



## 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**

WGEID report 1995 (E/CN.4/1996/38)

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.

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**

WGEID report 1995 (E/CN.4/1996/38)

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;
- (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**

WGEID Report 1996 (Excerpt of E/CN.4/1997/34 / 13 December 1996)

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.

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**

WGEID report 2000 (E/CN.4/2001/68 / 18 December 2000)

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.

“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 Cancado 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**

WGEID Report 2005 (E/CN.4/2006/56)

Disappearances, amnesty and impunity: general comment on article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance

#### 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 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**

WGEID Report 1997 (E/CN.4/1998/43)

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 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.