

# Article 7(1)(i)

## *(i) Enforced disappearance of persons;*

### **General remarks:**

The “systematic practice” of enforced disappearance was considered of “the nature of crimes against humanity” by the UN General Assembly through a resolution in 1992, enshrining the Declaration on the Protection of All Persons from Enforced Disappearances.[1] The Inter-American Convention on Forced Disappearance of Persons establishes that “the systematic practice of the forced disappearance of persons constitutes a crime against humanity”.[2] Similarly, the International Convention for the Protection of All Persons from Enforced Disappearance states that enforced disappearance “in certain circumstances defined in international law” constitutes a crime against humanity.[3]

The Statutes of the Nuremberg and Tokyo Tribunals, of the ICTY, ICTR, SPSC, and ECCC do not contain an explicit reference to enforced disappearance. The Nuremberg Tribunal referred to disappearance as a form of “mistreatment inflicted upon the missing person and their families”[4] and the UN Military Tribunal at Nuremberg qualified it as “inhumane treatment on both prisoners and their relatives”.[5]

In *Kupreškić et al.*, the ICTY affirmed that enforced disappearance could be characterized as a crime against humanity, although it was not listed as such in the ICTY Statute, considering that it falls into the category of ‘other inhumane acts’ provided for in Article 5(i) of its Statute.[6] In *Blagojević and Jokić*, the ICTY held that the mental harm suffered by relatives of disappeared persons reached the required threshold to constitute serious mental harm.[7] In *Nuon Chea and Khieu Samphan*, the ECCC considered enforced disappearance a crime against humanity, in the form of “attacks against human dignity as other inhumane acts”.[8]

According to one author, Article 7(2)(i) contributed to the crystallization of a nascent rule of customary law.[9] In a general comment on enforced disappearance as a crime against humanity, the UN Working Group on Enforced or Involuntary Disappearances (‘WGEID’) held that, today, this provision “reflects customary international law”.[10]

The complex nature of the crime of enforced disappearance is acknowledged in the Elements of Crimes: “it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose” (Elements of Crimes, Article 7(1)(i), footnote 23).

None of the judgments before the ICC have addressed the elements of this crime. In October 2017, the ICC Pre-Trial Chamber authorized the commencement of an investigation into the situation in *Burundi* finding, among others, a reasonable basis to believe that the crime of enforced disappearance was committed by State forces and a paramilitary group as part of a widespread and systematic attack against civilian population.[11]

The ICC Pre-Trial Chamber III held that enforced disappearance is considered a “continuous crime as long as the perpetrators continue to conceal the fate and whereabouts of the person or persons who have disappeared and these facts remain unclarified” (*Situation in Burundi*, 25 October 2017, para. 121). The continuous nature of the crime is recognized also in international human rights law instruments[12] and, as noted by the WGEID,

an enforced disappearance is a unique and consolidated act, and not a combination of acts. Even if some aspects of the violation may have been completed before the entry into force of the relevant

national or international instrument, if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented. Thus, when an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction.[13]

### ***Analysis:***

#### ***i. Definition***

According to Article 7(2)(i), enforced disappearance of persons means "the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or 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". The Elements of Crimes clarifies that both the deprivation of liberty and the refusal to acknowledge this deprivation or to give information on the fate or whereabouts of such person or persons must have been carried out by, or with the authorization, support or acquiescence of, a State or political organization.

#### ***ii. Requirements***

In addition to the contextual elements required for all crimes against humanity, the following needs to be proved:

##### ***a. Material elements***

The two central material elements are: 1) an arrest, detention or abduction of a person or persons, and 2) a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons. According to the Elements of Crimes, there must be an objective nexus between these material elements (Elements of Crimes, Article 7(1)(i), item 2).

Furthermore, the deprivation of liberty needs to have been carried out by, or with the authorization, support or acquiescence of, a State or political organization. In this respect, there is an overlap with one of the general elements of crimes against humanity: "part of a widespread or systematic attack directed against any civilian population", with "attack" being defined as "a course of conduct [...] pursuant to or in furtherance of a State or organizational policy to commit such attack" (Articles 7(1) and 7(2)(a)).

With regard to the element of 'deprivation of liberty', the ICC Pre-Trial Chamber III held that it understands the terms "arrest, detention or abduction" to "cover comprehensively any form of deprivation of liberty of a person against his or her will", thus encompassing also the scenario in which "a victim, initially arrested and detained lawfully, may be 'disappeared' in custody" (*Situation in Burundi*, 25 October 2017, para. 118).

