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# **Internal protection of persons from enforced disappearance: an analytical study on Jordan's non-ratification of the International Convention for the Protection of All Persons from Enforced Disappearance**

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**Abstract:** Enforced disappearance is a crime that witnessed significant attention internationally to confront and prevent such practice. This attention was reflected in the states' internal legislation aiming at fulfilling international obligations. Accordingly, many states have sought to criminalise enforced disappearance of all forms in their laws, guided by the provisions of international conventions and instruments. However, Jordan has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance justifying this by claiming that Jordan has an integrated internal legal system that is capable to confront and prevent this crime. Yet, real confrontation and prevention of this crime are potential only through ratification of this convention and inclusion thereof in the internal laws; otherwise, this crime will not be subject to the national jurisdiction.

**Keywords:** enforced disappearance; protection of persons; involuntary disappearance; protection of persons in Jordan.

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## 1 Introduction

Several terms expressing the exclusion of people from law protection have emerged. Such exclusion is due to various reasons. In addition, this breach has several forms ranging from abduction or detention to physical liquidation outside the law, or death due to detention conditions, amongst other forms, which have been covered by the term 'enforced disappearance' or 'involuntary disappearance'.

While enforced disappearance is sometimes committed during armed conflicts or by cruel regimes, it can also be perpetrated in peace time and by believed democratic governments. In fact, this practice has been applied to make quiet political challengers. However, it was also used to fight organised crime or terrorism, and then it had the form of secret arrests.<sup>1</sup>

The International Convention for the Protection of All Persons from Enforced Disappearance was adopted in December 2006 by the General Assembly of the United Nations in its Resolution No. 61/177, opened to signature on February 6, 2007, and enacted on December 23, 2010.

The convention explicitly stipulates that any person shall have the absolute right to be protected from enforced disappearance. The convention furthermore stresses on that the broad or methodical application of enforced disappearance does constitute an express crime that is directed against humanity and that shall not be protected through statute limitations.<sup>2</sup>

Enforced disappearance is considered a crime by virtue of the provisions of international law, furthermore, it is considered as a breach to many different human

rights, and this includes, but not limited to, the right to liberty and personal security, legal personality, not to be exposed to torture or cruel, inhuman or degrading treatment, fair trial and the right to life. Furthermore, such a crime does breach the social, cultural and economic rights of disappeared people and their own families.<sup>3</sup> Enforced disappearance as a crime is considered on going until affirming the fate and location of the disappeared person. Even when it is assumed that the disappeared person was subjected to an arbitrary execution, the discovery of human remains or personal belongings should be considered.<sup>4</sup> It is also considered an ongoing crime when the whereabouts of the disappeared person are not identified or their remains are not found and identified. Although international law is highly concerned in facing this serious crime, Jordan has not signed and ratified this convention.<sup>5</sup>

The problem addressed in this study is the belief of the states that have not ratified the convention that the internal legislation is capable of tackling this crime despite its seriousness, complexity, and impact on individuals' freedoms and human rights, without dedicating penal provisions to independently criminalise this act. Some states have legislated the criminalisation of this act as a violation of their obligation to guarantee the right to freedom and tended to define controls and cases that only restrict this act. They did not deal with it as an independent act of aggression deserving criminalisation. This practice is a form of refusal to recognise this crime as part of aggressions exercised by the authority, especially in exceptional circumstances such as wars, political and military coups, and other circumstances in which countries witness a state of political instability.

This study aims to highlight the impact of international law on defining the internal concept of enforced disappearance, and the forms of internal protection of persons from enforced disappearance, whether by constitutional, legal or judicial protection. Finally, light was shed on the protection of persons from enforced disappearance under the legal system of Jordan.

## **2 Methods**

The study employs a descriptive-analytical method in describing and analysing legal provisions and relevant literature related to constitutional, legal, and judicial protection of persons from enforced disappearance, and determining the extent of the impact of international law on internal legislation in defining the concept of enforced disappearance in the Jordanian law.

## **3 Impact of international law on defining the internal concept of enforced disappearance**

International law can be optimally applied by states showing their desire to implement and comply with the principles of international law by reforming the internal legislative system, in line with their obligations as international community members, especially in relation to respecting the dignity of humans and preserving all their rights and freedoms, and most important of which is the right to freedom and security.

### 3.1 *The need for states to include the enforced disappearance crime in law*

The concept of 'missing person' is much broader than the concept of 'person subjected to enforced disappearance'. International humanitarian law defines the missing person as a person whose family has no news about or who has been reported as missing, according to reliable information, due to an international or non-international armed conflict, a state of internal violence or internal unrest.<sup>6</sup> In some cases, a missing person is a victim of enforced disappearance. Enforced disappearance is always a crime, but not all missing persons are subjected to enforced disappearance.<sup>7</sup>

Although the declaration does not include a clear specific definition of enforced disappearance, it includes several elements representing the essence of protection from this significant violation. Enforced disappearance crime is defined under the provisions of Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law."

The definition stipulated in the International Criminal Court Statute differs from the ones stipulated in the international human rights instruments as it includes amongst the potential perpetrators of enforced disappearance the political organisations, or persons or groups of persons whose acts are tolerated, approved, or supported by such organisations. In addition, the act should have been committed with the intention of excluding the victim from law protection for an extended period. Elements of crimes and judicial precedents of the International Criminal Court provide no indication regarding the duration of this period so that the act is covered by the article.<sup>8</sup>

Responsibility for violations of international human rights law may be borne by several parties, namely: state apparatus such as armed forces, persons and entities authorised by the state to exercise powers, persons or groups that act based on the state's instructions and directives or those under its control, and individuals and groups recognised or adopted by the state.<sup>9</sup>

The various aspects for protecting human dignity and freedom were of interest in constitutions and internal laws. However, these laws differed in criminalising acts that constitute enforced disappearance under the international concept, whether in terms of terminology or penalties.

