Addressing the Continuing Phenomenon of Enforced Disappearances

Diane Webber and Khaola Sherani

Background

An enforced disappearance is the “arrest, detention, abduction or any other form of deprivation of liberty” by state agents or their proxies, followed by a refusal to acknowledge or disclose the fate of a seized individual. Unlike arbitrary detention, which may also involve arrest and inhumane treatment, enforced disappearances frequently leave families with no information as to the victim’s whereabouts or status. In many cases, it is ultimately revealed that the victim was killed rather than detained. Enforced disappearances violate multiple human rights, including the right to security and dignity of person; the right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment; the right to liberty; the right to humane conditions of detention; the right to a legal personality; the right to a fair trial; the right to a family life; and the right to life.

The phenomenon of enforced disappearances first emerged as a state practice during the Nazi era but became widespread under the military regimes in Latin America during the 1960s. The Commission for Historical Clarification in Guatemala found that from the mid-1960s until the 1996 peace agreement, security forces and “death squads” carried out approximately 45,000 enforced disappearances against anti-government forces and suspected opponents, including members of Mayan communities. The governments of Argentina, Chile, Uruguay, Paraguay, Bolivia, Brazil, Ecuador, and Peru developed a transnational cooperation mechanism called “Operation Condor” to share intelligence about political dissidents for the purposes of carrying out transnational enforced disappearances. The practice of enforced disappearances was soon taken up by governments in other parts of the world, as well. In Sri Lanka, for example, Amnesty International estimates that there have been “at least 60,000 and as many as 100,000 cases of enforced disappearance” since the 1980s.
The problem persists today, occurring at a large scale in many countries in the context of both armed conflicts and repressive, unaccountable regimes. The Syrian Network for Human Rights reported that from 2011 to 2021, the Syrian regime carried out 102,000 disappearances to suppress dissent during the civil war. Meanwhile, China’s Residential Surveillance at a Designated Location (RSDL) decree empowers authorities to detain foreign or Chinese nationals for a period of six months without disclosing their location. A Spain-based rights group, Safeguard Defenders, claims that between 27,000 and 57,000 people have gone through China’s RSDL system since 2013, citing data from the Supreme People’s Court and the testimony of survivors and lawyers. Altogether, the United Nations Working Group on Enforced or Involuntary Disappearances (UN Working Group) has recorded more than 59,000 cases of enforced disappearances across 110 countries since 1980, including 651 new cases originating in 30 countries in its most recent annual report. More than 46,000 cases remain unresolved.

The international community was slow to respond to the growing problem of enforced disappearances, initially addressing the problem only as part of broader “ad hoc working groups” on human rights issues in countries like Chile and Cyprus. It was not until 1992 that the United Nations General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance, which condemned acts of enforced disappearance as violations of the Universal Declaration of Human Rights and called on states to prevent, eradicate, and punish acts of enforced disappearance under criminal law. The international legal regime has since expanded: in 1996, the Inter-American Convention on Forced Disappearance of Persons (Inter-American Convention) entered into force, and in December 2010, the International Convention for the Protection of All Persons from Enforced Disappearance (Enforced Disappearance Convention) came into force. Enforced disappearances can also now be prosecuted as a crime against humanity under the Rome Statute of the International Criminal Court.

Article 2 of the Enforced Disappearance Convention sets out four components that characterize the crime of enforced disappearance:

1. Depriving an individual of their liberty
2. Carried out by state forces or state-supported groups
3. Denying knowledge of the abducted person
4. Placing the abducted individual outside the shield of law

Despite a strong consensus prohibiting enforced disappearances under international law, the practice continues unabated. There are three key challenges to addressing the ongoing, widespread phenomenon of enforced disappearances: the increased involvement of non-state actors in carrying out enforced disappearances, the use of enforced disappearances as a practice during armed conflicts, and the lack of effective mechanisms to hold states accountable for carrying out enforced disappearances.

ENFORCED DISAPPEARANCES BY NON-STATE ACTORS
Non-state actors carry out a significant proportion of enforced disappearances worldwide. In Syria, for example, 15 percent of all disappearances carried out since 2011 have been attributed to non-state actors. In some cases, these actors function as agents of the state, carrying out enforced disappearances on behalf of governments who want to keep these crimes at arms’ length. In such cases, international law and jurisprudence hold states responsible for these disappearances. For example, in Blake v. Guatemala, where a civil patrol group was found to be involved in hiding the victim’s body, the Inter-American Court on Human Rights (Inter-American Court) held that the state was responsible for this enforced disappearance and killing.
That said, in situations where disappearances are carried out by non-state actors who are not under the control of states, accountability of state actors and access to remedy for victims become limited or even nonexistent. While states still have a responsibility to investigate and prosecute these disappearances, international legal mechanisms mainly treat these cases as abductions or kidnappings.

