



## WORKING GROUP ON ENFORCED OR INVOLUNTARY DISAPPEARANCES

### Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance

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#### General Comment on article 3 of the Declaration<sup>1</sup>

48. Article 3 of the Declaration on the Protection of All Persons from Enforced Disappearance stipulates that "each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction". This is a broad obligation which is assumed by States and is primarily an obligation to do something. This provision cannot be interpreted in a restrictive sense, since what it does is to serve as the general model for the purpose and nature of the measures to be taken, as well as for the content of the international responsibility of the State in this regard.

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<sup>1</sup> *Report of the Working Group on Enforced or Involuntary Disappearances, 1995.* document E/CN.4/1996/38.

49. The purpose of the measures to be taken is clear: "to prevent and terminate acts of enforced disappearance". Consequently, the provision calls for action both by States in any territory under its jurisdiction of which acts of enforced disappearance might have occurred in the past and by States in which such acts have not occurred. All States must have appropriate machinery for preventing and terminating such acts and are therefore under an obligation to adopt the necessary measures to establish such machinery if they do not have it.

50. With regard to the nature of the measures to be taken, the text of the article clearly states that legislative measures are only one kind. In referring to "legislative, administrative, judicial ..." measures, it is clear that, as far as the Declaration is concerned, it is not enough to have formal provisions designed to prevent or to take action against enforced disappearances. It is essential that the entire government machinery should adopt conduct intended for this purpose. To this end, administrative provisions and judicial decisions play a very important role.

51. The article also refers to "other measures", thus making it clear that the responsibility of the State does not stop at legislative, administrative or judicial measures. These are mentioned only by way of example, so it is clear that States have to adopt policy and all other types of measures within their power and their jurisdiction to prevent and terminate disappearances. This part of the provision must be understood as giving the State a wide range of responsibility for defining policies suited to the proposed objective.

52. It is, however, not enough for legislative, administrative, judicial or other measures to be taken, since they also have to be "effective" if they are to achieve the objective of prevention and termination. If the facts showed that the measures taken were ineffective, the international responsibility of the State would be to take other measures and to adapt its policies so that effective results would be achieved. The main criterion for determining whether or not the measures are suitable is that they are effective in preventing and, as appropriate, terminating acts of enforced disappearance.

53. Consequently, the provision contained in article 3 must be understood as the general framework for guiding States and encouraging them to adopt a set of measures. It must be understood that the international responsibility of States in this regard arises not only when acts of enforced disappearance occur, but also when

there is a lack of appropriate action to prevent or terminate such acts. Such responsibility derives not only from omissions or acts by the Government and the authorities and officials subordinate to it, but also from all the other government functions and mechanisms, such as the legislature and the judiciary, whose acts or omissions may affect the implementation of this provision.

### **General Comment on article 4 of the Declaration<sup>2</sup>**

54. Article 4.1 of the Declaration on the Protection of All Persons from Enforced Disappearance stipulates that "all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness". This obligation applies to all States regardless of whether acts of enforced disappearance actually take place or not. It is not sufficient for Governments to refer to previously existing criminal offences relating to enforced deprivation of liberty, torture, intimidation, excessive violence, etc. In order to comply with article 4 of the Declaration, the very act of enforced disappearance as stipulated in the Declaration must be made a separate criminal offence.

55. The preamble of the Declaration defines the act of enforced disappearance "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". States are, of course, not bound to follow strictly this definition in their criminal codes. They shall, however, ensure that the act of enforced disappearance is defined in a way which clearly distinguishes it from related offences such as enforced deprivation of liberty, abduction, kidnapping, incommunicado detention, etc. The following three cumulative minimum elements should be contained in any definition:

- (a) Deprivation of liberty against the will of the person concerned;

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<sup>2</sup> *Report of the Working Group on Enforced or Involuntary Disappearances 1995*. Document E/CN.4/1996/38

(b) Involvement of governmental officials, at least indirectly by acquiescence;

(c) Refusal to disclose the fate and whereabouts of the person concerned.

56. The term "offences under criminal law" refers to the relevant domestic criminal codes that are to be enforced by competent ordinary courts, i.e. neither by any special tribunal, in particular military courts (art. 16.2 of the Declaration), nor by administrative agencies or tribunals. The persons charged with the offence of enforced disappearance shall enjoy all guarantees of a fair trial established in international law (art. 16.4 of the Declaration).

57. It falls into the competence of States to establish the appropriate penalties for the offence of enforced disappearance in accordance with their domestic legal standards. They shall, however, take into account the "extreme seriousness" of acts of enforced disappearance. In the absence of mitigating circumstances, appropriate penalties, therefore, in principle mean prison sentences.

58. According to 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 voluntarily information which would contribute to clarifying cases of enforced disappearance". This provision must, however, be read in conjunction with article 18 which states:

"1. Persons who have, or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.