International and internal jurisdiction stressed the importance of ratifying the convention and the necessity of this procedure so that the convention becomes binding. The decision issued by the International Court of Justice on July 1, 1952, regarding the *Ambatios Case*, which stated that "Ratification of a convention, if stipulated, shall be a primary condition for the convention to come into force."<sup>10</sup> As well, the internal jurisdiction confirmed this when Greece refused to extradite an American citizen due to not ratifying the extradition convention concluded between them on May 6, 1931.<sup>11</sup>

The concept of international enforced disappearance had and will have no effective impact on internal laws, unless states adopt effective and expedited measures to amend their penal legislation in accordance with their international obligations, including Article 4 of the International Convention for the Protection of All Persons from Enforced

Disappearance. This is an obligation for the state, regardless of the nature of international obligation imposed, in all aspects. It is worth noting that jurisprudence sets the state's liability for the acts of its apparatus, whether legislative, executive, or judicial, under specific conditions, when breaching its international obligations.<sup>12</sup>

The impact of international law on internal laws is evident by directing convections' member states to amend and activate their internal laws to confront enforced disappearance. Article 3 of the convention requires member states to investigate the acts indicated in Article 3 of the convention, and Article 4 expressly stipulates that "Each state party shall take the necessary measures to ensure that enforced disappearance constitutes an offense under its criminal law."

This commitment implies that states should not only criminalise the acts that are usually associated with enforced disappearance, such as abduction, illegal arrest, unlawful deprivation of liberty, and torture but rather enforced disappearance should be defined as an independent crime. In addition, in accordance with Article 6 of the convention, member states should hold "any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance" criminal liability.<sup>13</sup> Prohibition of enforced disappearance and the obligation of states to investigate enforced disappearances and punish persons committing them have acquired the status of *jus cogens*.<sup>14</sup>

States' commitment to the principles of criminal responsibility stipulated in Article 6 is mostly in line with the states' criminal legislation that often recognises essential principles in criminal law, such as attempted crimes of all kinds, criminal participation or inciting, or acts that are independent of the crime but penalised due to its relation to the criminal act.

These laws shall accordingly be an appropriate environment in which the principles and provisions of the convention are applied. Legislative amendments may be made in the states' laws, if necessary, to ensure criminalising the attempts to commit, assisting, justify, contribute to planning, conspire to commit, incite, keep silent against, cover-up, or facilitate in any other manner commission of this crime.

Consequently, the concept of enforced disappearance crime has become broad to include the perpetrator, abettor, instigator, any person initiating it, or any person contacting therewith in any form. This will be reflected in the concept of enforced disappearance in internal laws.

Due to the importance of this crime, internal laws are assumed to provide for initiating investigations even without receiving a complaint, promptly and effectively, as soon as signs of enforced disappearance appear, and even if such signs are press reports. The state should ensure that investigations are completed transparently and promptly, and all documents are reviewed by the investigation committee in accordance with Article 12 of the convention without any obstacles.

The convention does not consider enforced disappearance as a political crime and this has a significant impact. This results in impermissibility to refuse to extradite wanted persons based on this reason. Indeed, member states should consider enforced disappearance as a crime requiring extradition of perpetrators and consider the convention as a legal basis for extradition in case the states require that there should be an extradition treaty with the other state while such a treaty does not exist.<sup>15</sup>

### *3.2 Alignment of internal laws with international obligations and protection reinforcement factors*

In general, international conventions related to human rights oblige the parties thereof to implement the provisions of these conventions either immediately by issuing the necessary legislation or amending or cancelling the provisions that are unaligned with the new international obligations, or by the gradual implementation of the provisions of these conventions by the states to ensure alignment of the provisions of the convention and the state's internal political, economic, cultural, or financial conditions related to the convention. Regardless of the implementation method of the provisions of treaties, the national legislation – even it is the most important – shall not be the only method for this purpose, as governments should take administrative, judicial, economic, social, educational measures, amongst others, to achieve consistency and alignment of international obligations with its internal system.<sup>16</sup>

The state's duty to protect human rights and dignity is based on the grounds that the humanity of mankind is indivisible, and states' failure to commit to protecting human rights is unacceptable. Accordingly, no state may undermine or diminish such rights under any circumstances. Protection of such rights does not require the relevant state to take long-term or costly measures, but rather to refrain from violating them or cease violation if any.<sup>17</sup>

Interaction between considerations of state sovereignty and superiority of international law led to establishing general rules governing the relationship between general international law and internal law, especially those conventions related to human rights as their objective is directly oriented to the benefit of individuals, unlike other conventions that are primarily oriented to states. In addition, the states' addressing of individuals' rights is no longer an internal affair, which required transferring the rules relating to individual rights from international law to internal laws in a manner ensuring their strength and obligation. Internal laws are the only guarantee to facilitate the integration of international provisions into the states' societies. However, this raises a question on the legal basis of the relationship between conventions addressing human rights and national legislation on the one hand, and a question on the regulatory basis of this relationship on the other hand.