In situations where disappearances are carried out by non-state actors who are not under the control of states, accountability of state actors and access to remedy for victims become limited or even nonexistent.

On the contrary, these abductions by non-state actors are not like ordinary cases of abductions under domestic criminal law; in fact, they tend to include all the elements of enforced disappearances other than formal state involvement. Large-scale abductions of civilians carried out by Boko Haram in Nigeria and by criminal gangs in Mexico, as well as frequent disappearances of migrants—likely by smugglers and traffickers—are all examples of the tactical use of enforced disappearances by non-state actors. While technically working independently of the government, these organizations benefit from a permissive operating environment that fails to either prevent these crimes or hold perpetrators accountable. In some cases, they even exercise what the UN Working Group has called "territorial governmental control or quasi-state functions," essentially acting as a state in some areas.

The inclusion of non-state actors as perpetrators was discussed during the drafting process for the Enforced Disappearance Convention but was set aside due to concerns that states would use it as an excuse to pass blame on to others. Article 2 of the Enforced Disappearance Convention therefore includes state involvement as a necessary component for the criminal definition of enforced disappearance. Article 3 was included as a compromise for states arguing for a broader definition; it imposes responsibility on states to investigate acts of enforced disappearance perpetrated by persons acting without state support, authorization, or acquiescence.

As a result of this compromise, neither the UN Working Group nor the Committee on Enforced Disappearances can take up cases perpetrated by non-state actors. The committee, which under Article 30 of the Enforced Disappearance Convention can take urgent action and call on states to provide information within a set time frame, is not using this authority with respect to cases of enforced disappearances carried out by non-state actors. Moreover, the victims of disappearances by non-state actors do not receive the same reparations as victims of disappearances carried out by state actors. The same limitation is present in the regional Inter-American Convention. The Inter-American Court has dealt with cases of enforced disappearances in which non-state actors had an “informal or de facto link with the state" and has called out these states for their failure to fulfill their responsibilities of providing protection to their citizens. However, the court has not taken up any cases of enforced disappearances perpetrated by non-state actors without any connection to state agents.

It should be no surprise, then, that human rights advocates have sought to expand the responsibility of states to include enforced disappearances by non-state actors. After receiving reports of many cases of enforced disappearances perpetrated by non-state actors in Mexico, Syria, Nepal, Sri Lanka, and other states, the UN Working Group expanded its mandate in 2019 to consider these cases. In March 2021, the UN Working Group declared “both state and non-state actors as ‘duty bearers’ when discussing the context of enforced disappearances in Syria.” In addition, the UN Human Rights Committee proposed using “enforced disappearances” to refer to disappearances carried out by independent groups other than state agents. The
Committee on Enforced Disappearances has proposed to expand its mandate to include some enforced disappearances carried out by non-state actors if one of three conditions are met:

1. “The disappearance was perpetrated by a ‘political organization’ and there is a nexus with a ‘widespread or systematic attack against a civilian population,’ within the meaning of the definition of crimes against humanity in international criminal law; or

2. The disappearance was perpetrated by an ‘organized armed group,’ and there is a nexus with a ‘non-international armed conflict,’ within the meaning of international humanitarian law; or

3. The disappearance was perpetrated by a non-State actor that exercises effective control and/or government-like functions over a territory.”

This proposal provides an opportunity to expand international efforts toward ending enforced disappearances to include some of the worst crimes carried out by non-state actors. Its applicability would depend on the factual circumstances of each case—for example, whether the fight against Boko Haram in northern Nigeria constitutes a non-international armed conflict, or whether drug cartels exercise effective control over some geographic areas in Mexico. Applying the label of enforced disappearance to the crimes committed by these groups would provide an additional avenue for accountability and remedy previously unavailable to the victims of these criminal organizations.

