

CAMPAIGN FOR  
INTERNATIONAL  
JUSTICE



# NO IMPUNITY FOR ENFORCED DISAPPEARANCES

Checklist for effective implementation  
of the International Convention for  
the Protection of All Persons from  
Enforced Disappearance

**AMNESTY  
INTERNATIONAL**



Amnesty International is a global movement of more than 3 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

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*Clockwise from top right:* Usama Fakhri Mustafa Bzur, Syria; Abdelkrim Aribi, Algeria; Sandya Eknaligoda, wife of disappeared journalist Prageeth Eknaligoda with their two sons Sathyajith Sanjaya and Harith Danajaya, Sri Lanka; Alaide Foppa, Guatemala; Bekim Bunjaku, Kosovo; Aster Fissehatsion, Eritrea; Alexis Etienne Diatta, Senegal; Aminat Dugaeva, Russian Federation; Jorge Julio López, Argentina; Gao Zhisheng, China © Hu Jia.

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# CONTENTS

INTRODUCTION .....	1
PART I.....	4
1. ABSOLUTE PROHIBITION OF ENFORCED DISAPPEARANCE .....	4
2 DEFINITION OF ENFORCED DISAPPEARANCE .....	4
2.1 OBLIGATION TO DEFINE ENFORCED DISAPPEARANCE AS A CRIME.....	7
2.2 ENFORCED DISAPPEARANCE AS A CRIME AGAINST HUMANITY .....	7
3. PRINCIPLES OF CRIMINAL RESPONSIBILITY .....	9
3.1 SUPERIOR RESPONSIBILITY .....	10
4. DEFENCES .....	12
4.1 SUPERIOR ORDERS.....	12
5. SANCTIONS.....	14
5.1 APPROPRIATE PENALTIES.....	14
5.2 MITIGATING AND AGGRAVATING CIRCUMSTANCES .....	15
5.3 SUPPLEMENTARY SANCTIONS AND MEASURES TO PROTECT INVESTIGATIONS .....	16
6. BARS TO PROSECUTIONS .....	17
6.1 STATUTE OF LIMITATIONS.....	17
6.2. RIGHT TO EFFECTIVE REMEDY AND STATUTE OF LIMITATIONS .....	18
7. JURISDICTION.....	19
7.1 OBLIGATION TO PROVIDE FOR UNIVERSAL JURISDICTION.....	20
7.2. ELIMINATION OF INAPPROPRIATE OBSTACLES TO EXERCISE JURISDICTION .	22
7.3 OBLIGATION TO INVESTIGATE AND, IF THERE IS SUFFICIENT ADMISSIBLE EVIDENCE, PROSECUTE .....	24
7.4 PRECAUTIONARY MEASURES .....	30
7.5 RIGHT TO COMMUNICATE WITH THE NEAREST STATE REPRESENTATIVE .....	32
7.6 THE RIGHT TO FAIR TRIAL.....	33

8. STATE COOPERATION .....	33
8.1 EXTRADITION .....	34
8.2 MUTUAL LEGAL ASSISTANCE.....	37
8.3 REFOULEMENT .....	38
9. PREVENTION OF ENFORCED DISAPPEARANCE.....	39
9.1 SECRET DETENTION.....	40
9.2 OFFICIAL REGISTERS OF PERSONS DEPRIVED OF LIBERTY.....	46
9.3 RIGHT TO ACCESS TO INFORMATION ABOUT THE DETAINED PERSON.....	48
9.4 TREATMENT OF PERSONAL INFORMATION.....	49
9.5 RESTRICTIONS TO THE RIGHT TO ACCESS TO INFORMATION.....	50
9.6 VERIFICATION OF RELEASE OF PERSONS DEPRIVED OF LIBERTY .....	53
9.7 TRAINING.....	54
10. VICTIMS OF CRIMES OF ENFORCED DISAPPEARANCES .....	55
10.1 DEFINITION OF VICTIM .....	56
10.2 ACCESS TO JUSTICE .....	56
10.3 PROTECTION .....	57
10.4 RIGHT TO KNOW.....	58
10.5 RIGHT TO FULL REPARATION.....	60
10.6 LEGAL SITUATION OF DISAPPEARED PERSONS .....	62
10.7 GUARANTEEING THE RIGHT OF ASSOCIATION.....	62
11. WRONGFUL REMOVAL OF CHILDREN OF DISAPPEARED PARENTS.....	63
PART II.....	65
12. NOMINATION AND ELECTION OF MEMBERS OF THE COMMITTEE.....	65
13. SUBMISSION OF REPORTS AND FOLLOW-UP INFORMATION.....	66
14. PROVISION OF INFORMATION IN URGENT CASES .....	67
15. INDIVIDUAL COMMUNICATIONS .....	68

16. STATE COMMUNICATIONS .....	69
17. COMMITTEE VISITS .....	69
18. WIDESPREAD OR SYSTEMATIC PRACTICE.....	70
PART III .....	71
19. PROVISIONS APPLICABLE GENERALLY TO IMPLEMENTATION OF THE CONVENTION .....	71
20. DISPUTE SETTLEMENT PROCEDURE.....	72
21. RESTRICTION ON RESERVATIONS TO THE CONVENTION.....	73
ANNEX – CHECKLIST FOR EFFECTIVE IMPLEMENTATION OF THE ENFORCED DISAPPEARANCE CONVENTION PROVISIONS AND OTHER INTERNATIONAL LAW OBLIGATIONS WHICH MUST OR SHOULD BE INCLUDED IN NATIONAL IMPLEMENTING LEGISLATION .....	74



# INTRODUCTION

**“I will never give up”, I am determined to find Prageeth. I still believe that he is alive.” Sandya Eknaligoda.<sup>1</sup>**

The crime of enforced disappearance was invented by Adolf Hitler in his *Nacht und Nebel Erlass* (Night and Fog Decree) issued on 7 December 1941.<sup>2</sup> Since that date, hundreds of thousands of persons have been the victim of this crime. Sadly, the commission of this crime saw a resurgence in Latin America in the 1950s and then it spread around the world.

Enforced disappearance remains one of the worst human rights violations. As stated in Article 1 of the Declaration on the Protection of all Persons from Enforced Disappearance:

*“Any act of enforced disappearance places the person subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, 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 or punishment. It also violates or constitutes a grave threat to the right to life.”*

Enforced disappearance is a crime under international law that too often results in impunity. It is a violation of the person who has been disappeared. Very often the disappeared are never released and their fate remains unknown. Therefore it is also a continuing violation of human rights of their family members who are not able to learn the truth about their whereabouts. In

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<sup>1</sup> Sandya Eknaligoda is a leader of women’s struggle against enforced disappearances in Sri Lanka. Her husband, journalist and cartoonist Prageeth Eknaligoda, was “disappeared” on 24 January 2010 when travelling to his home in Homagama, near the capital Colombo, shortly after leaving work at the Lanka-e-News office. Local residents told Sri Lankan press that they saw a white van without number plates close to his house at around this time. Prageeth had been due to attend a religious ceremony on his way home that evening, but he called a colleague shortly beforehand to say that he could no longer attend as he had to travel to the Koswatte district of Colombo with an unnamed friend. During the conversation his phone cut out; this was the last contact anyone had with him. Since then his phone has not functioned. In the days leading up to his disappearance he had told a close friend that he believed he was being followed.

<sup>2</sup> Machteld Boot, Rodney Dixon and Christopher K. Hall, ‘Article 7 (Crimes against humanity)’, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, Munich: C.H.Beck, Oxford: Hart & Baden-Baden: Nomos, 2<sup>nd</sup> ed., 2008, p. 221.

a number of countries around the world Amnesty International has documented how witnesses of enforced disappearances and relatives of the disappeared persons are harassed, ill-treated and intimidated and how they are often not able to obtain access to justice and reparation

Furthermore, enforced disappearance has a particular impact on women and children. Wives, mothers and children are the ones who often bear the consequences of the enforced disappearances and who are the most affected persons.<sup>3</sup> In addition, when they are subjected to disappearance themselves, they may be targeted for sexual and other forms of violence.<sup>4</sup>

Amnesty International has been calling for all states not only to sign and ratify the Convention, but also to take effective steps to implement it in law and practice. States must guarantee the right of any person not to be subjected to enforced disappearance and the rights of victims to justice and to reparation.

This paper is similar to others that the organization has published which aim at providing guidance to states in implementing human rights treaties, such as the Rome Statute of the International Criminal Court (Rome Statute). It is also a helpful tool to civil society in participating in the drafting of implementing legislation or in commenting on draft implementing legislation.<sup>5</sup> Indeed, Amnesty International recommends that states parties and states contemplating ratification of the Convention involve civil society, including women and women's organisations, in the drafting of implementing legislation. The involvement of civil society should take place at the earliest possible stage and it should be conducted in a transparent manner, such as membership in inter-agency task forces or working groups with the mandate to draft implementing legislation.

Amnesty International emphasizes that states parties must implement the Convention not only in law, but in practice, including the adoption of a long-term, comprehensive plan that involves establishment of effective training programs for law enforcement and other personnel, and, in some instances, amendment of treaties or adoption of new ones. In doing so,

“[t]he highest authorities of every country should demonstrate their total opposition to “disappearances”.<sup>6</sup> They should make clear to all members of the police, military and other security forces that “disappearances” will not be tolerated under any circumstances.<sup>7</sup>

With respect to drafting implementing legislation, states parties need to ensure that they not simply enact the minimum required by the Convention, which, as a result of political

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<sup>3</sup> Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/13/31 (21 December 2009) para. 655.

<sup>4</sup> UN Human Rights Council, *Enforced or involuntary disappearances*, UN Doc. A/HRC/14/L.19, 14 June 2010.

<sup>5</sup> See, for example, *Amnesty International, International Criminal Court: Updated Checklist for Effective Implementation*, Index: IOR 53/009/2010, May 2010 (<http://www.amnesty.org/en/library/info/IO53/009/2010>).

<sup>6</sup> Amnesty International, *14-Point Program for the Prevention of “Disappearances”*, Point 1, reproduced in Amnesty International, *“Disappearances” and Political Killings: Human Rights Crisis of the 1990s – A Manual for Action*, AI Index: ACT 33/001/1994, February 1994 (14-Point Program).

<sup>7</sup> *Ibid.*



compromises, in some instances falls short of stricter international law and standards, but also implement such law and standards. Indeed, drafters were aware of this problem and the Convention repeatedly notes that states parties may have other, stricter standards that they must observe in addition to what was expressly required by the Convention itself. For example, as discussed below, in Part III the Convention makes clear that it cannot infringe stronger protection in national or international law (Article 37) and that it is without prejudice to the obligations of states parties under customary or conventional international humanitarian law, including the Geneva Conventions and Protocols I and II, or to the opportunity of any state party to authorize the International Committee of the Red Cross (ICRC) to visit places of detention in peacetime as well as in armed conflict (Article 43).<sup>8</sup>

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<sup>8</sup> *Ibid.*, Pt. 13 (“All governments should ratify international treaties containing safeguards and remedies against “disappearances”, including the International Covenant on Civil and Political Rights and its first Optional Protocol which provides for individual complaints. Governments should ensure full implementation of the relevant provisions of these and other international instruments, including the UN Declaration on the Protection of All Persons from Enforced Disappearance, and comply with the recommendations of intergovernmental organizations concerning these abuses.”).

# PART I

## Article 1

- 1. No one shall be subjected to enforced disappearance.**
- 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.**

## 1. ABSOLUTE PROHIBITION OF ENFORCED DISAPPEARANCE

Article 1 of the Convention recognizes the right not to be subjected to enforced disappearance. Article 1 (2) provides that this right is non-derogable, even in “a state of war, threat of war, internal political instability or any other public emergency”.<sup>9</sup>

**States parties must ensure that their national law absolutely prohibits enforced disappearance. In addition, that prohibition must expressly apply in all circumstances, even in a state of war or a threat of war, internal political instability or any other public emergency.**

## 2 DEFINITION OF ENFORCED DISAPPEARANCE

### Article 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 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.**

**State action.** Pursuant to Article 4, states parties to the Convention must define conduct that constitutes enforced disappearance under the Convention when committed by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state as a crime in a manner consistent with the definition in Article 2 of the Convention. That definition has the following elements:

- There is an arrest, detention, abduction or any other form of deprivation of liberty;

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<sup>9</sup> 14- Point Program, Point 8 (“The prohibition of "disappearances" and the essential safeguards for their prevention must not be suspended under any circumstances, including states of war or other public emergency.”).

- That conduct is carried out by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state; and
- The conduct is followed either by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person
- The objective result of the conduct is that the disappeared person is placed outside the protection of the law.

States parties should not adopt any narrower definition. In particular, they should not include the restrictive language in Article 7 of the Rome Statute of the International Criminal Court (Rome Statute) that defines an enforced disappearance as one requiring the perpetrator have had the double intent to remove a person from the protection of the law and to do so for a prolonged period of time.<sup>10</sup>

The removal of the person from the protection of the law is a necessary result or, at most, a purely objective element of the crime; there is no requirement that the perpetrator have specifically intended to deprive the victim of the protection of the law.<sup>11</sup> As established in article 1 (2) of the Declaration on the Protection of all Persons from Enforced Disappearance (1992 Declaration)<sup>12</sup>, “any act of enforced disappearance places the persons subjected thereto outside the protection of the law” - i.e. as stated by the Inter-American Convention on Forced Disappeared Person (Inter-American Convention), “impeding his or her recourse to the applicable legal remedies and procedural guarantees”, placing him or her in a situation of complete defencelessness.<sup>13</sup> As stated by the Working Group on Enforced or Involuntary Disappearances (Working Group) this element should be included *as a consequence* of the other constitutive elements.<sup>14</sup> States should ensure that their legislation provides that placing a person outside the protection of the law is no more than an *objective* element of the offence, not requiring any mental element.<sup>15</sup> Although the very nature of the crime is such

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<sup>10</sup> Rome Statute of the International Criminal Court, art. 7 (<http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>).

<sup>11</sup> Boot, Dixon & Hall, *supra* note 2, p. 269-270; Report of the Working Group on Enforced or Involuntary Disappearances. *Best practices on enforced disappearances in domestic criminal legislation*. A/HRC/16/48/Add.3 (28 December 2010), paras. 29-32 and 62 (d) (2010 Working Group Report).

<sup>12</sup> UN General Assembly, resolution 47/133, *Declaration on the Protection of all Persons from Enforced Disappearance*, 18 December 1992.

<sup>13</sup> 2010 Working Group Report, para. 29.

<sup>14</sup> 2010 Working Group Report, para. 32; See as well UN Human Rights Council, *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the working group on arbitrary detention represented by its vice-chair, Shaheen Sardar Ali; and the working group on enforced or involuntary disappearances represented by its chair, Jeremy Sarkin*, (Joint Study) UN Doc. A/HRC/13/42. 19 February 2010. para. 28. (<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>). “The definition does not require intent to put the person concerned outside the law as a defining element, but rather refers to an objective consequence of the denial, refusal or concealment of the whereabouts and fate of the person.”

<sup>15</sup> Nigel Rodley and Matt Pollard, *The Treatment of Prisoners under International Law*, Oxford, Oxford

that anyone involved will have knowledge or constructive knowledge that the result of the actions in question will be to place the person outside of the law,<sup>16</sup> requiring that they have an intent to achieve this result could pose difficult, if not insurmountable problems for prosecutors.<sup>17</sup>

Similarly, there is no requirement that the removal be for a prolonged period of time.<sup>18</sup> For example, when the period of time in which a person should already have been brought before a judicial authority for control of the lawfulness of his or her detention (as required by national and international law) has elapsed, but the person has not in fact been brought before a judicial authority, there can be no question that the person has been placed outside the protection of the law, even if the period has not been “prolonged”.

**States must define enforced disappearance as a crime in a way which is not narrower than the definition in Article 2 of the Convention, and must include each of the following elements, while excluding the requirements in Article 7 of the Rome Statute that the perpetrator have specifically intended to remove the victim from the protection of the law and that the removal be for a prolonged period of time:**

- there is an arrest, detention, abduction or any other form of deprivation of liberty;
- that conduct is carried out by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state;
- the conduct is followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;
- The placing of the disappeared person outside the protection of the law as an objective result.

**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.

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; however, any offence defined for that purpose should not include the

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University Press, 3<sup>rd</sup> ed., 2009, p. 337 (“The better interpretation is that the text [of the Convention definition] be read as prohibiting the unacknowledged detention or refusal to clarify the fate or whereabouts of the person *in circumstances* which place the person outside the protection of the law. This would mean that the placing of the person outside the protection of the law would be an independent, objective element of the definition.”) (emphasis in original).

<sup>16</sup> Boot, Dixon & Hall, *supra* note 2, p. 270 (“In enforced disappearances when the initial deprivation of liberty was unlawful – the overwhelming number of cases – the manner in which it is carried out demonstrates an intention to remove a person from the protection of the law . . .”).

<sup>17</sup> Rodley and Pollard, *supra* note 15, p. 337 (noting the difficulties of proving individual criminal responsibility for enforced disappearance).

<sup>18</sup> *Ibid.*, p. 271.

restrictive language in Article 7, which does not purport to be exhaustive of the actual scope of the crime as matter of general international law. States must ensure that persons who carry out an enforced disappearance “pursuant to or in furtherance of a . . . organizational policy to commit . . . [an] attack [on a civilian population]” can be prosecuted for the crime against humanity of enforced disappearance. For the reasons discussed above regarding Articles 4 and 2, when doing so, states parties should ensure that the definition is as strong as the definition in Article 2 of the ED Convention and does not include the restrictive language regarding intent found in Article 7 of the Rome Statute.

- **States parties should investigate the conduct prohibited 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 them.**
- **States parties should define the conduct prohibited in Article 2 as a crime in national criminal law when it is carried out by persons who are not agents of the state or by persons or groups of persons acting without the authorization, support or acquiescence of the state.**

## 2.1 OBLIGATION TO DEFINE ENFORCED DISAPPEARANCE AS A CRIME

### Article 4

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

The obligation under Article 4 requires that states parties must define enforced disappearance as a separate crime. It is not enough to define offences that are often linked with enforced disappearances such as abduction, unlawful detention, illegal deprivation of liberty, torture or extrajudicial executions.

**States parties must define enforced disappearance as an independent crime along with the consequences provided in conventional and customary international law. When drafting the definition of enforced disappearances as a crime, states parties need to take into account their obligations under Articles 2, 3, 5, 6 and 7 of the Convention and other international law (see the text below under each of these articles).**

## 2.2 ENFORCED DISAPPEARANCE AS A CRIME AGAINST HUMANITY

### Article 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.**

*Status of enforced disappearance as a crime against humanity.* The first element of Article 5 of the Convention is that “[t]he widespread or systematic practice of enforced disappearance” is “a crime against humanity as defined in applicable international law”.