The legal basis is represented in the necessity to apply these conventions in the place in which the person exists, and in all states with no exceptions. As for the regulatory basis, it depends on the state's internal legal system, which shows the state's sovereignty as one of the basic principles on which international relations are based within the framework of respect for internal and external sovereignty in the international community.<sup>18</sup>

Currently, we notice that internal laws have been affected by the concept of international law and have complied therewith due to several factors, including the state's involvement in the international community, as well as to avoid international isolation, and to achieve financial and economic interests and the various benefits. For this purpose, states sought to cancel, amend and introduce internal legislation to ensure achievement thereof. It is no longer acceptable to have legislation contradicting the international conventions in a manner preventing the application of provisions thereof. This cannot be invoked in the international community, which requires the state to take measures to implement its obligations. One of the requirements of alignment between internal legislation and the provisions of international conventions related to enforced

disappearance is that states adopt the policy of enhancing protection from enforced disappearance by activating the practical and legislative mechanisms for implementing the international humanitarian law at the national level, such as establishing a national committee for international humanitarian law to develop plans to achieve the objectives thereof and contribute to activating the role of government and non-government institutions in implementing the rules of international humanitarian law.<sup>19</sup>

As enforced disappearance is one of the crimes affecting the lives and freedoms of individuals, states should seek to enhance protection against this crime at all levels, including increasing knowledge and awareness of individuals on their rights provided for in the international law or constitutions and internal laws. Hence, individuals' knowledge of their rights and means of protection thereof represents an important component of avoiding individuals to be exposed to any violation, including enforced disappearance of all forms. Awareness of individuals is achieved in several ways, such as developing a clear national implementation plan supported by all segments and classes of society, including ministries, government and non-government institutions, research centres, universities, schools in addition to mosques, places of worship and religious institutions.<sup>20</sup>

#### **4 Legal protection of persons from enforced disappearance**

Legal protection is decided according to the first law in the state, which is the constitution. It is also decided according to the ordinary laws that fall in the lower level of the constitution. They are supposed to be in line with the provisions of the constitution; otherwise, they will be subject to appeal due to violating the provisions of the constitution.

##### *4.1 Constitutional protection*

The international law system impacts the constitutions and laws of states, and they all constitute the legal basis for criminalising enforced disappearance, especially the provisions of the constitution. Constitutions guarantee the protection of the various rights and freedoms of individuals, including the right to life, security, and freedom, and the right to protection from detention, arrest, imprisonment, disappearance, or arbitrary arrest, all of which lead to enforced disappearance. States seek to create guarantees in their constitutions, whether in a general manner that includes general principles while the state's authorities undertake detailing such guarantees, or in a detailed manner that includes precise details which is the most protective method for the individuals' rights and freedoms. Such guarantees shall include stipulating prohibition of enforced disappearance in the constitutional texts as it is the supreme law of the state that directs all state's laws, and no law may be issued in contravention of the constitution. Therefore, the absence of criminalisation of enforced disappearance in constitutions means that it is possible to issue laws involving a violation of some forms of enforced disappearance on the one hand, and the explicit prohibition of such forms leads to the issuance of penal laws criminalising and imposing a penalty on these acts on the other hand.<sup>21</sup>

Criminalising enforced disappearance in constitutions does not necessarily reduce committing this crime, as the constitutional provisions require guarantees for

implementation thereof, even if they are well-drafted. Many constitutions contain a number of prohibited cases, but the practical application reflects otherwise, especially in non-democratic states or states that newly adopted democracy.<sup>22</sup>

Notwithstanding the position of international law represented in the necessity of criminalising enforced disappearance in the constitutional provisions, in which states are supposed to direct their constitutions and internal laws to prohibit enforced disappearance by explicit provisions and inclusion of forms thereof<sup>23</sup>, most constitutions indicated the forms of enforced disappearance by referring to prohibiting arrest, imprisonment, detention, deportation or exile, etc., which are some of the forms of enforced disappearance in the international concept.<sup>24</sup>

#### 4.2 *Rule of law*

Submission of state authorities and individuals to the law guarantees respect for rights and freedoms in any state as laws are applicable to persons in authority and individuals. However, the existence of laws does not necessarily mean the rule of law, especially in states with tyrannical regimes, as their laws are devoid of their content, while rule of law requires legal content that guarantees respect for human rights. Rule of law appears when the legal rule is applied to everyone without discrimination, and when the state's constitution is not violated by suspension, amendment, or cancellation, except in accordance with the constitution itself, and also when the principle of penal legitimacy is respected where crime and penalty are only decided based on provisions as legislation is the only source of criminalisation and penalisation, and the penalty is only decided by a court ruling issued by a competent court.

#### 4.3 *Judicial control on the constitutionality of laws*

The constitution includes provisions prohibiting enforced disappearance. Therefore, the provisions of laws should comply with the constitutional principles. Judicial control may be the key guarantee for laws' compliance with the provisions of the constitution<sup>25</sup>, and control on administration decisions that enforced disappearance is often linked to governments or bodies supported or known by governments. Therefore, decisions issued by the administration in this regard may be subject to the control of the administrative judiciary, as the law aims to balance the achievement of effectiveness in combating crime by the wide powers granted to the competent authorities and the protection of human rights and freedoms of individuals, which is part of the key guarantees protecting persons from deviation or arbitrariness of authorities, which is the commitment of the authorities to the principle of legitimacy and legality that is controlled by the administrative judiciary, which is based on the fact that all administrative actions are within the law limits in its general meaning that includes all binding rules, whether in the constitution, law, or system.<sup>26</sup> French Council of State suggested inadmissibility of absolute prohibition of freedom since absolute prohibition is a comprehensive and total prevention of freedom, which is considered as cancellation thereof, and the administration has no right to cancel freedoms under the pretext of maintaining public order.<sup>27</sup>

The arrest of individuals by the administration is considered an unlawful act violating the governing law. The administration often seeks to justify its decisions by claiming maintenance of public order and public security. In Egypt, the administrative court decided to impose its strict control to verify the validity of the facts mentioned by the

administration as the reason for an arrest decision. The administrative control bodies were required to rely on the administrative detention decision on valid facts regarding the danger of the person against whom the arrest decision was issued on public order. The court considered that affiliation to an extremist group does not justify an arrest and approved its competence to consider, control and verify the facts attributed to the person. However, this consideration of the administrative court started to decrease after establishing the Supreme Administrative Court.<sup>28</sup>

However, the administrative judiciary cannot always counter the administration's decisions when they are based on enforceable laws allowing the issuance of such decisions, because protecting individuals and their freedoms and preventing subjecting them to enforced disappearance shall require an integrated legal, constitutional and judicial system in order to realise the ultimate goal of protecting rights and freedoms.