ENFORCED DISAPPEARANCES DURING ARMED CONFLICT

The use of enforced disappearance during armed conflicts has been a persistent problem, despite its prohibition under customary International Humanitarian Law, as well as international human rights law. Thousands of people disappeared during the conflicts in Colombia, Sri Lanka, and the former Yugoslavia. In Syria, mass displacement and genocide against Yezidis and other minority groups, along with widespread incommunicado detentions, have contributed to the International Commission for Missing Persons’ collection of data on tens of thousands of missing persons—still a fraction of the numbers reported by civil society groups. In Iraq, Popular Mobilization Unit militias disappeared hundreds of men and boys fleeing with their families in 2016 and armed actors disappeared several protestors during the Tishreen demonstrations against the government in 2019–2021. In Afghanistan, the Taliban have carried out enforced disappearances of former members of the Afghan National Security Forces, accused militants, and female protestors.

Russia is currently using enforced disappearances to target prominent activists, journalists, and leaders amid the conflict in Ukraine. The UN Human Rights Monitoring Mission in Ukraine (HRMMU) documented at least 230 cases of enforced disappearances and detention in the first 100 days of the current conflict. Notable cases include 60-year-old Viktor Maruniak, the elected head of the Stara Zbur’ivka village; 25-year-old Ukrainian teacher Viktoria Andrusha; and the father of prominent Melitopol-based journalist Svetlana Zalizetskaya, who received threatening phone calls from Russian forces but was herself able to escape the city. Russia has carried out enforced disappearances during previous conflicts as well, including in Ukraine, where the UN High Commissioner for Human Rights and the HRMMU recorded 43 cases of enforced disappearances in Crimea in 2014–2018, and in Chechnya, where 3,000–5,000 people were disappeared, according to NGO estimates.

The use of enforced disappearances, like many war crimes, is a “military tactic meant to terrorize communities and demoralize civilian resistance.” In the case of international armed conflicts, the potential movement of victims across international borders compounds the already difficult nature of investigating these crimes, which by their definition leave behind little evidence. The fact that many of the victims are “secreted away to Russia
or Russian-held territory” makes investigating these cases extremely difficult. Moreover, the Ukrainian criminal justice system is also deemed to be ill-equipped to deal with the growing number of such cases. Thus, enforced disappearances at the time of international armed conflict can prove to be more challenging compared to disappearances carried out during military dictatorships or internal armed conflicts.

LIMITED ACCOUNTABILITY AND REMEDY MECHANISMS

Despite the existence of an international legal framework, the lack of effective accountability mechanisms prevents meaningful deterrence for states that carry out enforced disappearances. The Enforced Disappearance Convention depends on state parties enacting legislation to criminalize enforced disappearances, investigate potential cases, and hold persons accountable. The Committee on Enforced Disappearances, mandated under the Enforced Disappearances Convention to monitor state parties’ adherence, has itself very limited enforcement power. If a complaint is made about a state party, the committee can seek information from that party and visit the state, but it can only transmit recommendations and request that the state take all necessary measures to resolve the situation. It cannot compel the state to take action and it has no power to sanction. Further, the committee has no jurisdiction over states that are not party to the convention. There is also no mechanism for an individual aggrieved person—a formerly disappeared person or their family—to seek redress under the Enforced Disappearances Convention.

Despite the existence of an international legal framework, the lack of effective accountability mechanisms prevents meaningful deterrence for states that carry out enforced disappearances.

In contrast, the Inter-American Convention does allow complainants to petition the Inter-American Commission on Human Rights (IACHR) for redress once domestic remedies have been exhausted. To achieve redress, the IACHR can in turn refer cases to the Inter-American Court, which can order the offending state to pay compensation. For example, after a referral in 2016 by the IACHR in the case of Alvarado Espinoza v. Mexico, which concerned the enforced disappearance of three people by Mexican state agents, the court determined that Mexico had violated both the American Convention on Human Rights and the Enforced Disappearance Convention. The court ordered Mexico to organize a public act of acknowledgement of its responsibility, conduct a comprehensive and accessible investigation, provide psychological treatment to the victims’ families, admit them to benefit programs, and award them reparations. Yet as of 2021, the Mexico-based Center for Women’s Human Rights reported that the state had not fulfilled all of the court’s orders and in fact had regressed on adopting relevant reforms in the security sector.