Therefore, to meet their obligations under Article 5 of the Convention, states parties must not only define the “widespread or systematic practice of enforced disappearance” as a crime against humanity, but they must also ensure that the definition is consistent with “applicable international law”. Article 5 does not fully reflect applicable international law to the extent that it might appear to suggest that enforced disappearance is a crime against humanity only if it is a widespread or a systematic practice. However, there is no such high threshold in the

definition under international law. Article 7 of the Rome Statute of the ICC provides that an enforced disappearance is committed *as part of* a widespread or systematic attack on a civilian population. Thus, a single enforced disappearance can be a crime against humanity under Article 7 as long as it is part of a widespread or systematic attack, which could involve a wide range of other acts listed in that article that can amount to crimes against humanity when committed as part of a widespread or systematic attack against civilian population.

**This is an important distinction and states parties, in fulfilling all of their obligations under Article 5, must define enforced disappearance as a crime against humanity in accordance with applicable international law, when it is committed as part of a widespread or systematic attack on a civilian population, not simply the widespread or systematic practice of enforced disappearance.**

*Ensuring that enforced disappearance attracts the consequences provided under international law.* The second component of Article 5 provides that the widespread or systematic practice of enforced disappearance “shall attract the consequences provided for under such applicable international law”. These consequences include the non-applicability of statutory limitations (see discussion of Article 8), the prohibition of amnesties (see discussion in Section 7.2) and the recognition of the right of victims to full reparation (see discussion of Article 24 (4 to 6)). In addition, these consequences include penalties that reflect the serious nature of the crime (see discussion of Article 7), but also a maximum sentence that does not exceed life imprisonment and excludes the death penalty. Life imprisonment is the maximum penalty provided for this crime under the Rome Statute and the statutes of other international and internationalized<sup>19</sup> criminal courts, including the International Criminal Tribunal for the former Yugoslavia; the International Criminal Tribunal for Rwanda; the Special Panels for Serious Crimes in Dili, Timor-Leste; the international panels in Kosovo; the Special Court for Sierra Leone; the War Crimes Chamber of the State Court of Bosnia and Herzegovina,; and the Extraordinary Chambers in the Courts of Cambodia. .<sup>20</sup>

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<sup>19</sup> Internationalized criminal courts are courts that hybridize national and international systems. These sort of courts have been established to investigate crimes under international law in the country where they have been committed. No standard model of internationalized courts has been established and each of those created have been unique.

<sup>20</sup> Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute), art. 24 ([http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf)); Statute for the International Tribunal for Rwanda (ICTR Statute), art. 23 (<http://www.un.org/ictt/statute.html>); UNTAET Regulation 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor), 6 June 2000, Sect. 10 (<http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg0015E.pdf>); Statute of the Special Court for Sierra Leone (Sierra Leone Statute), art. 19 (<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>); Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006) (Cambodian Extraordinary Chambers Law), art. 38 ([http://www.cambodiatribunal.org/sites/default/files/resources/Domestic\\_Cambodian\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/Domestic_Cambodian_Law_as_amended_27_Oct_2004_Eng.pdf)).

**Therefore, states parties must ensure that they exclude statutes of limitation for the crime of enforced disappearance, prohibit amnesties for enforced disappearance, recognize the right of victims to full reparation for this crime and exclude the death penalty for this crime.**

### 3. PRINCIPLES OF CRIMINAL RESPONSIBILITY

As the Working Group has stated, states parties must establish a comprehensive regime of individual responsibility in relation to enforced disappearances, including superior responsibility.<sup>21</sup> States parties must ensure that they incorporate principles of criminal responsibility according to their international obligations under customary international law.

#### Article 6

##### 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;**

Article 6 (1) (a) of the Convention requires states parties, at a minimum, to take the necessary measures to hold criminally responsible persons who are involved in an enforced disappearance in accordance with five principles of criminal responsibility: “Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance”. This should include attempting, assisting, facilitating or aiding or abetting the commission of the crime of enforced disappearances,<sup>22</sup> as well as planning or conspiring and instigating or inciting.<sup>23</sup>

However, the Working Group has declared that states must also hold persons involved in an enforced disappearance on the following grounds: Complicity, instigation, consent, acquiescence and active concealment.<sup>24</sup> In addition, other principles of criminal responsibility applicable to the crime against humanity of enforced disappearance are recognized in Article 25 of the Rome Statute.

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<sup>21</sup> 2010 Working Group Report, para. 62 (f).

<sup>22</sup> International Committee of the Red Cross, *The Domestic Implementation of International Humanitarian Law*, p. 35 (<http://www.icrc.org/eng/assets/files/publications/icrc-002-4028.pdf>).

<sup>23</sup> ICTY Statute, art. 7 and ICTR Statute, art. 6.

<sup>24</sup> 2010 Working Group Report, *supra* note 11, para. 25.

**Therefore, states parties should ensure that persons can be held criminally responsible with regard to their involvement in an enforced disappearance based upon any of the following principles of criminal responsibility, in a manner that is defined consistently with international law:**

- **Committing, as an individual or jointly with or through another person, and regardless of whether that person is themselves criminally responsible;**
- **Ordering;**
- **Soliciting;**
- **Inducing;**
- **Attempting;**
- **Assisting;**
- **Facilitating;**
- **Aiding;**
- **Abetting;**
- **Planning;**
- **Conspiring;**
- **Instigating;**
- **Inciting;**
- **Being complicit in;**
- **Consenting;**
- **Acquiescing;**
- **Actively concealing;**
- **Contributing to the commission or attempted commission of an enforced disappearance by a group of persons acting with a common purpose; and**
- **Otherwise assisting the commission or attempted commission of an enforced disappearance.**

### 3.1 SUPERIOR RESPONSIBILITY

#### Article 6

##### 1. (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.**

Pursuant to Article 6 (1) (b) of the Convention and international law, states parties must ensure that they incorporate principle of criminal responsibility for those who failed to exercise effectively superior responsibility – whether as a military commander or as a civilian superior - over subordinates who were committing or about to commit according to their



international obligations under customary international law.<sup>25</sup>

Under the strictest international standards, the elements of superior responsibility include the following:

- a single standard applicable to military commanders (and others acting as military commanders) and civilian superiors;<sup>26</sup>
- the superior had effective control over the subordinate;<sup>27</sup>
- the superior knew or had reason to know;<sup>28</sup>
- that the subordinate had committed, was committing or was about to commit a crime;<sup>29</sup>
- the superior failed to take necessary and reasonable measures;<sup>30</sup> and

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<sup>25</sup> *14-Point Program*, Pt. 2 (“Officials with chain-of-command responsibility who order or tolerate ‘disappearances’ by those under their command should be held criminally responsible for these acts.”).

<sup>26</sup> ICTY Statute, art. 7 (3) (“superior”); ICTR Statute, art. 6 (3) (“superior”); Sierra Leone Statute, art. 6 (3) (“superior”); UNTAET Reg. 2000/15, s. 16 (“superior”); Cambodia Extraordinary Chambers Law, art. 29 (“the superior”); Draft Code of Crimes, art. 6 (“superiors”); Protocol I, art. 86 (2) (“superiors”). Only one instrument has a lesser standard for civilian superiors than for military commanders and persons acting effectively as military commanders. See Rome Statute, art. 28 (b).

<sup>27</sup> Cambodia Extraordinary Chambers Law, art. 29 (“effective command and control”); Rome Statute, art. 28 (a) (“effective command and control”) (military commander or person acting effectively as a military commander) and (b) (“effective authority and control”) (other superiors).

<sup>28</sup> ICTY Statute, art. 7 (3) (“knew or had reason to know”); ICTR Statute, art. 6 (3) (“knew or had reason to know”); Sierra Leone Statute, art. 6 (3) (“knew or had reason to know”); UNTAET Reg. 2000/15, s. 16 (“knew or had reason to know”); Cambodia Extraordinary Chambers Law, art. 29 (“knew or had reason to know”); Draft Code of Crimes, art. 6 (“knew or had reason to know, in the circumstances at the time”); Protocol I, art. 86 (2) (“if they knew, or had information which should have enabled them to conclude in the circumstances at the time”). Only one instrument has a lesser standard for civilian superiors than for military commanders and persons acting effectively as military commanders. See Rome Statute, art. 28 (b).

<sup>29</sup> ICTY Statute, art. 7 (3) (“about to commit such acts or had done so”); ICTR Statute, art. 6 (3) (“about to commit such acts or had done so”); Sierra Leone Statute, art. 6 (3) (“about to commit such acts or had done so”); UNTAET Reg. 2000/15, s. 16 (“about to commit such acts or had done so”); Cambodia Extraordinary Chambers Law, art. 29 (“about to commit such acts or had done so”); Draft Code of Crimes, art. 6 (“was committing or was going to commit such a crime”); Protocol I, art. 86 (2) (“was committing or was going to commit such a breach”); Rome Statute, art. 28 (a) (“were committing or about to commit such crimes”) and (b) (same).

<sup>30</sup> ICTY Statute, art. 7 (3) (“necessary and reasonable measures”); ICTR Statute, art. 6 (3) (“necessary and reasonable measures”); Sierra Leone Statute, art. 6 (3) (“necessary and reasonable measures”); UNTAET Reg. 2000/15, s. 16 (“necessary and reasonable measures”); Cambodia Extraordinary Chambers Law, art. 29 (“necessary and reasonable measures”); Draft Code of Crimes, art. 6 (“all necessary measures within their power”); Protocol I, art. 86 (2) (“all feasible measures within their

12 No Impunity for Enforced Disappearances  
Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance

- to prevent the crime, to repress or punish it or refer the case for the purpose of prosecution.<sup>31</sup>

**States parties must ensure that they incorporate a single rule of superior responsibility for commanders and superiors in accordance with the strictest requirements of international law.**

## 4. DEFENCES

National legislation should allow for defences to the crime of enforced disappearance only in the narrow circumstances permitted by international law, and should exclude any defences that are not appropriate for crimes under international law, including enforced disappearance. As Amnesty International has argued, compulsion, duress and necessity should not be defences to crimes under international law, but should at most be permitted to be considered as possible grounds for mitigation of punishment.<sup>32</sup> Indeed, article 1(2) of the Convention effectively precludes any defence based on any type of “exceptional circumstances”.

### 4.1 SUPERIOR ORDERS

**Article 6 (2): No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.**

Pursuant to Article 6 (2), superior orders or instructions may never be invoked as a defence to exclude criminal responsibility under any circumstances.<sup>33</sup> This includes “orders or instructions from any public authority, civilian, military or other”, which are *per se* manifestly unlawful. As provided in Article 23 (2), “states parties must ensure that orders or instruction prescribing, authorizing or encouraging enforced disappearance are prohibited.” States parties must also guarantee that a person who refuses to obey such an order will not be punished (see discussion of Article 23 (2)).

International law imposes the duty to disobey a manifestly unlawful order.<sup>34</sup> Due to the nature of the act, obeying an order may not relieve the subordinate of criminal

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power”); Rome Statute, art. 28 (a) (“all necessary and reasonable measures within his or her power”) and (b) (same).

<sup>31</sup> ICTY Statute, art. 7 (3) (“to prevent such acts or to punish the perpetrators thereof”); ICTR Statute, art. 6 (3) (“to prevent such acts or to punish the perpetrators thereof”); Sierra Leone Statute, art. 6 (3) (“to prevent such acts or to punish the perpetrators thereof”); UNTAET Reg. 2000/15, s. 16 (“to prevent such acts or to punish the perpetrators thereof”); Cambodia Extraordinary Chambers Law, art. 29 (“to prevent such acts or to punish the perpetrators”); Draft Code of Crimes, art. 6 (“to prevent to prevent or repress the crime”); Protocol I, art. 86 (2) (“to prevent or repress the breach”); Rome Statute, art. 28 (a) (“to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution”) and (b) (same).

<sup>32</sup> See Amnesty International, *THE INTERNATIONAL CRIMINAL COURT, Making the right choices - Part I*, Sections VI.E.3 and 4 (<http://www.amnesty.org/en/library/info/IO40/001/1997/en>).

<sup>33</sup> *14-Point Program*, Pt. 9 (“An order from a superior officer or a public authority must never be invoked as a justification for taking part in a “disappearance.”).

<sup>34</sup> *Ibid.*, Pt. 9 (“[All officials involved in the arrest and custody of prisoners] should be instructed that they have the right and duty to refuse to obey any order to participate in a “disappearance.”).

responsibility.<sup>35</sup> This defence has been contrary to international law since Nuremberg, although it may be taken into account in mitigation of punishment.<sup>36</sup> This defence has also been excluded in numerous international instruments since the Nuremberg Charter, including the Allied Control Council Law No. 10, the Statute of the International Criminal Tribunal of the former Yugoslavia (Article 7.4), the Statute of the International Criminal Tribunal for Rwanda (Article 6.4); the Statute of the Special Court for Sierra Leone (Article 6.4) as well as the Law establishing the Extraordinary Chambers in the Courts of Cambodia (Article 29).<sup>37</sup> It is also excluded as a defence in the Inter-American Convention.<sup>38</sup> Similarly, the Committee against Torture has concluded that superior orders can never be a defence to torture.<sup>39</sup>

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<sup>35</sup> International Committee of the Red Cross, *Customary International Humanitarian Law database*, Rules 154 and 155 ([http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul](http://www.icrc.org/customary-ihl/eng/docs/v1_rul)).

<sup>36</sup> Amnesty International, *The international criminal court: Making the right choices – Part I: Defining the crimes and permissible defences*, AI Index: IOR 40/01/1997, 1 January 1997, Sect. VI.E.6.

<sup>37</sup> Charter of the International Military Tribunal, annexed to the London Agreement (Nuremberg Charter), 8 Aug. 1945, art. 8; Allied Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity (Allied Control Council Law No. 10), 20 Dec. 1945, art. II (4) (b), (published in the Official Gazette of the Control Council for Germany, No. 3, Berlin, 31 Jan. 1946); Charter of the International Military Tribunal for the Far East (Tokyo Charter), art. 6; ICTY Statute, art. 7 (4); ICTR Statute, art. 6 (4); Draft Code of Crimes against the Peace and Security of Mankind (Draft Code of Crimes), art. 5 ([http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf)); UNTAET Regulation 2000/15, s. 21; Sierra Leone Statute, art. 6 (4); Cambodian Extraordinary Chambers Law, art. 29.

Article 33 of the Rome Statute permits the defence of superior orders to war crimes, but it is narrowly circumscribed, applicable only to trials in the International Criminal Court and contrary to every other international instrument adopted concerning crimes under international law, including instruments subsequently adopted, such as the Sierra Leone Statute and the Cambodian Extraordinary Chambers Law.

<sup>38</sup> Inter-American Convention, art. VIII (“*The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them.*”).

<sup>39</sup> UN Committee against Torture, General Comment No. 2, *Implementation of article 2 by States parties*, UN Doc. CAT/C/GC/2, 24 January 2008, para. 26.

**Therefore, states parties must exclude superior orders as a ground for excluding criminal responsibility, although it can be a ground for mitigation of punishment, and expressly provide that the order to commit or to participate in any way in the crime of enforced disappearance is “manifestly unlawful” or criminal.<sup>40</sup> Compulsion, duress, necessity, and any form of “exceptional circumstances” must similarly be excluded as defences to the crime of enforced disappearance. Not only must states refrain from creating new defences for these grounds, states must ensure that any such defences that already exist under national law are made expressly inapplicable to the crime of enforced disappearance.**

## 5. SANCTIONS

### 5.1 APPROPRIATE PENALTIES

#### Article 7

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

The Convention provides in Article 7 (1) that states parties have the obligation to punish “by appropriate penalties which take into account its extreme seriousness.” To be consistent with international law and standards, as well as the UN General Assembly’s calls upon all states to impose a moratorium on the death penalty, this penalty should be excluded as an appropriate penalty for an enforced disappearance. Even with the most serious crimes (genocide, crimes against humanity – including enforced disappearances – and war crimes), every international and internationalized court established since 1993 excludes this penalty, including: the Rome Statute, the ICTY and Rwanda Statutes, the Statute of the Special Court for Sierra Leone and the Extraordinary Chambers in the courts of Cambodia.<sup>41</sup>

The maximum sentence should not exceed the maximum sentence of life imprisonment for this crime under the Rome Statute and the statutes of other international criminal courts, including the International Criminal Tribunal for the former Yugoslavia; the International Criminal Tribunal for Rwanda; the Special Panels for Serious Crimes in Dili, Timor-Leste; the international panels in Kosovo; the Special Court for Sierra Leone; the War Crimes Chamber at the State Court of Bosnia and Herzegovina; and the Extraordinary Chambers in the Court of Cambodia, exclude the death penalty as an appropriate penalty for the crime of enforced disappearance.

**Establish appropriate penalties for the crime of enforced disappearance with a maximum sentence of life imprisonment, excluding in any case the death penalty in accordance with international law and standards..**

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<sup>40</sup> 2010 Working Group Report, para. 53.

<sup>41</sup> Rome Statute, art. 77; ICTY Statute, art. 24; ICTR Statute, art. 23; UNTAET Reg. 2000/15, s. 10 (25 years); Statute of the Special Court for Sierra Leone Statute, art. 19; Cambodian Extraordinary Chambers Law, art. 38.

## 5.2 MITIGATING AND AGGRAVATING CIRCUMSTANCES

### Article 7. 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.**

**Mitigating circumstances.** In accordance with Article 7 (2) (a), states parties may establish three different circumstances that can be taken into account in mitigation of punishment. They may be applied to person who: effectively contribute to bringing the disappeared person forward alive; make it possible to clarify cases of enforced disappearance; or identify the perpetrators of an enforced disappearance.

In determining whether mitigating circumstances exist with regard to the crime against humanity of enforced disappearance, the International Criminal Court takes into account, “as appropriate”, the following factors:

“(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress;

(ii) The convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court;”<sup>42</sup>

**States parties should ensure that the following circumstances are mitigating circumstances, but not include any that are inconsistent with other international law or standards:**

- **effectively contributing to bringing the disappeared person forward alive;**
- **making it possible to clarify cases of enforced disappearance; and**
- **identifying the perpetrators of an enforced disappearance.**

**Aggravating circumstances.** As regards aggravating circumstances, in line with Article 7 (2) (b) of the Convention, states parties may include “the death of the disappeared or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons.” The International Criminal Court, when determining the appropriate sentence for the crime against humanity of enforced disappearance takes into account six other aggravating circumstances:

“(i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature;

(ii) Abuse of power or official capacity;

(iii) Commission of the crime where the victim is particularly defenceless;

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<sup>42</sup> *Ibid.*, R. 145 (2) (b).

- (iv) Commission of the crime with particular cruelty or where there were multiple victims;
- (v) Commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3 [of the Rome Statute];
- (vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.”<sup>43</sup>

Apart from the circumstances established in the Convention, each of these aggravating circumstances should be factors in determining the appropriate penalty for an enforced disappearance.

