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Reporting under the International Convention for the Protection of All Persons from Enforced Disappearance

Training Guide

PART I – Manual

Reporting under the International Convention for the Protection of All Persons from Enforced Disappearance

Training Guide

PART I – Manual

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Foreword by the United Nations High Commissioner for Human Rights

The International Convention for the Protection of All Persons from Enforced Disappearance is a critical piece of the international human rights framework and a cornerstone for the protection of persons from enforced disappearance. The Convention is the result of the tireless work and advocacy of States, associations of victims' families, non-governmental human rights organizations, other parts of civil society and experts, who, over a quarter of a century, emphasized the need for a universal instrument to efficiently prevent and address this heinous human rights violation. Its all-encompassing approach focuses on prevention and punishment of enforced disappearances, as well as on reparations and guarantees of its non-recurrence.

Key obligations set out in the Convention include the duty for each State party to ensure that enforced disappearance constitutes an offence under its criminal law, and affirmation that the widespread or systematic practice of enforced disappearance is a crime against humanity and therefore attracts the consequences thereof under international law. The Convention also establishes obligations for States parties to hold persons deprived of their liberty in officially recognized places of detention, to disclose their whereabouts and to provide accurate and prompt information on their detention to their family, their counsel or other persons with a legitimate interest. Furthermore, the Convention provides for urgent actions and individual communications procedures, vital tools to assist States in their efforts to locate and protect disappeared persons and their relatives, and to examine allegations of violations of the Convention.

The Office of the High Commissioner for Human Rights (OHCHR) is pursuing the ratification of the Convention by every State Member of the United Nations by facilitating a greater understanding of the rights and corresponding obligations enshrined in the Convention. This initiative goes hand in hand with the efforts of OHCHR to assist States at the national level to build and develop their institutional capacity for reporting and implementing the full range of their human rights obligations.

This training guide, marking 10 years after the inaugural session of the Committee on Enforced Disappearances in November 2011, draws on the Committee's expertise and experience, particularly as set out in its concluding observations on States parties' reports, jurisprudence of individual communications and urgent actions. It is above all a practical tool seeking to assist States and other stakeholders to gain a greater understanding of the rights enshrined in the Convention, with the objective, in turn, of deeper implementation by States parties of their obligations under the Convention, including through high-quality reporting.

I therefore hope that this training guide will be a valuable tool for States parties and all other stakeholders to foster a broader understanding of the Convention. With this guide, OHCHR aims to facilitate the Convention's global implementation, with a view to eradicating the scourge of enforced disappearances worldwide.



Michelle Bachelet
United Nations High Commissioner
for Human Rights

Foreword by the Chair of the Committee on Enforced Disappearances

On 20 December 2006, the International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the General Assembly during its sixty-first session. The Convention entered into force on 23 December 2010. Since then, the Committee on Enforced Disappearances has been working on a daily basis to support States parties, victims, civil society organizations and national human rights institutions to eradicate and prevent enforced disappearances. Ten years later, there is still a lot to do. However, it is time to take stock of what has been achieved and to raise awareness about the work of the Committee, its competence and the jurisprudence that it has established through the 11 procedures that stem from the Convention.

The present training guide gathers all this information together. It provides clear guidance to States parties on how to report under the Convention and to other actors on how to contribute to the work of the Committee. It also gives key information to States that have still not ratified the Convention, painting a clear picture of the Committee's jurisprudence and competence and illustrating what the Committee does to support all actors in what must be a priority for us all, namely to eradicate and prevent enforced disappearances in all parts of the world.

As the United Nations High Commissioner for Human Rights recently said at a public event organized by the Committee and the Working Group on Enforced or Involuntary Disappearances, promises and good intentions are indeed not enough to this end. It is urgent that all States ratify the Convention; as well as consider the relevant declarations to enable the Committee to examine individual complaints and inter-State communications. We know that the Convention stems in great part from the terrible practices of the dictatorships in Latin America in the 1970s and 1980s. It is, however, a mistake to consider it as a tool that is only relevant to past crimes and to limited regions of the world; indeed, enforced disappearance is a worldwide scourge.

I want to thank the authors of the manual, as well as the colleagues at the Office of the United Nations High Commissioner for Human Rights who contributed to its review and elaboration. This is a key tool, which I hope will be useful for States, national human rights institutions and civil society actors for the purpose of preventing and eliminating enforced disappearances in every corner of the Earth.



Mohammed Ayat
Chair of the Committee on
Enforced Disappearances
(2019-2021)



About the manual



UN Photo/Elma Okic

A. BACKGROUND

In January 2015, pursuant to General Assembly resolution 68/268, the Office of the United Nations High Commissioner for Human Rights (OHCHR) established the treaty body capacity-building programme with a view to supporting States parties in building up their capacity to implement their treaty obligations. The programme is based at the headquarters of OHCHR in Geneva, with a core team supporting capacity-building staff in its regional offices in Addis Ababa, Bangkok, Beirut, Bishkek, Dakar, Panama, Pretoria, Santiago, Suva and Yaoundé.

In paragraph 17 of resolution 68/268, the General Assembly requested the Secretary-General, through OHCHR, to support States parties in building their capacity to implement their treaty obligations and provide in this regard advisory services, technical assistance and capacity-building, in line with the mandate of the Office, in consultation with and with the consent of the State concerned.

The capacity-building programme aims to transform the perception of reporting from that of being a burden to one of being a concrete benefit to States parties and ultimately to rights holders. The programme provides assistance to the States parties, on treaty-specific reporting, including the preparation of common core documents and the establishment or effective functioning of national mechanisms for reporting and follow-up. At the outset, the programme organized regional train-the-trainers events annually to equip potential trainers from among State officials with the knowledge and skills to provide support to States parties in their increasing engagement with the treaty bodies and other human rights mechanisms.

In 2017, to underpin all activities, the programme developed a training guide on reporting to the United Nations treaty bodies.¹ The training guide is the first part of a comprehensive training curriculum on human rights treaty reporting with an emphasis on procedural aspects of reporting. The training guide is divided into two complementary parts. Part I is a [manual](#), which provides an overview of the United Nations human rights system and detailed information on the reporting processes of the treaty bodies, including procedures, requirements and the roles of different stakeholders. It also includes chapters on the preparation of States parties' reports and on national mechanisms for reporting and follow-up, in accordance with the guidance provided in a [practical guide](#)² and [study](#)³ on such mechanisms by OHCHR. There is also a specific section and checklist on the role of other stakeholders – the United Nations system, the national human rights institution and civil society organizations – in the reporting process. Part II is a [guide for facilitators](#) on preparing and delivering training courses on treaty reporting. It includes facilitator's notes, session plans, presentation slides, videos, quizzes and so forth. The training guide has been transformed into an interactive online [course](#) on reporting to the treaty bodies.

The training guide will be complemented by specific training materials on each core international human rights treaty, focusing on substantive articles of each treaty. In addition to a [training guide on the Convention on the Rights of Persons with Disabilities](#),⁴ the capacity-building programme has developed a [practical guide on the role of the national preventive mechanisms in preventing torture](#)⁵ and a [training guide on reporting under the International Covenant on Civil and Political Rights](#).⁶

The present training guide on reporting under the International Convention for the Protection of All Persons from Enforced Disappearance has been developed in this context.

B. OVERVIEW OF THE MANUAL

1. WHAT IS THE MANUAL?

The manual aims to equip States parties with details about the [Convention](#), which was adopted on 20 December 2006 and which entered into force on 23 December 2010, and the relevant information needed to engage with the Committee on Enforced Disappearances. Its objective is to facilitate the understanding of the rights enshrined in the Convention and the corresponding obligations of States parties in respecting, protecting and fulfilling those rights.

The manual is based on the provisions of the Convention, the substantive statements issued by the Committee, its jurisprudence on individual communications, urgent actions and concluding observations on States parties' reports, as well as its annual reports, reporting guidelines, rules of procedure, working methods and other documents. The manual should be understood as a practical tool, while bearing in mind the constantly developing practice of the Committee in interpreting the Convention.

¹ OHCHR, *Reporting to the United Nations Human Rights Treaty Bodies Training Guide: Part I – Manual* (New York and Geneva, 2017) and *Reporting to the United Nations Human Rights Treaty Bodies Training Guide: Part II – Notes for Facilitators* (New York and Geneva, 2017).

² OHCHR, *National Mechanisms for Reporting and Follow-up: A Practical Guide to Effective State Engagement with International Human Rights Mechanisms* (New York and Geneva, 2016).

³ OHCHR, *National Mechanisms for Reporting and Follow-up: A Study of State Engagement with International Human Rights Mechanisms* (New York and Geneva, 2016).

⁴ *The Convention on the Rights of Persons with Disabilities: Training Guide*, Professional Training Series No. 19 (United Nations publication, 2014).

⁵ OHCHR, *Preventing Torture: the Role of National Preventive Mechanisms – A Practical Guide*, Professional Training Series No. 21 (New York and Geneva, 2018).

⁶ *Reporting under the International Covenant on Civil and Political Rights: Training Guide*, Professional Training Series No. 23 (United Nations publication, 2021).

This manual also constitutes a reference document for trainers who intend to design and deliver training courses on the Convention and engaging with the Committee. The manual can be used jointly with the training guide on reporting to the treaty bodies, which covers all the procedural aspects of the reporting process.

2. WHOM IS THE MANUAL FOR?

The manual is a reference source for States parties to understand the contents of the Convention and the ensuing obligations and to engage with the Committee, whether by submitting reports or dealing with urgent actions, individual and inter-State communications or country visits. The manual can also be useful for various other stakeholders, such as United Nations specialized agencies and country teams, national human rights institutions and civil society organizations that wish to inform themselves about the Convention and the functioning of the Committee.

3. HOW TO USE THE MANUAL

The manual has been designed as a support for States parties to implement the Convention and meaningfully engage with the Committee. It provides them with condensed information, organized by chapters, on the provisions of the Convention, the Committee and its functioning, and other relevant subjects, including the guiding principles for the search for disappeared persons⁷ and the Working Group on Enforced or Involuntary Disappearances and its relationship with the Committee.

The manual begins with a general discussion of issues such as signature and ratification, reservations and declarations and briefly explains the current status of the Convention, what States should do to become parties and fully recognize the competence of the Committee, providing reasons for becoming a State party to the Convention.

The sections of the manual include: (a) a detailed overview of the obligations of States parties, including an article-by-article analysis of the Convention; (b) an explanation on the composition, mandate and functions of the Committee, with clear guidelines on how to engage with it under the reporting procedure; urgent measures (known as “urgent actions”); individual and inter-State communications; country visits and the referral to the General Assembly; (c) the contents and scope of application of the guiding principles for the search for disappeared persons; (d) non-exhaustive examples of the provisions of the Convention that are reflected in other international treaties; (e) a presentation on the Working Group and its functions and relationship with the Committee; (f) a non-exhaustive summary of the linkages between the Convention and the recommendations issued in the context of the universal periodic review or those by special procedures. Finally, the manual includes a section on the linkages between the Convention and the Sustainable Development Goals.

Throughout the manual, examples of good practices and lessons learned in implementing the Convention and engaging with the Committee will be provided.

Where appropriate, reference will be made to general comments⁸ or reports of the Working Group, as well as to general comments, views on individual communications and concluding observations of the Human Rights Committee. In that connection, it is to be noted that, to date, the Committee on

⁷ CED/C/7.

⁸ The Working Group adopts [general comments](#) to clarify its interpretation of the provisions of the Declaration on the Protection of All Persons from Enforced Disappearance.

Enforced Disappearances has not adopted general comments. This is partly due to the fact that the Committee needs to expand its jurisprudence before precisely formulating its exact position on the dispositions of the Convention.

As mentioned earlier, the present manual is complemented by another tool, namely the notes for facilitators, which form part II of the training guide and closely follow the structure of part I. The notes have been designed to assist facilitators in preparing and delivering training courses on the contents of the Convention and the Committee and its functions, which are intended ideally for relatively small groups up to a maximum of 25 participants. The notes will be published online on the OHCHR website and will be updated when necessary. The training sessions may comprise a mix of slide presentations and group activities, and include different training components: facilitators' notes, session plans, slide presentations, videos, quizzes etc. The trainings sessions are based on the training methodology of OHCHR,⁹ which is based on a participatory approach. It is important that facilitators respect and use this approach to encourage enriching discussions and exchanges of information and experiences with and among the participants. The sessions are designed in such a way that, if necessary, the training can be conducted entirely online.

C. INTRODUCTION TO KEY NOTIONS

To have a better understanding of the subject of the manual – and ultimately of the Convention – it is important to clarify some key notions. In fact, there are different types of disappearances, but this manual – and the Convention – concerns solely enforced disappearances and does not encompass other types of disappearances, including disappearances due to accidents or natural disasters.

The Convention concerns enforced disappearance, which is a crime under international law and an ongoing violation of multiple human rights. It entails:

- The deprivation of liberty, in whatever form (e.g. arrest, detention or abduction), against the will of the disappeared person.
- Followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person.
- The direct or indirect involvement (through authorization, support or acquiescence) of State agents.

Notably, the expressions “enforced disappearance” and “forced disappearance” are synonyms.¹⁰

The notion of “missing person”, markedly broader than that of “person subjected to enforced disappearance”, must be clarified. There is no legal definition of a missing person under international law, and this notion is mostly used in international humanitarian law.

⁹ *From Planning to Impact: A Manual on Human Rights Training Methodology*, Professional Training Series No. 6/Rev.1 (United Nations publication, 2000) and Equitas (International Centre for Human Rights Education) and OHCHR, *Evaluating Human Rights Training Activities: A Handbook for Human Rights Educators*, Professional Training Series No. 18 (Montreal, 2011).

¹⁰ In practice, the term “involuntary disappearance” is also used and it has the same meaning.

The International Committee of the Red Cross (ICRC) has drafted the following operative definition:

Missing persons are “individuals of whom their families have no news and/or who, on the basis of reliable information, have been reported missing as a result of an armed conflict – international or non-international – or of internal violence, internal disturbances or any other situation that might require action by a neutral and independent body”. This includes disasters and situations involving migration.

ICRC, *Missing Persons: A Handbook for Parliamentarians* (Geneva, 2009), p. 9.

A victim of enforced disappearance can be considered as a “missing person”. However, not all missing persons are victims of enforced disappearance. When a missing person is a victim of enforced disappearance, a number of international obligations tied to this notion will be activated simultaneously, in particular the obligation to search for the disappeared person, investigate the crime of enforced disappearance, and prosecute and punish those responsible. However, the other contexts resulting in missing persons may not necessarily involve the existence of a crime, for example if persons are missing due to a natural catastrophe. The duty to clarify the fate of persons concerned applies to both phenomena.

Despite some obvious similarities, enforced disappearances must be distinguished from common crimes, such as abduction, kidnapping or extortion, the outcomes of which are similar to that of enforced disappearances. The victim “vanishes” in all these situations. However, in those cases, one or more of the constitutive elements of enforced disappearance are not present (e.g. the involvement of the State). Indeed, there are some areas in which the distinction between enforced disappearance and the other phenomena is blurred, including trafficking of persons and forced recruitment. In all these cases:

Enforced disappearance may only be ruled out after a complete, independent and impartial investigation.

The expression “disappearance” is broader than that of “enforced disappearance”. In addition to cases falling under the narrow category of “enforced disappearances” as defined by the Convention, it may encompass other instances in which the fate and whereabouts of a person are unknown, such as illegal deprivation of liberty, trafficking, illegal constraint and abuse of power, but some or all of the elements of the definition of “enforced disappearance” are not met (for instance, because there is no involvement whatsoever of the State in the commission of the crime).

In the manual, the phrase “victims of enforced disappearance” is often used and it must be understood in accordance with the definition that is contained in the Convention, thus encompassing:

- The disappeared person.
- Any other person who has suffered harm as the direct result of an enforced disappearance (e.g. relatives of the disappeared person).



Introduction to the Convention



The Convention is the first universally¹¹ legally binding human rights instrument¹² concerning enforced disappearance. It spells out in detail States parties' obligations vis-à-vis this phenomenon, which qualifies as a crime under international law and a gross human rights violation, as well as the corresponding victims' fundamental rights.

It was preceded by the [Declaration on the Protection of All Persons from Enforced Disappearance](#) (1992 Declaration) proclaimed by the General Assembly in its resolution 47/133 of 18 December 1992, which remains a valid reference as a body of principles for all States.

The adoption of the Convention was prompted by the tireless advocacy of families of disappeared persons and non-governmental organizations (NGOs) from across the world, which emphasized the pressing need for a universal treaty to effectively prevent and eradicate this heinous practice.

Indeed, the existence of relevant gaps in the international legal framework for protection from enforced disappearance was confirmed in 2001 by the independent expert appointed by the Commission on Human Rights to examine the available legal tools and assess their effectiveness and completeness.¹³ The independent expert outlined several gaps in the international legal framework, including the lack of recognition of a specific human right not to be subjected to enforced disappearance; the absence of a legally binding universal obligation on the applicability of universal jurisdiction; and many loopholes

¹¹ At the regional level, see the [Inter-American Convention on Forced Disappearance of Persons](#).

¹² Other international treaties (e.g. of international criminal law) contain relevant provisions on enforced disappearance. See sect. VII below

¹³ E/CN.4/2002/71.

regarding measures of prevention.¹⁴ The expert held that those gaps clearly indicated the need for a legally binding normative instrument for the protection of all persons from enforced disappearance.¹⁵

Following the report of the independent expert, in 2003, the Commission on Human Rights decided to draw up such a treaty. The negotiation process lasted three years¹⁶ and the Convention was eventually adopted in 2006, entering into force in 2010.

A. CONTENT AND STRUCTURE

The Convention is composed of 45 articles, divided into three parts. Part I contains the substantive provisions, mostly concerning the States parties' obligations to prevent and punish enforced disappearance and the corresponding victims' rights. Part II establishes the Committee on Enforced Disappearances and stipulates its functions to monitor implementation of the Convention. Part III contains the formal requirements regarding signature, entry into force, amendments and the relationship between the Convention and international humanitarian law.

The provisions of the Convention can be broken down as follows:

Preamble	<p>Sets the general context, recalling other international instruments relevant to the protection of all persons from enforced disappearance, in the fields of human rights, international humanitarian law and international criminal law.</p> <p>Affirms that enforced disappearance is a crime and that, in certain circumstances defined in international law, its "widespread" or "systematic" practice amounts to a crime against humanity.</p> <p>Upholds various rights vis-à-vis enforced disappearance, namely: the right of any person not to be subjected to enforced disappearance; the rights of victims to justice and reparation; the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person.</p> <p>Sets out the object and purpose of the Convention, namely to prevent enforced disappearance and to combat impunity for such crime.</p>	
Article 1	The non-derogable right not to be subjected to enforced disappearance	Establishes the specific non-derogable human right not to be subjected to enforced disappearance.
Article 2	Definition	Enshrines the definition of enforced disappearance and its constitutive elements (i.e. deprivation of liberty, followed by a refusal to acknowledge such deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, perpetrated by agents of the State or persons or groups of persons acting with the authorization, support or acquiescence of the State). The inherent consequence of an enforced disappearance is that the disappeared person is placed outside the protection of the law.
Article 3	Obligations vis-à-vis non-State actors	Spells out States parties' obligations when non-State actors commit acts that are tantamount to enforced disappearance (i.e. investigate and bring those responsible to justice).

¹⁴ Ibid., para. 96.

¹⁵ Ibid., para. 99.

¹⁶ The relevant documents concerning the negotiation process are available on the Committee's [web page](#).

Article 4	Criminalization of enforced disappearance in domestic legislation	Requests States parties to codify enforced disappearance as a criminal offence under domestic law.
Article 5	Enforced disappearance as a crime against humanity	Establishes that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law.
Article 6	Obligation to sanction perpetrators of enforced disappearance or superiors responsible for the actions of their subordinates	Requires States parties to hold criminally responsible those who commit, order, solicit or induce the commission of, attempt to commit, are accomplices to or participate in an enforced disappearance. It also regulates the responsibilities of superiors and states that no order or instruction from any public authority may be invoked to justify an offence of enforced disappearance.
Article 7	Sanctions and mitigating and aggravating circumstances	Stipulates States parties' obligations with regard to the sanction of enforced disappearance and the possibility to establish mitigating or aggravating circumstances.
Article 8	Statute of limitations for criminal proceedings	Stipulates that the crime of enforced disappearance is continuous in nature and regulates the application of the statute of limitations for criminal proceedings. The statute of limitations for criminal proceedings, if any, must be of long duration, proportionate to the extreme seriousness of the offence and commence from the moment when the offence ceases.
Article 9	Jurisdiction	Requests States parties to establish their competence to exercise jurisdiction over the offence of enforced disappearance, when the latter is committed in their territory; when the alleged offender is one of their nationals and the State party considers it appropriate; when the disappeared person is one of their nationals; and when the alleged offender is present in their territory and is not extradited.
Article 10	Obligation to extradite or prosecute (<i>aut dedere aut judicare</i>)	Stipulates, in combination with articles 9 (2) and 11 (1)–(2), that if the alleged perpetrator of an enforced disappearance is present in the territory of a State party, the latter must either apprehend and prosecute him or her or extradite or surrender him or her.
Article 11	Procedural safeguards for those prosecuted for enforced disappearance	Stipulates the procedural safeguards that States parties must afford to any person prosecuted for the offence of enforced disappearance.
Article 12	Procedural guarantees during the investigation phase	Establishes the measures States parties must adopt to ensure that allegations of enforced disappearance are subjected to a prompt, thorough, independent, impartial and effective investigation.
Article 13	Extradition	Stipulates that, for the purposes of extradition, the offence of enforced disappearance must not be regarded as a political offence and spells out the corresponding measures to be taken by States parties and the safeguards to be ensured.
Article 14	Mutual legal assistance	Requires States parties to afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings in cases of enforced disappearance.

Article 15	International cooperation to assist victims	Requires States parties to cooperate with a view to assisting and searching for victims of enforced disappearance and, in the event of death, in exhuming and identifying them and returning their remains.
Article 16	Non-refoulement	Stipulates that no State party shall expel, return, surrender or extradite a person to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance, and provides guidance to States parties on the elements to be taken into account when carrying out such an assessment.
Article 17	Prohibition of secret detention and the rights of persons deprived of liberty	Stipulates that no one shall be held in secret detention and spells out the safeguards to be afforded to persons deprived of liberty. Requests States parties, among others, to compile and maintain up-to-date official registers of persons deprived of liberty.
Article 18	Access to information on persons deprived of liberty	Establishes States parties' obligation to ensure access to a minimum of core information on persons deprived of liberty to any person with a legitimate interest, such as relatives, their representatives or their counsel.
Article 19	Protection of personal information and data of persons deprived of liberty	Stipulates the safeguards to be adopted by States parties to protect the personal data and information of persons deprived of liberty.
Article 20	Exceptional restriction on access to information on persons deprived of liberty	Spells out the very exceptional circumstances under which a State party can restrict access to information on persons deprived of liberty and the corresponding applicable safeguards, and sets out the obligation of States parties to ensure the right to a prompt and effective judicial remedy to obtain access to that information.
Article 21	Release of persons deprived of liberty	Stipulates the safeguards that must be in place when releasing persons deprived of liberty.
Article 22	Criminalization of conduct related to enforced disappearance	Requires States parties to criminalize and sanction conduct such as the failure to record accurate information on persons deprived of liberty, the provision of inaccurate information or the refusal to provide such information.
Article 23	Training of personnel	Requires States parties to train law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the treatment of persons deprived of liberty on the provisions of the Convention. It stipulates that States parties should ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited and that a person who refuses to obey such an order will not be punished.
Article 24	Definition of the victims of enforced disappearance and measures to protect and guarantee their rights	Sets forth that the notion of "victim" of enforced disappearance encompasses the disappeared person and any person who suffers harm as a direct result of enforced disappearance. Stipulates victims' rights and the corresponding obligations of States parties, namely: the right to know the truth; the obligation to search for disappeared persons; the right to compensation and other measures of reparation, including restitution, rehabilitation, satisfaction and guarantees of non-repetition; the obligation to regulate the legal situation of disappeared persons; and the obligation to guarantee the right to form and participate freely in organizations concerned with attempting to establish the circumstances of enforced disappearances and to assist victims.

Article 25	Wrongful removal of children and falsification of the identity documents of children	<p>Requires States parties to prevent and punish the wrongful removal of children and the falsification, concealment or destruction of documents attesting to the true identity of disappeared children subjected to wrongful removal.</p> <p>Stipulates that States parties must assist one another in searching for, identifying and locating disappeared children.</p> <p>Requires States parties to have in place legal procedures to review adoptions or placement procedures and, where appropriate, annul adoptions or placement that originated in an enforced disappearance.</p>
Article 26	Committee	<p>Establishes the Committee on Enforced Disappearances and stipulates the rules concerning its composition.</p>
Article 27	Evaluation of the functioning of the Committee	<p>Stipulates that a conference of the States parties, to be held within six years following the entry into force of the Convention, must evaluate the functioning of the Committee and decide whether to maintain it or to transfer its functions to another body.</p> <p>The conference took place on 19 December 2016 and States parties decided to maintain the Committee.</p>
Article 28	Cooperation between the Committee and other international human rights mechanisms	<p>Requires the Committee to cooperate with all relevant organs, offices and specialized agencies and funds of the United Nations, with other treaty bodies, with the special procedures and with the relevant regional intergovernmental organizations or bodies, as well as with all relevant State institutions, agencies or offices.</p> <p>Requires the Committee to consult other treaty bodies, in particular the Human Rights Committee, with a view to ensuring the consistency of the respective observations and recommendations.</p>
Article 29	State reporting procedure	<p>Requires States parties to submit a report to the Committee within two years after the entry into force of the Convention, and provides the Committee with the possibility to follow up on the adopted recommendations.</p> <p>Allows the Committee to request additional information from States parties.</p>
Article 30	Urgent actions	<p>Regulates the so-called urgent actions procedure, through which the Committee may request a State party to take immediate action to search for a disappeared person. Requests for urgent action may be submitted by relatives of a disappeared person, their representatives, their counsel, any person authorized by them or any person having a legitimate interest.</p>
Article 31	Individual communications	<p>Stipulates that States parties can recognize the competence of the Committee to receive and examine individual communications submitted by alleged victims of violations of the Convention. Such recognition requires States parties to make a specific declaration to that effect.</p>
Article 32	Inter-State communications	<p>Stipulates that States parties can recognize the competence of the Committee to receive and examine inter-State communications in which one State party alleges that another State party does not fulfil its obligations under the Convention. Such recognition requires States parties to make a specific declaration to that effect.</p>

Article 33	Country visits	Stipulates that if the Committee receives information indicating that a State party is seriously violating the provisions of the Convention, it may request to undertake a visit.
Article 34	Referral to the General Assembly	Establishes that, if the Committee receives information indicating that enforced disappearance is being practised on a widespread or systematic basis in a State party, it may urgently bring the matter to the attention of the General Assembly.
Article 35	Competence <i>ratione temporis</i>	Stipulates that the Committee is competent solely in respect of enforced disappearances that commenced after the entry into force of the Convention for the State concerned. The Committee has adopted a statement to clarify the content of this provision.
Article 36	Annual report	Requests the Committee to submit annual reports on its activities to the States parties and to the General Assembly.
Article 37	Best protection clause	Establishes that any provisions that are more conducive to the protection from enforced disappearance found in international and domestic laws should be applied.
Article 38	Signature and ratification	Stipulates that the Convention is open for signature and ratification/accession by all States Members of the United Nations. Instruments of ratification/accession must be deposited with the Secretary-General.
Article 39	Entry into force	Establishes that the Convention will enter into force after the twentieth instrument of ratification/accession has been deposited. For States ratifying/acceding after the twentieth instrument of ratification/accession has been deposited, the Convention will enter into force on the thirtieth day after the deposit of their instrument of ratification/accession.
Article 40	Notifications from the Secretary-General	Stipulates that the Secretary-General must notify all States parties of new signatures/ratifications/accessions; and the date of entry into force of the treaty.
Article 41	Territorial application	Establishes that the Convention applies to all parts of federal States without any limitations or exceptions.
Article 42	Dispute settlement	Stipulates the procedure to settle disputes between States parties on the interpretation or application of the Convention. Specifies that disputes can be submitted to arbitration at the request of one of the parties concerned. If, within six months from the date of such a request, the dispute is not settled, it may be referred to the International Court of Justice in conformity with the Statute of the Court. Stipulates that, if a State party does not want to be bound by this procedure, it can make a declaration to this effect at the time of signature or ratification (such a declaration may be withdrawn at any time afterwards).
Article 43	The Convention and international humanitarian law	Establishes that the Convention is without prejudice to the relevant provisions of international humanitarian law or to the opportunity of any State party to authorize ICRC to visit places of detention in situations not covered by international humanitarian law.

Article 44	Amendments	Stipulates the procedure to amend the Convention: <ul style="list-style-type: none">• Amendments to the Convention may be proposed by any State party. A proposed amendment must be filed with the Secretary-General, who communicates it to the States parties;• Within four months from this communication, at least one third of the States parties must expressly declare whether they favour a conference of States parties. If this is the case, the Secretary-General convenes such a conference;• At the conference, an amendment must be adopted by a majority of two thirds of the States parties present and voting. The Secretary-General submits such an amendment to all States parties for acceptance;• An amendment enters into force when two thirds of the States parties have accepted it in accordance with their respective constitutional processes. If an amendment enters into force, it is binding on those States parties that have accepted it.
Article 45	Authentic texts	Stipulates that the texts of the Convention in the six official United Nations languages are equally authentic and are deposited with the Secretary-General.

B. SIGNATURE AND RATIFICATION OR ACCESSION

If a State intends to become party to a treaty, it must express its consent to be bound by it. In this regard, signature is not enough and must be accompanied or followed by ratification. Upon signature of a treaty, a State is obliged not to act contrary to the object and purpose of the treaty. Accession is the act whereby a State that has not signed a treaty expresses its consent to become a party thereto. Accession has the same legal effect as ratification, acceptance or approval.¹⁷

Article 38 of the Convention establishes that States can express their consent to be bound through ratification or accession. Instruments of ratification or accession must be deposited with the Secretary-General.

Ratification consists of the deposit, through a formal letter, of the [instrument of ratification](#) with the Secretary-General, as the depositary of the treaty. With the deposit of the instrument of ratification, the State establishes, at the international level, its consent to be bound by the treaty.

Ratification or accession make the international human rights norms enshrined in the treaty legally binding vis-à-vis the State concerned. The State must adopt measures to align its legislation, policy and practice with the provisions of the treaty.

The various aspects of the ratification or accession processes are regulated at the domestic level by constitutional law and practice. In most civil law countries, ratification takes place through approval of the treaty by the legislative branch. After the vote of approval, the act of ratification is sent to the executive for its promulgation, publication and deposit. In most common law countries, ratification

¹⁷ Vienna Convention on the Law of Treaties, art. 18.

can take place through an act of the executive and, if parliament is involved, it is only in a consultative capacity.

The Convention entered into force on 23 December 2010, that is on the thirtieth day after the date on which the twentieth instrument of ratification or accession was deposited with the Secretary-General.

For States ratifying or acceding to the Convention after 23 December 2010, it enters into force on the thirtieth day after the date of the deposit of the instrument of ratification or accession.

There are 63 States parties to the Convention as of June 2021.¹⁸

Ratification/accession and the competence of the Committee

States that ratify or accede to the Convention become parties and accept to be bound by it. With regard to the Committee, this enables the reception and examination of States parties' reports (art. 29) and requests for urgent action (art. 30), the possibility to conduct country visits (art. 33) and the referral procedure to the General Assembly (art. 34).

However, ratification or accession to the Convention is not enough to recognize the competence of the Committee to consider individual and inter-State communications. This requires an additional separate declaration pursuant to articles 31 and 32 of the Convention. This declaration may be made at the time of ratification or accession or any time afterwards.

Hence, to become a party to the Convention and enable all the functions of the Committee, including the reception and consideration of individual and inter-State communications, a State must deposit with the Secretary-General:

**INSTRUMENT OF
RATIFICATION/ACCESSION**



**DECLARATION PURSUANT TO
ARTICLES 31 AND 32**

Examples of declarations pursuant to articles 31 and 32 Convention¹⁹



"... in accordance with article 31 of the Convention, [name of the State] declares that it recognizes the competence of the Committee on Enforced Disappearances to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation of provisions of this Convention by [name of the State]."

"... in accordance with article 32 of the Convention, [name of the State] declares that it recognizes the competence of the Committee on Enforced Disappearances to receive and consider communications in which a State party claims that another State party is not fulfilling its obligations under the Convention."

Compared with the other United Nations core human rights treaties, the number of States parties to the Convention is still low and the goal of universal ratification remains some way off.

¹⁸ The status of signature, ratification and accession may be consulted on the Treaty Section [website](#).

¹⁹ Notably, a State can submit a declaration pursuant to articles 31 and 32 or either of them separately. For more details, see sects. IV.C and IV.D below.

Campaigns to raise awareness and to encourage ratification of the Convention and recognition of the competence of the Committee pursuant to articles 31 and 32 of the Convention have been launched by OHCHR ([Stand up for the Disappeared](#)), civil society organizations (i.e. the [International Coalition against Enforced Disappearances](#)) and States parties.²⁰

The Secretary-General has repeatedly urged States that have not yet done so to sign, ratify or accede to the Convention.²¹ This has been echoed by regional intergovernmental organizations, such as the Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe²² and the General Assembly of the Organization of American States.²³ States also frequently recommend that their peers ratify the Convention in the context of the universal periodic review.

On the tenth anniversary of the Convention, the High Commissioner for Human Rights called on States to double the number of States parties to the Convention during the following five years.²⁴

Ratification of/accession to the Convention and recognition of the competence of the Committee pursuant to articles 31–32 are regularly recommended to States by:

- Treaty bodies (e.g. concluding observations of the Human Rights Committee and the Committee against Torture)²⁵
- Special procedures (e.g. the Working Group)²⁶
- Other States in the context of the universal periodic review²⁷

The case for ratification

Universal ratification of the Convention is the goal.

By becoming parties to the Convention, States bind themselves to:

- A treaty that fills significant gaps in international law and effectively contributes to ensuring the protection of all persons from enforced disappearance.
- A legal instrument that elucidates their obligations to prevent enforced disappearances and combat impunity for such a crime.
- A comprehensive framework that provides law enforcement personnel and public officials with a clear outline of their obligations and guidance on how to discharge their duties in compliance with international law and standards.
- An instrument that requires them to ensure that their domestic (criminal, civil and administrative) legislation contains the necessary elements to prevent, investigate and punish all acts of enforced disappearance.

²⁰ See, e.g., the campaigns launched by France and Argentina, supported by Morocco and Japan.

²¹ See, among others, the Secretary-General's statement of 29 August 2019 ([SG/SM/19716-OBV/1909](#)) and General Assembly resolution 72/183, para. 2.

²² See, among others, reports published by the [Parliamentary Assembly](#) and the [Commissioner for Human Rights of the Council of Europe](#).

²³ See, among others, the Organization of American States, General Assembly resolution No. 2295, para. 17, and resolution No. 2928, sect. vi, para. 2.

²⁴ See OHCHR, "[Committee on Enforced Disappearances meets with Member States and civil society](#)", 9 March 2017.

²⁵ See sect. VII below.

²⁶ See sect. VIII below.

²⁷ *Ibid.*

- A versatile instrument that may trigger procedures for urgent actions and visits, thus making it an effective tool to prevent and combat enforced disappearance, supporting relatives of disappeared persons and any other person with a legitimate interest in raising a case for the attention of the Committee and the United Nations, and to access information related to the search and investigation process, which, in some cases, may lead to the release of the disappeared or to the recovery of their remains.

Moreover, by becoming parties to the Convention, States show:

- Their support for the thousands of victims of enforced disappearance across the world who have struggled during the past 40 years for the adoption of this treaty.
- Their genuine commitment to human rights.

The case for the recognition of the competence of the Committee to receive individual and inter-State communications

The High Commissioner for Human Rights observed that the work of the Committee had had a significant preventive effect and had allowed relatives of disappeared persons to seek justice and redress.

By recognizing its competence pursuant to articles 31 and 32 of the Convention, States parties enable the Committee to discharge its mandate to its fullest extent and to provide victims of enforced disappearance with a mechanism to which they can submit allegations of violations of the Convention.

C. DENUNCIATION

The Convention does not contain a denunciation clause.

The subject is therefore regulated in accordance with article 56 of the Vienna Convention on the Law of Treaties. Accordingly, a treaty is not subject to denunciation unless (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or (b) a right to do so may be implied by the nature of the treaty.

The subject of denunciations was not explicitly discussed during the negotiations of the Convention. Inspiration can be drawn from the practice of the Human Rights Committee, which, in the absence of any denunciation clause in the International Covenant on Civil and Political Rights, has taken a firm stance on States parties' not being able to denounce or withdraw from the Covenant.²⁸

D. RESERVATIONS AND DECLARATIONS

At the moment of signature or ratification of, or accession to, a treaty, States may wish to make reservations or declarations. Reservations can be withdrawn at any time.

²⁸ Human Rights Committee, general comment No. 26 (1997).

A reservation is “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

Vienna Convention on the Law of Treaties, art. 2 (1) (d).

When signing, ratifying or acceding to a treaty, States can also lodge declarations, namely statements setting out a State party’s understanding of a matter contained in the treaty or an interpretation of a particular provision, without excluding or modifying the application of the latter for the State party concerned.

The distinction between reservations and interpretative declarations is not always clear-cut and it has often happened that an alleged interpretative declaration actually amounted to a reservation. The guiding principle to distinguish between them is to identify the legal effect that the State party meant to produce. If the interpretative declaration excludes or modifies a provision of the treaty, it must be considered as a de facto reservation.²⁹

The Convention does not contain any provisions on reservations or declarations. In accordance with article 19 of the Vienna Convention on the Law of Treaties, States parties may formulate reservations unless (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) the reservation is incompatible with the object and purpose of the treaty.

While the Committee has not yet pronounced itself on the subject, valuable inspiration can be drawn from the Human Rights Committee, which has adopted a general comment on the matter and systematically assesses reservations to the International Covenant on Civil and Political Rights when considering States parties’ reports and, where appropriate, recommends their withdrawal.³⁰

Human Rights Committee, general comment No. 24 (1994)

The following are a summary of the Human Rights Committee’s main conclusions:

- Reservations to provisions of the International Covenant on Civil and Political Rights that imply an intent not to comply with customary norms or peremptory norms are not permissible.
- Reservations to provisions concerning rights from which no derogation is permissible under any circumstances are not allowed.
- The normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.³¹
- States parties should include a reference on the status of their reservations in their reports to the Human Rights Committee and should regularly review their reservations and assess whether such reservations are still justified.

²⁹ For the text of reservations and declarations made by States parties to the Convention, see the Treaty Section [website](#).

³⁰ See, e.g., [CED/C/DEU/CO/1](#), paras. 14–15.

³¹ General comment No. 24 (1994), para. 18. However, the International Law Commission has concluded that the treaty bodies do not have the power to sever reservations. According to the Commission, human rights treaty bodies may not substitute their own judgment for the State’s consent to be bound by the treaty ([A/64/10](#), p. 290).

The general comment should be understood in the light of the [Guide to Practice on Reservations to Treaties](#), adopted by the International Law Commission in 2011. It offers guidance on distinguishing between reservations and interpretative declarations (1.3.1), determining the object and purpose of a treaty with the aim of assessing whether a reservation is inadmissible (3.1.5.1–3.1.5.6), and determining the powers of treaty bodies to declare reservations or declarations incompatible with the respective treaty and the legal consequences of such pronouncements (4.5.3 (4)).

The International Law Commission has modified such an approach in the sense that the State party would be considered to be bound by the treaty without the benefit of the reservation unless the opposite intention is clearly stated, that is unless the State party specifies that it does not intend to be bound by a treaty without benefiting from the reservation.³²

In the light of the above, if a State party wishes to make a reservation it will have to be compatible with the object and purpose of the Convention, bearing in mind the non-derogable right of every person not to be subjected to enforced disappearance and the *jus cogens* status of the prohibition of enforced disappearance, and of the corresponding obligation to investigate and punish those responsible.

With a view to their withdrawal, States parties to the Convention are expected to refer to the status of their reservations in their reports to the Committee and regularly review their reservations.

The Committee is competent to assess the compatibility of States parties' reservations with the Convention when reviewing reports under article 29 and, where appropriate, recommend their withdrawal.



³² If a treaty monitoring body expresses the view that a reservation is invalid and the reserving State or international organ intends not to be bound by the treaty without benefit of the reservation, it should express its intention to that effect within a period of 12 months from the date at which the treaty monitoring body made its assessment. See https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf.



Obligations of States parties to the Convention



A. TYPES OF OBLIGATIONS

In its article 1 (1), the Convention affirms the overarching right not to be subjected to enforced disappearance.³³ In doing so, the Convention enshrines a new absolute human right that cannot be subjected to any limitation and from which no derogation is permitted.³⁴ The Convention also establishes various specific rights of victims of enforced disappearance.³⁵ In addition, the Convention envisages a range of obligations of the States parties that aim at preventing and repressing this crime under international law, namely:

- (a) Obligation to respect, which means refraining from violating the right set out in article 1 (1) by not engaging in enforced disappearance as defined in article 2 of the Convention or otherwise denying victims' rights and entitlements under the Convention;
- (b) Obligation to protect, which implies protection against acts violating the rights affirmed in the Convention. Most notably, to prevent, punish, and investigate enforced disappearances and to redress the harm caused by such acts, as defined in article 2 of the Convention. It also implies that States parties are under an obligation to investigate and sanction disappearances of private persons or groups, as defined in article 3 of the Convention;³⁶
- (c) Obligation to fulfil, which requires States parties to take positive action to ensure the enjoyment of the non-derogable right not to be subjected to enforced disappearance³⁷ and other victims' rights as set out in the Convention;³⁸

³³ *Yrusta and Del Valle Yrusta v. Argentina* (CED/C/10/D/1/2013), para. 10.4.

³⁴ See sect. III.C.1 below.

³⁵ *Ibid.*

³⁶ See sect. III.C.3 below.

³⁷ See sect. III.E below.

³⁸ See sect. III.F.1 below.

- (d) Obligations to cooperate³⁹ and to take preventive measures,⁴⁰ which are also affirmed in the Convention and which require States parties to take concrete measures to facilitate the prevention and repression of enforced disappearance.

In accordance with article 26 of the Vienna Convention on the Law of Treaties, States parties are required to implement all the obligations under the Convention in good faith.

Failure to act can render a State party to the Convention in breach of its international obligations, namely to protect persons from enforced disappearance. The pronouncements of the Human Rights Committee on the duty to protect persons within their jurisdiction stemming from the right to life can be applied *mutatis mutandis*:

Human Rights Committee, **general comment No. 36 (2018)**

- “18. ... The duty to protect the right to life also includes an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats, including from threats emanating from private persons and entities.
- ...
21. ... States parties are thus under a due diligence obligation to take reasonable, positive measures that do not impose disproportionate burdens on them in response to reasonably foreseeable threats to life originating from private persons and entities whose conduct is not attributable to the State. Hence, States parties are obliged to take adequate preventive measures in order to protect individuals against reasonably foreseen threats of being murdered or killed by criminals and organized crime or militia groups, including armed or terrorist groups States parties should also disband irregular armed groups, such as private armies and vigilante groups, that are responsible for deprivations of life and reduce the proliferation of potentially lethal weapons to unauthorized individuals. States parties must further take adequate measures of protection, including continuous supervision, in order to prevent, investigate, punish and remedy arbitrary deprivation of life by private entities
22. States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction. ...
23. The duty to protect the right to life requires States parties to take special measures of protection towards persons in vulnerable situations whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence. Such persons include human rights defenders ..., officials fighting corruption and organized crime, humanitarian workers, journalists, prominent public figures, witnesses to crime and victims of domestic and gender-based violence and human trafficking. They may also include children, especially children in street situations, unaccompanied migrant children and children in situations of armed conflict, members of ethnic and religious minorities, indigenous peoples, lesbian, gay, bisexual, transgender and intersex persons, persons with albinism, alleged witches, displaced persons, asylum seekers, refugees and stateless persons. States parties must respond urgently and effectively in order to protect individuals who find themselves under a specific threat, by adopting special measures such as the assignment of around-the-clock police protection, the

³⁹ See sects. III.D.4 and III.D.5 below.

⁴⁰ See sects. III.E.1, III.E.2 and III.E.3 below.

issuance of protection and restraining orders against potential aggressors and, in exceptional cases, and only with the free and informed consent of the threatened individual, protective custody.

...

25. States parties also have a heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State, since by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their lives and bodily integrity, and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility. The same heightened duty of care attaches to individuals held in private incarceration facilities operating pursuant to an authorization by the State. ...” (Footnotes omitted.)

The Committee has stressed the importance of building up the institutional framework that can, among other things, help shape public policies to prevent enforced disappearances in the future. This holds true for all States parties, but it is particularly pertinent in relation to those States where, at a given time, there has been a systematic or widespread practice of enforced disappearance. Among other measures, the Committee has recommended that States parties must maintain a consolidated register of cases of enforced disappearances, which is organized in such a way as to enable the stakeholders to “discern different groups of victims, the causes and dynamics of enforced disappearance and patterns of behaviour”.⁴¹

Examples of recommendations



The Committee urges the State party to establish a consolidated register of all cases of enforced disappearance that have occurred in the national territory. The register should reflect the total number of disappeared persons, the number who have subsequently been found, whether alive or dead, and the number who are still missing.

Working Group on Enforced or Involuntary Disappearances, **general comment on article 3 of the Declaration**⁴²

By committing to address the issue of enforced disappearances, States undertake broad obligations to do something. This duty is pertinent for all States, including those in which enforced disappearances might have occurred in the past and those in which such acts have not occurred.

Under article 3 of the 1992 Declaration, “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 obligation to prevent and terminate disappearances implies that States have to adopt policies and all other types of measures within their power and their jurisdiction. Such measures must be suitable and effective in achieving concrete results.

Where no appropriate machinery is in place, States should consider establishing such machinery with the aim of facilitating implementation of this obligation.

⁴¹ CED/C/BOL/CO/1, para. 10; and CED/C/PER/CO/1, para. 10.

⁴² E/CN.4/1996/38, paras. 48–53.

B. APPLICABILITY

All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are bound by the Convention and thus in a position to engage the responsibility of the State party.

1. TERRITORIAL SCOPE OF APPLICATION OF THE CONVENTION (ART. 41)

“The provisions of this Convention shall apply to all parts of federal States without any limitations or exceptions.”

The Convention applies in the entire sovereign territory of the State party concerned.

“Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”

Vienna Convention on the Law of Treaties, art. 29.

Taking into account the territorial organization of their powers, States parties must make sure that the Convention is applied throughout the entire national territory, including the autonomous regions and sovereign overseas territories.⁴³ Under article 41 of the Convention, in federal States the Convention must be applied both at the federal and provincial levels. Moreover, States parties have to make sure that the application of the Convention is uniform throughout the national territory. The degree of compliance with the State party’s obligations under the Convention, both at the legislative level and in practice, should not vary from one level of jurisdiction to another.⁴⁴ The Committee has pointed out that in some instances this purpose could be facilitated through the adoption of a general law regulating all aspects of enforced disappearance that would apply to the entire national territory without any limitation.⁴⁵

CHECKLIST

INFORMATION ABOUT TERRITORIAL APPLICABILITY OF THE CONVENTION TO BE PROVIDED IN STATES PARTIES’ REPORTS

- ✓ Indicate which model of territorial organization of power is adopted in the State party (i.e. if it is a unitary or a federal State).
- ✓ Specify whether there are territories (autonomous or other regions, such as overseas territories), where de facto or de jure the applicability of domestic law and international instruments ratified by the State party may vary.
- ✓ Explain if and how the Convention applies to those territories.
- ✓ Indicate which measures are taken by the State party to make sure that the application of the Convention throughout the national territory is uniform.

⁴³ CED/C/NLD/CO/1, para. 11.

⁴⁴ CED/C/ARG/CO/1, para. 11; and CED/C/BIH/CO/1, paras. 9–10.

⁴⁵ CED/C/MEX/CO/1, para. 10.

Examples of recommendations



The Committee encourages the State to strengthen coordination measures in the national territory and to ensure the full application of the Convention throughout the territory, with no limitations or exceptions.

The Committee calls on the State party to take all the requisite measures to harmonize its procedures and practices throughout its territory in order to ensure the uniform application of the Convention in the European and Caribbean parts of the Netherlands.

Recalling article 41 of the Convention, the Committee recommends that the State party adopt the measures necessary to ensure that, at the State, entity and district levels, legislation and practice are in full compliance with the obligations set forth in the Convention.

States parties continue to be bound by the Convention even with respect to those sovereign territories over which they have temporarily lost control, for example due to armed conflict. According to the Committee, the inability to exercise factual control over such areas may pose a practical challenge to implementing some of the obligations contained in the Convention. Nevertheless, the applicability of the rights emanating from the Convention and the obligations included therein are not suspended as such.⁴⁶

Examples of recommendations



The Committee recommends that the State party intensify its efforts to prevent any violation of the Convention, including in areas currently controlled by the so-called Islamic State in Iraq and the Levant and affiliated groups. The Committee also recommends that the State party increase its efforts with a view to ensuring that all reports of acts defined in article 2 of the Convention committed by the so-called Islamic State in Iraq and the Levant or any other group of persons without the authorization, support or acquiescence of State officials are promptly, thoroughly and impartially documented and investigated and that those responsible are brought to justice and, if found guilty, punished in accordance with the gravity of their acts. Furthermore, the Committee recommends that the State party adopt the necessary measures to ensure that all persons deprived of liberty by these groups and whose fates remain unknown are searched for and located.

Neither the text of the Convention itself, nor the pronouncements of the Committee specifically address extraterritorial applicability (i.e. applicability of the Convention to a State party beyond its sovereign boundaries). Nevertheless, it is well established in international law that, in exceptional circumstances, when the agents of a State are exercising its sovereign powers abroad, all or some of the obligations under a given human rights instrument may become applicable.

⁴⁶ CED/C/IRQ/CO/1, paras. 22–23.

Human Rights Committee, general comment No. 31 (2004)

“10. A State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”

Human Rights Committee, general comment No. 36 (2018)

“22. States parties must take appropriate measures to protect individuals against deprivation of life by other States, international organizations and foreign corporations operating within their territory or in other areas subject to their jurisdiction. They must also take appropriate legislative and other measures to ensure that all activities taking place in whole or in part within their territory and in other places subject to their jurisdiction, but having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory, including activities taken by corporate entities based in their territory or subject to their jurisdiction, are consistent with article 6, taking due account of related international standards of corporate responsibility and of the right of victims to obtain an effective remedy.

...

63. In light of article 2 (1) of the Covenant, a State party has an obligation to respect and to ensure the rights under article 6 of all persons who are within its territory and all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner States also have obligations under international law not to aid or assist activities undertaken by other States and non-State actors that violate the right to life. Furthermore, States parties must respect and protect the lives of individuals located in places that are under their effective control, such as occupied territories, and in territories over which they have assumed an international obligation to apply the Covenant. States parties are also required to respect and protect the lives of all individuals located on marine vessels and aircraft registered by them or flying their flag, and of those individuals who find themselves in a situation of distress at sea, in accordance with their international obligations on rescue at sea. Given that the deprivation of liberty brings a person within a State’s effective control, States parties must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory.” (Footnotes omitted.)



2. TEMPORAL SCOPE OF APPLICATION OF THE CONVENTION

The Convention does not contain a specific provision addressing its temporal scope of application.⁴⁷ During the negotiations of the Convention, States discussed this matter and agreed that the general rules of international law on non-retroactive application of treaties would apply.⁴⁸ Consequently, in accordance with the relevant rules of international law, the Convention becomes applicable for the State party concerned upon the entry into force of the Convention with respect to that State.

“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.”

Vienna Convention on the Law of Treaties, art. 28.

Nevertheless, enforced disappearance is a continuous violation.⁴⁹ Consequently, a State party has ongoing obligations under the Convention even with respect to those disappearances that commenced prior to its entry into force with respect to that State.⁵⁰

⁴⁷ On the competence of the Committee, see sect. IV and the annex.

⁴⁸ E/CN.4/2004/59, para. 165.

⁴⁹ See sects. III.C.2 and III.D.1 below.

⁵⁰ Inter-American Court of Human Rights, *Radilla-Pacheco v. Mexico*, Judgment, 23 November 2009, para. 24. See also the [statement](#) by the Committee on the *ratione temporis* element in the review of reports submitted by States parties under the Convention. The Committee takes into account the acts of the past to understand the challenges and obligations of States parties in the present and to better identify the measures to be taken in a useful way adapted to the reality of the country.

- “2. 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.
3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.”

International Law Commission, Responsibility of States for Internationally Wrongful Acts, art. 14 (2)–(3).

Committee on Enforced Disappearances, statement on the *ratione temporis* element in the review of reports submitted by States parties under the Convention

“Recalling the very nature of enforced disappearance as a continuous crime,

...

Desirous of clarifying the scope of its functions *ratione temporis*, in order to provide consistency, predictability and legal security for States parties as well as for victims, states the following:

1. The Committee is bound by Article 35 in the exercise of its competence and cannot adjudicate individual cases concerning enforced disappearances as such which commenced before the entry into force of the Convention for the State concerned;
2. Article 29 deals with the ‘obligations under this Convention’, in the light of the ‘international law in force for this State party’ and request that the reporting process take into consideration the full range of its obligations today;
3. If information related to the past is useful during the reporting process as a means to understand fully the challenges of the present, the Committee ought to direct its attention in its concluding observations to the current obligations of the State concerned.”

3. CONSTITUTIONAL AND LEGAL FRAMEWORK

States parties should take the necessary steps to give full effect to the provisions of the Convention in their domestic legal order. Upon ratification of the Convention, States parties are expected to make such changes to domestic laws and practices as are necessary to ensure their conformity with all the obligations stemming from the Convention and the enjoyment of the rights emanating therefrom.

In some legal systems, the Convention as an international treaty or some of its provisions (e.g. self-executing rules) may become automatically and directly applicable, while in other cases the obligations and rights enshrined therein may require specific incorporation into the domestic legal order. The Committee has stressed that States whose constitutional systems allow some provisions of the Convention to be directly applicable must take concrete steps to give effect to all of the provisions, including those that require incorporation into the domestic legal system.⁵¹

⁵¹ CED/C/NLD/CO/1, para. 13.

According to the Committee, there must be certainty that the provisions of the Convention are applicable directly, so that nothing hinders the fulfilment of the obligations and enjoyment of the rights enshrined in the Convention.⁵²

CHECKLIST

INFORMATION ABOUT THE CONSTITUTIONAL AND LEGAL FRAMEWORK TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Indicate the principal legal measures that the State party has taken to give effect to the obligations contained in the Convention and the rights emanating therefrom.
- ✓ Specify which judicial, administrative and other competent authorities have jurisdiction to secure the rights guaranteed in the Convention.
- ✓ Explain if the Convention is directly applicable or whether it requires the adoption of additional domestic legislation.
- ✓ Indicate whether the Convention can be directly invoked before domestic courts and provide examples of cases in which it has been invoked.
- ✓ Explain if and to what extent the rights enshrined in the Convention are guaranteed in the Constitution or other laws.

Examples of recommendations



The Committee invites the State party to accelerate the legislative process with a view to giving the Convention constitutional status.

The Committee invites the State party to consider taking the necessary steps to acknowledge explicitly the direct applicability of the provisions of the Convention.

The Committee calls upon the State party to take all necessary measures to ensure the direct applicability and uniform application of the provisions of the Convention.



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⁵² Ibid., para. 12.

C. DEFINITION AND CRIMINALIZATION OF ENFORCED DISAPPEARANCE

1. NON-DEROGABILITY OF THE PROHIBITION OF ENFORCED DISAPPEARANCE (ART. 1 (2))

“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.”

The prohibition of enforced disappearance is absolute and unqualified. In other words, the Convention does not allow derogation from it even in the most exceptional circumstances, and no restriction or limitation can justify enforced disappearances.

The Committee has underlined on numerous occasions that domestic legislation must explicitly and specifically provide for the non-derogability of the prohibition of enforced disappearance under any exceptional circumstances.⁵³

EXAMPLES OF GOOD PRACTICE



“Article 15 (IV) of the Constitution states that ‘No person shall be subjected to enforced disappearance for any reason or under any circumstances’.”⁵⁴

“Article 66 (3) (c) of the Constitution enshrines the right not to be subjected to enforced disappearance: ‘The following rights shall be recognized and guaranteed ... the right to integrity of the person, including ... the prohibition of enforced disappearance.’”

“In turn, the exceptional circumstances that might be used to justify a restriction on constitutional rights are set out in articles 164 to 166 of the Constitution, which regulate ‘states of emergency’. ... In any of these situations, the President of the Republic may declare a state of emergency, specifying, inter alia, which constitutional rights are to be suspended or restricted. However, such restrictions can apply only to the right to inviolability of the home, inviolability of correspondence, freedom of movement, freedom of association and assembly and freedom of information.”

“As for the substantive requirements, article 30 (4) expressly states that ‘no measure may be taken that undermines the international obligations undertaken by Ecuador in international treaties and human rights instruments’. It follows from this that no state of emergency may include any restriction on the right not to be subjected to enforced disappearance, given that article 66 (3) (c) of the Constitution cannot be changed.”⁵⁵

⁵³ CED/C/BIH/CO/1, para. 11; CED/C/TUN/CO/1, para. 12; and CED/C/GAB/CO/1, para. 10; CED/C/SEN/CO/1, para. 11; CED/C/PER/CO/1, para. 13; CED/C/AUT/CO/1, para. 11; CED/C/JPN/CO/1, para. 12.

⁵⁴ CED/C/BOL/1, para. 15.

⁵⁵ CED/C/ECU/1, paras. 11–13.

CHECKLIST

INFORMATION ABOUT THE ABSOLUTE NATURE OF THE PROHIBITION OF ENFORCED DISAPPEARANCE TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Indicate the applicable law on a state of emergency.
- ✓ Clarify procedures for imposing and lifting derogations from rights.
- ✓ Specify which rights can be subject to derogation in time of emergency and explain how the prohibition of enforced disappearance is a non-derogable right at the domestic level.
- ✓ Provide information on any state of emergency that has been declared during the reporting period.
- ✓ Clarify if any legislation envisages any restrictions or limitations on human rights and specify whether these rules are applicable to the right not to be subjected to enforced disappearance.