"2. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account."

### **General Comment on article 10 of the Declaration<sup>3</sup>**

22. Article 10 of the Declaration is one of the most practical and valuable tools for ensuring compliance by States with their general commitment not to practise, permit or tolerate enforced disappearances (art. 2) and to take effective legislative, administrative and judicial measures to prevent and terminate such acts (art. 3).

23. One important legislative, administrative and judicial measure is that contained in article 10, paragraph 1, which stipulates that “any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention”. This provision combines three obligations which, if observed, would effectively prevent enforced disappearances: recognized place of detention, limits of administrative or pre-trial detention and judicial intervention.

24. The first commitment is that the person “deprived of liberty be held in an officially recognized place of detention”. This provision requires that such places must be official - whether they be police, military or other premises -and in all cases clearly identifiable and recognized as such. Under no circumstances, including states of war or public emergency, can any State interests be invoked to justify or legitimize secret centres or places of detention which, by definition, would violate the Declaration, without exception.

25. This first commitment is reinforced by the provisions contained in paragraphs 2 and 3 of article 10.

26. Paragraph 2 provides that information on the place of detention of such persons “shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned”. It is therefore not enough for the detention to take place in an officially recognized place; information on it must be made available to the persons mentioned in that paragraph. Accordingly, both the lack of such information and any impediments to access to it must be considered violations of the Declaration.

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<sup>3</sup> *Report of the Working Group on Enforced or Involuntary Disappearances 1996*. Document E/CN.4/1997/34

27. Paragraph 3 refers to the highly important commitment of maintaining up-to-date registers of all persons deprived of liberty and of making the information contained in those registers available to the persons mentioned in paragraph 2 and to any other authority entitled to it under national or international law, including the Working Group on Enforced or Involuntary Disappearances. The Group has a mandate to clarify the fate and whereabouts of disappeared persons and to monitor States' compliance with the Declaration. Emphasis is given to the principle that the information should not only exist, but must be available to a range of persons extending far beyond family members. The minimum requirement for such information is the up-to-date register in every centre or place of detention, which means that complying formally with this commitment by keeping some sort of record can never be sufficient; each register must be continuously updated so that the information that it contains covers all persons being held in the relevant centre or place of detention. Anything else would be a violation of the Declaration. It is also stipulated that each State shall take steps to maintain centralized registers. Such registers help in tracing the whereabouts of an individual who may have been deprived of liberty, since precise information is not always available on where such a person may have been taken, and this can be clarified with an up-to-date centralized register. As the complex situation in some countries makes it difficult to envisage the immediate establishment of a centralized register, the minimum commitment in this regard is "to take steps" in that direction; these must of course be effective and gradually produce results. Not "to take steps" would be a violation of the Declaration.

28. The second commitment is to ensure that any person deprived of liberty is "brought before a judicial authority", which complements the preceding provision on the place of detention and availability of information. It is not enough for the place of detention to be an "officially recognized place of detention" or for accurate information to be available on the place where the individual is being held. The Declaration takes account of a more substantive aspect of detention in stipulating that administrative or pre-trial detention must be only temporary, as the person deprived of liberty must be "brought before a judicial authority". This obligation is in addition to those considered above.

29. The third commitment is to ensure that the person in question is brought before a judicial authority "promptly after detention". This underlines the transitional and temporary nature of administrative or pre-trial detention which, *per se*, is not a violation of international law or of the Declaration unless it is unduly prolonged and

the detained person is not brought “promptly” before a judicial authority. Consequently, any detention which is prolonged unreasonably or where the detainee is not charged so that he can be brought before a court is a violation of the Declaration. The fact that this provision does not set a time limit for administrative detention should not be interpreted as allowing for unlimited laxity, since the principles of reasonableness and proportionality and the very spirit of the provision dictate that the period in question should be as brief as possible, i.e., not more than a few days, as this is the only conceivable interpretation of “promptly after detention”.

30. The Declaration provides for no exceptions to observance of the commitments contained in article 10. Consequently, not even the existence of a state of emergency can justify non-observance. Moreover, all of the commitments laid down must be observed as minimum conditions if the provisions of this article of the Declaration are to be interpreted as having been fulfilled by the State concerned. In this connection, reference is made to the jurisprudence of the Human Rights Committee with respect to article 9.3 of the International Covenant on Civil and Political Rights and to other relevant United Nations standards concerning administrative detention.

#### **General Comment on article 17 of the Declaration<sup>4</sup>**

25. With a view to focusing the attention of Governments more effectively on the relevant obligations deriving from the Declaration, the Working Group, in the light of its experience with communications with Governments, decided to adopt general comments on those provisions of the Declaration that might need further explanation.