**States parties should ensure that each of the following circumstances are aggravating circumstances in determining the appropriate penalty:**

- the death of the disappeared;
- the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons;
- any relevant prior criminal convictions for crimes under international law or of a similar nature;
- abuse of power or official capacity;
- commission of the crime where the victim is particularly defenceless;
- commission of the crime with particular cruelty or where there were multiple victims;
- commission of the crime for any motive involving discrimination on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status; and
- other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

### 5.3 SUPPLEMENTARY SANCTIONS AND MEASURES TO PROTECT INVESTIGATIONS

In addition to such criminal penalties, as stated by the Working Group, national legislation should also provide for supplementary sanctions, such as administrative disqualifications.<sup>44</sup> States parties must also ensure that their legislation provides 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” (Article 12 (4) of the Convention).<sup>45</sup> This requirement is in accordance with Article 16 (1) of the 1992 Declaration, persons alleged to have committed a crime of enforced disappearance *shall be suspended from any official duties during the investigation*, which should be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.<sup>46</sup>

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<sup>43</sup> Rules of Procedure and Evidence of the International Criminal Court, R. 145 (2) (a) ([http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules\\_of\\_procedure\\_and\\_evidence\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_evidence_English.pdf)).

<sup>44</sup> 2010 Working Group Report, para. 45.

<sup>45</sup> *14-Point Program*, Pt. 10 (“Complainants, witnesses, lawyers and others involved in the investigation should be protected from intimidation and reprisals.”).

<sup>46</sup> 1992 Declaration, art. 16 (1) (“Persons alleged to have committed any of the acts referred to in article 4, paragraph 1, above, shall be suspended from any official duties during the investigation

**States should provide that persons suspected of having committed an offence of enforced disappearance are suspended from any post where they would be 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.**

## 6. BARS TO PROSECUTIONS

### 6.1 STATUTE OF LIMITATIONS

#### Article 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.**

Article 8 of the Convention recalls the continuous nature of the crimes of enforced disappearance, as was previously provided in the Inter-American Convention and has been reaffirmed by both the European Court of Human Rights and the Inter-American Court of Human Rights.<sup>47</sup> Article VII (1) of the Inter-American Convention provides that “[c]riminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.”<sup>48</sup>

This prohibition must always apply in the case of the crime of enforced disappearances as a crime against humanity.<sup>49</sup> However, implicit in Article 8 (1) of the Convention, and as already provided in the Inter-American Convention<sup>50</sup> and the Working Group, states should never

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referred to in article 13 above.”). See also *14-Point Program*, Pt.10 (“Officials suspected of responsibility for “disappearances” should be suspended from active duty during the investigation.”).

<sup>47</sup> Inter-American Convention, art. III (“*This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.*”). For examples of jurisprudence please see; European Court of Human Rights, *Varnava and Others v. Turkey*, Grand Chamber Judgment of 18 September 2009, para. 139; Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, para. 155.

<sup>48</sup> 14-Point Program, Pt. 12 (“Governments should ensure that those responsible for “disappearances” are brought to justice. This principle should apply . . . no matter how much time has elapsed since the commission of the crime.”).

<sup>49</sup> Rome Statute, art. 29 (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”).

<sup>50</sup> Inter-American Convention, art. VII (“*Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.*”).

subject enforced disappearances to statutes of limitations under any circumstances.<sup>51</sup>

In addition, Article 8 (1) of the Convention imposes two stringent requirements on any state party “which applies a statute of limitations in respect of enforced disappearance”. First, its duration must be “proportionate to the extreme seriousness of this offence”. Second, it may only commence “from the moment when the offence of enforced disappearance ceases”. That means that, taking into account the continuous nature of the crime, as recognized in the Inter-American Convention, the statute of limitation period may not start until the fate or whereabouts of the victim has been determined.<sup>52</sup>

**States parties should provide that the crime of enforced disappearance is not subject to any statute of limitation whether with respect to either criminal or civil proceedings. In the meantime, states should ensure, as a strictly temporary measure, that any statutes of limitations for enforced disappearance that may not amount to crimes against humanity:**

- apply for as long as the period applicable to the most serious crimes under international law,
- are suspended during any period when the victims or family is unable effectively to seek justice or reparation, and
- commence only from the moment when the offence of enforced disappearances ceases.

## 6.2. RIGHT TO EFFECTIVE REMEDY AND STATUTE OF LIMITATIONS

### Article 8 (2):

**Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.**

Article 8 (2) necessarily obliges states to establish the same term of statutes of limitations both for criminal proceedings and civil tort claims, whether made in a civil proceeding or as part of a criminal proceeding. As provided in the Principles for the protection and promotion of human rights through action to combat impunity (Principle 23), in order to guarantee the right to an effective remedy, no statutes of limitations should apply for criminal, civil or administrative actions brought by victims seeking reparation for their injuries.<sup>53</sup> As statutes of limitations do not apply to the crime against humanity of enforced disappearance, they do not apply either to criminal or civil proceedings in which victims of the crime of enforced disappearance are entitled to seek an effective remedy.

However, in the event that statutes of limitations still apply under national law to the crime of enforced disappearances, the Convention requires that states parties must meet at least two strict requirements.

First, statutes of limitations for civil claims must have, at least, the same length. Second, the remedy must be “effective”. That means, as states recognized in Article 17 (2) of the 1992 Declaration, that the period of limitations must be suspended when the remedies during that period are ineffective or the remedies are not available. Article 17 (2) of the 1992

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<sup>51</sup> 2010 Working Group Report, para. 55.

<sup>52</sup> See *supra* note 50.

<sup>53</sup> See UN Economic and Social Council. *Report of the independent expert to update the Set of principle to combat impunity*. Diane Orentlicher. 8 February 2005. E/CN.4/102/Add.1. (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>)



Declaration provides that “[w]hen the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearances shall be suspended until these remedies are re-established”.<sup>54</sup>

States must ensure that the remedy granted is real and not merely theoretical, is available to the person concerned, is capable of restoring the enjoyment of the impaired right and ensures the effectiveness of the judgment.<sup>55</sup>

**States parties should eliminate any statute of limitations that would bar civil claims for reparation for enforced disappearances, whether in civil or criminal proceedings. Pending prompt removal of any statutes of limitation currently applicable to enforced disappearance, states parties under the Convention must guarantee the right to a remedy of victims and their families before statutes of limitation apply, ensuring that they are suspended during any period when they are ineffective or unavailable until these remedies are re-established. States should ensure, in any case, that any applicable statute of limitation can only commence from the moment when the offence of enforced disappearances ceases.**

## 7. JURISDICTION

### 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.**

In accordance with Article 9 (1) (a) of the Convention, states must provide for territorial jurisdiction, which includes not only the territory of the state party itself, but other territory subject to its jurisdiction, including occupied territory, foreign bases and areas where its peace keeping forces operate, as well as flag jurisdiction over ships and aircraft. They must provide for jurisdiction “[w]hen the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that state”. In addition, they are compelled to provide for active personality<sup>56</sup> jurisdiction and they should provide for passive personality<sup>57</sup>

<sup>54</sup> UN General Assembly, resolution 47/133, *Declaration on the Protection of all Persons from Enforced Disappearance*. 18 December 1992. Art. 17 (2).

<sup>55</sup> Human Rights Council, Report of the Special Rapporteur on the Independence of Judges and Lawyers, 13 May 2008, A/HRC/8/4 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/134/14/PDF/G0813414.pdf?OpenElement>).

<sup>56</sup> Active personality jurisdiction is a category of jurisdiction based on the nationality of the suspect or defendant at the time of the commission of the crime or tort. This is the approach taken in the International Bar Association Legal Practice Division, Report of the Task Force on Extraterritorial Jurisdiction (October 2008) (IBA Report), p. 144: “The active personality principle, also known as the active nationality principle, permits a state to prosecute its nationals for crimes committed anywhere in the world, if, at the time of the offense, they were such nationals.”. For the scope of the active

jurisdiction (Article 9 (1) (b) and (c)). States must provide their courts with jurisdiction “[w]hen the alleged offender is one of its nationals” and it is strongly recommended “[w]hen the disappeared person is one of its nationals”.

**States parties must provide for jurisdiction:**

- when the offence is committed in any territory under its jurisdiction.
- when the alleged offender is one of its nationals.

**States parties should provide for jurisdiction:**

- when the disappeared person is one of its nationals.

7.1 OBLIGATION TO PROVIDE FOR UNIVERSAL JURISDICTION

**Article 9:**

**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.**

**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,**

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personality principle, see Amnesty International, *Universal jurisdiction: The duty of states to enact and enforce legislation – Ch. One*, AI Index: IOR 53/003/2001, September 2001, Sect. II.B (<http://www.amnesty.org/en/library/asset/IO53/003/2001/en/a866e900-d8f0-11dd-ad8c-f3d4445c118e/ior530032001en.pdf>). See also Dapo Akande, *Active Personality Principle*, in Antonio Cassese, ed., *The Oxford Companion to International Justice*, Oxford: Oxford University Press, 2008, 229 (criticizing the application of the active personality principle to persons possessing the forum state's nationality at the time of prosecution, but not at the time of the crime, except when it was a crime under international law; seeing prosecution of persons who became residents of the forum state after the crime as analogous to active personality jurisdiction)."

<sup>57</sup> "Passive personality jurisdiction is a category of jurisdiction based on the nationality of the victim at the time of the commission of the crime or the tort. IBA Report, *supra*, note 18, p.146: "The victim must have been a national of the foreign state, State A, at the time of the crime". For the scope of the passive personality principle, see Amnesty International, *Universal jurisdiction (Ch. One)*, *supra*, note 56, at Sect. II.C. See also Dapo Akande, *Passive Personality Principle*, in Cassese, *supra* note 18, at p. 452 (justifying the passive personality jurisdiction on the ground that perpetrators "will often select their victims based on this nationality and will know that the state of nationality has an interest in preventing such acts")."

**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.**

Pursuant to Article 9 (2) of the Convention, states parties have the obligation to extradite or prosecute (*aut dedere aut judicare*) persons suspected of responsibility for an enforced disappearance under the principle of universal jurisdiction in all circumstances, whether as a crime against humanity or not.<sup>58</sup> Even if the crime of enforced disappearances is committed outside the territory of the state party and neither the victim nor the suspect are nationals of that state, states parties have the obligation to “exercise jurisdiction over the offence of enforced disappearance”. However, as discussed below, *all* states have a shared responsibility to investigate and prosecute enforced disappearances. They are also obliged to cooperate with other states investigating and prosecuting this crime, including through extradition and mutual legal assistance. Those responsible should be brought to justice in fair proceedings without the death penalty.

States parties should eliminate any barriers to exercising jurisdiction over the offence of enforced disappearance and should not require the offender to be present in territory under their jurisdiction. States parties should authorize the competent authorities to initiate an investigation as soon as they are aware that a person suspected of committing a crime of enforced disappearances is going to visit the state party, is on his or her way to that state or about to change planes at one of its airports. They should not only provide for jurisdiction “when the alleged offender is present in any territory under its jurisdiction”. A requirement to wait until the suspect has entered the state on a visit would leave too little time for an investigation to be completed and an arrest warrant issued and enforced.

States parties should also be able to request extradition of a person suspected of responsibility for an enforced disappearance committed abroad, which would also allow them to help shoulder the burden when other states fail to fulfil their obligations to investigate and prosecute the crime of enforced disappearance.<sup>59</sup> Indeed, this possibility was envisaged more than six decades ago as an essential component of the enforcement provisions of the four 1949 Geneva Conventions (and subsequently incorporated into the 1977 Protocol I to the Conventions), each of which provide that any state party, regardless of whether a suspect had ever been in its territory and as long as it “has made out a *prima facie* case”, may request extradition of someone suspected of grave breaches of those Conventions.<sup>60</sup> If the presence of the suspected perpetrator were to be necessary for an effective investigation in a particular case and the person could not be extradited to that state, it is very unlikely that the police would decide to open an investigation.

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<sup>58</sup> *14-Point Program*, Pt. 11 (“Governments should ensure that those responsible for “disappearances” are brought to justice. This principle should apply wherever such people happen to be, wherever the crime was committed, whatever the nationality of the perpetrators or victims . . .”).

<sup>59</sup> For further information about the shared responsibility model, see Amnesty International, *Improving the effectiveness of state cooperation*, 13 October 2009 (<http://www.amnestyusa.org/document.php?id=ENGIOR530042009&lang=e>). The absence of a presence requirement also means that states can accept cases transferred by an international court, such as the ICTY or ICTR, for crimes under international law more easily by completing an investigation before the transfer and issuing an arrest warrant before the transfer.

<sup>60</sup> First Geneva Convention, art. 49; Second Geneva Convention, art. 50; Third Geneva Convention, art. 129; Fourth Geneva Convention, art. 146.

**States parties must provide that their courts can exercise universal jurisdiction over any case of enforced disappearance. They should eliminate any barriers to exercising it, including the requirement that the suspect be present in their territory before an investigation can be opened or an extradition request made.**

## 7.2. ELIMINATION OF INAPPROPRIATE OBSTACLES TO EXERCISE JURISDICTION

States must eliminate any obstacles to the exercise of jurisdiction over crimes of enforced disappearance, whether as a crime against humanity or not. For the same reasons that the Committee against Torture concluded that the Convention against Torture must prevail over national laws offering a form of impunity, the Convention must prevail over any national legislation in conflict with the obligations of states parties under that treaty.<sup>61</sup> Indeed, it is a long-established rule of international law that treaty obligations prevail over any conflicting national law.<sup>62</sup>

As stated by the Inter-American Court of Human Rights, “the State may never apply amnesty laws –which will produce no effects in the future –, raise the statute of limitations, non-ex post facto nature of criminal laws or *res judicata* defenses, or rely upon the principle of double jeopardy, or resort to any other similar measure designed to eliminate responsibility in order to escape its duty to investigate and punish those responsible.”<sup>63</sup>

**No military courts.** States agreed when adopting Article 16 (2) of the 1992 Declaration that the crime of enforced disappearance must be tried only by competent ordinary courts, and not in any other special tribunal, in particular military courts.<sup>64</sup> This prohibition, expressly established in Article IX of the Inter-American Convention,<sup>65</sup> was not expressly included in the Convention. It is implicit in Article 11 (3), which establishes the persons suspected of having committed a crime of enforced disappearance shall benefit from a fair trial before a

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<sup>61</sup> Committee against Torture, Sixteenth session, *Summary Record of the 247th Meeting*, U.N. Doc. CAT/C/SR.247, para. 20.

<sup>62</sup> See Articles 26 and 27 of the Vienna Convention on the Law of the Treaties, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331. Annemie Schaus, *Les Conventions de Vienne sur le droit des traités*, p.1137 (« L'article 27 de la Convention de Vienne, quant à lui, prescrit certainement, dans l'ordre juridique international, la primauté du droit international sur le droit interne ») and at p.1124 (« Le principe d'impuissance du droit interne à justifier la non exécution d'un traité, telle que contenue à l'article 27, reflète en tout état de cause le droit international coutumier »)..

<sup>63</sup> See IACtHR, *Case of La Cantuta v. Peru* (Merits, Reparations and Costs), 29 November 2006, para. 226.

<sup>64</sup> 1992 Declaration, art. 16 (2) (“They shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.”). See also Inter-American Convention, Article IX, 1<sup>st</sup> para. (“Persons alleged to be responsible for the acts constituting the offense 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.”); *14-Point Program*, Pt. 11 (“Trials should be in the civilian courts.”).

<sup>65</sup> Inter-American Convention, art. IX (“Persons alleged to be responsible for the acts constituting the offense 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.

*The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties.”).*

competent, independent and impartial court or tribunal established by law.<sup>66</sup>

**States parties should provide that only ordinary courts have jurisdiction over the crime of enforced disappearance and that no military court or other special court have jurisdiction over this crime.**

**No immunities.** As a consequence of the duty of states parties to investigate and prosecute acts that could amount to a crime of enforced disappearance, suspects must not be granted immunity from prosecution. The obligation under the Convention to do so is absolute and it does not provide for any exception. Article 11 (1) of the Convention provides that states parties are obliged to “submit the case to its competent authorities for the purpose of prosecution” if it does not extradite that person or surrender him or her to another state or to an international criminal tribunal.

Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility.<sup>67</sup>

**State parties should provide that their courts will not recognize any claim to immunity from arrest and prosecution for the crime of enforced disappearance.**

**No amnesties and pardons.** Amnesties or similar measures that might have the effect of exempting persons suspected of responsibility for enforced disappearance from any criminal proceedings or sanctions are incompatible with the obligation in Article 11 (1) to submit the case of a person suspected of responsibility for an enforced disappearance who is not extradited “to its competent authorities for the purpose of prosecution”.<sup>68</sup> Indeed, states expressly provided in Article 18 (2) of the 1992 Declaration that amnesties were prohibited for the crime of enforced disappearance.<sup>69</sup> Likewise, pardons should be prohibited when they bar judicial determinations of guilt or innocence, the emergence of the truth or full reparation.

Regarding amnesties, the High Commissioner for Human Rights has declared that “[a]mnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes.”<sup>70</sup>

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<sup>66</sup> See also: Article 5 of the Basic principles on the independence of the judiciary (<http://www2.ohchr.org/english/law/indjudiciary.htm>) and Principle 29 of the Updated principles for the protection and promotion of human rights through action to combat impunity (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>).

<sup>67</sup> UN Human Rights Committee, General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, HRI/GEN/1/Rev.8, p. 238.

<sup>68</sup> *14-Point Program*, Pt. 11 (“The perpetrators should not benefit from any legal measures exempting them from criminal prosecution or conviction.”).

<sup>69</sup> 1992 Declaration, art. 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.”).

<sup>70</sup> UN High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States, Amnesties*, New York and Geneva, 2009, p. V.

The UN Security Council has also stated that “*United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights.*”<sup>71</sup>

Furthermore, the Inter-American Court of Human Rights has consistently stated that amnesties in whatever form are prohibited.<sup>72</sup> The Court considers that:

*“all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”.*<sup>73</sup>

**States parties should provide that amnesties, pardons and similar measures of impunity do not bar investigations and prosecutions of enforced disappearance and other crimes under international law, or of steps to ascertain the truth about these crimes or to obtain full reparation for them.**

### 7.3 OBLIGATION TO INVESTIGATE AND, IF THERE IS SUFFICIENT ADMISSIBLE EVIDENCE, PROSECUTE 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.**

#### 7.3.1 Obligation to open an investigation when a complaint has been filed

Consistently with Article 13 (1) of the 1992 Declaration, Article 12 of the Convention contains a three-part obligation.

First, it obliges states parties to guarantee the right of any person, which can include legal persons, such as non-governmental organizations, to report any act that may constitute a crime of enforced disappearance to the competent authorities.<sup>74</sup>

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<sup>71</sup> UN Security Council, The rule of law and transitional justice in conflict and post-conflict societies, U.N. Doc. S/2004/616, 3 August 2004, para. 10.