The key role of the judiciary in confronting enforced disappearance appears before its occurrence or at the beginnings thereof through the public prosecution – which is handled by judges – by effectively controlling the places of detention, arrest, and prisons and investigating torture crimes. The public prosecution exercises this role on a legal basis entitling it to this authority as it is the judicial authority that represents the community and undertakes control on justice and proper application of the law, supervising prisons and detention places, investigating crimes, receiving reports, and other mandates related directly to the forms of enforced disappearance that individuals may be subjected to.

#### *4.4 Compensation for the crime of enforced disappearance*

Detention and torture of persons and possibly concealment of their fate is one of the most common forms of enforced disappearance, and since these forms are often accompanied by a bad psychological state of the disappeared person and their family, national legislation should consider establishing a legal basis that guarantees the state's obligation to compensate the victims of enforced disappearance, in addition to defining the basis for the claim, the party bearing this compensation, the body judging this case, the persons deserving compensation in addition to the grounds and prohibitions of compensation. Although the legal system in many states allows this in accordance with the general rules of compensation for material and moral damages, the dedication of special legal provisions for compensation for victims of enforced disappearance will be a more effective guarantee for such victims and will lead to reducing the occurrence and recurrence of enforced disappearance because compensation is a financial penalty that, in combination with criminal penalty, shall reduce committing enforced disappearance.<sup>29</sup>

International law has been interested in providing compensation for victims of enforced disappearance as Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance guarantees the victim's right to obtain reparation, and restore their dignity, reputation, and the right to obtain compensation in a prompt, fair and adequate manner.

In addition, Article 7/14 of the Arab Charter on Human Rights and Article 9/5 of the International Covenant on Civil and Political Rights stipulated that every person who has been a victim of illegal arrest or detention shall have the right to obtain fair compensation, and this requires states to amend their internal laws to be in line with these conventions.<sup>30</sup>

On the national level, compensation for unlawful detention has not been significantly stipulated in internal laws. However, some states have developed special regulations and provisions for such compensation. The German legislature adopted the idea of compensation, and the Italian legislature did the same in Law No. 447 of 1988, as well as the French legislature in the French Criminal Procedures Law of 1975, and the French judiciary applied this rule and decided the necessity to compensate the arrested person for the losses resulting there from, such as the ruling of the Paris Court issued on October 15, 1969, and its ruling issued on March 3, 1971. Based on these rulings, the French legislature intervened and approved compensation in the French Law of 1975.<sup>31</sup>

Some Arab legislations have adopted compensation for the forms of enforced disappearance, such as the Algerian legislature in Articles 47 and 49 of the constitution, Article 137 b is of the Criminal Procedures Law of 1966, and the Egyptian legislature in Article 57 of the constitution and Article 494 from the Egyptian Criminal Procedures Law.

The national judiciary has the most important role represented in applying the provisions of the law and activating the right to obtain compensation for victims of enforced disappearance using the existing laws, whether the civil laws that address compensation in general rules or criminal laws that address the cause requiring the compensation ruling, as cases of enforced disappearance are in fact crimes and it is normal that proving it in a criminal court will be a robust basis to institute proceedings claiming compensation.

To ensure this, the judiciary of the state should be really independent, as the state is primarily the party responsible for reparation of enforced disappearance victims, or any other violations of human rights. The state has an explicit legal obligation, indicated previously, to undertake reparation by itself, when violations are committed by its representatives or under its authority, and to initiate that by its will without victims of these violations initiating proceedings in court.<sup>32</sup>

## **5 The position of the Jordanian legislature regarding protection of persons from enforced disappearance**

Dealing with human rights issues gained serious attention during the previous decades, in fulfilment of the international obligations imposed on the government of the Hashemite Kingdom of Jordan in the relevant international treaties and conventions. The National Center for Human Rights was established in 2002 to contribute to the protection of human rights and public freedoms in Jordan. Human rights issues also had a share of the constitutional amendments in 2011. Many laws were issued and amended to ensure the protection of and respect for human rights and freedoms.

### *5.1 Personal protection of individuals from unlawful detention*

The Constitution of Jordan guaranteed personal freedom, and paid special attention to guaranteeing human rights and protecting the people from unlawful detention or being subjected to torture or treatment affecting their dignity, and contained provisions to protect all persons within the territory of the state. Protection was not limited to Jordanian citizens as it did in some other cases, such as freedom of opinion in Article 15 of the constitution or the right to hold meetings in Article 16, amongst others, because personal

freedom should be safeguarded for the individual as a human being and residing in the territory of the state, rather than as a citizen connected with the state by nationality.

When reviewing the provisions of the Constitution of Jordan, it is noticed that the term ‘enforced disappearance’ is not used directly, and Articles 7, 8 and 9 guarantee protection from most forms of enforced disappearance as indicated in international conventions. The Jordanian legislature has expanded them recently through the amendments to the Constitution of 2011. Following are the articles related to enforced disappearance.