26. At its sixty-first session, the Working Group adopted the following general comments on article 17 of the Declaration. Article 17 of the Declaration reads as follows:

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

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<sup>4</sup> *Report of the Working Group on Enforced or Involuntary Disappearances 2000*. Document E/CN.4/2001/68.

“2. When the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.

“3. Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and commensurate with the extreme seriousness of the offence.”

27. Article 17 establishes fundamental principles intended to clarify the nature of enforced disappearances and their criminal consequences. The sense and general purpose of the article is to ensure conditions such that those responsible for acts constituting enforced disappearance are brought to justice within a restrictive approach to statutory limitations. Article 17 is complemented by the provisions of articles 1, 2, 3 and 4 of the Declaration.

28. The definition of “continuing offence” (para. 1) is of crucial importance for establishing the responsibilities of the State authorities. Moreover, this article imposes very restrictive conditions. The article is intended to prevent perpetrators of those criminal acts from taking advantage of statutes of limitations. It can be interpreted as seeking to minimize the advantages of statutes of limitations for the perpetrators of these criminal acts. At the same time, as the criminal codes of many countries have statutes of limitations for various offences, paragraph 2 stipulates that they shall be suspended when the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective. The Covenant refers in particular to the possibility of having “an effective remedy” when a human rights violation “has been committed by persons acting in an official capacity”.

29. In its decisions the Inter-American Court of Human Rights repeatedly expresses views wholly consistent with the provisions of article 17. In its judgment of 29 July 1988 in the Velásquez Rodríguez case and in the Blake case, the Court derived from the continuing nature of the enforced disappearance itself the obligation upon the State to investigate until the whereabouts of the victim were established (para. 181). In justifying its decision in the latter case, the Court, in its judgment of 2 July 1996, referred explicitly to article 17 of the Declaration (para. 37). In a separate opinion, Judge Antonio Cançado Trindade, who concurred with the content and



sense of the judgment, said that the offence was a “continuing situation” inasmuch as it was committed not instantaneously but continuously and extended over the entire period of the disappearance (para. 9); the separate opinion cites cases of the European Court of Human Rights in which the idea of a “continuing situation” also was considered (De Becker v. Belgium (1960) and Cyprus v. Turkey (1983)).

30. To the international jurisprudence, which on several occasions refers to article 17, must be added the proceedings of national courts which, on the basis of the same interpretation, have assumed jurisdiction over acts of enforced disappearance, including within the context of amnesties. During the course of 2000, several judicial proceedings have been instituted in Chile, for example, concerning cases of enforced disappearance that occurred before the 1978 Amnesty Act, precisely on the basis of the assumption that the notion of a “continuing situation” is inherent in the very nature of enforced disappearance.

31. Owing to the seriousness of acts of enforced disappearance a number of irrevocable rights are infringed by this form of human rights violation, with obvious consequences in criminal law. Recent developments in international law require clear priority to be given to action against the serious forms of violations of human rights in order to ensure that justice is done and that those responsible are punished. Thus, according to article 1 (2) of the Declaration, “Any act of enforced disappearance ... constitutes a violation of the rules of international law guaranteeing, *inter alia*, 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 and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life”.

32. The interpretation of article 17 must be consistent with the provisions of articles 1 (1), 2 (1), 3 and 4 of the Declaration, which seek to punish these crimes severely in order to eradicate the practice. This explains and justifies the restrictive approach to the application of statutes of limitation to this type of offence. Thus, article 1 (1) stipulates that “Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field”. For its part, article 2 (1) specifies that “No State shall practice, permit or tolerate enforced

disappearances”, while, according to article 3, “Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction”. The need for severe punishment is clearly established in article 4 (1) which reads: “All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness”.

### **General Comment on article 18 of the Declaration<sup>5</sup>**

#### *Preamble*

The Working Group on Enforced or Involuntary Disappearances has long been concerned with the effects of legal measures that result in amnesties and pardons, as well as mitigating measures or similar provisions that lead to impunity for gross violations of human rights, including disappearance. In its 1994 report (E/CN.4/1994/26) the Working Group specifically referred to the question of impunity, reminding States of their obligations not to make or enact laws that would in effect give immunity to perpetrators of disappearances. Subsequent reports have repeated this concern.

The Working Group has followed closely the development of international human rights law regarding impunity. The Working Group bears in mind the contents of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and recalls the provisions of article 15 (2) of the International Covenant on Civil and Political Rights, the several decisions of the Human Rights Committee and of the Inter-American Commission and Court of Human Rights on the question of amnesties, and the reports and independent studies on the question of impunity prepared for the United Nations human rights system by independent experts.

In its resolutions, particularly 57/215, entitled ‘Question of enforced or involuntary disappearances’, the General Assembly encouraged the Working Group to ‘continue to consider the question of impunity, in the light of the relevant provisions of the Declaration and of the final reports submitted by the special rapporteurs appointed by the Subcommission’. The Working Group decided at its seventy-fourth

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<sup>5</sup> *Report of the Working Group on Enforced or Involuntary Disappearances 2005*. Document E/CN.4/2006/56.

session that it would examine issues related to amnesties and impunity at its following sessions.