Examples of recommendations



The Committee recommends that the State party take the necessary steps to explicitly introduce an absolute ban on enforced disappearance into its domestic legislation in keeping with article 1 (2) of the Convention.

The Committee recommends that the State party take the legislative measures necessary to specifically incorporate into domestic law an absolute prohibition of enforced disappearance at all levels, in line with article 1 (2) of the Convention.

The Committee recommends that the State party should adopt a provision explicitly affirming that no exceptional circumstances of the kind described in article 1 of the Convention may be invoked to justify the offence of enforced disappearance.

The Committee recommends that the State party adopt a legal provision explicitly affirming that no exceptional circumstances whatsoever may be invoked as a justification for enforced disappearance, in accordance with article 1 of the Convention.

The Working Group and the Committee recall that enforced disappearance is prohibited in all circumstances, and call on member States to continue, during the coronavirus disease (COVID-19) pandemic, to respect their international obligations.

Working Group on Enforced or Involuntary Disappearances, **best practices on enforced disappearances in domestic criminal legislation**⁵⁶

- "7. ... the Working Group would like to congratulate those States where the non-derogable right of all persons not to be subjected to enforced disappearance is embodied in the Constitution. ... the Working Group deems it important that this right be fully recognized as a human right at the level of the Constitution, as it makes it clear that this right should be respected by all institutions of the State in all their activities." (Footnote omitted.)

⁵⁶ A/HRC/16/48/Add.3. There are corresponding articles between the 1992 Declaration and the Convention.

2. DEFINITION (ART. 2)

“For the purposes of this Convention, ‘enforced disappearance’ is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

Article 2 of the Convention provides the definition of enforced disappearance. By spelling out in accurate terms the constitutive elements of enforced disappearance, this provision is instrumental in implementing the obligations contained in the Convention. Thus, States parties are expected to reflect the definition provided in article 2 of the Convention in their domestic legislation. In the words of the Committee, implementation of article 2 of the Convention “makes it possible to correctly encompass the many legal rights affected by enforced disappearances”.⁵⁷

Article 2 is closely linked to the obligations under articles 4 and 5 of the Convention, requiring States parties to criminalize enforced disappearance as a separate crime and as a crime against humanity, respectively.⁵⁸ These are two distinct sets of obligations and both must be implemented by States parties. The ratification and the implementation of the Rome Statute of the International Criminal Court in domestic law is not in itself sufficient to comply with both sets of obligations.

In addition to the importance of formulating a clear and precise definition of enforced disappearance in domestic legislation, the Committee has recommended that States parties train their judges and prosecutors to ensure that the notion and its constituent elements are in practice interpreted in conformity with article 2 of the Convention.⁵⁹

Key elements of the definition of enforced disappearance under article 2 of the Convention:

- The deprivation of liberty, in whatever form (e.g. arrest, detention or abduction), against the will of the disappeared person.
- Followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person.
- The direct or indirect involvement (through authorization, support or acquiescence) of State agents.

As a consequence, the disappeared person is placed outside the protection of the law.

⁵⁷ CED/C/ESP/CO/1, para. 9. See also CED/C/ARM/CO/1, para. 11; CED/C/ALB/CO/1, para. 12; and CED/C/JPN/CO/1, para. 13.

⁵⁸ See sects. III.C.4 and III.C.5 below. See also CED/C/PRT/CO/1, paras. 12–13.

⁵⁹ CED/C/PRY/CO/1, para. 14.

States parties are encouraged to use wording that is identical to the one provided in article 2, since the Committee has concluded that even a minor modification of the text may render the definition incompatible with that article. A clear example is when the definition adopted by a State party to the Convention introduces additional elements, especially if these are vague notions.⁶⁰ Moreover, the Committee has found that significant and problematic changes in the meaning of the definition can even result from changing the position of phrases in the definition provided in the Convention.⁶¹

The Committee has also expressed concerns about a situation in which a definition adopted by a State party did not include the aspects expressly mentioned in article 2 of the Convention as constitutive elements.⁶²

The Committee has expressed its concern about a situation in which the term “arrest” was not expressly mentioned in the domestic legislation of a State party as a form of deprivation of liberty. According to the Committee, such an omission could restrict the applicability of the definition of enforced disappearances in cases where this crime lasts for a short time.⁶³

The Committee has also insisted on the importance of maintaining the focus on State involvement in the definition of enforced disappearance in the domestic legislation of States parties. It has held that “one of the essential elements of the definition of enforced disappearance contained in article 2 of the Convention is precisely the direct or indirect involvement of State agents in the criminal conduct in question that distinguishes it from other similar conduct, as may be inferred from a joint reading of articles 2 and 3”.⁶⁴ The Committee has also expressed its concern about a situation in which the definition of enforced disappearance in domestic legislation referred to acts carried out by “public officials or public servants”, not “agents of the State”, which is the language used in article 2 of the Convention. It concluded that such a framing prevented persons suspected of having committed the offence from being investigated if they no longer had the status of a public official or public servant at the time of the investigation.⁶⁵

The Committee has also held that the inclusion of non-State actors in the definition of the crime of enforced disappearance dilutes the accountability of the State and ignores the fact that the two distinct types of crimes addressed in the two articles requires differentiated approaches and strategies.⁶⁶

The Committee has taken note of the fact that some States parties consider “placement outside the protection of the law” to be an element of enforced disappearance⁶⁷ or only the consequence of the crime of enforced disappearance.⁶⁸ Nevertheless, the Committee has insisted in its concluding observations that mention of such an element must not be so vague as to allow it to be read or construed as an intentional element (*mens rea*) that would have to be present in order for the act to constitute criminal conduct; instead, in the opinion of the Committee, it should be considered as a consequence of such conduct.⁶⁹

⁶⁰ CED/C/FRA/CO/1, paras. 12–13.

⁶¹ Ibid.

⁶² CED/C/NLD/CO/1, paras. 14–15; CED/C/LTU/CO/1, paras. 11–12; and CED/C/PRT/CO/1, paras. 12–13.

⁶³ CED/C/LTU/CO/1, paras. 11–12.

⁶⁴ CED/C/COL/CO/1, para. 15.

⁶⁵ CED/C/PER/CO/1, para. 14.

⁶⁶ CED/C/COL/CO/1, para. 15. See sect. III.C.3 below.

⁶⁷ CED/C/FRA/CO/1, para. 12.

⁶⁸ CED/C/NLD/CO/1, para. 14; and CED/C/PRT/CO/1, para. 12.

⁶⁹ CED/C/PRY/CO/1, para. 14; CED/C/BOL/CO/1, para. 13; and CED/C/PRT/CO/1, para. 12.

Although the definitions contained in the Convention, the 1992 Declaration, the Rome Statute and the Inter-American Convention on Forced Disappearance of Persons essentially contain the same elements, there are nevertheless a few significant specificities, as outlined in the table below. The Convention, the 1992 Declaration and the Inter-American Convention on Forced Disappearance of Persons are human rights law instruments, while the Rome Statute is an international criminal law instrument which focuses on individual criminal responsibility rather than State responsibility. Consequently, they pursue slightly different aims and approaches.

International Convention for the Protection of All Persons from Enforced Disappearance	1992 Declaration	Inter-American Convention on Forced Disappearance of Persons	Rome Statute
<ul style="list-style-type: none"> • Deprivation of liberty against the will of the disappeared person; • Followed by the refusal to acknowledge the deprivation of liberty or by concealment of the fate and whereabouts of the person; • State involvement; • As a consequence, placement of the person outside the protection of the law. 	<ul style="list-style-type: none"> • Deprivation of liberty against the will of the disappeared person; • Followed by the refusal to acknowledge the deprivation of liberty or by concealment of the fate and whereabouts of the person; • State involvement; • As a consequence, placement of the person outside the protection of the law. 	<ul style="list-style-type: none"> • Deprivation of liberty against the will of the disappeared person; • Followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of the person; • State involvement; • As a consequence, the impediment of the person's recourse to the applicable legal remedies and procedural guarantees. 	<ul style="list-style-type: none"> • Deprivation of liberty against the will of the disappeared person; • Followed by the refusal to acknowledge the deprivation of liberty or by concealment of the fate and whereabouts of the person; • Involvement of a "political organization" (State and non-State); • Intention of removing them from the protection of the law for a prolonged period of time; • As a crime against humanity, these acts must be committed "as part of a widespread or systematic attack directed against any civilian population".

In its Views on an individual communication, the Committee has recalled the definition of enforced disappearance contained in article 2 of the Convention, while insisting on the fact that the notion applies as long as the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person places such a person outside the protection of the law, regardless of the duration of the said deprivation of liberty or concealment. This statement goes in the same direction as the pronouncement of the Working Group on the definition of enforced disappearance contained in the 1992 Declaration.

Committee on Enforced Disappearances, *Yrusta and Del Valle Yrusta v. Argentina*⁷⁰

“10.3 The Committee recalls that, according to article 2 of the Convention, an enforced disappearance commences upon the arrest, detention, abduction or any other form of deprivation of liberty. Therefore, an enforced disappearance may be initiated by an illegal detention or by an initially legal arrest or detention, as in the present case on the occasion of a transfer. The Committee further recalls that, in order to constitute an enforced disappearance, the deprivation of liberty must be followed by a refusal to acknowledge such deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law, regardless of the duration of the said deprivation of liberty or concealment.

10.4 ... The Committee considers that the lack of information or the refusal to acknowledge a deprivation of liberty constitute a form of concealment for the effects of article 2 of the Convention. ... The Committee considers that the placement of a person outside the protection of the law is the consequence of the concealment of the arrested or detained person’s whereabouts. In such instances, detained persons are placed outside the protection of the law when, as a result of the disappearance, they are prevented from availing themselves of the remedies which the laws of the State party place at their disposal in order to ensure that a court can reach a decision as to the lawfulness of their deprivation of liberty.” (Footnotes omitted.)

Working Group on Enforced or Involuntary Disappearances, *general comment on the definition of enforced disappearance*⁷¹

“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.

...

5. In accordance with article 1, paragraph 2, of the Declaration, any act of enforced disappearance has the consequence of placing the persons subjected thereto outside the protection of the law.

...

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.

...

⁷⁰ As at the date of publication of this manual, the Committee has only received and examined two individual complaints (*Yrusta and Del Valle Yrusta v. Argentina*; and *E.L.A. v. France* (CED/C/19/D/3/2019)) and discontinued one (*M.I. v. Czechia* (CED/C/14/D/2/2017)). Hence, reference is made only to this case law. The information will be updated as new cases are received and examined by the Committee.

⁷¹ A/HRC/7/2, para. 26.

10. Therefore, a detention, followed by an extrajudicial execution ... 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."

Working Group on Enforced or Involuntary Disappearances, best practices on enforced disappearances in domestic criminal legislation

"III. The constitutive elements of the offence

21. Since 1995, the Working Group has clarified that States are not bound to strictly follow the definition of the offence as contained in the Declaration, ensuring however '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 government officials, at least indirectly by acquiescence; (c) Refusal to disclose the fate and whereabouts of the person concerned'.

A. The deprivation of liberty

22. Every enforced disappearance starts with the deprivation of liberty of the victim. The Working Group pointed out that '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 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'.

...

B. The perpetrators of the offence

25. In its general comment on the definition of enforced disappearance, the Working Group recalled that 'with respect to the perpetrators of the crime, (...) 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'. Where domestic criminal legislation did not include acts committed by individuals acting on behalf of the Government or with its direct or indirect support, without necessarily having received orders or instructions from government agents to commit the offence, the Working Group found that the definition was partial and, as such, needed to be amended. The Working Group also noted that it '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'.

...

C. The refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person

28. According to definitions of enforced disappearance in international law, one of the constitutive elements of the offence is the refusal to acknowledge the deprivation of liberty of the victim, or the concealment of his or her fate or whereabouts. This element in fact distinguishes enforced disappearance from other offences, such as arbitrary detention or incommunicado detention. ...

D. The placement of the disappeared person outside the protection of the law and the intent of the perpetrators

29. All definitions of enforced disappearance in international law indicate that the victim is placed outside the protection of the law. This peculiarity of enforced disappearance entails the suspension of the enjoyment of all other human rights and freedoms of the victim and places him or her in a situation of complete defencelessness. This is strictly related to the right of everyone to be recognized as a person before the law, which is a prerequisite to enjoy all other human rights.
30. Article 1, paragraph 2, of the Declaration provides that any act of enforced disappearance *has the consequence* of placing the persons subjected thereto outside the protection of the law." (Footnotes omitted.)

EXAMPLES OF GOOD PRACTICE



"The Committee notes with satisfaction that the State party has classified enforced disappearance as an offence (Act No. 18026, art. 21) and that the definition of the offence is in line with that contained in article 2 of the Convention."⁷²

"The Committee notes with satisfaction that enforced disappearance is defined in article 236, paragraph 1, of the Criminal Code in conformity with the definition given in article 2 of the Convention."⁷³

"The Committee notes that the first paragraph of article 109 (c) of the Criminal Code provides elements of a definition of enforced disappearance, and criminalizes it in accordance with articles 2 and 4 of the Convention."⁷⁴

"The Committee also commends the State party on the measures adopted in areas related to the Convention, including ... the adoption of Law No. XII-776 of 13 March 2014, which supplements the Criminal Code by introducing into it the offence of enforced disappearance under article 100 (1), which is mostly in line with the Convention."⁷⁵

"The Committee welcomes the legislative measures adopted by the State party in matters related to the Convention, in particular the following provisions of the Criminal Code: ... Section 420a, which criminalizes enforced disappearance in line with the definition contained in article 2 of the Convention."⁷⁶

⁷² CED/C/URY/CO/1, para. 11.

⁷³ CED/C/PRY/CO/1, para. 13. Nevertheless, the Committee expressed its concern that the phrase "placing them outside the protection of the law" may be construed as an intentional element (*animus*) that would have to be present in order for the act to constitute criminal conduct, instead of being considered as a consequence of such conduct. In that regard, the Committee took note of the assurance of the State party that there had been no judicial precedents to date regarding the issue.

⁷⁴ CED/C/ALB/CO/1, para. 12.

⁷⁵ CED/C/LTU/CO/1, para. 6. Nevertheless, the Committee expressed its concern about the fact that the definition did not explicitly mention the term "arrest".

⁷⁶ CED/C/SVK/CO/1, para. 7.

CHECKLIST

INFORMATION ABOUT THE DEFINITION OF ENFORCED DISAPPEARANCE TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify whether domestic legislation expressly envisages a definition of enforced disappearance.
- ✓ Indicate whether the definition of a victim is in conformity with that given in the Convention, namely, an individual who has suffered harm as the direct result of an enforced disappearance, including the family of a disappeared person.
- ✓ Indicate the relevant provision(s) of the legislative act(s) and provide the text(s).
- ✓ Provide information on whether such a definition is in full conformity with the Convention, including its three constitutive elements.
- ✓ Provide information, in the absence of a definition of enforced disappearance in domestic law that is in full conformity with the Convention, on criminal or legislative provisions that are invoked to deal with cases of enforced disappearance.
- ✓ Specify, if the legislation in force does not envisage such a definition, if there is legislative reform pending to introduce such a definition and, if so, provide a copy of the draft legislation.

Examples of recommendations



The Committee recommends that the State party take all necessary measures to ensure that the definition of enforced disappearance is fully consistent with article 2 of the Convention and includes the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, as well as the refusal to provide information on the fate and not only on the whereabouts of the disappeared person.

The Committee recommends that the State party should adopt a definition of enforced disappearance as a separate offence in line with article 2 of the Convention and avoid altering the text by changing the position of phrases in sentences or introducing new expressions. This is to preclude the definition of enforced disappearance from being understood as requiring intent to be shown to incriminate the conduct.

The Committee recommends that the State party takes all measures necessary to ensure that the definition of enforced disappearance in national legislation is fully in line with the definition provided in article 2 of the Convention.

3. INVESTIGATION AND ACCOUNTABILITY FOR DISAPPEARANCES PERPETRATED WITHOUT STATE INVOLVEMENT (ART. 3)

“Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.”

Article 3 of the Convention deals with acts that fall short of the definition of enforced disappearance, namely those that meet all the elements but one – State involvement. In other words, it deals with arrest, detention, abduction or any other form of deprivation of liberty by persons or groups of persons acting without the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

Working Group on Enforced or Involuntary Disappearances, general comment on the definition of enforced disappearance

“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.”

Working Group on Enforced or Involuntary Disappearances, annual report 2018/2019⁷⁷

“94. For a number of years, the Working Group has been receiving information about increasing instances of abductions carried out by non-State actors, which may be tantamount to acts of enforced disappearances. In light of its humanitarian mandate and the fact that the victims of these acts do not have any remedy to address their plight, the Working Group has decided to document cases concerning enforced or involuntary disappearances allegedly perpetrated by non-State actors that exercise effective control and/or government-like functions over a territory.”

Article 3 of the Convention is concerned with disappearances perpetrated by “group of persons” without State involvement.⁷⁸ In this context, the term “non-State actors” must be construed broadly to encompass entities other than States, irrespective of their organization, structure or motivations. This includes organized armed groups, whether or not they are parties to armed conflicts, the so-called terrorist groups, insurgent movements, criminal organizations etc.

Under article 3 of the Convention, States parties are under an obligation to investigate cases involving such acts and bring those responsible to justice. The Committee has maintained that the obligation to investigate the acts defined in article 3 of the Convention must be carried out promptly, thoroughly and

⁷⁷ A/HRC/42/40.

⁷⁸ As discussed above, in article 7 of the [Rome Statute](#) the definition of enforced disappearance expressly mentions “political organization”, which covers both State and non-State entities.



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impartially. The Committee has also indicated that there is an obligation to bring those responsible to justice and, if found guilty, to punish them in accordance with the gravity of their acts.⁷⁹

While the Convention does not envisage such an obligation expressly, incorporation of article 3 in domestic legislation is a necessary precondition for States parties' compliance with the duties contained in this provision. To this end, the Committee has issued recommendations to States parties to expressly specify in their domestic legislation the acts perpetrated by non-State actors as set forth in article 3 of the Convention.⁸⁰ The Committee has expressed concerns in its concluding observations about situations in which there was uncertainty in the legislation of States parties regarding the application of article 3 of the Convention to the actions of non-State entities and the consequences of such actions for victims' rights.⁸¹

Under the Convention, States parties are obliged to take steps to prevent and punish disappearances perpetrated by non-State armed groups.⁸² Such an obligation stems from the general duty of due diligence to protect the population from gross violations of human rights perpetrated by private entities and is closely connected with article 3 of the Convention.

With respect to States parties in which there have been reports of trafficking in persons, the Committee has emphasized the heightened risk of their being subjected to disappearance, especially when they are under the control of non-State actors and has insisted on the importance of article 3 of the Convention.⁸³

⁷⁹ CED/C/IRQ/CO/1, para. 23.

⁸⁰ CED/C/ALB/CO/1, para. 15; and CED/C/SEN/CO/1, para. 16.

⁸¹ CED/C/SEN/CO/1, para. 15; and CED/C/ALB/CO/1, para. 14.

⁸² CED/C/COL/CO/1, para. 24.

⁸³ CED/C/GAB/CO/1, para. 19; and CED/C/ALB/CO/1, para. 14.

The Committee has also maintained that States parties have concrete obligations under the Convention with respect to disappearances of migrants,⁸⁴ noting that some situations may be tantamount to enforced or involuntary disappearance.⁸⁵ Given the particular nature of the disappearances of migrants, non-State actors are often involved at all or some of the stages of the crime. In this regard, the Committee notes the challenging nature of such situations in terms of ensuring the rights to truth and justice in light of the fact that the relatives of disappeared persons are not normally resident in the State party.⁸⁶ In such situations, the Committee insists on transnational cooperation between the country of origin and countries of destination in investigating the disappearances of migrants, prosecuting those responsible and providing adequate protection for complainants, experts, witnesses and defence counsel.⁸⁷ The Committee has highlighted the particular vulnerability of women and children who are subjected to enforced disappearance or the relatives of a disappeared person to human rights violations, including sexual and other forms of gender violence and identity substitution.⁸⁸ In this context, the Committee recommends that States ensure that gender perspectives and child-sensitive approaches are used in implementing the Convention. The Committee also requests a differential approach that takes into account a person's sex, gender identity, sexual orientation, age, ethnic origin, disability and vulnerability in the search for disappeared persons⁸⁹ and in investigation, reparation and protection.

The Human Rights Committee has addressed disappearances perpetrated without the involvement of States and the corresponding obligations of States parties to the International Covenant on Civil and Political Rights in its Views on individual communications.⁹⁰

CHECKLIST

INFORMATION ABOUT INVESTIGATION OF AND ACCOUNTABILITY FOR DISAPPEARANCES PERPETRATED WITHOUT STATE INVOLVEMENT TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify whether domestic legislation criminalizes acts defined in article 2 of the Convention committed by persons or groups of persons acting without the authorization, support or acquiescence of the State.
- ✓ Indicate, if such acts are criminalized, the provisions of the respective legislative acts and provide information regarding the definition of such acts, as well as the penalties envisaged.
- ✓ Specify which agencies are responsible for investigating such crimes.
- ✓ Indicate whether domestic courts have prosecuted persons pursuant to the provisions criminalizing disappearances perpetrated by non-State actors and, if applicable, summarize the main details of such trials and their outcomes.
- ✓ Provide information on the guarantees in place to ensure that the documentation and investigation of such crimes are carried out promptly, thoroughly and impartially and that those responsible are brought to justice and, if found guilty, punished in accordance with the gravity of their acts.
- ✓ Indicate the measures in place to ensure that a gender perspective and a victim-centred approach are integrated into the documentation and investigation of such crimes.

⁸⁴ CED/C/MEX/CO/1, para. 23.

⁸⁵ A/HRC/36/39/Add.2, para. 4.

⁸⁶ A/HRC/36/39/Add.2.

⁸⁷ CED/C/MEX/CO/1, para. 24.

⁸⁸ CED/C/ITA/CO/1, para. 37.

⁸⁹ Committee, [guiding principles for the search for disappeared persons](#), principle 4.

⁹⁰ Human Rights Committee, *Serna et al. v. Colombia* [CCPR/C/114/D/2134/2012]; *Padilla García et al. v. Mexico* [CCPR/C/126/D/2750/2016]; *Valdez Cantú and Rivas Rodríguez v. Mexico* [CCPR/C/127/D/2766/2016]; *Moreno Zamora et al. v. Mexico* [CCPR/C/127/D/2760/2016]; and *Durić and Durić v. Bosnia and Herzegovina* [CCPR/C/111/D/1956/2010], para. 9.3.

Examples of recommendations



The Committee encourages the State party to incorporate into its domestic law the measures set out in article 3 of the Convention relating to the acts defined in article 2 of the Convention committed by groups of persons without the authorization, support or acquiescence of State officials.

The Committee encourages the State party to explicitly specify in its domestic legislation the measures set out in article 3 of the Convention relating to the acts defined in article 2 of the Convention committed by persons or groups of persons acting without the authorization, support or acquiescence of the State.

The Committee recommends that the State party continues its efforts to prevent and to investigate promptly, thoroughly and impartially all acts referred to in article 3 of the Convention, and to prosecute and punish those responsible.

The Committee recommends that the State party intensifies its efforts to prevent any violation of the Convention, including in areas currently controlled by the so-called Islamic State in Iraq and the Levant and affiliated groups. The Committee also recommends that the State party increase its efforts with a view to ensuring that all reports of acts defined in article 2 of the Convention committed by the so-called Islamic State in Iraq and the Levant or any other group of persons without the authorization, support or acquiescence of State officials are promptly, thoroughly and impartially documented and investigated and that those responsible are brought to justice and, if found guilty, punished in accordance with the gravity of their acts. Furthermore, the Committee recommends that the State party adopt the necessary measures to ensure that all persons deprived of liberty by these groups and whose fates remain unknown are searched for and located.

The State party should, in cooperation with countries of origin and destination and victims of trafficking, redouble its efforts to prevent trafficking in persons and disappearances. Specifically, the State party should amend its legal framework in order to ensure that all forms of trafficking in persons are actually punished.

In conjunction with countries of origin and countries of destination, and with input from victims and civil society, the State party should redouble its efforts to prevent and investigate disappearances of migrants, to prosecute those responsible and to provide adequate protection for complainants, experts, witnesses and defence counsel. The transnational search and access to justice mechanism should guarantee: (a) that searches are conducted for disappeared migrants and that, if human remains are found, they are identified and returned; (b) that ante-mortem information is compiled and entered into the ante-mortem/post-mortem database; and (c) that the relatives of the disappeared persons, irrespective of where they reside, have the opportunity to obtain information and take part in the investigations and the search for the disappeared persons.

The Committee also wishes to emphasize the particularly cruel effect of enforced disappearance on the human rights of women and children. Women who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic disadvantages and to be subjected to violence, persecution and reprisal as a result of their efforts to locate their loved ones. Children who are victims of enforced disappearance, either because they themselves were subjected to disappearance or because they suffer the consequences of the disappearance of their relatives, are especially vulnerable to numerous human rights violations, including identity substitution. In this context, the Committee places special emphasis on the need for the State party to ensure that gender perspectives and child-sensitive approaches are used in implementing the rights and obligations set out in the Convention.

4. CRIMINALIZATION OF ENFORCED DISAPPEARANCE IN DOMESTIC LEGISLATION (ART. 4)

“Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.”

Article 4 of the Convention requires States parties to proscribe enforced disappearance as a separate and autonomous crime.⁹¹ In reviewing States parties’ reports, the Committee has expressed its concern about situations in which the State concerned had not taken steps to implement that obligation.⁹² In addition, it has noted that criminalization of enforced disappearance as a separate offence should be valid and applicable throughout a State, including at the entity and district levels.⁹³

In criminalizing such acts in accordance with article 4 of the Convention, States parties should make sure that the definition is compatible with the one contained in article 2 of the Convention.⁹⁴ Indeed, the Committee has expressed its appreciation in instances in which States parties have adopted such a definition in their criminal legislation.⁹⁵

The Committee has stressed that “the offence of enforced disappearance is not a series of different crimes, but rather a single complex offence, committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, that violates various rights”.⁹⁶ The Committee has stressed on numerous occasions that no other criminal act is “sufficient to adequately encompass all the constitutive elements of enforced disappearance” and “reference to a range of existing offences is not necessarily enough”.⁹⁷ In reviewing States parties’ reports under article 29 of the Convention, the Committee has taken note of the claims of States parties that their respective legislation covers similar acts, such as kidnapping, unlawful deprivation of liberty and torture.⁹⁸ Consequently, criminalization of the conduct defined in article 2 of the Convention as a separate crime is the only means to meet the obligation under article 4.

States parties whose domestic legislation does not envisage a definition of enforced disappearance are obliged under articles 2 and 4 of the Convention to codify it. As for those States parties whose domestic legal framework defines the offence, but not in full conformity with article 2 of the Convention, the definition must be reviewed and aligned with the Convention.

⁹¹ The same is required by article IV of the Inter-American Convention on Forced Disappearance of Persons. See also the cases from the Inter-American Court of Human Rights, such as *Gómez-Palomino v. Peru*, Judgment, 22 November 2005, paras. 96 et seq.; *Radilla-Pacheco v. Mexico*, paras. 144 et seq.; *Heliodoro Portugal v. Panama*, Judgment, 12 August 2008, paras. 179 et seq.; and *Blanco-Romero et al. v. Venezuela*, Judgment, 28 November 2005, paras. 105 et seq.

⁹² CED/C/IRQ/CO/1, para. 13; CED/C/MEX/CO/1, para. 19; CED/C/MNE/CO/1, para. 8; CED/C/BFA/CO/1, para. 13; CED/C/TUN/CO/1, para. 14; CED/C/CUB/CO/1, para. 11; CED/C/GAB/CO/1, para. 12; CED/C/JPN/CO/1, para. 13; CED/C/BOL/CO/1, para. 12; CED/C/CHL/CO/1, para. 8; and CED/C/ITA/CO/1, para. 14.

⁹³ CED/C/BIH/CO/1, para. 13.

⁹⁴ See sect. III.C.2 above.

⁹⁵ CED/C/SEN/CO/1, para. 13.

⁹⁶ CED/C/BEL/CO/1, para. 11. See also CED/C/ARM/CO/1, para. 11.

⁹⁷ CED/C/ESP/CO/1, para. 9. See also CED/C/BEL/CO/1, para. 11; CED/C/GAB/CO/1, para. 12; CED/C/JPN/CO/1, para. 13; CED/C/PRT/CO/1, para. 14; and CED/C/ITA/CO/1, para. 14.

⁹⁸ CED/C/ESP/CO/1, para. 9; CED/C/BEL/CO/1, para. 11; CED/C/GAB/CO/1, para. 12; CED/C/JPN/CO/1, para. 13; CED/C/PRT/CO/1, para. 14; CED/C/ITA/CO/1, para. 14; CED/C/DEU/CO/1, para. 7; CED/C/MNE/CO/1, para. 8; and CED/C/BFA/CO/1, para. 13.

The Committee has observed that, in instances in which a State party has started a legislative process to adopt or revise the definition of enforced disappearance, it must seek contributions from NGOs and other members of civil society and allow their views to be taken into consideration.⁹⁹

The Committee has noted on numerous occasions that the obligation under article 4 of the Convention is closely related with the other treaty obligations concerning legislation, such as those in articles 2, 6, 7 and 8 of the Convention.¹⁰⁰

Working Group on Enforced or Involuntary Disappearances, best practices on enforced disappearances in domestic criminal legislation

“12. The analysis of the responses given by States shows great progress made in a few years. In most of the cases, the impulse for codifying the crime of enforced disappearance seems to have been the ratification and thus the implementation of the Rome Statute of the International Criminal Court (ICC) in domestic law. At the same time, a number of States have also simultaneously or alternatively codified enforced disappearance as an autonomous crime in their domestic legislation.

...

16. Experience shows that enforced disappearances often do not occur as part of a widespread or systematic attack against civilians. In this perspective, criminalizing enforced disappearance in domestic law only when committed in this specific context implies that many acts of enforced disappearances remain outside the scope of domestic criminal law and the jurisdiction of national courts.

17. The Working Group has pointed out that ‘since most cases of enforced disappearance occur in isolation and not necessarily as part of a systematic attack with the intention to remove the victims from the protection of the law for a prolonged period of time ... efforts have to be increased to include enforced disappearance in all domestic criminal codes with appropriate punishment, and to bring the perpetrators to justice before domestic courts under national as well as universal jurisdiction’.

18. Even if it cannot lead to invoking the jurisdiction of the International Criminal Court, an isolated act of enforced disappearance nonetheless remains an international crime and a gross human rights violation, which determines the criminal responsibility of the perpetrators, as required by several international human rights treaties. It follows that States cannot limit the criminalization of enforced disappearances only to those instances which would amount to crimes against humanity in the sense of the ICC Statute, but should encompass in the definition of the offence any kind of such act.

19. A number of good practices can be seen in this regard. Two States have thus established in their domestic legislation two separate offences: one in the context of article 7 of the ICC Statute and, another, punishing enforced disappearances that do not take place in a widespread or systematic attack against a civilian population. Other States, however, have a single offence in their domestic law, which is sufficiently broad to include any instance of this crime, be it committed as an isolated act or as part of a widespread or systematic attack against a civilian population. Some of those States have chosen to qualify enforced disappearance as a crime against humanity, even if it is not committed in the context of a widespread or systematic attack.” (Footnotes omitted.)

⁹⁹ CED/C/BEL/CO/1, para. 13.

¹⁰⁰ CED/C/ESP/CO/1, para. 9; CED/C/DEU/CO/1, para. 7; CED/C/SRB/CO/1, para. 10; CED/C/MNE/CO/1, para. 8; CED/C/BFA/CO/1, para. 13; CED/C/CUB/CO/1, para. 11; and CED/C/JPN/CO/1, para. 13. See sect. III.C.2 above and sects. III.C.6, III.C.7 and III.D.1 below.

According to the Committee, article 4 of the Convention does not only require States parties to make the necessary legislative amendments. The Committee has noted that, in addition to criminalizing enforced disappearance as a separate offence, States parties must make sure that the application of the offence in practice is also consistent with the Convention.¹⁰¹

Working Group on Enforced or Involuntary Disappearances, best practices on enforced disappearances in domestic criminal legislation

- “9. Article 4 of the Declaration provides that ‘all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness’. In 1995, the Working Group adopted a general comment on this provision, noting that the obligation to codify enforced disappearance as a separate offence in domestic criminal codes ‘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’. ...
10. Even if the absence of an autonomous crime does not excuse States from investigating and punishing acts of enforced disappearances, the obligation to criminalize enforced disappearance under national legislation as a separate offence is a powerful mechanism for overcoming impunity. The Supreme Court of Nepal found that ‘in the absence of pertinent laws, no real, effective or practical investigation can be carried out. ... For the purpose of addressing this problem effectively, it is necessary to urgently enact a law which includes provisions that the act of disappearance is a criminal offence, defining the act of disappearance pursuant to the definition stated in the International Convention’.
11. A number of States admit that they have not yet incorporated the crime of enforced disappearance into their domestic legislation, but argue that their legislation provides for safeguards from various offences that are linked with enforced disappearance or are closely related to it, such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. However, a plurality of fragmented offences does not mirror the complexity and the particularly serious nature of enforced disappearance. While the mentioned offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection.
- ...
23. Thus the definition of the crime in domestic law should cover all the varieties of situations covered by the generic term of ‘deprivation of liberty’. For instance, using the term ‘kidnapping’ alone is inappropriate, as it refers only to a certain type of illegal abduction.
24. Good practices can be identified in laws that simply use the term ‘deprivation of liberty of the victim’ or ‘deprivation of liberty in whatever form’ – which is even better. The terms ‘legally or illegally detain a person’ can fit, provided they are interpreted broadly so as to cover all forms of deprivation of liberty in any place, and not only in official detention centres by competent authorities (although acting illegally). Definitions inspired from the Rome Statute use the same wording as article 7, paragraph 2-i, that is to say, ‘the arrest, detention or abduction of persons’, which should be interpreted as sufficiently broad to cover all types of deprivation of liberty.
- ...

¹⁰¹ CED/C/ARG/CO/1, para. 12.

26. Good practices therefore flow from the implementation of the Rome Statute, which contemplates the repression of enforced disappearance as a crime against humanity when committed ‘by, or with the authorization, support or acquiescence of, a State or a political organization’, a wording which covers the broadest spectrum of instances of enforced disappearances. The same can be said of the definition of enforced disappearance as an autonomous offence which foresees the perpetration of the crime by ‘any individual’. The Working Group however recalls that such broad definitions shall not be construed to dilute the responsibility of the State and should take into account the specificity of the offence of enforced disappearance that result from the other constitutive elements, and in particular the fact that such a crime results in placing the victim outside the protection of the law.
27. Equally positive and more in line with the language of the Declaration are the domestic laws restricting the category of potential perpetrators to those persons who have a link – whatever nature – with the State, following for instance the wording used in article 2 of the International Convention.
28. ... Good practices of States include the codification of enforced disappearance following the definition given by the Rome Statute (‘the arrest, detention or abduction of persons ... followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons’), as well as the codification of an autonomous offence including such an element in its definition. Other wordings are equally acceptable, provided they are interpreted as covering all the cases contemplated in the Declaration, the International Convention and the Rome Statute, that is to say: refusal to acknowledge the deprivation of liberty; refusal to give information on/concealment of the fate or the whereabouts of the person.
- ...
32. Good practices come from those States that include this element of ‘placement of the victim outside the protection of the law’ as a *consequence* of the other constitutive elements, in conformity with the Declaration and the position of the Working Group.” (Footnotes omitted.)

Working Group on Enforced or Involuntary Disappearances, general comment on the definition of enforced disappearance

- “3. The Working Group has stated ... that, although States are not bound to follow strictly the definition contained in the Declaration 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.”

EXAMPLES OF GOOD PRACTICE



“The Committee notes with satisfaction that the State party has made enforced disappearance an offence under the Criminal Code.”¹⁰²

“The Committee also commends the State party on the measures adopted in areas related to the Convention, such as the initiative to include enforced disappearance as an autonomous crime in the International Crimes Act of 19 June 2003, in addition to it being defined as a crime against humanity.”¹⁰³

“The Committee also welcomes the measures adopted by the State party regarding matters related to the Convention, including ... the adoption of the Criminal Code, in February 2014, which, among other things, classifies enforced disappearance as a separate offence (art. 84)”.¹⁰⁴

“[The Committee commends] the State for having included enforced disappearance as an autonomous crime in the International Crimes Act”.¹⁰⁵

“The Committee also welcomes the measures taken by the State party in areas related to the Convention, including: (a) The amendment of the Criminal Code, on 1 January 2015, which saw the insertion of sections 312b and 321a (3) (5) criminalizing the offence of enforced disappearance”.¹⁰⁶

“The Committee welcomes the measures taken by the State party in areas relevant to the Convention, such as: ... (c) The criminalization of enforced disappearance in article 292 bis of the Criminal Code through Act No. 3326 of 2006”.¹⁰⁷

“The Committee also welcomes the steps taken by the State party to address issues related to the Convention, including: ... (d) The amendment, in 2017, of article 320 of the Criminal Code, which criminalizes enforced disappearance (Legislative Decree No. 1351)”.¹⁰⁸

“The Committee notes with interest that the State party has begun a legislative process aimed at revising the Criminal Code and the Code of Criminal Procedure with a view to putting into effect all the provisions of the Convention. The Committee notes with appreciation that draft article 153 of the new Criminal Code uses the definition of enforced disappearance contained in article 2 of the Convention and characterizes enforced disappearance as an autonomous offence that is subject to punishment (arts. 2, 4, 6 and 7)”.¹⁰⁹

¹⁰² CED/C/ARG/CO/1, para. 12. However, the Committee expressed its concern that the application of the offence in practice was somewhat problematic.

¹⁰³ CED/C/NLD/CO/1, para. 5.

¹⁰⁴ CED/C/ECU/CO/1, para. 5.

¹⁰⁵ CED/C/NLD/CO/1, para. 14.

¹⁰⁶ CED/C/AUT/CO/1, para. 4.

¹⁰⁷ CED/C/BOL/CO/1, para. 5.

¹⁰⁸ CED/C/PER/CO/1, para. 5.

¹⁰⁹ CED/C/SEN/CO/1, para. 13.

CHECKLIST

INFORMATION ABOUT THE CRIMINALIZATION OF ENFORCED DISAPPEARANCE IN DOMESTIC LEGISLATION TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify whether domestic legislation includes an autonomous offence of enforced disappearance.
- ✓ Indicate the relevant provision(s) of respective legislative act(s) and provide the text(s).
- ✓ Provide information on how enforced disappearance is separately defined as a crime qualitatively distinguishable from other offences that may be related to, but different in nature from, enforced disappearance, such as abduction, abduction of children, arbitrary arrest, deprivation of liberty, torture and deprivation of life or similar crimes that may already exist in the domestic criminal code.
- ✓ Specify whether domestic courts prosecuted anyone for enforced disappearance pursuant to the provisions codifying enforced disappearance and, where possible, summarize the main details of such trials and their outcome.
- ✓ Specify, if the legislation in force does not envisage a separate crime, if legislative reform is pending to introduce such an offence and, if so, provide the draft of such legislation.

Examples of recommendations



The State party should adopt the necessary legislative measures to ensure, as quickly as possible, that enforced disappearance is defined as an autonomous offence, at both the federal and State levels, in line with the definition contained in article 2 of the Convention, and that the offence carries appropriate penalties which take account of its extreme seriousness.

The Committee recommends that the State party adopt the necessary measures to accelerate the process to make enforced disappearance an autonomous offence in line with the definition contained in article 2 of the Convention, as well as to ensure that the offence is punishable by appropriate penalties which take into account its extreme seriousness and that a system of superior responsibility which is in accordance with article 6, paragraph 1 (b), of the Convention is applicable to this offence.

The Committee recommends that the State party review the definition of enforced disappearance in the International Crimes Act in order to ensure that, insofar as it applies to the autonomous crime of enforced disappearance, it is fully compliant with article 2 of the Convention.

The Committee recommends that the State party ensure that the revision of the Criminal Code is fully aligned with the obligations contained in the Convention by incorporating all those changes that are needed to comply with the provisions of the Convention. In particular, the State party should define enforced disappearance as a separate crime in line with the definition in article 2 of the Convention.

The Committee recommends that the State party step up the pace in drafting a bill aimed at implementing the Convention so as to define and criminalize enforced disappearance as a separate offence in its Criminal Code, in conformity with articles 2 and 4 of the Convention, and to make it punishable by appropriate penalties commensurate with the extreme seriousness of the crime.

The Committee recommends that the State party take the necessary measures, including the provision of suitable training for judges and prosecutors, to ensure that the phrase "placing them outside the protection of the law" that appears in article 236, paragraph 1, of the Criminal Code be considered a consequence of the commission of the offence of enforced disappearance rather than an intentional element (*animus*) that would have to be present in order for the act to constitute criminal conduct.

The Committee recommends that the State party take all necessary measures to ensure that the definition contained in article 165 of the Criminal Code is applied in such a way as to guarantee that searches for disappeared persons and criminal investigations are carried out effectively and that the State's accountability is not diluted.

The Committee urges the State party to encourage contributions from NGOs and other members of civil society, in particular those with activities related to the Convention or in similar fields, at the most appropriate stage of drafting of the bill to fully implement the Convention in domestic law.

5. ENFORCED DISAPPEARANCE AS A CRIME AGAINST HUMANITY (ART. 5)

“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.”

The States parties to the Convention should make the widespread or systematic practice of enforced disappearance punishable as a crime against humanity. To implement this obligation under article 5 of the Convention, they should take legislative and other necessary measures. As discussed above, the criminalization of enforced disappearance as a separate crime under article 4 of the Convention is not in itself sufficient to comply with the duty to proscribe enforced disappearance as a crime against humanity in line with article 5.

According to the Committee, States parties should directly incorporate enforced disappearance as a crime against humanity, as such.¹¹⁰ General references to crimes under international law are not sufficient to meet this requirement.¹¹¹

In reviewing States parties reports under article 29 of the Convention, the Committee has expressed its concern about situations in which the widespread or systematic practice of enforced disappearance was not specifically characterized as a crime against humanity in the domestic legislation of the States concerned.¹¹² Such information should be specifically provided in reports submitted under article 29 of the Convention. The Committee has expressed its concern about situations in which it received no information on the measures taken to implement this obligation pursuant to article 5 of the Convention.¹¹³

According to the Committee, in order to comply with article 5 of the Convention, it is not sufficient to simply include a reference to enforced disappearance as a crime against humanity in legislation. The criminal legislation of States parties should define enforced disappearance and expressly mention the consequences of the widespread or systematic practice of enforced disappearance.¹¹⁴

¹¹⁰ CED/C/BEL/CO/1, para. 15.

¹¹¹ Ibid., para. 23.

¹¹² CED/C/CUB/CO/1, para. 11; CED/C/ITA/CO/1, para. 14; CED/C/JPN/CO/1, para. 13; and CED/C/PRT/CO/1, para. 12.

¹¹³ CED/C/GAB/CO/1, para. 12.

¹¹⁴ CED/C/SEN/CO/1, para. 17.



The definition of enforced disappearance as an underlying offence of crime against humanity must be compatible with article 2 of the Convention.¹¹⁵ The Committee has expressed concerns about a situation in which the definition in the respective legislative acts introduced additional requirements that were not included in international instruments, for instance that such an offence must be committed “as part of a concerted plan”.¹¹⁶ It has also found problematic those instances in which the definition was more restrictive than that envisaged in international law. For example, the Committee has pointed out that the wording that suggested that enforced disappearance constituted a crime against humanity only if preceded by abduction was not legally accurate and thus it was incompatible with article 5 of the Convention.¹¹⁷

The Committee has expressed its concern about a situation in which the legislation of a State party envisaged a time limit for the criminalization of enforced disappearance as a crime against humanity (e.g. only in relation to offences committed during a given period of time).¹¹⁸

The criminalization of enforced disappearance in domestic legislation as a crime against humanity is complementary and without prejudice to the mandates of the mechanisms concerned with the individual criminal responsibility of persons for crimes under international law, such as the International Criminal Court and mixed tribunals, the mandates of which may extend to enforced disappearance.¹¹⁹

¹¹⁵ CED/C/ALB/CO/1, para. 16. See sect. III.C.2 above.

¹¹⁶ CED/C/FRA/CO/1, para. 14.

¹¹⁷ CED/C/SEN/CO/1, para. 17.

¹¹⁸ CED/C/IRQ/CO/1, para. 13. The Supreme Criminal Tribunal Act No. 10 of Iraq criminalized enforced disappearance as a crime against humanity, although only in relation to offences committed between 1968 and 2003.

¹¹⁹ See sect. VII below.

Working Group on Enforced or Involuntary Disappearances, **general comment on enforced disappearance as a crime against humanity**¹²⁰

- “7. ... 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.
- ...
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.”

Working Group on Enforced or Involuntary Disappearances, **best practices on enforced disappearances in domestic criminal legislation**

“A. The codification of enforced disappearance in conformity with the Statute of the International Criminal Court

13. A significant number (45) of States analysed have indeed criminalized enforced disappearance as a crime against humanity, when it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, following the definition given of crimes against humanity and of enforced disappearance provided for in article 7 of the Rome Statute. ...
- ...
15. ... the Working Group recommends that the definition of enforced disappearance provided for by the Rome Statute be interpreted by the national authorities in line with the more adequate definition provided for in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.” (Footnote omitted.)

EXAMPLES OF GOOD PRACTICE



“The Committee commends the State party for having included in its legislation a definition of enforced disappearance as a crime against humanity, whether it is committed in peacetime or wartime.”¹²¹

“The Committee also commends the State party on the measures adopted in areas related to the Convention, such as ... enforced disappearance ... being defined as a crime against humanity.”¹²²

¹²⁰ A/HRC/13/31, para. 39.

¹²¹ CED/C/FRA/CO/1, para. 14. Nevertheless, the Committee has noted that the act of criminalizing enforced disappearance as a crime against humanity envisages additional elements that are not found in international instruments and has recommended that the necessary legislative changes are made to make sure that the definition is in line with articles 2 and 5 of the Convention.

¹²² CED/C/NLD/CO/1, para. 5.

“The Committee also welcomes the measures adopted by the State party regarding matters related to the Convention, including: ... (b) The adoption of the Criminal Code, in February 2014, which, among other things, ... classifies enforced disappearance as a crime against humanity when the offence of enforced disappearance is committed as part of a widespread or systematic attack against a civilian population (art. 89)”.¹²³

CHECKLIST

INFORMATION ABOUT ENFORCED DISAPPEARANCE AS A CRIME AGAINST HUMANITY TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify whether domestic legislation specifically criminalizes enforced disappearance as a crime against humanity.
- ✓ Indicate, if enforced disappearance is criminalized as a crime against humanity, the relevant provision(s) of the respective legislative acts and provide information regarding the definition of such acts and the penalties envisaged for them.
- ✓ Specify whether domestic courts prosecuted anyone for enforced disappearance as a crime against humanity and, if applicable, summarize the main details of such trials and their outcomes.
- ✓ Specify whether the State party has ratified/acceded to the Rome Statute and if it has acceded to/ratified the Agreement on the Privileges and Immunities of the International Criminal Court.

Examples of recommendations



The Committee also recommends that the State party explicitly recognize enforced disappearance as a crime against humanity, in line with article 5 of the Convention.

The Committee recommends that the State party take all necessary legal and other measures to ensure that the offence of enforced disappearance is defined in both of its forms, as a separate offence (art. 2) and as a crime against humanity (art. 5).

The Committee urges the State party to adopt the necessary legislative measures to make sure that enforced disappearance as a crime against humanity is criminalized in accordance with the standards provided for under article 5 of the Convention and regardless of the date of perpetration.

The Committee recommends that the State party review the definition of enforced disappearance as a crime against humanity in order to ensure its full compliance with articles 2 and 5 of the Convention.

The Committee recommends that the State party should review its criminal legislation relating to enforced disappearance as a crime against humanity and delete the expression “as part of a concerted plan” in order to ensure compliance with article 5 of the Convention and applicable international law so as to avoid introducing an additional condition for the prosecution of cases of enforced disappearance.

The Committee recommends that the State party review the definition of enforced disappearance as a crime against humanity in order to ensure its full compliance with articles 2 and 5 of the Convention.

¹²³ CED/C/ECU/CO/1, para. 5.

6. ESTABLISHING A REGIME OF CRIMINAL RESPONSIBILITY (ART. 6)

The States parties are expected to adopt the necessary legislative and other measures to give effect to article 6 of the Convention. The Committee maintains that the legislation in place should “reflect the full scope” of this provision.¹²⁴

(a) Criminal responsibility for enforced disappearance (art. 6 (1) (a))

- “1. Each State Party shall take the necessary measures to hold criminally responsible at least:
- (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance”.

The obligation under article 6 (1) (a) of the Convention to prescribe criminal responsibility of persons for enforced disappearance is closely linked to article 4 of the Convention.¹²⁵ States parties must ensure that their domestic legislation envisages all the forms of participation in the crime of enforced disappearance.

Working Group on Enforced or Involuntary Disappearances, best practices on enforced disappearances in domestic criminal legislation

“V. Participation in the commission of enforced disappearance and inchoate offences

35. The different forms of participation in the commission of enforced disappearance, such as complicity, command responsibility or instructions, instigation, consent, acquiescence and active concealment, shall also be punishable under domestic criminal law. This is important notably as regards the criminal responsibility of persons involved in the chain of command. Usually many perpetrators are implicated in the commission of an enforced disappearance and not necessarily all of them are aware of the whereabouts or the fate of the victim.” (Footnote omitted.)

CHECKLIST

INFORMATION ABOUT CRIMINAL RESPONSIBILITY FOR ENFORCED DISAPPEARANCE TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify whether legislation adequately defines the principles of criminal responsibility, in accordance with applicable international law, including committing, ordering, soliciting, inducing, attempting, being complicit in and participating in acts of enforced disappearance, or other circumstances that, by virtue of their nature, are similar to those mentioned.
- ✓ Indicate, in the absence of specific legislation, which forms of criminal responsibility are envisaged by domestic legislation and provide the relevant text(s).
- ✓ Provide details of the instances, if any, in which domestic courts conducted proceedings on enforced disappearance applying different modes of criminal liability (i.e. aiding and abetting, attempting, being an accomplice or participating in an enforced disappearance).

¹²⁴ CED/C/ITA/CO/1, para. 16.

¹²⁵ CED/C/BEL/CO/1, para. 11.

Examples of recommendations



The Committee recommends that ... in conformity with article 6, paragraph 1 (a), of the Convention, that the attempt to commit an enforced disappearance be punishable.

(b) Criminal responsibility of superiors for enforced disappearance (art. 6 (1) (b)–(c))

“1. Each State Party shall take the necessary measures to hold criminally responsible at least:

...

(b) A superior who:

- (i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
- (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and
- (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.”

Under article 6 of the Convention, States parties are expected to incorporate the criminal responsibility of superiors into their criminal legislation.¹²⁶ The Committee has expressed concerns about instances in which the legislation of States parties did not specifically provide for the criminal responsibility of superiors¹²⁷ or non-military authorities.¹²⁸

The Committee does not consider it sufficient for implementing article 6 of the Convention that States parties' legislation envisages the possibility of charging a superior who failed to prevent or repress offences of enforced disappearance with another crime.¹²⁹

¹²⁶ Rome Statute, art. 28.

¹²⁷ CED/C/PER/CO/1, para. 16; CED/C/BOL/CO/1, para. 14; CED/C/HND/CO/1, para. 16; and CED/C/GAB/CO/1, para. 15.

¹²⁸ CED/C/PER/CO/1, para. 16; and CED/C/BOL/CO/1, para. 14.

¹²⁹ CED/C/ITA/CO/1, para. 16.

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“37. Good practices from a great number of States result from the implementation of the Rome Statute in their domestic legislation and in particular of articles 25 and 28 of this Statute, which provide for a detailed account of forms of responsibility, comparable to the one that can be found in article 6 of the International Convention. However, this only concerns responsibility of persons having committed the crime of enforced disappearance as a crime against humanity, under the condition and the specific definition given in article 7 of the Statute.” (Footnotes omitted.)

Updated set of principles for the protection and promotion of human rights through action to combat impunity¹³⁰

Principle 27

- “(a) The fact that the perpetrator of violations acted on the orders of his or her Government or of a superior does not exempt him or her from responsibility, in particular criminal, but may be regarded as grounds for reducing the sentence, in conformity with principles of justice;
- (b) The fact that violations have been committed by a subordinate does not exempt that subordinate’s superiors from responsibility, in particular criminal, if they knew or had at the time reason to know that the subordinate was committing or about to commit such a crime and they did not take all the necessary measures within their power to prevent or punish the crime;
- (c) The official status of the perpetrator of a crime under international law – even if acting as head of State or Government – does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of sentence.”

CHECKLIST

INFORMATION ABOUT RESPONSIBILITY OF SUPERIORS FOR ENFORCED DISAPPEARANCE TO BE PROVIDED IN STATES PARTIES’ REPORTS

- ✓ Specify whether domestic legislation allows the sanctioning of superiors who: knew or consciously disregarded information that clearly indicated that subordinates under their effective authority and control were committing or about to commit a crime of enforced disappearance; exercised effective responsibility for and control over activities that were concerned with enforced disappearance; and failed to take all necessary and reasonable measures within their power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.
- ✓ Indicate, if that is not the case, if domestic criminal legislation provides general rules on the responsibility of superiors and provide a copy of the respective text(s).
- ✓ Specify whether domestic courts conducted proceedings applying provisions on the responsibility of superiors in cases of enforced disappearance and, if applicable, provide the details and summarize the outcomes of such proceedings.

¹³⁰ E/CN.4/2005/102/Add.1.

Examples of recommendations



The Committee recommends that the State party take the legislative measures necessary to ensure that domestic legislation specifically provides for: the criminal responsibility of superiors in accordance with article 6 (1) (b) of the Convention.

The Committee recommends that the State party take the legislative measures necessary to ensure that national law specifically provides for the criminal responsibility of superiors in accordance with article 6 (1) (b) of the Convention.

The Committee recommends that the State party take the necessary legislative measures to ensure that both federal and state laws specifically provide for the criminal responsibility of superior officials, in accordance with article 6, paragraph 1 (b), of the Convention.

The Committee recommends that the State party take the legislative measures necessary to ensure that domestic legislation specifically provides for the criminal responsibility of superiors in public, civilian and military institutions, in accordance with article 6 (1) (b) of the Convention.

The Committee recommends that the offence be punishable by appropriate penalties which take into account its extreme seriousness, and that a system of superior responsibility that is in accordance with article 6 (1) (b) of the Convention be applicable to this offence.

The Committee recommends that, in Bill No. 736, the State party should hold superiors fully responsible in any case of enforced disappearance, in accordance with article 6 of the Convention, and not responsible as accomplices.

The Committee recommends that the State party ensure that the new text of the Criminal Code complies fully with the Convention by providing for the responsibility of a superior within the meaning of article 6 (2).

(c) Due obedience (art. 6 (2))

"2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance."

According to the Committee, in order to comply with the obligation under article 6 of the Convention, domestic legislation must expressly provide that due obedience may not be invoked to justify enforced disappearance.¹³¹ The Committee has expressed its concern about a situation in which a State party's legislation made it possible to invoke such an order or instruction to justify a crime of enforced disappearance.¹³²

The Committee has found that article 6 of the Convention was not implemented in situations in which the criminal legislation specified that an act was not an offence if a public official or public servant committed the act in implementation of an order from a superior that they were obliged or felt obliged to obey.¹³³ It has also deemed it incompatible with the Convention when domestic legislation provided

¹³¹ CED/C/BOL/CO/1, para. 14; on a similar note, see CED/C/HND/CO/1, para. 16. The same principle is affirmed in the 1992 Declaration (art. 6), the Inter-American Convention on Forced Disappearance of Persons (art. VIII) and, for enforced disappearance as a crime against humanity, by the Rome Statute (art. 33).

¹³² CED/C/ITA/CO/1, paras. 16–17.

¹³³ CED/C/IRQ/CO/1, para. 15.

that officials who fulfilled illicit orders were exempt from liability if they first demanded or required that the orders be transmitted to them in writing, expressly mentioning that they considered them illegal.¹³⁴

The Committee maintains that the relevant provisions must be clear and specific and cover all categories of persons envisaged in article 6 of the Convention so as to offer sufficient protection to any subordinate wishing to disobey an order from a superior to commit an enforced disappearance.¹³⁵ It considers that, even when a State party has incorporated article 33 of the Rome Statute on superior orders into domestic legislation, the absence of a specific provision could give rise to different interpretations and, thus, be incompatible with the Convention.¹³⁶

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“B. Due obedience to superior orders

52. All international human rights instruments dealing with enforced disappearance make it clear that no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance. The Working Group stressed that this principle shall be duly mirrored by domestic legislation. None of the mentioned international instruments refers to the fact that superior orders could be considered a ground for mitigation of punishment if justice so requires. Indeed, even if national legislation were to introduce mitigation of sentence based on superior orders, mitigation could not be without limits: if too great a reduction of penalty were permitted by national law, it would contravene the obligation to provide for ‘appropriate penalties’ contained, among others, in article 4 of the Declaration.
53. ... it appears that a number of States already include in their domestic legislation provisions that expressly state that no order or instruction may be invoked to justify an enforced disappearance, in most of the cases when this act receives the qualification of crime against humanity. In other States, acting pursuant to an order normally excludes responsibility, unless the order was ‘manifestly unlawful’ or out of the limits of the superior’s powers, or the subordinate would commit a criminal act by carrying out the order. With regard to these States, the Working Group suggests that it should be specified, either by way of judicial interpretation or legislative amendment, that the order to commit or to participate in any way in the crime of enforced disappearance is ‘manifestly unlawful’ or criminal.
54. Finally, some other States still retain the principle according to which obeying an order is an exempting circumstance for the subordinate. The Working Group recommends those States to amend their legislation on this issue and to put in line with international law, following the good practices of other States.” (Footnotes omitted.)

¹³⁴ CED/C/PRT/CO/1, para. 16.

¹³⁵ CED/C/ALB/CO/1, para. 18; and CED/C/BFA/CO/1, paras. 15–16.

¹³⁶ CED/C/COL/CO/1, para. 17.



