

Mandate of the Working Group on Enforced or Involuntary Disappearances

REFERENCE:

G/SO 217/1/CAH

3 December 2018

Re: Comments to the Draft Articles on Crimes Against Humanity

To the distinguished members of the International Law Commission (ILC):

I have the honour to address you on behalf of the members of the Working Group on Enforced or Involuntary Disappearances (WGEID)* regarding the draft articles on crimes against humanity (Draft Articles) adopted by the International Law Commission (A/72/10, Chapter IV). The Draft Articles are accompanied by a commentary discussing the content and rationale of individual provisions (Commentary).

We commend the Commission's work on the Draft Articles and recognize the contribution that a future convention on this issue would make towards enhancing states efforts to address impunity for the world's worst atrocities, including enforced disappearances.

Nevertheless, we would like to draw your attention to a number of issues, notably in relation to the definition of enforced disappearances. Brief comments are also made with respect to the prohibition of amnesties, military justice, the right to truth and the definition of victim.

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International Law Commission Members
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1. Definition of enforced disappearances

Draft Article 3 (2) (i) defines the underlying criminal act of enforced disappearance of persons as follows:

[...] 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.

The definition of enforced disappearances contained in the Draft Articles mirrors the one contained in article 7 (2) of the Rome Statute of the International Criminal Court (ICC) and has moved from the consensus developed in the context of international human rights law and the national criminal law that followed it in many countries.

It is crucial for the Working Group to emphasize that the 2006 International Convention for the Protection of All Persons against Enforced Disappearances (the International Convention), adopted eight years after the Rome Statute the original definition contained in the 1992 International Declaration for the Protection of all Persons from Enforced Disappearances (the Declaration) and the 1994 Inter-American Convention on Forced Disappearances of Persons.

The expansion of the definition of enforced disappearance in the Draft Articles as to include the involvement of “political organizations” in addition to State authorities, can be explained with the fact that crimes under international law involve individual criminal responsibility rather than State responsibility¹. However, the inclusion of the wording *'with the intention of removing them from the protection of the law for a prolonged period of time'* is problematic both for the *mens rea* element and for the reference to a “*prolonged period of time*”.

¹ Recognizing the need for protection to those victims of disappearances committed by political organizations or other non-state actors acting without any link to the state, the International Convention established in its article 3 an obligation for the states to take appropriate measures to investigate those conducts.

In relation to the intentional element, the Working Group has indicated, in its 2008 General Comment on the definition of enforced disappearances, that: “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. Therefore, the Working Group admits cases of enforced disappearance without requiring that the information whereby a case is reported by a source should demonstrate, or even presume, the intention of the perpetrator to place the victim outside the protection of the law”². This interpretation of the Working Group, i.e. the fact that the placement outside the protection of the law is a direct result of the refusal to acknowledge the deprivation of liberty or denial to give information rather than part of the definition - is confirmed by the text of article 2 of the International Convention³.

With respect to the requirement of the “prolonged period of time”, the WGEID has consistently recognized that there is no time limit, no matter how short, for an enforced disappearance to occur and that accurate information on the detention of any person deprived of liberty and their place of detention should be made available promptly to family members⁴.

The Committee on Enforced Disappearance (CED) agreed to this view while interpreting the International Convention. In its first contentious case under its communication procedure⁵, “Yrusta v. Argentina”⁶, the CED understood that Mr. Yrusta was a victim of enforced disappearance for over seven days while being transferred from one prison facility to another under the concealment of his fate. The CED recalled 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

² A/HRC/7/2, page 11, para. 5.

³ 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**. Emphasis added.

⁴ See for instance A/HRC/39/46, para. 143.

⁵ Art. 31 of the International Convention.

⁶ Communication 1/2013, CED/C/10/D/1/2013.

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”⁷.

It is of crucial importance to express that the WGEID has been observing patterns of “short-term” enforced disappearances in countries in the different regions of the world, and in the context of its mandate is doing a pedagogical effort to clarify that these crimes equally cause grave harm to the disappeared person and their families.

Finally, the WGEID suggests including in the definition of enforced disappearances a reference to “any other form of deprivation of liberty”, in accordance with the definition contained in article 2 of the International Convention, in order to cover situations of deprivation of liberty other than arrest, detention or abduction.