<sup>72</sup> See IACtHR, *Gelman v. Uruguay*, Merits and Reparations, 24 February 2011, para. 195.

<sup>73</sup> See among others, *Barrios Altos v. Peru (Merits)*, 14 March 2001, para. 41. *La Cantuta v. Peru (Merits, Reparations and Costs)* 29 November 2006, para. 152; *Almonacid-Arellano et al. v. Chile*, (Preliminary Objections, Merits, Reparations and Costs), 26 September 2006, para. 112.

<sup>74</sup> 1992 Declaration, art. 13 (1) (“Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority”).

Second, it requires the competent authorities to examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. In conducting such an investigation, states parties must prevent and investigate “with special attention enforced disappearances of persons belonging to vulnerable groups, especially children, and enforced disappearances of women, as they may become particularly vulnerable to sexual violence and other forms of violence, and to bring the perpetrators of those enforced disappearances to justice.”<sup>75</sup>

Third, to ensure that the right to report is effectively guaranteed, states parties must establish effective measures in order to protect the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, against all ill-treatment or intimidation as a consequence of the complaint or any evidence given. One protection step is to require that those potentially implicated in crimes of enforced disappearance are removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation (see discussion of Article 12 (4) below).

**States parties must recognize in their law the right to report facts concerning enforced disappearances to the competent state authorities and to require those authorities promptly, thoroughly, independently and impartially to investigate such reports.**

### 7.3.2 Obligation to open an investigation ex-officio

#### Article 12

**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.**

In addition to the obligations under Article 12 (1) of the Convention to investigate complaints that a person has been subjected to enforced disappearance, due to the high risk of ill-treatment or intimidation to any individual who might file a complaint, states parties must, in accordance with Article 12 (2) of the Convention, investigate “even when there has been no formal complaint.”<sup>76</sup> States parties must ensure that complaints and reports of enforced disappearances are promptly and effectively investigated.<sup>77</sup> Even in the absence of an express complaint, an investigation shall be undertaken if there are other indications that enforced disappearances might have occurred. Given the largely secretive nature of this crime, states will often have to open investigations based on far less information than with respect to other crimes, for example, based on press reports.

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<sup>75</sup> UN Human Rights Council, Res. 10/10 (Enforced or involuntary disappearances), adopted without a vote, 26 March 2009, para. 4.(e) ([http://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_10.pdf](http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_10.pdf))

<sup>76</sup> There is a similar obligation in Article 12 of the Convention against Torture.

<sup>77</sup> *14-Point Program*, Pt. 10 (“Governments should ensure that all complaints and reports of “disappearances” are investigated promptly, impartially and effectively by a body which is independent of those allegedly responsible and has the necessary powers and resources to carry out the investigation. The methods and findings of the investigation should be made public.”).

As the Human Rights Committee has stated, states have a duty to “establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.”<sup>78</sup> As the Committee also stated, “[a]dministrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end.”<sup>79</sup>

**States parties must issue instructions to all authorities, including judicial authorities, to be alert to any indications that an enforced disappearance has taken place and, whenever that is the case, to require by law that they immediately open a thorough, independent and impartial investigation whenever there are reasonable grounds to believe that an enforced disappearance may have taken place.**

### 7.3.3 Competencies, resources and access to any place of detention

#### Article 12

**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.**

Article 12 (3) of the Convention contains two related obligations: to provide investigations with the necessary powers and resources and to ensure judicial access to places where disappeared persons might be located.

***Necessary powers and resources for investigations.*** Article 12 (3) of the Convention requires states parties to ensure that those investigating complaints of enforced disappearance, as well as those acting on their own initiative when there are reasonable grounds to believe that an enforced disappearance has been committed, must have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation. What constitutes necessary powers and resources for such an investigation is spelled out in a number of international instruments that reinforce or supplement those listed in the Convention, including Article 13 of the 1992 Declaration,<sup>80</sup> the Principles on the Effective Investigation and Documentation of Torture and

<sup>78</sup> United Nations Human Rights Committee, General Comment No. 6 (16) on article 6 of the International Covenant on Civil and Political Rights, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, doc. HRI/GEN/1/Rev.1, p. 8.

<sup>79</sup> United Nations Human Rights Committee, General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant\* /par. 14. HRI/GEN/1/Rev.8 , p. 237.

<sup>80</sup> 1992 Declaration, art. 13 provides:

“1. Each State shall ensure that any person having knowledge or a legitimate interest who



Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>81</sup> and Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. They include the following:<sup>82</sup>

- The investigators should be independent of the suspected perpetrators and the agency they serve shall be competent and impartial. They should have access to, or be empowered to commission investigations by, impartial medical or other experts. The methods used to carry out such investigations shall meet the highest professional standards and the findings shall be made public.
- The investigative authority must have the power and obligation to obtain all the information necessary to the inquiry. They must have access to the documentation and other information relevant to their investigation.
- The investigative authority must 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.
- The persons conducting the investigation must have at their disposal all the necessary budgetary and technical resources for effective investigation. They should also have the authority to oblige all those acting in an official capacity allegedly involved in enforced

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alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.

2. Each State shall ensure that the competent authority 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.

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.

4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.

5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.

6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.”

<sup>81</sup> UN, *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, recommended by U.N. G.A. Res. 55/89, 4 December 2000 (<http://www2.ohchr.org/english/law/investigation.htm>).

<sup>82</sup> UN, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, 24 May 1989 (<http://www.unhcr.org/refworld/docid/3ae6b39128.html>).

disappearances to appear and testify. The same should apply to any witness. To this end, the investigative authority should be entitled to issue summonses to witnesses, including any officials allegedly involved, and to demand the production of evidence.

- Alleged victims of enforced disappearances, witnesses, those conducting the investigation and their families must be protected from violence, threats of violence or any other form of intimidation that may arise pursuant to the investigation. Those potentially implicated in crimes of enforced disappearances must be removed from any position of control or power, whether direct or indirect, over complainants, witnesses and their families, as well as those conducting the investigation.
- Alleged victims of enforced disappearances and their legal representatives should be informed of, and have access to, any hearing, as well as to all information relevant to the investigation, and should be entitled to present other evidence.
- In cases in which the established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse or for other substantial reasons, states should ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a commission should be chosen for their recognized impartiality, competence and independence as individuals. In particular, they should be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission should have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry.
- A written report, made within a reasonable time, should include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. Upon completion, the report should be made public. It should also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The state should, within a reasonable period of time, reply to the report of the investigation and, as appropriate, indicate steps to be taken in response.

As provided by Article 13 (6) of the 1992 Declaration, an investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.<sup>83</sup>

The second obligation under Article 12 (3) of the Convention is to ensure that the authorities conducting the investigation have access, if necessary with the prior authorization of a judicial authority, which must rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that a disappeared person may be present (see discussion below of Article 17 (2)).

**States parties must ensure in law and practice that the authorities investigating an enforced disappearance have the necessary powers and resources, as spelled out in international law and standards, to conduct the investigation, including unimpeded access to any place where a disappeared person might be found.**

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<sup>83</sup> *14-Point Program*, Pt. 10 (“The investigation should not be curtailed until the fate of the victim is officially clarified.”).

### 7.3.4 Measures to prevent and sanction acts that hinder the conduct of the investigation

#### Article 12

**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.**

Closely related to the obligations in Article 12 (1) of the Convention discussed above, is the obligation under Article 12 (4) of the Convention, which provides that to prevent and sanction acts that hinder the conduct of an investigation, states parties must take effective measures “to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.”<sup>84</sup> In particular, states parties must ensure that persons suspected of having committed a crime 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.

**States parties must always ensure in law and practice effective protection to the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation.**

#### Article 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.**

As a measure to prevent enforced disappearances, pursuant to Article 22 of the Convention, states parties must sanction with disciplinary measures, as well as typify as a crime, three different conducts:

- Delaying or obstructing the right of any persons with a legitimate interest to take proceedings before a court in order to decide the lawfulness of the deprivation of liberty and

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<sup>84</sup> 1992 Declaration, art. 13 (5) (“Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.”).

order the person's release if such deprivation of liberty is not lawful.

- Failure of the official responsible for the official register to record the deprivation of liberty of any person according to national law, or the recording of any information which he or she knew or should have known to be inaccurate.
- 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.

**States parties must provide for disciplinary sanctions and define as crimes the conduct covered in Article 22 of the Convention.**

#### 7.4 PRECAUTIONARY MEASURES

##### 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.**

Article 10 of the Convention contains a two-part obligation whenever a person suspected of responsibility for an enforced disappearance is present in its territory.<sup>85</sup>

First, as soon as information about the presence of such a person becomes available to the authorities, they must examine that information and determine whether the circumstances warrant possible criminal, surrender to an international criminal court or extradition proceedings to another state. They cannot ignore such information, but must examine it promptly and in good faith and make the necessary determination to avoid impunity for this crime. Although Article 10 imposes this obligation only when the person is present in the territory of a state party, states parties should require the authorities to take such action when the person is present in any territory under its jurisdiction, such as occupied territory or territory in which its peacekeeping personnel are operating, as well as on board its ships and aircraft. In addition, the authorities should be required to take such action whenever it is believed that a suspect might visit such locations so that they can act as soon as the suspect arrives, thus avoiding the possibility of impunity for this crime.

Second, once states parties have conducted the preliminary examination of the information available and determined that criminal, surrender or extradition proceedings are required, they must ensure the presence at such proceedings of the person suspected of having committed a crime of enforced disappearances at such proceedings. This obligation includes taking the suspect into custody or any other preventive measures, over him or her, necessary to ensure his or her presence throughout the criminal, surrender or extradition proceedings according to national law.

The precautionary measures must be fully consistent with international law and standards,

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<sup>85</sup> Convention against Torture, art. 6 (1).

including those guaranteed in Article 9 of the International Covenant on Civil and Political Rights (ICCPR). Therefore, detention in custody must not be the general rule, as release may be subject to guarantees to ensure the presence of the suspect at the proceedings. In addition, the decision to release must take into account any risk to victims, witnesses and others connected with the proceedings. In the case of detention, the suspect must “be entitled to trial within a reasonable time or to release”.<sup>86</sup> As stated by the Human Rights Committee, “[p]re-trial detention should be an exception and as short as possible”.<sup>87</sup> In addition, the person deprived of his or her liberty must have the right to control by a court of the legality of the detention and the right to an effective remedy in case of violation of the ICCPR.<sup>88</sup> States must also ensure that any person arrested or detained has to be brought “promptly” before a judge or other officer authorized by law to exercise judicial power.<sup>89</sup>

**Each state party should ensure in law and practice that whenever a person suspected of responsibility for an enforced disappearance is present in its territory, other territory under its jurisdiction or on one of its ships or planes, or is expected to be present in one of those locations, it promptly examines the information available to it and determines whether criminal, surrender or extradition proceedings are warranted. If so, states parties must take him or her into custody or take such other legal measures as are necessary to ensure his or her presence for those proceedings. The custody and other legal measures must be consistent with international law and standards and should be maintained only for such time as is necessary to ensure the person's presence at those proceedings.**

#### Article 10

**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.**

Article 10 (2) of the Convention imposes two obligations on states parties. First, due to the nature of the measures referred to in Article 10 (1) of the Convention, states parties, and the right to a prompt and effective judicial remedy, once the precautionary measure has been adopted, a state party where a suspect is present must “immediately carry out a preliminary inquiry or investigation to establish the facts” in accordance with international law and standards concerning such investigations, as discussed above with regard to Article 12 (1) and (2) of the Convention. In addition, as discussed above, a state party should carry out such an inquiry or investigations whenever it is likely that a suspect will enter its territory, territory under its jurisdiction or one of its ships or planes so that the authorities can act in time to arrest the suspect and avoid the risk of flight and impunity.

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<sup>86</sup> ICCPR, art. 9 (3).

<sup>87</sup> Human Rights Committee. General Comment No. 8: Right to liberty and security of persons (Art. 9), para. 3, 30 June 1982.

<sup>88</sup> ICCPR, art. 9 (4).

<sup>89</sup> Human Rights Committee. General Comment No. 8: Right to liberty and security of persons (Art. 9), para. 2. 30 June 1982 (expressing the view of the Committee that delays must not exceed a few days).

Second, the state party where the suspect is present must notify all states parties listed in Article 9 (1) (the state party where the enforced disappearance was committed, the state party of the suspect and the state of the victim). The notice should include the measures taken, the findings of the inquiry and whether the state party intends to exercise its jurisdiction. However, all states under international law may investigate and prosecute crimes, including enforced disappearances, based on universal jurisdiction.<sup>90</sup> Therefore, in addition to the requirement in Article 10 (2) to notify certain states parties, the state party where the suspect is present should notify all other states parties and states that have not yet ratified the Convention.

**States parties where a suspect is present or expected to enter should immediately carry out a preliminary inquiry or investigation to establish the facts and should notify all states of the measures taken, the findings of the inquiry or investigations and whether they intend to exercise jurisdiction.**

## 7.5 RIGHT TO COMMUNICATE WITH THE NEAREST STATE REPRESENTATIVE

### Article 10

**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.**

Article 10 (3) guarantees the right of every person who is in custody suspected of committing a crime of enforced disappearance to “communicate immediately with the nearest appropriate representative of the state which he or she is a national.” This communication must be permitted to take place immediately. Likewise, as a measure to prevent enforced disappearances, Article 17 (2) (c) guarantees the right of any one deprived of liberty to communicate with his or her consular authorities, in accordance with applicable international law. In accordance with Article 36 of the Vienna Convention on Consular Relations of 1963, the competent authorities must inform the person concerned “without delay” of this right. Pursuant to the same article, consular officers must be guaranteed effectively the unobstructed right to visit any national of their state who is in “prison, custody or detention to converse and correspond with him and to arrange for his legal representation.”<sup>91</sup>

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<sup>90</sup> See, for example, Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, Index: IOR 53/002 to 018/2001, September 2001.

<sup>91</sup> *LaGrand (Germany v. United States of America)*, Judgment, International Court of Justice, 27 June 2001, para. 74. The Court held: “Article 36, paragraph 1, establishes an interrelated regime designed to facilitate the implementation of the system of consular protection. It begins with the basic principle governing consular protection: the right of communication and access (Art. 36, par. 1 ( u j ). This clause is followed by the provision which spells out the modalities of consular notification (Art. 36, par. 1 (6)). Finally Article 36, paragraph 1 ( c ) , sets out the measures consular officers may take in rendering consular assistance to their nationals in the custody of the receiving State. It follows that when the sending State is unaware of the detention of its nationals due to the failure of the receiving State to provide the requisite consular notification without delay, which was true in the present case during the period between 1982 and 1992, the sending State has been prevented for all practical purposes from exercising its rights under Article 36, paragraph 1.” See also Inter American Court of Human Rights, “The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law”, Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16.

**States parties must ensure that the right of any person in custody to communicate immediately with nearest appropriate representative of the state of which he or she is national is recognized, including the right to converse and correspond with them and to arrange for legal representation.**

## 7.6 THE RIGHT TO FAIR TRIAL

### Article 11

**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 11 (3) of the Convention imposes stringent requirements concerning fairness at all stages of criminal proceedings. In this regard, Article 16 (4) of the 1992 Declaration provides that “[t]he persons presumed responsible for such acts shall be guaranteed fair treatment in accordance with the relevant provisions of the Universal Declaration of Human Rights and other relevant international agreements in force at all stages of the investigation and eventual prosecution and trial.” These rights are guaranteed in numerous instruments.<sup>92</sup> In particular, Article 11 (3) of the Convention requires that suspects who are face trial must be tried before a competent, independent and impartial court or tribunal established by law. As the Human Rights Committee has stated, this right combines various guarantees with different scopes of application: (a) equality before the courts; (b) right to a fair and public hearing by a competent, independent and impartial tribunal established by law; (c) procedural guarantees; (d) right to compensation in cases of miscarriage of justice in criminal cases; and (e) right not to be tried or punished again for an offence that has already been tried (*ne bis in idem*). States parties must ensure that those guarantees are respected in their national legislation.<sup>93</sup>

**States parties must ensure that all the rights recognized in international instruments recognizing the right to fair trial, such as Article 14 of the International Covenant on Civil and Political Rights, are guaranteed at all stages of proceedings involving persons suspected of responsibility for an enforced disappearance.**

## 8. STATE COOPERATION

As discussed below, states parties have four main obligations to cooperate with each other with respect to the crime of enforced disappearance: to cooperate in aiding victims (Article 15), to extradite persons suspected or accused of enforced disappearance (Article 13), to provide each other with mutual legal assistance (Article 14) and not to expel, return, surrender or extradite a person when he or she would be in danger of enforced disappearance (Article 16). These treaty obligations are part of a broader range of cooperation obligations encompassing all crimes under international law and other human rights violations.<sup>94</sup>

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<sup>92</sup> For a comprehensive analysis of international law and standards regarding the right to a fair trial, see Amnesty International, *Fair Trials Manual*, Index: POL 30/02/98, December 1998 (second edition forthcoming 2012).

<sup>93</sup> UN Human Rights Committee, General comment No. 32, art. 14 of the International Covenant on Civil and Political Rights, UN Doc. CCPR/C/GC/32, 23 August 2007. (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/437/71/PDF/G0743771.pdf?OpenElement>).

<sup>94</sup> UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation of

## 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 15 imposes on states parties a two-part obligation. First, they must cooperate with each other assisting victims of enforced disappearance, including the greatest measure of mutual legal assistance, which necessarily includes assistance to victims in seeking reparations in civil or in criminal proceedings. Second, they must assist victims in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.<sup>95</sup> In many instances, this will require not only reform of law and practice, but amending or entering into new bilateral or multilateral treaties of mutual legal assistance (see Article 14).

**States parties should ensure, in law and practice, as well as in treaties, that their authorities provide full cooperation to victims of enforced disappearance and in searching for, locating and releasing disappeared persons and, in the event of death, exhuming and identifying them and returning their remains.**

## 8.1 EXTRADITION

### Article 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**

Victims of Gross Violations of International Human Rights Law and serious Violations of International humanitarian Law, UN Doc. A/RES/60/147, Princ. 5. That Principle provides in part: “. . . Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.”

<sup>95</sup> Article 12 of the 1994 Inter-American Convention on the Enforced Disappearance of Persons provides: “The States Parties shall give each other mutual assistance in the search for, identification, location, and return of minors who have been removed to another state or detained therein as a consequence of the forced disappearance of their parents or guardians.”



**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.**

Article 13 of the Convention imposes a number of obligations on states parties with regard to extradition of persons suspected, accused or convicted of enforced disappearance. However, as noted below, in some respects it falls short of what states should do with regard to extradition and, therefore, states parties should take additional steps to ensure that extradition proceedings are fully effective and subject to human rights safeguards.