EXAMPLES OF GOOD PRACTICE



“The Committee also commends the State party on the measures adopted in areas related to the Convention, such as the initiative to include enforced disappearance as an autonomous crime in the International Crimes Act of 19 June 2003, in addition to it being defined as a crime against humanity. The act, *inter alia*, establishes the imprescriptibility of the offence and foresees superior responsibility and extraterritorial jurisdiction.”¹³⁷

CHECKLIST

INFORMATION ABOUT DUE OBEDIENCE OF SUPERIORS' ORDERS TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify whether domestic legislation expressly mentions that due obedience of superiors' orders cannot be invoked to justify enforced disappearance and whether it provides guarantees to protect those who refuse to comply with such orders.
- ✓ Indicate, if that is the case, the relevant provision(s) of the respective legislative act(s) and provide the text(s).
- ✓ Indicate, if that is not the case, whether domestic criminal legislation provides general rules on due obedience of superiors' orders and provide a copy of the respective text(s).
- ✓ Provide details on whether “due obedience” was invoked in domestic criminal proceedings concerning cases of enforced disappearance and, if so, provide details thereon.

¹³⁷ CED/C/NLD/CO/1, para. 5.

Examples of recommendations



The Committee recommends that the State party take the legislative measures necessary to ensure that domestic legislation specifically provides for the prohibition of invoking superior orders or instructions to justify an offence of enforced disappearance in accordance with article 6 (2) of the Convention.

The Committee recommends that the State party revise the provisions of the above-mentioned legislation, and expressly specify that no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance, in line with article 6 (2) of the Convention. The Committee also recommends that the State party strengthen protection and legal guarantees for subordinates wishing to disobey an order from a superior to commit an enforced disappearance.

The Committee recommends that the State party take the legislative measures necessary to ensure that domestic legislation explicitly states that it is prohibited to invoke orders or instructions from superiors to justify an offence of enforced disappearance, in accordance with article 6 (2) of the Convention.

7. PUNISHING ACTS OF ENFORCED DISAPPEARANCE (ART. 7)

(a) Penalties for the crime of enforced disappearance (art. 7 (1))

“1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.”

According to the Committee, national criminal legislation should specify minimum and maximum penalties for the crime of enforced disappearance.¹³⁸ In its concluding observations on reports presented by States parties under article 29 of the Convention, the Committee has insisted that such penalties must be appropriate and take into account the extreme seriousness of enforced disappearance.¹³⁹

The Committee has expressed concerns about situations in which the punitive action taken by States parties was not commensurate with the extreme seriousness of the offence.¹⁴⁰ The Committee did not deem it appropriate when the criminal legislation permitted the imposition of a fine as a stand-alone penalty for the crime of enforced disappearance, noting that that “gives the courts a broad margin of discretion when deciding between a prison sentence or a fine for this type of crime and when deciding on the quantum of the penalty, particularly with regard to the amount of the penalty in cases where the minimum sentence is applied”.¹⁴¹ Nevertheless, the Committee recommends that States parties avoid imposing the death penalty for the crime of enforced disappearance.¹⁴²

¹³⁸ CED/C/AUT/CO/1, para. 13; and CED/C/ALB/CO/1, para. 13.

¹³⁹ CED/C/PRT/CO/1, para. 15; CED/C/LTU/CO/1, para. 16; and CED/C/CHL/CO/1, para. 11.

¹⁴⁰ CED/C/CHL/CO/1, para. 10; CED/C/JPN/CO/1, para. 15; and CED/C/AUT/CO/1, para. 12.

¹⁴¹ CED/C/NLD/CO/1, para. 16.

¹⁴² CED/C/JPN/CO/1, para. 16; CED/C/CUB/CO/1, para. 12.

The Committee has expressed its concern about situations in which a considerable gap existed between the minimum and maximum penalties prescribed for enforced disappearance, as that gave the courts a broad margin of discretion when imposing such penalties.¹⁴³

The Committee has maintained that, in order to comply with article 7 of the Convention, States parties should ensure an adequately consistent practice of imposing penalties.¹⁴⁴ It has expressed its concern about instances in which the imposition of penalties to deal with enforced disappearance varied greatly.¹⁴⁵

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“40. The Working Group found that a penalty of 25 to 40 years of imprisonment for the offence of enforced disappearance is consistent with the Declaration. ...

...

45. As regards accessory sanctions, the Working Group held that domestic legislation dealing with enforced disappearance shall provide that perpetrators must suffer administrative disqualification. Accordingly, some States expressly provide for disqualification from office for public servants convicted of enforced disappearance.

46. The obligation to provide for appropriate criminal sanctions shall not detract from the duty to ensure that full civil reparation is granted to the victims. The Working Group recalled that ‘in addition to the applicable criminal penalties, the alleged perpetrators of enforced disappearance bear general civil liability’.” (Footnotes omitted.)

See principle 27 of the **updated set of principles for the protection and promotion of human rights through action to combat impunity** cited above.

CHECKLIST

INFORMATION ABOUT THE PENALTIES IMPOSED FOR THE CRIME OF ENFORCED DISAPPEARANCE TO BE PROVIDED IN STATES PARTIES’ REPORTS

- ✓ Provide information on the maximum sanction provided for in the national criminal code.
- ✓ Indicate the sanctions provided for in the national criminal code for acts of enforced disappearance in accordance with international standards and the disciplinary sanctions established for those convicted of enforced disappearance.
- ✓ Indicate the relevant provision(s) of the respective legislative act(s) and provide the text(s).
- ✓ Provide details of the convictions and the corresponding sentences if there is relevant jurisprudence at the domestic level.

¹⁴³ CED/C/URY/CO/1, para. 11; and CED/C/AUT/CO/1, para. 12.

¹⁴⁴ CED/C/JPN/CO/1, para. 15.

¹⁴⁵ Ibid.

Examples of recommendations



The Committee recommends that the State party adopt the legislative measures necessary to ensure that, as soon as possible, the offence carries appropriate penalties that take into account its extreme seriousness, while avoiding the imposition of the death penalty.

The Committee recommends that the State party consider reformulating article 109 (c) of the Criminal Code to provide a clear and distinct definition of enforced disappearance, and to specify the penalties applicable to it.

The Committee recommends that the State party take the measures needed to ensure that perpetrators of enforced disappearance are always punished with appropriate penalties that take into account the extreme seriousness of the offence.

The Committee recommends that the State party should consider adopting legislative measures to reduce the wide gap between the minimum and maximum penalties for the offence of enforced disappearance, in particular by ensuring that the minimum sentence is in line with article 7 of the Convention and takes due account of the extreme seriousness of the offence.

The Committee recommends that the State party revise its legislation, with a view to removing the possibility of imposing fines as a stand-alone penalty for the offence of enforced disappearance. The State party should also ensure that the imposition of the minimum penalty for the crime of enforced disappearance takes due account of the extreme seriousness of the offence, in accordance with article 7 of the Convention.

The Committee recommends that the State party, when criminalizing enforced disappearance in national legislation, establish penalties for the crime of enforced disappearance that take due account of the extreme seriousness of the offence in accordance with article 7 of the Convention, while avoiding the imposition of the death penalty.

(b) Mitigating and aggravating circumstances for the crime of enforced disappearance (art. 7 (2))

“2. Each State Party may establish:

- (a) Mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;
- (b) Without prejudice to other criminal procedures, aggravating circumstances, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons.”

The Committee has addressed mitigating and aggravating circumstances under article 7 in its concluding observations on States parties’ reports submitted in accordance with article 29.¹⁴⁶ Even when the domestic

¹⁴⁶ CED/C/BEL/CO/1, paras. 17–18; CED/C/BIH/CO/1, paras. 15–16; CED/C/TUN/CO/1, para. 15; CED/C/LTU/CO/1, paras. 15–16; CED/C/FRA/CO/1, paras. 18–19; CED/C/ARM/CO/1, para. 12; CED/C/BFA/CO/1, paras. 17–18; CED/C/ALB/CO/1, paras. 20–21; and CED/C/BOL/CO/1, paras. 12–13.

legislation of a State party contained general principles on meting out punishment, the Committee insisted on the desirability of incorporating specific provisions that would provide for mitigating and aggravating circumstances applicable to acts of enforced disappearance listed in article 7 (2) (a)).¹⁴⁷

On a number of occasions, the Committee expressed concerns about situations in which the domestic legislation of a State party did not provide for mitigating and aggravating circumstances applicable to enforced disappearance.¹⁴⁸

While taking note of the position of some States parties that the establishment of mitigating or aggravating circumstances is not compulsory, the Committee has observed that the establishment of mitigating circumstances can help to clear up certain cases of enforced disappearance.¹⁴⁹ Nevertheless, it has insisted on the importance of ensuring that the reliance on mitigating circumstances does not result in penalties that are inadequate given the severity of the crime of enforced disappearance.¹⁵⁰ For example, it has expressed its concern about situations in which legal notions, such as irreproachable prior conduct, had been applied by States parties as a mitigating factor in cases involving enforced disappearance.¹⁵¹

The Committee believes that a general regime of mitigating and aggravating circumstances in the respective criminal codes of States parties does not adequately and fully address all elements set out in article 7.¹⁵² It has also observed that it is not sufficient for the provisions dealing with the general and specific mitigating and aggravating circumstances for distinct offences related to acts of enforced disappearance to cover only issues such as torture, inhuman treatment, illegal and arbitrary detention by public officials, violation by an individual of the right to liberty and security of person and the abduction and concealment of minors or other vulnerable persons.

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- “43. The Working Group found that the criminal legislation that ‘provides for mitigating measures only in the case that the perpetrators cooperate in the liberation of the victim or in the finding of the remains of the victim, as the case may be’ meets the requirements of article 3, paragraph 2, of the Declaration.
44. A number of States establish specific aggravating or mitigating circumstances for enforced disappearance, while others refer to the generic circumstances, if any, established in the Criminal Code. When specific aggravating circumstances are provided for, they relate, among others, to the event of the death or of serious physical or psychological harm to the disappeared person, the fact that the victim is a member of a particularly vulnerable group, the fact that the perpetrator is a public official, or the fact that the act considered is a continuous crime. In some other States, the commission of a crime over a longer period of time is considered as an aggravating circumstance. As regards mitigating circumstances, they include, among others, the fact that the victim is freed within a given lapse of time or the fact that the person implicated provides information which makes it possible to clarify the case or to identify the perpetrators.” (Footnotes omitted.)

¹⁴⁷ CED/C/BIH/CO/1, para. 15; and CED/C/BFA/CO/1, para. 17.

¹⁴⁸ CED/C/JPN/CO/1, para. 15.

¹⁴⁹ CED/C/FRA/CO/1, para. 18.

¹⁵⁰ See sect. III.C.7(b) above.

¹⁵¹ CED/C/CHL/CO/1, para. 10.

¹⁵² CED/C/ALB/CO/1, para. 20.

CHECKLIST

INFORMATION ABOUT MITIGATING AND AGGRAVATING CIRCUMSTANCES FOR THE CRIME OF ENFORCED DISAPPEARANCE TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify whether domestic legislation expressly mentions mitigating and aggravating circumstances for the crime of enforced disappearance.
- ✓ Indicate, if that is the case, the relevant provision(s) of the respective legislative act(s) and provide the text(s).
- ✓ Indicate, if that is not the case, whether domestic criminal legislation provides general rules on mitigating and aggravating circumstances and provide a copy of the respective text(s).
- ✓ Provide details of any cases concerning enforced disappearance in which aggravating or mitigating circumstances were concretely applied in domestic proceedings.
- ✓ Provide information on the application of mitigating or aggravating circumstances, as established in paragraph 2 (a), including, in the latter case, acts of a particularly cruel or discriminatory nature, the death of the disappeared person and the enforced disappearance of pregnant women, minors, persons with disabilities or other persons in situations of particular vulnerability.

Examples of recommendations



The Committee encourages the State party to amend its Criminal Code to provide for mitigating and aggravating circumstances applicable to acts of enforced disappearance covering all the elements listed in article 7, paragraph 2, of the Convention.

The Committee invites the State party to consider including mitigating circumstances in the law as a measure that might help in recovering the disappeared person alive or make it possible to clarify some cases of enforced disappearance or to identify the perpetrators of an enforced disappearance.

The Committee invites the State party, when criminalizing enforced disappearance as an autonomous offence, to consider establishing the specific mitigating and aggravating circumstances provided for in article 7, paragraph 2, of the Convention. It also recommends that the State party ensure that mitigating circumstances will in no case lead to a lack of appropriate punishment.

D. JUDICIAL PROCEDURE AND COOPERATION IN CRIMINAL MATTERS

1. STATUTE OF LIMITATIONS (ART. 8)

“Without prejudice to article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:
 - (a) Is of long duration and is proportionate to the extreme seriousness of this offence;
 - (b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.
2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.”

When enforced disappearance amounts to a crime against humanity, it should not be subject to any statute of limitations.¹⁵³

The Committee has observed in the concluding observations on States parties’ reports that, in criminalizing enforced disappearance as a crime against humanity, States parties must not subject the offence to any statute of limitations.¹⁵⁴

When enforced disappearances do not amount to crimes against humanity, States parties are obliged, under article 8, to make sure that the application of a statute of limitations does not result in impunity for enforced disappearance and that, during the term of limitation, the victims of enforced disappearance are enabled to exercise their right to an effective remedy.

The Committee has pointed out that, even when States parties choose to envisage a statute of limitations for enforced disappearance, several strict conditions enshrined in article 8 must be observed. Accordingly, domestic legislation should:

- (a) Specify the point of commencement of the statute of limitations.¹⁵⁵ According to the Committee, the term of limitations should only start running after the point at which enforced disappearance ceases, and not when only some of its elements may have been committed (e.g. the moment at which victims were deprived of liberty).¹⁵⁶ In this respect, the Committee has insisted on the continuous nature of the crime.¹⁵⁷ According to the Committee, enforced disappearances cease when the fate and whereabouts of the disappeared persons are determined with certainty, which happens, *inter alia*, when disappeared persons are found alive; in the event of death, when their remains are found and identified; or when the identity of a child subjected to wrongful removal is restored.¹⁵⁸

¹⁵³ See sect. III.C.5 above.

¹⁵⁴ CED/C/AUT/CO/1, para. 14. See also the [Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity](#) (General Assembly resolution 2391 (XXIII), annex); and [Rome Statute](#), art. 29.

¹⁵⁵ CED/C/FRA/CO/1, para. 21; and CED/C/HND/CO/1, para. 19;

¹⁵⁶ CED/C/ITA/CO/1, para. 18; CED/C/KAZ/CO/1, para. 14; CED/C/BFA/CO/1, para. 20; and CED/C/BEL/CO/1, para. 20.

¹⁵⁷ CED/C/HND/CO/1, para. 19; CED/C/SEN/CO/1, para. 24; CED/C/ALB/CO/1, para. 23; CED/C/KAZ/CO/1, para. 13; and CED/C/BEL/CO/1, para. 20.

¹⁵⁸ CED/C/KAZ/CO/1, para. 14.

The Committee has expressed concerns about situations in which domestic courts challenged the continuous nature of the crime of enforced disappearance and made presumptions with respect to the fate of disappeared persons – especially with regard to their death – when adjudicating on the applicability of a statute of limitations for criminal proceedings;¹⁵⁹

- (b) Specify the duration of the statute of limitations.¹⁶⁰ The Committee has insisted that the duration of a statute of limitations should be proportionate to the extreme seriousness of the offence.¹⁶¹ The Committee has found terms of limitation for the crime of enforced disappearance ranging from 5 to 20 years to be “extremely short”¹⁶². At the same time, it deemed 30 years, commencing from the point at which enforced disappearance ended, to be compatible with article 8 of Convention.¹⁶³

The same principles regarding a statute of limitations must be observed even in situations in which domestic legislation does not yet criminalize enforced disappearance as a separate offence.¹⁶⁴ This is without prejudice to the obligation of States parties to adopt the necessary legislative measures to implement their obligations under articles 2 and 4 of the Convention. The Committee has expressed its concern about the lack of clarity in relation to statutes of limitations for enforced disappearance in situations in which, in the absence of a separate crime, other related offences (e.g. abduction, deprivation of liberty and torture) were associated with varying statutes of limitations.¹⁶⁵ The Committee has also pointed out that, in situations in which, under domestic legislation, criminal proceedings relating to offences subject to a statute of limitations become time-barred from the date on which the offence was committed, States parties should specifically envisage exceptions for offences of a continuous nature.¹⁶⁶

According to the Committee, the requirements concerning statutes of limitations under article 8 must be observed with respect to all acts of enforced disappearance and not only those that were committed during a specific period.¹⁶⁷ In its concluding observations, the Committee has affirmed that the right of victims to an effective remedy should be guaranteed during the term of limitation. It expressed its concern about a situation in which, under domestic legislation, the statute of limitations for damages in civil proceedings was extinguished 20 years after the commission of the act.¹⁶⁸ The Committee also pointed out that article 8 was not properly implemented in a situation in which the statute of limitations for civil damages for victims of disappearance was the same as the statute of limitations under civil law (e.g. between 5 and 10 years).¹⁶⁹

The regime concerning the statute of limitations is without prejudice to article 24 (6) of the Convention, which affirms that States parties are obliged to continue the investigation at least until the fate of the disappeared person is clarified.¹⁷⁰

¹⁵⁹ CED/C/ESP/CO/1, para. 11; and CED/C/URY/CO/1, para. 13.

¹⁶⁰ CED/C/FRA/CO/1, para. 21.

¹⁶¹ CED/C/JPN/CO/1, para. 20. On a similar note, see CED/C/ESP/CO/1, para. 12; CED/C/BEL/CO/1, para. 12; CED/C/BFA/CO/1, para. 20; CED/C/TUN/CO/1, para. 19; CED/C/ALB/CO/1, para. 23; CED/C/CUB/CO/1, para. 12; CED/C/SEN/CO/1, para. 24; CED/C/AUT/CO/1, para. 15; CED/C/HND/CO/1, para. 19; CED/C/PRT/CO/1, para. 19; CED/C/CHL/CO/1, para. 11; and CED/C/ITA/CO/1, para. 17.

¹⁶² CED/C/JPN/CO/1, para. 19.

¹⁶³ CED/C/FRA/CO/1, para. 20.

¹⁶⁴ CED/C/AUT/CO/1, para. 14.

¹⁶⁵ CED/C/PRT/CO/1, para. 18.

¹⁶⁶ CED/C/CUB/CO/1, para. 15; and CED/C/CHL/CO/1, para. 12.

¹⁶⁷ CED/C/TUN/CO/1, para. 18.

¹⁶⁸ CED/C/JPN/CO/1, para. 19.

¹⁶⁹ CED/C/FRA/CO/1, para. 20.

¹⁷⁰ See sect. III.F.1 below. See also the [guiding principles for the search for disappeared persons](#), principles 1 and 7. See also sect. V below. See also CED/C/19/2, paras. 17–18.

Working Group on Enforced or Involuntary Disappearances, best practices on enforced disappearances in domestic criminal legislation

- “55. The qualification of any instance of enforced disappearance as not being subjected to statute of limitations is a concrete guarantee against impunity. This must always be recognized when the offence is committed in a context in which it becomes a crime against humanity. In other cases, if States decide to enact statutes of limitations, it must be made clear by domestic legislation that these terms shall not start for as long as the fate or whereabouts of the victims remain unclarified.
56. Best practices emanate from States that have established that enforced disappearances are not subjected to statute of limitations. In other States, it is established that crimes against humanity in general are not subjected to statute of limitations, which in most of the cases – in particular when the crime against humanity is the result of the implementation of the Rome Statute – includes enforced disappearances. Some other States informed that they subject crimes, including in some cases enforced disappearances, to statute of limitations. A good practice though, is set by those States which, among them, interpreted the statute of limitations in combination with the principle according to which enforced disappearance is to be considered as a continuous crime, thus admitting that the statute of limitations runs from the moment when the offence ceases.” (Footnotes omitted.)

Working Group on Enforced or Involuntary Disappearances, general comment on enforced disappearance as a continuous crime¹⁷¹

- “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.
- ...
5. ... 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 rights violation for as long as all elements of the crime or the violation are not complete.”

Working Group on Enforced or Involuntary Disappearances, general comment on article 17 of the Declaration¹⁷²

- “27. Article 17 [of the Declaration] 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. ...
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. ...

¹⁷¹ A/HRC/16/48, para. 39.

¹⁷² E/CN.4/2001/68, paras. 25–32.

29. In its decisions the Inter-American Court of Human Rights repeatedly expresses views wholly consistent with the provisions of article 17. In its judgement 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 judgement of 2 July 1996, referred explicitly to article 17 of the Declaration (para. 37). ...”

Updated set of principles for the protection and promotion of human rights through action to combat impunity

Principle 23

“Prescription – of prosecution or penalty – in criminal cases shall not run for such period as no effective remedy is available.

Prescription shall not apply to crimes under international law that are by their nature imprescriptible.

When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries.”

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹⁷³

Principle IV

“Where so provided in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.”

Principle VII

“Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.”

¹⁷³ General Assembly resolution 60/147, annex.

EXAMPLES OF GOOD PRACTICE



“The Committee notes with satisfaction that, under the criminal law in force in the State party, crimes against humanity are not subject to the statute of limitations. It also welcomes the information that, in accordance with article 132 of the Criminal Code, the term of limitation for continuing offences – the equivalent under Spanish law to offences of a continuous nature in the Convention – would start when ‘the offence being considered comes to an end’.”¹⁷⁴

“The Committee notes with satisfaction that, pursuant to article 7 of Act No. 31/2004, crimes against humanity are not subject to the statute of limitations. It also welcomes the information that, in accordance with article 119 (2) (a) of the Criminal Code, the term of limitation for permanent crimes runs from the date on which the consummation of the act ceases, in other words, in cases of enforced disappearance when the disappeared person is found.”¹⁷⁵

“The Committee notes with appreciation that article 253 of the Code of Criminal Procedure provides that the statute of limitations to bring criminal proceedings commences from the moment when the crime ceases.”¹⁷⁶

“The Committee notes with satisfaction that the State party has increased the statute of limitations from 10 to 30 years.”¹⁷⁷

“The Committee welcomes the State party’s statement that, given its continuous and imprescriptible character, the offence of enforced disappearance provided for in article 84 of the Criminal Code could be applied to enforced disappearances that may have commenced prior to the entry into force of that article but continued thereafter.”¹⁷⁸

“The Committee welcomes the State party’s assertion that, in accordance with the prevailing legal theory and practice, acts of enforced disappearance are not subject to statutory limitations, even when they do not amount to crimes against humanity, because they are understood to involve offences the commission of which is ongoing ...”¹⁷⁹

“The Committee also applauds the adoption of the Act on Cooperation with the International Criminal Court in Combating Genocide, War Crimes and Crimes against Humanity (Act No. 18026), of 4 October 2006. The Act, inter alia, classifies as an offence enforced disappearance, which is deemed to be a continuing offence as long as the fate or whereabouts of the victim remains unknown; it establishes the imprescriptibility of the offence and its punishment”¹⁸⁰

“The Committee welcomes the legislative measures adopted by the State party in matters related to the Convention, in particular the following provisions of the Criminal Code: ... Section 88, which establishes that the statute of limitation does not apply to the criminal offence of enforced disappearance.”¹⁸¹

“The Committee appreciates the fact that the crime of enforced disappearance is not subject to a statute of limitations under article 95 of the Criminal Code.”¹⁸²

¹⁷⁴ CED/C/ESP/CO/1, para. 11.

¹⁷⁵ CED/C/PRT/CO/1, para. 18. Nevertheless, the Committee expressed its concern about the ambiguity of the statute of limitations for an individual case of disappearance, as relevant offences under the Criminal Code had varying statutes of limitations.

¹⁷⁶ CED/C/JPN/CO/1, para. 19.

¹⁷⁷ CED/C/FRA/CO/1, para. 20.

¹⁷⁸ CED/C/ECU/CO/1, para. 11.

¹⁷⁹ CED/C/CHL/CO/1, para. 12. Nevertheless, the Committee expressed concern that the principle was not enshrined in domestic legislation.

¹⁸⁰ CED/C/URY/CO/1, para. 5.

¹⁸¹ CED/C/SVK/CO/1, para. 7.

¹⁸² CED/C/LTU/CO/1, para. 7.



CHECKLIST

INFORMATION ON THE STATUTE OF LIMITATIONS TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify whether a statute of limitations applies to enforced disappearance in domestic legislation, detailing the duration of the time limit after which the crime cannot be legally prosecuted. Information should relate to the statute of limitations for criminal proceedings and sanctions.
- ✓ Specify whether domestic legislation explicitly establishes that crimes against humanity, including enforced disappearance, are imprescriptible.
- ✓ Clarify any steps that were taken to ensure that the commencement of enforced disappearance is not taken as a reference point in applying the statute of limitations, in conformity with the Convention.
- ✓ Explain how the State party guarantees that no statute of limitations applies for criminal, civil or administrative actions brought by victims seeking the right to an effective remedy. Include concrete examples if they exist.
- ✓ Specify whether the right of victims of enforced disappearance to an effective remedy is guaranteed during the term of limitation, if applicable. Provide information on the measures taken to ensure an effective remedy that reflect a victim-centred approach, including gender- and child-sensitive approaches.
- ✓ Specify whether domestic courts applied the statute of limitations to cases involving enforced disappearance and, if applicable, summarize the main details of such trials and their outcomes.

Examples of recommendations



The Committee wishes to emphasize the continuous nature of the offence of enforced disappearance, in accordance with the principles of the Convention, to recall the strict terms laid down in the article governing the statute of limitations for this offence, and to emphasize its imprescriptible character in relation to crimes against humanity.

The Committee recommends that the State party should specify the starting point of the statute of limitations, which begins from the moment that the offence of enforced disappearance ceases in all its elements.

The Committee invites the State party to provide that, once criminalized, the offence of enforced disappearance is not subject to any statute of limitations; if it is, the Committee recommends that the State party ensure, in line with article 8 of the Convention, that: (a) the term of limitation for criminal proceedings brought in respect of enforced disappearances is of long duration and is proportionate to the extreme seriousness of the offence; (b) the right of victims of enforced disappearance to an effective remedy is guaranteed during the term of limitation.

The Committee, emphasizing the continuous nature of enforced disappearance, recommends that the State party take the measures necessary to ensure that, in line with article 8 (1) (b) of the Convention, the term of limitations for criminal proceedings in respect of enforced disappearance, or other continuous offences applied instead of it where enforced disappearance is not specifically criminalized, commences from the moment when the enforced disappearance ceases (inter alia, from the moment when the disappeared person is found alive, in the event of death, when his or her remains are found and identified, or when the identity of a child subjected to wrongful removal is restored). The Committee invites the State party, when criminalizing enforced disappearance as an autonomous offence, to provide that the offence is not subject to any statute of limitations.

The Committee recommends that the statute of limitations for civil damages should be, at a minimum, in conformity with the statute of limitations applied to other offences of similar gravity such as torture.

2. JURISDICTION (ARTS. 9–10)

Article 9

- “1. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance:
 - (a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is one of its nationals;
 - (c) When the disappeared person is one of its nationals and the State Party considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.
3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.”

The Committee is of the opinion that all cases of enforced disappearances must be excluded from military jurisdiction. Please refer to the cases illustrated under article 11 in section III.D.3(c).

Article 10

- “1. Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person suspected of having committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be maintained only for such time as is necessary to ensure the person’s presence at criminal, surrender or extradition proceedings.
2. A State Party which has taken the measures referred to in paragraph 1 of this article shall immediately carry out a preliminary inquiry or investigations to establish the facts. It shall notify the States Parties referred to in article 9, paragraph 1, of the measures it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and of the findings of its preliminary inquiry or its investigations, indicating whether it intends to exercise its jurisdiction.
3. Any person in custody pursuant to paragraph 1 of this article may communicate immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.”

Under article 9 of the Convention, States parties are required to establish their competence to exercise jurisdiction over the offence of enforced disappearance, when the latter is committed in their territory; when the alleged offender is one of their nationals; when the disappeared person is one of their nationals; and when – notwithstanding his or her nationality – the alleged offender is present in their territory.

The Committee has expressed its concern about situations in which the criminal legislation governing the jurisdiction of domestic courts was not fully in accordance with the obligations stemming from article 9.¹⁸³ For example, when the authorities of a State party refused to consider complaints of enforced disappearance of migrants committed abroad, on the grounds that the acts were not committed within their jurisdiction, and they did not refer such complaints to the jurisdiction of other countries, the Committee found such a practice incompatible with the Convention.¹⁸⁴

¹⁸³ CED/C/IRQ/CO/1, para. 17; CED/C/ALB/CO/1, para. 24; CED/C/GAB/CO/1, para. 21; CED/C/SVK/CO/1, para. 12; CED/C/HND/CO/1, para. 20; and CED/C/BOL/CO/1, para. 16.

¹⁸⁴ CED/C/HND/CO/1, para. 20.

Working Group on Enforced or Involuntary Disappearances, best practices on enforced disappearances in domestic criminal legislation

- “59. As a crucial guarantee against impunity, domestic legislation shall provide for the application in cases of enforced disappearance of the principle of universal jurisdiction, in addition to or in combination with that of *aut dedere aut judicare*. This allows States to bring to justice all persons presumed responsible for enforced disappearance who are found on their territory.
60. A number of States reported to have domestic provisions that allow for the application of the principles of universal jurisdiction and/or *aut dedere aut judicare*. In some States, *aut dedere aut judicare* is recognized for at least some international crimes, but not the principle of universal jurisdiction. In at least two States, universal jurisdiction is provided for by procedural law, while *aut dedere aut judicare* is not. In a limited number of States one principle or the other, or the combination of the two principles apply to any act of enforced disappearance. In many cases those principles are codified with express reference only to crimes against humanity or more generally to crimes coming under the jurisdiction of the International Criminal Court. One State informed that its law does not make specific reference to the principle of universal jurisdiction, although two instances closely reflect the concept, namely the exercise of jurisdiction over genocide and the offences that this State is bound to suppress under its treaty obligations. Also, in the same State, while the Criminal Procedure Code does not make specific reference to the principle *aut dedere aut judicare*, the principle is largely observed by virtue of the legislation in force and jurisprudence tends to apply it.
61. However, several States observed that, as enforced disappearance is not codified as a separate offence under their criminal legislation, the principles of universal jurisdiction and *aut dedere aut judicare* would not apply to such offence considered as such, which does not prevent to apply it to other acts linked to enforced disappearance. This confirms the crucial importance to combat impunity of the codification of enforced disappearance as a separate offence.” (Footnotes omitted.)

Updated set of principles for the protection and promotion of human rights through action to combat impunity¹⁸⁵

Principle 1

“Impunity arises from a failure by States to meet their obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.”

Principle 21

“States should undertake effective measures, including the adoption or amendment of internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable principles of customary and treaty law.

States must ensure that they fully implement any legal obligations they have assumed to institute criminal proceedings against persons with respect to whom there is credible evidence of individual responsibility for serious crimes under international law if they do not extradite the suspects or transfer them for prosecution before an international or internationalized tribunal.”

¹⁸⁵ See also the Princeton Principles on Universal Jurisdiction (A/56/677, annex).

EXAMPLES OF GOOD PRACTICE



“The Committee notes that article 4-2 of the Penal Code establishes the State’s competence to exercise jurisdiction over the offence of enforced disappearance, regardless of the nationality of the perpetrator or victim and even when the offence is committed outside the territory of Japan.”¹⁸⁶

“The Committee welcomes the fact that domestic legislation provides for the unrestricted principle of universal jurisdiction for enforced disappearances that amount to crimes against humanity.”¹⁸⁷

“The Committee takes due note of the system of extraterritorial jurisdiction provided for under article 669 of the Code of Criminal Procedure in cases of enforced disappearance constituting a crime against humanity and notes with interest that the State party is considering the adoption of a specific provision applying to all other cases of enforced disappearance, in accordance with article 11 of the Convention”¹⁸⁸

“The Committee welcomes the reinforcement of the legal framework for judicial cooperation and notes the position of the State party that article 10 of the Convention is applicable in its legal order.”¹⁸⁹

CHECKLIST

INFORMATION ON THE EXERCISE OF JURISDICTION UNDER ARTICLES 9 AND 10 OF THE CONVENTION TO BE PROVIDED IN STATES PARTIES’ REPORTS

- ✓ Specify what measures were taken to establish jurisdiction in the cases contemplated under subparagraphs (a), (b) and (c) of article 9 (1) of the Convention.
- ✓ Provide examples of cases in which subparagraphs (b) and (c) were applicable.
- ✓ Specify what measures were taken to establish jurisdiction in cases in which alleged offenders were present in the territory of the reporting State and the latter did not extradite them.
- ✓ Provide examples of cases in which: (a) extradition was granted; and (b) extradition was denied.
- ✓ Provide information on the legal provisions, including any treaties, concerning mutual judicial assistance that apply to ensure jurisdiction for acts of enforced disappearance.
- ✓ Provide information on the cases involving the offence of enforced disappearance in which mutual assistance was requested by or from the reporting State, including the result of the request.
- ✓ Provide information on the domestic legal provisions concerning, in particular: custody of persons or other precautionary measures to ensure their presence; their right to consular assistance; the obligation of the reporting State to notify other States that might also have jurisdiction in relation to those persons in custody; the circumstances of the detention; and whether the State party intends to exercise jurisdiction.
- ✓ Indicate the procedures in place to guarantee access to consular assistance for a person being investigated for having allegedly committed the crime of enforced disappearance.
- ✓ Provide information, if applicable, on judicial proceedings and trials pursuant to the principle of universal jurisdiction, summarizing the outcomes, good practices and obstacles encountered, if any.

¹⁸⁶ CED/C/JPN/CO/1, para. 21. However, the Committee noted with concern that the provision only applied to crimes governed by a treaty.

¹⁸⁷ CED/C/DEU/CO/1, para. 10.

¹⁸⁸ CED/C/SEN/CO/1, para. 25.

¹⁸⁹ CED/C/MNE/CO/1, para. 14. Nevertheless, the Committee expressed its concern with regard to the reciprocity requirement for the provision of international legal assistance.

Examples of recommendations



The Committee recommends that the State party adopt the legislative measures necessary with a view to establishing its competence to exercise jurisdiction over the acts of enforced disappearance in the terms set forth in article 9 (1) and (2) of the Convention.

The Committee encourages the State party to take the measures necessary to ensure that its criminal law fully complies with the provisions of article 9 (2) of the Convention.

The Committee recommends that the State party adopt the necessary measures with a view to ensuring that the exercise of jurisdiction by the courts over offences of enforced disappearance is fully guaranteed, in accordance with the obligations arising from article 9 of the Convention, in particular the principle of *aut dedere aut judicare* set out in that article. In this regard, the State party should ensure that no conditions which are not provided for in the Convention affect the exercise of such a jurisdiction by the courts, in conformity with article 9 of the Convention.

The Committee encourages the State party to consider incorporating enforced disappearance (section 420a of the Criminal Code) into the list of offences contained in section 5a of the Criminal Code, which represents the basis for universal jurisdiction.

The Committee recommends that the State party take the necessary measures to fully guarantee that its courts can exercise jurisdiction over all offences of enforced disappearance, including those committed against its nationals abroad.

The Committee recommends that the State party ensure that the reciprocity requirement contained in the Law on Mutual Legal Assistance in Criminal Matters does not prevent the State party from fully implementing article 10 of the Convention. It also recommends that the State party actively contribute in strengthening cooperation between the judicial authorities of the countries in the region with a view to facilitating the sharing of information and evidence, searching for and identifying disappeared and missing persons, conducting investigations and bringing those responsible for war crimes to justice.

3. INVESTIGATION, PROSECUTION AND FAIR TRIAL (ARTS. 11–12)

Article 11

- “1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.
2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.
3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.”

Article 12

- “1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.
2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 of this article shall undertake an investigation, even if there has been no formal complaint.
3. Each State Party shall ensure that the authorities referred to in paragraph 1 of this article:
 - (a) Have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation;
 - (b) Have access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present.
4. Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation. It shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.”

(a) Investigation

Under articles 11 and 12 of the Convention, all cases of enforced disappearance must be properly investigated.¹⁹⁰ Under article 24 (6) of the Convention, States parties are obliged to continue the investigation at least until the fate of the disappeared person is clarified.¹⁹¹ While commenting on the States parties’ understanding of their obligations under the Convention in its annual reports, the Committee has pointed out that States parties must be careful not to confuse efforts to determine the fate and whereabouts of the victims and the investigation into the crime.¹⁹² It has also stressed that, despite the fact that these are two distinct obligations, the investigation of enforced disappearances may lead to information that is necessary in searching for and locating the victims.¹⁹³ In this regard, the Committee believes that it is necessary to establish direct contact with the authorities that are responsible for the search and investigation.¹⁹⁴ The focus in this section is on the issues related to the investigation of cases of enforced disappearance, which primarily aims at the identification of those responsible for such acts.¹⁹⁵

¹⁹⁰ CED/C/ESP/CO/1, para. 12; CED/C/URY/CO/1, paras. 14 and 22; CED/C/ARM/CO/1, para. 15; CED/C/MEX/CO/1, paras. 28–29; CED/C/SEN/CO/1, para. 28; CED/C/HND/CO/1, para. 25; CED/C/PER/CO/1, para. 19; CED/C/IRQ/CO/1, para. 21; and CED/C/BOL/CO/1, para. 21.

¹⁹¹ See sects. III.D.5 and III.F.1 below. See also the [guiding principles for the search for disappeared persons](#), principles 1, 7 and 13. See also sect. V below.

¹⁹² A/71/56, para. 79; and A/72/56, para. 78. See sect. III.F.1(c) below.

¹⁹³ A/72/56, para. 78.

¹⁹⁴ A/73/56, para. 36.

¹⁹⁵ A/71/56, para. 79.

Committee on Enforced Disappearances, **guiding principles for the search for disappeared persons**

“Principle 13. The search and the criminal investigation should be interrelated

1. The search for the disappeared person and the criminal investigation of the persons responsible for the disappearance should be mutually reinforcing. The comprehensive search process for disappeared persons should be initiated and conducted with the same effectiveness as the criminal investigation.
2. When the search is conducted by non-judicial authorities independent of those that make up the justice system, mechanisms and procedures should be established to ensure cooperation, coordination and an exchange of information between them and the ones responsible for carrying out the criminal investigation, in order to guarantee that the progress and results achieved on both sides feed into one another regularly and without delay. The competencies of both sets of authorities should be clearly defined by law, so as to prevent them from overlapping and interfering with one another and ensure that they can be complementary. The existence of mechanisms and procedures for searches by administrative, non-judicial and other bodies cannot be invoked as an obstacle to the pursuit of criminal investigations or as an alternative to them.
3. If responsibility for the search process lies with specialized departments or units of the bodies in charge of the criminal investigation (public prosecutor’s offices, attorney general’s offices or criminal courts), the same level of attention should be devoted to the search as to the criminal investigation. The information obtained from the investigation into the crime of enforced disappearance should be used efficiently and expeditiously in the search for the disappeared person and vice versa. The distribution of trained professionals should reflect the fact that the search and the investigation require equal attention.
4. The completion of the criminal investigation, along with any conviction or acquittal of the persons accused of having committed an offence of enforced disappearance or the declaration of absence by reason of enforced disappearance, should not constitute an obstacle to the continuation of search activities or be invoked to justify their suspension. These activities should be pursued until it has been possible to determine with certainty the circumstances of the disappearance and the fate and whereabouts of the disappeared person.”

The States parties are under an obligation to investigate enforced disappearances even in the absence of a formal complaint. Besides, the Committee has expressed its concern about situations in which the investigative actions by the authorities were not carried out *ex officio*, but only when relatives, close contacts or representatives of disappeared persons took the initiative.¹⁹⁶

The Committee has expressed concerns about situations in which the competent authorities failed to initiate the investigation promptly, immediately after receiving information about a possible disappearance.¹⁹⁷

¹⁹⁶ A/73/56, para. 38.

¹⁹⁷ CED/C/MEX/CO/1, para. 27.



The Committee has also expressed concerns about situations in which there was an undue delay or a lack of significant progress in investigations¹⁹⁸ or all the persons allegedly involved in the crime were not investigated.¹⁹⁹

According to the Committee, in situations in which there are reports of a high number of complaints of enforced disappearance, a low number of corresponding indictments is an indication of impunity and of the State party's failure to implement its obligations under the Convention.²⁰⁰

Also according to the Committee, States parties did not discharge their obligations under the Convention when the relevant authorities classified some acts as other offences while there were grounds for believing that an enforced disappearance might have been perpetrated.²⁰¹

The Committee has insisted on the importance of providing the authorities in charge of investigating enforced disappearances with adequate technical, financial and human resources so that they are able to discharge their duties promptly and effectively.²⁰² It has also expressed concerns about situations in which, in the legislation and practice of the State party concerned, it found other obstacles (e.g. discretion of the relevant police officer, restrictions on accessing the relevant documentation and places of detention or other places where there are grounds to believe that disappeared persons may be present) that could hinder the prompt, effective and impartial investigation of alleged cases of enforced disappearance.²⁰³

In order to avoid the fragmentation and excessive delays in the investigative procedure, the Committee has also stressed that inter-agency coordination (including the incorporation of all the evidence into a single investigation) and pursuit of a joint strategy is required to effectively investigate cases of enforced disappearance.²⁰⁴

The Committee has expressed concerns about the flawed use of available evidence by the authorities in charge of investigations, such as the limited use or inconsistent analysis of information acquired from telephone or email networks, partial searches of locations that could potentially contain relevant evidence, the lack of analysis of skeletal remains and reluctance on the part of some authorities to interview identified witnesses.²⁰⁵

¹⁹⁸ CED/C/COL/CO/1, para. 19; and CED/C/HND/CO/1, para. 24.

¹⁹⁹ CED/C/ARG/CO/1, para. 16.

²⁰⁰ CED/C/MEX/CO/1, para. 27; CED/C/AUT/CO/1, para. 16; CED/C/HND/CO/1, para. 24; and CED/C/PER/CO/1, para. 18.

²⁰¹ CED/C/HND/CO/1, para. 24.

²⁰² CED/C/PRY/CO/1, para. 18; CED/C/JPN/CO/1, para. 24; and CED/C/PER/CO/1, para. 19.

²⁰³ CED/C/JPN/CO/1, para. 23; and CED/C/PER/CO/1, para. 18.

²⁰⁴ A/73/56, para. 38; and CED/C/19/2, paras. 11–12.

²⁰⁵ A/72/56, para. 78; A/73/56, para. 38; and A/74/56, para. 36.

Committee on Enforced Disappearances, report on requests for urgent action submitted under article 30 of the Convention²⁰⁶

- “19. In the requests for urgent action registered by the Committee, the use of forensic sciences in search and investigation strategies featured in around 65 per cent of cases. In most of them, the role of forensic sciences was at the core of the process. Victims tend to see forensic sciences as the main source of reliable information. Such a view can lead to various challenges, depending on the context of the specific urgent action. One key element is the reliability of the authorities in charge of the forensic evidence: if the authorities have the required resources and training, and fulfil their functions in a comprehensive and technical manner and with due diligence, forensic evidence can be considered reliable. In such cases, confidence is established between the authorities and the victims, who are informed about the various actions taken, and about the potential and limits of forensic evidence. Victims are also informed about the measures that they can take should they wish to obtain a second opinion. When, on the contrary, the authorities in charge of forensic evidence do not have the required resources and training and do not fulfil their functions with due diligence, and accountability mechanisms are not available, the reliability of any forensic evidence is frequently questioned and the evidence may be manipulated in searches and investigations. ... The legitimacy of the whole process is brought into question, and victims then face difficulties in obtaining a second opinion, whether in terms of identifying specialists and having them admitted by the competent national authorities or of paying the cost of such intervention.
20. In such circumstances, the difficulty of gaining access to forensic evidence is frequently presented by the authorities as an excuse for not taking any further action. They refer to the cost of obtaining the evidence, the lack of adequate laboratories or trained human resources at the national level, and the resulting need to send the evidence abroad as the main reasons for their incapacity to take further action.”

The Committee has also insisted on the importance of conducting on-site investigations and stressed the inadequacy of instances in which the authorities in charge of investigations limited their actions to sending unsuccessful requests for information to shelters, hospitals, other medical facilities and detention centres.²⁰⁷

Besides, in view of the complexity of the exercise, the Committee has recommended that the investigation of the crime of enforced disappearance should be handled by specially trained bodies and that prosecutors' offices, in particular, should have the required level of specialist skills and experience in the investigation of such crimes.²⁰⁸ The Committee has also expressed concerns about the news that some prosecutors with extensive experience in handling cases of enforced disappearance had been relieved of their duties without reasonable and objective justifications.²⁰⁹ Commenting on States parties' understanding of their obligations under the Convention in its annual reports, the Committee has expressed concerns about the lack of due diligence in investigations and ignorance about how to investigate an enforced disappearance.²¹⁰ The Committee has also underlined the importance of competent State authorities' establishing and implementing adequate strategies for the search for disappeared persons and for the investigation of their disappearance.²¹¹

²⁰⁶ CED/C/19/2.

²⁰⁷ A/72/56, para. 78; A/73/56, para. 38; and A/74/56, para. 36.

²⁰⁸ CED/C/ARG/CO/1, para. 19; and CED/C/JPN/CO/1, para. 23.

²⁰⁹ CED/C/ARG/CO/1, para. 18.

²¹⁰ A/71/56, paras. 80–81.

²¹¹ A/72/56, para. 78; and CED/C/19/2, para. 11.

According to the Committee, when investigating cases of disappearance, the investigation procedures relating to other offences, such as abduction and false imprisonment, are inappropriate for cases of enforced disappearance.²¹²

With regard to the investigation of cases of enforced disappearances with international or transnational dimensions (e.g. disappearance of migrants), the Committee has insisted on the importance of developing international legal cooperation as required under article 14 of the Convention.²¹³

The requisites of the investigation under article 12 of the Convention are equally pertinent for the investigation of disappearances perpetrated without the State's – direct or indirect – involvement as enshrined in article 3 of the Convention.²¹⁴

Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances²¹⁵

“II. Elements of the obligation to investigate enforced disappearances and the obstacles thereto

...

A. Prompt and ex officio nature of the investigation

11. Article 13 of the Declaration on the Protection of All Persons from Enforced Disappearance and article 12 of the International Convention on the Protection of All Persons from Enforced Disappearance set out the obligation for States to ensure the effective enjoyment of the right to issue a complaint to a competent and independent State authority, and to have such complaint promptly, thoroughly, effectively and impartially investigated.
12. The requirement to conduct prompt investigations is connected to the main objectives of finding the disappeared person alive and ensuring that sufficient evidence is obtained in order to establish the truth and identify the perpetrators. However, in many countries, law enforcement agencies implement a waiting period of up to 72 hours before initiating investigations on disappearances, which is problematic given that the first hours after the deprivation of liberty are key for the investigation of an enforced disappearance. This period can potentially provide perpetrators with an opportunity to circumvent the protections established by law, and to subject victims to unlawful interrogations, torture and, in some instances, extrajudicial executions.
13. In this regard, States must establish specific early complaint mechanisms for the reception and investigation of allegations of enforced disappearance that are easily available within the initial period of disappearance. ...

²¹² CED/C/SEN/CO/1, para. 27. See also A/72/56, para. 79.

²¹³ A/72/56, para. 82; and A/73/56, para. 41. See sect. III.D.5 below. [Guiding principles for the search for disappeared persons](#), principle 9.

²¹⁴ See sect. III.C.3 above. See also A/74/56, paras. 36–38.

²¹⁵ A/HRC/45/13/Add.3.

14. The Declaration and the International Convention stipulate that States cannot invoke the lack of a formal complaint as a valid reason to not initiate investigations. This clause is designed as a safeguard to help ensure that investigations take place, including in contexts where relatives are at high risk of facing reprisals or other situations where the complainant is unaware of existing mechanisms, and/or unable or unwilling to communicate with them for whatever reason.
15. Practices in many countries demonstrate that the lack of willingness to investigate, on the part of State authorities, puts the burden on the relatives to collect evidence and find witnesses and, in some instances, even search grave sites to look for their loved ones. However, although States should assume the duty to investigate, relatives and civil society organizations supporting them should be allowed to actively participate in this process.
16. With regard to the question of 'promptness' or investigations carried out 'without delay', it is well established that the delaying of investigations has often resulted in de facto impunity. These delays can also increase the anguish of the relatives of the disappeared, who, in many instances, are unable to see results in efforts deployed to find their loved ones and obtain justice and other forms of reparation. ...
17. Delays can sometimes be employed as an intentional means to shield perpetrators. They can also be the consequence of deficient institutions, which are not adequately equipped to investigate complex crimes such as enforced disappearance. The Working Group considered that delays could put witnesses at risk and foster revictimization.
18. In many countries where enforced disappearances have occurred, investigations have been bureaucratic, material resources have been insufficient or investigators have lacked the required special training to undertake such investigations effectively.
19. At the same time, it should be stressed that the duty to conduct diligent investigations should not lead to rushed or unduly hurried investigations.

B. Prompt legal remedy to determine the whereabouts of the disappeared persons

...

22. Prompt access to possible sites of detention can help ascertain important information towards the clarification of the facts and identification of the perpetrators. On the other hand, any delays by the judicial authorities in producing the necessary evidence may increase the risk to the life and welfare of the disappeared person and create favourable conditions for the concealment of the whereabouts of the victim or destruction of evidence. Therefore, any such delays must be investigated and sanctioned, both at the criminal and administrative levels.

...

C. Access to relevant information

24. Authorities in charge of the investigation must have access to all relevant information, including military, police and intelligence information. To this end, the authorities must be able to order the declassification of such files. The denial of access to information on the grounds that it may pose a risk to national security, international relations or the privacy of the persons should be strictly analysed by judges and be the object of a judicial decision.

25. Although the public disclosure of classified information may be limited in exceptional circumstances, legal means should be adopted to allow the authorities in charge of investigations, as well as those persons entitled to the information in the context of judicial procedures, to have full access to it, on the basis of confidentiality. ...

...

III. Public policies for an efficient investigation of enforced disappearances

...

B. Coordination of the authorities in charge of the search and criminal investigations

55. The Working Group has noted that a lack of coordination between State agencies with different responsibilities as regards enforced disappearances – that is, the search for victims, the investigation and the criminal prosecution – can often be one of the key factors that can undermine their effectiveness and result in undue delays. This issue can be particularly acute in States with a federal system of government. Overlapping and interferences can discredit State authorities in the eyes of the public and complicate the process for the victims, who have to repeat depositions, thus risking retraumatization, and at times even personally have to act as the connection between judicial and non-judicial authorities.

...

F. Creating specialized multidisciplinary units for investigation and contextual analysis

71. In the context of acts of enforced disappearance, experience has shown that the creation of specialized units for their investigation and criminal prosecution can be an effective approach and can contribute to better coordination of criminal policy. In many instances, the fragmented nature of investigations is one of the main factors hindering their effectiveness. Multidisciplinary investigative units can foster a joint investigation of related cases and provide a comprehensive contextual picture to the various institutions involved. Contextual analysis can also be important for the purposes of demonstrating the general or systematic nature of the offence. This comprehensive approach can enable the prioritization of cases and a better use of new investigative techniques, including the analysis of scientific evidence. It can also facilitate the identification of responsibilities in terms of the chain of command in organized power structures.
72. Moreover, centralizing the information in specialized investigation units has the potential to drive more efficient searches and to enable better coordination with other agencies, particularly those in charge of searching for disappeared persons.

...

K. Obligations to investigate disappearances committed by non-State actors

90. The investigation of disappearances potentially committed by non-State actors entails a series of specific challenges and has generated diverse interpretations regarding the protection that States owe victims. In its practice of transmitting cases, the Working Group has interpreted that where there are elements indicating a potential or indirect involvement of the State or of any of its officials, whether through support or acquiescence, the cases must be investigated as enforced disappearances, and it will be the burden of the State to investigate the facts and demonstrate that it has not participated in the acts of disappearance in question. In considering these cases, the Working Group has taken into account the context and patterns of disappearances in the concerned country.

91. It has equally been established that a State has an obligation to investigate disappearances, even if that State did not participate. This obligation was outlined in article 3 of the International Convention, which sought to amend a gap in the protection of victims. In addition, States may have tools and means to carry out in-depth investigations and, in some cases, have channels of communications with these non-State actors or with third parties, all of which can contribute to the success of such a process.
92. The multiplication of abductions committed by non-State actors, in particular in the context of internal armed conflicts, and the lack of adequate protection has led the Working Group to initiate a process for documenting cases that may amount to enforced disappearances when the alleged perpetrators are exercising effective control or governmental functions over a territory." (Footnotes omitted.)

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

- "3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

...

- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law."

Updated set of principles for the protection and promotion of human rights through action to combat impunity

Principle 19

"States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.

Although the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein."

EXAMPLES OF GOOD PRACTICE



“The Committee notes with satisfaction the information from the State party on the progress made in the investigation and prosecution of persons responsible for offences of enforced disappearance perpetrated during the military dictatorship.”²¹⁶

“The Committee notes with satisfaction the information provided by the delegation that officials suspected of having committed an offence may be temporarily suspended by administrative or judicial proceedings and that, if deemed appropriate, judges and prosecutors may order the exclusion from an investigation of an individual member of a security force or an entire security force”²¹⁷

“The Committee notes with satisfaction that, in the majority of cases, the investigation of cases of enforced disappearance is carried out by specialized bodies, namely the National Public Prosecutor’s Office in Rotterdam and the International Crimes Team of the National Police Services Unit.”²¹⁸

Examples of recommendations



The Committee urges the State party to take all measures necessary to ensure that all cases of enforced disappearance are investigated in a complete, impartial, diligent and effective manner, even in the absence of a formal complaint, and that those investigations be pursued until the fate or the whereabouts of the disappeared person have been established.

The Committee urges the State party to ensure that the necessary legislative or judicial measures are adopted to remove any legal impediments to such investigations in domestic law, notably the interpretation given to the Amnesty Act; suspected perpetrators are prosecuted and, if found guilty, punished in accordance with the seriousness of their actions.

The State party should guarantee that, where there are reasons to believe that an offence of enforced disappearance has been committed, it undertakes effective investigations into any State officials or agencies that might have been involved, without delay, and exhausts all lines of inquiry; encourage and facilitate the involvement of the relatives of the disappeared person in the investigations, without this conferring upon them any responsibility for providing the evidence necessary for the investigation; guarantee effective coordination and cooperation between all agencies involved in the investigation and ensure that they have sufficient infrastructures and the technical, expert, financial and human resources to perform their functions expeditiously and effectively.

The Committee also invites the State party to consider establishing a specialized unit under the Public Prosecution Service or other competent body, with staff specifically trained to investigate cases of alleged enforced disappearance, to pursue investigations and coordinate criminal prosecution policy in this field.

The State party should also take the necessary measures to ensure that adequate technical, financial and human resources are provided to the authorities in charge of investigating enforced disappearances so that they will be able to discharge their duties promptly and effectively.

The Committee recommends that the State party guarantee that authorities in charge of an investigation into an enforced disappearance have access to all information and documentation relevant to their investigation.

²¹⁶ CED/C/ARG/CO/1, para. 14.

²¹⁷ CED/C/ESP/CO/1, para. 17.

²¹⁸ CED/C/NLD/CO/1, para. 18.

The Committee recommends that the State party: expedite the investigations of enforced disappearance that are under way, including those carried out as part of the special criminal proceedings being conducted in the framework of the justice and peace process, while ensuring that no act of enforced disappearance is left unpunished; ensure effective coordination and cooperation between all the agencies involved in investigations so that they mutually reinforce, rather than impede, each other's work; and ensure that they have the necessary financial, technical and human resources to perform their duties expeditiously and effectively; adopt a common approach to investigations, following specific strategies based on similar crime commission patterns and regional contexts and avoiding fragmented investigations that undermine their own effectiveness; ensure that the authorities involved in the investigation of enforced disappearances have effective and timely access to all documentation and other information relevant to the investigation that may be in the possession of State agencies, in particular documentation held by intelligence agencies and by armed and security forces.

The Committee recommends that the State party take all necessary legislative and other measures to: guarantee the right of any person to report an alleged enforced disappearance to the competent authorities, irrespective of his or her relationship to the disappeared person; and ensure that appeal mechanisms be made available to the complainant in case the competent authorities refuse to investigate his or her case.

The State party should take the steps necessary to ensure that suspected perpetrators of enforced disappearances are duly tried and, if found guilty, punished in a manner that is commensurate with the gravity of their acts. The Committee encourages the State party to continue its efforts to investigate cases of enforced disappearance that allegedly occurred in foreign countries, including by requesting mutual assistance from the countries concerned.

The Committee recommends that the State party take the measures necessary to prevent the disappearance of migrants, in particular children, and to find the whereabouts of those already missing. The Committee recommends that the State party take the legislative and administrative measures necessary to establish investigation practices in domestic law, in accordance with articles 10, 11 and 12 of the Convention.

Recommendation of the Committee in relation to requests for urgent action submitted under article 30 of the Convention

The Committee has in its recommendations recalled that (a) the development of scientific evidence is an integral part of the strategy for the search for disappeared persons and for the investigation of their disappearance; (b) such evidence is not limited to DNA, and must be handled with due diligence and by competent authorities equipped with the necessary human and material resources; (c) reliable mechanisms of accountability must be established; and (d) where there are questions as to the accuracy of the DNA tests performed, an alternative DNA test should be conducted with the assistance of an independent international non-governmental organization specialized in DNA analysis, in order to ensure that the located remains were properly explored and analysed, in compliance with international standards related to the analysis of DNA samples. The Committee has also granted interim measures to protect pieces of evidence until the resources necessary have been made available for their analysis.

CHECKLIST

INFORMATION ABOUT INVESTIGATION, PROSECUTION AND TRIAL TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Clarify what measures are in place to ensure the fair trial of the alleged offender at all stages of the proceedings, including the right to legal counsel, the right to be presumed innocent until proven guilty, the right to equality before the courts etc.
- ✓ Provide information on the measures to ensure that the standards of evidence required for prosecution and conviction apply equally whether the alleged offender is a national of the State party or a foreigner who committed acts of enforced disappearance abroad.
- ✓ Specify which authorities are competent to investigate and prosecute those accused of enforced disappearance.
- ✓ Provide information on the process followed and the mechanisms used by the relevant authorities to clarify and establish the facts relating to enforced disappearance.
- ✓ Clarify what mechanisms are available to individuals who allege that a person has been subjected to enforced disappearance. Include information on the measures to ensure accessibility, including through gender- and child-sensitive approaches.
- ✓ Indicate how legislation ensures the access of any complainant to independent and impartial authorities, including information on any discriminatory barriers to the equal status of all persons before the law, measures to tackle such barriers and any rules or practices preventing harassment or retraumatization of victims.
- ✓ Clarify what remedies are available to complainants in the event that the competent authorities refuse to investigate their cases.
- ✓ Provide statistical data disaggregated, inter alia, by sex, age and geographical location on the number of complaints of enforced disappearance submitted to the domestic authorities and the results of the investigations.
- ✓ Provide information on any unit within the police force or prosecutorial or other relevant offices that is specifically trained to start investigations on cases of alleged enforced disappearance, including information on the power to start investigations, ex officio and gender- and child-sensitive investigations, and the budget and human resources at their disposal.
- ✓ Provide information on the measures in place to ensure gender- and child-sensitive approaches to investigation, prosecution and trial.
- ✓ Name the limitations, if any, placed on the authorities in charge of investigating cases of enforced disappearance that may restrict their access to places of detention (to be construed broadly to encompass also places such as holding facilities for migrants, sites of identification of migrants etc.) in situations in which there are grounds to believe that a disappeared person may be present (see also article 17 of the Convention).
- ✓ Provide information on the legal framework governing cooperation with the authorities of other States and coordinating investigation of cases of enforced disappearance. If applicable, provide examples of the cooperation that was granted and indicate which specific measures were taken (see also article 14 of the Convention).