Article 7 stipulates:

- 1 Personal freedom shall be guaranteed.
- 2 Every infringement on rights and public freedoms or the inviolability of the private life of Jordanians is a crime punishable by law.

Article 8 stipulates:

- 1 No person may be seized, detained, imprisoned or the freedom thereof restricted except in accordance with the provisions of the law.
- 2 Every person seized, detained, imprisoned, or the freedom thereof restricted should be treated in a manner that preserves human dignity; may not be tortured, in any manner, bodily or morally harmed; and may not be detained in other than the places permitted by the law; and every statement uttered by any person under any torture, harm or threat shall not be regarded.

Moreover, Article 9 stipulates:

- 1 No Jordanian may be deported from the territory of the Kingdom.
- 2 No Jordanian may be prohibited from residing at any place; be prevented from movement; or be compelled to reside in a specified place, except in the circumstances prescribed by law.

It must be noted that international conventions ratified by the government of the Kingdom are considered an integral part of national legislation and are superior to internal laws in force. In addition, the Jordanian judiciary has tended to conclude that the international convention cancels any internal provisions violating it, and that the international convention is enforceable and has priority for application to internal law, whether this law was before or after the conclusion of such a convention.<sup>33</sup>

## *5.2 The role of penal laws in protection from enforced disappearance*

The provisions contained in the laws are no less important than those contained in the constitution, as proper application of the constitutional provisions is only made through laws that are compatible in content with the principles and provisions of the constitution. Jordan has many penal laws contributing to enhancing the plans of combating enforced disappearance. Following are the most important ones:

Jordanian Penal Code No. 16 of 1960 as amended; this law includes in Chapter 3 the crimes constituting an infringement of freedom. Article 178 considers that arresting or imprisoning a person in circumstances other than those stipulated by law by any public official is a crime requiring imprisonment. Article 179 imposed imprisonment penalty on

wardens and guards of prisons and rehabilitation institutions who accept a person without a judicial warrant or decision, or if they kept him/her detained after the expiration of his/her detention term. As well, in Article 364, the legislature criminalised the deprivation of persons' liberty.

In the Penal Code, the legislature considered refusal or delay of bringing a detainee or a prisoner before the court a crime requiring imprisonment penalty<sup>34</sup>, as well as any officer or member of the police or gendarmes, who refrains from responding to a legal request made by the judicial authority and the orders issued to release detainees.<sup>35</sup>

Due to the importance of protecting people, especially during an investigation, and the Jordanian legislature's desire to provide full protection at this phase in a manner that preserves the dignity of persons and their right to receive humane treatment, the Jordanian legislature has devoted a special provision to the torture crime that persons may be exposed to during investigations made by the competent authority, as Article 208 has set general and special provisions for this crime in terms of the penalty of imprisonment for up to three years, and then added aggravating circumstances to this crime so that penalty may reach temporary hard labour, and this article obliges the court not to cease enforcing the penalty or consider mitigating factors.<sup>36</sup>

In addition to the Penal Code, the Military Penal Code imposes imprisonment penalty in Article 21 thereof on whoever keeps a person detained after issuance of a release order. As well, the Prisons and Reinsertion Centers Law No. 9 of 2004 requires the director of the centre in Article 19 thereof to release the inmate upon the end of sentence or detention.

In addition, legislation has a role in establishing centres and institutions concerned with enhancing the rights and freedoms guaranteed in the constitution and international conventions. Law No. 51 of 2006 concerning the National Center for Human Rights was issued in Jordan, involving the centre's objectives represented in promoting the principles of human rights. This law guarantees the independence of the centre to enable it to perform its work freely and competently. This law gave the centre the right to monitor human rights violations, the right to request information and report violations, and affirmed the centre's right to conduct visits to rehabilitation centres and detention centres.<sup>37</sup> The Public Security Directorate established the Transparency and Human Rights Bureau to receive complaints and grievances, investigate and verify complaints, organise statistics and periodicals, and coordinate with official and non-official bodies and organisations concerned with human rights.

In 2002, the Law on National Committee for International Humanitarian Law was issued, which established a specialised committee for cooperation and coordination to promote the principles and provisions of international humanitarian law.<sup>38</sup> Some procedural laws are closely relevant to confronting cases of enforced disappearances. The Criminal Procedures Law is one of the most important laws contributing to the protection of individuals from violations that they may be exposed to during investigation, especially those related to unlawful detention, torture, or bad and inhumane treatment.<sup>39</sup>

The Jordanian legislature entrusted the public prosecutor with the duty to investigate these crimes. Through the authority granted thereto under this law, he/she also has the duty to monitor prisons and detention centres, investigate crimes, receive reports and complaints, and prosecute the violating persons he/she knows about through direct supervision of detention centres. As the public prosecutor is the head of the judicial police in their region, and as all judicial police staff is under their supervision<sup>40</sup>, their role in the investigation of violations committed during an investigation by the judicial police

with suspects is a very important role and contributes to a large extent in confronting the forms of enforced disappearance and reducing them significantly.<sup>41</sup>

### *5.3 Judiciary's role in promoting protection against enforced disappearance*

The judiciary has a significant and pivotal role in confronting enforced disappearance, as judicial rulings, in addition to being the means to impose a penalty, whether civil or criminal, contribute to a large extent through the jurisprudence in enhancing the legal system, especially through the legal principles included in the jurisprudence of courts.