**Political offence.** Article 13 (1) requires states parties to ensure that the crime of enforced disappearance is not considered a political offence prohibiting extradition between states parties. However, they should also ensure that it is not considered such an offence prohibiting extradition to states that have not yet ratified the Convention.

**States parties should ensure that enforced disappearance is not considered a political offence or as an offence connected with a political offence or as an offence inspired by political motives, and that a request for extradition cannot be refused on these grounds.**

**Enforced disappearance an extraditable offence.** Pursuant to Article 13 (2), states parties must deem enforced disappearance as an extraditable offence in any extradition treaty existing between states parties before the entry into force of this Convention. In addition, states parties under Article 13 (3) undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them. They should also undertake to do the same with regard to new treaties with states that have not yet ratified the Convention and seek to revise any treaties that would bar extradition of person for enforced disappearance and other crimes under international law as political offences.

**States parties should ensure that enforced disappearance is an extraditable offence in all treaties with all states.**

**Convention a legal basis for extradition.** If a state party which makes extradition conditional on the existence of a treaty receives a request extradition from another state party with which it has no extradition treaty, pursuant to Article 13 (4), it should consider the Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance. In

addition, Article 13 (5) provides that 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. States parties should do the same with regard to states that have not yet ratified the Convention.

**States parties should ensure that the Convention is considered the necessary legal basis for extradition in respect of enforced disappearance to any state with which there is no extradition treaty.**

*Eliminating obstacles in national law and treaties to extradition.* Article 13 (6) unfortunately provides that 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. However, most of the extensive conditions in extradition law and treaties, even if appropriate with respect to ordinary crimes under national law, have no place with regard to crimes under international law, such as enforced disappearances. Therefore, states parties should eliminate such requirements under national law, waive them in treaties and renegotiate treaties containing such obstacles to eliminate them. Such inappropriate obstacles to active and passive extradition include<sup>96</sup>:

- Political control with respect to granting requests;
- Prohibition extradition of nationals;
- Double criminality (a requirement that the crime of enforced disappearance constitutes an offence in the other state);
- Considering the crimes of enforced disappearance as a political or military offence;
- *Ne bis in idem* (double jeopardy) prohibitions preventing retrial in another state even when the first trial was a sham or unfair;
- Prohibiting the extradition on the basis that the conduct was not a crime under the law of the requesting state at the time it occurred, even when the conduct was a crime under international law at that time;
- Recognizing claims to official immunities from prosecution for enforced disappearance;
- Statutes of limitations; and
- Prohibiting extradition when the person has benefited from an amnesty, pardon or similar measures of impunity.

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<sup>96</sup> Active personality refers to the process whereby a state requests the surrender of any person who is sought by the requesting state for criminal prosecution for an extraditable offence or for the imposition or enforcement of a sentence in respect of such an offence. By contrast, passive extradition refers to the process whereby a person in the territory of one state is surrendered to a foreign state for the same reasons.

**States should eliminate any of the above obstacles to extradition where they exist in domestic laws or treaties.**

**Human rights safeguards.** Article 13 (7) provides that “nothing in the 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.”

This provision does not contain sufficient human rights safeguards. In addition, states parties should ensure in domestic law, practice and treaties that they do not extradite anyone where they would be at risk of human rights violations, including:

- When the requested state does not guarantee the right to fair trial;
- When the accused could be subject to torture and other cruel, inhumane or degrading treatment or punishment; and
- When the accused could be punishable by the death penalty.

**States parties should implement Article 13 without any inappropriate obstacles to extradition, eliminate any such obstacles in current law and treaties and include effective human rights safeguards.**

## 8.2 MUTUAL LEGAL ASSISTANCE

### 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 14 (1) requires states parties to provide other states parties the greatest measure of mutual legal assistance in connection with criminal proceedings regarding enforced disappearances, in addition to their mutual legal assistance obligations with respect to victims in Article 15. This obligation should, with appropriate human rights safeguards, as discussed above with regard to article 13, should apply to states that have not yet ratified the Convention. However, as with extradition, the provision in Article 14 (2) subjecting mutual legal assistance to conditions provided for in the law of the requested state party or applicable mutual legal assistance treaties could lead to impunity for enforced disappearances. All inappropriate conditions restricting such assistance should be eliminated, but effective human rights safeguards should be included.

**States parties should implement Article 14 without any inappropriate obstacles to mutual legal assistance, eliminate any such obstacles in current domestic law and treaties and include effective human rights safeguards.**

### 8.3 REFOULEMENT

#### Article 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.**

Article 16 of the Convention prohibits the transfer of person if there is a real risk that he or she be subjected to an enforced disappearance upon removal. The prohibition of *refoulement*<sup>97</sup> would also prohibit transfer if, upon removal, the individual concerned faces a real risk of persecution, or other forms of serious harm, including torture or other ill-treatment; arbitrary deprivation of life; the imposition of the death penalty,<sup>98</sup> including, but not limited to, cases in which the imposition of the latter results from an unfair trial; and deliberate targeting or indiscriminate violence in situations of armed conflict.<sup>99</sup> State parties should apply the non-refoulement guarantee to all detainees in its custody. They should ensure that the main criterion to take into account in the prohibition of *non-refoulement* is the effective control over the individual: if effective control over the individual changes from

<sup>97</sup> The principle of *non-refoulement* prohibits the expulsion, extradition, deportation, return or removal of any person in any manner whatsoever to a country or territory where he or she would face a real risk of persecution and other forms of serious harm. This principle is outlined in numerous international instruments and is widely regarded as a norm of customary international law, binding on all states. The prohibition of *refoulement* is recognized among others in Article 7 of the International Covenant on Civil and Political Rights, Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Article 22 (8) of the American Convention on Human Rights, Article 33 of the Refugee Convention, Article 13 (4) of the Inter-American Convention to Prevent and Punish Torture, Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, Article 3 of the European Convention on Human Rights and Article 18 and Article 19 (2) of the Charter of Fundamental Rights of the European Union and Article 45 (4) of the Fourth Geneva Convention.

<sup>98</sup> See, in particular, Article 2 of the European Convention on Human Rights and Article 1 of Protocol No. 13 prohibiting the extradition or deportation of an individual to another state where he or she would face a real risk of being subjected to the death penalty there. See also, *Hakizimana v. Sweden* (dec.), no. 37913/05, 27 March 2008; and see, *mutatis mutandis*, the rule against *refoulement* in *Soering v. the United Kingdom*, (judgment of 7 July 1989, Series A no. 161); *S.R. v. Sweden* (dec.), no. 62806/00, 23 April 2002; *Ismaili v. Germany* (dec.), no. 58128/00, 15 March 2001; *Bader and Kanbor v. Sweden*, no. 13284/04, ECHR 2005-XI; *Kaboulov v. Ukraine*, no. 41015/04, § 99, 19 November 2009. UN Basic Principles on the Independence of the Judiciary, Principle N° 5; UN Human Rights Committee, General Comment N° 29, Article 4: Derogations during a state of emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11.

<sup>99</sup> See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/60/3/16, 30 August 2005, para. 29 (<http://www.unhcr.org/refworld/pdfid/43f30fb40.pdf>); See European Court of Human Rights, *Al Saddoon and Mufhdi v. UK case*, 2 March 2010, paras. 123-125, in turn, citing, in particular, *Saadi v. Italy*, Judgment, Appl. No. 37201/06, European Court of Human Rights, 28 February 2008, § 125).

one state to another, the prohibition applies.<sup>100</sup>

The state party should always ensure that suspects have the possibility to challenge decisions of *refoulement*.<sup>101</sup> There is an initial burden on the individual to present some evidence in support of the alleged risk.<sup>102</sup> However, at that point, the burden of proof may shift to the state to disprove such risk.<sup>103</sup> States should have a fair and effective individualised procedure in place to evaluate any claimed risk before any removal is actually carried out. This procedure must have suspensive effect pending the exhaustion of appeals.<sup>104</sup>

**States parties must not expel, return, surrender or extradite a person to another state where there is a risk that upon removal he or she would be subjected to an enforced disappearance or to other forms of serious harm such as persecution, torture or other cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or an unfair trial. National law should prohibit any transfer of effective control over a person to a state where he or she would face such risks, and should provide a procedure whereby individuals who allege they would face such risks can have their claims examined by an independent and impartial body.**

## 9. PREVENTION OF ENFORCED DISAPPEARANCE

With the aim of preventing enforced disappearances, Article 17 of the Convention recognizes the right not to be held in secret detention.<sup>105</sup> To ensure that this right is implemented, states parties have the obligation to establish and implement effective measures with regard to deprivation of liberty, according to Article 17 (2) and 17 (3) of the Convention, in order to prevent secret detention.<sup>106</sup> Among others, states parties must guarantee the right to communicate of the person deprived of liberty and the right of any person with legitimate interest to take proceeding before the court.

As stated by Article 9 of the Declaration, “[t]he right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carry out the deprivation of liberty is required to prevent enforced disappearances under all circumstances”, whether a threat of war, a state of war, internal political instability or any other public emergency.

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<sup>100</sup> Cordula Droege, *Transfers of detainees: legal framework, non-refoulement and contemporary challenges*, International Review of the Red Cross, vol. 90, No. 871, September 2008, p. 669.

<sup>101</sup> See UN Committee against Torture, conclusions and recommendations, United States of America, UN Doc. CAT/C/USA/CO/2, paras. 20 and 21.

<sup>102</sup> Rodley and Pollard, *supra* note 15, p. 173.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*, p. 174.

<sup>105</sup> 14-Point Program, Pt. 5 (“No one should be secretly detained.”).

<sup>106</sup> The obligation to ensure that this right is effectively implemented is reinforced by Article 3 of the 1992 Declaration, which provides that “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”.

## 9.1 SECRET DETENTION

### Article 17

#### 1. No one shall be held in secret detention.

As stated in the Joint study on global practices in relation to secret detention issued by the Human Rights Council, secret detention as such may constitute torture or ill-treatment for the direct victims as well as for their families<sup>107</sup> Amnesty International has noted that enforced disappearances and torture have been facilitated by the practice of secret detention:

“One way in which members of the security forces conceal the whereabouts of the ‘disappeared’ is to hold them in private homes or apartments, ‘safe houses’, or other locations which are not authorized places of detention. In other cases prisoners are held secretly in official places of detention, sometimes in separate sections or buildings which are off limits to ordinary security forces personnel. All such practices of secret detention should be stopped.”<sup>108</sup>

The Joint study has identified the following elements of secret detention:

- State authorities are acting in their official capacity, or persons acting under the orders thereof, with the authorization, consent, support or acquiescence of the State, or in any other situation where the action or omission of the detaining person is attributable to the state
- Those persons deprive someone of liberty (whether in an unofficial place of detention or an officially recognized place but in a hidden section or wing that is itself not officially recognized).<sup>109</sup>
- Those persons deprive someone of contact with the outside world (incommunicado detention). Even if the International Committee of the Red Cross (ICRC) is granted access by the authorities, the detention will still be secret if the ICRC is not permitted to register the case, or is not permitted by the state to, or does not for whatever other reason, notify the next of kin of the detainee of his or her whereabouts.<sup>110</sup>
- Those persons refuse to confirm or deny or actively conceal the fact that the person is deprived of his or her liberty hidden from the outside world or refuse to provide or actively conceal information about the fate or whereabouts of the detainee. This is an additional element, which is not essential for secret detention to take place.

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<sup>107</sup> See UN Human Rights Council, *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the working group on arbitrary detention represented by its vice-chair, Shaheen Sardar Ali; and the working group on enforced or involuntary disappearances represented by its chair, Jeremy Sarkin*, UN Doc. A/HRC/13/42, 19 February 2010, p. 5 (<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>).

<sup>108</sup> Amnesty International, *"Disappearances" and Political Killings*, *supra* note 6, p. 128; Amnesty International, *Combating Torture: A manual for action*, Index: ACT 40/001/2003 (2003), p. 96.

<sup>109</sup> Joint study, *supra* note 14, p. 9.

<sup>110</sup> *Ibid.*, p. 11.

Article 17 was included to make absolutely clear that it is not sufficient for states to create and enforce a criminal offence of enforced disappearance; states must more generally prohibit secret detention in ordinary law and enact additional measures of a non-criminal nature to prevent it.

**States parties should expressly prohibit secret detention in national laws and define it according to the essential elements identified above, along with all other forms of unofficial detention.**

#### Article 17

**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.**

As noted below, under Article 17 of the Convention, states parties must take a broad range of steps to prevent and end enforced disappearances. States parties must guarantee and fully respect human rights safeguards for persons deprived of their liberty. No restrictions on these safeguards, whether under counter-terrorism or emergency legislation or otherwise, are ever permissible. In addition, as indicated in that article, these expressly mandated steps are “[w]ithout prejudice to other international obligations of the State Party with regard to the deprivation of liberty”. There are also a broad range of other obligations under other international law and standards that require states to take steps to prevent and stop enforced disappearances.

***Establishing the conditions under which orders of deprivation of liberty may be given.*** Under Article 17 (2) (a) of the Convention, states must establish conditions under which orders of deprivation of

liberty may be given.<sup>111</sup> Such conditions must be established by law and be fully consistent with international law and standards concerning the deprivation of liberty, including the Universal Declaration of Human Rights (especially article 3), the International Covenant on Civil and Political Rights (especially article 9), the UN Code of Conduct for Law Enforcement Officials<sup>112</sup> and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>113</sup> The UN Working Group on Arbitrary Detention has established a framework for evaluating whether or not the grounds upon which a person has been deprived of liberty are arbitrary.<sup>114</sup>

**Indicating the authorities authorized to order the deprivation of liberty.** Article 17 (2) (b) of the Convention requires states parties to indicate the authorities authorized to order the deprivation of liberty. Such officials should be ordinary law enforcement officials only (except in situations of armed conflict in which members of the armed forces may also be so authorized for certain purposes). The duties of such officials should be clearly specified in law, with sanctions for failure to perform such duties, including officials who, without legal justification, refuse to provide information with regard to any detention.<sup>115</sup> To implement Article 17 (2) (a) effectively, states should ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.<sup>116</sup>

**Guaranteeing that any person deprived of liberty be held solely in officially recognized and supervised places of deprivation of liberty.** States parties under Article 17 (2) (c) of the Convention must expressly provide that any person deprived of liberty shall be held in officially recognized and supervised places of deprivation of liberty, without exemption.<sup>117</sup> As stated by the Working Group on Enforced or Involuntary Disappearances, under no circumstance, including states of war or public emergency, can any state interest be invoked to justify or legitimize secret centres or places of detention, which, by definition, would violate the Declaration without

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<sup>111</sup> 14-Point Program, Pt. 6 ("Arrest and detention should be carried out only by officials who are authorized by law to do so").

<sup>112</sup> Code of Conduct for Law Enforcement Officials, U.N. G.A. Res. 34/169, 17 December 1979 (<http://www2.ohchr.org/english/law/codeofconduct.htm>).

<sup>113</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (<http://www2.ohchr.org/english/law/firearms.htm>).

<sup>114</sup> See Report of the Working Group on Arbitrary Detention, UN Doc A/HRC/16/47, 19 January 2011, Annex, para. 8.

<sup>115</sup> 1992 Declaration, art. 12 (1) ("Each State shall establish rules under its national law indicating those officials authorized to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.").

<sup>116</sup> 1992 Declaration, art. 12 (2) ("Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms."); 14-Point Program, Pt.2 ("Those in charge of the security forces should maintain strict chain-of command control to ensure that officers under their command do not commit "disappearances".").

<sup>117</sup> 14-Point Program, Pt. 5 ("Governments should ensure that prisoners are held only in publicly recognized places of detention.").



exception.<sup>118</sup> As recognized in Article 10 of the 1992 Declaration, any person deprived of liberty must “be brought before a judicial authority promptly after detention.”

***Guaranteeing that any person deprived of liberty shall be authorized to communicate with and be visited by the outside world.*** Article 17 (2) (d) of the Convention expressly requires states parties to guarantee the right of the person deprived of liberty to communicate and be visited in accordance with international law.<sup>119</sup> They are obliged to guarantee the right of a person deprived of liberty to communicate and be visited by his or her family, counsel or any other person of his or her choice and to communicate with his or her consular authorities (see Section 7.4 above).<sup>120</sup> The right to access to the outside world is spelled out in further detail in other international law and standards, including the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,<sup>121</sup> the UN Standard Minimum Rules for the Treatment of Prisoners,<sup>122</sup> the UN Basic Principles on the Role of Lawyers<sup>123</sup> and the Vienna Convention on Consular Relations.<sup>124</sup>

***Guaranteeing access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty.*** A critical safeguard in Article 17 (2) (e) of the Convention requires that states parties must ensure access to places where persons are deprived of liberty. This provision, which implements an identically worded guarantee in Article 9 of the 1992 Declaration, obliges states parties to ensure access of competent authorities by national and international law “to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.”<sup>125</sup> To implement this requirement effectively, they should

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<sup>118</sup> Report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1997/34, 13 December 1996, para. 24 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G96/144/02/IMG/G9614402.pdf?OpenElement>).

<sup>119</sup> *14-Point Program*, Pt. 3 (“Accurate information about the arrest of any person and about his or her place of detention, including transfers and releases, should be made available promptly to relatives, lawyers and the courts.”).

<sup>120</sup> *14-Point Program*, Pt. 7 (“Relatives, lawyers and doctors should have prompt and regular access to them.”).

<sup>121</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. G.A. Res. 43/173, 9 December 1988 (<http://www2.ohchr.org/english/law/bodyprinciples.htm>).

<sup>122</sup> UN Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by ECOSOC Res. 663C(XXIV) (31 July 1957) and Res. 2076(LXII) (13 May 1977).

<sup>123</sup> Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 (<http://www2.ohchr.org/english/law/lawyers.htm>).

<sup>124</sup> Vienna Convention on Consular Relations, 24 April 1963 ([http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf)).

<sup>125</sup> 1992 Declaration, art. 9 (2) and (3). These provisions state:

“In such proceedings [judicial proceedings to locate the disappeared person or determine his or condition], competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.

provide for regular independent unannounced and unrestricted access of internal inspections and independent mechanisms to all places where persons are deprived of their liberty for monitoring purposes, at all times.<sup>126</sup> In times of armed conflict, the location of all detention facilities should be disclosed to the International Committee of the Red Cross. States parties should ensure that access is provided consistently with requirements in other international law and standards.<sup>127</sup>

***Guaranteeing that any person deprived of liberty and, in the case of a suspected enforced disappearance, any persons with a legitimate interest, in all circumstances, is 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.*** In

addition, states parties under Article 17 (2) (f) of the Convention must guarantee that 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. Those proceedings are to permit the court to 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.<sup>128</sup> In particular, effective habeas corpus and *amparo* reviews by independent judicial bodies are central to ensuring respect for the right to personal liberty. Therefore, domestic legislative frameworks should not allow for any exceptions from habeas corpus or *amparo*, and the court must fulfil all the requirements of independence, impartiality, and authority needed to discharge its functions,<sup>129</sup> including by operate independently of the detaining authority and from the place and form of deprivation of liberty. Judicial bodies can play a crucial role in protecting people against secret detention. National law should provide penalties for officials who refuse to disclose relevant information during habeas corpus or *amparo* proceedings.<sup>130</sup>

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3. Any other competent authority entitled under the law of the State or by any international legal instrument to which the State is a party may also have access to such places.”