The Working Group has decided to issue the following general comment on what it determines to be the proper interpretation of article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance:

*General Comment*

1. Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance (hereafter referred to as the 'Declaration') should be interpreted in conjunction with other articles of the Declaration. Therefore, States should refrain from making or enacting amnesty laws that would exempt the perpetrators of enforced disappearance from criminal proceedings and sanctions, and also prevent the proper application and implementation of other provisions of the Declaration.

2. An amnesty law should be considered as being contrary to the provisions of the Declaration even where endorsed by a referendum or similar consultation procedure, if, directly or indirectly, as a consequence of its application or implementation, it results in any or all of the following:

(a) Ending the State's obligations to investigate, prosecute and punish those responsible for disappearances, as provided for in articles 4, 13, 14 and 16 of the Declaration;

(b) Preventing, impeding or hindering the granting of adequate indemnification, rehabilitation, compensation and reparation as a result of the enforced disappearances, as provided for in article 19 of the Declaration;

(c) Concealing the names of the perpetrators of disappearance, thereby violating the right to truth and information, which can be inferred from articles 4 (2) and 9 of the Declaration;

(d) Exonerating the perpetrators of disappearance, treating them as if they had not committed such an act, and therefore have no obligation to indemnify the victim, in contravention of articles 4 and 18 of the Declaration;

(e) Dismissing criminal proceedings or closing investigations against

alleged perpetrators of disappearances or imposing insignificant sanctions in order to give the perpetrators the benefit of the right not to be tried twice for the same crime which would in fact result in impunity, thereby violating article 4 (1) of the Declaration;

3. The following are examples of 'similar measures' which, even if not contained in an amnesty law, should be considered contrary to the Declaration:

(a) Suspension or cessation of an investigation into disappearance on the basis of failure or inability to identify the possible perpetrators, in contravention of article 13 (6) of the Declaration;

(b) Making the victim's right to truth, information, redress, reparation, rehabilitation, or compensation conditional on the withdrawal of charges or the granting of pardon to the alleged perpetrators of the disappearance;

(c) Application of statutory limitations that are short or that commence even as the crime of disappearance is still ongoing, given the continuing nature of the crime, thereby breaching articles 4 and 17 of the Declaration;

(d) Application of any statutory limitation when the practice of disappearance constitutes a crime against humanity;

(e) Putting perpetrators on trial as part of a scheme to acquit them or impose insignificant sanctions, which would in fact amount to impunity.

4. Notwithstanding the above, article 18 of the Declaration, when construed together with other provisions of the Declaration, allows limited and exceptional measures that directly lead to the prevention and termination of disappearances, as provided for in article 3 of the Declaration, even if, *prima facie*, these measures could appear to have the effect of an amnesty law or similar measure that might result in impunity.

5. Indeed, in States where systematic or massive violations of human rights have occurred as a result of internal armed conflict or political repression, legislative measures that could lead to finding the truth and reconciliation through pardon might be the only option to terminate or prevent disappearances.

6. Although mitigating circumstances may, at first glance, appear to amount to measures that could lead to impunity, they are allowed under article 4 (2) of the Declaration in two specific cases, i.e. when they lead to bringing the victims forward alive or to obtaining information that would contribute to establishing the fate of the disappeared person.

7. Also, the granting of pardon is expressly permitted under article 18 (2) of the Declaration, as long as in its exercise the extreme seriousness of acts of disappearance is taken into account.

8. Therefore, in exceptional circumstances, when States consider it necessary to enact laws aimed to elucidate the truth and to terminate the practice of enforced disappearance, such laws may be compatible with the Declaration as long as such laws are within the following limits:

(a) Criminal sanctions should not be completely eliminated, even if imprisonment is excluded by the law. Within the framework of pardon or of the application of mitigating measures, reasonable alternative criminal sanctions (i.e. payment of compensation, community work, etc.) should always be applicable to the persons who would otherwise have been subject to imprisonment for having perpetrated the crime of disappearance;

(b) Pardon should only be granted after a genuine peace process or bona fide negotiations with the victims have been carried out, resulting in apologies and expressions of regret from the State or the perpetrators, and guarantees to prevent disappearances in the future;

(c) Perpetrators of disappearances shall not benefit from such laws if the State has not fulfilled its obligations to investigate the relevant circumstances surrounding disappearances, identify and detain the perpetrators, and ensure the satisfaction of the right to justice, truth, information, redress, reparation, rehabilitation and compensation to the victims. Truth and reconciliation procedures should not prevent the parallel functioning of special prosecution and investigation procedures regarding disappearances;

(d) In States that have gone through deep internal conflicts, criminal investigations and prosecutions may not be displaced by, but can run parallel to, carefully designed truth and reconciliation processes;

(e) The law should clearly aim, with appropriate implementing mechanisms, to effectively achieve genuine and sustainable peace and to grant the victims guarantees of termination and non-repetition of the practice of disappearance.

