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 disappearances

Preamble

The right to recognition as a person before the law is a widely recognized human right at the universal and regional levels, including article 6 of the Universal Declaration of Human Rights and article 16 of the International Covenant on Civil and Political Rights (see also, at the regional level, article XVII of the American Declaration on the Rights and Duties of Man, article 3 of the American Convention on Human Rights, and article 5 of the African Charter on Human and People's Rights).

This right is central to the conception of human rights, as it expresses the right and the capacity of each human being to be the holder of rights and obligations under the law. It has often been described as the "right to have rights" and as a direct consequence of the right to respect for human dignity.[1]

The Working Group has always considered that enforced disappearances infringe the right to be recognized as a person before the law (see the first report of the Working Group, E/CN.4/1435, § 184). Following this conclusion, the Declaration for the Protection of All Persons from Enforced Disappearance provides, in its article 1.2:

Any act of enforced disappearance places the persons subjected thereto outside the protection of the law […] *It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law* […]

There is indeed a strong link between one of the elements of the legal definition of enforced disappearance – the placement of the disappeared person outside the protection of the law – and the right to recognition as a person before the law.

Following recent developments of case law at the universal and regional levels[2], the Working Group deems it necessary to state its interpretation of article 1.2, in order to help States to apply the Declaration in a way that is most conducive to the protection of all persons from enforced disappearance.

Consequently, the Working Group has decided to issue the following general comment:

General Comment

1. Enforced disappearance represents a paradigmatic violation of the right to be recognized as a person before the law. One of the constitutive elements of enforced disappearances is that the person is placed "outside the protection of the law". This means that not only

[1] See in particular article 5 of the African Charter on Human and People's Rights, where those two rights are associated.
[2] See in particular, Human Rights Committee, views *Zohra Madoui v. Algeria*, 28 October 2008, § 7.7, 7.8; Inter-American Court of Human Rights decision, *Anzualdo Castro v. Peru*, 22 September 2009, par. 90 and 101.

the detention is denied, and/or the fate or the whereabouts of the person are concealed, but that while deprived of his/her liberty, this person is denied any right under the law, and is placed in a legal limbo, in a situation of total defencelessness.

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".

3. The right to be recognized as a person before the law is also implicated in the case of children who were born during their mothers' enforced disappearance, and who were thereafter illegally adopted. As far as their biological identity is no protected, their very own personality is not recognized before the law. Thus, 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 article 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".

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 under age 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).

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.