According to the Committee, the domestic legislation of States parties should provide clear guarantees to prevent persons suspected of having committed an offence of enforced disappearance from hindering or influencing the course or progress of investigations.²¹⁹ It has stressed the importance of States

²¹⁹ CED/C/ARG/CO/1, para. 23; CED/C/URY/CO/1, para. 20; CED/C/SRB/CO/1, para. 16; and CED/C/ECU/CO/1, para. 14.

parties' putting in place specific legislation that expressly provides for the suspension, for the duration of an investigation, of State agents, civilian or military, suspected of having committed an offence of enforced disappearance.²²⁰

In its concluding observations on States parties' reports submitted under article 29 of the Convention, the Committee has expressed concerns about situations in which the States concerned did not take the necessary measures to keep police institutions and individuals under suspicion away from investigations.²²¹ It has also found that the obligation was not duly implemented in situations in which the internal security or internal investigation units of the law enforcement or security forces whose officials were accused of having committed a crime could still be involved in the initial stages of an investigation.²²² The Committee has expressed its concern in situations in which there were reports that the authorities in charge of the search and investigation were directly or indirectly involved in the event, which effectively resulted in the processes being deadlocked.²²³ It has recommended that States parties take all necessary measures to investigate and punish any actions by the authorities that may hinder the effectiveness of the search and investigation processes under way.²²⁴

Examples of recommendations



The Committee encourages the State party to ensure that persons suspected of having committed an offence of enforced disappearance are not in a position to influence investigations by directly or indirectly obstructing them, either themselves or through others. For this reason, it recommends that the State party should adopt an explicit legal provision establishing a mechanism to ensure that security forces whose members are suspected of having committed an enforced disappearance do not participate in the investigation.

The Committee recommends that the State party adopt all the measures necessary to prevent acts that may hinder or influence the conduct of an investigation into an enforced disappearance, particularly by guaranteeing in practice that officials belonging to the same law enforcement or security force as the person accused of having committed an enforced disappearance are not involved in the investigation.

CHECKLIST

INFORMATION ABOUT THE MEASURES IN PLACE TO PRECLUDE PERSONS SUSPECTED OF HAVING BEEN INVOLVED IN ENFORCED DISAPPEARANCES FROM HINDERING OR INFLUENCING INVESTIGATIONS TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Include information on any measures, such as administrative disqualifications, provided under domestic legislation that aim to remove suspects from any posts in which they would be in a position to influence the investigation of cases of enforced disappearance or threaten persons involved in such an investigation.

²²⁰ CED/C/MNE/CO/1, para. 19.

²²¹ CED/C/ARG/CO/1, para. 22.

²²² CED/C/KAZ/CO/1, para. 15.

²²³ A/73/56, para. 38.

²²⁴ Ibid.

The Committee has insisted that the States parties are under an obligation to investigate, prosecute and sanction individuals suspected of having committed enforced disappearance, irrespective of the exigencies of the situations in which such offences have been committed, such as armed conflicts and other situations of violence²²⁵ or terrorism.²²⁶

EXAMPLES OF GOOD PRACTICE



“The Committee welcomes the very high rate of locating and identifying persons reported missing as a consequence of the war and the recent steps taken to accelerate investigations.”²²⁷

“The Committee welcomes the efforts made at the international and national levels to prosecute and punish perpetrators of war-related crimes.”²²⁸

“The Committee notes with satisfaction the establishment of a new commission on missing persons in February 2015, which since its establishment seems to have been more active and resolute with regard to searching for missing persons. The Committee welcomes the various steps taken to foster cooperation at the regional level to search for missing persons, including the signature in August 2014 by Bosnia and Herzegovina, Croatia, Montenegro and Serbia of the Declaration on the Role of the State in Addressing the Issue of Persons Missing as a Consequence of Armed Conflict and Human Rights Abuses, and the signature in 2012 of an agreement on mutual cooperation in the process of locating missing persons between the commissions on missing persons of Montenegro and Serbia”²²⁹

“The Committee welcomes the adoption by the State party of the Strategy for Investigating War Crimes in May 2015 and the establishment of specialized bodies to investigate and prosecute war crime cases, including a new special prosecutor’s office and a special department for war crimes, established within the Higher Court of Podgorica”²³⁰

“The Committee acknowledges the progress made in investigating enforced disappearances carried out during the dictatorship and notes that 834 cases involving kidnapping, unlawful detention, torture and disappearance are pending.”²³¹

Examples of recommendations



The Committee encourages the State party to continue its efforts in order to establish the truth and determine the fate and whereabouts of all the individuals who have been reported as missing following the armed conflicts in the former Yugoslavia. It recommends that the new commission on missing persons continue its efforts to search for missing persons and take a proactive approach in this regard.

The Committee recommends that the State party ensure that all cases of enforced disappearance that may have been committed by agents of the State party or by persons or groups of persons acting with their authorization, support or acquiescence in the context of past armed conflicts are investigated thoroughly and impartially without delay, including guarantees for full access to the relevant archives; and that those found responsible, including the commanders and civilian

²²⁵ CED/C/MNE/CO/1, paras. 13 and 17; CED/C/MEX/CO/1, para. 33; CED/C/SRB/CO/1, para. 14; CED/C/BIH/CO/1, para. 22; CED/C/GAB/CO/1, para. 26; and CED/C/CHL/CO/1, paras. 18–19.

²²⁶ CED/C/DEU/CO/1, paras. 12–13.

²²⁷ CED/C/BIH/CO/1, para. 17. However, the Committee noted that the fate and whereabouts of about one third of the 30,000 persons reported missing in the State party as a consequence of the war remained unknown and recalled that many of those persons might have been victims of enforced disappearance.

²²⁸ Ibid., para. 21. However, the Committee noted with concern that, despite those efforts, a large backlog of war crimes cases remained and that the number of prosecutions and convictions of perpetrators of enforced disappearances remained extremely limited.

²²⁹ CED/C/MNE/CO/1, para. 12.

²³⁰ Ibid., para. 16.

²³¹ CED/C/CHL/CO/1, para. 16.



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superiors, are punished in accordance with the gravity of their acts. The State party should also guarantee that sufficient personnel and technical and financial resources are provided to the Office of the War Crimes Prosecutor and any other competent authorities so that they can discharge their duties promptly and effectively.

The Committee, recalling the continuous nature of the offence of enforced disappearance, recommends that the State party ensure that all cases of enforced disappearance that may have been committed by State officials or by persons or groups of persons acting with their authorization, support or acquiescence in the context of the armed conflicts, are investigated thoroughly and impartially without delay, and that those found responsible, including the commanders and civilian superiors, are punished in accordance with the gravity of their acts.

The Committee recommends that the State party continue its efforts to establish the truth and determine the fate and whereabouts of all the individuals who have been reported as missing and, in the event of death, the identification of their remains. It recommends, in particular, that the State party: provide the Prosecutor's Office with adequate human and financial resources and appoint additional forensic experts to ensure that exhumations and identifications take place as swiftly as possible upon the location of mortal remains; and expedite the process of verifying data in the Central Record of Missing Persons.

The Committee recalls the continuous nature of the offence of enforced disappearance and recommends that the State party speed up its efforts to implement the National War Crimes Strategy and ensure that all cases of enforced disappearance that may have been committed by agents of the State party or by persons or groups of persons acting with their authorization, support or acquiescence in the context of the armed conflicts, are investigated thoroughly and impartially without delay, and that those found responsible, including the commanders and civilian superiors, are punished in accordance with the gravity of their acts.

(b) Participation and protection of the victims, witnesses and others involved in investigations and judicial proceedings

According to the Committee, in order to comply with the requirements of article 12 of the Convention, the domestic legislation of States parties must expressly guarantee the right of any individual to report an alleged enforced disappearance to the competent authorities, irrespective of their relationship to the disappeared person.²³²

In its concluding observations on States parties' reports submitted under article 29 of the Convention, the Committee insisted on the importance of ensuring the participation of victims, as defined under article 24, in investigations.²³³ It has pointed out that domestic legislation must allow these individuals to participate fully as parties in criminal proceedings with all the necessary entitlements, such as, for example, the right to appeal the decisions handed down.²³⁴ In addition, the Committee has pointed out that the relatives of disappeared persons must be kept regularly informed of and allowed to participate in investigations.²³⁵

Committee on Enforced Disappearances, *Yrusta and Del Valle Yrusta v. Argentina*

"10.9 The Committee also notes that, according to the information before it, the investigations that have been opened into the case of Mr. Yrusta have been based on the causes and circumstances of his death and the criminal liability that might arise therefrom. Meanwhile, his alleged disappearance during a period of over seven days is not referred to in any of the files made available in connection with the present communication. ... The Committee considers that, in the present case, the mere fact that it took over a year for a decision to be issued regarding the right of Mr. Yrusta's family members to take part in the investigative proceedings entails, in and of itself, a violation of articles 12 (1) and 24 (1), (2) and (3) of the Convention. After such a long period has passed, the possibility of playing an active and effective part in the proceedings is lessened to such an extent that the impairment of the right in question becomes irreversible, in violation of the victims' right to know the truth. In the absence of a satisfactory explanation from the State party, the Committee considers that the facts before it disclose a violation of articles 12 (1) and 24 (1), (2) and (3) of the Convention."

While underscoring the importance of victims' participation in proceedings,²³⁶ the Committee has insisted that the conditions under which the victims and witnesses are required to appear in court and provide testimony must not result in further traumatization and revictimization.²³⁷

²³² CED/C/JPN/CO/1, para. 24.

²³³ See sect. III.F.1 below.

²³⁴ CED/C/URY/CO/1, para. 21.

²³⁵ CED/C/HND/CO/1, para. 25.

²³⁶ The importance of victims' participation and protection has also been highlighted by the Working Group (A/HRC/45/13/Add.3, paras. 60–68).

²³⁷ CED/C/ARG/CO/1, para. 20.

Under article 12, the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation must be protected. According to the Committee, in order to implement this obligation, States parties are required to take all the necessary steps, legislative or otherwise, to ensure the effective implementation of existing protective measures and to make them applicable to all these persons.²³⁸ Such guarantees of protection must be adequate and their application in practice must be effective.²³⁹ The Committee considers that general provisions providing protection against intimidation and ill-treatment are insufficient to meet the requirements of article 12.²⁴⁰

The Committee has expressed its concern about situations in which there were allegations of harassment, intimidation, attacks, surveillance, killings and threats against relatives of disappeared persons, persons having submitted complaints of acts of enforced disappearance, human rights defenders assisting the victims and even judicial officials.²⁴¹ Furthermore, the Committee has found situations in which State agents publicly discredited persons and organizations involved in investigations of cases of enforced disappearance incompatible with article 12.²⁴² The Committee has also expressed its concern about alleged threats against witnesses in war crime trials by officials charged with their protection.²⁴³

In order to implement the obligations under article 12, States parties should take concrete measures to investigate and sanction such threats or attacks on persons who participate in investigations. According to the Committee, the existence of high-profile cases in which witnesses have been subjected to enforced disappearance may continue to have an intimidating effect on other potential witnesses.²⁴⁴

EXAMPLES OF GOOD PRACTICE



“The Committee welcomes the protection afforded to witnesses and relatives in the State party and the statement made by the delegation that this protection could be extended, in principle, to other persons that may be affected by the investigation”²⁴⁵

“The Committee welcomes the fact that article 40 of Organizational Act No. 53 authorizes the Truth and Dignity Commission to adopt appropriate measures to protect victims, witnesses, experts and all those whose statements are to be heard in connection with human rights violations. Furthermore, the Committee takes note of article 65 of the Code of Criminal Procedure, which stipulates that witnesses should not be heard in the presence of defendants, as well as of the information provided by the State party that other pieces of legislation also include measures for the protection of witnesses. Furthermore, the Committee notes with interest the information provided by the State party indicating that the mechanisms that protect complainants, witnesses and relatives against all forms of intimidation are being reviewed by the committee attached to the Ministry of Justice that is responsible for the amendments of the Criminal Code”²⁴⁶

²³⁸ Ibid., para. 21.

²³⁹ Ibid.; CED/C/MNE/CO/1, para. 21; CED/C/SEN/CO/1, para. 30; CED/C/GAB/CO/1, para. 29; and CED/C/URY/CO/1, para. 18.

²⁴⁰ CED/C/BEL/CO/1, para. 23.

²⁴¹ CED/C/COL/CO/1, para. 27. On a similar note, see CED/C/HND/CO/1, para. 26; CED/C/PER/CO/1, para. 20; and CED/C/MEX/CO/1, para. 30.

²⁴² CED/C/MEX/CO/1, para. 30.

²⁴³ CED/C/SRB/CO/1, para. 17; and CED/C/BIH/CO/1, para. 23.

²⁴⁴ CED/C/ARG/CO/1, para. 20.

²⁴⁵ CED/C/NLD/CO/1, para. 20.

²⁴⁶ CED/C/TUN/CO/1, para. 25.

CHECKLIST

INFORMATION ABOUT THE PARTICIPATION AND PROTECTION OF PERSONS INVOLVED IN INVESTIGATIONS AND PROCEEDINGS TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Provide information on the mechanisms in place to ensure a gender-sensitive and victim-centred approach to the participation and protection of persons involved in investigations and proceedings on enforced disappearances by, for example, taking into consideration the specific needs and situation of vulnerability of women, girls, children and lesbian, gay, bisexual, transgender and intersex persons.
- ✓ Indicate how relatives of disappeared persons and their representatives are regularly informed about the progress of investigations and are closely associated with the process.
- ✓ Provide information on the mechanisms to protect complainants, their representatives, witnesses and other persons participating in investigations, prosecutions and trials against any kind of intimidation or ill-treatment or other human rights violations, stigmatization or marginalization.
- ✓ Provide information on the mechanisms in place to ensure that women, children and lesbian, gay, bisexual, transgender and intersex victims affected by enforced disappearance can fully exercise their rights by, for example, arranging support person(s), privacy protection and protection from contact with the alleged perpetrators.



Examples of recommendations



The Committee recommends that the State party: expand its efforts to allow the relatives of disappeared persons to submit complaints; encourage and facilitate their participation in investigations and in all the procedural steps included within the framework of due process; and ensure that they are regularly informed about the progress and results of investigations.

The Committee encourages the State party to allow the victims of enforced disappearance to participate fully in judicial proceedings relating to the investigation of such an offence.

The Committee recommends that the State party adopt specific legislative measures to explicitly ensure, in cases of enforced disappearance, the protection not only of complainants and witnesses but also of relatives of disappeared persons and their counsel, as well as persons participating in the investigation, against any ill-treatment or intimidation as a consequence of the complaint or any evidence given.

The Committee recommends that the State party adopt the necessary steps to ensure that the existing protection measures are effectively applied with regard to all persons referred to in article 12, paragraph 1, of the Convention.

The Committee recommends that the State party adopt the measures necessary to swiftly pass the witness protection bill and to ensure that the adopted text is effectively applicable to all persons referred to in article 12 (1) of the Convention. In addition, the Committee encourages the State party to establish through this legislative initiative a unit for the protection of witnesses and other persons participating in investigations into enforced disappearances, which could also be competent to implement interim measures issued by the Committee under its urgent action procedure in relation to those persons.

The State party should: redouble its efforts to ensure the prompt and effective implementation of the protection measures provided for by law with the aim of ensuring the effective protection of all persons referred to in article 12, paragraph 1, of the Convention against any possible ill-treatment or intimidation; step up its efforts to prevent and punish any possible acts of intimidation and/or ill-treatment against human rights defenders working to combat enforced disappearances and to assist victims; document cases of assaults, threats and intimidation in order to devise prevention and protection policies and to facilitate the effective investigation of such cases; ensure in particular that all State agents refrain from making public statements that could discredit, stigmatize or endanger the relatives of disappeared persons or human rights defenders working to combat enforced disappearances and to assist victims.

The Committee recommends that the State party ensure the effective implementation of existing protective measures and make them applicable to all persons referred to in article 12 (1) of the Convention. It further recommends that the State party ensure that all potential allegations of threats or intimidation against witnesses in war crimes trials are promptly, thoroughly and impartially investigated, even if there has been no formal complaint, and that the alleged perpetrators are prosecuted and, if found guilty, punished with appropriate penalties.

The Committee recommends that the State party provide adequate and continuous psychological support to victims and witnesses prior, during and after war crimes trials.

The Committee recommends that the State party increase its efforts to: ensure the prompt and effective implementation of the protection measures that have been established under the various service and assistance programmes; ensure that persons who are to receive protection participate in carrying out risk assessments and in developing protection measures; and see to it that the necessary resources are provided to allow these protection measures to do what they were set up to do; prevent and

punish any acts of intimidation and ill-treatment of relatives of disappeared persons, persons having submitted complaints of acts of enforced disappearance, human rights defenders assisting the victims and persons participating in the investigation of an enforced disappearance.

The Committee recommends that the State party take the necessary measures to ensure the effectiveness of the Programme for the Protection of Victims, Witnesses, Complainants and Members of the Public Prosecution Service and to provide it with the resources necessary to enable it to function properly.

(c) Military jurisdiction

The Committee has expressed concerns about situations in which military courts were competent to investigate, hear and try offences of enforced disappearance committed in a military context. According to the Committee, as a matter of principle, military courts do not provide the independence and impartiality required by the Convention to deal with human rights violations, such as enforced disappearances.²⁴⁷

The Committee has insisted that, in order to comply with the obligation contained in article 11 of the Convention, all cases of enforced disappearance must be excluded from military jurisdiction. It has stressed that ordinary courts should deal with cases of enforced disappearances even when such offences are committed “in a military context”,²⁴⁸ “by members of the military in the course of their duties or inside military facilities”²⁴⁹ or “in time of war”.²⁵⁰

According to the Committee, as long as military courts have jurisdiction over enforced disappearance, article 11 of the Convention is not implemented, even when domestic legislation envisages that military courts may decline jurisdiction in favour of the ordinary courts.²⁵¹

Besides, the Committee has also expressed concerns in situations in which the military authorities were required under domestic legislation to report to both the ordinary and the military judicial authorities any facts that could constitute a crime that could be prosecuted *ex officio*, including enforced disappearance.²⁵²

²⁴⁷ CED/C/ESP/CO/1, para. 15; CED/C/BFA/CO/1, para. 21; CED/C/BEL/CO/1, para. 21; CED/C/MEX/CO/1, para. 25; CED/C/TUN/CO/1, para. 20; CED/C/ALB/CO/1, para. 26; CED/C/CUB/CO/1, para. 19; and CED/C/GAB/CO/1, para. 23.

²⁴⁸ CED/C/NLD/CO/1, para. 18.

²⁴⁹ CED/C/BFA/CO/1, para. 21. See also CED/C/MEX/CO/1, paras. 25–26; CED/C/TUN/CO/1, paras. 20–21; CED/C/CUB/CO/1, paras. 19–20; and CED/C/GAB/CO/1, paras. 23–24.

²⁵⁰ CED/C/BEL/CO/1, para. 21.

²⁵¹ CED/C/CUB/CO/1, para. 19.

²⁵² CED/C/ITA/CO/1, para. 20.

Committee on Enforced Disappearances, statement on enforced disappearance and military jurisdiction²⁵³

- “1. The right to justice for the victims of the crime of enforced disappearance implies the respect of the principles of independence and impartiality of the Courts. The jurisdiction of military courts in case of gross violations of human rights, whether the victims are military or civilians, has become an important question confronting the Committee on Enforced Disappearances ...
2. ... The Committee’s opinion is that military jurisdiction could limit the effectiveness of investigations and prosecutions of enforced disappearances.
- ...
5. In approaching the provisions of the Convention and with a view to ensuring a fair trial before an independent and impartial court, the Committee has recommended in its concluding observations to States parties, when relevant, that all cases of enforced disappearance remain expressly outside military jurisdiction and be investigated and prosecuted by or under control of civil authorities and tried only by ordinary courts.
6. The Committee notes the practice of other human rights treaty bodies, notably the Human Rights Committee, when considering the role of military courts (justice or jurisdiction) in relation to prosecutions of gross human rights violations.
7. The Committee takes into account the Declaration on the Protection of All Persons from Enforced Disappearance, in particular article 14, and also bears in mind the approach of the Working Group on Enforced or Involuntary Disappearance of the Human Rights Council in this regard.
8. The Committee is aware of other developments in international law, in particular the Inter-American Convention on Forced Disappearance of Persons (article IX), which states that ‘persons alleged to be responsible for the acts constituting the offence of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each State, to the exclusion of all other special jurisdictions, particularly military jurisdictions’.
- ...
10. Taking into account the provisions of the Convention and the progressive development of international law in order to assure the consistency in the implementation of international standards, the Committee reaffirms that military jurisdiction ought to be excluded in cases of gross human rights violations, including enforced disappearance.”

²⁵³ A/70/56, annex III.

Working Group on Enforced or Involuntary Disappearances, best practices on enforced disappearances in domestic criminal legislation

- “57. The Working Group has pointed out that the codification of enforced disappearances as 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 (article 16, par. 2 of the Declaration), nor by administrative agencies or tribunals’. It reiterated that domestic legislation shall ‘stipulate that those responsible for the offence of enforced disappearance shall be tried only by the competent ordinary courts, in each State, and not by any other special tribunal, in particular military courts’.
58. Some States expressly establish in domestic legislation that enforced disappearance can never be considered as an in-service offence and that military courts have no jurisdiction on enforced disappearance. Other States affirmed that enforced disappearance could only be tried by competent ordinary courts.” (Footnotes omitted.)

Updated set of principles for the protection and promotion of human rights through action to combat impunity

Principle 29

“The jurisdiction of military tribunals must be restricted solely to specifically military offences committed by military personnel, to the exclusion of human rights violations, which shall come under the jurisdiction of the ordinary domestic courts or, where appropriate, in the case of serious crimes under international law, of an international or internationalized criminal court.”

Sub-Commission on the Promotion and Protection of Human Rights, Commission of Human Rights, draft principles governing the administration of justice through military tribunals²⁵⁴

Principle 9

“In all circumstances, the jurisdiction of military courts should be set aside in favour of the jurisdiction of the ordinary courts to conduct inquiries into serious human rights violations such as extrajudicial executions, enforced disappearances and torture, and to prosecute and try persons accused of such crimes.”

²⁵⁴ E/CN.4/2006/58.

EXAMPLES OF GOOD PRACTICE



“The Committee notes with satisfaction that the military criminal courts are expressly barred from hearing cases of enforced disappearance”²⁵⁵

“The Committee notes with satisfaction that, under current legislation, civilians and minors are not subject to the jurisdiction of military courts under any circumstances. The Committee notes that, according to the information provided by the State party during the dialogue, ordinary offences committed by members of the armed forces or the Carabineros (police) against other members of those forces do not fall under the jurisdiction of military courts either.”²⁵⁶

Examples of recommendations



The Committee recommends that the State party take the necessary legislative measures to ensure that all cases of enforced disappearance remain expressly outside military jurisdiction and can be tried only by ordinary courts.

The Committee recommends that the State party take the legislative or other measures necessary to ensure that cases of enforced disappearance are expressly excluded from military jurisdiction and can only be investigated and tried by the competent civil authorities.

The Committee recommends that the State party adopt the necessary legislative measures to ensure that enforced disappearances committed by a military officer against another military officer are expressly excluded from military jurisdiction and can only be investigated and tried by the competent civil authorities.

The Committee recommends that the State party take the necessary measures to guarantee in practice that all cases of presumed enforced disappearance, including where the victim is found deceased, are tried, from the outset, by the ordinary courts.

CHECKLIST

INFORMATION ABOUT MILITARY JURISDICTION TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify which authorities are competent to investigate and prosecute those accused of enforced disappearance. In particular, it must be clarified whether, pursuant to domestic law, military authorities would be competent to investigate and prosecute persons accused of enforced disappearance.
- ✓ Indicate whether verdicts were issued by military tribunals in cases of enforced disappearance and, if that is the case, summarize the outcomes.

²⁵⁵ CED/C/COL/CO/1, para. 21. Nevertheless, the Committee expressed its concern about information, according to which many of the so-called “false positive” cases that may be classed as extrajudicial killings – which also come under the definition of enforced disappearance in the Convention – were subject to military criminal jurisdiction, and that consequently there was no guarantee of an independent and impartial investigation or of the proper legal characterization of such cases.

²⁵⁶ CED/C/CHL/CO/1, para. 14. However, the Committee was concerned that the exclusion of enforced disappearance from military jurisdiction was not specifically provided for by law.

(d) Independence of the institutions responsible for prosecuting and punishing persons responsible for enforced disappearance

According to the Committee, the independence of the authorities responsible for prosecuting offences under the Convention is essential in order to guarantee thoroughness and impartiality in the investigation, trial and sanctioning of cases of enforced disappearance.²⁵⁷

According to the Committee, States parties should make the necessary institutional arrangements to make sure that the investigations comply with the requirements of independence and impartiality.²⁵⁸ For example, the Committee has expressed its concern about situations in which domestic courts were subordinate to other organs (such as legislative and executive branches), noting that that could affect the independence of the courts as required under the Convention.²⁵⁹ On a similar note, it has expressed concerns about situations in which domestic legislation foresaw a role for the military authorities in appointing judges and prosecutors, who were reportedly the only ones empowered to initiate and hear criminal proceedings against the military personnel accused of the offence of enforced disappearance; the Committee held that such an arrangement jeopardized the impartiality and independence of investigations.²⁶⁰

Examples of recommendations



The Committee recommends that the State party ensure that offences of enforced disappearance allegedly committed by members of the security forces are investigated and prosecuted by competent, independent and impartial prosecutors and judges who have no institutional ties to the entity to which the individual under investigation belongs.

The Committee recommends that the State party adopt the measures necessary to guarantee the full independence of the judiciary and other branches of government.

(e) Amnesty laws and similar measures

The Convention does not expressly mention amnesty laws. Nevertheless, it is of the utmost importance that amnesty laws and similar measures, which might have the effect of exempting perpetrators from criminal proceedings or sanctions, do not hinder the fight against impunity for enforced disappearance. In its concluding observations on States parties' reports, the Committee has expressed concerns about situations in which the existence of an amnesty law served as an obstacle for the investigation and prosecution of persons for enforced disappearance and infringed the victims' right to justice.²⁶¹

²⁵⁷ CED/C/CUB/CO/1, para. 17.

²⁵⁸ CED/C/HND/CO/1, para. 23.

²⁵⁹ CED/C/CUB/CO/1, para. 17.

²⁶⁰ CED/C/HND/CO/1, para. 22.

²⁶¹ CED/C/ESP/CO/1, para. 12. See also CED/C/BRA/Q/1, para. 6; and CED/C/CHL/CO/1, para. 17.

1992 Declaration

Article 18

- "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."

Working Group on Enforced or Involuntary Disappearances, **general comment on article 18 of the Declaration**²⁶²

- "1. Article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance ... 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 ...;
 - (b) Preventing, impeding or hindering the granting of adequate indemnification, rehabilitation, compensation and reparation as a result of the enforced disappearances ...;
 - (c) Concealing the names of the perpetrators of disappearance, thereby violating the right to truth and information ...;
 - (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 ...;
 - (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 ...;
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 ...;
 - (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 ...;
 - (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.

²⁶² E/CN.4/2006/56, para. 49.

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.”

Working Group on Enforced or Involuntary Disappearances, best practices on enforced disappearances in domestic criminal legislation

- “49. The best practices emanate from States that expressly exclude the crime of enforced disappearance from the application of amnesty laws or similar measures, wherever the act is qualified as a crime against humanity or not. Some other States limit the exclusion to disappearances which fall under the definition of crimes against humanity. Again, the Working Group would like to underline that whereas enforced disappearance as a crime against humanity is abhorrent, enforced disappearance as a single act is still a very serious crime and should be as such excluded from any measure of amnesty that would not respect the conditions set by the Working Group in its general comment on article 18.
50. In some States, there exists no restriction at all that would prevent the granting of an amnesty for acts of enforced disappearances. The Working Group would like to recommend those States to follow the best practices by the States mentioned above, by excluding disappearances from the application of amnesty laws or similar measures. In any event, those States should refrain from adopting any amnesty law or similar measure that would not respect the conditions detailed by the Working Group in its general comment on article 18.
51. In a number of other States, previous amnesty laws or similar measures have been reviewed, limited in their scope of application or even declared illegal *ex post facto*, thus allowing the opening or reopening of judgements over crimes committed in the past, including still unsolved cases of enforced disappearances.” (Footnotes omitted.)

Updated set of principles for the protection and promotion of human rights through action to combat impunity

Principle 24

“Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds:

- (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19 refers or the perpetrators have been prosecuted before a court with jurisdiction – whether international, internationalized or national – outside the State in question;
- (b) Amnesties and other measures of clemency shall be without effect with respect to the victims’ right to reparation, to which principles 31 through 34 refer, and shall not prejudice the right to know;
- (c) Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have merely exercised this legitimate right, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, the law shall consider any judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay;
- (d) Any individual convicted of offences other than those to which paragraph (c) of this principle refers who comes within the scope of an amnesty is entitled to refuse it and request a retrial, if he or she has been tried without benefit of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights, or if he or she was convicted on the basis of a statement established to have been made as a result of inhuman or degrading interrogation, especially under torture.”



UN Photo/Marco Dormino

CHECKLIST

INFORMATION ON AMNESTIES TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify whether there is any amnesty legislation in place and, if so, provide the conditions for the applicability of the measures envisaged by it.
- ✓ Specify whether there is any legislation in force providing for measures that may have the effect of exempting alleged perpetrators of enforced disappearance from any criminal proceedings or sanction and the conditions under which these measures are applicable.
- ✓ Provide, if applicable, information regarding the instances in which amnesty legislation was applied in proceedings involving enforced disappearance and provide a short summary.

Examples of recommendations



The Committee urges the State party to ensure that the necessary legislative or judicial measures are adopted to remove any legal impediments to such investigations in domestic law, notably the interpretation given to the Amnesty Act; suspected perpetrators are prosecuted and, if found guilty, punished in accordance with the seriousness of their actions.

The Committee recommends that the State party ensure that domestic legislation does not contain provisions that would allow perpetrators of enforced disappearance to be exempted from any appropriate legal proceedings or criminal penalty. In this regard, the Committee recommends that the Amnesty Decree-Law (No. 2191) be declared null and void.

Various human rights bodies have made pronouncements regarding the incompatibility of amnesty laws with respect to the obligations of States on enforced disappearance.²⁶³

4. EXTRADITION OF PERSONS SUSPECTED, ACCUSED OR CONVICTED OF ENFORCED DISAPPEARANCE (ART. 13)

- “1. For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.
2. The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of this Convention.
3. States Parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them.
4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance.
5. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves.
6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, in particular, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.
7. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.”

According to article 13, for the purposes of extradition, the offence of enforced disappearance must not be regarded as a political offence. The provision spells out the corresponding measures to be taken by States parties and the safeguards to be ensured. The Committee has expressed concerns about situations in which the decision on requests for extradition was made by the minister of justice on a case-by-case basis.²⁶⁴

²⁶³ Human Rights Committee, *Boucherf v. Algeria* (CCPR/C/86/D/1196/2003); Inter-American Court of Human Rights, *Barrios Altos v. Peru*, Judgment, 14 March 2001; Inter-American Court of Human Rights, *Gelman v. Uruguay*, Judgment, 24 February 2011; and European Court of Human Rights, *Marguš v. Croatia*, application No. 4455/10, Judgment, 27 May 2014.

²⁶⁴ CED/C/ITA/CO/1, para. 24.

Updated set of principles for the protection and promotion of human rights through action to combat impunity

Principle 26

- “(a) Persons who have committed serious crimes under international law may not, in order to avoid extradition, avail themselves of the favourable provisions generally relating to political offences or of the principle of non-extradition of nationals. Extradition should always be denied, however, especially by abolitionist countries, if the individual concerned risks the death penalty in the requesting country. Extradition should also be denied where there are substantial grounds for believing that the suspect would be in danger of being subjected to gross violations of human rights such as torture; enforced disappearance; or extra-legal, arbitrary or summary execution. If extradition is denied on these grounds, the requested State shall submit the case to its competent authorities for the purpose of prosecution;
- (b) The fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”

EXAMPLES OF GOOD PRACTICE



“The Committee notes the delegation’s statement to the effect that in extradition agreements concluded before the entry into force of the Convention, enforced disappearance was not considered to be a political offence. The Committee also takes note of the fact that agreements are being negotiated and concluded with other States in the region to exchange information on human rights violations, including enforced disappearances, as well as of the information provided by the delegation regarding the numerous cooperation agreements concluded”²⁶⁵

CHECKLIST

INFORMATION ABOUT EXTRADITION TO BE PROVIDED IN STATES PARTIES’ REPORTS UNDER ARTICLE 29

- ✓ Provide information on the legislation that makes enforced disappearance an extraditable offence in all treaties with all States.
- ✓ Provide the list and texts of the extradition treaties between the reporting State and other States parties to the Convention that include enforced disappearance as an extraditable offence.
- ✓ Provide information on possible obstacles in implementing those treaties.
- ✓ Provide, if applicable, examples of cooperation among States in which the Convention was used as basis for extradition.

²⁶⁵ CED/C/URY/CO/1, para. 23.

- ✓ Specify the cases in which the reporting State allowed the extradition of persons alleged to have committed the crime of enforced disappearance.
- ✓ Clarify whether domestic legislation qualifies enforced disappearance as a political offence, or as an offence connected with a political offence or as an offence inspired by political motives; and indicate, if this is the case, which steps are being taken to comply with the provision of the Convention on this issue.
- ✓ Indicate if there is any treaty between the State party and other countries explicitly stating that enforced disappearance is a basis for extradition.
- ✓ Specify which authority determines whether persons are extradited and on the basis of which criteria, including references to human rights safeguards, cross-referencing with the information provided on article 16 of the Convention.
- ✓ Specify whether domestic courts or other stakeholders issued any judgments/decisions on requests for extradition relating to persons accused of enforced disappearance and, if so, provide a brief summary of the outcomes.

Examples of recommendations



The Committee urges the State party to ensure that all agreements on extradition or mutual judicial assistance to be concluded in the future, including those currently being negotiated, contain specific provisions on enforced disappearances.

5. MUTUAL LEGAL ASSISTANCE (ARTS. 14–15)

Article 14

- “1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.
2. Such mutual legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular, the conditions in relation to the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.”

Article 15

“States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.”

Article 14 requires States parties to afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings on enforced disappearance. Under article 15, States parties are

required to cooperate with a view to assisting and searching for victims of enforced disappearance. The Committee has expressed concerns at the limitations and conditions in domestic legislation in relation to requests for judicial assistance or cooperation in the terms established by articles 14 and 15.²⁶⁶

In one of its annual reports, the Committee requested that a State party take all the necessary measures to promote international legal assistance between it and the neighbouring States with the aim of investigating the disappearance of migrants.²⁶⁷

The Committee has insisted on the importance of mutual legal assistance among States parties on various measures that are necessary to address the issue of missing migrants who may have been subjected to enforced disappearance.²⁶⁸

Committee on Enforced Disappearances, guiding principles for the search for disappeared persons

Principle 9

- “1. Given the particular vulnerability of persons who cross international borders on a regular or occasional basis, especially unaccompanied children, the States concerned should take specific coordinated measures to prevent disappearances in that context. States should pay attention to the risks of enforced disappearance, which increase as a result of migration, especially in contexts of trafficking in persons, sexual slavery and forced labour.
2. States that send and receive migrants and refugees should adopt specific search mechanisms that take account of the difficulties associated with migration situations. They should offer guarantees and safe conditions to persons who can give testimony about enforced disappearances linked to migration.
3. The States concerned should develop cooperation agreements and establish competent authorities to allow for effective coordination in the search for disappeared persons at each stage of migration. Cooperation between search authorities in countries of origin, transit and destination should ensure the rapid and secure exchange of information and documentation that may help to locate disappeared persons in the country of transit or destination. In full compliance with international standards on non-refoulement, States should ensure that the registration of migrants at border controls involves the individual examination of all applications for entry so as to allow for an effective search in the event of a person’s disappearance.
4. Specific instruments are required to ensure the effective participation in search processes, from their countries of residence, of family members and persons close to persons subjected to disappearance on migration routes. Their knowledge and that of organizations with experience in supporting migrants should be included in the design of strategies and measures for the search for disappeared migrants.
5. States should adopt policies for the protection of victims of enforced disappearance at all stages of migration in order to avoid their revictimization, in particular when the victims are women and/or unaccompanied minors.”

²⁶⁶ CED/C/JPN/CO/1, para. 27; and CED/C/ITA/CO/1, para. 24.

²⁶⁷ A/73/56, para. 41.

²⁶⁸ CED/C/HND/CO/1, para. 28. See also CED/C/19/2, para. 14.

Committee on Enforced Disappearances, report on requests for urgent action submitted under article 30 of the Convention

"14. ... The Committee also recalled the obligation of States parties to afford one another the greatest measure of mutual assistance and cooperation, in compliance with article 15 of the Convention, through the development of cooperation agreements and the establishment of competent authorities to enable effective coordination in the search for disappeared persons at each stage of migration. Search authorities in countries of origin, transit and destination should cooperate to ensure the rapid and secure exchange of information and documentation that could help to locate disappeared persons in the country of transit or destination. In full compliance with international standards on non-refoulement, States parties should ensure that the registration of migrants at border controls includes the individual examination of all applications for entry so as to allow for an effective search in the event of a person's disappearance. ..."

EXAMPLES OF GOOD PRACTICE



The Committee notes with satisfaction that Spanish legislation stipulates that 'Spanish courts shall provide to foreign judicial authorities such cooperation as they may request in the conduct of their functions, in accordance with international treaties and agreements to which Spain is a party' and that there is no particular restriction on judicial assistance in cases of enforced disappearance²⁶⁹

"The Committee welcomes the various steps taken to foster cooperation at the regional level to search for missing persons, including the signature in August 2014 by Bosnia and Herzegovina, Croatia, Montenegro and Serbia of the Declaration on the Role of the State in Addressing the Issue of Persons Missing as a Consequence of Armed Conflict and Human Rights Abuses, and the signature in 2012 of an agreement on mutual cooperation in the process of locating missing persons between the commissions on missing persons of Montenegro and Serbia"²⁷⁰

CHECKLIST

INFORMATION ON MUTUAL LEGAL ASSISTANCE TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Provide information on the treaties or provisions on mutual legal assistance among States parties applicable to enforced disappearance and, if applicable, provide examples of such mutual cooperation.
- ✓ Provide information on cooperation with other States that are not party to the Convention.
- ✓ Provide information on any new agreement the State may be entering into or amending in order to provide mutual assistance to victims of enforced disappearance and facilitate searches.
- ✓ Provide, if applicable, specific examples of situations in which this kind of cooperation was granted and which specific measures were taken in this sense.

²⁶⁹ CED/C/ESP/CO/1, para. 19.

²⁷⁰ CED/C/MNE/CO/1, para. 12.

Examples of recommendations



The Committee urges the State party to ensure that all agreements on mutual judicial assistance to be concluded in the future, including those currently being negotiated, contain specific provisions on enforced disappearances.

The State party, in cooperation with countries of origin and destination, and with input from victims and civil society, should: strengthen cooperation with the authorities of other States in the region to ensure that searches for disappeared migrants are conducted and that those allegedly responsible are investigated.

The Committee recommends that the State party ensure that it provides, in all cases, the necessary judicial assistance, including providing all evidence at its disposal, to the authorities of other States parties that may request it in connection with investigations into possible cases of enforced disappearance. The Committee also recommends that the State party actively contribute to strengthening mutual assistance between judicial authorities with a view to facilitating the sharing of information and evidence and searching for and identifying disappeared and missing persons, in particular missing migrants. Furthermore, the Committee recommends that the State party extend to all States parties to the Convention the practice of extradition and non-refoulement on the basis of a judicial decision with respect to States members of the European Union.

The Committee recommends that the State party ensure that it provides the necessary judicial assistance to the authorities of other States parties that request it in connection with investigations into possible cases of enforced disappearance. The Committee encourages the State party to ensure that its authorities afford the greatest measure of assistance possible when they receive requests under article 15 of the Convention.



E. MEASURES TO PREVENT ENFORCED DISAPPEARANCE

1. NON-REFOULEMENT (ART. 16)

- “1. No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.”

According to the Committee, States parties must incorporate the prohibition of refoulement in domestic legislation and the respective rules must expressly refer to enforced disappearance among the factors that could put the returned person concerned in serious danger.²⁷¹ Furthermore, States parties must prescribe clear and specific criteria and procedures to assess and verify the risk of a person being subjected to enforced disappearance in the country of destination.²⁷²

The principle of non-refoulement must be observed in all circumstances. The Committee has expressed its concern about situations in which, in spite of the existence of an applicable legal framework in a State party, the principle of non-refoulement was not upheld in practice with respect to migrants.²⁷³ It also expressed its concern about a situation in a State party in which the application of the principle of non-refoulement was discretionary if the person concerned was considered dangerous for the security of the State party or had been convicted of a particularly serious felony and was regarded as a threat to the State party.²⁷⁴

The Committee has insisted on the importance of the right to appeal the decision of return or expulsion and has expressed concerns about a situation in a State party in which decisions on extradition were final and could not be appealed.²⁷⁵ It has also expressed its concern about situations in which decisions on expulsion had immediate effect.²⁷⁶ For example, the Committee has expressed its concern in situations in which it received reports that migrants had allegedly been expelled without going through the relevant legal remedies, thereby preventing a substantive evaluation of whether such persons might be in danger of being subjected to enforced disappearance.²⁷⁷ It has also found situations incompatible with the Convention in which the administrative procedures for the admission of appeals were excessively restrictive and the period of time for asylum seekers located in holding areas to appeal the decisions concerned was extremely short.²⁷⁸

²⁷¹ CED/C/FRA/CO/1, para. 27; CED/C/ESP/CO/1, para. 22; CED/C/ARM/CO/1, para. 17; CED/C/DEU/CO/1, para. 15; CED/C/IRQ/CO/1, para. 27; CED/C/MNE/CO/1, para. 23; CED/C/SRB/CO/1, para. 20; CED/C/BIH/CO/1, para. 30; CED/C/BFA/CO/1, para. 30; CED/C/TUN/CO/1, para. 28; CED/C/CUB/CO/1, para. 24; CED/C/GAB/CO/1, para. 31; CED/C/LTU/CO/1, para. 20; CED/C/SEN/CO/1, para. 31; CED/C/JPN/CO/1, para. 30; CED/C/BOL/CO/1, para. 25; and CED/C/PER/CO/1, para. 23.

²⁷² CED/C/LTU/CO/1, para. 20; CED/C/SEN/CO/1, para. 31; CED/C/JPN/CO/1, para. 30; and CED/C/BOL/CO/1, para. 25.

²⁷³ CED/C/ITA/CO/1, para. 26.

²⁷⁴ CED/C/SVK/CO/1, para. 14.

²⁷⁵ Ibid.

²⁷⁶ CED/C/PER/CO/1, para. 22.

²⁷⁷ CED/C/ESP/CO/1, para. 21; and CED/C/AUT/CO/1, para. 20.

²⁷⁸ CED/C/FRA/CO/1, para. 26.

The Committee has observed that, under the Convention, the obligation of non-refoulement must be fully implemented, even in situations in which States parties are involved in military operations abroad.²⁷⁹

Committee on Enforced Disappearances, *E.L.A. v France*

“7.2 ... According to article 16 (2), for the purpose of determining whether there are such grounds, the competent authorities must take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law. Furthermore, additional grounds must be adduced to show that the individual concerned would face a real and personal risk of being subjected to enforced disappearance in his or her specific circumstances. Each person’s case should be examined individually, impartially and independently by the State party through competent administrative and/or judicial authorities, in conformity with essential procedural safeguards.

...

7.6 The Committee considers that the risk of enforced disappearance must be examined by the domestic courts in a comprehensive manner. In this respect, domestic courts must meticulously examine the essential issues before them, rather than merely giving formal answers to the arguments raised by the author or simply endorsing the conclusions of a lower court or both. In the present case, the mere fact that the courts of appeal endorsed the decisions adopted in this case by the French Office for the Protection of Refugees and Stateless Persons and the arguments on which they were based could not release them from their obligation to examine the merits of the issues raised in the author’s appeals.” (Footnotes omitted.)

EXAMPLES OF GOOD PRACTICE



“The Committee notes with satisfaction that the asylum and extradition procedures provide for a suspensive appeal of the decision to return or extradite.”²⁸⁰

“The Committee welcomes the fact that article 66 (14) of the Constitution of Ecuador establishes that ‘foreign nationals may not be expelled or returned to a country where the life, freedom, security or safety of the persons involved or of members of their families would be threatened’ and takes note of the statement by the State party that the principle of non-refoulement is fully guaranteed in practice.”²⁸¹

²⁷⁹ Ibid., para. 29.

²⁸⁰ CED/C/NLD/CO/1, para. 22. However, the Committee expressed its concern about information indicating that the appeals procedure for rejected asylum applications did not always provide for a substantive review of the facts.

²⁸¹ CED/C/ECU/CO/1, para. 15.

CHECKLIST

INFORMATION ON NON-REFOULEMENT TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Provide information on the domestic legislation with regard to the prohibition of refoulement, including, in addition to enforced disappearance, the risk of other forms of serious harm to life and personal integrity.
- ✓ Clarify whether legislation and practices concerning terrorism, emergency situations, national security or other grounds that the State may have adopted had any impact on the effective implementation of this prohibition.
- ✓ Provide information on the measures in place to ensure extradition is carried out in a manner that is gender- and child-sensitive, for example, by ensuring that a person is not placed in a situation of increased risk due to their gender, such as gender-based violence and prosecution based on sexual orientation or gender identity and expression. Include information on whether officials are trained on gender- and child-sensitive approaches, including the capacity to assess the risks of vulnerable groups.
- ✓ Specify which authority determines the extradition, expulsion, removal or refoulement of a person and on the basis of which criteria.
- ✓ Clarify whether a decision on the subject can be challenged and reviewed and, if so, before which authority, the procedures applicable and whether such procedures have a suspensive effect.
- ✓ Provide information on the kind of training received, cross-referencing with the information provided on article 23 of the Convention, by officers dealing with the expulsion, return or extradition of foreigners.

Examples of recommendations



The Committee invites the State party to consider explicitly incorporating into its domestic legislation a prohibition on carrying out an expulsion, refoulement, rendition or extradition when there are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance.

The Committee urges the State party to ensure that the competent authorities strictly comply with the applicable procedures for extradition, refoulement or expulsion and ensure, in particular, that an individual examination is carried out in each case to determine whether there are substantial grounds for believing that the person might be in danger of being subjected to enforced disappearance.

The Committee encourages the State party to take any measures necessary to ensure that there are clear and specific criteria and/or procedures to assess and verify the risk of a person being subjected to enforced disappearance in the country of destination.

The Committee recommends that the State party adopt all the necessary measures to ensure that diplomatic assurances are effectively evaluated with the utmost care and that they are not accepted in any case where there are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance.

The Committee calls on the State party to ensure that the appeals procedure against a decision to extradite, return or expel provides for a substantive review of the application when assessing

whether there are grounds for believing that the applicant would be in danger of being subjected to enforced disappearance.

The Committee recommends that the State party ensure that the principle of non-refoulement enshrined in article 16 (1) of the Convention is strictly observed in all circumstances. To that end, the State party should: ensure the suspensive effect of appeals against a decision on expulsion, return, surrender or extradition.

The Committee recommends that the State should guarantee an effective remedy to asylum seekers, within a suitable period, under asylum procedures at the border. The Committee recommends that the State party should introduce an appeal with suspensive effect for asylum applications submitted under the priority procedures on which the negative decisions are issued.

The Committee recommends that the State party ensure that the principle of non-refoulement enshrined in article 16 (1) of the Convention is strictly respected in all circumstances by taking the necessary measures, notably: refrain from collectively expelling migrants, including in the context of vessels of migrants arriving by sea; ensure the individual assessment of each migrant situation; ensure an effective judicial remedy in law and in practice against expulsion decisions; and take into account each individual's special protection needs.

The Committee recommends that the State party ensure that the principle of non-refoulement enshrined in article 16 (1) of the Convention is strictly respected in all circumstances. In particular, the Committee recommends that the State party adopt the measures necessary to ensure in practice that: all asylum seekers, including those without valid travel documents or visas, have unhindered access to effective refugee status determination procedures that comply fully with the obligations arising under article 16 of the Convention; before it proceeds to an expulsion, return or extradition, all relevant procedures have been exhausted and a thorough individual examination has been carried out to determine whether there are substantial grounds for believing that the person concerned would be in danger of being subjected to enforced disappearance and that, if there are such grounds, the person concerned is not expelled, extradited or returned; and diplomatic assurances are evaluated with the utmost care and that they are not accepted in any case where there are substantial grounds for believing that a person would be in danger of being subjected to enforced disappearance.

The Committee recommends that, in the event of an intervention of the armed forces in crisis situations, delays in communication to the chain of command regarding the capture or detention of persons should be limited exclusively to cases in which the detained persons' own security is at stake and, in any case, should be in keeping with the Convention. The Committee recommends that the State party should establish a protocol for the transfer of detainees between States that is consistent with international law. The Committee recommends that the State party should ensure that the protection standards enshrined in the Convention are also fully respected when the State is involved in military operations abroad.

The Committee invites the State party to consider withdrawing its declaration on article 16 of the Convention and recommends that it ensure that, in practice, the obligation of non-refoulement is implemented in a manner that is consistent with the standards set in the said provision and that it is the most conducive to protection from enforced disappearance.

The Committee recommends that the State party guarantee that respect for the principle of non-refoulement is not subject to any conditions.

Recommendations of the Committee in *E.L.A. v. France*

"9. ... the Committee urges the State party to: (a) Examine the author's application for asylum in the light of its obligations under the Convention and in the light of the present Views; (b) Refrain from deporting the author while his asylum application is pending before the domestic courts."

2. LEGAL SAFEGUARDS FOR PERSONS DEPRIVED OF LIBERTY AND THEIR RELEASE FROM DETENTION (ARTS. 17 AND 21)

Article 17

- “1. No one shall be held in secret detention.
2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:
 - (a) Establish the conditions under which orders of deprivation of liberty may be given;
 - (b) Indicate those authorities authorized to order the deprivation of liberty;
 - (c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
 - (d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;
 - (e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;
 - (f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person’s release if such deprivation of liberty is not lawful.
3. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:
 - (a) The identity of the person deprived of liberty;
 - (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
 - (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
 - (d) The authority responsible for supervising the deprivation of liberty;
 - (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
 - (f) Elements relating to the state of health of the person deprived of liberty;
 - (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
 - (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.”



Article 21

“Each State Party shall take the necessary measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released. Each State Party shall also take the necessary measures to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release, without prejudice to any obligations to which such persons may be subject under national law.”

(a) Prohibition of secret detention and legal safeguards

In its concluding observations on States parties’ reports submitted under article 29 of the Convention, the Committee has noted that, in practice, enforced disappearances are often linked to arbitrary administrative detention or failure to accord persons deprived of liberty the relevant safeguards.²⁸²

The Committee has insisted that these fundamental safeguards must be afforded to all persons deprived of liberty held in all types of establishments in which personal liberty is restricted, including immigration facilities and medical institutions.²⁸³

The Committee has expressed concerns at the lack of an explicit ban and the failure to provide for effective safeguards against secret detention in the domestic legislation of States parties.²⁸⁴

²⁸² CED/C/ARG/CO/1, para. 24.

²⁸³ CED/C/FRA/CO/1, para. 30; CED/C/ITA/CO/1, para. 28; and CED/C/JPN/CO/1, para. 33.

²⁸⁴ CED/C/GAB/CO/1, para. 34; CED/C/IRQ/CO/1, para. 28; and CED/C/LTU/CO/1, para. 21.

Committee on Enforced Disappearances, *Yrusta and Del Valle Yrusta v. Argentina*

“10.5 As for the authors’ claims under articles 17 and 18 of the Convention, the Committee recalls that, at the time of the events that gave rise to the present communication, Mr. Yrusta was serving a custodial sentence. In such a situation, the Committee emphasizes that States parties are in a special position to safeguard the rights of persons deprived of their liberty owing to the extent of the control that they exercise over such persons. States parties are therefore under a special obligation to safeguard rights established in the Convention of persons deprived of their liberty and to take effective measures to ensure, inter alia, that the deprivation of liberty will not at any time become secret detention or an enforced disappearance. In this respect, the Committee notes that, according to the authors, Mr. Yrusta was transferred to Santa Fe, while under the impression that he was being transferred to Santiago del Estero Province, as he had requested, in order to be nearer to his family. The Committee notes that no agent of the State party provided any information whatsoever to the representatives or family members of Mr. Yrusta, or to himself, regarding his transfer. It further notes that Mr. Yrusta was held in isolation and was unable to communicate with anyone for more than seven days. The Committee recalls that, pursuant to article 17 of the Convention, ‘no one shall be held in secret detention’ and that States parties are under an obligation to ensure that the relevant information concerning a person’s deprivation of liberty and his or her detention is available in detailed, accessible registers. Furthermore, pursuant to article 18 of the Convention, States parties shall ‘guarantee to any person with a legitimate interest [...], such as relatives of the person deprived of liberty, their representative or their counsel, access to at least the following information: [...] The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer’.”

Working Group on Enforced or Involuntary Disappearances, *general comment on article 10 of the Declaration*²⁸⁵

- “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. ... 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. ... 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.
- ...
28. ... 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.

²⁸⁵ E/CN.4/1997/34, paras. 22–30.

29. ... the person in question [must be] 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."

See also:

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) (General Assembly resolution [40/33](#), annex)
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution [43/173](#), annex)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution [45/113](#), annex)
- Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, joint study on global practices in relation to secret detention in the context of countering terrorism ([A/HRC/13/42](#))
- Office of the United Nations High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Geneva, 2012)
- Working Group on Arbitrary Detention, United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court ([A/HRC/30/37](#))
- United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (General Assembly resolution [70/175](#), annex)

In reviewing States parties' reports under article 29 of the Convention, the Committee has expressed its concern in situations in which it found shortcomings in the fundamental legal safeguards afforded from the very outset of the deprivation of liberty, such as habeas corpus,²⁸⁶ communication with the

²⁸⁶ CED/C/MNE/CO/1, para. 24; CED/C/HND/CO/1, para. 30; CED/C/JPN/CO/1, para. 33; CED/C/CUB/CO/1, para. 25; CED/C/BFA/CO/1, para. 31; CED/C/ESP/CO/1, para. 25; CED/C/ARG/CO/1, para. 24; and CED/C/FRA/CO/1, para. 30.

family,²⁸⁷ and access to a lawyer or a defence counsel or, in the case of foreigners, with the respective consular representatives.²⁸⁸ States parties are under an obligation to codify and sanction the delay or obstruction of the remedies concerned.²⁸⁹

The Committee has also expressed its concern about reports of arbitrary transfers of persons from detention centres in order to cover up punishments being applied outside the regular process, observing that such practices expose detainees to the risk of enforced disappearance.²⁹⁰

States parties must afford these guarantees in any circumstances, including in counter-terrorism operations. The Committee has stressed that the allegations of renditions and secret detention in the context of anti-terrorism policies must be duly investigated and justice and reparation must be provided for the victims.²⁹¹



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²⁸⁷ CED/C/TUN/CO/1, para. 29; CED/C/LTU/CO/1, para. 23; CED/C/HND/CO/1, para. 30; CED/C/SVK/CO/1, para. 16; and CED/C/PER/CO/1, para. 24.

²⁸⁸ CED/C/TUN/CO/1, para. 29; CED/C/GAB/CO/1, para. 34; CED/C/LTU/CO/1, para. 23; CED/C/HND/CO/1, para. 30; CED/C/CUB/CO/1, para. 25; CED/C/KAZ/CO/1, para. 19; CED/C/COL/CO/1, para. 29; CED/C/SVK/CO/1, para. 16; and CED/C/PER/CO/1, para. 24.

²⁸⁹ See sect. III.E.4 above.

²⁹⁰ CED/C/ARG/CO/1, para. 26.

²⁹¹ See sect. III.D.3(a) above. See also CED/C/DEU/CO/1, paras. 12–13.

EXAMPLES OF GOOD PRACTICE



“The Committee welcomes the fact that the remedy of habeas corpus is provided for under the Constitution and the statement by the State party that the absence of related legislation does not prevent the effective exercise of that remedy.”²⁹²

“The Committee is pleased to note that the Constitution establishes the right of persons deprived of their liberty to have their families or any person of their choosing informed immediately of their detention”²⁹³

CHECKLIST

INFORMATION ON LEGAL SAFEGUARDS AND RELEASE OF PERSONS DEPRIVED OF LIBERTY TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Provide information on the prohibition in domestic legislation of secret detention or unofficial detention.
- ✓ Clarify the conditions under which orders of deprivation of liberty may be given and by which authorities.
- ✓ Illustrate the applicable measures requiring prompt notification of and access to lawyers, doctors, family members and, in the case of foreign nationals, consular officials.
- ✓ Describe the measures to ensure that persons deprived of liberty communicate with, and are visited by, their families, counsel or any other person of their choice. Specify whether domestic legislation establishes specific conditions in this sense and, if so, which conditions. Specify the measures applicable to the case of foreigners communicating with consular authorities.
- ✓ Provide information on the guarantees for any person with a legitimate interest to bring proceedings before a court in order to decide on the lawfulness of a detention.
- ✓ Provide information on existing domestic legislation and practice to ensure the reliable verification of the release of persons deprived of liberty.
- ✓ Specify which authorities are in charge of supervising the release of persons deprived of liberty according to domestic legislation and the applicable international law.
- ✓ Provide information on the sanctions in the domestic legislation for the delay or obstruction of remedies referred to in articles 17 and 20, cross-referencing with the information provided on article 20 of the Convention.