The Jordanian legislature authorised the administration to arrest any person representing a danger to the public order. The Administrative Court (formerly called the 'Supreme Court of Justice') monitors the legal characterisation of the facts attributed to the person in terms of seriousness and validity in its decision and whether it constitutes a crime penalised by law or not. If it is a crime, the court decides to cancel the administrative decision as it violates the jurisdiction of the judicial authority.<sup>42</sup>

The administrative judiciary aims to balance the relationship between the authority and the human beings to regulate rights and freedoms, and it reflects the political and social interaction in society. Due to the constitutional amendments in 2011, a two-layered administrative judiciary was established after the Jordanian administrative judiciary was represented only by the Supreme Court of Justice. This paper will review some decisions of the Supreme Court of Justice, as the administrative court was formed a short time ago, and it did not issue rulings sufficient to give a public perception about its performance at this phase. The court had many jurisprudences regarding control over the administration's decisions affecting the freedom of individuals.

In its Ruling No. 68/1984, the court cancelled the administrative decision issued to arrest a person, as he was arrested as a means of pressure for the extradition of another person, and there was no legal justification for arresting him. The jurisprudence of the Supreme Court of Justice was to cancel the administrative decision issued regarding the arrest, if the act committed constitutes a normal crime.

The administration may not arrest any person due to a civil dispute, because civil disputes fall within the jurisdiction of regular judiciary, and they may not be considered by the administrative authority, otherwise, the administrative decision is void because the executive authority, in this case, violates the jurisdiction of the judicial authority. Accordingly, the Supreme Court of Justice decided, "... the authority vested in the administrative rulers by the prime minister under the defense order is to maintain the public safety of the Kingdom and not to settle individual disputes related to personal rights, which the constitution has entrusted the courts to decide on them. Therefore, the decision of the Governor of the Capital to arrest the applicant due to deception in the sales contracts is an interference beyond the intended purpose of Article (9)b is of the defense system, which requiring cancellation..."<sup>43</sup>

The Supreme Court of Justice monitors arresting, as this should take place in rehabilitation centres that are legally approved for this purpose; otherwise, the court shall consider the administrative decision contrary to the law and shall decide to cancel it, stating "... if the applicant is admitted to the National Center for Mental Health against his/her will by decision of the governor of the capital and the director of the said center, this shall be equal to arrest or imprisonment stipulated in Article (8) of the Constitution of Jordan... No provision in the Crime Prevention Law nor in any other legislation giving

both respondents the authority to detain the applicant to receive treatment at the National Center for Mental Health and to detain him/her in the center, in which case the two appealed decisions deficient due to incompetence of authority, and therefore they are contrary to the law and should be canceled...”<sup>44</sup>

The Supreme Court of Justice Decision No. 243/1997 of October 15, 1997, published on p.551 of the Judicial Journal Edition No. 4 on 1/1/1997, stated:

“Personal freedom shall be guaranteed under Article 7 of the constitution. It is the property of human life, and it is an established right for individuals that may not be restricted or undermined unless under the provisions of law. The individual’s right to obtain and renew a passport is part of freedom of movement, which is a form of personal freedom guaranteed under Article (7) of the Constitution that is deemed a pillar on which modern democratic regimes are established. The Jordanian Passports Law No. (2) of 1969 does not allow confiscation of passport nor prohibit renewal thereof for any Jordanian. Under Article (3) of this law, every Jordanian may obtain a passport. This right is derived from the law and does not require the approval of any other body. In case the Director of Civil Status and Passports Department refrains from renewing an applicant’s passport with no legal justification, this shall be contrary to the provisions of Article (3) of the Passports Law and Article (7) of the constitution. Disapproval of the military security to renew an applicant’s passport may not be justified, as the security requirements should be serious reasons justifying taking such a measure that affects personal freedom and should be derived from real facts indicating this meaning. Such facts should be specific acts evidenced to be committed by the applicant.”

As for the Courts of Cassation, Appeal, and First Instance, they undertake roles of equal importance to the administrative judiciary’s role, as they are the competent body that undertakes the direct violations of individual’s rights because they constitute punishable crimes, and they decide on compensation provided to victims of such violations. The decision of the Jordanian Court of Cassation, in its penal capacity, No. 820/2003, dated 23/11/2003 stated that:

“If the accused persons were arrested on 11/8/2001 and were sent to the public prosecutor on 20/8/2001, remaining detained in the security center for nine days is deemed by common sense and sound legal sense evidence for invalidity of the confession they made to the police because the sound logic suggests that the accused persons should not be detained for such period in police custody and that they should have been sent immediately to the public prosecutor if their confession was before the police upon their willingness and choice. The conclusion that is consistent with logic and reason is that they

confessed as a result of beating and torture and detention thereof by the judicial police based on an administrative arrest warrant was to wait until the traces of torture disappear from their bodies, and this was proven by the forensic medicine”.

The decision of the Jordanian Court of Cassation, in its penal capacity, No. 450/2004 dated 3/17/2004 stated that: “If the trial court finds that the accused person’s confession before the police was taken in suspicious circumstances regarding validity thereof, and the traces of beating and torture are apparent, that court shall have the right not to consider such a confession under the provisions of Article (274) of the Criminal Procedures Law.”

As per compensation, the Jordanian Court of Cassation issued a decision in its legal capacity No. 787/1999 dated October 23, 1999, stating:

“The prisoner’s sentence was completed but the police continued to detain him after receiving him from Swaqa Rehabilitation Center instead of releasing him. The police transferred him from one security center to another across the governorates of the Kingdom until arriving at Jerash Security Directorate, but when the door of the prison van was opened, he was found dead. It was proven through technical expertise that he had been subjected to beatings, violence, and torture. Ongoing investigations on his death did not lead to knowing the perpetrators of policemen. The court ruling requires the treasury to pay the funeral costs of the deceased as the material damage is represented in this damage only. Given that the moral damage is originally decided for the individual who is personally affected by the death of the relative thereof, the ruling is made based on this, rather than the legal shares under the experts’ evaluation.”