The definition of enforced disappearance enshrined in Article 7(2)(i) departs from that provided by international human rights instruments,[14] as it explicitly acknowledges that, besides by State agents, the crime can be perpetrated also by, or with the authorization, support or acquiescence of a political organization. The ICC Pre-Trial Chamber interpreted the 'organizational policy' requirement, affirming that the organization does not need to be exclusively political or have elements of state power, but may be any criminal organization with the capability to undertake a widespread or

systematic attack and cause large scale harm.[15] This would encompass non-state actors, or private individuals, who exercise *de facto* power.[16]

Other international criminal courts apply a similar criterion (*Nuon Chea and Khieu Samphan*, 17 November 2018, para. 754) and also international human rights mechanisms are increasingly looking into non-state actors as potential perpetrators of the crime.[17]

The refusal to acknowledge the deprivation of liberty and the concealment of the fate or whereabouts of the disappeared is the distinguishing element of enforced disappearance and is present in all definitions of the crime. The ICC Pre-Trial Chamber III held that

the refusal to acknowledge or give information encompasses outright denial or the giving of false information about the fate or whereabouts of the victim. Whether or not the victim's family lodges a formal complaint, the State authorities are duty-bound to commence an impartial and thorough investigation *ex officio* without delay into the disappearance of the victim (*Situation in Burundi*, 25 October 2017, para. 118).

In this context, it is noted that, whether or not the family of the victim lodged a formal complaint, the State has the duty to carry out *ex officio* an effective investigation into the disappearance of the victim without delay; equally, the political organization has the obligation to account for disappeared persons and inform the families of their fate and whereabouts (*Situation in Burundi*, 25 October 2017, para. 118).

#### ***b. Mental elements***

According to the Elements of Crimes, the perpetrator must be aware that the deprivation of liberty “would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons” or that “[s]uch refusal was preceded or accompanied by that deprivation of freedom”.

Article 7(2)(i) adds a specific intent for this crime: “the intention of removing [the person or persons deprived of their liberty] from the protection of the law for a prolonged period of time”.

The ICC Pre-Trial Chamber III found that the removal of the victim from the protection of the law is a result of the enforced disappearance, “i.e. the victim no longer has access to judicial assistance and legal procedures” (*Situation in Burundi*, 25 October 2017, para. 120). It further clarified that:

oftentimes the manner in which the person is deprived of his or her liberty allows the Chamber to infer the intention to remove the victim from the protection of the law, such as the lack of a court order for the detention; abduction in cars without licence plates and with tinted windows; detention in secret, unofficial prisons; non-registration of names of the detainees in official records; or capture in desolate areas (*Situation in Burundi*, 25 October 2017, para. 120).

With regard to the referred “prolonged period of time” of the intended removal, neither the ICC Statute nor the Elements of Crimes provide any indication of how long it should be to meet the threshold of the ICC Statute. The ICC Pre-Trial Chamber III held that a “period of several months or years certainly fulfils that requirement” (*Situation in Burundi*, 25 October 2017, para. 120).

It has been observed that denying access to the outside world to a detainee for more than 24 or 48 hours would amount to a violation of the disappeared person's fundamental rights and should be regarded as prolonged enough to consider that the person is “outside the protection of the law”, bearing in mind that

in contemporary English usage, ‘prolong’, simply means ‘to make something longer; to extend or protract’. Therefore a prolonged period of time simply means an extended period of time, not a specific period of time in hours, days, weeks, months or years. Given that the moment that there has been a refusal to acknowledge or give information an enforced disappearance has occurred, the

reference period which has been prolonged should be as short as possible [...]. For determining those enforced disappearances over which the Court would be able to exercise jurisdiction, the reference period should not be longer than the short period of time under international law and standards which the State may deny a detained person access to families, counsel, independent medical attention or a judge.[18]

In the decision on the confirmation of the indictment against *Thaçi et al.*, the Pre-Trial Judge of the Kosovo Specialist Chambers observed that “the definition of enforced disappearance under customary international law does not establish a minimum period for the victim’s removal from the protection of the law”.[19]

### ***Cross-references:***

Elements of Crime.

Elements Digest.

Means of Proof Digest.

### ***Doctrine:***

- 1 Kai Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing*, Oxford University Press, 2014, pp. 108-113 (<https://www.legal-tools.org/doc/jjcr50/>).
- 2 Cherif M. Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application*, Cambridge University Press, 2011, pp. 448-452 (<http://www.legal-tools.org/doc/83b13d>).
- 3 Brian Finucane, “Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War”, in *The Yale Journal of International Law*, Vol. 35, 2010, pp. 171-197.
- 4 Christopher K. Hall and Larissa van den Herik, “Article 7 Crimes Against Humanity, (i) ‘Enforced Disappearance of Persons’”, in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd. ed., C.H. Beck/Hart/Nomos, Munich/Oxford/Baden-Baden, 2016, pp. 226-232, 286-292 (<http://www.legal-tools.org/doc/040751/>).
- 5 Timothy L.H. McCormack, “Crimes Against Humanity”, in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford/Portland, 2004, pp. 197-198 (<http://www.legal-tools.org/doc/ba5c37>).
- 6 William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd. ed., Oxford University Press, 2016, pp. 202-205 (<http://www.legal-tools.org/doc/b7432e>).
- 7 William A. Shabas, “Defining enforced disappearance as a crime against humanity”, in Milène Bidault, Mouloud Boumghar, Olivier de Frouville and Laurent Trigeaud (eds.), *Réciprocité et universalité: sources et régimes du droit international et des droits de l'homme: mélanges en l'honneur du Professeur Emmanuel Decaux*, Pedone, Paris, 2017, pp. 449-466.