A handful of other enforced disappearance cases have been referred by the IACHR to the Inter-American Court. Most cases referred in 2019–2022 pertained to disappearances that had taken place decades earlier, including a disappearance in Ecuador in 1990, two disappearances in Uruguay in 1974, and one disappearance in Colombia in 1993. While the IACHR has been inundated with petitions in recent years, a lack of resources and other challenges have resulted in the court taking up a relatively small percentage of applications. The process of following up on recommendations is also slow and lengthy: in 2020, only 10 out of 113 cases had been closed, with very low levels of adherence to resulting orders.

Other international law mechanisms also provide limited opportunities for redress. Individuals can petition for redress using the International Covenant on Civil and Political Rights (ICCPR) under
provisions that are tangentially related to enforced disappearances, such as deprivation of liberty or unfair treatment. Additionally, the ICCPR-mandated Human Rights Committee can direct an offending state to provide “adequate or appropriate” compensation in such cases. For example, in 1982, the Human Rights Committee accepted the case of *Quinteros v. Uruguay*, the first time it admitted such a submission by a victim’s relative. Upon determining Uruguayan responsibility for the enforced disappearance and related violation of several articles of the ICCPR, the committee ordered the state to investigate the incident, punish those involved, and provide compensation. That said, there is no mechanism to enforce or to ensure compliance with their rulings.

Although the European Convention on Human Rights does not specifically address enforced disappearances, the European Court of Human Rights will adjudicate complaints of violations of its provisions brought by individuals, some of which are relevant to enforced disappearances. It can also order the payment of specified amounts of damages to individuals, as in the 2005 case of *Koku v. Turkey*, in which the court ruled that Turkey had violated several articles of the European Convention in the disappearance and killing of a local politician. However, the majority of damages in such cases have tended not to be paid promptly or even at all.

Opportunities for redress at the International Court of Justice and the International Criminal Court are similarly limited by jurisdictional restrictions and inadequate enforcement mechanisms. Although enforced disappearances are classified as a crime against humanity under the Rome Statute, when carried out on a widespread and systematic basis, there have been no charges brought against defendants for the crime at this time.

**U.S Policy on Enforced Disappearances**

The United States has a mixed record with regard to policy and practice on enforced disappearances. The United States has not ratified the Enforced Disappearance Convention and has not played an active role in further developing the international normative framework on this issue. Its own history of enforced disappearances after 9/11—most notably the indefinite, initially secret detention of terrorist suspects in Afghanistan and Guantanamo Bay—has led to a reluctance to engage on this issue globally. This has limited the ability of the United States to influence the trajectory of international law development on this topic and to engage substantively when enforced disappearances are carried out.

Two reasons are commonly suggested for the United States’ reluctance to ratify the Enforced Disappearance Convention and other human rights treaties: (1) fears that international treaty obligations might infringe upon U.S. sovereignty and (2) the difficulty of securing bipartisan support via a two-thirds vote of the Senate to ratify a treaty. In the case of the Enforced Disappearance Convention in 2005, the United States did not support some of the language in the draft covenant and thought that further discussions were required. The primary criticisms involved Article 5, which the U.S. government argued “insufficiently defined” its requirement of domestic legislation criminalizing crimes against humanity, and Article 6, due to the possibility that “unwitting military and law enforcement personnel” could be prosecuted, regardless of whether they had followed orders. Despite U.S. reservations, the draft was adopted. While the United States expressed support for the Declaration on the Protection of All Persons from Enforced Disappearance in 2021, it also emphasized its lack of obligations as a non-party to the convention.

Current U.S. policy on enforced disappearances has tended instead to focus narrowly on aiding U.S. citizens that have disappeared overseas. Official policy varies depending on whether the citizen has disappeared due
to terrorist or foreign government activity, but in both situations, families of the disappeared persons have often turned to the U.S. government for help in locating and repatriating the victims. As of October 2021, according to the James Foley Foundation, there were 66 publicly disclosed wrongful detention cases of U.S. citizens in various countries. Disappeared persons include Austin Tice, a journalist who has been missing in Syria since 2012; Majd Kamalmaz, a psychologist missing in Syria since February 2017; and Mark Frerichs, a civil engineer, who has been held hostage in Afghanistan since 2020.