Examples of recommendations



The Committee recommends that the State party should adopt the necessary legislative and other measures to ensure that all persons, regardless of the offence with which they are charged, enjoy all the safeguards provided for in the Convention, in particular in article 17, and in other relevant human rights instruments. It also urges it to ensure that the text that emerges from the reform of the Criminal Procedure Act does not include any restrictions on the rights of detained persons, even under a discretionary regime, that might violate the provisions of article 17, paragraph 2, of the Convention.

²⁹² CED/C/URY/CO/1, para. 25.

²⁹³ CED/C/PRY/CO/1, para. 19. However, the Committee was concerned by reports that the appropriate material conditions were not in place to give effect to that right in practice.

The Committee encourages the State party to adopt the necessary legislative measures to regulate the exercise of habeas corpus. In this regard, the Committee recommends that the State party should ensure that the legislative measures adopted are in conformity with the Convention, in particular article 17, and with other relevant international norms.

The Committee recommends that the State party should adopt the necessary measures to establish that the right to apply for habeas corpus may be neither suspended nor restricted under any circumstances, even when a state of emergency or siege has been declared, and to guarantee that any person with a legitimate interest may initiate the procedure.

The Committee recommends that the State party should establish the right of appeal before a sitting judge to ensure that coercive measures are lawful and to enable detainees to be present in court. The Committee also recommends that a sitting judge should rule on the extension of police custody beyond 24 hours and should limit that possibility. The Committee recommends that any person in pre-trial or administrative detention should have the right to communicate with the outside world and that this right should not be restricted beyond 48 hours.

The Committee recommends that the State party should adopt all the necessary measures, including legislative, to ensure that all persons detained in the national territory are immediately placed under judicial supervision.

The Committee recommends that the State party take the necessary measures to ensure that, from the outset of deprivation of liberty, all detained persons, including persons held in incommunicado detention, have immediate access to a lawyer and can communicate with their families or any other person of their choice and that their families are informed of their deprivation of liberty and where they are being detained.

The Committee recommends that the State party take the necessary measures, including the adoption of compulsory enforcement protocols and the allocation of appropriate resources, to ensure that, in practice, all persons deprived of their liberty may communicate without delay with their families, a lawyer or any person of their choosing and, in the case of foreigners, with their consular authorities.

The State party should adopt all the measures necessary to ensure that no person is held in secret detention, including by guaranteeing that all persons deprived of liberty are afforded, *de jure* and *de facto*, since the outset of their deprivation of liberty all the fundamental legal safeguards provided under article 17 of the Convention and other human rights treaties. In particular, the State party should guarantee that: deprivations of liberty are carried out only by officials authorized by law to arrest and detain persons and in strict compliance with the law; persons deprived of their liberty are held solely in officially recognized and supervised places of deprivation of liberty; all persons deprived of their liberty can communicate without delay and regularly with their families, counsel or any other person of their choosing and, in the case of foreigners, with their consular authorities.

The State party should also investigate all allegations concerning secret detention and ensure that: any existing secret detention facility or place where people are held in secret detention be immediately closed or converted into regular detention centres in accordance with the Convention and relevant international standards; those involved in holding people in secret detention are brought to justice and sanctioned in accordance with the gravity of their acts; and victims receive adequate reparation, including rehabilitation.

The Committee urges the State party to complete the investigation into allegations of its involvement in the rendition and secret detention programmes within a reasonable time, that those responsible be held accountable, and that victims be duly recognized and provided with appropriate redress and reparation; recommends that the State party inform the public and ensure that its investigation process is transparent; and requests the State party to provide it with updated information on the findings of such investigation and, if appropriate, sanctions for those responsible.

The Committee recommends that the State party should take all the necessary steps, including legislative, to ensure that all transfers are subject to judicial control and that they are only carried out with the knowledge of the detainee's counsel and family or other relatives.

The Committee recommends that the State party take effective measures to ensure, in practice, that all persons who are deprived of their liberty, including those in temporary detention and those who are transferred from one place of deprivation of liberty to another, are able to communicate immediately with their family, counsel or any other person of their choice.

The Committee likewise calls on the State party to put in place the inspections and oversight necessary to prevent unlawful transfers and to ensure that such practices are appropriately punished.

Recommendations of the Committee in *Yrusta and Del Valle Yrusta v. Argentina*

"12. In accordance with article 31 (5) of the Convention, the Committee urges the State party to: ... (e) Adopt all necessary measures to enforce the guarantees of non-repetition stipulated in article 4 (5) (d) of the Convention, including compiling and maintaining registers that meet the requirements of the Convention and to ensure that the relevant information is accessible to all persons with a legitimate interest therein, as set out in articles 17 and 18 of the Convention."

(b) Official registers

According to the Committee, all records of persons deprived of liberty must be duly completed, updated immediately and monitored.²⁹⁴ In this vein, the Committee has insisted that the registers must be kept in all places in which persons may be deprived of liberty, irrespective of their nature.²⁹⁵ According to the Committee, this includes places such as migrant holding facilities or military detention centres.²⁹⁶

The registers must contain all the information referred to in article 17 of the Convention. The Committee has expressed concerns regarding reports about registers containing incomplete and/or incorrect information on persons deprived of liberty.²⁹⁷ The Committee has also expressed concerns about situations in which detentions had not been registered, registers had been altered or relevant information had not been recorded.²⁹⁸

The Committee has insisted that methods of inspection must exist to ensure that the data stored in the different registers of persons deprived of liberty are fully compliant with article 17 of the Convention.²⁹⁹

The failure to record information on persons deprived of liberty or entering inaccurate information in the corresponding registers is an offence and should be codified and sanctioned as such in domestic legislation.³⁰⁰ In its concluding observations on States parties' reports under article 29 of the Convention, the Committee noted that persons responsible for the shortcomings in the registration of information about persons deprived of liberty must be duly sanctioned.³⁰¹

²⁹⁴ CED/C/JPN/CO/1, para. 36.

²⁹⁵ CED/C/KAZ/CO/1, paras. 21–22.

²⁹⁶ CED/C/MEX/CO/1, para. 34.

²⁹⁷ CED/C/HND/CO/1, para. 32.

²⁹⁸ CED/C/COL/CO/1, para. 31; and CED/C/PRY/CO/1, para. 21.

²⁹⁹ CED/C/NLD/CO/1, para. 27.

³⁰⁰ See sect. III.E.4 below.

³⁰¹ CED/C/HND/CO/1, para. 33; CED/C/JPN/CO/1, para. 36; and CED/C/BFA/CO/1, para. 34.

Working Group on Enforced or Involuntary Disappearances, **general comment on article 10 of the Declaration**

“27. Paragraph 3 [of article 10 of the 1992 Declaration] 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.”

EXAMPLES OF GOOD PRACTICE



“[The Committee welcomes the fact] that article 414 of the Criminal Code punishes the falsification of the time at which an arrest record was drawn up or of the time of actual arrest”.³⁰²

CHECKLIST

INFORMATION ON PROHIBITION OF SECRET DETENTION AND LEGAL SAFEGUARDS TO BE PROVIDED IN STATES PARTIES’ REPORTS

- ✓ Provide information on the existence, or measures taken for the creation, of one or more official and updated registers of detention that include all the elements contained in article 17 (3) of the Convention.
- ✓ Explain, in the event that various registers exist, how they are interconnected and can be cross-checked with the registers of disappeared persons.

³⁰² CED/C/KAZ/CO/1, para. 21. However, the Committee expressed concerns at reports that, in some instances, law enforcement officials had allegedly failed to accurately record the time of arrest.

Examples of recommendations



The State party should adopt all the measures necessary to ensure that all deprivations of liberty, without exception, are entered in uniform registers and/or records which include, as a minimum, the information required under article 17 (3) of the Convention; and registers and/or records of persons deprived of liberty are filled out and updated promptly and accurately and are subject to periodic checks and, in the event of irregularities, the officers responsible are adequately sanctioned.

The Committee recommends that the State party ensure that, without exception, all deprivations of liberty, including those that are not conducted within the context of judicial proceedings, are logged in standard registers or records that include, as a minimum, the information required under article 17 (3) of the Convention; that all registers and/or records of persons deprived of their liberty are accurately and promptly completed and kept up to date; and that all registers and records of persons deprived of their liberty are regularly checked and that, in the event of irregularities, the officials responsible are investigated and punished in accordance with the seriousness of their actions.

The Committee recommends that the State party should: develop a set of standard operating procedures and an identical supervisory system for all centres holding persons deprived of their liberty throughout the national territory that are fully in line with article 17, paragraph 3, of the Convention; take all the necessary measures to ensure that the computerized register of detainees is set up as rapidly as possible, as a matter of urgency, and that it is fully in line with article 17, paragraph 3, of the Convention; ensure that registers and individual records of persons deprived of their liberty are duly completed with the information required under article 17, paragraph 3, of the Convention and promptly updated as required; put in place an effective system of checks to ensure that records are being established and kept up to date in accordance with the provisions of the Convention, with appropriate sanctions for the failure to do so, where necessary.

The Committee encourages the State party to introduce the prison administration software and ensure that it is fully consistent with article 17, paragraph 3, of the Convention. The Committee also encourages the State party to use similar registration and monitoring tools in all facilities housing persons deprived of their liberty.

The Committee recommends that the State party finalize and adopt the royal decrees on registers of persons deprived of liberty and on gathering, conserving and accessing information on the origin of adopted children, so as to bring domestic legislation into line with the Convention in these fields.

The Committee recommends that the State party immediately release information about the list of immigration detention centres, ensure all the necessary conditions for access by the National Guarantor and take all the measures necessary to comply with the full scope of article 17 of the Convention. The Committee recommends that the State party take all the measures necessary to ensure prompt and immediate registration of the identity of all persons entering all migrant centres.

(c) Inspection of places of deprivation of liberty

Independent inspections of places of detention are key in preventing enforced disappearances. The Committee has expressed concerns about situations in which no specific independent mechanism had been established in a State party that would be mandated to carry out regular visits to all the places in which persons deprived of liberty may be held.³⁰³ This obligation is in addition to that of States parties' being obliged to make sure that the authorities in charge of the investigation of enforced disappearances have access to any place of detention.³⁰⁴

In this vein, the Committee considers that ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as establishment of

³⁰³ CED/C/CUB/CO/1, para. 29.

³⁰⁴ See sect. III.D.3(a) above.

a national preventive mechanism in accordance with the provisions of the Optional Protocol, could be instrumental in preventing enforced disappearances and other violations of the rights and obligations contained in the Convention.³⁰⁵ For this reason, in its concluding observations on States parties' reports under article 29, where appropriate, the Committee has recommended ratification of the Optional Protocol and establishment of a national preventive mechanism by the State party concerned.³⁰⁶

Committee on Enforced Disappearances, guiding principles for the search for disappeared persons

Principle 10. The search should be organized efficiently

- “2. The authorities responsible for the search should have the legal capacity, necessary financial and technical resources, administrative structure and budget to enable them to promptly undertake the search activities with the required technical capacity, security and confidentiality. They should also have the necessary professional staff, with appropriate technical and personal skills, including training on protection following a differential approach, and with up-to-date logistical, technical and scientific resources, from all relevant disciplines, to ensure an effective and exhaustive search. They should have the capacity to travel to the places that need to be visited. When necessary, and if requested, they should be afforded adequate protection.
3. The authorities with the competence to carry out search activities should have unrestricted access, and full powers to conduct unannounced visits, to all places where the disappeared persons may be, including military and police facilities and private premises. Where necessary, they should have the power to intervene to ensure the preservation of sites relevant to the search.”³⁰⁷

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³⁰⁸

Article 3

“Each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter referred to as the national preventive mechanism).

Article 4

1. Each State Party shall allow visits, in accordance with the present Protocol, by the mechanisms referred to in articles 2 and 3 to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). These visits shall be undertaken with a view to strengthening, if necessary, the protection of these persons against torture and other cruel, inhuman or degrading treatment or punishment.
2. For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.”

³⁰⁵ CED/C/SVK/CO/1, para. 18.

³⁰⁶ Ibid., para. 19; and CED/C/CUB/CO/1, para. 30.

³⁰⁷ See sect. V below.

³⁰⁸ General Assembly resolution 57/199, annex.

Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [guidelines on national preventive mechanisms](#)³⁰⁹

- “5. The NPM should complement rather than replace existing systems of oversight and its establishment should not preclude the creation or operation of other such complementary systems.
6. The mandate and powers of the NPM should be in accordance with the provisions of the Optional Protocol.
7. The mandate and powers of the NPM should be clearly set out in a constitutional or legislative text.
8. The operational independence of the NPM should be guaranteed.
9. The relevant legislation should specify the period of office of the member/s of the NPM and any grounds for their dismissal. Periods of office, which may be renewable, should be sufficient to foster the independent functioning of the NPM.
10. The visiting mandate of the NPM should extend to all places of deprivation of liberty, as set out in Article 4 of the Optional Protocol.
11. The necessary resources should be provided to permit the effective operation of the NPM in accordance with the requirements of the Optional Protocol
12. The NPM should enjoy complete financial and operational autonomy when carrying out its functions under the Optional Protocol.
13. The State authorities and the NPM should enter into a follow-up process with the NPM with a view to the implementation of any recommendations which the NPM may make.
14. Those who engage or with whom the NPM engages in the fulfilment of its functions under the Optional Protocol should not be subject to any form of sanction, reprisal or other disability as result of having done so.
15. The effective operation of the NPM is a continuing obligation. The effectiveness of the NPM should be subject to regular appraisal by both the State and the NPM itself, taking into account the views of the SPT, with a view to its being reinforced and strengthened as and when necessary.
- ...
21. The NPM should be established within one year of the entry into force of the Optional Protocol for the State concerned, unless at the time of ratification a declaration has been made in accordance with Article 24 of the Optional Protocol.
22. The body designated as the NPM should be publicly promulgated as such at the national level.
23. The State should notify the SPT promptly of the body which has been designated as the NPM.
- ...
25. The State should ensure that the NPM is able to carry out visits in the manner and with the frequency that the NPM itself decides. This includes the ability to conduct private interviews with those deprived of liberty and the right to carry out unannounced visits at all times to all places of deprivation of liberty, in accordance with the provisions of the Optional Protocol.

³⁰⁹ CAT/OP/12/5.

26. The State should ensure that both the members of the NPM and its staff enjoy such privileges and immunities as are necessary for the independent exercise of their functions.
27. The State should not order, apply, permit or tolerate any sanction, reprisal or other disability to be suffered by any person or organization for having communicated with the NPM or for having provided the NPM with any information, irrespective of its accuracy, and no such person or organization should be prejudiced in any way.
- ...
34. The NPM should plan its work and its use of resources in such a way as to ensure that places of deprivation of liberty are visited in a manner and with sufficient frequency to make an effective contribution to the prevention of torture and other cruel, inhuman or degrading treatment or punishment.”

The Committee has expressed concerns about situations in which, despite establishing national preventive mechanisms, the States parties concerned did not provide sufficient legal basis³¹⁰ or adequate human and financial resources³¹¹ to enable such mechanisms to effectively fulfil their mandates, or in which the composition of the national preventive mechanism could compromise its independence.³¹²

The Committee has also expressed its concern in situations in which the national preventive mechanism or other independent mechanisms established in States parties were confronted with bureaucratic obstacles that in practice restricted their ability to carry out visits to places of detention.³¹³

The Committee has insisted on the importance of making sure that the national preventive mechanism or other independent mechanisms had access to all places of detention. Moreover, it has expressed its concern about situations in which certain places of possible deprivation of liberty were left outside the mandate of the national preventive mechanism in accordance with the relevant legislation.³¹⁴ It has also expressed its concern about situations in which the access of such mechanisms to places that were designated as forbidden pursuant to the relevant domestic legislation on State secrets could be restricted.³¹⁵

³¹⁰ CED/C/ARM/CO/1, para. 20; and CED/C/BIH/CO/1, para. 31.

³¹¹ CED/C/ESP/CO/1, para. 27; CED/C/ARM/CO/1, para. 20; CED/C/BIH/CO/1, para. 31; and CED/C/DEU/CO/1, para. 20.

³¹² CED/C/NLD/CO/1, para. 24.

³¹³ CED/C/KAZ/CO/1, para. 23.

³¹⁴ Ibid.

³¹⁵ CED/C/NLD/CO/1, para. 24.



UN Photo/Tim McKulka

Committee on Enforced Disappearances and Working Group on Enforced or Involuntary Disappearances, **key guidelines on COVID-19 and enforced disappearances**

- “13. Procedural guarantees contained in articles 12 and 17 to 21 of the Convention and 9 to 13 of the Declaration apply at all times and to all places in which persons are deprived of their liberty, including compulsory quarantine centres. Whatever the circumstances, all individuals deprived of their liberty must be held only in officially recognized and supervised places of deprivation of liberty, and any form of secret detention must be excluded. States should also proactively ensure that the authorities in charge of the search for the disappeared person have access to all places of detention. States must also take all necessary measures to ensure that persons deprived of liberty are able to communicate with their relatives, counsel or any other person of their choice, and with consular authorities, including when visits have to be limited.” (Footnote omitted.)

EXAMPLES OF GOOD PRACTICE



“The Committee welcomes the adoption of the law establishing a national preventive mechanism”³¹⁶

“The Committee welcomes the ratification by the State party of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the adoption of the law amending legislation concerning the establishment of a national mechanism to prevent torture and other cruel, inhuman or degrading treatment or punishment and the designation of the Human Rights Commissioner as the national preventive mechanism, as it considers that those measures could be

³¹⁶ CED/C/ARG/CO/1, para. 30. Nevertheless, the Committee regretted the fact that the mechanism was still not fully operational.

instrumental in preventing enforced disappearances and other violations of the rights and obligations contained in the Convention.”³¹⁷

“The Committee applauds the establishment of the National Human Rights Institution (NHRI) and Ombudsman’s Office by Act No. 18446 of 27 January 2009. It also applauds the fact that the NHRI has been designated as the national preventive mechanism under the Optional Protocol to the Convention against Torture.”³¹⁸

CHECKLIST

INFORMATION ON THE INSPECTION OF PLACES OF DETENTION TO BE PROVIDED IN STATES PARTIES’ REPORTS

- ✓ Provide information on the guarantees for any independent bodies or mechanisms established to inspect prisons and other places of detention, including authorization for international monitoring and inspections by national preventative mechanisms under the Optional Protocol to the Convention against Torture or other regional human rights instruments, national human rights institutions or NGOs.
- ✓ Provide information on the existence of administrative mechanisms to inspect prisons and ensure that detention conditions are in line with the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ([the Bangkok Rules](#)), and whether they belong to the penitentiary administration. Include information on whether officials are trained on inspecting places of detention with a gender-sensitive approach.
- ✓ Provide detailed information on the sanctions (criminal, administrative and disciplinary) foreseen for the failure to record deprivation of liberty or entering inaccurate data in the corresponding registers, and the refusal to provide information on deprivation of liberty or the provision of inaccurate information, cross-referencing with the information provided on article 22 of the Convention.

Examples of recommendations



The Committee recommends that the national preventive mechanism should be launched and made fully operational rapidly. It also urges the State party to protect the independence of the mechanism and to ensure that the monitors have effective and immediate access to all places of deprivation of liberty throughout the national territory.

The Committee recommends that the State party should ensure that the Office of the Ombudsman has sufficient financial, human and technical resources effectively to perform its role as the mechanism for the prevention of torture.

The Committee recommends that the State party establish a specific independent mechanism with the power to undertake, without hindrance, regular unannounced visits to all places in which persons may be deprived of liberty, irrespective of their nature. In this respect, the Committee encourages the State party to speed up the process aimed at ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and to swiftly establish a national preventive mechanism that is in full conformity with it.

³¹⁷ CED/C/KAZ/CO/1, para. 23. On a similar note see CED/C/ECU/CO/1, para. 17; and CED/C/ECU/CO/1, para. 17.

³¹⁸ CED/C/URY/CO/1, para. 9.

3. ACCESS TO INFORMATION ON PERSONS DEPRIVED OF LIBERTY (ARTS. 18–20)

Article 18

- “1. Subject to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:
- (a) The authority that ordered the deprivation of liberty;
 - (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
 - (c) The authority responsible for supervising the deprivation of liberty;
 - (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
 - (e) The date, time and place of release;
 - (f) Elements relating to the state of health of the person deprived of liberty;
 - (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.
2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1 of this article, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.”

Article 19

- “1. Personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.
2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.”

Article 20

- “1. Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.
2. Without prejudice to consideration of the lawfulness of the deprivation of a person’s liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.”

Despite the legal significance of respect for the privacy of any person detained and given that the “refusal to acknowledge the deprivation of liberty or ... concealment of the fate” of the disappeared person are constitutive elements of enforced disappearance, the Committee has affirmed that the right of any person with a legitimate interest to collect and receive information on the fate of a person presumed disappeared must be recognized.³¹⁹ The Committee has specified that such information must be automatically supplied to the relatives of a person deprived of liberty.³²⁰

The Committee has expressed its concern about situations in which the definition of those persons who are entitled to seek information on persons deprived of liberty in domestic legislation was too restrictive and did not entitle persons other than direct relatives to obtain such information.³²¹

The Committee has expressed its concern about situations in which the domestic legislation of a State party did not guarantee access to the information listed in article 18 (1) and that the provision of this information was dependent on the person deprived of liberty.³²² Besides, according to the Committee, States parties must ensure that judicial remedies exist for persons seeking to obtain the information referred to in article 18 (1).³²³ Under article 22 of the Convention, the refusal to provide information should be criminalized and sanctioned at the domestic level.³²⁴

³¹⁹ CED/C/FRA/CO/1, para. 32; CED/C/NLD/CO/1, para. 28; CED/C/HND/CO/1, para. 33; and CED/C/IRQ/CO/1, para. 29.

³²⁰ CED/C/NLD/CO/1, para. 28.

³²¹ CED/C/SVK/CO/1, para. 20.

³²² CED/C/JPN/CO/1, para. 35.

³²³ CED/C/SEN/CO/1, para. 34.

³²⁴ See sect. III.E.4 below.

Committee on Enforced Disappearances, *Yrusta and Del Valle Yrusta v. Argentina*

“10.6 The Committee notes that Mr. Yrusta’s family members did not receive any information about his whereabouts and were not even told that he had been transferred to another prison. Although the right of family members to obtain information about a person’s arrest and place of detention may be restricted, such restriction is subject to very strict conditions as set out in article 20 (1) of the Convention, which, judging from the available information, do not apply in the present case. In this respect, the Committee notes that the State party has not made any allegation, nor has provided any explanation regarding the status of its national legislation on such restrictions. In view of the foregoing, the Committee considers that the fact that Mr. Yrusta and his family, including the authors, were deprived of information for a period of over seven days constitutes in and of itself a violation of articles 17 (1), 18 and 20 (1) of the Convention.

10.7 Similarly, the Committee recalls that, pursuant to article 20 (2) of the Convention: ‘Without prejudice to consideration of the lawfulness of the deprivation of a person’s liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.’ In the light of the information contained in the case file and in the absence of observations from the State party in this respect, the Committee considers that the State party failed to fulfil its obligations under article 20 (2) of the Convention.”

Committee on Enforced Disappearances, *guiding principles for the search for disappeared persons*

Principle 10. The search should be organized efficiently

“4. The authorities responsible for the search should have unrestricted access to all information, documents, databases, including national security databases, registers and records of the security, military and police forces and private institutions that they consider necessary to search for and locate disappeared persons. Where necessary, they should have the power to intervene to ensure the preservation of documents relevant to the search.”³²⁵

Examples of recommendations



The Committee recommends that the State party should establish a mechanism to guarantee that any person with a legitimate interest has the right and a real possibility of access to information concerning the person presumed disappeared referred to in article 17, paragraph 3, in accordance with article 18, paragraph 1, and that this person may lodge an appeal with the court to obtain the relevant information.

The Committee recommends that any person with a legitimate interest can have prompt and easy access to at least the information listed in article 18 (1) of the Convention, including during the period of police custody, and the right of recourse where a request for access has been denied.

The Committee calls on the State party to guarantee that those persons have access to prompt and effective judicial remedies to obtain that information without delay, as established in article 20, paragraph 2, of the Convention, and the possibility of appealing against a refusal to disclose this information.

³²⁵ See also principle 11 on the use of information in an appropriate manner. On the guiding principles, in general, see sect. V below.

The Committee encourages the State party to review its definition of “close person” so as to bring it into line with article 18 (1) of the Convention.

The Committee recommends that explicit provision be made in the State party’s criminal legislation, in accordance with article 22 of the Convention, for sanctions to be imposed for deliberate failure to record a deprivation of liberty or the relevant information, as well as for deliberate refusal to provide such information.

Recommendations of the Committee in *Yrusta and Del Valle Yrusta v. Argentina*

“12. In accordance with article 31 (5) of the Convention, the Committee urges the State party to ... Adopt all necessary measures to enforce the guarantees of non-repetition stipulated in article 4 (5) (d) of the Convention, including compiling and maintaining registers that meet the requirements of the Convention and to ensure that the relevant information is accessible to all persons with a legitimate interest therein, as set out in articles 17 and 18 of the Convention.”

CHECKLIST

INFORMATION ON ACCESS TO INFORMATION TO BE PROVIDED IN STATES PARTIES’ REPORTS

Provide information on:

- ✓ Legislation that guarantees the right of any person with a legitimate interest to access the information referred to in article 17 (3) of the Convention.
- ✓ Any restriction on exercising the right of any person with a legitimate interest to gain access to the aforementioned information.
- ✓ Legislation to ensure protection from any ill-treatment, intimidation or sanction of persons who request access to information and all those involved in the investigation and the existence of mechanisms to that effect.
- ✓ Procedures used to obtain genetic data or medical information and whether they are consistent with article 19 (1) of the Convention.
- ✓ How the data obtained are used.
- ✓ Provisions for the protection, and eventual storage, of such genetic data and medical information.
- ✓ Databases of genetic data.
- ✓ Domestic legislation that would enable the restriction of access to information on persons deprived of liberty. Information should indicate the nature and duration of such measures and how they are in conformity with applicable international law and standards and with the objectives of the Convention.
- ✓ Any kind of restriction on the right of access to information on persons deprived of liberty that may still be included in domestic legislation and the steps taken to remove it.
- ✓ Guarantees that any person with a legitimate interest has the right to a prompt and effective judicial remedy to obtain information without delay.
- ✓ Whether such guarantees can be suspended at any time or under any specific circumstances, and on how they are guaranteed in times of crisis.
- ✓ Means of appeal against the refusal to disclose such information on persons deprived of liberty.
- ✓ Sanctions (criminal, administrative and disciplinary) foreseen for the refusal to provide information on deprivation of liberty or the provision of inaccurate information, cross-referencing with the information provided on article 22 of the Convention.

4. SANCTIONS FOR CONDUCT RELATED TO ENFORCED DISAPPEARANCE (ART. 22)

“Without prejudice to article 6, each State Party shall take the necessary measures to prevent and impose sanctions for the following conduct:

- (a) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;
- (b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate;
- (c) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.”

In its concluding observations on States parties’ reports under article 29 of the Convention, the Committee has expressed concerns about situations in which it received reports about States parties’ failure to record a deprivation of liberty, refusal to provide information and provision of inaccurate information.³²⁶ The Committee has held that, in order to comply with article 22, such practices must be automatically subject to sanctions.³²⁷

EXAMPLES OF GOOD PRACTICE



“[The Committee welcomes the fact] that article 414 of the Criminal Code punishes the falsification of the time at which an arrest record was drawn up or of the time of actual arrest”³²⁸

“The Committee notes with appreciation that article 414 of the Criminal Code criminalizes, inter alia, the wilful failure to inform a suspect’s relatives of his or her detention and whereabouts and the unlawful refusal to provide information on the place where a person is being held in custody to a citizen who has the right to receive such information.”³²⁹

“The Committee, while noting that it has not been able to verify the information, welcomes the assurance provided by the State party that [the stipulations of article 17 (3) are being complied with] ... and that sanctions can be imposed if they are not adequately completed and/or updated.”³³⁰

³²⁶ CED/C/JPN/CO/1, para. 35; CED/C/BOL/CO/1, para. 28; and CED/C/BFA/CO/1, para. 33.

³²⁷ CED/C/BFA/CO/1, para. 34.

³²⁸ CED/C/KAZ/CO/1, para. 21. However, the Committee expressed concerns about reports that, in some instances, law enforcement officials had allegedly failed to accurately record the time of arrest.

³²⁹ Ibid., para. 19.

³³⁰ CED/C/DEU/CO/1, para. 18.

CHECKLIST

INFORMATION ON SANCTIONS FOR CONDUCT RELATED TO ENFORCED DISAPPEARANCE TO BE PROVIDED IN STATES PARTIES' REPORTS

Provide information on:

- ✓ Legislation guaranteeing that persons deprived of liberty or any other person with a legitimate interest are entitled to initiate proceedings before a court.
- ✓ Mechanisms in place to prevent unlawful deprivation of liberty, failure to record deprivation of liberty, refusal to provide information on deprivation of liberty and provision of inaccurate information.
- ✓ Sanctions (criminal, administrative and disciplinary) foreseen for the above-mentioned conduct.

Examples of recommendations



The Committee recommends that the State party guarantee in practice that any acts hindering the observance of the rights affirmed in the Convention are adequately sanctioned.

The Committee recommends that explicit provision be made in the State party's criminal legislation, in accordance with article 22 of the Convention, for sanctions to be imposed for deliberate failure to record a deprivation of liberty or the relevant information, as well as for deliberate refusal to provide such information.

5. TRAINING OF LAW ENFORCEMENT AND MEDICAL PERSONNEL AND PUBLIC OFFICIALS (ART. 23)

- "1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to:
 - (a) Prevent the involvement of such officials in enforced disappearances;
 - (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances;
 - (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.
2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.
3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy."

The Committee has expressed concerns about situations in which States parties' efforts to provide training to the relevant stakeholders were limited to the general human rights framework and no specific and regular training was envisaged on the provisions of the Convention.³³¹ The Committee has found that States parties do not comply with their obligations under article 23 of the Convention when the relevant training programmes are not delivered regularly.³³²

The Committee has observed that reasons such as the lack of experts who can provide special training on the provisions of the Convention do not justify States parties' non-compliance with the obligations contained in article 23.³³³

The Committee has noted that such training must be provided at least to security and law enforcement personnel and other persons involved in the custody or treatment of persons deprived of liberty.³³⁴

The Committee has also specified that training must be given to federal, state and municipal officials.³³⁵ It did not deem it sufficient in situations in which the specific education programmes on the Convention were provided only to a particular segment of State personnel, such as the Carabinieri Corps.³³⁶

EXAMPLES OF GOOD PRACTICE



"It takes note with satisfaction of the human rights training being provided to government officials"³³⁷

"The Committee welcomes the human rights training provided to military and police personnel and, in particular, the training in the investigation of cases of enforced disappearance given to officials of the Public Prosecution Service."³³⁸

"The Committee welcomes the information provided by the State party on the steps taken to ensure human rights training for various State officials, including officials of the national police, the armed forces and the prison system. It also notes with satisfaction that the training provided for judges, prosecutors and public defenders contains a module on issues related to enforced disappearance."³³⁹

"The Committee notes with appreciation the information provided by the State party regarding the regular training provided to judges and military and internal affairs personnel, including on international human rights law, and in particular the information concerning the training dispensed to law enforcement personnel on how to deal with missing persons and other issues related to the Convention."³⁴⁰

³³¹ CED/C/URY/CO/1, para. 29; CED/C/PRT/CO/1, para. 22; CED/C/BEL/CO/1, para. 25; CED/C/DEU/CO/1, para. 22; CED/C/NLD/CO/1, para. 30; CED/C/PRY/CO/1, para. 23; CED/C/ARM/CO/1, para. 22; CED/C/ITA/CO/1, para. 30; CED/C/MNE/CO/1, para. 26; CED/C/SRB/CO/1, para. 21; CED/C/BIH/CO/1, para. 33; CED/C/BFA/CO/1, para. 35; CED/C/KAZ/CO/1, para. 25; CED/C/ALB/CO/1, para. 30; CED/C/LTU/CO/1, para. 25; CED/C/SEN/CO/1, para. 35; CED/C/AUT/CO/1, para. 22; CED/C/HND/CO/1, para. 34; CED/C/JPN/CO/1, para. 37; CED/C/BOL/CO/1, para. 30; and CED/C/CHL/CO/1, para. 20.

³³² CED/C/ALB/CO/1, para. 30.

³³³ CED/C/SVK/CO/1, para. 22.

³³⁴ CED/C/NLD/CO/1, para. 31; and CED/C/PRT/CO/1, para. 23.

³³⁵ CED/C/MEX/CO/1, para. 37.

³³⁶ CED/C/ITA/CO/1, para. 30.

³³⁷ CED/C/ARG/CO/1, para. 32. Nevertheless, the Committee regretted the fact that training on the provisions of the Convention was not being provided on a regular basis.

³³⁸ CED/C/PRY/CO/1, para. 23. Nevertheless, the Committee noted that no specific, regular instruction was given to State officials on the relevant provisions of the Convention, as provided for in article 23 thereof.

³³⁹ CED/C/ECU/CO/1, para. 19. Nevertheless, the Committee regretted the fact that the State party had not provided it with detailed information on whether specific training was provided to all State officials on the relevant provisions of the Convention in light of article 23 (1) thereof.

³⁴⁰ CED/C/KAZ/CO/1, para. 25. However, the Committee still took note of the fact that no specific and regular training was provided to all State officials on the relevant provisions of the Convention as required by article 23 (1) thereof. On a similar note, see CED/C/AUT/CO/1, para. 22.



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CHECKLIST

INFORMATION ON TRAINING OF LAW ENFORCEMENT AND MEDICAL PERSONNEL AND PUBLIC OFFICIALS TO BE PROVIDED IN STATES PARTIES' REPORTS

Provide information on:

- ✓ Training programmes, or steps taken to establish them, aimed at preventing the above-mentioned persons from becoming involved in cases of enforced disappearance, emphasizing the importance of preventing and investigating cases of enforced disappearance and ensuring that those persons recognize the urgency of solving cases of enforced disappearance and are adequately trained in handling cases in a gender- and child-sensitive manner.
- ✓ The nature and frequency of the instruction and training and which administrative authorities are in charge of such training.
- ✓ Measures taken to ensure that all those involved in the custody or treatment of persons deprived of liberty understand the duty to report acts of enforced disappearance to their superiors or other authorities that can provide remedy.
- ✓ Domestic legislation that explicitly establishes that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited and that persons who refuse to obey such orders will not be punished.

Examples of recommendations



The Committee recommends that the State party should step up its efforts to provide public officials with training on the provisions of the Convention, in conformity with article 23 of the Convention.

The Committee recommends that the State party should step up its efforts to provide training on human rights matters to State officials and, in particular, should ensure that all law enforcement personnel, whether civil or military, and medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty, including judges, prosecutors and other court officials of all ranks, receive appropriate and regular training on the provisions of the Convention, in accordance with article 23.

The Committee encourages the State party to further ensure that all law enforcement and security personnel – whether civil or military – medical personnel, public officials and other persons who may be involved in the custody or treatment of persons deprived of their liberty and migrants, including judges, prosecutors and other officials responsible for the administration of justice, receive specific and regular training on the provisions of the Convention, in accordance with article 23 (1).

The Committee recommends that the State party ensure that all law enforcement and security personnel, whether civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of persons deprived of liberty, including judges, prosecutors and other officials responsible for the administration of justice, receive specific and regular training on the provisions of the Convention, in accordance with article 23 (1) thereof. In addition, the Committee encourages the State party to provide training to judges on the offence of enforced disappearance, in particular to ensure its proper application, and that the phrase “thereby makes for them impossible to exercise legal protection” contained in section 420a (1) of the Criminal Code is always considered as a consequence of the constitutive elements of the offence of enforced disappearance rather than an intentional element.

Recommendations of the Committee in *Yrusta and Del Valle Yrusta v. Argentina*

“13. The State party is further urged to make public the present Views and disseminate their content widely, in particular, though not solely, among members of the security forces and prison personnel who are in charge of persons deprived of their liberty.”

F. MEASURES TO PROTECT AND GUARANTEE THE RIGHTS OF VICTIMS OF ENFORCED DISAPPEARANCE

1. RIGHTS OF VICTIMS (ART. 24)

- “1. For the purposes of this Convention, ‘victim’ means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.
2. 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.
3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.
4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.
5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:
 - (a) Restitution;
 - (b) Rehabilitation;
 - (c) Satisfaction, including restoration of dignity and reputation;
 - (d) Guarantees of non-repetition.
6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.
7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.”

(a) Definition of victim

According to the Committee, the definition of “victim” set out in the legislation of a State party must cover all the persons referred to in article 24 (1) of the Convention³⁴¹ and such a definition must be properly applied in practice.³⁴² The Committee considers that exhaustive lists are generally not well suited for this purpose.³⁴³ In its concluding observations on States parties’ reports submitted under article 29 of the Convention, the Committee has noted that, in the absence of a definition in the domestic legislation of a State party, the case-by-case determination of who should be considered

³⁴¹ CED/C/HND/CO/1, para. 37; CED/C/JPN/CO/1, para. 40; and CED/C/CHL/CO/1, para. 23.

³⁴² CED/C/LTU/CO/1, para. 28.

³⁴³ CED/C/CHL/CO/1, para. 22.

as a “victim” will generally not be sufficient to guarantee the enjoyment of all the rights under the Convention by all persons who are encompassed by the definition in article 24 (1).³⁴⁴

The Committee has expressed its concern about the absence of a definition of a victim in domestic legislation and an existing definition not being in full compliance with the Convention, in particular article 24 (1).³⁴⁵ Moreover, it has observed that, as a consequence of such shortcomings, the measures required by the Convention may not benefit all those natural persons who have suffered harm as the direct result of enforced disappearance.³⁴⁶ In this regard, the Committee has observed that article 24 was not properly implemented in a situation in which only widows or widowers and their heirs were considered victims.³⁴⁷ Similarly, the Committee has expressed its concern about a situation in which the legal definition of a victim of enforced disappearance excluded spouses or partners of lesbian, gay, bisexual, transgender and intersex persons.³⁴⁸

The Committee has observed that general notions, such as “damaged party”, envisaged by domestic legislation in civil proceedings might not be sufficient to meet the requirements of the Convention, since these are generally narrower than the notion of a victim within the meaning of article 24 of the Convention, and the application of such notions may leave certain persons without protection.³⁴⁹ It has expressed its concern about a situation in which domestic legislation stipulated that a victim must have suffered “direct and personal harm”, noting that the two conditions were more restrictive than that provided for under article 24.³⁵⁰

The Committee has also expressed its concern about a situation in which the definition used in domestic legislation made the granting of victim status conditional upon the initiation of criminal proceedings against a perpetrator.³⁵¹

Committee on Enforced Disappearances, *Yrusta and Del Valle Yrusta v. Argentina*

“10.8 With regard to the authors’ claims that they have not been able to play an active part in the investigation of their brother’s case, including his enforced disappearance, because they have been refused legal standing as private criminal plaintiffs, the Committee recalls that, in accordance with article 24 of the Convention, the term ‘victim’ is understood to mean the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance. The Committee notes that the State party has not advanced any arguments that would lead to the conclusion that Mr. Yrusta’s sisters do not fall into that category. Moreover, the Committee considers that the anguish and suffering experienced by the authors owing to the lack of information that would allow clarification of what happened to their brother have been exacerbated by the de facto failure to acknowledge their status as victims, which thus becomes a cause of revictimization that is incompatible with the principles enshrined in the Convention.

³⁴⁴ CED/C/ALB/CO/1, para. 32.

³⁴⁵ CED/C/LTU/CO/1, para. 27; CED/C/SEN/CO/1, para. 37; CED/C/ITA/CO/1, para. 32; CED/C/PER/CO/1, para. 28; CED/C/MNE/CO/1, para. 28; CED/C/BIH/CO/1, para. 35; CED/C/KAZ/CO/1, para. 27; and CED/C/TUN/CO/1, para. 31.

³⁴⁶ CED/C/ESP/CO/1, para. 29.

³⁴⁷ CED/C/BOL/CO/1, para. 32.

³⁴⁸ CED/C/PER/CO/1, para. 28.

³⁴⁹ CED/C/SRB/CO/1, para. 23.

³⁵⁰ CED/C/FRA/CO/1, para. 34.

³⁵¹ CED/C/MNE/CO/1, para. 28.

10.9 The Committee also notes that, according to the information before it, the investigations that have been opened into the case of Mr. Yrusta have been based on the causes and circumstances of his death and the criminal liability that might arise therefrom. Meanwhile, his alleged disappearance during a period of over seven days is not referred to in any of the files made available in connection with the present communication. ... The Committee considers that, in the present case, the mere fact that it took over a year for a decision to be issued regarding the right of Mr. Yrusta's family members to take part in the investigative proceedings entails, in and of itself, a violation of articles 12 (1) and 24 (1), (2) and (3) of the Convention. After such a long period has passed, the possibility of playing an active and effective part in the proceedings is lessened to such an extent that the impairment of the right in question becomes irreversible, in violation of the victims' right to know the truth. In the absence of a satisfactory explanation from the State party, the Committee considers that the facts before it disclose a violation of articles 12 (1) and 24 (1), (2) and (3) of the Convention."

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

"VIII. Access to justice

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:
 - (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
 - (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;
 - (c) Provide proper assistance to victims seeking access to justice;
 - (d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.
13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.
14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies."³⁵²

³⁵² See also principles IX–XI.

Committee on Enforced Disappearances, **guiding principles for the search for disappeared persons**

“Principle 3. The search should be governed by a public policy

...

6. A key aim of the public search policy should be to protect and provide comprehensive support to the victims. It should include psychosocial care and support for the victims and measures that prevent their revictimization or secondary victimization. This public policy should include measures to ensure respect for victims and to prevent and punish any form of stigmatization against them.”

See also:

- Working Group, study on enforced or involuntary disappearances and economic, social and cultural rights ([A/HRC/30/38/Add.5](#))

CHECKLIST

INFORMATION ON THE DEFINITION OF VICTIM TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Specify how the broad definition of “victim”, to include both the disappeared person and any individual who has suffered harm as the direct result of the enforced disappearance, is reflected in domestic law.
- ✓ Provide information on the measures taken regarding the legal situation of disappeared persons whose fate has not been clarified, and that of their relatives, in areas such as social welfare, financial matters, family law and property rights.

Examples of recommendations



The State party should consider introducing the legislative amendments necessary to establish a definition of victim that conforms to that contained in article 24 (1) of the Convention in order to ensure the full enjoyment by any individual who has suffered harm as the direct result of an enforced disappearance of the rights set forth in the Convention, in particular the rights to the truth and reparation enshrined in its article 24 (2), (4) and (5).

The Committee recommends that the State party should take adequate legislative measures to adopt a definition of victim that complies with the definition set out in article 24, paragraph 1, of the Convention, recognizing a victim as any person who has suffered harm as the direct result of enforced disappearance, without requiring that such harm should also be personal.

The Committee recommends that the State party include a definition of victim of enforced disappearance in its criminal legislation in accordance with article 24 (1) of the Convention, in order to ensure the full enjoyment, by any individual who has suffered harm as the direct result of an enforced disappearance, of the rights set forth in the Convention.

The Committee recommends that the State party take the appropriate measures, including the provision of suitable training for members of the judiciary, to ensure that the concept of injured party in article 71 of the Code of Criminal Procedure is applied in accordance with the definition of victim contained in article 24 (1) of the Convention.

(b) Right to know the truth

According to the Committee, States parties are obliged under the Convention to explicitly recognize in their domestic legislation the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate and whereabouts of the disappeared person and to uphold this right in practice.³⁵³ In its concluding observations on States parties' reports submitted pursuant to article 29 of the Convention, the Committee has expressed its concern about situations in which such a right was not explicitly granted.³⁵⁴

The Committee has also expressed concerns about a situation in which the right to truth referred exclusively to judicial truth.³⁵⁵

Working Group on Enforced or Involuntary Disappearances, general comment on the right to the truth in relation to enforced disappearance³⁵⁶

"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 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 disappearance. 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.

...

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.

³⁵³ CED/C/FRA/CO/1, para. 35; CED/C/NLD/CO/1, para. 33; and CED/C/ALB/CO/1, para. 33.

³⁵⁴ CED/C/FRA/CO/1, para. 34; CED/C/NLD/CO/1, para. 32; and CED/C/ALB/CO/1, para. 32. In addition to the Convention, the right to know is enshrined in international humanitarian law, such as the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), article 32 of which affirms the right of families to know the fate of their relatives. See also the study on customary international humanitarian law by ICRC, *rule 117*.

³⁵⁵ CED/C/ITA/CO/1, para. 32.

³⁵⁶ A/HRC/16/48, para. 39.

3. ... 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. ... 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 ... 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' ... to the family, a suffering that reaches the threshold of torture 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. ...
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. ...
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."

Updated set of principles for the protection and promotion of human rights through action to combat impunity

"Principle 2. The inalienable right to the truth

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.

Principle 3. The 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. The victims' right to know

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.

Principle 5. Guarantees to give effect to the right to know

States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know. Appropriate measures to ensure this right may include non-judicial processes that complement the role of the judiciary. Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence. Regardless of whether a State establishes such a body, it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law.”

EXAMPLES OF GOOD PRACTICE



“The Committee welcomes the establishment of the National Centre for Historical Memory (Act No. 1448 of 2011, art. 146) and, in particular, the Centre’s activities in connection with enforced disappearance, as it considers that these activities contribute to the realization of the rights to the truth and to reparation for the victims of enforced disappearance ...”³⁵⁷

CHECKLIST

INFORMATION ON THE RIGHT TO KNOW THE TRUTH TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Provide information on the existence of, or steps taken to establish, mechanisms to ensure the right to know the truth about the circumstances of the enforced disappearance and the fate of the disappeared person.
- ✓ Specify how such mechanisms ensure the right of victims to be informed about the progress and results of investigations and participate in the respective proceedings.
- ✓ Provide information on the measures taken to facilitate access to information and address obstacles in accessing information, such as physical access, format, language and literacy, including legal literacy.

³⁵⁷ CED/C/COL/CO/1, para. 33.

Examples of recommendations



The Committee recommends that the State party include an explicit provision for the right of victims to know the truth regarding the circumstances of an enforced disappearance and the fate of the disappeared person.

The Committee further encourages the State party to make explicit provision for the right of victims of enforced disappearance to know the truth, in conformity with the terms of article 24, paragraph 2, of the Convention and to ensure that all victims are able fully and effectively to enjoy that right. The Committee invites the State party to consider setting up a commission of independent experts charged with establishing the truth about past human rights violations, in particular enforced disappearances.

The Committee recommends that the State party take all necessary measures to ensure that the Truth Commission has the financial, human and technical resources it needs to carry out its task of investigating cases of enforced disappearance.

(c) The search for disappeared persons

The Committee has insisted on the crucial importance of the obligation to search for disappeared persons whose whereabouts are not known and, in the event of their death, the exhumation, identification, respect and return of mortal remains. It has issued guiding principles for the search for disappeared persons.³⁵⁸

In its annual reports, the Committee has insisted that States parties must be careful not to confuse efforts to determine the fate and whereabouts of the victims and the investigation into the crime.³⁵⁹ It has also stressed that, despite the fact that these are two distinct obligations, the investigation of enforced disappearance may lead to information that is necessary in searching for and locating the victims.³⁶⁰ In this regard, the Committee believes that it is necessary to establish direct contact with the authorities responsible for searching for disappeared persons and investigating their disappearance.³⁶¹ Principle 13 of the guiding principles for the search for disappeared persons establishes that the search should be linked to the criminal investigation and provides details on how this must be ensured in practice.

In its annual reports, the Committee has insisted on the importance of inter-agency coordination among the authorities responsible for the search for disappeared persons.³⁶² Where appropriate, States parties must engage in inter-State cooperation in the search for disappeared persons, in accordance with article 15 of the Convention.³⁶³

In its concluding observations on States parties' reports under article 29, the Committee has expressed its concern about situations in which States parties failed to make significant progress in the search for disappeared persons whose whereabouts were not known and in the identification and return of remains.³⁶⁴

³⁵⁸ See sect. V below.

³⁵⁹ A/71/56, para. 79; and A/72/56, para. 78. See sect. III.D.3(a) above.

³⁶⁰ A/72/56, para. 78.

³⁶¹ A/73/56, para. 36.

³⁶² A/72/56, para. 80. See also the [guiding principles for the search for disappeared persons](#), principle 12. See sect. V below.

³⁶³ See sect. III.D.5 above.

³⁶⁴ CED/C/HND/CO/1, para. 36; CED/C/CHL/CO/1, para. 26; CED/C/SRB/CO/1, para. 27; CED/C/PRY/CO/1, para. 27; and CED/C/PER/CO/1, para. 32.



UN Photo/Martine Perreil

According to the Committee, States parties must make sure that they put in place systems that allow immediate and urgent action to search for disappeared persons in cases in which there is reason to believe that they may be alive. It has expressed concerns about situations in which there were reports that the search for disappeared persons had not been initiated immediately.³⁶⁵

The Committee has expressed concerns about the failure of the authorities to take basic investigative steps to search for and locate disappeared persons, even when reliable information was available that could have been used to advance the search and investigation.³⁶⁶ It has also expressed concerns about older cases in which the national authorities have been taking less and less action to search for and locate disappeared persons, limiting themselves to taking formal actions or repeating previous investigations.³⁶⁷ The Committee has noted that States parties do not discharge their obligations under the Convention when witnesses are not interviewed as soon as possible to facilitate the search for disappeared persons or when they fail to conduct relevant analysis of the available evidence (e.g. instances in which available telephone or video records are not analysed until several months after they are submitted to the competent authorities).³⁶⁸

The Committee has expressed concerns about allegations that the authorities in charge of the search and investigation had been directly or indirectly involved in the events and that the processes therefore remained deadlocked.³⁶⁹

³⁶⁵ CED/C/HND/CO/1, para. 40; CED/C/BOL/CO/1, para. 38; and CED/C/MEX/CO/1, para. 40. See also the [guiding principles for the search for disappeared persons](#), principles 6 and 7. On the guiding principles, in general, see sect. V below.

³⁶⁶ A/73/56, para. 45.

³⁶⁷ *Ibid.*, para. 46.

³⁶⁸ *Ibid.*

³⁶⁹ A/74/56, para. 36. See sect. III.D.3(a) above.

EXAMPLES OF GOOD PRACTICE



"It also notes with satisfaction the establishment of the Specialized Immediate Search Unit in the Attorney General's Office of the State of Nuevo León."³⁷⁰

"On 9 October 2015, the Office of the Attorney General transformed the Disappeared Persons Unit into the Office of the Special Prosecutor for Disappeared Persons, thereby giving the Special Prosecutor greater powers to lead, coordinate and oversee efforts to search for and locate disappeared persons and, where applicable, to forensically identify them and prosecute individuals charged with disappearance-related offences. The Office of the Special Prosecutor collaborates with the offices of various special prosecutors and investigation units, in particular those affiliated with the Office of the Assistant Attorney General for the Investigation of Organized Crime."³⁷¹

"The Committee also welcomes the measures adopted by the State party to address issues related to the Convention, including: ... (e) The adoption of Act No. 971 of 2005, which regulates the Urgent Search Mechanism; (f) The adoption of Act No. 589 of 2000, which sets out the legal characterization of enforced disappearance and provides for the establishment of the Disappeared Persons Investigative Commission and the Urgent Search Mechanism."³⁷²

"The Committee welcomes the creation of a genetic databank for use in locating disappeared persons in Peru and of the Directorate General for the Search for Disappeared Persons."³⁷³

CHECKLIST

INFORMATION ON THE SEARCH FOR DISAPPEARED PERSONS AND EXHUMATION, IDENTIFICATION AND RETURN OF REMAINS TO BE PROVIDED IN STATES PARTIES' REPORTS

Provide information on the existence of or steps taken to:

- ✓ Establish mechanisms to conduct investigations, locate disappeared persons and, in the case of death, locate, respect and return their mortal remains to relatives.
- ✓ Establish protocols to handle and return mortal remains of disappeared persons to their families in accordance with international standards.
- ✓ Collect systematically ante-mortem data related to disappeared persons and their relatives and to set up national databases of DNA relevant to identify victims of enforced disappearance.
- ✓ Establish a mechanism to store the genetic material of disappeared persons and their relatives.

³⁷⁰ CED/C/MEX/CO/1, para. 40. However, the Committee noted with concern the numerous reports of the serious practical difficulties in tracing disappeared persons and identifying remains.

³⁷¹ CED/C/MEX/CO/1/Add.1, para. 29.

³⁷² CED/C/COL/CO/1, para. 4.

³⁷³ CED/C/PER/CO/1, para. 32. However, the Committee expressed concern about the limited progress made in searching for disappeared persons whose whereabouts were unknown and the potential difficulty of ensuring coordination between the Directorate General and the specialized forensic team of the Institute of Legal Medicine and Forensic Sciences.

Examples of recommendations



The Committee recommends that the State party intensify its efforts to search for, locate and release all disappeared persons and, in the event that they are found dead, to arrange for the dignified return of their remains. In particular, the State party should: (a) ensure in practice that, when a disappearance is reported, a search is initiated automatically, without delay; (b) ensure that the search is conducted by the competent authorities and that the relatives of the person concerned may take part in it if they so wish; (c) pursue its efforts to establish a genetic database to store genetic information on human remains that have been found so that it can be checked against the data of disappeared persons' relatives in order to facilitate their identification; (d) provide for effective coordination, cooperation and cross-checking of data between the agencies responsible for searching for disappeared persons and, in the event that such persons are found dead, for identifying their remains and returning them to their relatives.

In the light of article 24, paragraph 3, of the Convention, the State party should redouble its efforts to search for, locate and release disappeared persons and, in the event of death, locate, respect and return their remains. In particular, it should: (a) guarantee in practice that when news of a person's disappearance is received the search is initiated *ex officio* without delay in order to increase the chances of finding the person alive; (b) ensure that the search is conducted by the competent authorities with the involvement of the relatives of the person concerned; (c) strengthen the ante-mortem/post-mortem database, ensure that it is fully operational in all states as quickly as possible and guarantee that it contains the relevant information on all cases of disappeared persons, without exception, in strict conformity with the relevant protocols; (d) strengthen the genetic database of the Office of the Attorney General of the Republic to ensure that it contains information on all the persons that have disappeared in the State party; (e) guarantee effective coordination, cooperation and cross-referencing between the agencies responsible for searching for disappeared persons and for identifying their remains in the event of death, and ensure that they have the necessary economic, technical and human resources.

The Committee recommends that the State party continue and step up its efforts to locate any persons subjected to enforced disappearance during or after the dictatorship and whose fate is not yet known and, in the event of death, to identify and return their remains in a dignified manner. In particular, the Committee recommends that the State party: (a) continue its efforts with a view to ensuring efficient coordination, cooperation and cross-referencing of data between the agencies responsible for investigating enforced disappearances, searching for missing persons and identifying their remains in case of death; (b) ensure that the agencies responsible for searching for missing persons and identifying their remains in case of death have the financial and technical resources and qualified staff necessary to conduct their work promptly and effectively; (c) ensure that searches are conducted by the competent authorities with the active involvement of the relatives of the disappeared person, if they so request; (d) ensure that the search continues until the fate of the disappeared person has been established. This includes identification, preservation and protection of all sites where it is suspected that human remains of disappeared persons might be found.

In the light of article 24, paragraph 3, of the Convention, the Committee recommends that the State party continue and intensify its efforts within the framework of the Working Group on Missing Persons with a view to achieving further progress in the search for the missing persons and, in the event of death, the identification of their remains.

The State party should redouble its efforts in order to ensure that all persons who were forcibly disappeared and whose fate is not yet known are searched for and located without delay and that, in the event of death, their remains are identified, respected and returned. In this sense, it should also guarantee the effective coordination and cooperation between the authorities responsible for

searching for disappeared persons and identifying their remains in the event of death, and ensure that they have the necessary financial, technical and human resources to enable them to carry out their work promptly and effectively. In addition, the State party should adopt the measures necessary to ensure the swift entry into force of the amendment to the Protection of Mass Graves Act (Act No. 13 of 2015), as well as the effective implementation of the legislative framework concerning mass graves. The Committee recalls that, in the light of article 24 (6) of the Convention, the State party should ensure that investigations continue until the fate of the disappeared person has been clarified.

The Committee invites the State party to consider revising its legislation to ensure that, in a case of enforced disappearance, a declaration of death of a missing or disappeared person does not remove the obligation on the State party to continue its investigation pursuant to article 24 (3) and (6) of the Convention. The Committee invites the State party to establish a balance in its legislation between the need to clarify the legal situation and rights of the relatives of a missing or disappeared person and the interest and rights of that person, and specifically the obligation on the State party to continue its investigation.

The Committee recalls that the search for persons who have been the victims of enforced disappearance and efforts to clarify their fate are obligations of the State even if no formal complaint has been laid, and that relatives are entitled, *inter alia*, to know the truth about the fate of their disappeared loved ones. In this connection, the Committee recommends that the State party should adopt all the necessary measures, including the allocation of sufficient human, technical and financial resources, to search for and clarify the fate of disappeared persons. In the same connection, the State party should consider the possibility of setting up an *ad hoc* body responsible for searching for persons who were the victims of enforced disappearance and endowed with sufficient powers and resources effectively to perform its role.

(d) Measures of reparation

In its concluding observations on States parties' reports under article 29 of the Convention, the Committee has pointed out that they have an ongoing obligation to provide reparation for victims and to establish the truth regarding the circumstances of enforced disappearances.³⁷⁴ Reparation should be ensured for all persons defined as victims under article 24.³⁷⁵

The Committee has expressed its concern in situations in which it found that there was no comprehensive system of reparations that fully met the requirements of article 24 (4) and (5).³⁷⁶ According to the Committee, besides compensation and rehabilitation of health, such systems should include other reparative measures, such as restitution, rehabilitation, satisfaction, including restoration of dignity and reputation, and guarantees of non-repetition.³⁷⁷

³⁷⁴ CED/C/ARG/CO/1, para. 34.

³⁷⁵ See sect. III.F.1 above.

³⁷⁶ CED/C/CUB/CO/1, para. 31; CED/C/KAZ/CO/1, para. 27; CED/C/LTU/CO/1, para. 29; and CED/C/GAB/CO/1, para. 36.