- 8 Marieke Wierda and Thomas Unger, "Enforced Disappearances", in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, pp. 309-310 (<http://www.legal-tools.org/doc/7be65f>).
- 9 Georg Witschel and Wiebke Rückert, "Article 7(1)(i)-Crime Against Humanity of Enforced Disappearance of Persons", in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, pp. 98-103 (<http://www.legal-tools.org/doc/e34f81>).

**Author:** Gabriella Citroni (the views here expressed are those of the author alone and do not necessarily reflect the position of the UN Working Group on Enforced or Involuntary Disappearances).

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**Footnotes:**

- [1] Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133, 18 December 1992, Preamble ('1992 Declaration') (<https://www.legal-tools.org/doc/534c27/>).
- [2] Inter-American Convention on Forced Disappearance of Persons, 9 June 1994, Preamble ('1994 Inter-American Convention') (<https://www.legal-tools.org/doc/7c67e0/>).
- [3] International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, Preamble and Article 5 ('2006 International Convention') (<https://www.legal-tools.org/doc/0d0674/>).
- [4] Nuremberg International Military Tribunal, Judgment, 30 September 1946-1 October 1946, reprinted in *The Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945 – 1 October 1946*, vol. I (Nuremberg: International Military Tribunal, 1947), pp. 222-223 (<https://www.legal-tools.org/doc/f21343/>).
- [5] United States Military Court at Nuremberg, *Prosecutor v. Altstötter et al.*, Judgment, 4 December 1947, pp. 75, 1042, 1057-1058 (<https://www.legal-tools.org/doc/04cdaf/>).
- [6] ICTY, *Prosecutor v. Kupreškić et al.*, Trial Chamber, Judgment, 14 January 2000, IT-95-16-T, para. 566 (<https://www.legal-tools.org/doc/a4a6ae/>).
- [7] ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Chamber, Judgment, 17 January 2005, IT-02-60-T, para. 653 (<https://www.legal-tools.org/doc/7483f2/>).
- [8] ECCC, *Prosecutor v. Nuon Chea and Khieu Samphan*, Supreme Court Chamber, Appeal Judgment, 23 November 2016, No. 002/19-09-2007-ECCC/SC, paras. 647-653 (<https://www.legal-tools.org/doc/e66bb3/>); and *Prosecutor v. Nuon Chea and Khieu Samphan*, Trial Chamber, Judgment, 17 November 2018, No. 002/19-09-2007/ECCC/TC, para. 755 ('*Nuon Chea and Khieu Samphan*, 17 November 2018') (<https://www.legal-tools.org/doc/8v76lk/>).
- [9] Antonio Cassese i., *Cassese's International Criminal Law*, 3rd ed., Oxford University Press, 2013, p. 98 (<https://www.legal-tools.org/doc/7ca295/>).
- [10] General Comment on Enforced Disappearance as a Crime against Humanity, UN Doc. A/HRC/13/31, 21 December 2009, para. 39 (para. 14 of the general comment) (<https://www.legal-tools.org/doc/b2546c/>).
- [11] ICC, Pre-Trial Chamber III, *Situation in Burundi*, Decision pursuant to Article of the 15 ICC Statute on the Authorization of an Investigation (public redacted version), 25 October 2017, ICC-

01/17-X-9-US-Exp, paras. 48, 117-129 and 182 ('*Situation in Burundi*, 25 October 2017') (<https://www.legal-tools.org/doc/8f2373/>).

[12] 1992 Declaration, Article 17; 1994 Inter-American Convention, Article III; and 2006 International Convention, Articles 5 and 8.

[13] General Comment on Enforced Disappearance as a Continuous Crime, UN Doc. A/HRC/16/48, 26 January 2011, para. 39 (paras. 2-3 of the general comment) (<https://www.legal-tools.org/doc/ab6f07/>).

[14] 1992 Declaration, Preamble; 1994 Inter-American Convention, Article II; and 2006 International Convention, Article 2.

[15] ICC, Pre-Trial Chamber II, Decision pursuant to Art. 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 90 (<https://www.legal-tools.org/doc/338a6f/>).

[16] Irena Giorgou, "State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 5, pp. 1001-1021. See also Alexander Wolffenbuttel, "Enforced Disappearances: Applicable to Political Organizations?", in *Virginia Journal of International Law*, 2021, vol. 61, no. 150, pp. 160-174.

[17] Statement on non-State actors in the context of the International Convention for the Protection of All Persons from Enforced Disappearances, UN Doc. CED/C/10, 2 May 2023 (<https://www.legal-tools.org/doc/j3jobwsx/>).

[18] Christopher K. Hall and Larissa Van den Herik, "Article 7 Crimes against humanity", in Otto Triffterer (ed.), *The Rome Statute of the International Criminal Court – Observers' Note*, 2nd ed., C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2008, note 155, pp. 290-291 and fn. 953.

[19] KSC, *Prosecutor v. Thaçi et al.*, Public Redacted Version of Decision on the Confirmation of the Indictment against Hashim, Thaçi Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020, KSC-BC-2020-06/F00026/RED/1, para. 75 (<https://www.legal-tools.org/doc/nj9vgi/>).