

General Comment on the definition of enforced disappearance

Preamble

The Working Group on Enforced or Involuntary Disappearances has referred in the past to the scope of the definition of enforced disappearance under the Declaration for the protection of all persons against enforced disappearances (hereinafter the “Declaration”), particularly in its general comment on article 4 of the Declaration.

According to the Declaration, enforced disappearances occur when 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.

The Working Group has followed closely the development of International Human Rights Law on this matter, especially with respect to the definitions of enforced disappearance contained in the Rome Statute of the International Criminal Court (hereinafter the “Rome Statute”) and in the recently adopted and not yet in force International Convention for the Protection of all Persons against Enforced Disappearances (hereafter identified as the “International Convention”), as well as in the Inter-American Convention on Forced Disappearance of Persons (hereinafter referred to as the “Inter-American Convention”).

The Working Group takes note that the international instruments on human rights mentioned above, that is, the Declaration, the International Convention and the Inter-American Convention, contain definitions of enforced disappearance that are substantially similar. The definition contained in the Rome Statute differs from those contained in the international instruments on human rights indicated above, inasmuch as the definition of enforced disappearance provided by the Rome Statute includes (i) political groups as potential perpetrators of the crime, even if they do not act on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, and (ii) the intention of removing the victim from the protection of the law for a prolonged period of time, as an element of the crime.

The Working Group deems that it should construe the definition provided by the Declaration, in a way that is most conducive to the protection of all persons from enforced disappearance.

Based on the foregoing the Working Group has decided to issue the following general comment:

General Comment

1. With respect to the perpetrators of the crime, the Working Group has clearly established that, for purposes of its work, enforced disappearances are only considered as such when the act in question is perpetrated by state actors or by private individuals or organized groups (e.g. paramilitary groups) acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government.

2. The Working Group concurs with the provisions of article 3 of the International Convention, in connection with the fact that States shall take appropriate measures to investigate acts comparable to enforced disappearances committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

3. The Working Group has stated, in its General Observation on article 4 of the Declaration that, although States are not bound to follow the definition contained in the Declaration strictly in their criminal codes, they shall ensure that the act of enforced disappearance is defined in a way that clearly distinguishes it from related offences such as abduction and kidnapping.

4. Based on the foregoing, the Working Group does not admit cases regarding acts which are similar to enforced disappearances, when they are attributed to persons or groups not acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, such as terrorist or insurgent movements fighting the Government on its own territory, since it considers that it has to strictly adhere to the definition contained in the Declaration.

5. In accordance with article 1.2 of the Declaration, any act of enforced disappearance has the consequence of placing the persons subjected thereto outside the protection of the law. Therefore, the Working Group admits cases of enforced disappearance without requiring that the information whereby a case is reported by a source should demonstrate, or even presume, the intention of the perpetrator to place the victim outside the protection of the law.

6. In those cases where the Working Group would receive reports of enforced disappearances in which the victim would have already been found dead, the Working Group, under its methods of work, would not admit the case for transmission to the respective government, since it would be a case clarified *ab initio*. Indeed, under the Methods of Work clarification occurs when the whereabouts of the disappeared persons are clearly established irrespective of whether the person is alive or dead. However, this does not mean that such cases would not fall within the definition of enforced disappearance included in

the Declaration, if (i) the deprivation of liberty took place against the will of the person concerned, (ii) with involvement of government officials, at least indirectly by acquiescence, and (iii) state officials thereafter refused to acknowledge the act or to disclose the fate or whereabouts of the person concerned. That is to say, in accordance with the mandate of the Working Group related to monitoring the implementation of the Declaration, such reports may be transmitted to the governments in question under the method of “general allegations”, but not as an “urgent appeal”, nor under the “normal procedure”, as such terms are used in the Working Group’s methods of work. Under the general allegations method, the Working Group would invite the Governments concerned, to comment on the measures that should be taken under the Declaration to investigate such cases, to bring the perpetrators to justice, to satisfy the right to adequate compensation, as well as regarding measures to stop and prevent enforced disappearances.

7. Under the definition of enforced disappearance contained in the Declaration, the criminal offence in question starts with an arrest, detention or abduction against the will of the victim, which means that the enforced disappearance may be initiated by an illegal detention or by an initially legal arrest or detention. That is to say, the protection of a victim from enforced disappearance must be effective upon the act of deprivation of liberty, whatever form such deprivation of liberty takes, and not be limited to cases of illegitimate deprivations of liberty.

8. Even though the Working Group, in its general observation on article 10 of the Declaration, has said that any detention that is unduly prolonged constitutes a violation of the Declaration, this does not mean that any short-term detention is permitted by the Declaration, since the Working Group immediately clarifies that a detention where the detainee is not charged so that he can be brought before a court, is a violation of the Declaration.

9. As the Working Group said in the same general comment, administrative or pre-trial detention is not *per se* a violation of International Law or of the Declaration. However, if a detention, even if short-term, is followed by an extrajudicial execution, such detention cannot be considered of administrative or pre-trial nature under article 10 of the Declaration, but rather as a condition where the immediate consequence is the placement of the detainee beyond the protection of the law. The Working Group considers that when the dead body of the victim is found mutilated or with clear signs of having been tortured or with the arms or legs tied, those circumstances clearly show that the detention was not immediately followed by an execution, but that the deprivation of liberty had some duration, even of at least a few hours or days. A situation of such nature, not only constitutes a violation to the right not to be disappeared, but also to the right not to be subjected to torture, to the right to recognition as a person before the law and to the right to life, as provided under article 1.2 of the Declaration.

10. Therefore, a detention, followed by an extrajudicial execution, as described in the preceding paragraph, is an enforced disappearance proper, as long as such

detention or deprivation of liberty was carried out by governmental agents of whatever branch or level, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the government, and, subsequent to the detention, or even after the execution was carried out, state officials refuse to disclose the fate or whereabouts of the persons concerned or refuse to acknowledge the act having been perpetrated at all.