³⁷⁷ CED/C/LTU/CO/1, para. 30; CED/C/PRT/CO/1, para. 25; CED/C/ALB/CO/1, para. 35; CED/C/FRA/CO/1, para. 35; CED/C/ESP/CO/1, para. 30; CED/C/NLD/CO/1, para. 33; CED/C/PRY/CO/1, para. 26; CED/C/ARM/CO/1, para. 27; CED/C/IRQ/CO/1, para. 32; CED/C/MNE/CO/1, para. 31; CED/C/SRB/CO/1, para. 26; CED/C/TUN/CO/1, para. 32; CED/C/BIH/CO/1, para. 38; and CED/C/JPN/CO/1, para. 40.

Working Group on Enforced or Involuntary Disappearances, thematic section of its 2011–2012 annual report on the issue of reparations for victims of enforced disappearance³⁷⁸

“A. Definition of reparation

48. ... The right to reparations is a well-established and basic human right, which is enshrined in universal and regional human rights treaties as well as in other international instruments. The Working Group considers that the scope of the right to reparation in customary law has been evolving over recent decades.
49. For the first time in international law, the right to reparation for acts of enforced disappearance has been enshrined in an international legally binding instrument, namely, the International Convention for the Protection of All Persons from Enforced Disappearance. ...

1. Reparation as a consequence of the violation of the victim’s rights

50. The Working Group notes that, in practice, measures intended to help relatives to cope with the consequences of the absence of the disappeared person are assimilated to measures of reparation. Everyone has the right to social security and the State has the duty to provide the family with the widest possible protection. Measures that provide for social assistance do not, however, prejudice the obligation of the State to provide reparation to victims as a consequence of the violation of their rights. In addition, social allowances and/or measures of reparation should not be made conditional on the requirement that the relatives of the disappeared person produce a death certificate. In its general comments on article 19 of the Declaration, 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.’

2. Definition of those with the right to obtain reparation

51. The Working Group does not differentiate between direct and indirect victims, but rather considers that both the disappeared person and those who have suffered harm as a result of the disappearance are to be considered victims of the enforced disappearance and are therefore entitled to obtain reparation. For the purposes of reparation, a broad definition of the victim, not linked to the establishment of the criminal liability and conviction of the accused, should be adopted.
52. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law define victims as persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

B. Forms of reparation in cases of enforced disappearance

53. The Working Group noted that, in a number of countries, reparation was interpreted exclusively in the form of compensation, namely, as a sum of money intended to compensate all forms of damages caused to victims. The Working Group has already explained, in its general comments on article 19 of the Declaration, however, that the obligation to provide redress

³⁷⁸ A/HRC/22/45, paras. 46–68.

to victims of enforced disappearance is not limited to the right to monetary compensation, but includes, inter alia, medical and psychological care and rehabilitation for any form of physical or mental damage as well as legal and social rehabilitation, guarantees of non-repetition, restoration of personal liberty and similar forms of restitution, satisfaction and reparation that may remove the consequences of the enforced disappearance.

54. The Working Group generally recommends the establishment of a national programme on reparations that includes compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition for all victims of human rights violations, including enforced disappearances. The Working Group also emphasizes that, within the scope of the right to reparation in the case of enforced disappearance, the family of the disappeared person has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person and, in the event of decease, that person's body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted.

1. Restitution

55. Restitution is the act of restoring the victim, to the extent possible, to the original situation before the violation was committed. In the case of enforced disappearance, these measures include recovery of identity, restoration of liberty or return to one's place of residence. The Working Group underlines that, as full restitution is normally not possible in the case of enforced disappearance owing to the irreversible nature of the harm suffered, other forms of reparation, such as compensation and rehabilitation, should complement restitution. Furthermore, it is important to emphasize that, even when restitution is possible, reparation measures to return the victim to the status quo ante may need to remedy and address prior situations of discrimination and/or vulnerability.

2. Compensation

56. The Working Group emphasizes that financial compensation is not sufficient in itself and should be normally associated with other forms of reparation. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law provide that compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law. Principle 20 also provides a list of what may be considered economically assessable damage: (a) physical or mental harm; (b) lost opportunities, including employment, education and social benefits; (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage; or (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
57. Compensation is an important element of the right to an effective remedy, particularly when restoring the victim to the situation *ex ante* is not possible, as is frequently the case in many international crimes, including enforced disappearance. The Working Group emphasizes that compensation should be full and 'adequate', namely, proportionate to the gravity of the human rights violation (such as the period of disappearance or the conditions of detention) and to the suffering of the victim and the family.
58. The Working Group also emphasizes that monetary compensation should be applied in a broad sense and must be given 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. The Working Group further

emphasizes the fact that, as civil responsibility of the State is generated by the seriousness of the crime of enforced disappearance, the passing of time should not be an obstacle for the progress of civil demands through the application of statutes of limitation.

3. Rehabilitation

59. Rehabilitation is an essential component of reparation. Article 19 of the Declaration refers to a 'as complete a rehabilitation as possible' for the victims of acts of enforced disappearance and their family. Rehabilitation measures and programmes should be established and be easily accessible for victims and their families.
60. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law provide that 'rehabilitation should include medical and psychological care as well as legal and social services'. The particular circumstances and needs of each victim must be taken into account when providing psychological or psychiatric treatment. The treatment may be individual, collective or a family one.
61. The Working Group also emphasizes that measures should be taken to ensure that members of families of disappeared persons are entitled to social benefits and other measures of social support irrespective of where they live, including health care, special education programmes and psychological assistance.

4. Satisfaction and guarantees of non-repetition

62. Of the above-mentioned Basic Principles and Guidelines, principle 22, on measures of satisfaction, makes specific reference to a measure relating to enforced disappearance, namely, 'the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities'. The Working Group emphasizes that the search for the truth, including the obligation to investigate the facts and to identify, prosecute and, where appropriate, punish those responsible, is also a form of satisfaction for the victims. It also emphasizes that procedural rights to an investigation, to truth and to justice are equally central to victims' perceptions of reparation. Indeed, in some instances, the truth and justice process may in itself constitute a form of reparation.
63. Other forms of satisfaction for victims of enforced disappearance and their families include a judicial decision or an official declaration restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; a public apology, including acknowledgement of the facts and acceptance of responsibility, for instance through a public ceremony or act; and commemorations and tributes to the victims. Specific measures relating to enforced disappearance may include the creation of specialized units to carry out the investigation of complaints of serious human rights violations, including enforced disappearances; the elaboration of a protocol for the collection and identification of the bodily remains; the creation of psychosocial assistance programme for individuals who are found and their relatives, and for the relatives of those who remain disappeared; and public access to State files and archives containing relevant information.
64. The Working Group considers that the establishment of memorial sites and monuments contributes to the collective social recognition of violations that have occurred, as well as to the rejection and repudiation of these violations which could also serve as a preventive measure.

The Working Group emphasizes that States should adopt a comprehensive legal framework for reparation programmes, including the issue of memorials, with a view to avoiding re-victimization and further violations of the right to dignity. Legislation should set out the criteria and the process for the establishment of such memorials, taking into account the potential controversies that may arise out of conflicting memories from different groups in society. The establishment and maintenance of memorial sites is a responsibility of the State, with the close participation of the relatives of the disappeared and other parties concerned.

65. With regard to guarantees of non-repetition, there are measures that should be taken to prevent future recurrence of enforced disappearances. Principle 23 (e) of the above-mentioned Basic Principles and Guidelines refers to various possible guarantees of non-repetition, such as providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces; promoting mechanisms for preventing and monitoring social conflicts and their resolution; and reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law. The introduction of specific protocols and safeguards and the promotion of judicial or security sector reforms are other important measures of non-repetition. The Working Group further emphasizes that the full realization of the right to truth and justice are essential elements to ensure non-repetition.

C. Individual and collective reparations

66. The Working Group welcomes the growing recognition in international human rights law that reparations may be awarded on both an individual and a collective basis. Individual and collective reparations may be granted concurrently and they do not exclude each other, given that both their essence and purpose are different. Collective reparations respond to collective harm or harm to society as a whole. Public apology or acceptance of responsibility as well as the construction of monuments or memorials for victims of enforced disappearance are possible forms of collective reparation.

D. Gender perspective and culturally sensitive reparations

67. The Working Group emphasizes that both a gender-sensitive as well as culturally-sensitive approach should be taken in the determination of the forms and modalities of reparations. The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation in particular provides gender specific considerations with respect to the formulation and implementation of reparations, emphasizing additional aspects of importance of the process of obtaining reparations, including removing possible barriers for them to claim their rights and to access to justice. The Declaration highlights the fundamental importance of a consultative process, which empowers women themselves to determine what forms of reparation are best suited to their situation. Special measures should be taken to empower women and enable their participation in all stages of the reparation process affecting them. The Working Group also emphasizes that reparation measures need to take into account many factors, in particular the victims' perspective and the circumstances of the case, given that what might be an appropriate reparation measure in one case may be inappropriate or even counterproductive in another.
68. The Working Group further stresses that access to reparation must be ensured in a culturally sensitive manner. Information on reparation processes and measures should be facilitated in local languages, if necessary, and the design of reparation plans or mechanisms should be designed with the participation of the communities affected, taking into account their needs. The Working Group also emphasizes that the provision of social services for victims should not be confused with their right to obtain reparation." (Footnotes omitted.)

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

“IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.
16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.
17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.
18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.
20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
 - (a) Physical or mental harm;
 - (b) Lost opportunities, including employment, education and social benefits;
 - (c) Material damages and loss of earnings, including loss of earning potential;
 - (d) Moral damage;
 - (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.
22. *Satisfaction* should include, where applicable, any or all of the following:
 - (a) Effective measures aimed at the cessation of continuing violations;
 - (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
 - (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
 - (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
 - (e) Public apology, including acknowledgement of the facts and acceptance of responsibility;
 - (f) Judicial and administrative sanctions against persons liable for the violations;
 - (g) Commemorations and tributes to the victims;
 - (h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.
23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:
 - (a) Ensuring effective civilian control of military and security forces;
 - (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
 - (c) Strengthening the independence of the judiciary;
 - (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
 - (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
 - (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
 - (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
 - (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

X. Access to relevant information concerning violations and reparation mechanisms

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access. Moreover, victims and their representatives should be

entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

XI. Non-discrimination

25. The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.”

See also:

- Working Group, general comment on article 19 of the Declaration ([E/CN.4/1998/43](#), paras. 68–75)
- [Updated set of principles for the protection and promotion of human rights through action to combat impunity](#), principles 31–34
- Working Group, study on enforced or involuntary disappearances and economic, social and cultural rights ([A/HRC/30/38/Add.5](#))
- Working Group, general comment on children and enforced disappearances ([A/HRC/WGEID/98/1](#))
- Working Group, general comment on women affected by enforced disappearances ([A/HRC/WGEID/98/2](#))
- Working Group, report on enforced disappearances in the context of migration ([A/HRC/36/39/Add.2](#))
- Committee against Torture, [general comment No. 3 \(2012\)](#)
- Reports of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence:
 - Report to the General Assembly on reparations for gross human rights violations and serious violations of international humanitarian law ([A/69/518](#))
 - Report to the Human Rights Council on guarantees of non-recurrence ([A/HRC/30/42](#))
 - Report to the Human Rights Council on practical experiences of domestic reparation programmes ([A/HRC/42/45](#))
 - Report to the General Assembly on apologies for gross human rights violations and serious violations of international humanitarian law ([A/74/147](#))

The Committee has expressed its concern in situations in which compensation for enforced disappearance could only be secured through civil proceedings and in which relatives had to initiate proceedings to declare a disappeared person dead in order to receive pension rights or compensation.³⁷⁹ It has also found problematic the application of a high threshold to prove harm in civil proceedings, as well as other obstacles that could hinder the effective access of victims to reparation and prompt and adequate compensation.³⁸⁰

³⁷⁹ [CED/C/MNE/CO/1](#), para. 30; and [CED/C/SRB/CO/1](#), para. 25.

³⁸⁰ [CED/C/SRB/CO/1](#), para. 25; and [CED/C/PER/CO/1](#), para. 28.



The Committee has also insisted that the non-applicability of statutory limitations for civil actions for damages arising from enforced disappearances must be enshrined in domestic law.³⁸¹

The Committee has expressed its concern about a situation in which a State party did not have systematic statistics on reparations granted to victims, particularly in recent cases of enforced disappearance.³⁸²

Various international and regional human rights bodies have made important pronouncements on the different forms of reparation to be granted to victims of enforced disappearance.³⁸³

EXAMPLES OF GOOD PRACTICE



“The Committee expresses its satisfaction concerning article 14 of Act No. 18026, which stipulates that the State shall be responsible for making reparation to victims of the offences defined in the Act, including enforced disappearances”³⁸⁴

“The Committee also takes note with satisfaction of the information provided by the delegation about the special legal regime that was set up in Germany to grant reparations for victims of past atrocities and the affirmation that, since enforced disappearances are committed with the involvement of State agents, compensation would be the responsibility of the State (federal or *Länder*, depending on the case). It also

³⁸¹ CED/C/CHL/CO/1, para. 25.

³⁸² CED/C/ARG/CO/1, para. 36.

³⁸³ Among many others, Human Rights Committee (*Kandel and Kandel v. Nepal* (CCPR/C/126/D/2560/2015); *Cifuentes Elgueta v. Chile* (CCPR/C/96/D/1536/2006) (dissenting opinion of Ms. Helen Keller and Mr. Fabián Salvioli); *Boucherf v. Algeria*; *Molina et al. v. Colombia* (CCPR/C/114/D/2134/2012); and *Ičić v. Bosnia and Herzegovina* (CCPR/C/113/D/2028/2011)); European Court of Human Rights (*Janowiec and others v. Russia*, application Nos. 55508/07 and 29520/09, Judgment, 21 October 2013); and Inter-American Court of Human Rights (*Río Negro Massacres v. Guatemala*, Judgment, 4 September 2012; *Radilla-Pacheco v. Mexico*; and *Gelman v. Uruguay*).

³⁸⁴ CED/C/URY/CO/1, para. 31.

welcomes the additional information provided by the State party after the dialogue in relation to the different forms of compensation and reparation available under German law."³⁸⁵

"The Committee welcomes the adoption of the Victims Act which, among other things, provides full reparation for victims of crimes and human rights violations and establishes that a person may be considered a victim regardless of whether the person responsible for the harm has been identified, apprehended or convicted or involved in any judicial or administrative proceeding. The Committee also welcomes the establishment of the Executive Commission for Victim Support to give effect to the broad rights of victims guaranteed under the law."³⁸⁶

"The Committee welcomes the various initiatives taken by the State party to address the human rights violations, in particular the enforced disappearances, that occurred during the communist period from 1944 to 1991. The Committee observes that the State party has taken measures to compensate victims and their families, and has set up specific institutions to study and identify political persecution by the communist regime, and to raise public awareness in that regard. The Committee notes that the State party has created a Disappeared Persons Section within the Institute for Integration of the Former Politically Persecuted, which is mainly tasked with finding persons subjected to enforced disappearances during the communist regime, in particular by collecting evidence and information on the victims, and by exhuming human remains. The Committee welcomes the negotiation of an agreement with the International Commission on Missing Persons."³⁸⁷

"The Committee welcomes the adoption of Act No. 1448 of 2011, which provides for a series of measures to ensure full reparation for the victims of the internal armed conflict, including victims of enforced disappearance. It also welcomes the enormous efforts made by the State party to implement these measures."³⁸⁸

"The Committee welcomes the establishment of the National Centre for Historical Memory (Act No. 1448 of 2011, art. 146) and, in particular, the Centre's activities in connection with enforced disappearance, as it considers that these activities contribute to the realization of the rights to the truth and to reparation for the victims of enforced disappearance"³⁸⁹

"The Committee welcomes the information on the various mechanisms for obtaining reparation that exist in the State party and are available to victims of enforced disappearance. The Committee also notes that the State party has set up a High Council for Reconciliation and National Unity, which is specifically mandated to receive and address complaints concerning human rights violations committed in the past, with a view to providing reparation, and that the High Council has identified approximately 5,000 such cases"³⁹⁰

³⁸⁵ CED/C/DEU/CO/1, para. 24.

³⁸⁶ CED/C/MEX/CO/1, para. 38. However, the Committee expressed its concern that the Act had not been fully implemented, in particular at the state level.

³⁸⁷ CED/C/ALB/CO/1, para. 36. However, the Committee expressed its regret that the State party had not carried out investigations, with a view to identifying and prosecuting those responsible and to providing all forms of reparation to victims and their families, in accordance with article 24 of the Convention.

³⁸⁸ CED/C/COL/CO/1, para. 35. Nevertheless, the Committee regretted that it had not received sufficient information on the reparation measures provided for in the State party's legislation for victims of enforced disappearance who were not covered by Act No. 1448 of 2011.

³⁸⁹ CED/C/COL/CO/1, para. 33.

³⁹⁰ CED/C/BFA/CO/1, para. 37.

CHECKLIST

INFORMATION ON REPARATIONS FOR VICTIMS TO BE PROVIDED IN STATES PARTIES' REPORTS

Provide information on:

- ✓ Procedures in place for obtaining compensation and reparation for victims, whether these procedures are codified or in any way formalized and how victims are consulted in the design of reparations for them.
- ✓ Which kinds of reparation are provided to victims and whether they comprise compensation, restitution, rehabilitation, satisfaction, including restoration of dignity and reputation, or guarantees of non-repetition.
- ✓ Measures taken to ensure that the reparations provided are gender sensitive and transformative. Include information on the protection measures in place for relatives of victims who are left behind and may face an increased risk of sexual- and gender-based violence.
- ✓ Rehabilitation programmes for victims of enforced disappearance.

Examples of recommendations



The State party should guarantee the right to reparation (including medical and psychological rehabilitation, restitution and satisfaction, including restoration of dignity and reputation) and to prompt, fair and adequate compensation of all persons who have suffered harm as a direct result of an enforced disappearance, regardless of when it was perpetrated and even if no criminal proceedings have been opened against the potential perpetrators or the latter have not been identified.

The Committee recommends that the State party: (a) continue its efforts to ensure that all persons who have suffered harm as the direct result of enforced disappearances perpetrated during the dictatorship, including victims who were not recognized as such by the truth commissions, receive full reparation; (b) ensure that the institutions dealing with reparation, including symbolic reparation, have adequate financial and technical resources and qualified staff. The Committee also encourages the State party to reflect in its legislation the position adopted by the Supreme Court with respect to the non-applicability of statutory limitations to civil actions for damages arising from enforced disappearances; or, if a statute of limitations is applied in respect of civil actions of that kind, the Committee recommends that the State party take the necessary steps to ensure, by means of its legislation, that the term of limitation is of long duration and commences from the moment when the enforced disappearance ceases.

The Committee recommends that the State party ensure that in all circumstances it will take all the appropriate measures at its disposal to guarantee that victims of enforced disappearance can effectively enjoy their right to obtain full reparation in accordance with article 24 of the Convention.

The Committee recommends that the State party take the necessary measures to: (b) Ensure that all victims of enforced disappearance have access to full reparation and that all obstacles and restrictions hindering their registration in the Comprehensive Reparations Programme are eliminated; (c) Ensure that the system for awarding reparations takes into account the personal circumstances of the victims, such as their sex, sexual orientation, gender identity, age, ethnic origin, social status and disability, and is fully in line with the provisions of article 24 (4) and (5).

The State party should also guarantee that any person who has suffered harm as a direct result of an enforced disappearance obtains reparation in accordance with article 24 (5) of the Convention and prompt, fair and adequate compensation, even if no criminal proceedings have been brought against the potential perpetrators or the latter have not been identified. In this respect, the State party should establish a comprehensive system of reparation that is fully in line with article 24 (4) and (5) of the Convention and other relevant international standards and guarantee that any measures taken in respect of the rights of victims are gender sensitive and take into account the special situation of children affected by enforced disappearances.

The State party should guarantee the right to reparation and to prompt, fair and adequate compensation of all persons who have suffered harm as a direct result of an enforced disappearance, regardless of their nationality. To this effect, the Committee recommends that the State party adopt the necessary measures, including revision of the Victims Act, to guarantee that its domestic legislation provides for a comprehensive system of compensation and reparation that complies fully with article 24 (4) and (5) of the Convention and other relevant international standards, for which the State is responsible; that is applicable, even if no criminal proceedings have been initiated; and that is sensitive to the victims' individual characteristics, taking into account, for instance, their sex, sexual orientation, gender identity, age, ethnic origin, social status and disability.

The Committee also recommends that the State party should take measures to broaden forms of reparation, in particular restitution, rehabilitation, satisfaction and guarantees of non-repetition, in accordance with article 24, paragraph 5, of the Convention.

The Committee recommends that the State party consider extending the competence of the Commission for Financial Support for the Victims of Deliberate Acts of Violence, including enforced disappearances, to acts that take place in other countries but that are prosecuted or have effects in Belgium.

The Committee encourages the State party to redouble its efforts to effectively shed light on enforced disappearances that took place during the communist regime, in particular regarding the fate and the whereabouts of the disappeared persons, and to consider investigating such crimes, prosecuting those responsible and providing all forms of reparation to the victims and their families, in accordance with article 24 of the Convention.

The Committee recommends that the State party continue to take account of the programmes, reports and recommendations of the National Centre for Historical Memory in connection with enforced disappearances and continue to support the Centre's work, in particular by ensuring that it has sufficient resources to carry out its mandate effectively.

The Committee recommends that the State party should collect statistics on reparations granted to victims of enforced disappearance, as a tool for improving the reparation measures.

Recommendations of the Committee in *Yrusta and Del Valle Yrusta v. Argentina*

"12. In accordance with article 31 (5) of the Convention, the Committee urges the State party to: ... (d) Provide the authors with rehabilitation and prompt, fair and adequate compensation, in accordance with article 24 (4) and (5) of the Convention; (e) Adopt all necessary measures to enforce the guarantees of non-repetition stipulated in article 4 (5) (d) of the Convention"

(e) Legal situation of disappeared persons and their relatives

According to the Committee, under article 24 of the Convention, all States parties have an obligation to regulate the legal situation of disappeared persons and their relatives. The fact that there are no known cases of enforced disappearance in the State party concerned does not relieve them from this obligation.³⁹¹

The Committee has expressed its concern about situations in which States parties' domestic legislation did not fully address the status and legal situation of disappeared persons whose fate had not been clarified and that of their relatives, in fields such as social welfare.³⁹² The Committee recommends that States parties adequately deal with the legal situation of such victims without having to declare the disappeared person dead and set up a procedure to obtain a declaration of absence as a result of enforced disappearance.³⁹³

The Committee considers that, as a matter of principle, in cases involving enforced disappearance, domestic legislation should not presume the death of disappeared persons until their fates have been established with certainty.³⁹⁴ The Committee holds that a declaration of absence with a presumption of death as a means of establishing the legal situation of persons who have disappeared does not adequately reflect the complexity of the phenomenon of enforced disappearance.³⁹⁵ Instead, States parties should introduce in their domestic legal framework a declaration of absence due to enforced disappearance. The Committee considers that, bearing in mind the continuous nature of enforced disappearance, in principle, and unless specific evidence shows otherwise, there is no reason to presume the death of disappeared persons until their fates have been determined.³⁹⁶

Besides, the Committee has observed that, in practice, the issuance of a declaration of death may effectively result in the termination of the search for the disappeared person, which would be incompatible with the obligations imposed upon States parties under the Convention to continue the search until the fate of the disappeared person is clarified.³⁹⁷

The Committee has also expressed its concern about situations in which civil law required that disappeared persons be presumed to have died even if their fates have not been clarified and that a long period of time needed to have elapsed since their disappearances in order to regularize the situations of their family members in fields such as social welfare, financial matters, family law and property rights.³⁹⁸

³⁹¹ CED/C/DEU/CO/1, para. 27.

³⁹² CED/C/LTU/CO/1, para. 31; CED/C/GAB/CO/1, para. 38; CED/C/SEN/CO/1, para. 39; CED/C/MEX/CO/1, para. 42; CED/C/SRB/CO/1, para. 29; CED/C/MNE/CO/1, para. 32; and CED/C/SVK/CO/1, para. 26.

³⁹³ CED/C/SVK/CO/1, para. 27.

³⁹⁴ CED/C/NLD/CO/1, para. 34; CED/C/PRY/CO/1, para. 29; CED/C/JPN/CO/1, para. 42; CED/C/IRQ/CO/1, para. 35; and CED/C/MNE/CO/1, para. 32. See also the [guiding principles for the search for disappeared persons](#), principle 1. On the guiding principles, in general, see sect. V below.

³⁹⁵ CED/C/PRY/CO/1, para. 29; CED/C/BOL/CO/1, para. 36; CED/C/HND/CO/1, para. 39; CED/C/IRQ/CO/1, para. 36; CED/C/DEU/CO/1, para. 26; CED/C/SVK/CO/1, para. 26; and CED/C/ECU/CO/1, para. 21.

³⁹⁶ CED/C/CUB/CO/1, para. 33; CED/C/ECU/CO/1, para. 21; CED/C/PRY/CO/1, para. 29; CED/C/BOL/CO/1, para. 36; CED/C/HND/CO/1, para. 39; CED/C/IRQ/CO/1, para. 35; and CED/C/DEU/CO/1, para. 26.

³⁹⁷ CED/C/BFA/CO/1, para. 39. See sect. III.D.3(a) above. See also the [guiding principles for the search for disappeared persons](#), principles 1 and 7. On the guiding principles, in general, see sect. V below.

³⁹⁸ CED/C/JPN/CO/1, para. 41.

Working Group on Enforced or Involuntary Disappearances, general comment on the right to recognition as a person before the law in the context of enforced disappearances³⁹⁹

“2. Enforced disappearances entail the denial of the disappeared person’s legal existence and, as a consequence, prevent him or her from enjoying all other human rights and freedoms. The disappeared person may keep his or her name, at least when the birth has been registered (and except in cases when the true identity of children, who have been taken away from their parents, is falsified, concealed or destroyed), but he/she is not shown in the record of detainees; neither is the name kept in the registers of deaths. The disappeared is de facto deprived of his or her domicile. His/her properties become frozen in a legal limbo since no one, not even the next-of-kin, may dispose of that patrimony until the disappeared appears alive or is declared dead, that is a ‘non-person’.

...

4. Even if the right to recognition as a person before the law is extinguished on the death of the disappeared person, its effects may last beyond his/her death, in particular with all matters related to inheritance. In addition, as the Working Group stated in its General Comment on Enforced Disappearance as a Continuous Crime, ‘[e]ven though the conduct violates several rights, including the right to recognition as a person before the law, (...) the Working Group considers that an enforced disappearance is a unique and consolidated act, and not a combination of acts’ with the consequence that ‘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’. The violation of the right to recognition as a person before the law therefore lasts until the disappearance ends, that is to say when the fate or the whereabouts of the person have been determined.
5. Enforced disappearances also entail violations of the rights of other persons, including the next-of-kin and others connected to the disappeared persons. Family members are prevented to exercise their rights and obligations due to the legal uncertainty created by the absence of the disappeared person. This uncertainty has many legal consequences, among others on the status of marriage, guardianship of underage children, right to social allowances of members of the families and management of property of the disappeared person.
6. The Working Group considers that the right to be recognized as a legal person entails the obligation of the State to fully recognize the legal personality of disappeared persons and thus respect the rights of their next-of-kin and as well as others.
7. For that reason, most domestic legal systems have institutions designed to deal with the impossibility of ascertaining a person’s death. Some States allow the issuance of a ‘presumption of death’, others of a ‘declaration of absence’. Some other States, which have been confronted in the past with a systematic or massive practice of enforced disappearance, have specifically created the notion of ‘certificate of absence by reason of forced disappearance’ (see in particular the Working Group’s study on Compensation, presumption of death and exhumation, in E/CN.4/1998/43, p. 9 sq).

³⁹⁹ A/HRC/19/58/Rev.1, para. 42.

8. The basis for such an acknowledgement should take the form of a 'declaration of absence by reason of enforced disappearance', to be issued, with the consent of the family, by a State authority after a certain time has elapsed since the disappearance, in any case no less than one year.
9. Such a declaration should allow the appointment of a representative of the disappeared person, with the mandate to exercise his/her rights and obligations for the duration of his/her absence, in his/her interests and those of his/her next-of-kin. The latter should be allowed to manage temporarily the disappeared person's properties, for as long as the enforced disappearance continues, and to receive due assistance from the State through social allowances. In most cases, the disappeared persons are men and were the family breadwinners and special social support should be provided to dependent women and children. The acceptance of financial support for members of the families should not be considered as a waiver of the right to integral reparation for the damage caused by the crime of enforced disappearance, in accordance with article 19 of the Declaration.
10. In parallel to the issuance of a system of declaration of absence as a result of enforced disappearance, States should continue to investigate all cases to determinate the fate and the whereabouts of the disappeared and to ensure accountability of those responsible for the commission of enforced disappearances. That is, such declaration should not interrupt or close the investigations to determine the fate or the whereabouts of the victim, but should allow his/her next-of-kin to exercise on their behalf certain rights.
11. The Working Group is committed to preserve and safeguard the right to recognition as a person in the implementation of its mandate. As the legal personality of the disappeared person is denied at the domestic level, the humanitarian mandate implemented by the Working Group should be understood as an international guarantee of this right."

See also:

- Working Group, thematic section in its annual report on the issue of reparation for victims of enforced disappearance ([A/HRC/22/45](#), paras. 46–68)
- Working Group, study on enforced or involuntary disappearances and economic, social and cultural rights ([A/HRC/30/38/Add.5](#))

EXAMPLES OF GOOD PRACTICE



"The Committee takes note of Act No. 24321, which provides for the possibility of declaring absence by reason of enforced disappearance for persons who disappeared up to 10 December 1983."⁴⁰⁰

"The Committee notes with appreciation that Act No. 20377 envisages the possibility of declaring absence due to enforced disappearance in relation to enforced disappearances perpetrated during the dictatorship."⁴⁰¹

"The Committee notes with satisfaction the adoption of Act No. 1531 of 2012, which establishes the procedure for declaring a person missing as a result of enforced disappearance or other forms of involuntary disappearance."⁴⁰²

⁴⁰⁰ CED/C/ARG/CO/1, para. 38. However, the Committee regretted the fact that that declaration did not extend to enforced disappearances that occurred after 10 December 1983.

⁴⁰¹ CED/C/CHL/CO/1, para. 28.

⁴⁰² CED/C/COL/CO/1, para. 37. However, the Committee expressed its concern about reports that the relatives of disappeared persons and the authorities that were required to apply the procedure had limited knowledge of it.

“... while the Committee notes with interest the commitment by the National Conference of Governors to promote the necessary legislative reforms [related to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives], it observes that thus far only two states, Coahuila and Querétaro, have defined absence due to disappearance as a legal concept”⁴⁰³

CHECKLIST

INFORMATION ON THE LEGAL STATUS OF DISAPPEARED PERSONS AND THEIR FAMILIES TO BE PROVIDED IN STATES PARTIES' REPORTS

Provide information on:

- ✓ The existence of, or steps taken to establish, procedures to recognize the legal status of a disappeared person and the issuance of legal documents, preferably declarations of absence due to enforced disappearance and not declarations of death, which can allow the relatives of the disappeared person to solve issues relating to social welfare, financial matters, family law and property rights.
- ✓ The measures taken to ensure access to the procedures in place to settle the legal status of disappeared persons and the issuance of legal documents that include a gender- and child-sensitive approach.

Examples of recommendations



The Committee recommends that the State party address appropriately the legal situation of disappeared persons and that of their relatives in areas such as social care, financial matters, family law and property rights.

The Committee encourages the State party to take the steps necessary to ensure that legislation establishes a procedure whereby a declaration of absence due to enforced disappearance may be obtained irrespective of the date on which the disappearance began, in order to ensure that the legal situation of disappeared persons whose fate has not been clarified and that of their families is appropriately regulated.

The Committee invites the State party to consider reviewing its legislation, with a view to incorporating specific legal provisions establishing a procedure to obtain a declaration of absence by reason of enforced disappearance that adequately address the legal situation of disappeared persons and that of their relatives in areas such as social welfare, financial matters, family law and property rights.

The Committee recommends that the State party adopt the necessary legislative measures with a view to setting up a procedure to obtain a declaration of absence as a result of enforced disappearance, in order to adequately address the legal situation of disappeared persons and that of their relatives in areas such as social welfare, financial matters, family law and property rights.

In the light of article 24 (6) of the Convention, the Committee recommends that the State party adopt the measures necessary to review its domestic legislation in order to ensure that it deals appropriately with the legal situation of disappeared persons whose fate has not been clarified and that of their relatives in fields such as social welfare, financial matters, family law and property

⁴⁰³ CED/C/MEX/CO/1, para. 42.

rights, without having to declare the disappeared person dead. In this respect, the Committee encourages the State party to set up a procedure to obtain a declaration of absence as a result of enforced disappearance.

The Committee recommends that the State party should adopt the necessary measures to recognize the right of families of persons who disappeared to request a declaration of absence by reason of enforced disappearance.

The Committee recommends that the State party take the necessary measures to ensure the timely and effective implementation of the existing legal provisions regarding the legal situation of disappeared persons whose fate has not been clarified and that of their relatives. In this regard, it recommends that the State party strengthen outreach campaigns and provide specific training on a regular basis to the relevant authorities concerning the procedure for declarations of absence by reason of enforced disappearance under Act No. 1531 of 2012 and its compatibility with other relevant mechanisms, such as the protection mechanisms provided for in Act No. 986 of 2005.

(f) Right to form and participate freely in associations dealing with enforced disappearance

The Committee has expressed concerns about reports of alleged persecution of and threats against relatives of victims of enforced disappearance and human rights defenders working to assist victims and public discreditation of such organizations by State agents.⁴⁰⁴

It has also expressed concerns about situations in which States parties have failed to put in place effective protection measures to address allegations concerning acts of harassment, intimidation, attacks and threats by private persons against victims and their relatives and defence counsel.⁴⁰⁵

The Committee works closely with associations of victims' families.⁴⁰⁶ It has encouraged States parties to promote and facilitate the participation of civil society, in particular associations of victims' families, in the dissemination of and follow-up to its concluding observations.⁴⁰⁷

CHECKLIST

INFORMATION ON THE RIGHTS OF VICTIMS TO FORM AND PARTICIPATE FREELY IN ASSOCIATIONS DEALING WITH ENFORCED DISAPPEARANCE TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Provide information on the existing legislation and administrative procedures that guarantee the rights of victims to form and participate in associations concerned with enforced disappearance, including measures in place to ensure participation in gender- and child-sensitive manners.
- ✓ Specify whether there are processes in place to ensure that associations of victims' families are consulted and their views taken into account in the drafting of relevant legislation.

⁴⁰⁴ CED/C/MEX/CO/1, para. 30.

⁴⁰⁵ CED/C/COL/CO/1, para. 27; CED/C/HND/CO/1, para. 26; and CED/C/PER/CO/1, para. 20.

⁴⁰⁶ Committee, *working methods*, paras. 33 and 35, and rules of procedure (CED/C/1), rules 44 and 52.

⁴⁰⁷ CED/C/MEX/CO/1, para. 48; CED/C/FRA/CO/1, para. 43; CED/C/ARG/CO/1, para. 45; CED/C/URY/CO/1, para. 39; CED/C/COL/CO/1, paras. 43 and 45; CED/C/PRY/CO/1, para. 35; CED/C/ARM/CO/1, para. 34; CED/C/IRQ/CO/1, para. 41; CED/C/MNE/CO/1, paras. 38 and 40; CED/C/LTU/CO/1, para. 35; CED/C/PER/CO/1, para. 38; and CED/C/SRB/CO/1, paras. 35 and 37.

Examples of recommendations



The State party should ensure in particular that all State agents refrain from making public statements that could discredit, stigmatize or endanger the relatives of disappeared persons or human rights defenders working to combat enforced disappearances and to assist victims.

The Committee recommends that the State party increase its efforts to prevent and punish any acts of intimidation and ill-treatment of relatives of disappeared persons, persons having submitted complaints of acts of enforced disappearance, human rights defenders assisting the victims and persons participating in the investigation of an enforced disappearance.

2. ENFORCED DISAPPEARANCE AND WRONGFUL REMOVAL OF CHILDREN (ART. 25)

- “1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:
 - (a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;
 - (b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a) above.
2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) of this article and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.
3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a) of this article.
4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) of this article and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.
5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.”



According to the Committee, the implementation of article 25 (1) requires the existence of specific provisions in domestic legislation (criminal, civil and administrative). Consequently, in reviewing States parties' reports under article 29 of the Convention, the Committee has expressed its concern about the absence of provisions in domestic legislation specifically criminalizing the conduct referred to in article 25 (1).⁴⁰⁸

The Committee has observed that the existence of related crimes in domestic legislation, such as abduction, trafficking and forging documents,⁴⁰⁹ or crimes against the interests of the family and the child,⁴¹⁰ is not sufficient to comply with the obligations incumbent upon States parties under article 25. Additionally, article 7 of the Convention specifies that the fact that the disappeared person is a minor can be an aggravating circumstance.⁴¹¹

The Committee has insisted that, apart from criminalizing the act of wrongful removal of children, States parties' legislation must also contain a specific provision making it possible to prevent or punish, under its criminal law, the falsification, concealment or destruction of documents attesting to the true identity of the children concerned.⁴¹²

The Committee has expressed concerns about situations in which there were neither specific programmes to help adults who believed that they were the children of disappeared parents to have their true identities re-established nor procedures to ensure that families had the right to search for children and

⁴⁰⁸ CED/C/FRA/CO/1, para. 36; CED/C/URY/CO/1, para. 33; CED/C/DEU/CO/1, para. 28; CED/C/PRT/CO/1, para. 26; CED/C/IRQ/CO/1, para. 37; CED/C/MEX/CO/1, para. 44; CED/C/MNE/CO/1, para. 34; CED/C/BIH/CO/1, para. 39; CED/C/COL/CO/1, para. 39; CED/C/KAZ/CO/1, para. 31; CED/C/ALB/CO/1, para. 38; CED/C/CUB/CO/1, para. 35; CED/C/GAB/CO/1, para. 40; CED/C/SEN/CO/1, para. 41; CED/C/JPN/CO/1, para. 43; CED/C/BOL/CO/1, para. 40; CED/C/PER/CO/1, para. 34; CED/C/AUT/CO/1, para. 24; and CED/C/CHL/CO/1, para. 30.

⁴⁰⁹ CED/C/SRB/CO/1, para. 31; and CED/C/TUN/CO/1, para. 33.

⁴¹⁰ CED/C/ARM/CO/1, para. 28.

⁴¹¹ See sect. III.C.7(b) above.

⁴¹² CED/C/BFA/CO/1, para. 42; CED/C/GAB/CO/1, para. 41; and CED/C/SEN/CO/1, para. 42.

adolescents victims of enforced disappearance.⁴¹³ In this respect, the Committee has insisted on the importance of the obligation of States parties to regulate, in their domestic legislation, the gathering and conservation of and access to information on the origin of adopted children.⁴¹⁴

Furthermore, the Committee has affirmed that States parties are obliged under article 25 to envisage in their domestic legislation specific procedures for the review and, where appropriate, the annulment of adoptions or placements that originated in an enforced disappearance.⁴¹⁵

The Committee has expressed concerns in instances in which the fate and whereabouts of child victims of enforced disappearance were not clarified after the elapse of significant time from the date of their alleged removal.⁴¹⁶ In commenting on the effectiveness of States parties' responses to the allegations of wrongful removal of children, the Committee has taken note of the gap between the number of complaints received and the limited number of genetic samples entered in the national DNA bank.⁴¹⁷ In order to fulfil international obligations pursuant to article 25 of the Convention, States parties must set up and adequately maintain genetic and forensic databases to facilitate the identification of disappeared children.⁴¹⁸

The Committee has expressed its concern about the risk of enforced disappearance of unaccompanied children from asylum reception centres, in situations in which reports indicated that a large number of children had left publicly run reception centres without a trace.⁴¹⁹

The Committee has observed that children under 4 years of age at the time of their disappearance are particularly vulnerable.⁴²⁰ It has also held that children who might have been born in captivity and survived are particularly vulnerable to becoming victims of identity substitution.⁴²¹



UN Photo/Tobin Jones

⁴¹³ CED/C/HND/CO/1, para. 42; CED/C/JPN/CO/1, para. 43; and CED/C/PER/CO/1, para. 34.

⁴¹⁴ CED/C/BEL/CO/1, para. 29.

⁴¹⁵ CED/C/URY/CO/1, para. 35; and CED/C/NLD/CO/1, para. 39.

⁴¹⁶ CED/C/BIH/CO/1, para. 39.

⁴¹⁷ CED/C/ESP/CO/1, para. 34.

⁴¹⁸ Ibid., para. 35; and CED/C/HND/CO/1, para. 43.

⁴¹⁹ CED/C/NLD/CO/1, para. 36.

⁴²⁰ CED/C/COL/CO/1, para. 39.

⁴²¹ CED/C/CHL/CO/1, para. 30.

Committee on Enforced Disappearances, *guiding principles for the search for disappeared persons*⁴²²

“Principle 4. The search should follow a differential approach

...

3. In cases involving adolescent girls and women who have disappeared or are involved in the search, all stages of the search should be conducted with a gender perspective and staff, including female staff, who have received proper training.

...

Principle 8. The search should be conducted on the basis of a comprehensive strategy

...

8. The comprehensive search strategy for newborn and very young children should take into account the fact that their identity documents may have been altered and that they may have been taken from their families, given a false identity and handed over to a children’s institution or another family for adoption. These children and adolescents, who may by now be adults, should be searched for, identified and have their identity restored.”

Working Group on Enforced or Involuntary Disappearances, *general comment on children and enforced disappearances*

“2. Based on its experience, the Working Group recognizes three particular situations in which children become victims of enforced disappearance. The first involves children who are themselves subjected to enforced disappearance A second particular situation occurs when children are born during the captivity of a mother subjected to enforced disappearance. In this case, children are born in secret detention centres and, most of the time, documents attesting to their true identity are suppressed or altered. Finally, children are victimized by the fact that their mother, father, legal guardian or other relative is subjected to enforced disappearance. ...

3. In addition to these three situations of enforced disappearance, the Working Group is aware of other situations in which children may become victims of enforced disappearance. If State agents are involved with or support private groups, directly or indirectly, or consent or acquiesce to the activities of criminal organizations in the abduction or kidnapping of child migrants or in child trafficking, notably for the purpose of child labour, sexual exploitation or transfer of organs of the child, this may be considered, in certain circumstances, an enforced disappearance. Children living and/or working on the street and children placed in care institutions may also be in a particularly vulnerable situation, potentially becoming victims of enforced disappearance. The forced recruitment of child soldiers also places them in a potential situation of enforced disappearance, especially when they are recruited by armed groups distinct from the regular armed forces of a State but operating with the support, consent or acquiescence of the State.

...

Violation of multiple rights

6. The enforced disappearance of children represents in itself a breach of the States’ obligation to prevent violations and the duty to respect and guarantee multiple human rights. ... In all circumstances, as child victims of enforced disappearance or as relatives of a person who

⁴²² On the guiding principles, in general, see sect. V below.

disappeared, they experience feelings of loss, abandonment, intense fear, uncertainty, anguish, and pain, all of which could vary or intensify depending on the age and the specific circumstances of the child. The Working Group considers that the separation of children from their families has specific and especially serious effects on their personal integrity that have a lasting impact, and causes great physical and mental harm.

...

Obligation to prevent

...

12. All State policies, including a comprehensive strategy to prevent and respond to enforced disappearances of children, should recognize children as rights holders, rather than objects of protection, following the guiding principles of the Convention on the Rights of the Child: non-discrimination; the best interests of the child; the right to life, survival and development; and child participation. ...

Deprivation of liberty

13. ... The best interest of the child must be a primary consideration in all actions that affect children in contact with the criminal justice system, in particular those who are deprived of their liberty. ...

...

15. To prevent enforced disappearances of newborn children in captivity, States should establish special protection measures for pregnant women who are detained, in line with international law. States should also highlight official registries of detained individuals in order to give appropriate monitoring to cases of detained pregnant women. States should guarantee the rights of children born in such circumstances and also to provide them with birth registration immediately.

Right to identity and to the recognition as a person in front of the law

16. The experience of the Working Group demonstrates that many of the disappeared children were registered under false information or had their personal data altered. The effects of this are twofold: on the one hand, for the children whom were appropriated, it makes it impossible to find their family and learn their biological identity – and in some cases their own nationality – and, on the other, for the family of origin, whom are prevented from exercising the legal remedies to re-establish the child's biological identity and the family ties and end the deprivation of liberty. That situation only ceases when the truth about the identity is revealed and the child victims are guaranteed the legal and real possibility of re-establishing their true identity and, where appropriate, the family ties, with the pertinent legal consequences.

...

Adoption and custody

19. In order to prevent enforced disappearances, States must act with due diligence in all cases of adoption. ... Enforced disappearances of children are often exposed after tracing cases of illegal adoptions. Irregularities such as the forging of birth certificates and falsifying the identity of the child can occur. ... Birth registration provides children with a legal identity and supports enforcement of minimum age legislation. Thereby protects children against trafficking for the purpose of child labour and forcible conscription in armed forces, two instances that could lead to enforced disappearances. It also helps the traceability of children who have been separated from their parents.

20. [The Convention on the Rights of the Child] requires States to ensure that the adoption of a child is authorized only by competent authorities. Those authorities should determine on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary. In addition, the Declaration in article 20, 'considering the need to protect the best interests of children', establishes that 'there shall be an opportunity, in States which recognize a system of adoption, for a review of the adoption of such children and, in particular, for annulment of any adoption which originated in enforced disappearance'.
21. A child has an absolute right to protection and custody when separated from his or her family. Without the speedy resolution of custody issues resulting from the enforced disappearance of a child or of their parent or guardian, children may face problems ranging from lack of appropriate shelter to complete loss of legal identity. Any custody determination must take into account a child's best interest, protect the child from discrimination, and respect the child's views concerning the matter, pursuant to article 12 of the [Convention on the Rights of the Child].
22. According to article 20, paragraph 2, of the Declaration, States must, in most cases, annul 'any adoption which originated in enforced disappearance'. However, considering the evolution of international human rights law in this area and particularly the need to protect the best interests of children such adoption should continue to be in force if consent is given, at the time of the review, by the child's biological closest relatives. These principles should be combined with the principles of the [Convention on the Rights of the Child] in determining whether the annulment of an adoption is in the best interests of the child. The views of children, according to the child's age and maturity, should be given due consideration in the decision-making process.

...

Right to the truth and obligation to search

24. States need to develop truth-seeking mechanisms that are child-sensitive and that assess how children were affected by enforced disappearances. The mandate of those mechanisms should make clear references to child victims of enforced disappearance. There should be proper allocation of resources to secure the proper expertise, methodology and structure.
25. The Declaration, in its article 20, requires that States 'shall devote their efforts to the search for and identification of [children abducted of parents subjected to enforced disappearance and of children born during their mother's enforced disappearance]'. The Working Group understands that the obligation to search for child victims of enforced disappearance does not limit to those circumstances mentioned in article 20. ... Acknowledging the special urgency of resolving cases of enforced disappearances involving children, States should create or adapt already-established institutions to search for these disappeared children and ensure their care in the event they are found. ... All searches should be carried out in a safe, child- and gender-sensitive and fair manner by trained professionals.

Genetic data

26. States should create a bank of genetic data or adapt a similar institution to take DNA and blood samples and to store the genetic information of the families of disappeared children and conduct appropriate DNA tests when necessary to determine the true identity of a child or to identify their remains or the remains of their family members.

27. The bank of genetic data should also coordinate with the body responsible for the search process, taking referrals from them for conducting DNA and blood tests of possible child victims of enforced disappearance. Because many times these crimes are transnational in scope, the entity must also coordinate with a network of genetic banks or DNA-testing centres in order to facilitate the investigative process. In the trial process, staff members in charge of the genetic database should serve to give testimony and expert opinions regarding genetic tests in particular cases. Taking into account the particular importance of not presuming the child victim dead, genetic databases must maintain and store genetic information for a disappeared child for a time greater than or equal to the average lifespan of a person in that country.
28. Special guidelines must be established in the procedures for DNA testing, keeping in mind the best interests of the child and giving accurate weight to the child's views, depending on his or her age and maturity. The child's parents or guardians should be present, unless the conditions deem the presence of parents or guardians inappropriate, such as in cases where the aforementioned are the alleged perpetrators of the enforced disappearance or in cases in which the child does not desire parental presence. Tests based on court orders must be particularly sensitive to the privacy and views of the child assessing his or her age and maturity. The actual testing process should utilize the least invasive methods possible in order to minimize intrusions to privacy, taking gender and age into consideration.

...

Recovery, reintegration and reparation

30. 'Declarations of absence by reason of enforced disappearance' are particularly important in cases where children become victims because of the disappearance of one or both of their parents. These allow children access to any State benefits that would be available if their parents were deceased, without being forced to declare a parent dead and bringing an end to any State obligations to investigate the enforced disappearance. In order to properly secure a child's best interest, especially their development, there cannot be any obstacles discouraging them or their parents from claiming benefits.

...

Effective investigation

37. States should pay particular attention to the expeditious resolution of cases involving child victims of enforced disappearance. ... States have an obligation to conduct prompt and full investigations in order to determine the whereabouts of the child or of his or her parent or guardian. Because of children's dependence on adults, the impact of the family separation, and their potential vulnerability and threats to their development and life, States should conduct expeditious investigations of cases involving child victims of enforced disappearance. States must conduct the investigation of enforced disappearances of children in an effective and prompt manner so that it is done in a reasonable amount of time, ensuring that the competent authorities conduct the corresponding ex officio investigations, having at their disposal the necessary authorization and remedies. Those who are part of the investigation, among them the victim's relatives, witnesses, and administrators of justice, shall be assured the due guarantees of protection and security. States must ensure the full access and capacity to act of the next of kin of the victims in every stage of the investigation and prosecution of those responsible. These investigations should be assumed as a State obligation, and should not be deemed the responsibility of the victim's family.

...

Right to complain

39. ... victims and their advocates have the right to complain to a competent authority that will properly investigate each case, fully prosecute perpetrators, and conduct body exhumations where appropriate. The right to complain must be treated sensitively when dealing with children because they may be less willing to come forward than adults or may be unaware of remedies available. States must facilitate a complaint by adopting measures that are sensitive to the child's age, gender and maturity

...

Child participation

41. States must actively foster and encourage child participation in all official proceedings regarding cases where they are victims of enforced disappearance. A child always has the right to be heard directly and not only through a representative or an appropriate body, if this is in his or her best interests. Truth commissions and prosecutors must seek out the children affected by enforced disappearances and secure their participation in proceedings in a way that is sensitive to each child's needs, age, gender and maturity level.
42. Upholding the principle of child participation includes informing a child about the enforced disappearance of a relative in a manner that he or she understands. This will not only require presentation of the information in the child's native language, but also the explanation of the circumstances of the disappearance and of the legal proceedings in a manner that takes into account the age, maturity, and psychological state of the child.

...

International cooperation

46. Enforced disappearances of children can be transnational in scope. States must act with reciprocity and cooperation with other States in the search, identification, localization, and restitution of children who have been transported to another State or retained in another State as a result of an enforced disappearance. As required by article 20 of the Declaration, States shall, where appropriate, conclude bilateral and multilateral agreements for these purposes." (Footnotes omitted.)

Working Group on Enforced or Involuntary Disappearances, general comment on the right to the truth in relation to enforced disappearance

- "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. ... 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, [article 20 (2) of the 1992 Declaration] 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."

Other human rights bodies have also made important pronouncements on children and enforced disappearances.⁴²³

EXAMPLES OF GOOD PRACTICE



“The Committee welcomes the adoption by the State party of a specific law, Act No. 2017/47, on protection measures for unaccompanied foreign minors, including special safeguards such as non-refoulement, prohibition of forced return and specific protection against trafficking. The Committee further notes the existence of a draft protocol to harmonize the relevant procedural rules nationwide regarding the identification and age-assessment procedure.”⁴²⁴

CHECKLIST

INFORMATION ON WRONGFUL REMOVAL OF CHILDREN TO BE PROVIDED IN STATES PARTIES' REPORTS

- ✓ Provide information on domestic legislation (criminal, civil and administrative) applicable to: the wrongful removal of children submitted to enforced disappearance; children whose parents are subjected to enforced disappearance; babies born during the captivity of pregnant mothers subjected to enforced disappearance; and the falsification, concealment or destruction of documents attesting the true identity of those children.
- ✓ Provide information on the existing mechanisms, or the steps taken to create them, for the search and identification of disappeared children and procedures to return them to their families of origin, including the existence of DNA databases.
- ✓ Specify which procedures are in place to guarantee the right of disappeared children to have their true/biological identity re-established.
- ✓ Provide information on the existence of programmes related to assisting adults who suspect they are children of disappeared parents to establish their true/biological identity.
- ✓ Indicate the procedures in place to guarantee families their right to search for child victims of enforced disappearance.
- ✓ Provide information on the procedures in place to review and, if necessary, annul the adoption/ placement of children that originated from an act of enforced disappearance.
- ✓ Provide information on the cooperation with other States in the search or identification of children of disappeared parents.
- ✓ Provide information on the domestic legislation and procedures that guarantee that in all actions concerning children, whether taken by public institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child are a primary consideration.
- ✓ Provide information on how children, who are capable of forming their own views, have the right to express those views freely in all matters related to enforced disappearance that are affecting them.
- ✓ Provide statistical data on cases of enforced disappearance disaggregated, inter alia, by sex, age, ethnic origin and geographical location.

⁴²³ See, among others, Inter-American Court of Human Rights (*Molina-Theissen v. Guatemala*, Judgment, 4 May 2004; *Serrano-Cruz Sisters v. El Salvador*, Judgment, 1 March 2005; *Tiu Tojín v. Guatemala*, Judgment, 26 November 2008; “*Las Dos Erres*” *Massacre v. Guatemala*, Judgment, 24 November 2009; *Contreras et al. v. El Salvador*, Judgment, 31 August 2011; *Río Negro Massacres v. Guatemala*; *Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala*, Judgment, 20 November 2012; and *Rochac Hernández et al. v. El Salvador*, Judgment, 14 October 2014); and Human Rights Committee (*Mónaco de Gallicchio v. Argentina* (CCPR/C/53/D/400/1990); and *Prutina et al. v. Bosnia and Herzegovina* (CCPR/C/107/D/1917/2009, 1918/2009, 1925/2009 and 1953/2010)).

⁴²⁴ CED/C/ITA/CO/1, para. 34. Nevertheless, the Committee was concerned that unaccompanied minors may be at risk of going missing from migrant reception centres.

Examples of recommendations



The Committee encourages the State party to consider reviewing its criminal legislation with the aim of including, as specific offences, the acts described in article 25, paragraph 1, of the Convention, which are subject to appropriate penalties that take into account the extreme seriousness of the offences.

The Committee also urges the State party to step up its efforts to search for and identify any children who may have been the victims of removal, enforced disappearance and/or identity substitution, in conformity with article 25, paragraph 2, of the Convention. In this respect, it recommends that the State party should also step up its efforts to ensure that the national DNA bank holds genetic samples for all cases that have been reported whether through administrative or judicial channels.

The Committee urges the State party to investigate thoroughly the disappearance of unaccompanied children from asylum reception centres and to search for and identify those children who may have been the victims of enforced disappearance, in conformity with article 25, paragraph 2, of the Convention.

The Committee recommends that the State party intensify its efforts to search for and identify disappeared children and ensure that they are returned to their families of origin if they have been victims of identity substitution.

The Committee also recommends introducing an explicit provision into the Code of Civil Procedure that an appeal for review of adoption decrees should cover adoption that originated in an enforced disappearance as a legal basis for the appeal.

The Committee recommends that the State party should ensure, in all cases, that the best interests of the child are a primary consideration, in accordance with article 25, paragraph 5, of the Convention, and that a child who is capable of forming his or her own views has the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

The Committee recommends that the State party finalize and adopt the royal decrees on registers of persons deprived of liberty and on gathering, conserving and accessing information on the origin of adopted children, so as to bring domestic legislation into line with the Convention in these fields.

The Committee recommends that the State party strengthen its criminal legislation specifically to prevent and punish cases of falsification, concealment or destruction of documents attesting to the true identity of the children referred to in article 25 (1) (a).

The Committee urges the State party to take necessary and specific measures to ensure the effective protection of children against enforced disappearance, in particular by: (a) setting up procedures aimed at re-establishing the true identity of children in case of the falsification, concealment or destruction of documents attesting thereto; (b) adopting legislation and establishing procedures to review, and, where appropriate, to annul any adoption or placement of children originating from an enforced disappearance; and (c) concluding mutual assistance agreements with other States for the search for and identification and location of children subjected to enforced disappearance.

The Committee recommends that the State party (a) expedite investigations into cases of removal and/or irregular adoption of minors and disappearance of pregnant women; (b) ensure that victims are able to exercise their right to recover their identity if it emerges that that identity was changed.

The Committee recommends that the State party take the necessary measures to: (a) ensure that unaccompanied minors are promptly referred to child protection authorities as soon as possible after their arrival at an immigration detention centre; (b) ensure the effective application of the new harmonized multidisciplinary age-assessment procedures across all immigration detention centres, and ensure that anyone claiming to be a child is treated as such until a comprehensive and child-friendly age-assessment is undertaken; (c) improve the data system for unaccompanied or separated minors, and ensure the collection of statistics on unaccompanied minors and children going missing from reception centres; (d) prevent the disappearance of children from reception centres and find the whereabouts of those already missing.



Committee on Enforced Disappearances and its functions



UN Photo/Martine Ferrel

Monitoring of States parties' compliance with the Convention is entrusted to the [Committee on Enforced Disappearances](#), which is composed of 10 independent experts, established pursuant to article 26 of the Convention. The members of the Committee⁴²⁵ must be “experts of high moral character and recognized competence in the field of human rights, who shall serve in their personal capacity and be independent and impartial” (art. 26 (1) of the Convention). They are elected by States parties to the Convention “according to equitable geographical distribution” and taking into account “the usefulness of the participation in the work of the Committee having relevant legal experience and of balanced gender representation” (ibid.). Pursuant to article 26 (2), members are nationals of a State party and are nominated by their Governments and elected by the States parties. They are elected for a term of four years and are eligible for re-election once.

Article 27 of the Convention established that a conference of States parties, to be held within six years following the entry into force of the Convention, should evaluate the functioning of the Committee and decide whether to maintain it or to transfer its functions to another body. The [conference](#) took place on 19 December 2016 and it was decided to maintain the Committee. Pursuant to article 28 of the Convention, the Committee must cooperate with all relevant organs, offices and specialized agencies and funds of the United Nations, with other treaty bodies, with the special procedures and with the relevant regional intergovernmental organizations or bodies, as well as with all relevant State institutions, agencies or offices. The Committee must consult other treaty bodies, in particular the Human Rights Committee, with a view to ensuring the consistency of the respective observations and recommendations.

