

Contribution to the Committee on Enforced Disappearance's Draft Statement on "non-State actors and enforced disappearances in the context of the International Convention for the Protection of All Persons from Enforced Disappearances"

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The Committee on Enforced Disappearances' (hereinafter CED/the Committee) Draft Statement (DS) on non-State actors and enforced disappearances represents a welcome step towards clarifying States' obligations vis-à-vis disappearances committed by non-State actors and the victims of such crimes. Indeed, in view of the changing nature of disappearances since the adoption of the International Convention on the Protection of All Persons from Enforced Disappearance (ICPPED), such clarification is warranted and necessary so as to protect victims and advance accountability of States for their actions and omissions.

The term 'non-State actor' is broad and encompasses a wide range of actors who can be involved in the disappearance of persons in different ways. For example, non-State armed groups (NSAG) may disappear opponents in the context of an armed conflict, while other non-State actors, such as organised criminal groups (OCG), may be involved in the disappearance of persons through forced recruitment or human trafficking, among others. It is important to note that the obligations of States may vary depending on the particular scenario, which underlines the relevance of the DS, as well as the importance of clarifying how these obligations – and the level of responsibility that a State may incur for violating them – differ depending on the context and type of non-State actor. One particularly positive aspect of the DS in this regard is the definition of the terms 'authorisation', 'support' and 'acquiescence', which will help to clarify the distinction between a State's direct and indirect responsibility for disappearances committed by non-State actors.

Additionally, I invite the Committee to expand on the following aspects of the DS:

- 1) The implications of CED's interpretation as regards the obligations of States when it comes to 'enforced disappearances' committed by non-State actors (as defined in paragraph 14 DS). As the obligations under the ICPPED apply to *States*, clarifying how they are to implement their obligations if a non-State actor commits an 'enforced disappearance' is crucial, especially where the latter exercises effective control over a territory.
- 2) It is welcome that the DS clarifies under what circumstances disappearances committed by non-State actors fall within the definition of 'enforced disappearances' under article 2 ICPPED, or can otherwise be considered 'enforced disappearances'. At the same time, CED should take this opportunity to further clarify the scope of States' obligations in relation to disappearances within the scope of article 3 that do *not* meet the definition of enforced disappearance, especially in relation to the applicability of articles 24 and 30

¹ This contribution is based on Chapters 1 and 2 of my PhD thesis '*Protecting Victims of Disappearances Committed by Organised Criminal Groups: State Responsibility in International Human Rights Law and the Experiences of Human Rights Practitioners in Mexico*' (KU Leuven, 2021), which received funding from the European Research Council under the European Union's Horizon 2020 research and innovation programme ('Digital Memories', grant agreement no. 677955). The full thesis is available [here](#).

ICPPED. In this regard, the DS could also include a general statement on the positive obligations of States under IHRL, which include adopting general measures to prevent and respond to human rights abuses by non-State actors.

- 3) The Committee could further take this opportunity to clarify potentially ambiguous wording in the ICPPED, such as references to ‘disappeared persons’. A victim-based approach would imply that the term ‘disappeared persons’ encompasses victims of enforced disappearances, as well as victims of disappearances committed by non-State actors that fall within the scope of article 3 ICPPED but do not amount to ‘enforced disappearances’.

In addition to these general observations, please see the table below for specific comments and suggestions.

Original Text of Draft Statement	Comments
Introduction	
The Committee on Enforced Disappearances,	
[1] Bearing in mind the object and purpose of the International Convention for the Protection of All Persons from Enforced Disappearance (thereafter, the Convention),	
[2] Recalling the <i>Preamble</i> of the Convention which declares that States Parties are ‘[a]ware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity’, are ‘[d]etermined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance’ and reaffirm ‘the right of victims to justice and to reparation’ and ‘the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end’,	
[3] Recalling <i>article 2</i> of the Convention which provides that ‘[f]or 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’, and <i>article 3</i> which states that ‘[e]ach 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’,	

