



STATUS OF IMPLEMENTATION OF DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE IN SYRIA

Syrian Legal Development Programme

Contact details: v.bellintani@sldp.ngo and obai.k@sldp.ngo

The present submission provides an analytical legal study of the status of the Declaration in the domestic legal order in Syria, in relation to Article 4 and Article 18.

In Syria, the act of "enforced disappearance" is not criminalised as an autonomous crime according to international standards in the Syrian penal code. However, Syria claimed that such conduct can be criminalised under the category of abduction and deprivation of liberty as an ordinary crime. We argue that the legal framework is not compatible with the Declaration since it fails to include an autonomous offence for the crime of enforced disappearance. We are also alarmed by the interpretation of the Syrian government which fails to acknowledge the characterizing element of enforced disappearance, the refusal to provide information. In addition to the inability of the legal framework to address enforced disappearance, Syria has also enacted two different amnesties or similar measures that lead to impunity and can be applied to acts of enforced disappearance if categorised as abduction and deprivation of liberty, in violation of Article 18 of the Declaration.

1. Criminalization of enforced disappearance as autonomous offence in national laws

The Syrian Arab Republic asserted in its recent national report submitted to the Working Group on the Universal Periodic Review that the term "enforced disappearance" does not exist in Syrian law. Nonetheless, it argued that first of all, "the law does penalize abduction and deprivation of liberty" which, according to the Syrian government, are internationally classified as enforced disappearance. In this regard, it made explicit reference to Legislative Decree No. 20 of 2013 which criminalizes the act of abduction if committed with a specific intention.¹

The crime of abduction and the crime of deprivation of liberty are criminalized in the Syrian Penal Code in Article 555 and Article 556.² It is worth noting that the crime of abduction is not only criminalised by the

¹ See "The term "enforced disappearance" does not exist in Syrian law. Nonetheless, the law does penalize abduction and deprivation of liberty, which are internationally classified as enforced disappearance. Under Legislative Decree No. 20 of 2013, anyone who abducts another thereby depriving that person of liberty with the intention of achieving political, material or sectarian ends, of reprisal and revenge or of demanding ransom is liable to life imprisonment with hard labour. If the abduction leads to the death or permanent disability of the victim, or if the victim is sexually assaulted, the perpetrator is liable to the death penalty. The penalty also extends to anyone who seeks to practise extortion in any form against the victim, the victim's spouse or any of the victim's direct or indirect antecedents or descendants", Extracted from Universal Periodic Review, National Report Submitted in Accordance with Paragraph 5(1) of the Annex to Human Rights Council Resolution 5/1: Syrian Arab Republic, UN Doc. A/HRC/WG.6/40/SYR/1, 17 November 2021, para 44, available online at: <https://undocs.org/en/A/HRC/WG.6/40/SYR/1>

² The text of the aforementioned Articles reads as follows: Article 555 ("(1)Whoever deprives another person of his personal liberty by any means shall be jailed from six months to two years. (2) The penalty for the offender should be reduced, as stipulated in Article 241, its third paragraph, if the kidnapped person is released spontaneously within forty-eight hours without having committed another crime, whether a felony or a misdemeanor"); Article 556 (as amended by Law No. 21 of 2012) ("(1) the criminal shall be sentenced to temporary hard labor: (a) If the period of deprivation of liberty exceeds one month, (b) if the one whose freedom is deprived is inflicted with physical or mental torture, (c) if the offense is committed against an employee while he or she is on duty, (2) whoever abducts by violence or deception a person with the intent of asking for ransom shall be punished with hard labor from ten to twenty years and a fine of double the amount, in addition to the said fine.")



SLDP

Syrian Legal Development Programme
البرنامج السوري للتطوير القانوني

Syrian Penal Code, but also by Decree 20/2013.³ In this case, what characterizes the aforementioned decree is the expansion of the special *Mens Rea* required to aggravate the sentence, which also includes “political, material, and sectarian ends, and revenge”, in addition to ransom which was already included in the ordinary crime of the Syrian Penal Code.

We argue that the legal framework provided above is not compatible with the obligations set out by the UN Declaration since the legal framework fails to include an autonomous offence for the crime of enforced disappearance and lacks the element of the refusal to disclose information on the victim. We believe that the failure to include the characterizing element of enforced disappearance in Syrian laws will have a negative impact on the recognition and exercise of the right to know the truth of families.