<sup>126</sup> *14-Point Program*, Pt. 7 (“There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention.”). See reports of the UN Special Rapporteur on Torture: UN Doc A/56/156 (3 July 2001), paras. 34-38; UN Doc E/CN.4/2006/6 (23 December 2005), paras. 20-27; UN Doc A/61/259 (14 August 2006), paras. 72-73; UN Doc A/65/273 (10 August 2010), paras. 75-86.

<sup>127</sup> See, for example, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Twelfth session, Geneva, 15–19 November 2010, Guidelines of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in relation to visits to States parties, U.N. Doc. CAT/OP/12/4 (<http://www2.ohchr.org/english/bodies/cat/opcat/index.htm>). See also, Association for the Prevention of Torture, *Planning Strategies for an NPM Visit* ([http://www.apt.ch/index.php?option=com\\_k2&view=item&id=1020%3Aplanning-strategies-for-an-npm-visit&lang=en](http://www.apt.ch/index.php?option=com_k2&view=item&id=1020%3Aplanning-strategies-for-an-npm-visit&lang=en)).

<sup>128</sup> ICCPR, art. 9 (4); *14-Point Program*, Pt. 4 (“Governments should at all times ensure that effective judicial remedies are available which enable relatives and lawyers to find out immediately where a prisoner is held and under what authority, to ensure his or her safety, and to obtain the release of anyone arbitrarily detained.”).

<sup>129</sup> See also General Comment No. 32 of the Human Rights Committee.

<sup>130</sup> See *Joint study*, *supra* note 14, p. 5.

**States parties must effectively guarantee each of these safeguards for persons deprived of liberty and provide in their legislation all the measures required in Article 17 (2), in addition to other requirements in international law and standards. Particularly, states must:**

- Establish the conditions under which orders of deprivation of liberty may be given.
- Indicate the authorities authorized to order the deprivation of liberty.
- Guarantee that any person deprived of liberty be held solely in officially recognized and supervised places of deprivation of liberty.
- Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited in accordance with international law.
- Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty.
- Guarantee that any person deprived of liberty and, in the case of a suspected enforced disappearance, any persons with a legitimate interest, is 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.

**Other steps that states parties should take in accordance with other international law and standards.** As noted above, Article 17 (2) makes clear that states must take other steps in accordance with international law and standards to prevent and end secret detention. In this regard, the Joint study declares that states should do the following: <sup>131</sup>

- Guarantee that any action by intelligence services should be governed by law, which in turn should be in conformity with international norms. To ensure accountability in intelligence cooperation, truly independent intelligence review and oversight mechanisms should be established and enhanced. Such mechanisms should have access to all information, including sensitive information. They should be mandated to undertake reviews and investigate upon their initiative, and to make public reports;
- Provide for strictly independent institutions of those that have allegedly been involved in secret detention to promptly investigate any allegations of secret detention. Those individuals found to have participated in secretly detaining persons and any unlawful acts perpetrated during such detention, including their superiors if they have ordered, encouraged or consented to secret detentions, should be prosecuted without delay and, where found guilty, given sentences commensurate to the gravity of the acts perpetrated;
- Provide in their domestic legislation that the status of all pending investigations into allegations of ill-treatment and torture of detainees and detainee deaths in custody should be made public. No evidence or information obtained by torture or cruel, inhuman and degrading treatment should be used in any proceedings; and
- Guarantee that victims of secret detention be provided with judicial remedies and reparation in accordance with the Convention and relevant international norms, which recognize the right of victims to adequate, effective and prompt reparation proportionate to the gravity of the violations and the harm suffered. Given that families of disappeared persons have been recognized as victims under international law, they should also benefit from rehabilitation and compensation.

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<sup>131</sup> *Ibid.*

**States parties should implement each of these steps, in law and practice, in addition to those expressly mentioned in Article 17 (2) of the Convention. Particularly, states should:**

- **Guarantee that any action by intelligence services should be governed by law, which in turn should be in conformity with international norms.**
- **Provide for institutions that are strictly independent of those that have allegedly been involved in secret detention to promptly investigate any allegations of secret detention.**
- **Provide in their domestic legislation that the status of all pending investigations into allegations of ill-treatment and torture of detainees and detainee deaths in custody should be made public.**
- **Guarantee that victims of secret detention be provided with judicial remedies and reparation in accordance with the Convention and relevant international norms,**

## 9.2 OFFICIAL REGISTERS OF PERSONS DEPRIVED OF LIBERTY

### Article 17

**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.**

In order to prevent enforced disappearances, and pursuant to Article 17 (3) of the Convention, states parties must compile and maintain up-to-date official registers and/or records of persons deprived of liberty.<sup>132</sup> This obligation is reinforced by the obligations in other international law and standards requiring states to establish such registers and

<sup>132</sup> *14-Point Program*, Pt. 5 (“Up-to-date registers of all prisoners should be maintained in every place of detention and centrally. The information in these registers should be made available to relatives, lawyers, judges, official bodies trying to trace people who have been detained, and others with a legitimate interest.”).

European Court of Human Rights jurisprudence.<sup>133</sup> Under Article 17 (3), the registers must include:

- The identity of the person deprived of liberty;
- The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- The authority responsible for supervising the deprivation of liberty;
- 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;
- Elements relating to the state of health of the person deprived of liberty;
- In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

Similar requirements exist in other international instruments, including the third Geneva Convention,<sup>134</sup> the UN Standard Minimum Rules for the Treatment of Prisoners<sup>135</sup> and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>136</sup> Detention records should be kept, including in times of armed conflict, as required by the Geneva Conventions, and should also include the number of detainees, their nationality and the legal basis on which they are being held, whether as prisoners of war or civilian internees.<sup>137</sup>

In accordance with Article 10 (3) of the 1992 Declaration, the registers must be maintained in every place of detention and states should also create and maintain centralized registers that 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.<sup>138</sup>

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<sup>133</sup> European Court of Human Rights, *Kurt v. Turkey*, Judgment of 25 May 1998, para. 125 reads: “the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention and the name of the person effecting it must be seen as incompatible with the very purpose of Article 5 of the Convention.”

<sup>134</sup> Third Geneva Convention, arts. 122 to 125.

<sup>135</sup> UN Standard Minimum Rules for the Treatment of Prisoners, R. 7 (Register).

<sup>136</sup> UN Body of Principles for the Protection of All Persons under Any Form of Detention or imprisonment, Principle 12.

<sup>137</sup> See *Joint study*, *supra* note 14, p. 5, recommendation (a).

<sup>138</sup> 1992 Declaration, art. 10 (3) (“An official up-to-date register of all persons deprived of their liberty

As required both by Article 10 (3) of the 1992 Declaration and 17 (3) of the Convention, these records must be accurate and 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.

To enable adoption of effective measures to prevent the commission of the crime of enforced disappearance states should also include in the registers sex disaggregated information.

**State parties must create official up-to-date registers of persons deprived of liberty in times of peace and armed conflict, which include all the information required by the Convention and other international law and standards.**

### 9.3 RIGHT TO ACCESS TO INFORMATION ABOUT THE DETAINED PERSON

#### 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.**

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shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.”).

As discussed above, pursuant to Article 17 (3) of the Convention, states must compile and maintain “one or more up-to-date official registers and/or records of persons deprived of liberty”. Apart from the access to judicial or other competent authorities or institutions, in accordance with Article 18 of the Convention, any person with a legitimate interest in this information must have access to this information. The term “person with a legitimate interest” must include, at a minimum, relatives of the person deprived of liberty, his or her representatives or counsel. Under Article 18, these persons must receive, at least, the following information:

- The authority that ordered the deprivation of liberty;
- The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
- The authority responsible for supervising the deprivation of liberty;
- 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;
- The date, time and place of release;
- Elements relating to the state of health of the person deprived of liberty;
- In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.

Persons with legitimate interest should also have guaranteed, including in times of armed conflict, the right to be informed of the legal basis on which they are being held.<sup>139</sup>

In addition to the requirements in Article 18 of the Convention, states are required under other international treaties and standards to provide information to a variety of persons and institutions.

**States parties must ensure that national law guarantees that all persons with legitimate interests have the right to receive in a timely manner all the information required in the Convention and in other international treaties and standards.**

#### 9.4 TREATMENT OF PERSONAL INFORMATION

##### 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.**

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<sup>139</sup> See *Joint study*, *supra* note 14, p. 5, recommendation (a).

**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 19 of the Convention requires states parties to establish safeguards for personal information gathered in order to search for the disappeared person to ensure that it is not made available for improper purposes. States parties must guarantee that the collection, processing, use and storage of personal information, including medical and genetic data, must be used only for purposes of searching for the disappeared person. However, that information may be used in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation. The collection, processing, use and storage of personal information must comply with human rights, fundamental freedoms and human dignity of an individual.

**States must ensure that all proceedings established to search for disappeared persons do not violate human rights with regard to the collection, processing, use and storage of personal information, as well as its protection.**

#### 9.5 RESTRICTIONS TO THE RIGHT TO ACCESS TO INFORMATION

##### 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.**

Article 20 of the Convention provides stringent conditions narrowly limiting the restrictions that states parties may impose on the extensive right to information concerning persons deprived of liberty, as guaranteed by Article 18. Indeed, the conditions set forth in Article 20 are so stringent that there is little, if any, room for restricting this right to information. Judicial safeguards may not be restricted under any circumstances.

***Limitations on restriction of the right to information.*** Under Article 20 (1), restrictions can only be adopted “on an exceptional basis, where strictly necessary and where provided for by law”. Pursuant to Article 20 (1), the right to information may be restricted only when the following conditions are met:

- The person is under the protection of law. Implicit in this requirement is that the protection must be effective. In addition, the term “law” cannot be limited to national law, but it must be national law that is fully consistent with the requirements of international law and standards.



- The deprivation of liberty is subject to judicial control. That necessarily means effective judicial control where the court can determine whether restrictions on the right to information are incompatible with the Convention or other international law and standards and then order the restrictions to be ended. This condition is spelled out in further detail in Article 20 (2).
- Conditions whereby the restriction may be adopted are established by law. Such national law, of course, must be fully consistent with the requirements of international law and standards.

Any restrictions imposed do not result in an enforced disappearance or secret detention; i.e. it is never permissible for the state to keep the fact of detention, the fate of the detainee, or the place of detention secret from the entire outside world (i.e. at least one member of the family, lawyer, or other persons with legitimate interest in the situation of the detainee must in all circumstances be given at least this core of information about the detainee).<sup>140</sup>

There are only four situations under Article 20 (1) when states parties may restrict the right to information about persons deprived of liberty:

- When the transmission of the information would adversely affect the privacy of the person.

Given the pressing need of the person for the outside world to know of his or her fate as a safeguard for that person's safety, there should be a presumption that would prevail over any supposed privacy concerns, absent a compelling reason to the contrary. Concern for privacy of the detainee should not be invoked to restrict information against the will of the detainee him- or herself.<sup>141</sup>

- When the transmission of the information would adversely affect the safety of the person who has been deprived of liberty.

Given that in most instances the provision of information immediately after the deprivation of liberty about the person is the most effective way to protect his or her safety, the number instances when publicity would adversely affect the person's safety are likely to be exceedingly rare.<sup>142</sup> Again, concern for the safety of the detainee should not be invoked as a

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<sup>140</sup> See relevant discussion during the drafting of the Convention, reported at UN Doc E/CN.4/2005/66, para. 92; UN Doc E/CN.4/2006/57, paras. 17 and 136; and Pollard, "A lighter shade of black? 'Secret detention' and the UN Disappearances Convention" in Gilbert, Hampson, Sandoval (eds), *The Delivery of Human Rights* (Abingdon: Routledge, 2011), pp. 153-154.

<sup>141</sup> This approach is reflected in the UN Declaration on Disappearances Article 10 (2): "Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned."

<sup>142</sup> A leading guide on the subject notes that "the risk the disappeared person will suffer torture or murder is highest during the hours or days directly following a detention". Aim for Human Rights, *Using law against enforced disappearance: Practical Guide for Relatives of Disappeared Persons and NGOs*, 2009, p. 22. The guide declares that "[b]ecause enforced disappearances are crimes of withholding or denying information, documenting them and gathering evidence about them is pivotal for a whole range of actions." *Ibid.*, p. 96 (footnote omitted).

ground for restricting information against the detainee's own wishes.

- When the transmission of the information would hinder a criminal investigation (see more general comment, particularly relevant to this round, below); or
- For other equivalent reasons in accordance with the law. It should be noted that in the drafting of the Convention, proposals to include a reference to “national security” or “public security” as a ground for refusing information were specifically rejected on the ground that precisely these concepts had frequently been invoked by states seeking to perpetrate enforced disappearances.<sup>143</sup> As such, to include such vaguely-defined concepts as “national security” or “public security” as a ground for refusing information under article 20 would be inconsistent with the purpose and intent of the Convention.

In each instance, the restriction must be in conformity with applicable international law and with the objectives of the Convention.

The reference to “strictly necessary” in the provision means that national law must specify the specific reasons for which the restrictions are imposed and must be strictly limited in duration on the same basis; national law should require that any delay, and the reasons for it, be recorded, and subject to prior approval by an independent officer.<sup>144</sup> National law should also explicitly specify an absolute maximum limit to any restriction that is not at the request of the detainee of, for instance, no more than 18 hours.<sup>145</sup>

**States parties must expressly provide in their domestic law for the strictest conditions in which the right to access to information of the person deprived of liberty can be restricted. Such a restriction should be strictly limited in nature and duration, subject (in cases where the restrictions are not requested by the detainee) to a specified absolute maximum of, for instance, 18 hours, and in strict conformity with applicable international law and standards and with the objectives of the Convention. States parties should ensure that concern for privacy or safety of the detainee cannot be invoked to**

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<sup>143</sup> See reports from the drafting sessions, including particularly E/CN.4/2005/66 (10 March 2005), paras. 90-91. See also Scovazzi and Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention* (Leiden: Koninklijke Brill, 2007), p. 339.

<sup>144</sup> See, for example, the European Committee for the Prevention of Torture, *CPT Standards*, Doc CPT/Inf/E (2002) 1 - Rev. 2010, p. 12: “A detained person's right to have the fact of his/her detention notified to a third party should in principle be guaranteed from the very outset of police custody. Of course, the CPT recognises that the exercise of this right might have to be made subject to certain exceptions, in order to protect the legitimate interests of the police investigation. However, such exceptions should be clearly defined and strictly limited in time, and resort to them should be accompanied by appropriate safeguards (e.g. any delay in notification of custody to be recorded in writing with the reasons therefor, and to require the approval of a senior police officer unconnected with the case or a prosecutor).”

<sup>145</sup> The General Recommendations of the UN Special Rapporteur on Torture, UN Doc E/CN.4/2003/68 (17 December 2002), para. 26, state in clause (g): “In all circumstances, a relative of the detainee should be informed of the arrest and place of detention within 18 hours.” Principle 15 of the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment specifies that, even in the limited circumstances where restrictions might be justified “...communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”

**restrict information against the will of the detainee him- or herself. “National security” or “public security” should not be included as a ground for refusing information under article 20.**

*Preserving the effectiveness of judicial safeguards.* In addition, Article 20 (2) requires states parties to guarantee that any person with a legitimate interest in the information mentioned in Article 18 (1) about persons deprived of liberty, such as relatives, their representatives or their counsel, has the right to a prompt and effective judicial remedy to obtain without delay that information, in addition to the right to a judicial determination of the lawfulness of the deprivation of liberty.<sup>146</sup> States parties may not suspend or restrict this right under any circumstances.

**States parties must guarantee that any person with a legitimate interest in the information mentioned in Article 18 (1) has the right to a prompt and effective judicial remedy to obtain that information without delay. States parties must guarantee that this right is not suspended or restricted under any circumstances.**

## 9.6 VERIFICATION OF RELEASE OF PERSONS DEPRIVED OF LIBERTY

### 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.**

As a measure to prevent enforced disappearances, Article 21 of the Convention, which implements Article 11 of the 1992 Declaration, obliges states parties to provide for means that permit a reliable verification that persons deprived of liberty have actually been released.<sup>147</sup> States parties must also provide for necessary measures to assure the physical integrity of such person and their ability to exercise fully their rights at the time of release. Those means should include judicial control and provision of information to appropriate persons with legitimate interest.

**States parties must provide in their domestic legislation and practice effective measures to ensure reliable verification of the release of persons deprived of liberty, as well as to ensure physical integrity of such person and their ability to exercise fully their rights at the time of release.**

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<sup>146</sup> 14-Point Program, Pt. 4 (“Governments should at all times ensure that effective judicial remedies are available which enable relatives and lawyers to find out immediately where a prisoner is held and under what authority, to ensure his or her safety, and to obtain the release of anyone arbitrarily detained.”).

<sup>147</sup> 1992 Declaration, art. 11 (“All persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured.”); 14-Point Program, Pt. 3 (“Prisoners should be released in a way that allows reliable verification of their release and ensures their safety.”).

## 9.7 TRAINING

### Article 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.**

Article 23 of the Convention requires states parties to take four separate, but related, steps to prevent and stop enforced disappearances: training of officials prohibiting orders to commit enforced disappearances, punishing those who refuse to obey such orders, and ensuring that officials report planned or committed enforced disappearances.

*Training.* The first step required, in Article 23 (1), is to train four categories of persons with a view to preventing and stopping enforced disappearances:

- law enforcement personnel, civil or military;
- medical personnel;
- public officials;
- other persons who may be involved in the custody or treatment of any person deprived of liberty.<sup>148</sup>

That training must include the necessary education and information regarding provisions of the Convention to achieve three goals: preventing such persons from becoming involved in enforced disappearances, emphasizing the importance of preventing and investigating enforced disappearances and ensuring that they recognize the urgent need to resolve such crimes.

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<sup>148</sup> See also 1992 Declaration, art. 6 (3) (requiring training of law enforcement officials to emphasize orders or instructions may not be invoked to justify an enforced disappearance, the right and duty to disobey such an order and the prohibition of orders or instructions directing, authorizing or encouraging enforced disappearance.