### **General Comment on article 19 of the Declaration<sup>6</sup>**

72. Article 19 also explicitly mentions the right of victims and their family to “adequate compensation”. States are, therefore, under an obligation to adopt legislative and other measures in order to enable the victims to claim compensation before the courts or special administrative bodies empowered to grant compensation. In addition to the victims who survived the disappearance, their families are also entitled to compensation for the suffering during the time of disappearance and in the event of the death of the victim; his or her dependants are entitled to compensation.

73. Compensation shall be “adequate”, i.e. proportionate to the gravity of the human rights violation (e.g. the period of disappearance, the conditions of detention, etc.) and to the suffering of the victim and the family. Monetary compensation shall be granted for any damage resulting from an enforced disappearance such as physical or mental harm, lost opportunities, material damages and loss of earnings, harm to reputation and costs required for legal or expert assistance. Civil claims for compensation shall not be limited by amnesty laws, made subject to statutes of limitation or made dependent on penal sanctions imposed on the perpetrators.

74. The right to adequate compensation for acts of enforced disappearance under article 19 shall be distinguished from the right to compensation for arbitrary executions. In other words, the right of compensation in relation to an act of enforced disappearance shall not be made conditional on the death of the victim. “In the event of the death of the victim as a result of an act of enforced disappearance”, the

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<sup>6</sup> *Report of the Working Group on Enforced or Involuntary Disappearances 1997*. Document E/CN.4/1998/43.

dependents are, however, entitled to additional compensation by virtue of the last sentence of article 19. If the death of the victim cannot be established by means of exhumation or similar forms of evidence, States have an obligation to provide for appropriate legal procedures leading to the presumption of death or a similar legal status of the victim which entitles the dependants to exercise their right to compensation. The respective laws shall specify the legal requirements for such procedure, such as the minimum period of disappearance, the category of person who may initiate such proceedings, etc. As a general principle, no victim of enforced disappearance shall be presumed dead over the objections of the family.

75. In addition to the punishment of the perpetrators and the right to monetary compensation, the right to obtain redress for acts of enforced disappearance under article 19 also includes “the means for as complete a rehabilitation as possible”. This obligation refers to medical and psychological care and rehabilitation for any form of physical or mental damage as well as to legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty, family life, citizenship, employment or property, return to one’s place of residence and similar forms of restitution, satisfaction and reparation which may remove the consequences of the enforced disappearance.

### **General Comment on the definition of enforced disappearance<sup>7</sup>**

26. As a result of the development of international law, especially with respect to the definition of enforced disappearance, the Working Group decided to draft a general comment to provide a construction of the definition of enforced disappearance that is most conducive to the protection of all persons from enforced disappearance. In March 2007, during its eighty-first session, the Working Group adopted the following general comment:

#### *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

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<sup>7</sup> Report of the Working Group on Enforced or Involuntary Disappearances 2007. Document A/HRC/7/2

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.

### **General Comment on enforced disappearance as a crime against humanity<sup>8</sup>**

39. As a result of the development of international law, the Working Group is working on a series of general comments, including on enforced disappearance as a continuous crime and continuous human rights violation. In 2009, the Working Group finalized a general comment on enforced disappearance as a crime against humanity, which was adopted at its eighty-seventh session:

#### *Preamble*

The 1992 Declaration for the Protection of All Persons from Enforced Disappearances affirms the connection between enforced disappearances and crimes against humanity. It states, in the fourth preambular paragraph, that the “systematic practice [of enforced disappearances] is by its very nature a crime

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<sup>8</sup> *Report of the Working Group on Enforced or Involuntary Disappearances 2009*. Document A/HRC/13/31.

against humanity”.

The Working Group considers that this provision needs to be interpreted in the view of legal developments which have occurred since 1992.

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

*General Comment*

1. The notion of crimes against humanity has been recognized for a long time in international law. The connection between enforced disappearances and crimes against humanity was explicitly acknowledged in the 1983 Resolution 666 (XIII- 0/83) of the General Assembly of the Organization of American States, which described the practice of enforced disappearances *per se*, as a crime against humanity: in other words, any act of enforced disappearance is considered, according to this text, to be a crime against humanity.

2. The 1994 Inter-American Convention on Forced Disappearance of Persons reaffirms, in its sixth preambular paragraph, “that the systematic practice of enforced disappearances of persons constitutes a crime against humanity”.