First of all, the Syrian government fails in its obligation to criminalize enforced disappearance as an autonomous offence, as provided by Article 4(1) of the Declaration which stipulates that “all acts of enforced disappearance shall be offences under criminal law”. The Syrian government argued that the pre-existing laws on deprivation of liberty and abduction can be utilized to address the specific crime of enforced disappearance. However, in this regard, the WGEID established that it is not sufficient for States to refer to previously existing criminal offences relating to arbitrary deprivation of liberty, torture, or kidnapping.⁴

Secondly, the Syrian government fails to criminalize enforced disappearance in a way that clearly distinguishes it from related offences such as kidnapping and deprivation of liberty.⁵ As provided above, the Syrian Arab Republic has recently stated that enforced disappearance does not exist in the Syrian law, but that Legislative Decree no.20 of 2013 on the crime of kidnapping *de facto* applies to enforced disappearance. Additionally, it referred to the criminalization of abduction and deprivation of liberty, pursuant to Articles 555 and 556, as effectively able to address the crime of enforced disappearance. However, the Syrian government fails to consider that abduction falls into the various forms that deprivation of liberty may take in the context of enforced disappearance, as provided by the preamble of the UN Declaration which reads as follows: “persons are arrested, detained, or abducted against their will or otherwise deprived of their liberty (...)”.⁶

In this regard, we are particularly concerned about the legal interpretation made by the Syrian government of international law. Indeed, by arguing that enforced disappearance consists only of the elements of deprivation of liberty and abduction, the Syrian government fails to acknowledge the characteristic element of enforced disappearance, namely the refusal to provide information. We argue that the analogy made by the Syrian government between the crime of abduction and the crime of enforced disappearance is alarming, for it undermines the very objective of the Declaration and, most of all, it negatively affects the exercise of the right to truth of families of individuals disappeared and,

³ The definition of kidnapping within Decree 13/2021 reads as follows: “Anyone who abducts another, thereby depriving that person of liberty with the intention of achieving political, material, or sectarian ends, of reprisal and revenge or of demanding ransom is liable to life imprisonment with hard labor.”

⁴ WGEID, General Comment on Article 4 of the UN Declaration on the Protection of All Persons from Enforced Disappearance, Un Doc E/CN.4/1996/36, para 54

⁵ Ibid, para 55

⁶ UN Declaration, Preamble: “enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law”





SLDP

Syrian Legal Development Programme
البرنامج السوري للتطوير القانوني

especially, the recognition of the crime of enforced disappearance as continuous crime until the fate and whereabouts of the disappeared have been fully clarified.

This analogy is particularly alarming within the Syrian context, with more than 100,000 reported as disappeared, and specifically in relation to the practice of the Syrian government to provide death certificates to families of disappeared without fully disclosing the fate of the disappeared person, its cause of death and its whereabouts.⁷ While, the crime of kidnapping is considered to cease the moment the act of kidnapping has been completed, the crime of enforced disappearance is a continuous crime that ceases only when the fate and whereabouts of the individual (or those of his or her mortal remains if the person has died) have been fully clarified. Our concern is that, by dismissing the element of the refusal to provide information and failing to acknowledge the subsequent right to truth of families, the Syrian government may exploit this law in order to characterize the systematic acts of enforced disappearance committed in Syria as kidnapping and therefore to flee from its obligation of result of clarifying the fate and the whereabouts of the disappeared individuals.⁸

2. Enactment of amnesty laws applicable to crimes of enforced disappearance

The UN Declaration prohibits the enactment of amnesty laws concerning crimes of enforced disappearance in Article 18. However, the Syrian state is violating such an article by enacting two different amnesty or similar measures that lead to impunity that can be applied to acts of enforced disappearance.

1. Legislative Decree no. 14 of 1969, and Decree no. 64 of 2008

Legislative Decrees 14/1969 and 64/2008 prevent the prosecution of all members of the Syrian state intelligence and police for the crime they have committed while on duty, unless the prosecution is allowed by their superiors, resulting in de facto immunity.⁹ These two decrees have been the main cause of impunity for State actors in Syria and will continue to be so in the coming years, most of all in relation to the tens of thousands of cases of torture, extrajudicial executions and enforced disappearance that State actors have committed since 2011. Nevertheless, we believe that, in addition to the fact of being in violation of Article 18 of the Declaration, these legislative decrees should not apply to the crime of enforced disappearance in view of the continuous nature of such crime.

First of all, international jurisprudence and the experience of the *juicios por la verdad* in Argentina confirm that even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, including the existence of amnesty decrees, the State is

⁷ International Independent Commission of Inquiry on the Syrian Arab Republic, Death Notifications in the Syrian Arab Republic, November 2018

⁸ Human Rights Committee, Case *Prutina et al. v. Bosnia and Herzegovina*, Views of 28 March 2013, Individual Opinion of Mr. Fabián Salvioli

⁹ Article 30 of Legislative Decree 14/1969 states that "This law shall not be published and goes into effect on the day of issuance."

