

NON-STATE ACTORS AND ENFORCED DISAPPEARANCES

OBSERVATIONS TO INFORM THE DRAFT STATEMENT BY THE COMMITTEE ON ENFORCED DISAPPEARANCES

Amnesty International welcomes the opportunity to submit brief observations to the Committee on Enforced Disappearances (CED) to inform the draft Statement on non-state actors and enforced disappearances and, on the specific question of whether acts under Article 3 of the Convention for the Protection of All Persons from Enforced Disappearance (CPED) can be considered as crimes under international law.

Amnesty International has so far not formally labelled acts under Article 3 CPED as ‘enforced disappearance’ – the organization calls the conduct ‘disappearance’. However, the organization is open to consider alternative options.

Aside from the question of the *nomen juris*, which is not the most relevant for the present purposes, it is Amnesty International’s long-standing position that:

‘Non-state action. There is an express obligation in Article 3 to extend the active subject of the crime not only to state agents, but also to those persons or groups of persons acting without the authorization, support or acquiescence of the state. States have the obligation to define the conduct prohibited in Article 2 when committed by such individuals as a crime under national law. Under Article 3, states parties must investigate conduct defined in Article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the state, **which is a crime under international law**, and, where there is sufficient admissible evidence, prosecute suspects.’¹ (emphasis added)

Prosecutions should take place in fair trials before ordinary civilian courts.

In other words, the act itself, in our view, remains the same in Article 2 and 3. These articles only differ in the actors and in the state obligations attached. Hence, if an enforced disappearance under Article 2 is considered a crime under international law, so should the same act under Article 3.

Furthermore, it is also our long-standing position that:

‘In addition, states parties to the Rome Statute are under the obligation to define the crime against humanity of enforced disappearance as a crime under national law in a manner that covers all the conduct prohibited in Article 7 of the Rome Statute and which covers non-state as well as state actors ...’²

International criminal law recognizes that non-state actors can commit the crime of enforced disappearance in the context of the commission of a crime against humanity (see also Article 5 of the CPED).

The same has been included in the draft Articles on Prevention and Punishment of Crimes against Humanity (draft Article 2(2)(i)), adopted by the International Law Commission in 2019;³ and is reflected in the draft Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and Other International Crimes (draft MLA Convention), which shall be adopted in May 2023 in Ljubljana, Slovenia.⁴

¹ See, Amnesty International, ‘No impunity for enforced disappearances: Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance’, p.6, available at (<https://www.amnesty.org/en/documents/ior51/006/2011/en/>)

² Amnesty International, *No impunity for enforced disappearances*, p.6.

³ International Law Commission, Report on the work of the seventy-first session (2019), UN Doc. A/74/10, Chapter 4.

⁴ See, <https://www.gov.si/en/registries/projects/mla-initiative/>

In the context of the negotiations of the draft Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes and Other International Crimes, Amnesty International made public, in 2020, its objection to the exclusion of Article 3 CPED from a list of additional crimes under international law to which states may decide to expand the scope of the Treaty, in the following terms:

‘Annex F provides for the Draft MLA Convention to also apply to the crime of enforced disappearance, in respect of states parties which make a declaration at the time of ratification, acceptance or approval of or accession to the Draft Convention, or at any later time.’

‘The second paragraph of Annex F is verbatim the text of article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED), and provides: ‘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’.

‘However, Annex F does not include article 3 of CPED, which criminalizes the same act but when ‘committed by persons or groups of persons acting without the authorization, support or acquiescence of the State’.

‘Amnesty International recalls that conduct defined in article 3 of CPED is also a crime under international law. And there is no reason for drafters to relieve armed non-state actors from the provisions of the Draft MLA Convention when they are suspected of criminal responsibility for a disappearance’.⁵

Likewise in international humanitarian law, the prohibition of enforced disappearance is applicable to all parties to the conflict, state and non-state actors.

We would also like to note that the Human Rights Committee in its General Comment No. 36 has reaffirmed that threats to or violations of the right to life can emanate from non-state actors.⁶ It also confirmed that the circumstances of enforced disappearances are “representing a grave threat to life” and ultimately “thus results in a violation of the right to life”.⁷ That Committee subsequently lays out the various related obligations of states parties (prevent; investigate; punish; bringing those suspected of criminal responsibility to justice; reparation; informing victims and families; and special administrative duties), but at no point indicates that any of this is limited to conduct of state actors.

In sum, Amnesty International is of the view that conduct defined in Article 3 CPED – aside from its labelling – is, like the conduct in Article 2, a crime under international law, leading to a number of consequences applicable to such a category of crimes (scope of jurisdiction; obligation to prosecute or extradite (*aut dedere aut judicare*); non-applicability of statutory limitations, amnesties and other similar measures of impunity; responsibility of commanders and other superiors, etc.).

Therefore, Amnesty International would like to express its reservations regarding the current wording of section 15 of CED 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”⁸: in our view, the conduct set out in Article 3 CPED is not an ordinary offence, but a crime under international law.

⁵ Amnesty International, 'Recommendations for a Convention on Mutual Legal Assistance, p.8, available at <https://www.amnesty.org/en/documents/ior51/1651/2020/en/>

⁶ International Covenant on Civil and Political Rights, General comment No. 36, UN Doc. CCPR/C/GC/36, paras 30 and 63, respectively.

⁷ International Covenant on Civil and Political Rights, General comment No. 36, UN Doc. CCPR/C/GC/36, para. 58; see also, General comment No. 35, UN Doc. CCPR/C/GC/35, para. 55.

⁸ 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'.