⁴²⁵ For details of the current members, see www.ohchr.org/EN/HRBodies/CED/Pages/Membership.aspx.

OHCHR provides the Committee with secretariat support. It holds two sessions each year in Geneva. In general, the sessions of the Committee can be watched live online.⁴²⁶

The Committee has established [rules of procedure](#) and [working methods](#) and adopted documents regulating its relationship with [civil society organizations](#) and [national human rights institutions](#).

The Committee discharges its mandate through the following functions:

- Examination of States parties' reports (art. 29)
- Urgent actions (art. 30)
- Individual communications (art. 31)
- Inter-State communications (art. 32)
- Country visits (art. 33)
- Referral of systematic enforced disappearances to the General Assembly (art. 34)

The functions of the Committee and the need for separate declarations with regard to individual and inter-State communications

- Upon becoming a party to the Convention, a State is automatically subjected to the following functions of the Committee:
 - Examination of States parties' reports (art. 29)
 - Urgent actions (art. 30)
 - Country visits (art. 33)
 - Referral of systematic enforced disappearances to the General Assembly (art. 34)
- By becoming parties to the Convention, States do not automatically accept the competence of the Committee to receive and consider individual and inter-State communications under articles 31 and 32 of the Convention. This requires a separate declaration⁴²⁷ that can be made at the time of ratification or accession or any time afterwards.

Article 35 of the Convention establishes that the Committee shall have competence solely in respect of enforced disappearances that commenced after the entry into force of the Convention. The Committee has adopted a [statement](#) to clarify the content of this provision.⁴²⁸ In summary, the Committee held that:

- It could not adjudicate individual cases – both as urgent actions and individual communications (arts. 30–31) – concerning enforced disappearance as such that had commenced before the entry into force of the Convention for the State concerned.
- If information related to the past is useful during the reporting process (art. 29) as a means to understand fully the challenges of the present, the Committee will take that information into account in its concluding observations.

⁴²⁶ See <https://media.un.org/en/webtv>.

⁴²⁷ See sect. II.B above.

⁴²⁸ See sect. III.B.2 above.

The statement does not directly address the implications of article 35 of the Convention on the other functions of the Committee. However, the referral procedure under article 34 requires that “enforced disappearance is being practised on a widespread or systematic basis”, thus suggesting that its application refers to acts having commenced after the entry into force of the treaty for the State party concerned. The procedure of country visits pursuant to article 33 is activated only if “a State party is seriously violating the provisions of the Convention”.

Pursuant to article 36 of the Convention, the Committee reports annually to the General Assembly on its activities.⁴²⁹

To enhance deeper understanding of the content and implications of the Convention, the Committee may devote one or more meetings of its regular sessions to a general discussion on the provisions of the Convention or a related subject (rule 55 of the [rules of procedure](#)). Representatives of Governments, United Nations human rights mechanisms, special procedures, treaty bodies and specialized agencies, national human rights institutions and NGOs, as well as individual experts and victims, may be invited to take part in discussions.

The Committee has adopted a number of [substantive statements](#) on issues such as enforced disappearance and military jurisdiction or on the report of the United Nations High Commissioner for Human Rights on strengthening the human rights treaty body system. Pursuant to its [rules of procedure](#), the Committee may prepare and adopt general comments on the provisions of the Convention with a view to promoting its implementation or to assisting States parties in fulfilling their obligations (rule 56 of the [rules of procedure](#)). At the time of writing, the Committee has not yet adopted any general comments.

In 2019, the Committee adopted the [guiding principles for the search for disappeared persons](#).⁴³⁰

In September 2020, together with the Working Group, the Committee adopted the [key guidelines on COVID-19 and enforced disappearances](#).

A. MONITORING AND REPORTING

The monitoring function entrusted to the Committee is carried out mostly through the examination of States parties’ reports under article 29 of the Convention and the corresponding follow-up procedure. This function of the Committee applies automatically to all States parties, without the need for any specific separate declaration of recognition.

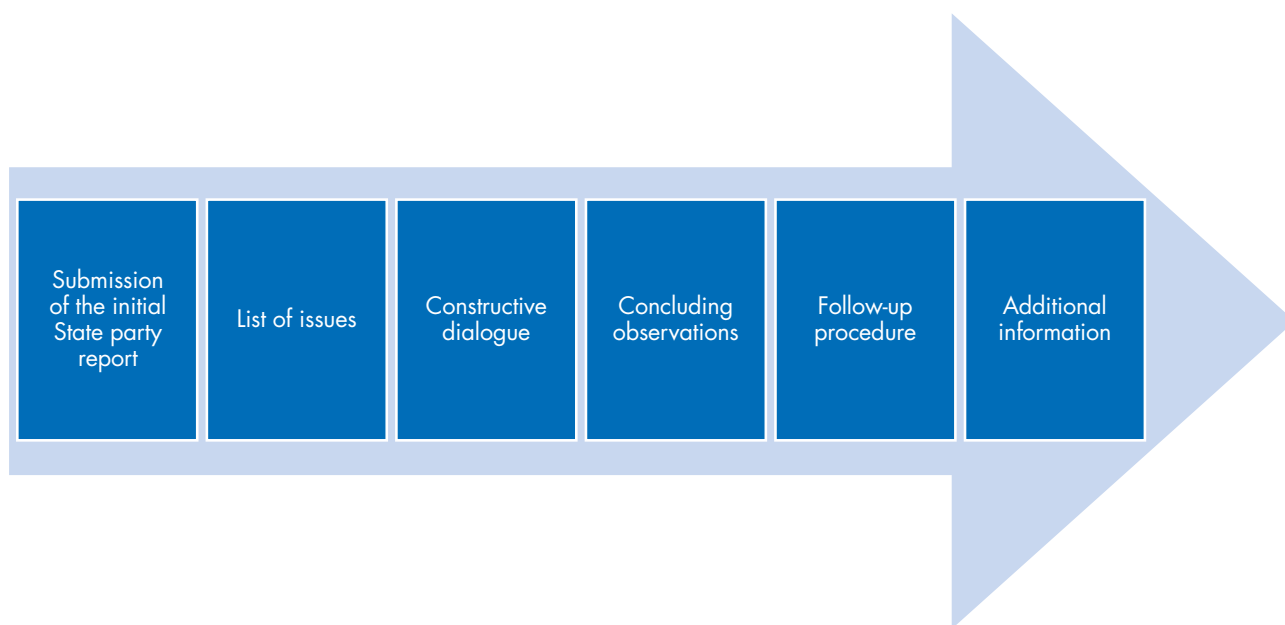
⁴²⁹ The annual reports of the Committee are available on the [Treaty Body database](#).

⁴³⁰ See sect. V below.

1. EXAMINATION OF STATES PARTIES' REPORTS (ART. 29)

- “1. Each State Party shall submit to the Committee, through the Secretary-General of the United Nations, a report on the measures taken to give effect to its obligations under this Convention, within two years after the entry into force of this Convention for the State Party concerned.
2. The Secretary-General of the United Nations shall make this report available to all States Parties.
3. Each report shall be considered by the Committee, which shall issue such comments, observations or recommendations as it may deem appropriate. The comments, observations or recommendations shall be communicated to the State Party concerned, which may respond to them, on its own initiative or at the request of the Committee.
4. The Committee may also request States Parties to provide additional information on the implementation of the Convention.”

The examination of States parties' reports under article 29 of the Convention is composed of different phases, throughout which also civil society organizations, national human rights institutions and other stakeholders can participate. The interaction between the Committee and other stakeholders is analysed at the end of this section, while here the main stages of the process are illustrated:



(a) Submission of the State party report

Upon becoming a party to the Convention, a State undertakes to submit a report on the measures taken to give effect to its obligations within two years after the entry into force of the treaty for the State concerned.⁴³¹

The Committee examines on average two initial reports during a two-week session. Normally, priority is given to those reports that have been submitted early.

⁴³¹ The deadlines for submission of States parties' reports are available from the [Treaty Body database](#).

A State party that does not comply with its reporting obligations becomes subject to rule 50 of the [rules of procedure](#), which allows, among other things, the Committee to consider the measures taken by the State party to implement its obligations under the Convention in the absence of a report. In 2019, the Committee adopted [internal guidelines for the review of States in the absence of a report due under article 29 \(1\) of the Convention](#). Pursuant to such guidelines, the consideration of a State party's measures to implement its obligations under the Convention, in the absence of a report, can only take place after the transmission of four reminders to the State concerned and attempts by the Committee to engage informally with the State party's representatives in Geneva, including by offering capacity-building support, and an attempt to meet the Permanent Representative of the State party concerned.⁴³²

(b) List of issues

Upon reception of a report prepared pursuant to article 29 (1) of the Convention, the Committee appoints from among its members two or more country rapporteurs, who are entrusted with the review of the report and the preparation of a draft list of issues and concluding observations. The Committee notifies the State party concerned of the dates, duration and venue of the session at which its report will be examined and of the list of issues about which the Committee would like to receive additional information.⁴³³

The Committee asks the State party to provide its replies to the list of issues within a fixed time limit. The replies should be short and precise; they should not exceed the length indicated by the Committee in the transmittal letter; and they should be submitted to the secretariat of the Committee electronically. States parties may annex additional pages of statistical data.⁴³⁴

(c) Constructive dialogue

The examination of a report under article 29 (1) of the Convention takes the form of a constructive dialogue⁴³⁵ between a delegation from the reporting State and the Committee members held in public meetings, with the aim of enhancing the Committee's understanding of the level of implementation of the Convention in the State party concerned.

The Committee usually dedicates two 3-hour meetings for the examination of a State party's report.⁴³⁶ Consideration of reports proceeds on an article-by-article basis. Other stakeholders, including United Nations partners, civil society stakeholders and any interested individuals, may attend reviews of States parties' reports as observers, although they do not have the right to take the floor during the constructive dialogue.

(d) Concluding observations

The Committee adopts concluding observations on the States parties' reports that it considers.⁴³⁷ Concluding observations follow a standard format, which consists of a brief introduction, followed by a section noting positive aspects, another on subjects of concern and related recommendations, and a

⁴³² For specific strategies of the Committee to encourage reporting by States parties, see paras. 26–28 of the Committee's [working methods](#).

⁴³³ Lists of issues are available from the [Treaty Body database](#).

⁴³⁴ Replies to lists of issues are available from the [Treaty Body database](#).

⁴³⁵ A guidance note for States parties on the constructive dialogue with the treaty bodies is available in annex I of [A/69/285](#).

⁴³⁶ On the practical aspects of the constructive dialogue, see the Committee's [working methods](#), paras. 13–19.

⁴³⁷ For details and practical aspects concerning the adoption of concluding observations, see the Committee's [working methods](#), paras. 20–23, and its [rules of procedure](#), rule 53.

final one on follow-up and dissemination. Concluding observations are posted on the Committee's web page and included in the annual report to the General Assembly.

States parties are expected to widely disseminate, at the national level and in all the appropriate languages, the Committee's concluding observations. Moreover, States parties may submit to the Committee any comments that they consider appropriate on its concluding observations. Such comments are posted on the Committee's web page and, at the request of the State party concerned, they are included in the Committee's annual report to the General Assembly.⁴³⁸

(e) Follow-up procedure and additional information

In its concluding observations on States parties' reports, the Committee identifies certain issues of particular concern to be followed up within a specific short period of time.

Unlike other United Nations treaty bodies, the Committee does not have a system of periodic reports. Instead, the Committee can request the State party to provide additional information on its implementation of the Convention (art. 29 (4) of the Convention).

The follow-up procedure and the request for and analysis of additional information from States parties by the Committee are analysed below in section IV.A.3.

2. GUIDELINES ON THE FORM AND CONTENT OF REPORTS⁴³⁹

States parties' reports consist of two parts: a [common core document](#) and a treaty-specific document (e.g. initial or periodic report). The common core document should contain general information about the reporting State, the general framework for the protection and promotion of human rights, as well as information on non-discrimination, equality and effective remedies.⁴⁴⁰

Guidance concerning States parties' reports is included in the Committee's [rules of procedure](#) (rules 48–54), [working methods](#) and [guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention](#).

The treaty-specific report should contain specific information relating to the implementation of articles 1–25 of the Convention. The report should be comprehensive – within the applicable 60-page limit – focusing on the actual situation with regard to the practical implementation of the Convention and progress achieved and obstacles encountered.

States parties are expected to include in their reports information on enforced disappearances that commenced prior to the entry into force of the Convention, illustrating how they are fulfilling their continuing obligations in this respect (e.g. the obligations to search for disappeared persons, to investigate, prosecute and sanction those responsible and to provide reparation).

A section of the State party's report should provide information on how the report was prepared, in particular details on any consultations that might have taken place within Government and with national human rights institutions, organizations of victims' relatives, human rights defenders working

⁴³⁸ The concluding observations adopted by the Committee are available from the [Treaty Body database](#).

⁴³⁹ CED/C/2.

⁴⁴⁰ See the harmonized guidelines on reporting under the international human rights treaties ([HRI/MC/2006/3](#) and [HRI/MC/2006/3/Corr.1](#)).

on the issue of enforced disappearance, NGOs and other stakeholders. The Committee expressly encourages such consultations in the preparation of reports. The consultation process should ensure wide and inclusive participation of all stakeholders, including women, children, lesbian, gay, bisexual, transgender and intersex persons and other vulnerable populations.

States parties' reports under article 29 of the Convention should contain information on the general legal framework under which enforced disappearance is prohibited.

CHECKLIST

INFORMATION ON THE GENERAL LEGAL FRAMEWORK UNDER WHICH ENFORCED DISAPPEARANCE IS PROHIBITED TO BE PROVIDED IN STATES PARTIES' REPORTS

Provide information on:

- ✓ Constitutional, criminal and administrative provisions regarding the prohibition of enforced disappearance.
- ✓ International treaties dealing with enforced disappearance to which the reporting State is a party.
- ✓ Status of the Convention in the domestic legal order (i.e. with respect to the Constitution and ordinary legislation).
- ✓ How domestic laws ensure the non-derogability of the prohibition of enforced disappearance.
- ✓ How the provisions of the Convention can be invoked before and are directly enforced by the courts or administrative authorities.
- ✓ How the provisions of the Convention apply to all parts of federal States.
- ✓ Judicial, administrative or other competent authorities with jurisdiction/mandates for matters dealt with in the Convention, such as the Constitutional Court, the Supreme Court, ordinary and military courts, public prosecutors, disciplinary bodies, administrative authorities in charge of police and prison administration, national institutions for the protection and promotion of human rights etc.
- ✓ Examples of concrete case law in which the provisions of the Convention were enforced and case law in which, on the contrary, violations of the Convention were identified, the reasons for such violations and the measures taken to remedy such situations.
- ✓ Examples of concrete administrative measures giving effect to the provisions of the Convention and administrative measures that, on the contrary, violated the Convention, the reasons for such violations and the measures taken to remedy such situations.
- ✓ Statistical data on cases of enforced disappearance disaggregated by, inter alia, sex, age, ethnic origin and geographical location.

The reporting guidelines provide details of the information required article by article in States parties' reports; the guidelines assist in the drafting of a structured report and dialogue with the Committee.

A report submitted by a State party under article 29 of the Convention should be accompanied by copies (if possible in English, French or Spanish) of the principal legislative and other texts referred to. Reports under article 29 should be submitted in electronic form (on a USB key or by email). As stipulated in paragraph 19 of the harmonized guidelines, treaty-specific documents should not exceed

60 pages (A4-size paper, with 1.5 line spacing and text set in 12-point Times New Roman type) and subsequent additional reports should be limited to 40 pages.

When a State party submits a report containing additional information pursuant to article 29 (4) of the Convention, there is no need to report on every single provision of the Convention. These reports should contain:

- (a) A response to the concerns expressed by the Committee in its concluding observations and decisions;
- (b) Any relevant information on the evolution of the situation related to enforced disappearance in the State party;
- (c) Information on the implementation of the recommendations adopted by the Committee in its concluding observations and on the machinery developed at the national level to ensure follow-up, taking into consideration the guidelines for follow-up on concluding observations and recommendations.

For a detailed explanation of the reporting process, see [Reporting to the United Nations Human Rights Treaty Bodies Training Guide: Part I – Manual](#).

3. FOLLOW-UP PROCEDURE AND REQUESTS FOR ADDITIONAL INFORMATION

The Committee applies a follow-up procedure with regard to its concluding observations. In this context, it requests States parties to provide a follow-up report within one year on the steps taken to implement specific (usually up to three) recommendations of its concluding observations.⁴⁴¹ For this purpose, the Committee selects recommendations that are particularly serious, urgent, protective of the victims or the results of which can be achieved within a short period.⁴⁴²



OHCHR Mexico/Prometeo Lucero

⁴⁴¹ For detailed information on the follow-up procedure, see the Committee's [working methods](#), paras. 24–25, and its [rules of procedure](#), rule 54.

⁴⁴² Follow-up reports are available from the [Treaty Body database](#).

The Committee has appointed a Special Rapporteur for follow-up on concluding observations who assesses, in consultation with the country rapporteurs, the information submitted by States parties and reports at every session to the Committee. The Special Rapporteur analyses the follow-up report and presents an analysis thereof to the Committee, and a decision is taken during a plenary session on the follow-up measures to be taken. Various options are available, including an evaluation of the degree of compliance with the recommendations and requests for more information to be provided in the report on additional information. In all cases, the Special Rapporteur will send a letter informing the State party of the decision adopted by the Committee.

ASSESSMENT OF FOLLOW-UP REPLIES BY THE COMMITTEE

To carry out its assessment of the information provided by the States parties concerned, the Committee uses the following criteria:

A – Reply/action satisfactory. The State party has provided evidence of significant action taken towards implementing the Committee's recommendations.

B – Reply/action partially satisfactory. The State party has taken steps towards implementing the recommendations, but additional information or action is necessary.

C – Reply/action not satisfactory. The State party has sent a reply, but action taken or information provided is not relevant or does not implement the Committee's recommendations.

D – No cooperation with the Committee. No follow-up information has been received following a reminder or reminders.

E – Information or measures taken are contrary to or reflect rejection of the Committee's recommendations. The reply reveals that the measures taken are contrary to or have results or consequences that are contrary to the Committee's recommendations or reflect rejection of the recommendations.

All the follow-up decisions adopted by the Committee are reflected in the Committee's [reports on follow-up to the concluding observations](#).

In the next step of the procedure, the Committee can request the State party to submit additional information pursuant to article 29 (4) of the Convention. In such cases, the review of the report on additional information is carried out through different modalities that aim at ensuring a thorough monitoring of the implementation of the Committee's recommendations and of the obligations stemming from the Convention for all States parties. The frequency and extent of the monitoring required depend on the specific situation regarding enforced disappearances in the country.

Upon examination of the State party's report on additional information, the Committee decides whether it will request additional information from the State party, and the timeline for submission of such information. The decision is based on the level of implementation of the Committee's recommendations, the obligations of the State party vis-à-vis the Convention and the evolution of the situation related to enforced disappearances in that country.

INTERACTION OF THE COMMITTEE WITH OTHER STAKEHOLDERS IN THE CONTEXT OF THE REPORTING PROCEDURE⁴⁴³

To build up a more comprehensive picture of how a State party is implementing the Convention, the Committee may receive alternative reports, documentation or other information from national human rights institutions, NGOs, associations of victims' families, other relevant civil society organizations and individual experts. These stakeholders are encouraged to provide alternative reports that contain information on the implementation of some or all of the provisions of the Convention; comments on the States parties' reports and their written replies to the lists of issues; and information on implementation of the recommendations contained in previous concluding observations of the Committee. They are encouraged to ensure that any reports are provided well in advance of the deadlines stipulated by the secretariat of the Committee. Information provided by these stakeholders will be posted on the Committee's web page, thus making it public and bringing it to the attention of the State party concerned, unless the stakeholders request that the Committee keep their contributions confidential.

Civil society actors may also brief the Committee orally in a private meeting at the session during which the State party's report is examined. They can also brief the Committee during formal and informal briefings to be organized during the session. The Committee also sets aside time, before the examination of the State party's report, for meeting in private with representatives of national human rights institutions. These meetings can be held in person or through the use of videoconferencing.

For more information about the engagement of stakeholders with the Committee, see the Committee's web page on interaction with the Committee for [civil society actors and national human rights institutions](#) and [Reporting to the United Nations Human Rights Treaty Bodies Training Guide: Part I – Manual](#), chapters 5 and 6.

Everyone, in particular victims of enforced disappearance and civil society organizations, must have the right to have unhindered access to and communicate with the treaty bodies, including the Committee, without fear of intimidation or reprisals. Over the past few years, acts of intimidation and reprisals against those who seek to cooperate, are cooperating or have cooperated with the treaty bodies have increased.

Treaty bodies have consistently reaffirmed that the free engagement of individuals and groups is critical to their efficiency and effectiveness and have repeatedly raised their concerns about acts of intimidation and reprisals collectively and individually. Due to the increasing attention being paid to instances of intimidation and reprisals⁴⁴⁴ and the growing urgency to strengthen protection and bring coherence to the responses of treaty bodies to persons and groups at risk of or targeted by intimidation or reprisals, the Chairs of the treaty bodies endorsed the [Guidelines against Intimidation or Reprisals](#) ("San José Guidelines") during their annual meeting in 2015. More information about responses to reprisals can be found on the OHCHR [website](#).

In reviewing States parties' reports, the Committee may also take into consideration information originating from other treaty bodies, special procedures (in particular the Working Group) and the United Nations system. In this regard, these stakeholders may, in accordance with article 28 of the Convention, submit reports, other information or documentation or oral and written statements to the Committee.

⁴⁴³ For detailed information on the Committee's interaction with other stakeholders, see its [working methods](#), paras. 31–37, and its [rules of procedure](#), rule 52 on the consideration of alternative reports.

⁴⁴⁴ See the Committee's [working methods](#), para. 48 on reprisals, and its [rules of procedure](#), rule 99 on protection measures.



B. URGENT ACTION (ART. 30)

Article 30 (1)

“1. A request that a disappeared person should be sought and found may be submitted to the Committee, as a matter of urgency, by relatives of the disappeared person or their legal representatives, their counsel or any person authorised by them, as well as by any other person having a legitimate interest.”

The urgent action procedure⁴⁴⁵ is unique to the Committee: no other treaty body has been entrusted with a similar function. It has also been called an “international habeas corpus” and has been designed bearing in mind the nature of enforced disappearance and the imperative to establish the fate and whereabouts of a disappeared person within the shortest delay, potentially preventing other gross human rights violations from taking place and putting an end to the uncertainty lived by, among others, the relatives of the disappeared.

⁴⁴⁵ On urgent actions, see also the Committee’s [working methods](#), paras. 38–42, and its [rules of procedure](#), rules 57–64.

The urgent action procedure applies to all States parties to the Convention, without the need for any separate additional declaration by the State concerned.

The aim of urgent actions is not to establish the responsibility of a State party, but rather to locate the disappeared person. This distinguishes it from individual communications under article 31 of the Convention, but makes it similar to the procedure conducted by the Working Group under its humanitarian mandate.⁴⁴⁶

COMMITTEE OR WORKING GROUP?

- For States that are not yet parties to the Convention, only the Working Group is competent, within the limits of its mandate. Accordingly, its cases procedure can be activated to establish the fate and whereabouts of a disappeared person.
- For States parties to the Convention, both the Committee and the Working Group are competent, within their respective mandates.
- However, as a rule, the Committee cannot register an urgent action for a case that has already been registered by the Working Group. In a spirit of cooperation and complementarity, the Working Group has developed a practice pursuant to which if it receives a request related to a State party to the Convention, it consults with the source (e.g. relatives of disappeared persons or their representatives) and then refers the case to the Committee for action.
- The benefits of bringing a case to the Committee include:
 - Stronger follow-up by the Committee based on the smaller number of States parties to the Convention.
 - Stronger legal framework of the Convention and of the recommendations of the Committee, compared with the humanitarian mandate of the Working Group.
 - The possibility to ask for provisional and protective measures based on article 30 of the Convention.

Under article 30 (1) of the Convention, the request for urgent action can be submitted by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having legitimate interest. The request must be submitted in writing, and it is strongly recommended to use the [model form](#) for submission.⁴⁴⁷

⁴⁴⁶ See sect. VI below.

⁴⁴⁷ CED/C/4.

CHECKLIST

ADMISSIBILITY CRITERIA (ART. 30 (2) OF THE CONVENTION AND RULE 62 OF THE RULES OF PROCEDURE

- ✓ The request must not be manifestly unfounded.
- ✓ The request must not constitute an abuse of the right of submission of such requests neither be incompatible with the provisions of the Convention.
- ✓ The same matter (i.e. same author and same facts) must not be in the process of being examined under another procedure of international investigation or settlement of the same nature (e.g. the humanitarian procedure of the Working Group). The Committee considers that it has the competence to initiate urgent actions in cases in which the Inter-American Commission on Human Rights has adopted precautionary measures, requesting the search for and location of the disappeared person. In its practice, the Committee has coordinated with the Inter-American Commission to avoid duplication of efforts.
- ✓ While there is no need to exhaust domestic remedies, the matter should have already been duly presented to at least one of the competent bodies of the State party concerned, such as those authorized to carry out investigations, in situations in which such a possibility exists. If the authors of the request consider that such a possibility does not exist, they must explain why. In cases in which the disappearance has not been brought to the attention of the competent authorities, the Committee considers whether the information provided allows it to conclude that registration is not possible, taking into account the following criteria: (a) the existence of national institutions that are competent to investigate cases of enforced disappearance; and (b) the existence of risks that would result from the submission of a complaint to one of these institutions.

* * *

The request for urgent action must concern an enforced disappearance that occurred in a State party to the Convention. In its practice, the Committee has registered urgent actions with respect to the disappearance of persons who are returned by a State party to a non-State party, pursuant to the obligation of States parties to cooperate (arts. 14–15 of the Convention)⁴⁴⁸ and the obligation of non-refoulement (art. 16 of the Convention).⁴⁴⁹

The events referred to in the request for urgent action must have commenced after the entry into force of the Convention in the State party concerned.

Requests for urgent action cannot be anonymous. The identity of the victim must be provided in order for a request for urgent action to be submitted to a State party. The identity and contact details of the persons submitting the request are required so that the Committee may contact them. However, this information always remains confidential.

⁴⁴⁸ See sect. III.D.5 above.

⁴⁴⁹ See sect. III.E.1 above.

PRACTICAL INDICATIONS TO SUBMIT A REQUEST FOR URGENT ACTION TO THE COMMITTEE

The following indications are not compulsory, but aim at providing guidance to ensure that persons submitting a request for urgent action provide all the information relevant to the case.

- The person(s) submitting the request should answer the questions contained in the model form as fully as possible.
- Requests must be submitted in writing. Authors are invited to:
 - Provide a detailed and clear description of the facts of the case in chronological order.
 - Provide information on the following: (a) the identity of the disappeared person; (b) the date and circumstances of the disappearance and, if available, information on the alleged perpetrators; and (c) the steps taken to report the enforced disappearance to the competent authorities of the State party and the response that they provided.
 - Provide the full names of the institutions referred to (security forces, government agencies or other bodies). Do not use abbreviations.
 - Limit the request to a maximum of 30 pages (not counting any annexes).
 - Fill out the form on a computer (or typewriter) in Word format. If that is not possible, complete it by hand in block capitals.
 - Provide the Committee with all the information considered to be useful for a proper consideration of the request, even if this is done after the initial submission of the communication. Copies of all available supporting documentation should be attached. If such copies cannot be provided because of time constraints at the time of the request, a detailed account of the steps taken will be sufficient. The Committee may, however, request a copy of relevant documentation at a subsequent stage of the proceedings.
- Requests may be submitted in any of the working languages of the secretariat of the Committee (Arabic, English, French, Russian or Spanish). Annexes will be considered only if they are submitted in one of these languages (an unofficial translation will suffice).
- Interim measures of protection can be requested when submitting an urgent action or at any time afterwards. Details are provided below.

How to send requests for urgent action

By post:

Petitions and Urgent Actions Section
 Office of the United Nations High Commissioner for Human Rights
 United Nations Office at Geneva
 8–14 Avenue de la Paix
 1211 Geneva 10
 Switzerland
 By fax: +41 22 917 90 22
 By email: ohchr-petitions@un.org

INTERPRETIVE CRITERIA ADOPTED BY THE COMMITTEE WITH REGARD TO URGENT ACTIONS

The authors of requests for urgent actions must provide information on the alleged perpetrators of the disappearance. However, in most cases, the identity of the perpetrators of the disappearance remains unknown. The Committee found it especially challenging when requests refer to the possible involvement of non-State actors without any kind of support or acquiescence of State agents.

Accordingly, the Committee has decided⁴⁵⁰ that, in cases in which it is not clear who the perpetrators of a disappearance are, an urgent action will be registered when:

- (a) The possible involvement of non-State actors — without support or acquiescence — is a mere hypothesis that can neither be confirmed nor dismissed without a thorough investigation by the competent authorities;
- (b) The disappeared person has experienced conflict or tension or has a relationship with State actors which, considering the context of the events, would suggest that an enforced disappearance is a possibility.

In either case, if the information provided by the parties in the course of the urgent action procedure shows that there is no involvement of State actors, including through support or acquiescence, the Committee will close the urgent action.

COMMUNICATION BETWEEN THE COMMITTEE AND THE AUTHORS OF URGENT ACTIONS

Authors of requests for urgent action must be diligent in remaining in contact with the Committee and replying to its communications. If authors do not respond to the Committee's notes, the Committee has decided⁴⁵¹ to proceed as follows:

- (a) Three reminders are sent to authors;
- (b) If the authors have not replied within three months of the third reminder, the secretariat will attempt to locate the authors through other means, and will enquire as to their reasons for not responding;
- (c) If the authors state that they are unable to respond in writing but have information to share with the Committee, the secretariat will attempt to obtain that information orally (e.g. by telephone) and will send a follow-up note to the States parties concerned;
- (d) If, six months after the third reminder, the authors cannot be located or have no new information, the Committee will send a note to the States parties concerned on the basis of the information available and provide them with a deadline for sending updated information.

⁴⁵⁰ A/72/56, para. 58.

⁴⁵¹ Ibid., para. 75.

1. INTERIM MEASURES IN THE CONTEXT OF URGENT ACTIONS

Under article 30 (3), the Committee may request that the State party should take all the necessary measures, including interim measures, to locate and protect the person concerned in accordance with the Convention and to inform the Committee, within a specified period of time, of the measures taken, bearing in mind the urgency of the situation.

Accordingly, interim measures can be requested when there is a risk of irreparable damage to persons concerned or to other elements (including pieces of evidence) relevant to locating the disappeared person. These measures may be requested also to protect complainants, witnesses, the relatives of disappeared persons and their defence counsel, as well as persons participating in the investigation and/or search.

To ensure effective protection and the adaptation of the interim measures to the specific needs of the case, the Committee requests the State party to convene regular coordination meetings between the authorities responsible for implementing the interim measures and the beneficiaries and their representatives.

The request for interim measures may be lodged in the initial request for urgent action under article 30 or at any time after the initial submission. In most requests for urgent action, the authors ask for interim measures when they submit the initial request or in subsequent correspondence with the Committee.

TYPES OF INTERIM MEASURES ADOPTED BY THE COMMITTEE

In the practice of the Committee, three types of interim measure can be identified:

- (a) Protection of the relatives of disappeared persons and their representatives or counsel;
- (b) Protection of the authors of requests for urgent action;
- (c) Protection of witnesses or other individuals participating in searches for disappeared persons or in investigations;
- (d) Protection of any elements or pieces of evidence that could help to locate disappeared persons, such as mass graves, burial sites, remains etc.

States parties must cooperate in accordance with the general principle of good faith with the Committee, inter alia, with a view to taking all necessary measures, including interim measures. The latter are therefore binding on the State party concerned.

The Committee expects to receive regular information from the State party concerned on the interim measures granted. If this does not happen, the Committee will repeat its request through notes verbales, until it is satisfied with the information provided and the action taken.

2. PROCEDURE

The Committee designates some of its members to act as a “working group on urgent actions”, to assist it in exercising its mandate under article 30.

If it satisfies the aforementioned admissibility criteria, a request for urgent action is registered within 48 hours and the Committee transmits it to the State party concerned, with a request to take urgent measures necessary to search for and locate the disappeared person and to provide the Committee with any information available as to the current status of the disappeared person (within a deadline of two weeks to one month depending on the specific circumstances of the case).

In light of the information received, or if no information is received, the Committee may transmit recommendations to the State party, indicating the measures considered necessary to locate and protect the disappeared person and fixing a period of time (usually three months) within which the State party concerned must inform the Committee on the measures adopted and the obstacles encountered therein. In formulating its recommendations, the Committee takes into account the provisions of the Convention and the guiding principles for the search for disappeared persons.⁴⁵²

In response to the Committee’s requests, the State party concerned shall submit any written explanations, statements or documents that may help to clarify the fate or whereabouts of the disappeared person as well as any information with regard to the investigation thereof by the State party concerned.

The Committee is in constant contact with States parties through their permanent missions and with the authors of requests for urgent action through notes, letters, meetings and telephone calls. The Committee keeps the persons who have submitted requests for urgent action informed of the progress of the procedure, including the information provided to it by the States concerned as it becomes available. States parties are also regularly informed and reminders are sent until the fates of disappeared persons have been established with certainty. When three reminders have been sent but remain unanswered, the following rule applies:

- (a) In cases in which the failure to respond concerns the first urgent action registered in relation to events that took place in the State party, a meeting of the Committee’s rapporteurs (or the secretariat, acting on their behalf) and the permanent mission is convened;
- (b) In cases in which the failure to respond relates to a urgent action concerning events that took place in a State party in relation to which other urgent actions have already been registered, a meeting of the Committee’s rapporteurs (or the secretariat, acting on their behalf) and the permanent mission will be convened only if there are particular circumstances that suggest that such a meeting might be useful;
- (c) In all other cases, a fourth reminder is sent. In this context, the Committee reminds the State party concerned of its obligations pursuant to article 30 of the Convention and informs it that if the Committee does not receive a response within the time limit indicated, it may decide to make this information public in its sessional report on urgent actions and in its next report to the General Assembly;
- (d) Whatever the decision taken with regard to the inclusion of information on the lack of response by the State party, the frequency of reminders sent will be limited (to only one every six months) and the Committee will review the situation at every session to see if a response has been provided.

⁴⁵² See sect. V below.

As a general rule, and with the exception of the information that it may make public pursuant to paragraph (c) above, the Committee considers the exchanges with States parties concerned and authors of requests for urgent measures as confidential. However, at each session, the Committee adopts a [report on urgent actions](#), in which it takes stock of the urgent actions registered since its previous session and describes the main trends observed and the jurisprudence adopted. These reports are reflected in the Committee's annual report to the General Assembly. A list of registered urgent actions is published on the web page of the Committee and is updated after each session of the Committee.

The Committee continues its efforts to work with the State party concerned for as long as the fate of the person sought remains unresolved, including by requesting the State party to provide more detailed information or to take further specific measures in the search for the disappeared person. The Committee will consider that the fate of the person sought has been resolved if it receives reliable information in that regard. Urgent actions are considered:

- (a) Discontinued when the disappeared person has been located, but is still detained. This is because the person in question is particularly vulnerable to being subjected to a further enforced disappearance and to being placed outside the protection of the law;
- (b) Closed when the disappeared person has been found at liberty or located and released or has been found dead, provided that the relatives and/or the authors of the request do not contest these facts;
- (c) Open when the disappeared person has been located but the persons to whom interim measures have been granted in the context of the urgent action are still under threat. In such cases, the actions taken by the Committee are limited to following up on the interim measures.

EXAMPLES OF GOOD PRACTICE



As of January 2021, the Committee had registered more than 1,000 urgent actions.

Some 90 disappeared persons have been located:

- In 21 cases, the respective disappeared persons were found alive, but remain in detention (hence the corresponding urgent action was discontinued).
- In 62 cases, the disappeared persons were located and released alive, and in 7 cases, they were found dead (hence the corresponding urgent action was closed).

The proportion of located persons remains limited, demonstrating the difficulty of the task to locate disappeared persons and the urgency of promoting and supporting the search and investigation. Nonetheless, the Committee's contacts in the States parties concerned have reported that registering requests for urgent action has had a positive impact in the cases reported, as demonstrated by the practical measures taken by the authorities of the State party concerned.

“Urgent actions”, drafted by the Committee. Also available in [French](#) and [Spanish](#).

C. INDIVIDUAL COMMUNICATIONS (ART. 31)

Article 31 (1)

“1. A State Party may at the time of ratification of this Convention or at any time afterwards declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of this Convention. The Committee shall not admit any communication concerning a State Party which has not made such a declaration.”

The individual communication procedure⁴⁵³ applies only to States parties that have made a declaration accepting such competence.⁴⁵⁴

Pursuant to article 31, any individuals claiming to be victims of violations of the rights protected under the Convention by States parties can submit complaints (called “communications”). A communication must be submitted in writing and it is strongly recommended to use the [model complaint form](#). A communication may be submitted by a victim of an alleged violation or by another person with the written consent of the victim (no specific form is required). If communications are submitted on behalf of disappeared persons, their consent is obviously not required and the authors of the communications must establish that they have a legitimate interest in the submission.

CHECKLIST

ADMISSIBILITY CRITERIA (ART. 31 (2) OF THE CONVENTION AND RULE 65 (3) OF THE RULES OF PROCEDURE)

- ✓ The communication must not be anonymous.
- ✓ The communication must not constitute an abuse of the right of submission of such communications nor be incompatible with the provisions of the Convention.
- ✓ The same matter (i.e. same author, same facts and same substantive rights) must not be in the process of being examined under another procedure of international investigation or settlement of the same nature (e.g. another treaty body, such as the Human Rights Committee; or regional human rights mechanism, such as the Inter-American Commission on Human Rights, the European Court of Human Rights, the African Commission on Human and Peoples’ Rights or the African Court on Human and Peoples’ Rights).⁴⁵⁵ This does not include complaints submitted under the Human Rights Council complaint procedure or to its special procedures.
- ✓ All internal remedies must have been exhausted or it must be demonstrated that the application of domestic remedies would be unreasonably prolonged or that they are ineffective or inaccessible (mere doubts on the part of the author about the effectiveness or accessibility of domestic remedies are not sufficient).

⁴⁵³ On the individual communication procedure, see also the Committee’s [working methods](#), paras. 43–44, and its [rules of procedure](#), rules 65–80.

⁴⁵⁴ For the list of States parties that have deposited a declaration pursuant to article 31 of the Convention, see the Treaty Section [website](#).

⁴⁵⁵ Some of these mechanisms have indeed dealt with individual complaints concerning enforced disappearance and issued relevant views or judgments. See sect. VII below. While the coverage of the regional bodies is limited to specific regions, they bring together several States and therefore are considered as procedures of international investigation or settlement.

Ratione personae – the alleged victim must be subject to the jurisdiction of a State party to the Convention.

Ratione temporis – an alleged violation must have occurred after the entry into force of the Convention in the State party concerned.

According to the Committee's [statement](#) on the *ratione temporis* element, the Committee cannot adjudicate individual communications concerning enforced disappearance that commenced before the entry into force of the Convention for the State concerned.

Bearing in mind the continuous nature of several obligations under the Convention and the continuous nature of enforced disappearance, a communication concerning a breach of these ongoing obligations due to acts or omissions attributable to the State perpetrated after the entry into force of the Convention could be declared admissible. It should be noted that the Committee's discussions on this issue are ongoing.

While the communication procedure and all related documents are confidential, the decisions adopted by the Committee on admissibility and the merits are public. Should the authors of communications not wish to disclose their identities to the public, they should indicate so to the Committee as soon as possible.

PRACTICAL INDICATIONS TO FILL OUT THE FORM TO BE SUBMITTED TO THE COMMITTEE

Authors of communications should answer the questions contained in the model form as fully as possible. Authors should:

Provide a detailed and clear description of the facts of the case in chronological order.

Specify how they consider the rights protected under the Convention to have been violated and the articles of the Convention that they believe have been violated.

Provide the full names of all the institutions that are mentioned in the communication (security forces, government agencies etc.) and not only abbreviations.

Limit the communication to a maximum of 30 pages (not counting any annexes).

Fill out the form on a computer (or typewriter). If that is not possible, complete it by hand in block capitals.

Provide the Committee with all the information considered to be useful for a proper examination of the case, even if this is done after the initial submission of the communication. Copies of all available supporting documentation should be attached.

Communications may be submitted in any one of the six official languages of the United Nations (Arabic, Chinese, English, French, Russian and Spanish). Annexes will only be considered if they are submitted in one of these languages (an unofficial translation is sufficient).

How to send communications

By post:

Petitions and Urgent Actions Section
Office of the United Nations High Commissioner for Human Rights
United Nations Office at Geneva
8–14 Avenue de la Paix
1211 Geneva 10
Switzerland
By fax: +41 22 917 90 22
By email: ohchr-petitions@un.org

At the time of writing, the Committee has received three individual communications. In two cases it issued its views (on 11 March 2016 and 25 September 2020), while the other was discontinued at the request of the authors, since their daughter was found alive while the case was ongoing.

1. INTERIM MEASURES IN THE CONTEXT OF INDIVIDUAL COMPLAINTS

Pursuant to article 31 (4) of the Convention and rule 70 of the Committee's [rules of procedure](#), in order to prevent possible irreparable damage to the person concerned or to other parties, the author may ask the Committee to issue a request for interim measures. A decision to request interim measures does not imply a decision on the admissibility of the communication. The author of the communication may ask the Committee to request interim measures in the communication or at any time after the communication has been submitted to the Committee, so long as the request is made prior to the adoption of a final decision or views. If granted, interim measures can be subsequently withdrawn by the Committee in view of information provided by the State party or the author.

An author may, at any stage of the process, also request the adoption of protection measures on behalf of the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation.

DIFFERENT TYPES OF INTERIM MEASURES

The Committee can request the adoption of interim measures under two different procedures, namely:

- Urgent actions (art. 30 (4)).⁴⁵⁶
- Individual communications (art. 31 (4)).

In both cases, interim measures aim at avoiding irreparable damage. In particular, interim measures:

- Aim, when requested in the context of urgent actions, at locating and protecting the persons concerned (i.e. disappeared persons and their relatives and representatives) and the evidence related to the case.
- Aim, when requested in the context of individual communication, at avoiding irreparable damage to the victims of the alleged violation.

The requirements and applicable procedures vary depending on whether the Committee is acting pursuant to article 30 (4) or article 31 (4) of the Convention.

⁴⁵⁶ See sect. IV.B above.

2. PROCEDURE

The Committee designates a rapporteur on individual communications and interim measures. A communication fulfilling prima facie admissibility criteria is transmitted to the rapporteur who decides upon registration of the case.

If the case is registered, it is sent to the State party for its observations on admissibility and merits within a fixed deadline (four months). The observations of the State party are sent to the author for comments. If a State party wishes to request the Committee to declare the communication inadmissible, without looking into the merits, it must do so within two months from the date of reception of the communication. Each party can comment on the submission of the other party and/or send additional relevant information and documents. When two rounds of submissions are received from both parties, the case is generally ready to be considered. The Committee may decide to consider the admissibility separately from the merits. If the State party fails to respond, even after receiving several reminders, the Committee decides the case on the basis of the information on file.

At any time after the receipt of a communication and before a decision on the merits has been reached, the Committee may consult, as appropriate, relevant documentation emanating from United Nations organs, bodies, specialized agencies, funds, programmes and mechanisms, including other treaty bodies and the special procedures of the Human Rights Council, and other international organizations, including the relevant regional intergovernmental organizations or bodies and all the relevant State institutions, agencies or offices that may assist in the examination of the communication. However, to this end, the Committee must afford each party an opportunity to comment on such third party documentation or information within fixed time limits. The Committee formulates its decision on the communication in the light of all information made available to it by the author(s) of the communication, by the State party concerned and by any other sources.

Once the Committee issues its decision on the case, it is submitted to the author and the State party simultaneously. These decisions, which have a quasi-judicial character, are posted on the [OHCHR website](#).

If the Committee decides that the facts before it disclose a violation of the rights of the author(s) under the Convention, it requests the State party to provide information (within six months) on the steps that it has taken to give effect to its findings and recommendations. The case is kept under consideration by the Committee under the follow-up procedure as long as the Committee considers that further action is necessary from the State party to implement its recommendations. Information related to follow-up is not confidential and the Committee's assessment is reflected in its [follow-up progress reports on individual communications](#) and in its annual reports to the General Assembly.

OHCHR, *Individual Complaint Procedures under the United Nations Human Rights Treaties*, Fact Sheet No. 7/Rev.2 (New York and Geneva, 2013).



D. INTER-STATE COMMUNICATIONS (ART. 32)

“A State Party to this Convention may at any time declare that it recognizes the competence of the Committee to receive and consider communications in which a State party claims that another State Party is not fulfilling its obligations under this Convention. The Committee shall not receive communications concerning a State Party which has not made such a declaration, nor communications from a State Party which has not made such a declaration.”

The inter-State communication procedure applies only to States parties that have made a declaration accepting such competence.⁴⁵⁷ Accordingly, both States involved in an inter-State communication (i.e. the one lodging the communication and the respondent State) must have deposited the declaration pursuant to article 32 of the Convention.

⁴⁵⁷ For the list of States parties that have made declarations pursuant to article 32 of the Convention, see the Treaty Section [website](#).

The inter-State communication procedure is governed by rules 81–87 of the Committee’s [rules of procedure](#).⁴⁵⁸ An inter-State communication should contain:

- (a) The name of the respondent State;
- (b) The provisions of the Convention alleged to have been violated;
- (c) The objectives of the communication;
- (d) The facts of the claim.

If the formal requirements are met, the Committee must make its good offices available to the States parties concerned with a view to finding a friendly solution to the matter. If such a friendly settlement is reached, the Committee issues a report containing a brief statement of the facts and of the solution found. If the attempt at conciliation fails, the Committee may request the submission of additional information or observations in writing from the States parties concerned. The procedure culminates in the publication of a report that contains a summary of the facts submitted, the position of both parties and suggestions to solve the issues raised. The written submissions made by the States parties are attached to the report.

As at July 2021, the Committee has not received any inter-State communications.⁴⁵⁹

E. COUNTRY VISITS (ART. 33)

Article 33 (1)

- “1. If the Committee receives reliable information indicating that a State Party is seriously violating the provisions of this Convention, it may, after consultation with the State party concerned, request one or more of its members to undertake a visit and report back to it without delay.”

The Committee is the first treaty body that can conduct country visits⁴⁶⁰ that are not related to an ongoing inquiry.⁴⁶¹ The procedure applies to all States parties to the Convention and does not require an additional declaration of acceptance. The preconditions for a country visit pursuant to article 33 are that:

- (a) The Committee receives reliable information indicating that a State party is seriously violating the provisions of the Convention;
- (b) The State party concerned agrees to the visit.

⁴⁵⁸ On inter-State communications, see also the Committee’s [working methods](#), para. 45.

⁴⁵⁹ Although several United Nations core human rights treaties have provisions on inter-State communications ([Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), art. 21; [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), art. 76; [Optional Protocol to the International Covenant on Economic, Social and Cultural Rights](#), art. 10; [Optional Protocol to the Convention on the Rights of the Child on a communications procedure](#), art. 12; and [International Convention on the Elimination of All Forms of Racial Discrimination](#), arts. 11–13), as at July 2021, it has been activated only three times, on each occasion pursuant to the [International Convention on the Elimination of All Forms of Racial Discrimination](#).

⁴⁶⁰ On the country visits procedure, see also the Committee’s [working methods](#), para. 46, and its [rules of procedure](#), rules 88–99.

⁴⁶¹ Other treaty bodies can launch an inquiry procedure that may entail a fact-finding visit to the territory of the State party concerned ([Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), art. 20; [Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women](#), arts. 8–9; [Optional Protocol to the Convention on the Rights of Persons with Disabilities](#), arts. 6–7; [Optional Protocol to the International Covenant on Economic, Social and Cultural Rights](#), art. 11; and [Optional Protocol to the Convention on the Rights of the Child on a communications procedure](#), arts. 13–14).

With regard to the information that a State party is seriously violating the provisions of the Convention, the Committee is expected to first ascertain the reliability of such information. It may, therefore, seek to obtain additional relevant information to substantiate the facts brought to its attention (rule 91 (1) of the [rules of procedure](#)). If the Committee is satisfied that the information received is reliable and appears to indicate serious violations of the provisions of the Convention by a State party, the Committee will invite the latter to submit observations within fixed time limits. The Committee may also obtain additional information from other sources, including relevant organs, offices and specialized agencies and funds of the United Nations; other treaty bodies and special procedures of the Human Rights Council; regional intergovernmental organizations or bodies; State institutions, agencies or offices working towards the protection of all persons against enforced disappearance; national human rights institutions; NGOs; associations of victims' families; and other relevant civil society organizations.

If, based on the assessment of the information received, the Committee decides to proceed, pursuant to article 33, it notifies the State party concerned, in writing, of its intention to organize a visit, indicating the composition of the delegation and the purpose of the visit. The State party concerned must reply to the Committee's request within a reasonable time. Upon a substantiated request by the State party, the Committee may decide to postpone or cancel its visit.

If a State party agrees to the visit, it should work together with the Committee to define the modalities of such a visit and provide the Committee with all the facilities needed for the successful completion of the visit, including access to information and the persons concerned. The members designated by the Committee to conduct the visit should determine their own methods of work. During the period of the visit, the Committee may defer the consideration of any report by the State party under article 29 of the Convention. At all stages of the visit, the Committee can seek the assistance of interpreters and persons with special competence in the fields covered by the Convention.

Pursuant to rule 95 of the Committee's [rules of procedure](#), visits may include hearings to enable the designated members of the Committee to determine facts or issues relevant to the assessment of the situation. Persons appearing in such hearings to give their testimonies should make a solemn declaration as to the veracity of their statements. The State party concerned must take all appropriate steps to ensure that no one is subjected to reprisals as a consequence of providing information or participating in any hearings or meetings in connection with the visit.

Following the visit, the Committee transmits its findings, together with any conclusions, observations and recommendations, to the State party, which can submit its observations within a period set by the Committee. Subsequently, to ensure follow-up to the outcome of the visit, the Committee may request that the State party provide additional information on the measures taken with a view to implementing its recommendations.

Since its inception, the Committee has made formal requests to visit three States parties, but as at July 2021 such visits have not yet taken place.

F. BRINGING WIDESPREAD OR SYSTEMATIC ENFORCED DISAPPEARANCES TO THE ATTENTION OF THE GENERAL ASSEMBLY (ART. 34)

“If the Committee receives information which appears to it to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State party, it may, after seeking from the State party concerned all relevant information on the situation, urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations.”

The referral procedure under article 34 of the Convention is unique to the Committee.⁴⁶² It is one of its core functions and is applicable to all States parties without the need for any separate declaration of acceptance. The aim of this procedure is to give the highest degree of visibility to the issue, allowing further action from other United Nations bodies or international institutions.

The precondition for activating this procedure is the receipt of reliable information that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State party, which is when crimes against humanity are being committed.

Information can be submitted to the Committee by organs, offices and specialized agencies and funds of the United Nations; other treaty bodies and the special procedures of the Human Rights Council; regional intergovernmental organizations or bodies; agencies or offices working towards the protection of all persons against enforced disappearances; national human rights institutions; NGOs; associations of victims’ families; and other relevant civil society organizations.⁴⁶³

If the Committee activates the referral procedure, it will seek information from the State party concerned, allowing the State to comment on the allegations brought against it. If the Committee decides to bring the matter to the General Assembly, it must notify the State party concerned in writing. Once the matter reaches the General Assembly, its treatment will be regulated by the Charter of the United Nations and other documents regulating the General Assembly’s mandate.

The referral procedure is governed by rules 100–103 of the Committee’s [rules of procedure](#).⁴⁶⁴ As at July 2021, the procedure has never been activated.

⁴⁶² Unlike other treaty bodies that have an inquiry procedure, the referral procedure of the Committee’s inquiry procedure differs in that it is not meant to be confidential, it does not imply a fact-finding visit and it does not culminate in the adoption of a report that may be published, rather it brings the matter to the attention of the General Assembly. The inquiry procedure entrusted to other treaty bodies requires an explicit acceptance by States parties or allows for opting-out through reservation.

⁴⁶³ [Rules of procedure](#), rule 44.

⁴⁶⁴ See also the Committee’s [working methods](#), para. 47.



Guiding principles for the search for disappeared persons



UN Photo/Caroline Gluck

Since 2015, the Committee has devoted increasing attention to the subject of the search for disappeared persons, holding thematic sessions and studying good practices and existing gaps. Various experts' meetings have been held in addition to the Committee's regular sessions.

The Convention enshrines an obligation to search for disappeared persons and to cooperate for such purposes (arts. 15 and 24 (3)),⁴⁶⁵ as well as an obligation to investigate (arts. 3 and 12).⁴⁶⁶ In examining States parties' reports pursuant to article 29 and in dealing with urgent actions under article 30, the Committee has been confronted on numerous occasions with the practical challenges posed by the search process. It therefore deemed it appropriate to reflect its experience in a document, drawing on lessons learned and good practices, to guide those involved in search processes.

After a thorough consultation process gathering [written submissions](#) from civil society organizations, national human rights institutions, intergovernmental organizations, academia, the United Nations and its specialized agencies and States, on 16 April 2019, the Committee adopted the [guiding principles for the search for disappeared persons](#). The content of the guiding principles can be summarized as follows:

⁴⁶⁵ See sects. III.D.5 and III.F.1 above.

⁴⁶⁶ See sects. III.C.3, III.D.3 and III.F.1 above.

Introduction	Sets the general context in which the guiding principles were adopted and must be read, clarifying that they are based on the Convention and the obligation to search enshrined therein. The guiding principles take into account other international instruments and the experience of other international bodies (especially the general comments of the Working Group) and countries across the world. In particular, reference is made to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law , the updated set of principles for the protection and promotion of human rights through action to combat impunity and the 2016 revised version of the Minnesota Protocol on the Investigation of Potentially Unlawful Death .	
Principle 1	The search for a disappeared person should be conducted under the presumption that he or she is alive	Stipulates that finding the disappeared person alive is the primary objective of the search process, regardless of the circumstances of the disappearance, the date on which the disappearance began and when the search is launched.
Principle 2	The search should respect human dignity	Stipulates that respect for the dignity of victims should be a guiding principle at every stage of the search and spells out how to enforce this principle.
Principle 3	The search should be governed by a public policy	Stipulates that the search should be part of a comprehensive public policy on disappearances and provides details on how to design such a policy.
Principle 4	The search should follow a differential approach	Stipulates that the search for persons in situations of vulnerability requires special procedures, experience and knowledge that meet their particular needs. Reference is made in particular to disappeared children and adolescents, girls and women, indigenous peoples, persons with disabilities, older persons and members of the lesbian, gay, bisexual, transgender and intersex community.
Principle 5	The search should respect the right to participation	Reaffirms that victims, their legal representatives, counsel or any person authorized by them, and any person, association or organization with a legitimate interest have the right to take part in the search. Provides guidance on how this participation should be ensured in practice.
Principle 6	The search should begin without delay	Stipulates that the search should be launched immediately and expeditiously, as soon as the authorities become aware, by any means, or have indications that a person has been subjected to enforced disappearance.
Principle 7	The search is a continuing obligation	Stipulates that the search for disappeared persons should continue until their fates and/or whereabouts have been determined with certainty.
Principle 8	The search should be conducted on the basis of a comprehensive strategy	Requires that in conducting the search process, all reasonable hypotheses concerning the person's disappearance should be explored and a comprehensive strategy must be designed accordingly.
Principle 9	The search should take into account the particular vulnerability of migrants	Provides guidance on the special measures to be taken when searching for persons who disappear in the context of migration, bearing in mind their special vulnerability and the formidable obstacles posed by the transnational scope of the phenomenon.

Principle 10	The search should be organized efficiently	Requires States to ensure that the authorities responsible for the search have the legal capacity, necessary financial and technical resources, administrative structure and budget to effectively discharge their mandate.
Principle 11	The search should use information in an appropriate manner	Provides guidance on the creation, collection, storage, preservation, management, archiving and use of documents, data and information to ensure the effectiveness of the search process.
Principle 12	The search should be coordinated	Stipulates that the search should be centralized under, or coordinated by, a competent body that ensures effective coordination with other entities the cooperation of which is needed for the search to be effective, exhaustive and prompt.
Principle 13	The search and the criminal investigation should be interrelated	Stipulates that the search for the disappeared person and the criminal investigation of the persons responsible for the disappearance should be mutually reinforcing and provides guidance on how to ensure this in practice.
Principle 14	The search should be carried out safely	Requires the adoption of effective measures to protect victims, witnesses and officials involved in the search during the search process.
Principle 15	The search should be independent and impartial	Stipulates that authorities in charge of the search must be independent and autonomous and perform all their duties in compliance with the principle of due process.
Principle 16	The search should be governed by public protocols	Requires that the search be guided by public protocols that allow for oversight of the process.

THE NATURE OF THE GUIDING PRINCIPLES

- The guiding principles are based on the Convention.
- The guiding principles are not a new treaty or an additional protocol to the Convention. Accordingly, they do not require signature, ratification or accession by States.
- For States parties to the Convention, the guiding principles can be regarded as an instrument that provides direction on the implementation of their obligations under the Convention to search and investigate, giving more detail on the rights and duties enshrined in the Convention.
- For victims, the guiding principles provide guidance on better understanding the scope of the rights that they are entitled to under the Convention.
- For States that are not yet parties to the Convention, and for other actors involved in the search process (e.g. international organizations, associations of victims' families and NGOs), they provide useful guidance and can be regarded as a soft law instrument.
- The guiding principles must be considered as a living instrument, which draws upon the experience of the Committee and its interaction with other actors. They may accordingly be updated in the coming years.

The Committee takes into account and refers to the guiding principles, especially:

- When examining States parties' reports under article 29 of the Convention (in lists of issues,⁴⁶⁷ during the actual dialogue, in the concluding observations,⁴⁶⁸ during the follow-up process⁴⁶⁹ and in the examination of additional information).
- In the context of urgent actions under article 30, when providing recommendations and guidance on the measures to be taken to search for disappeared persons.