However, you can find the analysis of the decree in: "Alternative Report to the Syrian Government's Initial Report on Measures taken to Fulfil its Commitments under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, by Damascus Center for Human Rights Studies, available online at

https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/SYR/INT_CAT_NGO_SYR_48_10106_E.pdf, Page 5-6;

Legislative Decree No. 64 on The Prosecution of Police Officers, Customs and Political Security Personnel, Before the Military Court 2008, Art 1. Available at:

<http://www.parliament.gov.sy/arabic/index.php?node=5585&nid=16268&First=0&Last=3&CurrentPage=0&mid=&refBack=>





SLDP

Syrian Legal Development Programme
البرنامج السوري للتطوير القانوني

obligated to use all its means at its disposal to investigate the fate and whereabouts of victims of enforced disappearance. This means that, even if the State aims to flee its obligations, Syria still remains obligated to clarify the fate and the whereabouts of these individuals, which is an obligation of result. Additionally, the particular wording of the legislative decrees (“while on duty”) seems to indicate a specific temporal timeframe applicable to the immunity laws, indicating that these immunities would apply as long as the crime started and finished within the temporal limit of the duty service of the perpetrator. In this regard, since enforced disappearance is a continuous crime until the fate and whereabouts (which in case of death include the remains of the victim) are fully clarified, if elements of the crime are continuing outside of the period in which the perpetrator was on duty, specifically the refusal to provide information on the fate and whereabouts, the perpetrator should be investigated and prosecuted.¹⁰

2. Legislative Decree no. 13 of 2021

The Syrian government issued Legislative Decree No. (13) of 2021 to grant a general amnesty for crimes committed before May 2, 2021.¹¹ This decree provides amnesty from punishment to any perpetrator of the crime of kidnapping pursuant to Legislative Decree 20 of 2013 if the person kidnapped was released before the issuance of the legislative decree without causing any permanent disability or if the perpetrator releases the victim within ten days from the entry into force of the decree. The provisions of the amnesty decree also apply to the crimes stipulated in Article 556 of the Penal Code promulgated by Legislative Decree No. 148 of 1949, as amended by Legislative Decree No. 1 of 2011 and Law No. 21 of 2012. The amnesty therefore applies both to the crime of kidnapping in the specific context set out by Decree 13/2021 but also as ordinary crime within the Penal Code.

In the previous section we have argued that the existing legal framework in Syria (Syrian Penal Code Articles 555 and 556, Decree 20/2013) is not applicable to the crime of enforced disappearance. Nevertheless, we have highlighted our concern at the possible utilization of this law by the Syrian government to flee from the continuous obligations that the specific nature of enforced disappearance entails. Within this context, we are also concerned that the Syrian government may exploit the amnesty laws applicable to the existing legal framework as an additional tool to establish impunity over acts of enforced disappearance in Syria. Therefore, we provide here below our analysis of the compatibility of such amnesty law in relation to the UN Declaration, in the view that the Syrian government will utilize it in relation to the act of enforced disappearance.

The amnesty provided by Decree 13/2021 is conditional on the termination of the kidnapping and in releasing the person alive without causing a permanent disability. The Syrian government may argue that this conditionality may bring up the possible application of mitigating circumstances in relation to perpetrators of enforced disappearance, pursuant to Article 4(2) of the Declaration, which allows for

¹⁰ WGEID, General comment on enforced disappearance as continuous crime, A/HRC/16/48, para 39

¹¹ Legislative Decree No. (13) on Granting General Amnesty for Crimes Committed Before (2.May.2021) 2021 Available at: <http://www.moj.gov.sy/ar/node/790> Art 7.

Unofficial translation to Art 7:

“A- Amnesty for the entire penalty for the crime stipulated in Article 1 of Legislative Decree No. /20/ of 2013:

1- If the kidnapper was released prior to the date of this legislative decree being issued without causing him any permanent disability.

2- If the kidnapper takes the initiative to release the kidnapped safely and without any consideration or hand him over to any competent authority within ten days from the date this legislative decree comes into force.

B- The provisions of the previous paragraph shall apply to the crimes stipulated in Article 556 of the Penal Code promulgated by Legislative Decree No. 148 of 1949, as amended by Legislative Decree No. 1 of 2011 and Law No. 21 of 2012.”





SLDP

Syrian Legal Development Programme
البرنامج السوري للتطوير القانوني

mitigating measures in cases, inter alia, when perpetrators take actions that lead to bringing the victims forward alive.¹²

However, in General Comment on Article 18, the WGEID argues that those mitigating procedures are only complying with the UN Declaration if certain circumstances are met. Those include:

- a. The existence of alternative criminal sanctions if imprisonment is not possible.