#### *5.4 The importance of stipulating enforced disappearance crime in internal legislation*

Although Jordanian legislation criminalises crimes related to enforced disappearance, such as abduction, illegal detention, unlawful deprivation of liberty, human trafficking, illegal coercion, and abuse of authority, the multiplicity of individual crimes hinders covering all forms and dangers relating to missing persons and enforced disappearance victims. The abovementioned crimes may represent one kind of enforced disappearance, yet all of it does not involve all of the elements of enforced disappearance, and in most cases, the intended penalties are unaligned with the crime’s seriousness. Accordingly, the International Convention for the Protection of All Persons from Enforced Disappearance should be ratified, and this crime should be stipulated in internal legislation. In France, for example, the Criminal Law and the Criminal Procedures Law were amended to accommodate the provisions of the convention.<sup>45</sup> As well, stipulating enforced disappearance in internal legislation allows creating a special system tackling the legal status of missing persons throughout the period in which their fate remains unknown, and setting-up a special system for settling inheritance and social assistance issues. Most states have no special legislation considering the peculiarity of this crime, and in most cases, provisions relating to assumed death are applied, or even subjecting social assistance and compensation to the condition of obtaining a death certificate, which leads to harm the disappeared persons’ relatives, and this can be described as a form of mistreatment.

Inclusion of enforced disappearance within the Jordanian penal laws will lead to set provisions thereto that are in line with the international provisions. The wording of the legal article criminalising this act may set a comprehensive definition of enforced disappearance, and that it is prohibited in the constitution, and then the penalties and circumstances associated therewith are provided for in the law. When making the definition of enforced disappearance, all elements contained in Article 2 of the convention should be considered, so that the national judge can apply the provisions to enforced disappearance cases in the state.<sup>46</sup>

Regardless of the method adopted for the implementation of the conventions’ provisions, the national legislation shall not be the only method for this purpose even it is the most important, as governments should take administrative, judicial, economic,

social, educational, and other measures in order to be consistent and aligned with the international obligations with the internal system thereof.<sup>47</sup>

The state's duty to protect human rights and dignity is based on the grounds that the humanity of mankind is indivisible, and states' failure to commit to protecting human rights is unacceptable. Accordingly, no state may undermine or diminish such rights under any circumstances. Protection of such rights does not require the relevant state to take long-term or costly measures, but rather to refrain from or cease violating them.<sup>48</sup>

Addressing individuals' rights by states is no longer an internal affair, which required the transfer of rules relating to individuals' rights from the international law to the internal laws, in a manner that guarantees robust and mandatory application thereof. Internal laws are the only guarantee to facilitate the integration of international provisions in societies.

Article 7 of the Rome Statute of the International Criminal Court, which was ratified by Jordan, defined its jurisdiction over enforced disappearance of individuals as one of the crimes against humanity. The International Criminal Court has jurisdiction over these cases in the state parties to the Treaty of Rome, especially those that have not addressed enforced disappearance within the internal legislation thereof, which is the principle affirmed by Article 1 of the Treaty of Rome through describing the International Criminal Court jurisdiction as complementary to the internal jurisdiction. This means that the jurisdiction to handle this type of crimes may become part of the jurisdiction of the International Criminal Court and outside the jurisdiction of the internal judiciary as this is associated with the existence of internal legislation or not, because the general rule in this regard is '*nullum crimen, nulla poena sine lege*'.<sup>49</sup> In addition, some forms of enforced disappearance included in the international law will be outside the scope of criminalisation, unless the internal legislation, on top of which are the constitutions, provides for criminalisation of enforced disappearance as an independent crime, based on the forms contained in the International Convention for the Protection of All Persons from Enforced Disappearance, rather than protection there from being based on miscellaneous crimes and in an indirect manner.<sup>50</sup>

Accordingly, states should include penalties for enforced disappearance in their laws, and set provisions for this crime aligned with the international provisions. The wording of the legal article criminalising this act may set a comprehensive definition of enforced disappearance, and that it is prohibited in the constitution, and then the penalties and circumstances associated therewith are provided for in the law. When making the definition of enforced disappearance, all elements contained in Article 2 of the convention should be considered, so that the national judge can apply the provisions to enforced disappearance cases in the state.<sup>51</sup>

## 6 Conclusions

The concept of enforced disappearance has not taken the required place in the states' internal laws so far. This requires setting provision concerning this crime based on the principle of penal legitimacy stating '*nullum crimen, nulla poena sine lege*'. Notwithstanding the substantial interest in confronting enforced disappearance at the international level, intensive national efforts at the level of internal laws are still needed as the constitutions and laws of many states, including Jordan, still do not give enforced disappearance the necessary interest in terms of setting an appropriate standard for acts

constituting enforced disappearance in the international sense, so that this concept represents the starting point for establishing an integrated legal system imposing deterrent penalty in case it is committed and to ensure that the state provides compensation to the victims.

Criminal protection of individuals from enforced disappearance should be objective that is concerned with the forms of activities related to the interest to be protected, whether criminalisation or permissibility; as well, it may be original when aiming at protecting the right itself and may be dependent when striving to protect a right that is closely related to another right such as torture crimes. As for procedural protection, it is represented in the non-provision of exceptions preventing the application of the provisions, such as immunity of presidents, and non-availability of other obstacles such as suspending prosecution of a complaint, permission or request.