<p>[4] Also recalling <i>article 5</i> of the Convention recognizing that “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”,</p>	<p>[5] Taking also note of <i>article 7 of the Statute of the International Criminal Court</i> which provides that enforced disappearance of persons is a crime against humanity when ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’ (art. 7, par. 1-i), ‘by, or with the authorization, support or acquiescence of, a State or a political organization’ (art. 7, par. 2-i),</p>
<p>[6] Taking note of <i>Rule 98 of the International Committee of the Red Cross’ study on customary international humanitarian law</i> recognizing that enforced disappearance is prohibited under customary international law applicable in both international and non-international armed conflicts,</p>	<p>[7] Recalling article 28 of the Convention,</p>
<p>[8] Having reviewed the case-law of the Human Rights Committee and of other treaty bodies, United Nations Special Procedures, as well as regional tribunals and human rights mechanisms and other relevant bodies,</p>	<p>[9] Having consulted the relevant human rights bodies with a view to ensure the consistency of its observations and recommendations,</p>
<p>[10] Aiming at clarifying the scope of applicability of the Convention with regard to acts committed by non-State actors, the obligations of States parties in that regard, as well as implications for the functions entrusted to the Committee, decides to issue the following statement:</p>	<p>Considering the stated aim of clarifying the <i>obligations of State Parties</i>, throughout the statement greater focus could be placed on the content and scope of States’ obligations. The definition of circumstances in which a disappearance committed by non-State actors constitutes an ‘enforced disappearance’ in paragraph 14 is undoubtedly a key contribution of the DS. Nonetheless, the implications of such a definition are not yet apparent: What could the implications be for CED vis-à-vis non-State actors who commit enforced disappearances? To what extent would the obligations of States in relation to enforced disappearances committed by non-State</p>

	actors be affected if the latter exercise territorial control?
Section 1. Notion of non-State actors	
<p>1. There is no existing definition in international law of the notion of “non-State actors”. During the drafting of the Convention, various proposals were made by States on how to refer to non-State actors. In the absence of a consensus, States finally decided to use an organic criterion by using the neutral terms ‘persons or groups of persons’ and making clear that these were not ‘agents of the State’ (as the use of ‘or’ indicates: ‘agents of the State <i>or</i> persons or groups of persons’). In the light of the <i>travaux préparatoires</i>, the Committee does not consider it necessary to elaborate on the definition of “non-State actors” beyond what the Convention states. It however deems necessary to provide more specific indications on the conditions and criteria that need to be fulfilled so that a “disappearance” perpetrated by “persons or groups of persons” not being State agents can be considered as an “enforced disappearance” within the meaning of the Convention.</p>	
Section 2. Enforced disappearances by non-State actors in the context of Article 2	
<p>2. Article 2 of the Convention deals with “enforced disappearance” perpetrated “by agents of the State or by persons or groups of persons acting <i>with</i> the authorization, support or acquiescence of the State”. It refers to the <i>exceptional circumstances</i> when the acts or omissions of persons or groups of persons, not being agents of the State, can nevertheless be attributed to the State and thus trigger the State’s responsibility in international law.</p>	
<p>3. “<i>Authorization</i>” in that context means that the State, through its agents, has either orally or in writing given licence to persons or groups of persons to perpetrate an enforced disappearance.</p>	<ul style="list-style-type: none"> • I invite the Committee to consider the possibility of ‘tacit authorisation’ and whether tacit authorisation would be equal to acquiescence. This distinction could be made explicit. • In order to avoid circularity, I suggest changing the wording to ‘a disappearance’. This is because it is the act of authorising a disappearance which makes it an ‘enforced disappearance’. (This comment also applies to the following paragraphs.)
<p>4. “<i>Support</i>” means that the State has provided some assistance to persons or groups of persons who</p>	<ul style="list-style-type: none"> • I suggest adding ‘funding’ to the examples of means provided by the State. • Examples of jurisprudence relating to the ‘objective’ assessment of support and State