In the Syrian Penal Code, any general amnesty extinguishes criminal prosecutions, discontinues ongoing ones and renders invalid any verdict and related punishment order in previous judgments. This means that any perpetrator prosecuted based on the aforementioned legal framework would be released. In this context, the amnesty decree only allows the possibility for the injured party to request the payment of compensation. While the WGEID considers the payment of compensation a form of alternative criminal sanction compatible with the Declaration, we argue that in Syrian law, compensation cannot be considered a form of criminal sanction. The compensation in this context would be awarded as part of a civil procedure and would not constitute a criminal sanction. This is quite clear from the articulation of the amnesty decree which says that the amnesty granted is on the entire criminal punishment for the crime of abduction. It is also clear from Article 150 of the Syrian Penal Code: "The general amnesty drops every original, subsidiary or additional penalty".

- b. Satisfaction of victims' rights to remedy, justice, truth, guarantees of non-recurrence and satisfaction

The possibility of only having access to a civil lawsuit as a form of remedy violates the right of victims and families to effective remedy, as provided by Article 19 of the Declaration and further clarified by the WGEID and the UN Basic Principles.¹³ According to the Syrian law, when ordering compensation to a victim, the judge has the ability to order the provision of other forms of remedy, including restitution and rehabilitation, if the case applies.¹⁴ However, as provided above, the fact that this form of remedy is devoid of any criminal sanction to perpetrators does not constitute a form of satisfaction to the victims and their families, especially that the burden of following up the civil compensation will be put on the injured party, which disproportionately affects the exercise of the right to remedy and compensation of the victim.

Moreover, this amnesty decree deprives victims of the most straightforward guarantees of non-recurrence. The Syrian Penal Code requires the aggravation of the penalty for offenders who have been convicted of a previous offence and recommitted a new crime subsequent to the sentence.¹⁵ As for the existence of a general amnesty, the offence covered by the amnesty is not considered a criminal precedent and thus will not be registered as a crime in the perpetrator's criminal record. Therefore, if the offender commits a similar act again, it will not be counted as a recommitment.¹⁶ Thus, the punishment

¹² UN Declaration, Article 4(2): "mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntary information which would contribute to clarifying cases of enforced disappearance"

¹³ Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/22/45, 29 January 2013, paras 46-68

¹⁴ Syrian Civil Law issued by Legislative Decree No. /84/ of 1949, Art 172 (2): "The compensation is estimated in cash. However, the judge may, according to the circumstances, and upon the request of the injured person, order the restoration, or order the performance of a specific act related to the illegal wrongdoing as a form of compensation"

¹⁵ About Al Sarraj, *The General Criminal Law*, vol 2 (Publications of the Syrian Virtual University 2018). Page 180,181.

¹⁶ About Al Sarraj, *The General Criminal Law*, vol 2 (Publications of the Syrian Virtual University 2018). Page 208; Bareaa Al Koudsi, *Criminal Procedures*, vol 1 (Publications of the Syrian Virtual University 2018) Page 140.





SLDP

Syrian Legal Development Programme
البرنامج السوري للتطوير القانوني

will not be aggravated, depriving the victims of the simplest form of guarantee of non-recurrence. We wonder to which extent, in a specific context like the Syrian one where repression of basic rights and persecution based on political dissent is still ongoing, this sole form of remedy may be accessible and effective for victims. We therefore believe that the amnesty decree is not compatible with the requirement of ensuring satisfaction and remedy and reparations to the victim.

(c) existence of a peace process or bona fide negotiations with victims, resulting in apologies, expressions and regret and promises to prevent enforced disappearance, (d) criminal prosecutions to run parallel with carefully designed truth and reconciliation process, and (e) establishment of appropriate implementing mechanisms to guarantee the non-recurrence of enforced disappearance.

At the moment, in Syria, there is no genuine peace process, and no attempt has been taken by the Syrian government to address the crimes committed during the conflict in a holistic manner and in collaboration and consultation with victims, as established by UN Special Procedures in a previous communication to the Syrian government.¹⁷ Enforced disappearance continues to be perpetrated in a widespread and systematic manner in Syrian regime detention centres, and no action has been taken to prevent and to terminate these acts, whether within the law or in practice.¹⁸ Additionally, there has been no action taken by the Syrian government to acknowledge the specific act of enforced disappearance, with its particular impact on victims and families, and its widespread and systematic nature, which is further confirmed by the characterization of enforced disappearance as kidnapping in its statements.

¹⁷ Joint Public Communication by Special Procedures to the Syrian Arab Republic, UN Doc. AL SYR 5/2020, November 2020, available online at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=25666>

¹⁸ International Independent Commission of Inquiry of the Syrian Arab Republic, A Decade of Arbitrary Detention and Imprisonment, UN Doc A/HRC/46/55, March 2021, available online at: <https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Detention-report.aspx>

