



Working Group on Enforced or Involuntary Disappearances

General Comment on Enforced Disappearance as a Continuous Crime

Preamble

With a view to focusing the attention of States more effectively on the relevant obligations deriving from the Declaration on the Protection of All Persons from Enforced Disappearance, the Working Group on Enforced or Involuntary Disappearances decided to adopt general comments on those provisions of the Declaration that might need further explanation.

The following general comment complements its previous general comment on article 17 of the Declaration regarding the interpretation of the continuous nature of the crime of enforced disappearance.

Under international law, *“The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”* (Articles on Responsibility of States for internationally wrongful acts, General Assembly resolution 56/83, Article 14 § 2)

Various international treaties, and international, regional and domestic tribunals, have recognized that enforced disappearances are continuing acts and continuing crimes.

Article 17 § 1 of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance provides:

“Acts constituting enforced disappearance shall be considered a continuing offence as long as perpetrators continue to conceal the fate and whereabouts of persons who have disappeared.”

This continuous nature of enforced disappearances has consequences with regards to the application of the principle of non retroactivity, both in treaty law and criminal law.

Article 28 of the Vienna Convention on the Law of Treaties of 1969 provides that:

“Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

It is also a practice of some States, when ratifying a convention, to issue a reservation providing that the treaty shall not apply to acts that occurred before the entry into force of the treaty for this State.

Equally, the Universal Declaration of Human Rights provides in its article 11 § 2:

“No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

Based on the foregoing, the Working Group has decided to issue this general comment in the following terms:

General Comment

1. Enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to

say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual.

2. Even though the conduct violates several rights, including the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment and also violates or constitutes a grave threat to the right to life, the Working Group considers that an enforced disappearance is a unique and consolidated act, and not a combination of acts. Even if some aspects of the violation may have been completed before the entry into force of the relevant national or international instrument, if other parts of the violation are still continuing, until such time as the victim's fate or whereabouts are established, the matter should be heard, and the act should not be fragmented.
3. Thus, when an enforced disappearance began before the entry into force of an instrument or before the specific State accepted the jurisdiction of the competent body, the fact that the disappearance continues after the entry into force or the acceptance of the jurisdiction gives the institution the competence and jurisdiction to consider the act of enforced disappearance as a whole, and not only acts or omissions imputable to the State that followed the entry into force of the relevant legal instrument or the acceptance of the jurisdiction.
4. The Working Group considers, for instance, that when a State is recognized as responsible for having committed an enforced disappearance that began before the entry into force of the relevant legal instrument and which continued after its entry into force, the State should be held responsible for all violations that result from the enforced disappearance, and not only for violations that occurred after the entry into force of the instrument.
5. Similarly, in criminal law, the Working Group is of the opinion that one consequence of the continuing character of enforced disappearance is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non retroactivity. The

crime cannot be separated and the conviction should cover the enforced disappearance as a whole.

6. As far as possible, tribunals and other institutions ought to give effect to enforced disappearance as a continuing crime or human right violation for as long as all elements of the crime or the violation are not complete.
7. Where a statute or rule of procedure seems to negatively affect the continuous violation doctrine, the competent body ought to construe such a provision as narrowly as possible so that a remedy is provided or persons prosecuted for the perpetration of the disappearance.
8. In the same spirit, reservations that exclude the competence of such a body for acts or omissions that occurred before the entry into force of the relevant legal instrument or the acceptance of the institution's competence should be interpreted so not to create an obstacle to hold a State responsible for an enforced disappearance that continues after this.