<p>committed an enforced disappearance, inter alia through the sharing of information, the provision of means such as weapons, training or logistics. For the purpose of attribution in this context, support does not have to be provided with the specific aim of committing an enforced disappearance.</p>	<p>responsibility can be found in cases of the IACtHR. For example: IACtHR, judgement of July 5, 2004 (Merits, Reparations and Costs) <i>Case of the 19 Merchants v Colombia</i>, §141; judgement of September 15, 2005 (Merits, Reparations, and Costs) <i>Case of the “Mapiripán Massacre” v Colombia</i>, §110.</p>
<p>5. “<i>Acquiescence</i>” means that the State has either approved, tolerated or even implicitly endorsed an enforced disappearance perpetrated by an individual or a group of individuals. It includes circumstances where the State knew, had reasons to know, or ought to have known of the commission or of the real and imminent risk of commission of an enforced disappearance by persons or groups persons, but has either accepted or given consent to this situation, or has deliberately and in full knowledge failed to take measures to prevent or investigate the crime and punish the</p>	<p>The clarification of the notion of ‘acquiescence’ is particularly important in relation to present-day disappearances committed by non-State actors, for example in the Mexican context or in the context of migration. Importantly, acquiescence differs from authorisation in that it (literally) indicates that there is consent to an act through silence⁴ and I invite the Committee to make this difference explicit.</p> <p>Arguments have been made to consider a ‘systematic’ failure to investigate disappearances committed by non-State actors as acquiescence,⁵ which support the reference to State inaction in contexts where there is a ‘known pattern’ as mentioned in this paragraph. The statement should clarify that such a ‘pattern of disappearances’ can also refer to disappearances committed by non-State actors that would normally</p>

⁴ See Nuno Sérgio Marques Antunes, ‘Acquiescence’, *Max Planck Encyclopedia of International Law (MPIL)*, Oxford Public International Law (2006), para 2.

⁵ See Working Group on Enforced or Involuntary Disappearances, ‘Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration’ (2017) UN Doc. A/HRC/36/39/Add.2 para 42, Barbara A Frey, ‘Conceptualising Disappearances in International Law’ in Karina Ansolabehere, Leigh A Payne and Barbara A Frey (eds), *Disappearance in the Post-Transition Era in Latin America* (Oxford University Press 2021).

<p>perpetrators.² It also includes situations when there is a known pattern of disappearances of persons and the State has failed to take the necessary measures to prevent further disappearances, to investigate and bring the perpetrators to justice³.</p>	<p>fall within the scope of article 3 ICPPED, in view of the fact that impunity fuels the commission of human rights violations by both State and non-State actors.⁶</p> <p>At the same time, in order to avoid confusion, it would be important for CED to explain the difference between failing to respond to a 'known pattern of disappearances' and a breach of the obligation to investigate disappearances committed by non-State actors under article 3 ICPPED. A useful point of reference is the view taken by the Inter-American Commission on</p>
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² See inter alia IACtHR, judgement of July 29, 1988 (Merits), *Case of Velásquez-Rodríguez v. Honduras*, §§ 169-182; judgment of 31 January 2006 (Merits, Reparations and Costs), *Case of the Pueblo Bello Massacre v. Colombia*, § 123; judgment of 16 November 2009 (Preliminary objection, Merits, reparations and costs), *Case of González et al. (« Cotton Field ») v. Mexico*, § 280-283; judgment of November 19 2015, (Preliminary objections, merits, reparations and costs), *Case of Velásquez Paiz et al. v. Guatemala*, § 109; ECtHR, *Osman v. The United Kingdom*, Judgment of 28 October 1998, Application No. 23452/94, paras 115-116; *Kiliç v. Turkey*, Judgment of 28 March 2000, Application No. 22492/93, paras 62-63.

³ See ECtHR, judgment of 2 August 2005, *Taniş and others v. Turkey* (app. n° 65899/01), §§ 206-210 ; judgment of 31 July 2012, *Er and others v. Turkey* (app. n° 23016/04), §§ 66-79 ; judgment of 16 April 2013, *Meryem Çelik and others v. Turkey* (app. n° 3598/03), §§ 48-60 ; judgment of 9 November 2006, *Imakayeva v. Russia* (app. n° 7615/02), §§ 139-143 ; judgment of 3 July 2008, *Musayeva v. Russia* (app. n° 12703/02), §§ 95-107 ; judgment of 28 August 2018, *Alikhanov v. Russia* (app. n° 17054/06), §§ 70-75 ; judgment of 2 October 2018, *Tsakoyevy v. Russia* (app. n° 16397/07), §§ 115-121. HRCtee, *María Eugenia Padilla García, Ricardo Ulises Téllez Padilla and María Eugenia Zaldívar Padilla v. Mexico*, 15 July 2019, comm. 2750/2016, § 9.4; *Midiam Iricelda Valdez Cantú and María Hortencia Rivas Rodríguez v. Mexico*, 24 October 2019, comm. 2766/2016, § 12.4; *Irma Leticia Hidalgo Rea v. Mexico*, 25 March 2021, comm. 3259/2018, § 9.3.