Accordingly, this paper recommends ratifying the International Convention for the Protection of All Persons from Enforced Disappearance and to allocate provisions specific to enforced disappearance in the internal legislation, such as the inclusion of every person ordering the commission of this crime, urging others to commit it, or every person trying, helping, facilitating, planning, instigating, conspiring, agreeing, approving by silence, or assists in the commission of this crime. It also proposes that the national legislature in the states accepted to join or will be members of the international group in the convention to give full interest to this serious crime, by setting a comprehensive definition of enforced disappearance covering all internationally prohibited forms thereof.

Moreover, this paper recommends that the states joined or will join the convention shall establish a judiciary specialised in this form of crimes. The role of the judiciary is no less important than the role of legislation, as the judiciary should be strict in this type of case by issuance the highest penalties, and guaranteeing the victim's right to obtain fair compensation, which greatly contributes to confronting this crime, in addition to considering the cases of enforced disappearance by ordinary courts only as this is deemed a basic pillar to ensure fair trials. The internal laws shall deny any immunity preventing prosecution of this crime. Finally, this paper also suggests giving special attention to the crimes taking place inside places of detention in terms of qualifying those in charge of investigating them and continuing to train them on investigation techniques, methods, and means, allocating a special record for torture cases in the departments and divisions of the public prosecution, and activating the role of the institutions and centres concerned with confronting these crimes.

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**Notes**

- 1 See Council of Europe Commissioner for Human Rights (2016).
- 2 Ibid.
- 3 Nations Unies, GTDFI (2015).
- 4 See Council of Europe Commissioner for Human Rights (2016).
- 5 Nations Unies, GTDFI (2010).
- 6 See Council of Europe Commissioner for Human Rights (2016).
- 7 CICR (2009).
- 8 See Article 7-1-i of the International Criminal Court Statute, adopted in Rome on July 17, 1998.
- 9 UN Publication (2011, p.78).
- 10 <https://www.icj-cij.org/public/files/summaries/summaries-1948-1991-ar.pdf>.
- 11 Al-Attayah (2006, p.125).
- 12 Al-Jundi (2015, p.72, etc.).
- 13 Amnesty International Document No. 51/51/2011.
- 14 Sarkin (2012).
- 15 Amnesty International Document, *ibid*.
- 16 Aswad (2011, pp.30–34).
- 17 Al-Kabash (2008, p.75).
- 18 Three opinions appeared in this regard: one of which supports upholding and enhancing the state's sovereignty, while the second supports suspending this principle as it hinders the development of international rules, and the last acknowledges the state's sovereignty on the one hand and the rules governing its behaviour on the other hand [Aswad, (*ibid*), p.54].
- 19 In Jordan, the National Commission for the Implementation of International Humanitarian Law of 2002 was issued identifying formation, mandates, activities and objectives thereof [Al Tarawneh, (2005), p.102, etc.].
- 20 Bin Saghir (2014, p.118, etc).
- 21 Al Dosouki (2009, pp.169–171).
- 22 Al Hussein (2010, p.271).
- 23 This is stipulated in Article 4 of the International Convention for the Protection of All Persons from Enforced Disappearance, in addition to many articles of the convention, such as Articles 1, 2 and 3.
- 24 Citroni (2021).
- 25 Al Khatib (1999, pp.555–564).
- 26 Korouf (2006, p.14).
- 27 Korouf (*ibid*, p.107).
- 28 Korouf (*ibid*, p.107).
- 29 Fulton (2014).
- 30 Abu-Zeitoun and Al-Qudah (2015, p.475).
- 31 Abu-Zeitoun and Al-Qudah (*ibid*, p.476).
- 32 Amnesty International Document, *ibid*.
- 33 Al Okour et al. (2013).
- 34 Article 180 of the Jordanian Penal Code.
- 35 Article 184 of the Jordanian Penal Code.
- 36 Article 208 stipulates a comprehensive definition of torture in Paragraph 2 thereof.

- 37 Articles 4–10 of Law No. 51 of 2006 concerning the National Center for Human Rights in Jordan.
- 38 The National Committee for International Humanitarian Law was established by Law No. 63 of 2006.
- 39 Article 103 of the Jordanian Code of Criminal Procedure.
- 40 Article 15 of the Criminal Procedures Law No. 9 of 1961, as amended.
- 41 Article 106 of the Criminal Procedures Law stipulates that the public prosecution has the right to inspect prisons to ensure that no person is illegally detained, and this article requires the prison director to facilitate this task.
- 42 Judgment of the Supreme Court of Justice No. (170/1985) on 25/3/1987 and Judgment No. (188/1989).
- 43 Adalah Publications (1978, p.303).
- 44 Adalah Publications (1996, 2004).
- 45 *Loi No. 2013-711 du 5 août 2013* [online] <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000027805521/> (accessed 17 December 2021); Voir aussi, les Articles 306-1 628-10 689-13 [online] <http://codes.droit.org/PDF/Code%20de%20proc%3%a9dure%20p%3%a9nale.pdf>[https://www.legifrance.gouv.fr/codes/texte\\_lc/LEGITEXT000006071154/](https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006071154/) (accessed 17 December 2021).
- 46 Al Jundi (2011, p.239).
- 47 Aswad (ibid, pp.30–34).
- 48 Al-Kabash (2008, p.75).
- 49 For example, the misdemeanour of attempted deprivation of liberty in Article 346 of the Jordanian Penal Code is not punishable according to the rule “no punishment for attempted misdemeanor unless stipulated in the law in accordance with Article (71) of the same law.”
- 50 Al Hussein (ibid, p.268), and there are many legislations criminalising arrest, detention, abduction and imprisonment, under its various names, if it is illegal, but we found no legislation fulfilling the minimum requirements of Article 2 of the convention.
- 51 Al Jundi (ibid. p.239).