3. Article 18 of the 1996 International Law Commission draft Code of Crimes Against Peace and Security for Mankind defines crimes against humanity as the following: “A Crime against Humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group”; this definition is applicable to all crimes enumerated in the article, among which enforced disappearances.

4. Article 7, paragraph 1, of the 1998 Rome Statute establishing the International Criminal Court also gives a general definition of the concept of crime against humanity, applicable to all crimes listed in the above-mentioned paragraph, including enforced disappearance. This definition includes several criteria: “For the purposes of this present Statute ‘crimes against humanity’ means [any of the following] acts where committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

5. Article 5 of the 2006 International Convention on the Protection of All Persons

against Enforced Disappearance states: “The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.”

6. This provision, while recalling the criteria which are similar to those enunciated in the draft Code of the International Law Commission, is in fact essentially referring to other instruments or sources of international law, by mentioning “crime against humanity *as defined in applicable international law*”. The *travaux préparatoires* confirm that States did not intend to give a “definition” of enforced disappearances as a crime against humanity, but mainly to recall that, in accordance with other instruments and sources of international law, this qualification was accepted.

7. Drawing from the case law of international tribunals, as well as from the Statute of the International Criminal Court, it can be seen that crimes against humanity are crimes which are committed in a context. In other words, crimes against humanity are characterized by contextual elements. Those specific elements make it possible to differentiate, for instance, murder as a common crime from murder when occurring as a crime against humanity.

8. The same applies to enforced disappearances, which can only be qualified as crimes against humanity when committed in a certain context.

9. Thus, the fourth preambular paragraph of the 1992 Declaration is no longer in line with existing international law. Persuasive evidence of existing international law on this matter can be found in the case law of the international criminal tribunals, as well as hybrid tribunals and in the Rome Statute of the International Criminal Court.

10. The case law of the two ad hoc international criminal tribunals has been settled, among others, by the judgement of the ad hoc International Criminal Tribunal for the former Yugoslavia Appeals Chamber in the *Kunarac and others* case (12 June 2002, IT-96-23 & 23/1-A, see paras. 71–105), in which the Appeals Chamber considered that the contextual elements of the crime against humanity are the following:

- (a) There has been an “attack”;

(b) The attack was targeting any civilian population;

(c) This attack must have been widespread *or* systematic;

(d) The perpetrator had knowledge of the attack.

11. These same elements are repeated in article 7 (1) of the Statute of the International Criminal Court which states: “For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”

12. The Statute of the International Criminal Court has been ratified by more than 100 countries. In a landmark decision, Preliminary Chamber I of the International Criminal Court extensively cited the *Kunarac* judgement to interpret article 7 (1) (*The Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) an Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, No. ICC-02/05-01/07, Decision on the Prosecutor application under article 58 (7) of the Statute, 27 April 2007, paras. 60–62).

13. It is also to be noted that article 7 (1) has been incorporated in the statutes of other international and hybrid tribunals, including those of the Sierra Leone Special Court, the Special Panels for Serious Crimes in Timor-Leste and the Extraordinary Chambers in the Courts of Cambodia.

14. The Working Group is thus convinced that the definition given by article 7 (1) of the Statute of the International Criminal Court now reflects customary international law and can thus be used to interpret and apply the provisions of the Declaration.

15. When there are claims of practices of enforced disappearances which may amount to crimes against humanity, the Working Group will evaluate these claims in the light of the criteria listed in article 7 (1) of the Rome Statute, as interpreted by international and hybrid tribunals, and, if appropriate, will refer them to the competent authorities, be they international, regional or domestic.

## General Comment on enforced disappearance as a continuous crime<sup>9</sup>

### *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:

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<sup>9</sup> *Report of the Working Group on Enforced or Involuntary Disappearances*, 2010. Document A/HRC/16/48

*“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."

## **General Comment on the right to the truth in relation to enforced disappearance<sup>10</sup>**

### *Preamble*

“The right to the truth – sometimes called the right to know the truth – in relation to human rights violations is now widely recognized in international law. This is witnessed by the numerous acknowledgements of its existence as an autonomous right at the international level, and through State practice at the national level. The right to the truth is applicable not only to enforced disappearances. However, this general comment is concerned solely with enforced disappearances in the context of the Declaration on the Protection of All Persons from Enforced Disappearance.

At the international level, the right to the truth relating to enforced disappearances or missing persons is recognized in a number of instruments. Article 32 of Protocol I to the Geneva Conventions establishes “the right of families to know the fate of their [disappeared] relative”. Article 24 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance states:

“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.”