⁶ See for example IACtHR, judgement of July 29, 1988 (Merits), *Case of Velásquez-Rodríguez v. Honduras*, §177, judgment of 31 January 2006 (Merits, Reparations and Costs), *Case of the Pueblo Bello Massacre v. Colombia*, §145; judgment of 16 November 2009 (Preliminary objection, Merits, reparations and costs), *Case of González et al. (« Cotton Field ») v. Mexico*, §291; ECtHR, judgement of 20 April, 2004, *Buldan v Turkey* (Application No 28298/95), §84; judgement of 18 September, 2009, *Varnava and Others v Turkey* (Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) §191; judgement of 5 September, 2019, *Olewnik-Cieplińska and Olewnik v Poland* (Application no. 20147/15) §137.

	<p>Human Rights (IACHR) and its Special Rapporteurship on Economic, Social, Cultural and Environmental Rights (REDESCA) that a State's <i>prolonged</i> failure to respond to business activities that threaten human rights and of which the State is aware can constitute acquiescence. To differentiate acquiescence from a 'mere' failure to act with due diligence, the IACHR and REDESCA suggest taking into account '<i>the magnitude, seriousness, prolongation, and manifestations of the breach of the duties to prevent and investigate</i>'.⁷</p> <p>Moreover, while existing jurisprudence on the notion of 'acquiescence' is far from consistent, the ability to and subsequent failure to take <i>preventive</i> measures appears to be a decisive factor.⁸ Therefore, I invite the Committee to expand on the type of preventive measures that States could and should take in relation to disappearances committed by non-State actors beyond the obligation to investigate.</p>
<p>6. The circumstances under article 2 cover <i>inter alia</i> so-called "paramilitary groups"⁹ or "civil patrols"¹⁰ acting as <i>de facto</i> organs of security forces or intelligence</p>	<p>An example that could be added here, in line with the WGEID's <i>Report on Enforced Disappearances in the Context of Migration</i>, are border officials turning a blind eye to human trafficking or</p>

⁷ See IACHR and REDESCA (2019) 'Business and Human Rights : Inter-American Standards', Organization of American States, OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/19, paras 78-79.

⁸ See for example Committee against Torture *Hajrizi Dzemajl et al v Yugoslavia* [2002] CAT/C/29/D/161/2000, *Francisco Dionel Guerrero Larez v Venezuela* [2015] CAT/C/54/D/456/2011; ECtHR, judgement of 10 January 2010, *Rantsev v. Cyprus and Russia* (Application no. 25965/04) §321.

⁹ See IACtHR, judgment of 5 July 2004 (Merits, Reparations and Costs), *case of the 19 Merchants v. Colombia*; judgment of September 15, 2005 (Merits, Reparations, and Costs), *case of the 'Mapiripán Massacre' v. Colombia*; HRCtee, *Rosa Maria Serna et al.*, 9 July 2015, comm. 2134/2012.

¹⁰ IACtHR, judgement of 24 January 1998, *Blake case v. Guatemala*, §§ 76 and 78.

<p>services, but also extends to any individual or groups of individuals, included informal groups or networks from the moment that they were authorized, received support or acquiescence from a State authority.</p>	<p>smuggling.¹¹ Another example are instances of collusion or direct collaboration between state officials and organised criminal groups that lead to the disappearance of persons, which have been documented in the recent Mexican context.¹²</p>
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Section 3. Enforced disappearances by NSA in the context of Article 3

7. Article 3 deals with “acts as defined in article 2 committed by persons or groups of persons acting *without* the authorization, support or acquiescence of the State”. This refers to the *general case*, that is when acts or omissions by persons or groups of persons are *not* attributable to the State, because these persons have no organic link to the State authorities and the State did not authorize, support or give its acquiescence to those acts or omissions. The *travaux préparatoires* reveal diverging views among States as to whether disappearances perpetrated in these circumstances should be called or equated to “enforced disappearances”.¹³ As a result, it was decided to have such acts referred to in a separate article and to use the wording “acts as defined in article 2” instead of “enforced disappearances”. One major

¹¹ Working Group on Enforced or Involuntary Disappearances, ‘Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration’ (2017) UN Doc. A/HRC/36/39/Add.2 para 35.