The Commentary to the Draft Articles⁸ has made an attempt - insufficient in the WGEID’s view - to solve these differences with the international human rights standards through the introduction of draft article 3(4), which states that the definition contained in draft article 3 “*is without prejudice to broader definitions in international instruments or national laws*”. This would leave the possibility for States to adopt the definition contained in the Declaration and the ICCPED but *de facto* could leave a number of conducts which constitute enforced disappearance under international human rights law (IHRL) outside the scope of this Convention.

The WGEID understands the strategic position of the ILC to follow the Rome Statute to foresee a high number of ratifications, taking into consideration the wide acceptance the latter has had, though it considers that following that definition may transmit a confusing message to the international community.

The WGEID recognizes that it may be considered that there is no real contradiction between the Rome Statute and the three other IHRL instruments on enforced disappearances because, while the Declaration and the International and Inter-American Convention define the crime of enforced disappearance, what the Rome Statute does is to select which conduct should be under the jurisdiction of the ICC. However, both the

⁷ *Ibid.*, para. 10.3.

⁸ A/72/10, paragraph 41.

inclusion of the intentional element and the reference to the “prolonged period of time” may negatively impact on the proper consideration of the nature of crimes against humanity of enforced disappearances, and notably short-term disappearances. A narrow interpretation of enforced disappearance might be suitable for the ICC which, according to article 1 of the Statute, limits its jurisdiction to “the most serious crimes of international concern” and its complementary nature to national criminal jurisdictions. It cannot be considered though the correct definition of enforced disappearance.

Therefore, we request the ILC to consider our suggestion to drop the definition included in the Rome Statute taking into consideration the specific nature and purpose thereof, and rather follow a definition consistent with the three IHRL instruments.

2. Prohibition of amnesties

It is suggested that the draft Convention include a provision not allowing amnesties for genocide, war crimes, and crimes against humanity⁹. Article 18 (1) of the 1992 Declaration states: “*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*”¹⁰.

3. Military jurisdiction

It is suggested to expressly include a provision prohibiting that military tribunals are competent for crimes against humanity, in accordance with article 16 (2) of the 1992 Declaration, which indicates that persons alleged to have committed an 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*”.

Even if an explicit prohibition has not been included in the International Convention, the CED has interpreted in its 2016 “Statement on Enforced Disappearances and Military

⁹ See, for example, Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (23 August 2004), document S/2004/616, paras. 10, 32 and 64 (c).

¹⁰ The Working Group has studied this provision in its General Comment to Article 18 of the Declaration, E/CN.4/2006/56, page 17.

Jurisdiction” that military justice in case of enforced disappearances could violate a number of provisions of the Convention and limit the effectiveness of investigation and prosecutions of enforced disappearances. With a view to ensuring a fair trial before an independent and impartial court, it has thus 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 courts¹¹.

4. Right to truth

We suggest including a provision on the right to truth for victims of crimes against humanity as a State obligation. There has been a wide development of this right at the normative and jurisprudential levels. In this sense, the International Convention has adopted it in its article 24, both as a right for victims and as an obligation for states¹².

The WGEID has clarified in its general comment on the right to truth¹³ that this right means, in relation to enforced disappearances, 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)¹⁴. 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 derogation¹⁵. The right to the truth has also been defined as inalienable in the Updated Set of principles for the protection and promotion of human rights through action to combat impunity¹⁶.

¹¹ https://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/INT_CED_SUS_7639_E.pdf

¹² See paras. 2 and 3 of article 24 of the International Convention.

¹³ A/HRC/16/48, page 14.

¹⁴ A/HRC/16/48, page 14, para.1.

¹⁵ A/HRC/16/48, page 14, para.4.

¹⁶ E/CN.4/2005/102/Add.1, principle 2: “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”.



5. Victims

It would be advisable to adopt a broad definition of victim for all the crimes against humanity included in the Draft Articles, along the lines of that contained under article 24 (1) of the International Convention.

Please accept, Excellency, the assurances of my highest consideration.

Bernard Duhaime
Chair-Rapporteur
Working Group on Enforced
or Involuntary Disappearances

* The [Working Group on Enforced or Involuntary Disappearances](#) is comprised of five independent experts from all regions of the world. The Chair-Rapporteur is **Mr. Bernard Duhaime** (Canada) and the Vice-Chair is **Mr. Tae-Ung Baik** (Republic of Korea); other members are **Ms. Houria Es-Slami** (Morocco); **Mr. Luciano Hazan** (Argentina) and **Mr. Henrikas Mickevicius** (Lithuania).