The existence of the right to the truth as an autonomous right was acknowledged by the Working Group on Enforced or Involuntary Disappearances (WGEID) in its very first report (E/CN.4/1435, 22 January 1981, § 187). It has also been recognized by various other international bodies at the universal and regional levels (for relevant case law, see in particular the “Study on the right to the truth”, report of the UN Office of the High Commissioner for Human Rights, E/CN.4/2006/91, 8 February 2006); by intergovernmental bodies, including the Human Rights Commission and now the Human Rights Council (see resolutions 2005/66 of 20 April 2005 of the Commission; decision 2/105, 27 November 2006; resolution 9/11, 18 September 2008; and 12/12, 1 October 2009 of the Council).

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<sup>10</sup> *Report of the Working Group on Enforced or Involuntary Disappearances, 2010*. Document A/HRC/16/48

The existence of the right to the truth in international law is accepted by State practice consisting in both jurisprudential precedent and by the establishment of various truth seeking mechanisms in the period following serious human rights crises, dictatorships or armed conflicts (see the “Study on the right to the truth”, op. cit.). Those mechanisms include the launching of criminal investigations and the creation of “truth commissions” designed to shed light on past violations and, generally, to facilitate reconciliation between different groups.

The right to the truth is both a collective and an individual right. Each victim has the right to know the truth about violations that affected him or her, but the truth also has to be told at the level of society as a “vital safeguard against the recurrence of violations”, as stated in Principle 2 of the *Set of principles for the protection and promotion of human rights through action to combat impunity* (E/CN.4/2005/102/Add.1)

Principle 3 of this document specifies that the State has a correlative “duty to preserve memory”:

“A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.”

Principle 4 establishes the “victim’s right to know” as an individual right:

“Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.”

The Working Group has often recommended that States adopt measures to promote truth, reparations for victims and reconciliation in their societies, as a means of implementing the right to the truth and the right to integral reparation for victims of enforced disappearances. Based on its experience, the Working Group has acknowledged that such processes are often crucial to ensure non-repetition of

enforced disappearances as well as to clarify cases, by uncovering the truth of the fate or the whereabouts of disappeared persons. However, the Working Group has also underlined that reconciliation between the State and the victims of enforced disappearance cannot happen without the clarification of each individual case.

The 1992 Declaration on the Protection of All Persons from Enforced Disappearance enumerates a number of obligations that flow from the right to the truth.

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

#### *General Comment*

1. The right to the truth in relation to enforced disappearances means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s).

2. The right to the truth in relation to enforced disappearances should be clearly distinguished from the right to information, and in particular the right of the relatives or other persons with a legitimate interest, their representatives or their legal counsel, to obtain information on a person who is deprived of his liberty. The right to information on the person detained, together with the non-derogable right of *habeas corpus*, should be considered central tools to prevent the occurrence of enforced disappearances.

3. Article 13 of the Declaration recognizes the obligation of the State to investigate cases of enforced disappearances. Paragraph 4 of Article 13 specifies that “the findings of such an investigation shall be made available upon request to all interested persons, unless doing so would jeopardize an ongoing criminal investigation.” In light of the developments that happened since 1992, the Working Group deems that the restriction in the last part of this paragraph should be interpreted narrowly. Indeed, the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth. Such a limitation must be strictly proportionate to the only legitimate aim: to avoid jeopardizing an ongoing criminal

investigation. A refusal to provide any information, or to communicate with the relatives at all, in other words a blanket refusal, is a violation of the right to the truth. Providing general information on procedural matters, such as the fact that the matter has been given to a judge for examination, is insufficient and should be considered a violation of the right to the truth. The State has the obligation to let any interested person know the concrete steps taken to clarify the fate and the whereabouts of the person. Such information must include the steps taken on the basis of the evidence provided by the relatives or other witnesses. While the necessities of a criminal investigation may justify restricting the transmission of certain information, there must be recourse in the national legislation to review such a refusal to provide the information to all interested persons. This review should be available at the time of the initial refusal to provide information, and then on a regular basis to ensure that the reason for the necessity that was invoked by the public authority to refuse to communicate, remains present.

4. Paragraph 6 of Article 13 provides that: “An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.” The obligation to continue the investigation for as long as the fate and the whereabouts of the disappeared remains unclarified is a consequence of the continuing nature of enforced disappearances (see the Working Group’s general comment on article 17 and its general comment on enforced disappearance as a continuous human rights violation and continuous crime).

It also makes it clear that the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation. No legitimate aim, or exceptional circumstances, may be invoked by the State to restrict this right. This absolute character also results from the fact that the enforced disappearance causes “anguish and sorrow” (5<sup>th</sup> preambular paragraph of the Declaration) to the family, a suffering that reaches the threshold of torture, as it also results from article 1§2 of the same Declaration that provides: “Any act of enforced disappearance (...) constitutes a violation of the rules of international law guaranteeing, (...) the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.” In this regard, the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives.