¹² See for example Sergio Aguayo, ‘En El Desamparo: Los Zetas, El Estado, La Sociedad y Las Víctimas de San Fernando, Tamaulipas (2010), y Allende, Coahuila (2011)’ (El Colegio de Mexico AC 2017), Sergio Aguayo and Jacobo Dayán, ‘El Yugo Zeta: Norte de Coahuila, 2010-2011’ (Colegio de México 2017); Ginger Thompson, ‘Anatomía De Una Masacre’ *ProPublica* (12 June 2017) <https://www.propublica.org/article/allende-zetas-cartel-masacre-y-la-dea> (last access 29 August 2022), Human Rights Clinic, “Control...Over the Entire State of Coahuila” An Analysis of Testimonies in Trials against Zeta Members in San Antonio, Austin, and Del Rio, Texas’ (The University of Texas School of Law 2017).

¹³ Report of the intersessional open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (thereafter : the Drafting Working Group), first session (January 2003), E/CN.4/2003/71, § 35; report of the Drafting Working Group, first session (January 2003), E/CN.4/2003/71, § 39 ; and second session (January 2004), E/CN4./2004/59, § 17.

<p>concern was to avoid the confusion between enforced disappearances and other crimes such as abduction or kidnapping.¹⁴ This concern still exists today, including for the Committee.</p>
<p>7. The Committee considers that the Convention is a living instrument and should be interpreted in the light of present-day conditions and of the evolution of international law.</p>
<p>8. In this regard, it is concerned of the growing number of allegations of disappearances imputable to non-State actors acting without the authorization, support or acquiescence of the State, some of which have been reported to it in the context of the review of reports of States parties (art. 29 of the Convention).¹⁵</p>
<p>9. The Committee has also taken note of a number of legal developments that have occurred since the adoption of the Convention. The Rome Statute of the International Criminal Court had already been adopted by 2006 but it has now been incorporated into the legislation of [...] States, including the definition of enforced disappearance as a crime against humanity.¹⁶ Article 7 of the Statute, including this definition, has also been transposed in the statutes of hybrid tribunals¹⁷. The International Criminal Court and other tribunals have developed a</p>

¹⁴ Drafting Working Group, fifth session (September 2005), E/CN.4/2006/57, §13 : « Many delegations suggested replacing the words ‘enforced disappearances’ by a reference to acts or conduct described or defined in article 1, in order to highlight the fact that disappearances committed by non-State actors are not of the same nature as those committed by agents of the State and fall outside the sphere of application of article 1. ».

¹⁵ See concluding observations on Irak, CED/C/IRQ/CO/1, §§ 22-23 and CED/C/IRQ/OAI/1, §§ 8-9; Colombia, CED/C/COL/CO/1, §§ 23-24 and CED/C/COL/OAI/1, §§ 22-23; Mexico, CED/C/MEX/CO/1, §§ 23-24 and CED/C/MEX/FAI/1, §§ 10-11; Gabon, CED/C/GAB/CO/1, §§ 19-20; Honduras, CED/C/HND/CO/1, §§ 28-29; Panama, CED/C/PAN/CO/1, §§ 12-13; Niger, CED/C/NER/CO/1, §§ 18-19; Greece, CED/C/GRC/CO/1, §§ 26-27.

¹⁶ See also *Report of the Working Group on Enforced or Involuntary Disappearances. Addendum. Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3, § 13-15: at that time the WGEID noted that 45 States had criminalized enforced disappearance as a crime against humanity following the definition provided for in article 7 of the Rome Statute. The Working Group encouraged more States to ratify the Rome Statute and to transpose crimes of the ICC Statute into domestic law, while reiterating its reservations on the specific definition of enforced disappearances in the Rome Statute, and recommending that it be interpreted by the national authorities in line with the more adequate provisions of article 2 of the ICPPED.

