reasonably expect that these tactics will ensure your rescue
- Be careful about eye contact especially during tense moments: eyes can show fear, anger or contempt, which can trigger violence. Face your captors (it is more difficult to harm someone who is facing you) but avoid making eye contact
- If you have been taken as a group, try not to be separated from the group

5.5 Surviving the Kidnap Period – Relations With the Kidnappers

- Try to gain the kidnappers' respect and build rapport with them
- Obey orders without appearing servile
- Avoid surprising, alarming or threatening your captors; don't indicate that you would testify against them
- Be cautious about making suggestions to your captors, as you may be held responsible if something you suggest goes wrong
- If there are several people kidnapped, elect one spokesperson to speak for the group. This presents a common front and avoids the kidnappers playing you off against each other
- Regard all information they give you with scepticism

5.6 Surviving the Kidnap Period – Physical and Mental Health

- Accept that you may be held captive for a long period of time. Try to keep a record of the days
- Inform your captors of any medical treatment you have been receiving
- Take care of your health by eating (even if the food you are offered is unappealing), developing an exercise routine, and prayer/meditation
- Keep your mind occupied. If books or writing materials are not available, pray, meditate, recall favourite books and films, compose music, plan for the future in your head – all this can lift your mood
- Be mentally prepared for changes: of location, or guards, being separated from others
- You may be treated in a humiliating or terrifying way. Fears of pain or death are normal reactions – do not lose hope. It is normal to feel extreme shock and depression. Let your hope for being released or for being found supersede all the other fears

6.0 Contingency Plan Against Enforced Disappearance for HRD Organisations

If enforced disappearance via abduction / kidnap is a threat to any members of your organisation, it is imperative that your institution has a contingency in case

of any eventuality. Your contingency planning could include the below aspects:

- Each organizational member knowing and memorising the phone number of a human rights lawyer they can contact if they believe abduction is imminent or a colleague has been disappeared
- The organisation sets up a crisis committee with key roles designated in advance, such as:
 - o Description of the abduction, names and other details of those involved, time, date, location
 - o Establishing as far as possible where the person is being held and by whom (with independent verification as far as is possible)
 - o Dealing with the authorities if appropriate
 - o Contact with and support of the family
 - o Contact with local, regional, national, international human rights groups for regional and international alerts
 - o Media spokesperson - primed with a careful media strategy if news of the disappearance has leaked out
 - o Developing a plan of support (need for medical treatment, recuperative leave, counselling and other services) for the member when released/returned home (to be implemented in direct consultation with the member and/or their family).
 - o Keeping other staff informed, as appropriate
 - o Offering psycho-social support to affected colleagues as required

7.0 Frequently Asked Questions-When a Person Has Been disappeared

Q: If your work colleague/family member has been abducted what is the first step you should take?

A: Immediately report the incident to the nearest police station or contact the police on their national hotline. Contact human rights lawyers for support and follow up on the case.

Q: How many hours should you wait before you report a disappeared person to the police?

A: As soon as you believe a person is missing in unexplained circumstances,

you must contact the police.

Q: Who should accompany you to make the report?

A: A lawyer, family member or trusted colleague.

Q: What information should you furnish the police with?

A: As much information as possible linked to the disappearance included but not limited to-

Full names of the missing person, age, race, gender, hair colour, colour of eyes, description of clothes at time of disappearance, location, persons last seen.

8.0 Conclusion

It is anticipated that this booklet will serve as an information tool that human rights defenders and civil society organisations can make use of to understand more about enforced disappearances, the local, regional and international legal instruments seeking to prevent the phenomenon as well as protecting citizens from being disappeared. It is hoped that the survival tips and strategies shared in the last section will also support CSO and activists to be alert and responsive to risk of enforced disappearances around them should it arise.

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