5. The State's main obligations under the right to the truth are mainly procedural and include: the obligation to investigate until the fate and the whereabouts of the person have been clarified; the obligation to have the results of these investigations communicated to the interested parties under the conditions specified in paragraph 3 of this general comment; the obligation to provide full access to archives; and the obligation to provide full protection to witnesses, relatives, judges and other participants in any investigation. There is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result. Indeed, in certain cases, clarification is difficult or impossible to attain, for instance when the body, for various reasons, cannot be found. A person may have been summarily executed, but the remains cannot be found because the person who buried the body is no longer alive, and nobody else has information on the person's fate. The State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person.

In its general comment on article 19 (the right to compensation), the Working Group made it clear that: "As a general principle, no victim of enforced disappearance shall be presumed dead over the objections of the family."

6. The right to know the truth about the fate and the whereabouts includes, when the disappeared person is found to be dead, the right of the family to have the remains of their loved one returned to them, and to dispose of those remains according to their own tradition, religion or culture. The remains of the person should be clearly and indisputably identified, including through DNA analysis. The State, or any other authority, should not undertake the process of identification of the remains, and should not dispose of those remains, without the full participation of the family and without fully informing the general public of such measures. States ought to take the necessary steps to use forensic expertise and scientific methods of identification to the maximum of its available resources, including through international assistance and cooperation.

7. The right to know the truth about the fate and the whereabouts also applies to the cases of children who were born during their mothers' enforced disappearances, and who were thereafter illegally adopted. Article 20 of the Declaration provides that such acts of abduction, as well as the act of altering or suppressing documents attesting to their true identity, shall constitute an extremely serious offence, which

shall be punished as such". The same provision also provides that States "shall devote their efforts to the search for and identification of such children and to the restitution of the children to their families of origin". That is to say that the falsity of the adoption should be uncovered. Both the families of the disappeared and the child have an absolute right to know the truth about the child's whereabouts. However, paragraph 2 of the same article tries to ensure a balance when it comes to the issue of whether the adoption should be revisited. This balance, taking into consideration the best interest of the child, does not prejudice the right to know the truth of the family of origin or the child's whereabouts.

8. The right to know the truth about the circumstances of the disappearance, in contrast, is not absolute. State practice indicates that, in some cases, hiding parts of the truth has been chosen to facilitate reconciliation. In particular, the issue whether the names of the perpetrators should be released as a consequence of the right to know the truth is still controversial. It has been argued that it is inappropriate to release the names of the perpetrators in processes such as "truth commissions", when perpetrators do not benefit from the legal guarantees normally granted to persons in criminal processes, in particular the right to be presumed innocent. Regardless, under article 14 of the Declaration, the State has an obligation to bring any person alleged to have perpetrated an enforced disappearance "before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force."

However, in its general comment on article 18 of the Declaration, the Working Group noted that the prohibition of amnesty provided for by article 18 allowed "limited and exceptional measures that directly lead to the prevention and termination of disappearances, as provided for in article 3 of the Declaration, even if, prima facie, these measures could appear to have the effect of an amnesty law or similar measure that might result in impunity."

The Working Group continued:

"Indeed, in States where systematic or massive violations of human rights have occurred as a result of internal armed conflict or political repression, legislative measures that could lead to finding the truth and reconciliation through pardon might be the only option to terminate or prevent

disappearances.”

In other words, restrictions on the right to the truth do not affect the right to justice of the victims, i.e. the decision not to release the names of the perpetrators in a truth process does not prevent a prosecution from occurring. In the meantime, the realization of the right to the truth may in exceptional circumstances result in limiting the right to justice, within the strict limits contained in paragraphs 6 and 8 of the Working Group’s general comment on article 18 and taking account paragraph 3-b of the same general comment. The Working Group in particular recalls that: “Pardon should only be granted after a genuine peace process or *bona fide* negotiations with the victims have been carried out, resulting in apologies and expressions of regret from the State or the perpetrators, and guarantees to prevent disappearances in the future” (general comment on article 18, § 8-b). In addition, the Working Group is of the opinion that no such limitation may occur when the enforced disappearance amounts to a crime against humanity (on the definition of enforced disappearances as a crime against humanity, see the WGEID’s general comment on this issue).

9. The right to the truth implies that the State has an obligation to give full access to information available, allowing the tracing of disappeared persons. Paragraph 2 of Article 13 of the Declaration states that the “competent authority [to investigate] shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits”. This authority should also have the power to have full access to the archives of the State. After the investigations have been completed, the archives of the said authority should be preserved and made fully accessible to the public.

10. Finally, the right to the truth also ensures that the State has an obligation to provide the necessary protection and assistance to victims, witnesses and other interested persons. The search for truth often provokes perpetrators and others, who may attempt to prevent the truth from being discovered by threatening or even attacking persons participating in an investigation. Thus, the State has an obligation to provide for effective protection of interested parties. Paragraph 3 of Article 13 is very clear when it states that “[s]teps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.” In particular, the State may set up a witness protection programme through an



independent institution.”

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