¹⁷ See *Regulation n° 2000/15 of the United Nations Transitional Administration in East Timor (UNTAET)*, on the establishment of panels with exclusive jurisdiction over serious criminal offences, 6 June 2000, sections 5(1) and 5(2)(h) ; *Statute of the Extraordinary African Chambers within the Senegalese courts*, annexed to the agreement signed between the African Union and the Government of the Republic of Senegal, 22 August 2012, art. 6(f); *Law*

<p>case-law related to enforced disappearance as a crime against humanity¹⁸. The Committee thus considers that it is now well-established that in international customary law enforced disappearances as a crime against humanity can be perpetrated by a ‘political organization’ acting without the authorization, the support or the acquiescence of the State.</p>
<p>10. The Committee has also noted that the ICRC has resolved that the prohibition of enforced disappearances is part of international customary law¹⁹ and that this prohibition is applicable to both international and non-international armed conflict and, in the latter, to all “parties” to the conflict, including armed groups having a certain level of organization.</p>
<p>11. The Committee is also aware of the practice of some commissions of inquiries set up after 2006 that have classified enforced disappearances perpetrated by non-State actors as enforced disappearances.²⁰</p>
<p>12. The Committee notes that in its 2019 report, the WGEID decided, in the implementation of its humanitarian mandate, to ‘document cases concerning enforced or involuntary</p>

n° 10.001 on the Central African Penal Code, art. 153 and *Organic Law n° 15-003 on the creation, organisation and functioning of the Special Criminal Court in the Central African Republic*, 2015 ; *Law n° 05/L-053 on Specialist Chambers and Specialist Prosecutor’s Office of the Assembly of Republic of Kosovo*, 3 August 2015, art. 13(1)(i).

¹⁸ ICTY, TRIAL CHAMBER, judgment of 15 April 2011, *Prosecutor v. Gotovina et al.* (IT-06-90), §§ 1831-1839 and 1891. ECCC, TRIAL CHAMBER, judgment of 7 August 2014, *Prosecutor v. Nuon Chea and Khieu Samphan* (Case n° 002/01), §§ 441-44 (see also §§ 640-643, 653-657, 942, 1029, 1032, 1036, 1054). More recently, see ECCC, TRIAL CHAMBER, judgment of 17 November 2018, *Prosecutor v. Nuon Chea & Khieu Samphan* (Case n° 002/02), §§ **753-755** (see also §§ **1200-1204, 1422-1429, 1708-1712, 1838-1846, 2852-2858, 3160-3166, 3341-3342, 3927, 4147, 4152, 4198**). *Chambres africaine extraordinaire d’assises, Ministère public c. Hissène Habré*, jugement, 30 mai 2016, § 1471. ICC, Pre-Trial Chamber III, Situation in the Republic of Burundi, Public Redacted version of “Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the situation in the Republic of Burundi”, ICC-01/17-X-9-US-Exp, 25 October 2017, Date Public Redacted Version: 9 November 2017, § 120.

¹⁹ See: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule98.

²⁰ Independent International Commission of Inquiry on the Syrian Arab Republic, *Without a trace: enforced disappearances in Syria (Conference room paper)*, 19 December 2013; Situation of human rights in Yemen, including violations and abuses since September 2014. Detailed findings of the Group of Eminent International and Regional Experts on Yemen, A/HRC/45/CRP.7, 29 September 2020, § 166 [enforced disappearances by the De Facto Authorities in Sana’a]; Report of the Independent Fact-Finding Mission on Libya, A/HRC/48/83, 29 November 2021, § 14.