In establishing and implementing such training programs, states parties should use the best practices with regard to human rights training of officials, as described in Amnesty International's paper, *A 12-Point Guide for Good Practice in the Training and Education for Human Rights of Government Officials*.<sup>149</sup>

***Prohibition of orders to commit enforced disappearances.*** The second step in Article 23 (1) is to ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited.<sup>150</sup>

***Protection of those who refuse to obey orders to commit enforced disappearances.*** The third step in Article 23 (1) is to guarantee that a person who refuses to obey such an order will not be punished.<sup>151</sup>

***Duty to report.*** The fourth step required in Article 23 (1) is to impose a duty on all officials to report any information suggesting that an enforced disappearance has been committed. For this step to be effective, states must establish secure, confidential methods of reporting and make widely known and they should not only protect those who make such reports from threats and reprisals, but also make fulfilment of this duty a positive factor in career development.

**States parties should implement each of the four steps required under Article 23 in their law and practice.**

## 10. VICTIMS OF CRIMES OF ENFORCED DISAPPEARANCES

In accordance with international law, victims have the right to an effective remedy, including full and effective reparation. As stated by the Working Group, “[t]he obligation to provide for appropriate criminal sanctions shall not detract from the duty to ensure that full civil reparation is granted to the victims” and “the alleged perpetrators of enforced disappearance bear general civil liability”.<sup>152</sup>

Article 8.2 of the Convention states the obligation of states parties to respect, protect and fulfil the right of victims of human rights violations to an effective remedy.<sup>153</sup> Principle VII of

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<sup>149</sup> AI Index: ACT 30/1/98, February 1998

(<http://www.amnesty.org/en/library/asset/ACT30/001/1998/en/011e0855-e83c-11dd-bca7-eb90848b856c/act300011998en.html>).

<sup>150</sup> 1992 Declaration, art. 6 (2) (“Each State shall ensure that orders or instructions directing, authorizing or encouraging any enforced disappearance are prohibited. . .”).

<sup>151</sup> *Ibid.*, (“Any person receiving such an order or instruction shall have the right and duty not to obey it.”).

<sup>152</sup> Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Best practices on enforced disappearances in domestic criminal legislation, para. 46. A/HRC/16/48/Add.3.

<sup>153</sup> The right to an effective remedy for victims of human rights violations is enshrined in article 2 (3) of the ICCPR. It is also recognized in Article 8 of the Universal Declaration of Human Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 of the Convention against Torture, Article 39 of the Convention on the Rights of the Child, Article 3 of the 1907 Hague Convention concerning the Laws and Customs of War on Land, Article 91 of Protocol I, Article 75 of the Rome Statute and Article 7 of the African Charter on Human and Peoples' Rights.

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 (Principles) explains:

“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; and (c) Access to relevant information concerning violations and reparation mechanisms.”<sup>154</sup>

Article 24 of the Convention imposes six express or implied obligations regarding victims of enforced disappearances.

## 10.1 DEFINITION OF VICTIM

### Article 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.**

To implement Article 24 effectively, states parties must ensure that the definition of “victim” used in national law and practice covers both the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance, including members of the family of the disappeared person or friends. States must ensure that its national law is consistent with Principle V of the Principles.<sup>155</sup> In addition, states should ensure that a person is considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.<sup>156</sup>

## 10.2 ACCESS TO JUSTICE

States should guarantee the right to access to justice as provided for in the Principle VII of the Principles.<sup>157</sup> In addition, states parties should guarantee the right to representation and participation in the judicial process of victims of crimes of enforced disappeared. As stated

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<sup>154</sup> 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 (Basic principles on the right to a remedy and reparation), adopted and proclaimed by UN General Assembly resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147 (<http://www2.ohchr.org/english/law/remedy.htm>).

<sup>155</sup> *Ibid.*, Principle V, para. 8:

“victims are 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.”

<sup>156</sup> *Ibid.*, Principle V, para. 9.

<sup>157</sup> *Ibid.*, Principle VII.

by the Inter-American Court of Human Rights, states must ensure that full access and participation to relatives of the victims in every stage of the investigation and trial of those responsible of crimes.<sup>158</sup> Therefore, states must remove any economic and discriminatory barriers to access to justice and ensure effective protection to those who participate in the process.

**In order to guarantee the right to remedy, states parties must ensure equal and effective access to justice as provided for under international law, with special attention to cases of enforced or involuntary disappearances of women and men who may have been targeted for sexual and other forms of violence, and vulnerable persons such as children.**

### 10.3 PROTECTION

**Article 18 (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.**

In order to guarantee the right to an effective remedy and to comply with the obligation to investigate and, if there is sufficient admissible evidence, prosecute those responsible of crimes of enforced disappearances, states must protect persons with legitimate interest in the case and those who participate in the investigation. States should protect the safety, physical and psychological well-being, dignity and privacy of, at least, victims, witnesses of enforced disappearances, human rights defenders acting against enforced disappearances, lawyers and families of disappeared persons. As stated by the Human Rights Council, special attention should be given to women relatives seeking to resolve the disappearance of members of their families.<sup>159</sup>

States should establish programmes that preclude public disclosure of their identity or of information that would indirectly identify those persons as sources of information in archives. Those programmes should provide as well other effective remedies that protect their safety, physical and psychological well-being, dignity and privacy. These programmes should include effective measures to protect their citizens abroad and provide consular protection to ensure that foreign states comply with their obligations under international law. Protection measures can include provisions for hearings *in camera*, pre-recorded testimonies, image and voice distortion, videoconferencing and the use of pseudonyms to protect identity from the general public. All such measures taken in criminal proceedings must not be prejudicial to or inconsistent with the rights of the accused and of a fair and impartial trial. In any case, protection measures should include: ordering police protection; issuing restraining orders against anyone who poses a threat to the victim or witness and their family; safeguarding the whereabouts of the victim or witness and their family from disclosure, providing them with medical and psychological treatment and support. In cases where a victim or witness is at serious risk, provision should be made for relocation within the country, or, if necessary, in another state. These measures should be taken before, during and after judicial,

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<sup>158</sup> See, among others, *Gelman v. Uruguay* (Merits and Reparations), IACtHR, 24 February 2011, para. 256.

<sup>159</sup> Human Rights Council, Tenth Session, Resolution 10/10 (Enforced or involuntary disappearances), UN Doc. A/HRC/RES/10/10.

administrative, or other related proceedings.<sup>160</sup> States should also establish victims and witnesses units as provided by the Rome Statute.<sup>161</sup> The victims and witnesses unit should be able to provide protective measures, security arrangements, counselling and other appropriate assistance to victims, witnesses who appear before courts and others who are at risk because of such testimony. This office should also be able to advise prosecutors and judges on such measures. It should include experienced staff, trained to deal with traumatized individuals, including victims of sexual violence and child victims.

**States parties must ensure that their domestic law provides at least the same level of protection for victims as that required under their international obligations. States must provide for effective measures of protection to victims, witnesses of enforced or involuntary disappearances, human rights defenders acting against enforced disappearances, and the lawyers and families of disappeared persons. They must be protected against any intimidation, persecution, reprisals or ill-treatment to which they might be subjected, with special attention to children, as well as women relatives seeking to resolve the disappearance of their family members.**

#### 10.4 RIGHT TO KNOW

##### Article 24

**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.**

The preamble of the Convention affirms the right of victims of enforced disappearances to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right freedom to seek, receive and impart information to this end.

According to Principle 4 of the Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Principles to Combat Impunity), the right to know the truth about the circumstances in which violations took place and the right to know the fate of the disappearance person are imprescriptible (no statutes of limitation apply).

***The right to know the truth regarding the circumstances of the enforced disappearance.*** States must guarantee both the individual and collective dimension of the right to truth.<sup>162</sup> States have the obligation to investigate what happened to the victims and inform them and the society of what happened. As provided in the Principles to Combat Impunity (Principle V), states should establish “appropriate measures to ensure this right may include non-judicial processes that

<sup>160</sup> UN General Assembly, *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*, A/60/509/Add.1.

<sup>161</sup> See Rome Statute, arts. 43 and 68.

<sup>162</sup> See *Independent study on best practices, including recommendations, to assist states in strengthening their domestic capacity to combat all aspects of impunity*, by Professor Diane Orentlicher. UN Doc. E/CN.4/2004/88.



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.” States should take measures to ensure that information concerning human rights violations is publicly available.<sup>163</sup>

**States must provide for effective mechanisms to guarantee the individual and collective dimensions of the right to truth, ensuring that both victims and society are informed of what happened. States should ensure that no statute of limitations apply to these rights.**

***The right to know the progress and results of the investigation;*** Victims of crimes of enforced disappearances should not only be entitled to the right to be informed of the progress and results of the investigation, but also to the right to participate in the investigation and trial of all those responsible of the crime, including the right to representation. As already discussed in the draft of the convention, the right of victims to participate in all stages of proceedings should be guaranteed and they should be entitled to the broadest protection possible against violations of their rights during proceedings.<sup>164</sup> In any case, states must provide for effective mechanisms to ensure the right of victims to be informed of the progress and results of the investigation and to participate in the proceedings.

***The right to know the fate of the disappearance person.*** States parties must investigate and identify the fate and whereabouts of the disappeared person. This right should be imprescriptible.<sup>165</sup> States must guarantee the right of the victims’ next of kin to know where are the remains of their loved ones.<sup>166</sup> States must receive the bodies of the disappeared person who passed away given that it allows them to bury them according to their beliefs, as well as to close the mourning process.<sup>167</sup> The remains of the disappeared person are also evidence of that which occurred, and offer details of the treatment received, manner of execution, the modus operandi.<sup>168</sup> The place where the remains are found may also provide valuable information as to the perpetrators or to which institution they belonged.<sup>169</sup>

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<sup>163</sup> *Ibid.*, para. 20.

<sup>164</sup> UN Commission of Human Rights, 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, UN Doc. E/CN.4/2003/71.

<sup>165</sup> See UN Economic and Social Council, *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, 8 February 2005, E/CN.4/102/Add.1, Principle 34.

<sup>166</sup> See among others, IACtHR, *Moiwana Village v. Suriname*, 15 June 2005, para. 103.

<sup>167</sup> See IACtHR, *Gelman v. Uruguay (Fondo y reparaciones)*, Judgment of 24 February 2011, para. 258. *Neira Alegría y others Vs. Perú* (Reparations and Costs), Judgment, 19 September 1996, Serie C No. 29, para. 69; *Ibsen Cárdenas e Ibsen Peña*, para. 214; *Gomes Lund and others (Guerrilha do Araguaia)*, para. 261.

<sup>168</sup> Inter-American Court of Human Rights, *La Cantuta v. Perú*, Judgment, November 29, 2006 (Merits, Reparations and Costs); Inter-American Court of Human Rights, *Caracazo v. Venezuela*, Judgment, 11 November 1999 (Merits).

<sup>169</sup> *Ibid.*

**As compelled by Article 24 (3) of the Convention, states must provide for effective mechanisms in order to conduct an investigation, to locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.**

## 10.5 RIGHT TO FULL REPARATION

### Article 24

**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.**

States parties must ensure in their legal systems that the victims of enforced disappearance have the right to obtain full reparation.<sup>170</sup>

Reparation is the term for the concrete measures that should be taken to address the suffering of the victims and their family members and it should help them rebuild their lives. The aim of reparation measures is to “as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>171</sup>

Of course, in situations where victims suffer serious harm or when family members are killed, it is impossible to fully restore them to the situation which existed before the violation occurred. Nevertheless, the obligation to ensure that as much as possible is done to address the suffering of the victims remains.

States bear the primary responsibility for providing reparation to victims of human rights violations in their country. There is an express legal obligation on the state to provide reparation when violations are committed by agents of the state or under the state's authority.

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<sup>170</sup> 1992 Declaration, art. 19 (“The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.”); *14-Point Program*, Pt. 12 (“Victims of “disappearance” and their dependants should be entitled to obtain fair and adequate redress from the state, including financial compensation. Victims who reappear should be provided with appropriate medical care or rehabilitation.”). As noted below, the scope of reparations to which victims of enforced disappearance are entitled is now recognized as much broader.

<sup>171</sup> See *The Factory at Chorzów case (Germany v. Poland)*, Judgment, Permanent Court of International Justice, 13 September 1928, p. 47.

States must guarantee the right to obtain full reparation by including effective measures that ensure full and effective reparation of victims, including the following forms: restitution, compensation, rehabilitation, satisfaction, including restoration of dignity and reputation as well as guarantees of non-repetition.<sup>172</sup> In some instances, states parties must implement guarantees of non-repetition by taking interim measures of protection.<sup>173</sup> In order to fulfil their obligations under international law, states should, at least, provide as stated in Principle IX of the 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.

As stated in Principle VI of the 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, 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 obligation. Victims and other sectors of civil society should play a meaningful role in the design and implementation of such programmes.<sup>174</sup> As stated in its Principle 33, in the event of *ad hoc* procedures enabling victims to exercise their right to obtain full and effective reparation should be given the widest possible publicity by private as well as public communication media.<sup>175</sup> In addition, states should provide for effective mechanisms for the enforcement of national and foreign reparation judgments.<sup>176</sup> States parties must also pay particular attention to gender issues and to victims who are children, assigning resources to provide psychological and social care and rehabilitation.

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<sup>172</sup> These five forms are well established and defined in international instruments. See UN Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and international humanitarian law (Van Boven-Bassiouni Principles), UN Comm'n Hum. Rts Res. E/C.N.4/2005/35, 13 April 2005; GA Res. A/RES/60/147, 16 Dec. 2005 (<http://www2.ohchr.org/english/law/remedy.htm>); UN Updated set of principles for the protection and promotion of human rights through action to combat impunity (Joinet-Orentlicher Principles), UN Comm'n Hum. Rts Res. E/C.N.4/2005/81, 15 April 2005 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>).

<sup>173</sup> "19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations. HRI/GEN/1/Rev.8 page 238".

<sup>174</sup> See UN Economic and Social Council, *Report of the independent expert to update the Set of principle to combat impunity*, Diane Orentlicher. 8 February 2005, E/CN.4/102/Add.1, Principle 32.

<sup>175</sup> *Ibid.*

<sup>176</sup> 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 (Basic principles on the right to a remedy and reparation), adopted and proclaimed by UN General Assembly resolution 60/147 of 16 December 2005, UN Doc. A/RES/60/147 (<http://www2.ohchr.org/english/law/remedy.htm>).

**States must guarantee the right of victims of enforced disappearances to obtain reparation consistently with international law, with special attention to cases of enforced or involuntary disappearances of women and men who may have been targeted for sexual and other forms of violence, and persons belonging to vulnerable groups, such as children.**

## 10.6 LEGAL SITUATION OF DISAPPEARED PERSONS

### Article 24

**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.**

In addition to the obligation to continue the investigation until the fate of the disappeared person has been clarified, under Article 24 states parties must take appropriate steps, in law and practice, 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.

States must establish mechanisms in its national law in order to determine the legal personality of disappeared persons. They must establish procedures for issuing, at the request of relatives; other interested persons or of the competent authority, a declaration of absence when that person has been missing for a determined period of time. A representative would be appointed, under judicial or administrative control, to protect the interests and needs of the disappeared person and his or her dependents. Among others, it would entitle the representative to preserve the rights of the disappeared person and manage its property and assets in his or her interest. It would also entitle his or her dependants to financial assistance by way of an allowance drawn from the assets of the disappeared person when no public assistance is available. It should also entitle his or her relatives and dependents to claim for assistance and social benefits according to their specific needs.<sup>177</sup>

States must also establish the procedures and conditions for a declaration of death of disappeared persons, including the date of death and effects of the declaration.

**States parties must establish the procedures for recognising a legal status to a disappeared person by issuing a declaration of absence that allow the management of their property and assets as well as the needs of their dependents. This declaration should entitle their relatives and dependants to financial assistance and social benefits.**

**States parties must also establish effective procedures and conditions for a declaration of death of disappeared persons, including the date of death and effects of the declaration.**

## 10.7 GUARANTEEING THE RIGHT OF ASSOCIATION

### Article 24

**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**

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<sup>177</sup> ICRC, *Missing persons, A Handbook for Parliamentarians*, 2009, pp. 50 – 53.

**and the fate of disappeared persons, and to assist victims of enforced disappearance.**

Article 24 requires that state parties must effectively 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. This right is recognized in other international law and standards and it would also entail protection for those who participate in these organisations if needed.<sup>178</sup>

**States parties must guarantee the right of association concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearances as well as protect those who participate in.**

## 11. WRONGFUL REMOVAL OF CHILDREN OF DISAPPEARED PARENTS

### Article 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.

Article 25 requires states parties to take five steps to prevent, investigate, end and punish the wrongful removal of children of disappeared parents.

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<sup>178</sup> See, for example, Universal Declaration of Human Rights, art. 20; ICCPR, art. 22.

**Respecting the best interests of the child.** Article 25 (5) requires states parties “[i]n all cases”, and particularly when taking such steps regarding wrongful removal of children, to ensure that “the best interests of the child shall be a primary consideration”. In addition, when states parties are deciding upon and implementing such steps, they must guarantee that “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”.

**Preventing and punishing wrongful removal in criminal law.** States parties under Article 25 (1) must take the necessary measures to prevent and punish under their criminal law:

- 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; and
- The falsification, concealment or destruction of documents attesting to the true identity of such children.<sup>179</sup>

**Searching for and identifying children.** State parties are required under Article 25 (2) to take the necessary measures to search for and identify children of disappeared parents and to return them to their families of origin, in accordance with legal procedures and applicable international agreements. National legal procedures, however, must be consistent with the Convention and other international law and standards.

**Assisting other states.** Article 25 (3) requires states parties to assist one another in searching for, identifying and locating children of disappeared parents. States parties should also assist states taking such steps that have not yet ratified or acceded to the Convention.<sup>180</sup>

**Establishing effective adoption procedures.** Article 25 (4) recognizes the right of children of disappeared parents to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law. In addition, it requires states parties that recognize a system of adoption or other form of placement of children to 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.

**States parties should take each of the five steps discussed above with regard to the wrongful removal of children of disappeared parents: respect the best interests of the child, prevent and punish in criminal law such wrongful removal, search for and identify children of disappeared parents, assist other states taking such steps and establish effective adoption procedures.**

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<sup>179</sup> See also the duties of states parties under Article 22 of the Convention with regard to obstruction of investigations of enforced disappearances.

<sup>180</sup> See also the duties of states parties under Article 15 of the Convention to assist each other in resolving enforced disappearances.

## PART II

Part II of the Convention (Articles 26 to 36) also requires implementation by states parties, but, in contrast to Part I, most of this implementation will be in the form of practice, rather than in legislation. Part II establishes a Committee on Enforced Disappearances (Committee) to monitor implementation of the Convention by states parties, to consider communications from states and individuals concerning reported violations of the Convention and to provide authoritative interpretations of the Convention. For this system of supervision to be effective, each state party will need to fulfil its express obligation in Article 26 (9) to “cooperate with the Committee and assist its members in the fulfilment of their mandate, to the extent of the Committee's functions that the State Party has accepted”. With regard to certain specific articles in Part II, each state party should take the steps described below.