After the horrific killing in Syria of U.S hostages James Foley, Steven Sotloff, Peter Kassig, and Kayla Mueller, who had all been disappeared and killed in 2012–2014, President Obama revamped the hostage recovery policy. This brought about a number of organizational changes among those dealing with strategies for recovering hostages and working with hostages’ families, including the appointment of a special presidential envoy for hostage affairs, all while maintaining the “no concessions” to terrorists stance. In cases where foreign governments are responsible for the disappearance, the United States engages in dialogue with the foreign government. In December 2020, the Robert Levinson Hostage Recovery and Hostage-Taking Accountability Act was signed into law, building on President Obama’s reworked hostage policy. A 2021 report by the Foley Foundation and New America noted that the law was a “substantial move in the right direction,” but that “there remain some gaps in the support provided to these hostage families and in the U.S. government’s ability or willingness to prioritize the recovery of U.S. hostages.” In July 2022, President Biden issued an Executive Order on Bolstering Efforts to Bring Hostages and Wrongfully Detained United States Nationals Home. The order authorizes the imposition of sanctions against those accused of carrying out hostage taking or wrongful detention of U.S. nationals.

The reduced influence of the United States on the international human rights law stage—derived both from its reluctance to fully adopt the international normative framework and from its own history of enforced disappearances in the post-9/11 context—has diminished its role in addressing this issue globally.

This narrow focus on the disappearance of U.S. citizens is a missed opportunity for the United States to tackle the broader problem of enforced disappearances. The reduced influence of the United States on the international human rights law stage—derived both from its reluctance to fully adopt the international normative framework and from its own history of enforced disappearances in the post-9/11 context—has diminished its role in addressing this issue globally. Although the United States no longer includes abductions, renditions, and inhumane interrogation methods (though some complaints about harsh treatment at Guantanamo remain) in its counterterrorism policy, its policy for seeking accountability and redress for enforced disappearances requires rethinking. In line with broader U.S. engagement on egregious human rights violations and reengagement with international human rights legal mechanisms, the United States has an opportunity to lead the way and ensure that the persons and states responsible for these violations are held accountable.

Recommendations for U.S. Policy on Enforced Disappearances

1. **Sign the Enforced Disappearance Convention.** There are 98 signatories and 68 state parties to the convention, though the state parties do not include the worst violators. The United States can make its own position clear, and in doing so expand on the growing international consensus against the
heinous practice, by signing the treaty and encouraging others to do so as well. Despite challenges in enforcement and remedy, the convention lays out an important international legal principle—prohibiting enforced disappearances without exception—that is consistent with U.S. values. In 2020, Congressmen Brad Sherman and Jamie Raskin introduced a resolution “calling for an end to enforced disappearances in Asia and around the world and calling upon the United States to ratify” the convention. The resolution was referred to the Foreign Affairs and Judiciary Committees, but no further action has been taken to date.

2. **Strengthen regional and international enforcement bodies** working to provide accountability and remedy for enforced disappearances, especially in Latin America. These bodies need trained personnel and funding to strengthen the rule of law and accountability.

3. **Highlight the problem of enforced disappearances in the context of the Russian invasion of Ukraine.** Enforced disappearances are among the many egregious human rights violations being carried out by Russian forces in Ukraine. Putting a spotlight on this conduct can help raise awareness of the pervasive nature of this abuse and garner further support for strengthening the international legal regime designed to combat it.

4. **Work to hold non-state actors accountable for enforced disappearances** by addressing the exclusion of non-state actors in the definition of enforced disappearances in the Enforced Disappearance Convention. The Committee on Enforced Disappearances is seeking the input of states and other stakeholders for a draft statement on enforced disappearances and non-state actors with respect to the convention. The United States should encourage the adoption of this draft statement.

5. **Use existing tools to demand accountability from states that carry out enforced disappearances.** Even without ratifying the Enforced Disappearance Convention, the United States has domestic tools available for holding violators accountable, including imposing sanctions under the Global Magnitsky Act. President Biden’s new executive order, while narrowly focused on U.S. nationals, could nevertheless provide an opportunity to impose sanctions on those carrying out enforced disappearances of U.S. citizens and others.

---

**Diane Webber** is a senior associate (non-resident) with the Human Rights Initiative at the Center for Strategic and International Studies (CSIS) in Washington, D.C. **Khaola Sherani** is a research intern with the CSIS Human Rights Initiative.

This report is made possible by general support to CSIS. No direct sponsorship contributed to this report.

This report is produced by the Center for Strategic and International Studies (CSIS), a private, tax-exempt institution focusing on international public policy issues. Its research is nonpartisan and nonproprietary. CSIS does not take specific policy positions. Accordingly, all views, positions, and conclusions expressed in this publication should be understood to be solely those of the author(s).

© 2022 by the Center for Strategic and International Studies. All rights reserved.