<p>disappearances allegedly perpetrated by non-State actors that exercise effective control and/or government-like functions over a territory.”²¹</p>	
<p>13. Finally, is also mindful of the practice of Special Procedures, including the “joint statement” released on 25 February 2021 by a group of mandate holders who, based on the common practice of various organs of the UN, have considered that ‘at a minimum, armed non-State actors exercising either government-like functions or <i>de facto</i> control over territory and population must respect and protect the human rights of individuals and groups.</p>	
<p>14. Based on the foregoing, the Committee finds that under article 3 of the Convention, disappearances perpetrated without the authorization, support or acquiescence of the State constitute ‘enforced disappearances’ in the following circumstances:</p> <ul style="list-style-type: none"> • the disappearance was perpetrated by a ‘political organisation’, and there is a nexus with a ‘widespread or systematic attack against a civilian population’, within the meaning of the definition of crimes against humanity in international criminal law; or • the disappearance was perpetrated by an ‘organized armed group’, and there is a nexus with a ‘non-international armed conflict’, within the meaning of international humanitarian law; or <p>the disappearance was perpetrated by a non-State actor that exercises effective control and/or government-like functions over a territory.</p>	
<p>15. Conversely, other disappearances falling within the scope of article 3 but not perpetrated in the above circumstances do not constitute ‘enforced disappearances’ and will generally be characterized as ‘kidnapping’ or ‘abduction’ under domestic law.</p>	<p>The clarification that other disappearances that cannot be considered ‘enforced disappearances’ as described in paragraph 14 still fall within the scope of article 3 ICCPED is crucial because it upholds States’ obligations to investigate such disappearances and bring the perpetrators to justice. In view of the stated aim of the DS to clarify States’ obligations with regards to ‘acts committed by non-State actors’, as well as the present-day reality that disappearances can be the result of actions by criminal groups who are unlikely to meet the criteria specified in the preceding paragraph, I invite CED to engage in more detail with the content of the obligations</p>

²¹ Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/42/40, 30 July 2019, § 94.

	under article 3 and to specify any differences in obligations (see further below).
Section 4. Obligations of States parties under article 3	
<p>16. Under article 3, States parties have an obligation to investigate enforced disappearances perpetrated by non-State actors and to bring those responsible to justice. To that end, States parties shall apply, in relation to those disappearances, articles 4 to 16 of Convention, as well as articles 24 and 25.</p>	<p>It would be important for CED to also clarify the scope of the obligation to investigate disappearances falling within the scope of article 3 that do not constitute ‘enforced disappearances’ and to indicate whether articles 4-16 ICCPED, as well as articles 24-25 also apply to those disappearances. To my knowledge, CED has not yet engaged in depth with the obligations arising under article 3 in a public document and this would be an excellent opportunity to do so. In particular, I invite the Committee to engage with the meaning of ‘appropriate measures’ and to specify that the criteria for effective investigations established in the <i>Minnesota Protocol on the Investigation of Potentially Unlawful Death</i>²² are applicable to <i>all</i> disappearances falling within the scope of article 3 ICCPED.</p> <p>Second, I invite the Committee to expressly state that the obligation to conduct an effective, independent investigation applies <i>regardless</i> of whether or not there exists suspicion about the involvement of State actors in the disappearance. This is in line with general obligations of States under IHRL, whose positive component requires providing an effective remedy and investigating acts committed by non-State actors.²³</p>

²² *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), United Nations High Commissioner for Human Rights (2017).

²³ See for example HRC ‘General Comment No.36: Article 6: Right to Life’ (2019) UN Doc. CCPR/C/GC/36, §27; ECtHR, judgement of *Case of Mahmut Kaya v. Turkey* (Application no. 22535/93, 2000–III) §96; judgement of 18 September 2009, *Varnava and Others v. Turkey* (Applications nos.

	<p>Additionally, considering that disappearances can lead to the violation of multiple human rights, especially where no investigation is conducted, the importance of this obligation should be emphasised.</p> <p>Third, in view of the detrimental impact that a disappearance has on the relatives of the disappeared person, the extent to which obligations arising under article 24 are applicable to all disappearances within the scope of article 3 should be addressed. Article 24 holds great importance due to its focus on the victims of disappearances and it is not clear to what extent States' obligations under this article extend to victims of disappearances within the scope of article 3 that do not amount to 'enforced' disappearances. At a minimum, and following the CED's <i>Guiding Principles for the Search for Disappeared Persons</i>, particularly Principle 10 (1), the DS should explicitly mention States' obligation to search for all 'disappeared persons', as well as the continuous nature of this obligation (Principle 7), <u>regardless of the identity of the perpetrators</u>.²⁴</p> <p>Finally, according to paragraph 14 DS, non-State actors commit 'enforced disappearances' where they exercise effective control and/or government-like functions over a territory. In practice, such effective control could impede a</p>
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16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90) §191, judgement of 10 January 2010, *Rantsev v. Cyprus and Russia* (Application no. 25965/04) §288; IACtHR, judgment of 31 January 2006 (Merits, Reparations and Costs), *Case of the Pueblo Bello Massacre v. Colombia*, §142; Human Rights Committee, *Carlos Moreno Zamora et al v Mexico* [2019] Communication No. 2760/2016, CCPR/C/127/D/2760/2016, §12(5).