For instance, the Committee has frequently requested that States parties include in their reports under article 29 information about efforts taken, and the results thereof, to search for and locate disappeared persons. In particular, the Committee has asked for information on how a State party ensures the immediacy of the search; and the protocols in use to govern the search process and the measures taken to locate, exhume, identify and return mortal remains.

States parties are encouraged to use the guiding principles to gather and better organize the information provided to the Committee in their reports under article 29 with regard to the search for disappeared persons.

EXAMPLES OF GOOD PRACTICE



In its concluding observations and the follow-up procedure thereto – even prior to the adoption of the guiding principles – the Committee has expressly referred to measures to:

- Establish an urgent search mechanism – or similar body, such as a disappeared persons investigative commission or a national search system – and adopt the necessary legislation to ensure its functioning.⁴⁷⁰
- Adopt a national plan on the search for disappeared persons and the corresponding legislation.⁴⁷¹
- Create a genetic database for use in locating disappeared persons and the corresponding implementing regulations.⁴⁷²
- Sign bilateral agreements and documents on cooperation with neighbouring countries in the search for disappeared persons.⁴⁷³

In the context of urgent measures pursuant to article 30, the Committee calls on States parties to search and find disappeared persons as a matter of urgency. The Committee can also request the State party concerned to take all necessary measures, including interim measures, to locate and protect a disappeared person.

In this regard, the Committee provides specific recommendations to the State party concerned and requests it to provide information on the measures taken to implement such recommendations.

⁴⁶⁷ CED/C/PAN/Q/1, para. 12; and CED/C/BRA/Q/1, para. 14.

⁴⁶⁸ CED/C/BOL/CO/1, paras. 38–39; and CED/C/COL/CO/1, paras. 25–26.

⁴⁶⁹ CED/C/MEX/OAI/1, paras. 18–21.

⁴⁷⁰ CED/C/COL/CO/1, para. 4.

⁴⁷¹ CED/C/PER/CO/1, para. 5.

⁴⁷² CED/C/MEX/CO/1, para. 41.

⁴⁷³ Ibid., para. 24.

States parties should use the guiding principles to define and implement their plan of action to effectively search for and locate a disappeared person and should not hesitate to refer to these principles when submitting information to the Committee on the measures taken.

Since the application of the guiding principles will ultimately be in the hands of public officials and, in some instances, also other actors, it is crucial to disseminate them widely and, to the extent possible, translate them into languages other than the six official languages of the United Nations. These initiatives can be carried out by State authorities in cooperation with national human rights institutions and civil society organizations.

EXAMPLES OF GOOD PRACTICE



In Mexico, with the help of the local office of OHCHR, an [illustrated version](#) in Spanish of the guiding principles was drafted and disseminated widely, including among associations of victims' families and civil society organizations. Workshops and training for public officials involved in the search process were also organized to raise their awareness of the guiding principles and duly familiarize them with the content thereof.

Workshops on the guiding principles were also organized in Nepal (which is not yet a State party to the Convention) and local civil society organizations drafted a [Nepali version](#) of the document.

Events to analyse and disseminate the guiding principles have been organized by NGOs and international organizations.

The International Expert Working Meeting on the Search for Missing Persons, including Victims of Enforced Disappearance, which was held in Jordan in 2019, produced an [outcome report](#).



The Working Group on Enforced or Involuntary Disappearances and the 1992 Declaration in a nutshell



UN Photo/Albert Gonzalez Farran

The [Working Group](#) was established by the Commission on Human Rights in its resolution [20 \(XXXVI\)](#) with a mandate to examine questions relevant to enforced or involuntary disappearances of persons. Since then, the mandate of the Working Group has been renewed periodically.⁴⁷⁴

The Working Group is composed of five independent experts and holds three sessions each year (usually in February, May and September). Recently, the Working Group has tried to organize at least one session each year outside Geneva. For instance, it recently held sessions in Buenos Aires, Rabat, Seoul, Brussels and Sarajevo. The Working Group meetings are held in private. During the sessions, the Working Group – in addition to reviewing cases of enforced disappearances – also meets with NGOs and family members of the disappeared, as well as representatives of Governments to exchange information relevant to its mandate.

The Working Group reports annually to the Human Rights Council on its activities and, since 2013, it also issues post-session documents, illustrating the activities accomplished during each session.⁴⁷⁵ In 2013, it also started producing thematic studies on specific issues of relevance to its mandate alongside the activity reports.⁴⁷⁶

The Working Group is one of the more than 40 thematic [special procedures](#) of the Human Rights Council. The main feature of these mechanisms is that they are Charter-based, meaning that they derive their competence from the Charter of the United Nations and not from a specific treaty. In fact, a key feature of special procedures is their ability to respond rapidly to allegations of human rights violations occurring anywhere in the world at any time.

⁴⁷⁴ The last resolution renewing the mandate of the Working Group was adopted by the Human Rights Council on 6 October 2020 (resolution [45/3](#)).

⁴⁷⁵ The reports of the Working Group are available on the [OHCHR website](#).

⁴⁷⁶ *Ibid.*

Accordingly, the Working Group has competence in respect of enforced disappearance in all the States Members of the United Nations, without prejudice to their status as parties to any human rights treaty, including the Convention. This means that the Working Group has competence on matters relating to enforced disappearance even for States that have not ratified the Convention.

The main function of the Working Group is humanitarian in nature, in the sense that it assists families in determining the fate or whereabouts of their family members who have been reportedly disappeared. In this context, the Working Group acts as a channel of communication between relatives of victims of enforced disappearance and other sources reporting cases of disappearances and the Governments concerned. For this purpose, the Working Group receives, examines and transmits to Governments reports of enforced disappearances submitted by relatives of disappeared persons or human rights organizations acting on their behalf. The Working Group requests Governments to carry out investigations and to inform it of the results thereof. The Working Group follows up those requests for information on a periodic basis. Cases remain open in the Working Group's database until the fate or whereabouts of the person is determined. Since its inception, according to the latest publicly available information,⁴⁷⁷ the Working Group has transmitted 58,606 cases to 109 States. The number of cases under active consideration stands at 46,271 in more than 92 States.

If the Working Group receives claims of practices of enforced disappearance that may amount to crimes against humanity, it will evaluate these claims and, if appropriate, refer them to the competent authorities, be they international, regional, subregional or domestic.⁴⁷⁸ The Working Group has used this procedure on two previous occasions to request the President of the Security Council to bring the subject to the attention of the Human Rights Council for any appropriate action, including a possible referral to the International Criminal Court.⁴⁷⁹ On other occasions, the Working Group endorsed similar calls made by commissions of inquiry established by the Human Rights Council.⁴⁸⁰

Since 1992, the Working Group has also been entrusted, in addition to its core mandate, with monitoring States' progress in implementing the [1992 Declaration](#). The content of the latter, which in many respects is the predecessor of the Convention, can be summarized as follows:

Preamble

Sets the general context in which the 1992 Declaration was adopted and recalls other international instruments relevant to the protection of all persons from enforced disappearance, in the fields of human rights, international humanitarian law and international criminal law.

It contains the first internationally agreed definition of enforced disappearance, namely that "persons are arrested, detained or abducted against their will or otherwise deprived of 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".

In 2007, the Working Group adopted a general comment on the definition of enforced disappearance.⁴⁸¹

The preamble also affirms that the systematic practice of enforced disappearance is of the nature of a crime against humanity. In 2009, the Working Group adopted a general comment on enforced disappearance as a crime against humanity.⁴⁸²

⁴⁷⁷ A/HRC/45/13.

⁴⁷⁸ Methods of work of the Working Group (A/HRC/WGEID/102/2, para. 48).

⁴⁷⁹ A/HRC/27/49, paras. 72 and 99.

⁴⁸⁰ A/HRC/39/46, para. 101; and A/HRC/42/40, paras. 66 and 76.

⁴⁸¹ A/HRC/7/2, para. 26.

⁴⁸² A/HRC/13/31, para. 39.

Article 1	Any act of enforced disappearance violates human rights and fundamental freedoms	<p>Affirms that any act of enforced disappearance places the victims outside the protection of the law and inflicts severe suffering on them and their families; any such act entails the violation of multiple human 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 and other cruel, inhuman or degrading treatment. It also violates or constitutes a grave threat to the right to life.</p> <p>In its practice, the Working Group has emphasized that enforced disappearance also violates other fundamental human rights. In 2010 and 2011 respectively, the Working Group adopted a general comment on the right to the truth in relation to enforced disappearance⁴⁸³ and a general comment on the right to recognition as a person before the law in the context of enforced disappearances.⁴⁸⁴</p> <p>In 2015, it issued a thematic study on enforced or involuntary disappearances and economic, social and cultural rights.</p>
Article 2	General prohibition of enforced disappearance and cooperation	<p>Establishes that no State should practise, permit or tolerate enforced disappearance and that States must act at the national and regional levels and in cooperation with the United Nations to prevent and eradicate enforced disappearance.</p>
Article 3	Prevention and elimination of enforced disappearances	<p>Requires States to take legislative, administrative, judicial and other measures to prevent and terminate enforced disappearance. In 1995, the Working Group adopted a general comment on this provision.⁴⁸⁵</p>
Article 4	Criminalization of enforced disappearance in domestic legislation	<p>Requests States to codify enforced disappearance as a separate criminal offence under domestic law.</p> <p>In 1995, the Working Group adopted a general comment on this provision.⁴⁸⁶</p> <p>In 2010, the Working Group published a study on the best practices on enforced disappearances in domestic criminal legislation.</p>
Article 5	Liability under civil law	<p>Stipulates that, in addition to the applicable criminal penalties, perpetrators of enforced disappearance and the State or State authorities that organize, acquiesce in or tolerate such disappearances are liable under civil law.</p>
Article 6	Prohibition of orders directing, authorizing or encouraging enforced disappearance and the corresponding training of law enforcement officials	<p>Stipulates that:</p> <ul style="list-style-type: none"> • No order of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order has the right and duty not to obey it. • States must ensure that such orders are prohibited. • Law enforcement officials must receive adequate training on these aspects.
Article 7	Non-derogability of the prohibition of enforced disappearance	<p>Establishes that no circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.</p>

⁴⁸³ A/HRC/16/48, para. 39.

⁴⁸⁴ A/HRC/19/58/Rev.1, para. 42.

⁴⁸⁵ E/CN.4/1996/38, paras. 48–53.

⁴⁸⁶ *Ibid.*, paras. 54–58.

Article 8	Non-refoulement	Stipulates that States should not expel, return, surrender or extradite persons to States where there are substantial grounds for believing that they would be in danger of being subjected to enforced disappearance.
Article 9	Access to a prompt and effective judicial remedy as a means of determining the whereabouts of persons deprived of liberty	Establishes that, in all circumstances, the right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of liberty and/or identifying the authority ordering or carrying out the deprivation of liberty must be upheld.
Article 10	Information on persons deprived of liberty	Establishes that persons deprived of liberty must be held in officially recognized places of detention and brought before a judicial authority promptly after detention. Stipulates that States must ensure access to a minimum of core information on persons deprived of liberty to any person with a legitimate interest, such as relatives, their representatives or their counsel. Requires States, among others, to compile and maintain up-to-date official registers of persons deprived of liberty. In 1996, the Working Group adopted a general comment on this provision. ⁴⁸⁷
Article 11	Release of persons deprived of liberty	Stipulates the safeguards that must be in place when releasing persons deprived of liberty.
Article 12	Guarantees for persons deprived of liberty	Spells out the safeguards to be afforded to persons deprived of liberty, including the identification of officials authorized to order deprivation of liberty and the establishment of a clear chain of command.
Article 13	Procedural guarantees during the investigation phase	Spells out the measures to be adopted to ensure that allegations of enforced disappearance are subjected to a prompt, thorough, independent, impartial and effective investigation. In 2020, the working Group issued a report on standards and public policies for an effective investigation of enforced disappearances .
Article 14	Jurisdiction – <i>aut dedere aut judicare</i>	Requests States to establish their competence to exercise jurisdiction over the offence of enforced disappearance, especially when the presumed perpetrator is found to be within their jurisdiction or under their control, unless this person has been extradited to another State wishing to exercise jurisdiction.
Article 15	Granting asylum	Requires States to take into account any grounds for believing that a person has participated in the perpetration of an enforced disappearance when deciding whether to grant asylum.
Article 16	Incompetence of special courts, including military tribunals	Establishes that persons alleged to have committed an act of enforced disappearance must be tried only by the competent ordinary courts and not by any other special tribunal, in particular military courts; and that persons alleged to have committed any such act must be suspended from official duties during the investigation.

⁴⁸⁷ E/CN.4/1997/34, paras. 22–30.

Article 17	Enforced disappearance as a continuing offence	<p>Recognizes that enforced disappearance must 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.</p> <p>Stipulates that statutes of limitations, where they exist, should be substantial and commensurate with the extreme seriousness of the offence.</p> <p>In 2010, the Working Group adopted a general comment on enforced disappearance as a continuous crime.⁴⁸⁸</p>
Article 18	Prohibition of amnesty laws and similar measures	<p>Establishes that persons who are alleged to have committed an act of enforced disappearance should not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.</p> <p>In 2005, the Working Group adopted a general comment on this provision.⁴⁸⁹</p>
Article 19	Measures of reparation	<p>Stipulates that the victims of enforced disappearance and their families should obtain redress and should have the right to adequate compensation, including the means for as complete a rehabilitation as possible.</p> <p>In 1997, the Working Group adopted a general comment on this provision⁴⁹⁰ and, in 2013, it issued a thematic study on reparations and enforced disappearances.</p>
Article 20	Enforced disappearance, wrongful removal and falsification of identity of children	<p>Requires States to prevent and suppress the abduction of children of parents subjected to enforced disappearance and of children born during their mother's enforced disappearance.</p> <p>Stipulates that States must devote their efforts to the search for and the identification of such children and their restitution to the families of origin.</p> <p>Requires States to have in place legal procedures to review adoptions and, where appropriate, annul adoptions or placements that originated in an enforced disappearance.</p> <p>In 2012, the Working Group adopted a general comment on children and enforced disappearances.⁴⁹¹</p>
Article 21	Best protection clause	<p>Stipulates that any provisions that are more conducive to protection from enforced disappearance found in the Universal Declaration of Human Rights and any other international instrument should be applied.</p>

⁴⁸⁸ A/HRC/16/48, para. 39.

⁴⁸⁹ E/CN.4/2006/56, para. 49.

⁴⁹⁰ E/CN.4/1998/43, paras. 68–75.

⁴⁹¹ A/HRC/WGEID/98/1.

NATURE OF THE 1992 DECLARATION

- The 1992 Declaration was proclaimed by the General Assembly in its resolution 47/133. It is not a treaty and, accordingly, it does not require signature, ratification or accession by States.
- The 1992 Declaration is a soft law instrument, which contains a body of principles for all States and reflects customary international law on the subject.
- In its mandate, the Committee applies the Convention, but it also takes into account as a reference the provisions of the 1992 Declaration, especially as interpreted by the Working Group in its general comments and in its thematic studies.

As detailed in its methods of work, the Working Group performs its mandate mainly through the following procedures:

- Cases (dealt with under either the “urgent” or “standard” procedure), paragraphs 10–11
- Urgent appeals, paragraphs 30–31
- Prompt intervention letters, paragraph 32
- General allegations, paragraphs 33–34
- Country visits, paragraphs 49–51



A. CASES

Reports of cases of enforced disappearance are submitted to the Working Group by the families of disappeared persons, their representatives or NGOs. The reports must be submitted in writing,⁴⁹² with clear indication of the identity of the “source”. If the latter is other than a family member, it must have the explicit consent of the family to submit the case on its behalf and it must also be in a position to follow up with the relatives of the disappeared person.

To be considered by the Working Group, which can always request additional information, reports of enforced disappearance must contain the following information, which will then be provided to States to enable them to carry out meaningful investigations:

- (a) Full name of the disappeared person and, if applicable, any aliases or other names used by the person, and the person’s date of birth, gender, nationality and occupation or profession;
- (b) Date of disappearance, namely the day, month and year of deprivation of liberty, or day, month and year when the disappeared person was last seen. In the event that the date of disappearance is not known, an approximate indication should be provided;
- (c) Place of deprivation of liberty or where the disappeared person was last seen;
- (d) State agents or other parties acting on behalf of, or with the support, direct or indirect, consent or acquiescence of, the State believed to be responsible for the deprivation of liberty of the person or to be holding the disappeared person in unacknowledged detention;
- (e) The steps taken by the family or any other individual or organization on behalf of the family to determine the fate or whereabouts of the disappeared person, or at least an indication that efforts to resort to domestic remedies have been frustrated or otherwise been inconclusive. Reasons should be provided in the event that no action has been taken.

Notably, the submission of a case to the Working Group does not require the previous exhaustion of domestic remedies.

CASES CONSIDERED BY THE WORKING GROUP

- Historically, the Working Group has operated on the basis that, in accordance with the definition contained in the preamble of the 1992 Declaration, 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, a State.
- Based on the above, the Working Group does not intervene in cases that are attributed to persons or groups not acting on behalf of, or with the support, direct or indirect, consent or acquiescence of, a Government, such as terrorist or insurgent movements fighting a Government on its own territory.
- However, in 2019, the Working Group announced that, “in light of its humanitarian mandate and the fact that the victims of these acts did not have any remedy to address their plight, the Working Group has decided to document cases concerning enforced or involuntary disappearances allegedly perpetrated by non-State actors that exercise effective control and/or government-like functions over a territory.”⁴⁹³

⁴⁹² The forms to be used to submit a case to the Working Group are available in English, French and Spanish.

⁴⁹³ A/HRC/42/40, para. 94.

The Working Group handles cases under urgent procedure or the standard procedure. Urgent procedure applies to cases of enforced disappearance that commenced within the three months prior to the receipt of the report by the Working Group. These cases are transmitted to the State concerned through the most direct and rapid means possible. Cases that have occurred prior to the three-month limit, but not more than one year before the date of their receipt by the secretariat, provided that they had a connection with a case that occurred within the three-month period, may be transmitted between sessions by letter upon authorization by the Chair-Rapporteur.

The standard procedure applies to cases of enforced disappearance that are reported after three months. These cases are examined by the Working Group during its sessions and they are communicated by letter from the Chair-Rapporteur to the State concerned with the request to carry out investigations in order to clarify the fate or whereabouts of the disappeared person and to inform the Working Group of the results.

The Working Group considers cases outstanding until they have been clarified, archived or discontinued, namely:

- (a) Clarified: when the fate or whereabouts of the disappeared persons are clearly established and detailed information is transmitted as a result of an investigation by the State, inquiries by NGOs, fact-finding missions by the Working Group or by human rights personnel from the United Nations or from any other international organization operating in the field, or by a search conducted by the family, irrespective of whether the person is alive or dead;
- (b) Archived: a case may be archived when the competent authority specified in the relevant national law issues a declaration of absence as a result of enforced disappearance and the relatives or other interested parties have manifested, freely and indisputably, their desire not to pursue the case any further. These conditions should at all times respect the rights to truth, justice and integral reparation;
- (c) Discontinued: in exceptional circumstances, the Working Group may discontinue the consideration of cases in which the families have manifested, freely and indisputably, their desire not to pursue the case any further, or when the source is no longer in existence or is unable to follow up the case, and the steps taken by the Working Group to establish communication with other sources have proven unsuccessful.

While cases remain outstanding, the Working Group reminds every State concerned once a year of the cases that have not yet been clarified and three times a year of all urgent action cases transmitted since the previous session.

When the Working Group receives replies from States on outstanding cases containing clear and detailed information on the fates or whereabouts of disappeared persons, it transmits the replies to the sources to make any observations that they may have or to provide additional details on the cases. If the sources do not respond within six months of the dates on which the States' replies were communicated to them or if they contest the States' information on grounds that are considered unreasonable by the Working Group, the cases will be considered clarified and accordingly listed under the heading "cases clarified by the State's response" in the statistical summary of the annual report. If the sources contest the States' information on reasonable grounds, the States will be informed and invited to comment thereon.



If sources provide clear and detailed information on cases that have been clarified, archived or discontinued erroneously because the States' replies referred to different persons, did not correspond to the situations reported or did not reach the sources within the six-month period referred to above, the Working Group may decide to reopen and transmit the cases to the States anew and request them to comment thereon. In such instances, the cases in question will be relisted among the cases outstanding.

B. URGENT APPEALS

The Working Group may send an urgent appeal to the Government concerned through the minister for foreign affairs whenever it receives credible allegations that a person has been arrested, detained, abducted or otherwise deprived of liberty and is at risk of being made to disappear. In these cases, the Working Group requests the State concerned to carry out investigations on the matter and to provide information on it. The Working Group may decide to deal with these cases as joint communications with other relevant special procedures (e.g. the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment or the Working Group on Arbitrary Detention).

Urgent appeals are reflected in post-session documents and in annual reports, but are not counted in the statistics of the State concerned. Replies received from States concerning urgent appeals are also summarized in post-session documents and annual reports and, where pertinent, the information provided by the States is forwarded to those who submitted the urgent appeal, who are invited to make observations thereon or to provide additional details.

C. PROMPT INTERVENTION LETTERS

The Working Group transmits to the Governments concerned information concerning cases of intimidation, persecution or reprisal against relatives of disappeared persons, witnesses to disappearances or their families, members of associations of victims' relatives and other NGOs, human rights defenders or individuals concerned with disappearances. Upon transmitting such information, the Working Group calls on the Governments concerned to take steps to protect all the fundamental rights of the persons affected. In light of the urgent nature of these communications, they are transmitted directly and by the most rapid means to the ministers for foreign affairs.

Intervention letters and the corresponding replies received from States are summarized in post-session documents and annual reports of the Working Group.

D. GENERAL ALLEGATIONS

The Working Group regularly transmits to States allegations received from reliable sources (e.g. relatives of disappeared persons or credible NGOs) with regard to obstacles encountered in the implementation of the 1992 Declaration and requests them to comment thereon. For instance, general allegations may concern the existence of legislation or policies that are at odds with the 1992 Declaration. Such allegations are reflected in post-session documents and in the annual reports of the Working Group, together with the replies received from States.

E. COUNTRY VISITS

With the prior agreement of the relevant Government, the Working Group can visit a country to assess the overall situation regarding enforced disappearances. Through visits, the Working Group aims to enhance the dialogue among the authorities most directly concerned, the families of the disappeared or their representatives and the Working Group and to assist in the clarification of the reported cases of enforced disappearance. Moreover, during the visits, the Working Group examines the actions taken by States to prevent, investigate, punish and eradicate enforced disappearance, as well as the programmes and measures adopted to implement the 1992 Declaration.

Some countries have issued “standing invitations”, which means that they are, in principle, prepared to receive a visit from any special procedure mandate holder, including the Working Group.⁴⁹⁴ While the Working Group carries out visits to countries by invitation, when deemed appropriate, it can take the initiative of approaching States with a view to conducting country visits.

Country visits are guided by the provisions contained in the [code of conduct](#) and the [terms of reference for country visits by special procedure mandate holders](#).

⁴⁹⁴ The updated list of countries that have issued a standing invitation is available on the [OHCHR website](#).

The Working Group presents a report on the visit, containing its findings and recommendations, to the Human Rights Council.⁴⁹⁵ The conclusions contained in the report aim to assist Governments in identifying factors that may contribute to enforced disappearances and provide practical solutions to implement international standards.

A few (usually four) years after issuing the report on the visit, the Working Group seeks information from the State concerned on the steps taken to implement the recommendations contained in the report or the constraints that might have prevented their implementation. Information is also received from civil society and other sources. Based on the information gathered, the Working Group issues a follow-up report on the visit and, with the prior agreement of the Government concerned, it may also carry out follow-up visits.

THE WORKING GROUP AND THE COMMITTEE

- For States that are not yet parties to the Convention, only the Working Group can deal with cases of enforced disappearance.
- For States parties to the Convention, both the Committee and the Working Group are competent, within their respective mandates. They coexist side by side and can be regarded as complementary: they coordinate and cooperate between themselves with a view to strengthening joint efforts to prevent and eradicate enforced disappearance.
- Coordination and cooperation between the Committee and the Working Group is explicitly required pursuant to article 28 (1) of the Convention. In accordance with paragraph 43 of its methods of work, the Working Group “cooperates and coordinates with the Committee When exchanging information and coordinating action, the Working Group respects the different mandates and roles of the two bodies.” The Working Group and the Committee hold regular meetings to enhance their cooperation and coordination. In September 2020, the Working Group and the Committee jointly adopted the [key guidelines on COVID-19 and enforced disappearances](#).
- For States parties to the Convention, the mandates of the Committee and the Working Group may overlap somewhat especially with regard to urgent actions under article 30 of the Convention and cases submitted to the Working Group. In this connection, in principle, the Committee deals with those cases of enforced disappearances that took place after the entry into force of the Convention, while the Working Group examines all situations that commenced before.
- Should the Working Group determine that cases or allegations before it enter within the competence of the Committee, it will inform the sources (e.g. relatives of disappeared persons or their representatives) and refer the cases to the Committee for action. The Committee does the same when it receives a case or allegations that do not fall within its competence but can be addressed by the Working Group.
- If a case, allegation or other document received by the Working Group contains information relevant to the Committee, the information will be referred to the Committee. While conducting its visits, the Working Group takes into consideration the Committee’s examination of States parties’ reports. Conversely, the Committee uses the Working Group’s visit reports to prepare its examination of States parties’ reports.

⁴⁹⁵ The Working Group reports on its country visits are available on the [OHCHR website](#).



**Provisions of the Convention reflected
in other international treaties**



UN Photo/Victoria Hazou

Even if the Convention is the only comprehensive and universal treaty on enforced disappearance, enforced disappearance is a crime under international law and it violates multiple human rights and fundamental freedoms enshrined in various universal and regional human rights and other international treaties. These legal instruments affirm various rights that might be affected by enforced disappearance and envisage the corresponding obligations of States parties to prevent and repress such practices.

A. UNIVERSAL HUMAN RIGHTS TREATIES

1. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

The [International Covenant on Civil and Political Rights](#) is the core international human rights treaty stipulating civil and political rights.⁴⁹⁶ Adopted in 1966, it entered into force in 1976. There are [173 States parties](#) to the Covenant.

The [Human Rights Committee](#) – the body charged with overseeing the implementation of the Covenant – has made important pronouncements on enforced disappearance in its concluding observations on States parties' reports, in its Views on individual communications and in its general comments.

The Human Rights Committee has affirmed that, although the Covenant does not mention enforced disappearance as such, it constitutes a unique and integrated series of acts and omissions representing a grave threat to multiple rights affirmed therein, such as the right to life (art. 6), the prohibition of torture or cruel, inhuman or degrading treatment or punishment (art. 7), the right to liberty and security

⁴⁹⁶ OHCHR, [Civil and Political Rights: The Human Rights Committee](#), Fact Sheet No. 15/Rev.1 (New York and Geneva, 2005).

of person and the rights of persons deprived of liberty (arts. 9–10) and the right to a legal personality (art. 16). According to the Human Rights Committee, the cases involving enforced disappearance or wrongful removal of children also violate the right to family life (art. 17) and the right to special measures of protection for children (art. 24). In its jurisprudence, the Human Rights Committee has found violations of these provisions alone and read in conjunction with article 2 (3) of the Covenant (the right to an effective remedy) with respect to the positive obligations stemming from the Covenant.⁴⁹⁷

Human Rights Committee, **general comment No. 35 (2014)**

“17. ... Enforced disappearances violate numerous substantive and procedural provisions of the Covenant and constitute a particularly aggravated form of arbitrary detention.

...

55. The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6, paragraph 1, may overlap with the right to security of person guaranteed by article 9, paragraph 1. The right to personal security may be considered broader to the extent that it also addresses injuries that are not life-threatening. Extreme forms of arbitrary detention that are themselves life-threatening violate the rights to personal liberty and personal security as well as the right to protection of life, in particular enforced disappearances.

58. Several safeguards that are essential for the prevention of torture are also necessary for the protection of persons in any form of detention against arbitrary detention and infringement of personal security. The following examples are non-exhaustive. Detainees should be held only in facilities officially acknowledged as places of detention. A centralized official register should be kept of the names and places of detention, and times of arrival and departure, as well as of the names of persons responsible for their detention, and made readily available and accessible to those concerned, including relatives. Prompt and regular access should be given to independent medical personnel and lawyers and, under appropriate supervision when the legitimate purpose of the detention so requires, to family members. Detainees should be promptly informed of their rights, in a language they understand; providing information leaflets in the appropriate language, including in Braille, may often assist the detainee in retaining the information. Detained foreign nationals should be informed of their right to communicate with their consular authorities, or, in the case of asylum seekers, with the Office of the United Nations High Commissioner for Refugees. Independent and impartial mechanisms should be established for visiting and inspecting all places of detention, including mental-health institutions.” (Footnotes omitted.)

⁴⁹⁷ See, among others, Human Rights Committee, *Bousroual v. Algeria* (CCPR/C/86/D/992/2001), para. 9.2; *Katwal v. Nepal* (CCPR/C/113/D/2000/2010), para. 11.3; *El Boathi v. Algeria* (CCPR/C/119/D/2259/2013), para. 7.4; *Herrera Rubio v. Colombia*, communication No. 161/1983 (A/43/40, pp. 190–198), para. 10.3; *Prutina et al. v. Bosnia and Herzegovina*, para. 9.2; *Mojica v. Dominican Republic*, communication No. 449/1991 (A/49/40, pp. 142–145), para. 5.5; and *Guezout et al. v. Algeria* (CCPR/C/105/D/1753/2008), paras. 8.4 and 8.7.

Human Rights Committee, general comment No. 36 (2018)

- “57. The right to life guaranteed by article 6 of the Covenant, including the right to protection of life under article 6 (1), may overlap with the right to security of person guaranteed by article 9 (1). Extreme forms of arbitrary detention that are themselves life-threatening, in particular enforced disappearances, violate the right to personal liberty and personal security and are incompatible with the right to life Failure to respect the procedural guarantees found in article 9 (3) and (4), designed inter alia to prevent disappearances, could also result in a violation of article 6.
58. Enforced disappearance constitutes a unique and integrated series of acts and omissions representing a grave threat to life. The deprivation of liberty, followed by a refusal to acknowledge that deprivation of liberty or by concealment of the fate of the disappeared person, in effect removes that person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. It thus results in a violation of the right to life as well as other rights recognized in the Covenant, in particular, article 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment), article 9 (liberty and security of persons), and article 16 (right to recognition of a person before the law). States parties must take adequate measures to prevent the enforced disappearance of individuals, and conduct an effective and speedy inquiry to establish the fate and whereabouts of persons who may have been subject to enforced disappearance. States parties should also ensure that the enforced disappearance of persons is punished with appropriate criminal sanctions and introduce prompt and effective procedures to investigate cases of disappearances thoroughly, by independent and impartial bodies that operate, as a rule, within the ordinary criminal justice system. They should bring to justice the perpetrators of such acts and omissions and ensure that victims of enforced disappearance and their relatives are informed about the outcome of the investigation and are provided with full reparation. Under no circumstances should families of victims of enforced disappearance be obliged to declare them dead in order to be eligible for reparation. States parties should also provide families of victims of disappeared persons with the means to regularize their legal status in relation to the disappeared persons after an appropriate period of time.” (Footnotes omitted.)

In addition to recommending that States parties continue their efforts to establish the fates and whereabouts of disappeared persons until they are established with certainty, and to investigate and bring to justice those responsible for the criminal act, the Human Rights Committee has referred to numerous measures of reparation in its Views on individual communications dealing with enforced disappearance, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.

Examples of recommendations of the Human Rights Committee in its Views on individual communications



Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*: (a) to conduct a thorough and effective investigation into the facts surrounding the detention of the disappeared person and the treatment he suffered during detention and disappearance; (b) to provide the authors with detailed information about the results of its investigation; (c) to release the disappeared person if he is still alive or, should he be deceased, to hand over his remains to his family; (d) to prosecute and punish those found responsible for the violations committed and make the results of such measures public; (e) to ensure that necessary and adequate psychological rehabilitation and medical treatment are made available to the authors; and (f) to provide adequate compensation, including appropriate measures of satisfaction, beyond the partial compensation already offered, to the authors for the violations suffered. The State party is also under an obligation to take steps to prevent the occurrence of similar violations in the future. In particular, the State party should ensure that its legislation criminalizes torture and enforced disappearance and provides for appropriate sanctions and remedies commensurate with the gravity of the crimes. Moreover, it should guarantee that such cases give rise to a prompt, impartial and effective investigation and it should allow for the criminal prosecution of those responsible for such crimes.

In its concluding observations on States parties' reports, the Human Rights Committee has made findings on the practice of enforced disappearance itself and the corresponding obligations of the States parties to the Covenant, as well as on the importance of the ratification of the Convention and the recognition of the competence of the Committee pursuant to articles 31–32 of the Convention.⁴⁹⁸

Examples of recommendations



The Committee recommends that the State party should expedite the investigation of all unresolved cases involving missing persons. Furthermore, the State party should take all necessary measures to ensure that the Missing Persons Institute is adequately funded and able to fully implement its mandate with a view to completing the resolution of these cases as soon as possible. The State party should also continue to provide adequate psychological support to families of missing persons during the conduct of exhumations. The State party should abolish the obligation in cases of disappearance which makes the right to compensation dependent on the family's willingness to have the family member declared dead. The State party should ensure that any compensation or other form of redress adequately reflects the gravity of the violation and the harm suffered.

The State party should take all necessary action to (a) ensure that disappeared persons and their families have access to an effective remedy, including for those families who have declared – for purposes of being able to receive compensation – that their disappeared family member was dead; (b) ensure that thorough and independent investigations are launched into all allegations of enforced disappearance; (c) guarantee access to the truth for families of victims, such as by arranging for the exhumation of unmarked graves and mass graves and by having remains identified through scientific means, such as DNA testing; (d) guarantee the right to comprehensive reparation for all victims; (e) put in place guarantees to prevent enforced disappearance from reoccurring; and

⁴⁹⁸ CCPR/C/DZA/CO/4, paras. 29–30; CCPR/C/MEX/CO/5, para. 12; and CCPR/C/BIH/CO/2, paras. 9 and 12.

(f) implement the relevant Views adopted by the Committee under the Optional Protocol, provide any information that may be useful in resolving the cases pending before the Working Group on Enforced or Involuntary Disappearances and organize as promptly as possible the country visit referred to in the invitation extended in December 2013 by the State party to the Working Group. The State party should also take all necessary action to ratify the International Convention for the Protection of All Persons from Enforced Disappearance, which it signed in 2007.

2. CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The [Convention](#) is a universal international human rights treaty, stipulating the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and establishing numerous obligations of States parties.⁴⁹⁹ It was adopted in 1984 and entered into force in 1987.

The [Committee against Torture](#) – the body charged with overseeing the implementation of the Convention – has made important findings on enforced disappearance in its concluding observations on States parties' reports and its decisions on individual communications. It has affirmed that enforced disappearance amounts to torture in itself and that States parties have various obligations under the Convention to prevent and repress such practices, including under articles 2, 11, 12, 14 and 16.

Committee against Torture, *Hernández Colmenarez and Guerrero Sánchez v. Bolivarian Republic of Venezuela*⁵⁰⁰

"6.4. ... the Committee recalls that States parties are under a special obligation to take effective measures to prevent torture and ensure that persons deprived of their liberty can exercise the rights enshrined in the Convention, since they bear a special responsibility owing to the extent of the control that prison authorities exercise over such persons. States parties must therefore take the necessary steps to prevent individuals from inflicting acts of torture on persons under their control. The Committee further recalls that enforced disappearance entails multiple human rights violations and a failure by the State party concerned to comply with the obligations contained in the Convention, and that this constitutes in itself, in relation to the disappeared person, or may constitute, in relation to the person's relatives, a form of torture or inhuman treatment contrary to the Convention." (Footnotes omitted.)

⁴⁹⁹ See OHCHR, *Methods of Combating Torture*, Fact Sheet No. 4/Rev.1 (New York and Geneva, 2002); and *The Committee against Torture*, Fact Sheet No. 17 (New York and Geneva, 1992). These fact sheets were published a number of years ago but remain available for reference purposes.

⁵⁰⁰ CAT/C/54/D/456/2011.

Examples of recommendations of the Committee against Torture in its Views on individual communications



The Committee urges the State party to: (a) conduct a thorough and effective investigation into the circumstances surrounding Mr. Guerrero Larez's disappearance in the Penitentiary; (b) prosecute, try and punish those responsible for the violations committed; and (c) grant compensation and the means for rehabilitation in accordance with the Convention to Mr. Guerrero Larez, if he is still alive, and compensation to the complainants.

In its concluding observations on States parties' reports, the Committee against Torture has made findings on the practice of enforced disappearance itself and the corresponding obligations of States parties to the Convention against Torture, as well as on the importance of the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance and the recognition of the competence of the Committee on Enforced Disappearances pursuant to articles 31–32 of that Convention.⁵⁰¹

Examples of recommendations



The Committee recommends that the State party: (a) unambiguously affirm at the highest level of government that law enforcement authorities must immediately cease engaging in the practice of unacknowledged detention; (b) publish a list of all recognized places of detention and ensure that no one is held in secret or incommunicado detention anywhere in the territory of the State party; (c) ensure that any official found to have held an individual in unacknowledged detention is prosecuted and punished with penalties commensurate with the gravity of the crime, including in cases where the individual was subsequently released; (d) ensure that all allegations of unacknowledged detention, disappearance and death in custody are promptly and thoroughly investigated by a body that is independent of the authorities alleged to have been responsible for the detention; (e) ensure that all places of deprivation of liberty in the State party are monitored by an independent authority with the power to carry out unannounced visits to places of detention and speak confidentially with any individual in the facility, and that representatives of non-governmental organizations (NGOs) are also permitted to access all places of detention; (f) consider ratifying the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (g) because offences such as "abduction" do not sufficiently communicate the serious nature of unacknowledged detention carried out by or with the complicity of State officials, prohibit "enforced disappearance" as a distinct crime in the legislation, reflecting the definition set out in the International Convention for the Protection of All Persons from Enforced Disappearance, and consider ratifying the Convention.

The Committee calls upon the State party to ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

⁵⁰¹ CAT/C/BGD/CO/1, para. 16; and CAT/C/NIC/CO/1, para. 27.

3. OTHER UNIVERSAL HUMAN RIGHTS TREATIES

Enforced disappearance may also infringe numerous obligations stemming from other universal human rights treaties, including:

- [International Covenant on Economic, Social and Cultural Rights](#), which was adopted in 1966 and entered into force in 1976.⁵⁰²
- [Convention on the Elimination of All Forms of Discrimination against Women](#), which was adopted in 1979 and entered into force in 1981.⁵⁰³
- [Convention on the Rights of the Child](#), which was adopted in 1989 and entered into force in 1990.⁵⁰⁴
- [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), which was adopted in 1990 and entered into force in 2003.⁵⁰⁵

The treaty bodies charged with overseeing the implementation of these instruments have made findings and recommendations in their concluding observations on the practice of enforced disappearance itself and the corresponding obligations, as well as on the importance of the ratification of the Convention and the recognition of the competence of the Committee pursuant to articles 31–32 of the Convention.

Examples of recommendations



The Committee encourages the State party to ratify the International Convention for the Protection of All Persons from Enforced Disappearance, to which it is not yet a party.

The Committee recommends that it increase and strengthen its efforts to prevent child disappearances, fully investigate those cases and prosecute those responsible.

The Committee recommends that the State party take measures to ensure that families of disappeared persons have unconditional access to social security, in particular pension and survivor benefits and child benefits. It draws the attention of the State party to its general comment No. 19 on the right to social security, which refers to the core obligation of a State party to ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups.

The Committee urges the State party to: arrange for a broadening of the mandate and funding of the Forensic Committee in order to ensure a gradual cross-referencing of forensic information on disappeared migrants from other cases in addition to the three massacres; and ensure effective cooperation with expert commissions and multidisciplinary teams in countries of origin and destination, in assisting migrants who are victims of serious crimes, including enforced disappearance, and in tracing, locating and releasing disappeared persons or, in the event of death, in exhuming and identifying their remains and arranging for their dignified return.

⁵⁰² See OHCHR, *Frequently Asked Questions on Economic, Social and Cultural Rights*, Fact Sheet No. 33 (New York and Geneva, 2008); *The Committee on Economic, Social and Cultural Rights*, Fact Sheet No. 16/Rev.1 (New York and Geneva, 1991); and *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, Professional Training Series No. 12 (New York and Geneva, 2005).

⁵⁰³ See OHCHR, *Discrimination against Women: The Convention and the Committee*, Fact Sheet No. 22 (New York and Geneva, 1995).

⁵⁰⁴ See OHCHR, *The Rights of the Child*, Fact Sheet No. 10/Rev.1 (New York and Geneva, 1997).

⁵⁰⁵ See OHCHR, *The International Convention on Migrant Workers and its Committee*, Fact Sheet No. 24/Rev.1 (New York and Geneva, 2005).

B. REGIONAL HUMAN RIGHTS TREATIES

1. AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

The [African Charter on Human and Peoples' Rights](#) is a regional treaty open to African States.⁵⁰⁶ It was adopted in 1981 and entered into force in 1986. It has 54 States parties.

The Charter enshrines numerous rights that are relevant in preventing and repressing enforced disappearances, including the right to life (art. 4), the prohibition of torture and cruel, inhuman or degrading treatment or punishment (art. 5), the right to personal liberty and protection from arbitrary arrest (art. 6), the right to fair trial (art. 7), the right to receive information (art. 9) and the right to freedom of association (art. 10).

The [African Commission on Human and Peoples' Rights](#) has dealt with enforced disappearance in its reviews of States parties' reports and in its decisions on individual communications.⁵⁰⁷ It has also held special thematic panels on enforced disappearance and, in 2005, established the [Working Group on the Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa](#). This Working Group, in consultation with various stakeholders, including other international mechanisms and civil society organizations, is currently drafting a document containing guidelines on enforced disappearances in Africa.

2. AMERICAN CONVENTION ON HUMAN RIGHTS

The [American Convention on Human Rights](#) is a regional human rights treaty open to members of the Organization of American States. Together with the [American Declaration of the Rights and Duties of Man](#), it is a cornerstone of the protection of human rights in the Americas. The Convention was adopted in 1969 and entered into force in 1978. It has 24 States parties.

The [Inter-American Commission on Human Rights](#) also has an important role to play in upholding the rights provided in these instruments. Apart from initially examining the complaints concerning human rights violations prior to their potential referral to the [Inter-American Court of Human Rights](#) and issuing provisional measures when appropriate, the Commission is also mandated to receive individual petitions with respect to those member States of the Organization of American States that are not parties to the Convention. It also carries out country visits and issues both [thematic](#) and [country-specific reports](#) that often contain relevant findings and recommendations concerning enforced disappearance and the corresponding obligations of States.

⁵⁰⁶ Although they will not be analysed here, it is worth mentioning that, within the African human rights system, reference – albeit punctual – to enforced disappearance is made in the [Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights](#) (adopted on 27 June 2014, not yet in force), annex, art. 28C (1) (i); [African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa](#) (adopted on 23 October 2009, in force since 6 December 2012), art. IX; and the [Pact on Security, Stability and Development in the Great Lakes Region, Protocol on the Prevention and Suppression of Sexual Violence against Women and Children](#) (adopted in December 2006, entered into force in June 2008), art. 1 (2) (i).

⁵⁰⁷ African Commission on Human and Peoples' Rights, [Malawi African Association and others v. Mauritania](#), Nos. 54/91, 61/91, 96/93, 98/93, 164/97, 196/97 and 210/98, Decision, 11 May 2000; [Zegveld and Ephrem v. Eritrea](#), No. 250/2002, Decision, 20 November 2003; and [Commission nationale des droits de l'homme et des libertés v. Chad](#), No. 74/92, Decision, 11 October 1995.

The Inter-American Court of Human Rights has issued several judgments on enforced disappearance. Importantly, the Court has affirmed that “the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*”.⁵⁰⁸ It has also held that enforced disappearance is a complex phenomenon that must be understood and confronted in an integral fashion and that it is a multiple and continuous violation of many rights under the Convention, such as the right to life (art. 4), the right to humane treatment (art. 5), the right to personal liberty (art. 7), the right to a fair trial and judicial protection (arts. 8 and 25), the right to juridical personality (art. 3) and freedom of thought and expression (art. 13). In cases involving enforced disappearance, the aforementioned provisions are considered autonomously, as well as in conjunction with articles 1–2 (thus covering the positive obligations of the State).⁵⁰⁹ The Court has also made important findings on enforced disappearance and wrongful removal of children, declaring the violation of other rights enshrined in the Convention, such as the rights of the family (art. 17), the right to a name (art. 18), the rights of the child (art. 19) and, where applicable, the right to nationality (art. 20).⁵¹⁰

In cases involving enforced disappearance, the Court has ordered various measures of reparation, including pecuniary compensation, but also various measures aiming to guarantee restitution, rehabilitation, satisfaction, restoration of dignity and reputation, and guarantees of non-repetition. Such measures include the carrying out of an investigation into the events leading up to the enforced disappearance and the prosecution and sanctioning of those responsible; the localization, exhumation and identification of mortal remains and their restitution to relatives; the abrogation of amnesty laws; the provision of medical and psychological assistance to victims and their relatives; the establishment of training and educational programmes for members of the armed forces and penitentiary personnel on international human rights and humanitarian law; the carrying out of public ceremonies in which State authorities acknowledge international responsibility for the violations committed and apologize; and the building of monuments to honour victims and re-establish their dignity. In cases involving women, in particular, the Court has paid special attention to the determination of gender-sensitive measures, meant to effectively contribute to rehabilitation and exercise a transformative role by breaking down pre-existing gender hierarchies and stereotypes.⁵¹¹

3. INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS

The [Inter-American Convention on Forced Disappearance of Persons](#) is the only comprehensive regional treaty on enforced disappearance. It was adopted in 1994 and entered into force in 1996. It is open to members of the Organization of American States. It has 15 States parties.

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights are competent to adjudicate on alleged violations of the provisions of the Inter-American Convention on Forced Disappearance of Persons by a State party.⁵¹²

⁵⁰⁸ Inter-American Court of Human Rights, *Goiburú et al. v. Paraguay*, para. 84.

⁵⁰⁹ Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras*, Judgment, 29 July 1988; *Bámaca-Velásquez v. Guatemala*, Judgment, 25 November 2000; *Goiburú et al. v. Paraguay*; *Heliodoro Portugal v. Panama*; *Radilla-Pacheco v. Mexico*; *Anzualdo Castro v. Peru*, Judgment, 22 September 2009; *Ticona Estrada et al. v. Bolivia*, Judgment, 27 November 2008; and *Alvarado Espinoza et al. v. Mexico*, 30 August 2019 (only available in Spanish).

⁵¹⁰ Inter-American Court of Human Rights, *Contreras et al. v. El Salvador*; *Molina-Theissen v. Guatemala*, Judgment, 3 July 2004; and *“Las Dos Erres” Massacre v. Guatemala*.

⁵¹¹ See, e.g., Inter-American Court of Human Rights, *González et al. (“Cotton Field”) v. Mexico*, Judgment, 16 November 2009.

⁵¹² Inter-American Court of Human Rights, *Radilla-Pacheco v. Mexico*.

4. CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

The [Convention for the Protection of Human Rights and Fundamental Freedoms](#) (European Convention on Human Rights) is a regional human rights treaty that is open for signature by member States of the Council of Europe and accession by the European Union. It was adopted in 1950 and entered into force in 1953. All 47 member States of the Council of Europe are parties to it.

The [European Court of Human Rights](#) – charged with overseeing compliance with the European Convention on Human Rights – has held that the practice of enforced disappearance violates multiple rights affirmed in the European Convention on Human Rights, such as the right to life (art. 2), the right to liberty and security of persons (art. 5), the right to respect for private and family life (art. 8) and the right to an effective remedy (art. 13). According to the Court, relatives of disappeared persons are victims of a violation of the prohibition of torture and inhuman or degrading treatment (art. 3).⁵¹³

In cases involving enforced disappearance, the Court has ordered the respondent States found in breach of their international obligations to adopt measures of reparation, namely pecuniary and non-pecuniary compensation.⁵¹⁴ On one occasion, it also required the adoption of comprehensive and complex measures to address systemic problems in the lack of effective investigation and the absence of effective remedies for victims.⁵¹⁵

C. OTHER INTERNATIONAL TREATIES

1. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The [Rome Statute](#) grants the International Criminal Court jurisdiction over four main crimes, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression. It was adopted in 1998 and entered into force in 2002. It has 123 States parties.

Enforced disappearance committed as part of a widespread or systematic attack against a civilian population is listed in the Rome Statute among the crimes against humanity.

⁵¹³ European Court of Human Rights, *El-Masri v. the former Yugoslav Republic of Macedonia*, application No. 39630/09, Judgment, 13 December 2012; and *Aslakhanova and others v. Russia*, application Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10, Judgment, 18 December 2012.

⁵¹⁴ European Court of Human Rights, *Bazorkina v. Russia*, application No. 69481/01, Judgment, 27 July 2006, para. 181; *Er and others v. Turkey*, application No. 23016/04, Judgment, 31 July 2012, para. 123; and *El-Masri v. the former Yugoslav Republic of Macedonia*, paras. 269–270.

⁵¹⁵ European Court of Human Rights, *Aslakhanova and others v. Russia*, para. 217.

Rome Statute

“Article 7: Crimes against humanity

1. 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:
...
(i) Enforced disappearance of persons;
...
2. For the purpose of paragraph 1:
...
(i) ‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

Elements of Crimes

“Article 7 (1) (i)

Crime against humanity of enforced disappearance of persons

Elements

1. The perpetrator:
 - (a) Arrested, detained or abducted one or more persons; or
 - (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2.
 - (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
3. The perpetrator was aware that:
 - (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.

5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.” (Footnotes omitted.)

2. INTERNATIONAL HUMANITARIAN LAW INSTRUMENTS

International humanitarian law instruments, namely the Geneva Conventions of 12 August 1949 and the Protocols Additional thereto, do not mention enforced disappearance as such. Nevertheless, these instruments include numerous rules that might be infringed by enforced disappearances, such as the prohibition of arbitrary deprivation of liberty; torture and other cruel, inhuman or degrading treatment or punishment; and murder. These instruments also include numerous rules aimed at preventing instances of persons going missing and facilitating the re-establishment of family links. International humanitarian law treaties also expressly enshrine the right of families to know the fate of their missing relatives. These rules are also firmly established in customary law.⁵¹⁶



UN Photo/JC McIlwaine

⁵¹⁶ See also the study on customary international humanitarian law by ICRC, [rules 98 and 117](#).



**The Convention in the recommendations
of the universal periodic review and
the special procedures**



UN Photo/Marco Dormino

The [universal periodic review](#) is a unique process, which involves a periodic review of the human rights records of all 193 States Members of the United Nations. The universal periodic review is a significant innovation of the Human Rights Council and is based on equal treatment of all countries. It provides an opportunity for all States to provide information about the actions that they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The universal periodic review also highlights the best human rights practices around the globe.

As part of the universal periodic review process, States have issued various types of recommendations concerning enforced disappearance. With respect to States that, at the time of their reviews, were not parties to the Convention, other States have recommended that they ratify the Convention and recognize the competence of the Committee pursuant to articles 31–32 of the Convention. Other recommendations concerned the obligation to prevent enforced disappearances.

Examples of recommendations



Consider acceding to and ratifying the International Convention for the Protection of All Persons from Enforced Disappearance, and recognize the competence of its Committee.

Fully implement on a nationwide basis the federal law against enforced disappearance and ensure the creation of an efficient judicial mechanism involving federal, state and municipal institutions that ensures prompt, thorough, independent and impartial investigations, a fair trial and convictions of perpetrators of enforced disappearance.

EXAMPLES OF GOOD PRACTICE



In 2014, during the second cycle of the review, the Gambia received and accepted the recommendations to ratify the Convention.⁵¹⁷ In 2019, during the third cycle of the review, States welcomed its ratification of the Convention.⁵¹⁸

In addition to the Working Group,⁵¹⁹ a number of thematic and country-specific special procedures are concerned with enforced disappearance, including the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

In discharging their respective mandates, special procedures have issued several recommendations relevant to eliminating enforced disappearance and ensuring respect for the obligations of States thereon, especially, but not solely, in reports issued after carrying out country visits.

Examples of recommendations



The Special Rapporteur makes the following recommendations to the Government on the legal framework and policies: ratify the International Convention for the Protection of All Persons from Enforced Disappearance.

Regarding institutional reform, the Special Rapporteur recommends that the Government implement the detailed recommendations of the Working Group on Enforced or Involuntary Disappearances.

The Special Rapporteur calls on the Government and the State bodies concerned to: urgently deal with the demands of victims in terms of truth, establish some mechanism to “make truth official” and resolve the excessive fragmentation to which memory-building in the State has been subject. Restore, if not increase, the resources devoted to this purpose. An official mechanism for clarifying the truth should perform at least the following functions: systematize existing information; resolve the fragmentation and dispersion of information and efforts; draw up an orderly plan of investigations; establish methodologies and register them; access both official and unofficial archives and document funds; introduce an official process of validation, formal presentation and dissemination of its conclusions such as to offer official recognition to the victims; facilitate the participation of victims and their families in the process and be governed by the notion of rights, regardless of the identity or political affiliation of either victims or perpetrators. The Special Rapporteur also calls on the Government and the State bodies concerned to, in consultation with victims and associations, review the current system whereby the State delegates responsibility for exhumations. Allocate the necessary resources and ensure the participation of judicial authorities, among others, in all cases; and establish a State archive policy that guarantees access to all documentary funds, reviewing the criteria applicable to privacy and confidentiality, in order to bring them into line with applicable international standards, introducing clear regulations.

⁵¹⁷ A/HRC/28/6, paras. 109.31–109.36.

⁵¹⁸ A/HRC/43/6, paras. 68, 89 and 105.

⁵¹⁹ See sect. VI above.



Sustainable Development Goals



A. WHAT ARE THE SUSTAINABLE DEVELOPMENT GOALS?

In September 2015, the General Assembly adopted resolution 70/1, entitled “transforming our world: the 2030 Agenda for Sustainable Development”. In the resolution, the General Assembly sets out 17 Sustainable Development Goals, divided into 169 specific targets to be achieved by all countries by 2030. The 2030 Agenda seeks to realize human rights for all and 90 per cent of the targets relate to human rights. The expertise of the human rights treaty bodies is therefore highly relevant to achieving progress in the realization of the Sustainable Development Goals. Similarly, the implementation processes of the voluntary national reviews should support implementation of the treaty bodies’ recommendations on the ground. Although the Sustainable Development Goals are universally applicable to all countries, they take into account different national realities, capacities and levels of development and respect national policies and priorities. A universal commitment to leaving no one behind means shared concerns for reaching everyone, including the most vulnerable, marginalized and excluded populations. While the Sustainable Development Goals are more general, the targets provide objectives that are more specific and provide a better understanding of their connection with the provisions of the human rights treaties, including the Convention.

Treaty bodies can raise human rights issues in the framework of the Sustainable Development Goals while examining States parties’ reports, including during the constructive dialogue. Treaty bodies can also recommend that States take into account specific human rights obligations in their national action plans to implement the Sustainable Development Goals, including their voluntary national reviews. States can use the dialogue with treaty bodies and their expertise to bridge national gaps in implementation.

B. THE SUSTAINABLE DEVELOPMENT GOALS MOST RELEVANT TO THE CONVENTION

While most targets address cultural and economic issues, there are also strong correlations with civil and political rights, among which is the prohibition of enforced disappearance, since the Sustainable Development Goals pay attention to democratic governance, the rule of law, accountable and inclusive institutions, access to justice and personal security. In particular, Goal 5 is devoted to gender equality and empowerment of all women and girls, while Goal 16 touches on important human rights standards and principles, such as personal security and integrity of persons and access to justice. The inclusion of these commitments recognizes the importance that prevention and repression of enforced disappearances may play in realizing sustainable and equitable development.



1. GOAL 5 – GENDER EQUALITY

Goal 5 refers to the elimination of all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation (target 5.2) (relevant articles of the Convention: 7, 12, 24 and 25).



2. GOAL 16 – PEACE, JUSTICE AND STRONG INSTITUTIONS

The most relevant goal for the prohibition of enforced disappearances is Goal 16, which refers to the aim of promoting peaceful and inclusive societies for sustainable development, providing access to justice for all and building effective, accountable and inclusive institutions at all levels. Its specific targets include the following:

- Significantly reduce all forms of violence and related death everywhere (target 16.1). Indicators include: (a) number of victims of intentional homicide; (b) proportion of population subjected to physical, psychological and sexual violence; and (c) conflict-related deaths. The relevant articles of the Convention are 2, 3, 4 and 5.
- End abuse, exploitation, trafficking and all forms of violence against and torture of children (target 16.2). Indicators include the number of victims of trafficking in persons. The relevant article of the Convention is 25.
- Promote the rule of law at the national and international levels and ensure equal access to justice for all (target 16.3). Indicators include: (a) the proportion of victims of violence who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms; and (b) the number of unsentenced detainees as a proportion of the overall prison population. The relevant articles of the Convention are 12, 22 and 24.
- Ensure public access to information and protect fundamental freedoms (target 16.10). Indicators include the number of verified cases of killing, kidnapping, enforced disappearance, arbitrary detention and torture of journalists, associated media personnel, trade unionists and human rights advocates. The relevant articles of the Convention are 18, 19, 20 and 24.
- Strengthen relevant national institutions to prevent violence and combat terrorism and crime (target 16.a) and develop effective, accountable and transparent institutions at all levels (target 16.6). Indicators include the existence of independent national human rights institutions in compliance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles). The relevant articles of the Convention are 17, 23 and 24. The guiding principles for the search for disappeared persons are also relevant.

ANNEX

REFERENCE DOCUMENTS

International Convention for the Protection of All Persons from Enforced Disappearance
(General Assembly resolution [61/177](#))

Guidelines on the form and content of reports under article 29 to be submitted by States parties to the
Convention ([CED/C/2](#))

The relationship of the Committee with civil society actors ([CED/C/3](#))

The relationship of the Committee with national human rights institutions ([CED/C/6](#))

Guiding principles for the search for disappeared persons ([CED/C/7](#))

Statement by the Committee on the *ratione temporis* element in the review of reports submitted by
States parties

Internal guidelines for the review of States in the absence of a report due under article 29 (1) of the
Convention

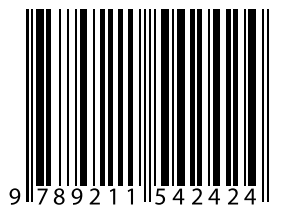
Statement by the Committee on enforced disappearances and military jurisdiction ([A/70/56](#), annex III)



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