²⁴ Committee on Enforced Disappearances, 'Guiding Principles for the Search for Disappeared Persons' (2019) UN Doc. CED/C/7.

	<p>State from accessing such territories, for example for the purpose of investigating an enforced disappearance. I invite the Committee to reflect on such a hypothetical scenario (similar to that envisaged in Section 5 paragraph 18 below) and its implications for the practical implementation of the State's obligations. For example, where a State is not in full control of its territory, it nevertheless has to act diligently and make best efforts to comply with its obligations to investigate and search to the extent possible. On this, see the ECtHR's reasoning in the case of <i>Ilaşcu and Others v. Moldova and Russia</i>.²⁵</p>
<p>Section 5. Procedural consequences</p>	
<p>17. In the context of their reporting obligations under article 29, States parties shall report on enforced disappearances falling within the scope of article 3, as explained in Section 3 above, as well as on the implementation of their obligations under the relevant articles, as specified in Section 4.</p>	<p>In line with previous comments, and in view of the definition of acquiescence provided in Section 2, information about disappearances committed by non-State actors that do not amount to enforced disappearances, and the implementation by States of their obligations under article 3, is also crucial. Such information will, for example, facilitate an assessment of a State's awareness of a <i>pattern</i> of disappearances. In this sense, I invite the Committee to consider specifying the need for States to also report on other disappearances falling within the scope of article 3 and their actions to investigate such disappearances and bring those responsible to justice.</p>
<p>18. In the context of urgent actions under article 30 of the Convention, the Committee may decide to register cases of enforced</p>	<p>In view of the existence of disappearances that are not 'enforced disappearances' but that nevertheless fall within the scope of article 3, I suggest using the term 'disappearances' in these</p>

²⁵ ECtHR, judgement of 8 July 2004, *Ilaşcu and Others v. Moldova and Russia* (Application No. 48787/99), §331ff.

<p>disappearances attributable to non-State actors falling within the scope of article 3, as explained in Section 3 above, and request the State to “seek and find” the person as a matter of urgency. Even though the State may not be in the immediate capacity to locate the person – if for instance the non-State actor alleged to be responsible for the enforced disappearance has control over the territory where the person was disappeared – the Committee may request the State party to take all measures that are necessary to search for and locate him or her, including interim measures, such as registering the case in a specific database, securing mass graves, collecting the DNA of the families, providing assistance to the family, take steps, to the extent possible, to get information from the NSA on the fate or the whereabouts of the disappeared etc.</p>	<p>paragraphs in order to sustain the possibility to present an Urgent Action request under article 30 or a communication under articles 31 and 32 in relation to disappearances committed by non-State actors that do not amount to enforced disappearances.</p>
<p>19. Under articles 31 and 32 of the Convention, the Committee may receive communications alleging that the State party has violated its obligations under article 3 [and][read together with] articles 4 to 16, as well as 24 and 25, with respect to an [actual or potential] enforced disappearance falling</p>	

<p>within the scope of article 3.</p>	
<p>20. Under article 33 of the Convention, the Committee may request a State party to undertake a visit, if it receives reliable information indicating that this State party is seriously violating its obligations under article 3 [and][read together with] articles 4 to 16, as well as 24 and 25 in relation to an [actual or potential] enforced disappearance falling within the scope of article 3.</p>	
<p>21. Under article 34, the Committee may, after seeking from a State party concerned all relevant information on the situation, urgently bring to the attention of the General Assembly, through the Secretary General of the United Nations, a widespread or systematic practice of enforced disappearances falling within the scope of article 3 in the territory under the jurisdiction of the State party.</p>	