### 12. NOMINATION AND ELECTION OF MEMBERS OF THE COMMITTEE

#### Article 26

- 1. A Committee on Enforced Disappearances (hereinafter referred to as "the Committee") shall be established to carry out the functions provided for under this Convention. The Committee shall consist of ten 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. The members of the Committee shall be elected by the States Parties according to equitable geographical distribution. Due account shall be taken of the usefulness of the participation in the work of the Committee of persons having relevant legal experience and of balanced gender representation.**
- 2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties from among their nationals, at biennial meetings of the States Parties convened by the Secretary-General of the United Nations for this purpose. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.**
- 3. The initial election shall be held no later than six months after the date of entry into force of this Convention. Four months before the date of each election, the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit nominations within three months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the State Party which nominated each candidate, and shall submit this list to all States Parties.**
- 4. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election once. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 2 of this article.**
- 5. If a member of the Committee dies or resigns or for any other reason can no longer perform his or her Committee duties, the State Party which nominated him or her shall, in accordance with the criteria set out in paragraph 1 of this article, appoint another candidate from among its nationals to serve out his or her term, subject to the approval of the majority of the States Parties. Such approval shall be considered to have been obtained unless half or more of the States Parties respond**

**negatively within six weeks of having been informed by the Secretary-General of the United Nations of the proposed appointment.**

**States parties should:**

- **Nominate candidates, including women, in transparent consultation with civil society, who are highly qualified experts of high moral character and recognized competence in the field of human rights to serve in their personal capacity as independent and impartial members of the Committee (Article 26 (1) (2));**
- **Elect in a secret ballot members of the Committee from among these candidates according to equitable geographical distribution, taking into account the importance of having members with relevant legal experience and ensuring a balanced gender representation (Article 26 (1) and (2)).**
- **Appoint, in transparent consultation with civil society, a candidate from among its nationals to serve out the term of a member of the Committee who dies, resigns or for any other reason can no longer perform his or her Committee duties (Article 26 (5)).**

### 13. SUBMISSION OF REPORTS AND FOLLOW-UP INFORMATION

#### Article 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 this Convention.

**States parties should:**

- **Submit a report within two years of entry into force of the Convention for that state party on the measures taken to give effect to its obligations under the Convention (Article 29 (1));**
- **Respond without delay to the comments, observations and recommendations of the Committee with regard to this report and implement fully and without delay those recommendations (Article 29 (3));**
- **Provide, without delay, any additional information requested by the Committee at any time on the implementation of the Convention (Article 29 (4));**



## 14. PROVISION OF INFORMATION IN URGENT CASES

### Article 30

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 authorized by them, as well as by any other person having a legitimate interest.

2. If the Committee considers that a request for urgent action submitted in pursuance of paragraph 1 of this article:

(a) Is not manifestly unfounded;

(b) Does not constitute an abuse of the right of submission of such requests;

(c) Has already been duly presented to the competent bodies of the State Party concerned, such as those authorized to undertake investigations, where such a possibility exists;

(d) Is not incompatible with the provisions of this Convention; and

(e) The same matter is not being examined under another procedure of international investigation or settlement of the same nature;

it shall request the State Party concerned to provide it with information on the situation of the persons sought, within a time limit set by the Committee.

3. In the light of the information provided by the State Party concerned in accordance with paragraph 2 of this article, the Committee may transmit recommendations to the State Party, including a request that the State Party should take all the necessary measures, including interim measures, to locate and protect the person concerned in accordance with this Convention and to inform the Committee, within a specified period of time, of measures taken, taking into account the urgency of the situation. The Committee shall inform the person submitting the urgent action request of its recommendations and of the information provided to it by the State as it becomes available.

4. The Committee shall continue its efforts to work with the State Party concerned for as long as the fate of the person sought remains unresolved. The person presenting the request shall be kept informed.

### States parties should:

- Provide, within the time limit set by the Committee, any information requested by the Committee on the situation of the persons sought, as a matter of urgency, in a submission to the Committee 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 a legitimate interest (Article 30 (1) and (2));
- Implement fully, within the period of time specified by the Committee, its recommendations, including any request that the state party should take all the necessary measures, including interim measures, to locate and protect the person concerned in accordance with this Convention and to

**inform the Committee, within a specified period of time, of measures taken, taking into account the urgency of the situation (Article 30 (3)).**

## 15. INDIVIDUAL COMMUNICATIONS

### Article 31

**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.**

**2. The Committee shall consider a communication inadmissible where:**

**(a) The communication is anonymous;**

**(b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;**

**(c) The same matter is being examined under another procedure of international investigation or settlement of the same nature; or where**

**(d) All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.**

**3. If the Committee considers that the communication meets the requirements set out in paragraph 2 of this article, it shall transmit the communication to the State Party concerned, requesting it to provide observations and comments within a time limit set by the Committee.**

**4. At any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party will take such interim measures as may be necessary to avoid possible irreparable damage to the victims of the alleged violation. Where the Committee exercises its discretion, this does not imply a determination on admissibility or on the merits of the communication.**

**5. The Committee shall hold closed meetings when examining communications under the present article. It shall inform the author of a communication of the responses provided by the State Party concerned. When the Committee decides to finalize the procedure, it shall communicate its views to the State Party and to the author of the communication.**

**States parties should:**

- **Recognize the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be a victim of a violation of the Convention by the state party (Article 31 (1)).**
- **Provide, within the time limit set by the Committee, observations and comments on such individual communications (Article 31 (3)).**
- **Take, immediately, any interim measures requested by the Committee as may be necessary to avoid possible irreparable damage to the victims (Article 31 4)).**

## 16. STATE COMMUNICATIONS

### Article 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.

**States parties should:**

**Recognize 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 the Convention (Article 32).**

## 17. COMMITTEE VISITS

### Article 33

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.
2. The Committee shall notify 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 shall answer the Committee within a reasonable time.
3. Upon a substantiated request by the State Party, the Committee may decide to postpone or cancel its visit.
4. If the State Party agrees to the visit, the Committee and the State Party concerned shall work together to define the modalities of the visit and the State Party shall provide the Committee with all the facilities needed for the successful completion of the visit.
5. Following its visit, the Committee shall communicate to the State Party concerned its observations and recommendations.

**States parties should agree, without delay, to any request by the Committee to visit, work with the Committee to define the modalities of the visit and provide the Committee with all the facilities needed for the successful completion of the visit (Article 33).**

**States parties should implement fully and without delay the Committee's recommendations based on the visit (Article 33 (5)).**

## 18. WIDESPREAD OR SYSTEMATIC PRACTICE

### Article 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.**

**States parties should provide all information requested, without delay, by the Committee when it is considering information it has received that appears to contain well-founded indications that enforced disappearances are being practised on a widespread or systematic basis (Article 35).**

## PART III

Part III (Articles 37 to 45), in addition to final clauses concerning signature, ratification and accession (Articles 38 and 40); entry into force (Article 39); amendment (Article 44); and official languages (Article 45), contains four important provisions, three that are applicable generally to all aspects of implementation in law and practice of the Convention, and the other, which is an important dispute settlement procedure, as well as one important omission.

### 19. PROVISIONS APPLICABLE GENERALLY TO IMPLEMENTATION OF THE CONVENTION

As discussed in the Introduction to this *Checklist*, there are three provisions in Part III that are important generally to all aspects of implementation in law and practice of the Convention: Article 37, making clear that the Convention cannot infringe stronger protection in national or international law; Article 41, which provides that the Convention applies to all parts of federal states; and Article 43, which provides that the Convention is without prejudice to the obligations of states parties under customary and conventional international humanitarian law including the Geneva Conventions and Protocols I and II and the opportunity of any state to invite the ICRC to visit places of detention not covered by international humanitarian law.

#### Article 37

**Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in:**

**(a) The law of a State Party;**

**(b) International law in force for that State.**

Article 37 should guide states parties at all stages of implementation of the Convention in law and practice. As in all international instruments, political compromises were made during the drafting of the Convention and, as a result, in certain aspects it does not expressly require states parties to take all the measures to prevent, solve and punish the crime of enforced disappearance as required in the national law of some states or in international law. Article 37 ensures that these gaps in the Convention will not in any way undermine existing or future national or customary or conventional international law that is more conducive to the protection of all persons from enforced disappearance.

#### Article 41

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

This provision, which is similar to provisions in other human rights treaties, requires states parties with federal governments when implementing the Convention in law and practice to ensure that all constituent units of the state implement the Convention.<sup>181</sup> In some

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<sup>181</sup> Article 29, Vienna Convention on the Law of Treaties.

instances, this article may require constitutional changes.

#### Article 43

**This Convention is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the two Additional Protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.**

Article 43 reinforces the safeguards in Article 37 by making clear that nothing in the Convention can be read to undermine greater protections provided in customary and conventional international humanitarian law, including, in particular, the obligations in the Geneva Conventions and Protocols I and II. In this connection, it is important to note that enforced disappearances are war crimes under customary international law.<sup>182</sup>

**States parties should ensure that all steps to implement the Convention are fully consistent with the full range of protection provided by customary and conventional international humanitarian law. In addition, they should guarantee in law and practice the ability of the ICRC to visit any place of detention in peacetime as well as during armed conflict with unrestricted access (see also Articles 17 and 18).**

## 20. DISPUTE SETTLEMENT PROCEDURE

#### Article 42

**1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation or by the procedures expressly provided for in this Convention shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.**

**2. A State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a declaration.**

**3. Any State Party having made a declaration in accordance with the provisions of paragraph 2 of this article may at any time withdraw this declaration by notification to the Secretary-General of the United Nations.**

Amnesty International believes that interpretation of human rights treaties is best left to the expert body treaty mechanisms established under those treaties, which have a clear mandate to monitor implementation and to interpret them. If states parties implement the recommendations without delay and in good faith made by the Committee (see discussion

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<sup>182</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Geneva, International Committee of the Red Cross and Cambridge University Press, 2005; Rule 98 (Enforced Disappearance) (Enforced disappearance is prohibited); Rule 156 (Serious violations of international humanitarian constitute war crimes).

above in Part II), then there never will be a need to resort to arbitration or to the International Court of Justice. If states parties ever invoke this provision, they should ask the Committee itself to arbitrate or to appoint the arbitrators. This approach would ensure that the International Court of Justice would have an authoritative interpretation of the obligations of the states parties relevant to resolving the dispute.

## 21. RESTRICTION ON RESERVATIONS TO THE CONVENTION

States parties should not make any restrictive reservations to the Convention that would undermine in any way the scope of its protection or implementation mechanisms. Although the Convention, unlike the Rome Statute, does not have a provision expressly excluding reservations,<sup>183</sup> states parties are not free to make any reservation that they please. First of all, they may not make any reservation that would defeat the object and the purpose of the Convention.<sup>184</sup> Second, reservations to human rights treaties are subject to strict scrutiny. As the International Law Commission has stated in its draft guidelines on reservations to treaties:

“To assess the compatibility of a reservation with the object and purpose of a general treaty for the protection of human rights, account shall be taken of the indivisibility, interdependence and interrelatedness of the rights set out in the treaty as well as the importance that the right or provision which is the subject of the reservation has within the general thrust of the treaty, and the gravity of the impact the reservation has upon it.”<sup>185</sup>

**Given the horror of this crime – an attack on the entire international community - and its devastating impact on the disappeared person, his or her family and friends, society and the rule of law, no state party should make any reservation to this treaty.**

<sup>183</sup> Rome Statute, art. 120 (Reservations) (No reservations may be made to this Statute).

<sup>184</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, entered into force, 27 January 1980, 1155 U.N.T.S. 331, art. 19 (Formulation of reservations). ([http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)).

<sup>185</sup> International Law Commission, Report of the International Law Commission, Sixty-second session (3 May–4 June and 5 July–6 August 2010), U.N. Doc. A/10/65, Reservations to treaties Guide to Practice, Guideline 3.1.12 (Reservations to general human rights treaties) (<http://untreaty.un.org/ilc/reports/2010/2010report.htm>).

# ANNEX – CHECKLIST FOR EFFECTIVE IMPLEMENTATION OF THE ENFORCED DISAPPEARANCE CONVENTION PROVISIONS AND OTHER INTERNATIONAL LAW OBLIGATIONS WHICH MUST OR SHOULD BE INCLUDED IN NATIONAL IMPLEMENTING LEGISLATION

The chart is designed to assist those drafting legislation implementing the International Convention for the Protection of All Persons from Enforced Disappearance to identify the provisions that treaty must be implemented in national law in accordance with explicit requirements of the convention and those that should be implemented law as a matter of best practice. It could be used as a model for reform of national procedures regarding criminal and civil cases. It is also designed to assist those analyzing draft or enacted legislation seeking to implement the Convention to spot gaps.

PROVISIONS OF THE CONVENTION	National law and practice
<b>PART I</b>	
<b>Article 1.-</b> States parties must: <ul style="list-style-type: none"><li>■ Ensure that their national law absolutely prohibits enforced disappearances. In addition, that prohibition must expressly apply in all circumstances, even in a state of war or a threat of war, internal political instability or any other public emergency.</li></ul>	



<p><b>Article 2.-</b> States parties should:</p> <p>Define enforced disappearance as a crime in a way which is not narrower than the definition in Article 2 of the Convention, and should include each of the following elements, while excluding the requirements in Article 7 of the Rome Statute that the perpetrator have specifically intended to remove the victim from the protection of the law and that the removal be for a prolonged period of time:</p> <ul style="list-style-type: none"> <li>■ there is an arrest, detention, abduction or any other form of deprivation of liberty;</li> <li>■ that conduct is carried out by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state;</li> <li>■ the conduct is followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person;</li> <li>■ the placing of the disappeared person outside the protection of the law as an objective result.</li> </ul>	
<p><b>Article 3.-</b> States parties should:</p> <ul style="list-style-type: none"> <li>■ Investigate the conduct prohibited 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 them.</li> <li>■ Define the conduct prohibited in Article 2 as a crime in national criminal law when it is carried out by persons who are not agents of the state or by persons or groups of persons acting without the authorization, support or acquiescence of the state.</li> </ul>	
<p><b>Article 4.-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Define enforced disappearances as an independent crime along with the consequences provided in conventional and customary international law. When drafting the definition of enforced disappearances as a crime, states parties need to take into account their obligations under Articles 2, 3, 5, 6 and 7 of the Convention and other international law (see the recommendations below under each of these articles).</li> </ul>	
<p><b>Article 5.-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Define enforced disappearance as a crime against humanity in accordance with applicable international law, when it is committed as part of a widespread or systematic attack on a civilian population, not simply the widespread or systematic practice of enforced disappearance.</li> </ul>	

<p><b>Article 6 (1) (a).</b>- States parties should:</p> <ul style="list-style-type: none"> <li>■ Ensure that persons can be held criminally responsible with regard to their involvement in an enforced disappearance based upon any of the following principles of criminal responsibility, in a manner that is defined consistently with international law:                     <ul style="list-style-type: none"> <li>■ Committing, as an individual or jointly with or through another person, and regardless of whether that person is themselves criminally responsible;</li> <li>■ Ordering;</li> <li>■ Soliciting;</li> <li>■ Inducing;</li> <li>■ Attempting;</li> <li>■ Assisting;</li> <li>■ Facilitating;</li> <li>■ Aiding;</li> <li>■ Abetting;</li> <li>■ Otherwise assisting;</li> <li>■ Planning;</li> <li>■ Conspiring;</li> <li>■ Instigating;</li> <li>■ Inciting;</li> <li>■ Being complicit in;</li> <li>■ Consenting;</li> <li>■ Acquiescing;</li> <li>■ Actively concealing;</li> <li>■ Contributing to the commission or attempted commission of an enforced disappearance by a group of persons acting with a common purpose; and</li> <li>■ Otherwise assisting the commission or attempted commission of an enforced disappearance.</li> </ul> </li> </ul>	
<p><b>Article 6 (1) (b).</b>- States parties should:</p> <ul style="list-style-type: none"> <li>■ Ensure that they incorporate a single rule of superior responsibility for commanders and superiors in accordance with the strictest requirements of international law.</li> </ul>	
<p><b>Article 6 (2).</b>- States parties must:</p> <ul style="list-style-type: none"> <li>■ Exclude superior orders as a ground for excluding criminal responsibility, although it can be a ground for mitigation of punishment, and expressly provide that the order to commit or to participate in any way in the crime of enforced disappearance is “manifestly unlawful” or criminal. Compulsion, duress, necessity, and any form of “exceptional circumstances” must similarly be excluded as defences to the crime of enforced disappearance. Not only must states refrain from creating new defences for these grounds, states must ensure that any such defences that already exist under national law are made expressly inapplicable to the crime of enforced disappearance.</li> </ul>	
<p><b>Article 7 (1).</b>- States parties should:</p>	

- Establish appropriate penalties for the crime of enforced disappearance with a maximum sentence of life imprisonment, excluding in any case the death penalty in accordance with international law and standards.

- Provide that persons suspected of having committed an offence of enforced disappearance are suspended from any post where they would be 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 persons participating in the investigation.

**Article 7 (2) (a) .-** States parties should:

Ensure that the following circumstances are mitigating circumstances, but not include any that are inconsistent with other international law or standards:

- Effectively contributing to bringing the disappeared person forward alive;
- Making it possible to clarify cases of enforced disappearance; and
- Identifying the perpetrators of an enforced disappearance.

**Article 7 (2) (b).-** States parties should:

Ensure that each of the following circumstances are aggravating circumstances in determining the appropriate penalty:

- The death of the disappeared;
- The commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons;
- Any relevant prior criminal convictions for crimes under international law or of a similar nature;
- Abuse of power or official capacity;
- Commission of the crime where the victim is particularly defenceless;
- Commission of the crime with particular cruelty or where there were multiple victims;
- Commission of the crime for any motive involving discrimination on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status; and
- Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.

<p><b>Article 8 (1).</b>- States parties should:</p> <ul style="list-style-type: none"> <li>■ Provide that enforced disappearances are not subject to any statute of limitations whether with respect to either criminal or civil proceedings.</li> <li>■ Pending the prompt enactment of such a prohibition, with regard to the application of statutes of limitations to all cases of enforced disappearances that might not be characterized as crimes against humanity, states should ensure, as a strictly temporary measure, that any statute of limitations is as long as the period applicable to the most serious crimes under international law, that it should be suspended during any period when the victims or family is unable effectively to seek justice or reparation and that it commences only from the moment when the offence of enforced disappearances ceases.</li> </ul>	
<p><b>Article 8 (2).</b>- States parties should:</p> <ul style="list-style-type: none"> <li>■ Provide that the crime of enforced disappearance is not subject to any statute of limitation whether with respect to either criminal or civil proceedings.</li> </ul> <p>In the meantime, states should ensure, as a strictly temporary measure, that any statutes of limitations for enforced disappearance that may not amount to crimes against humanity:</p> <ul style="list-style-type: none"> <li>■ apply for as long as the period applicable to the most serious crimes under international law,</li> <li>■ are suspended during any period when the victims or family is unable effectively to seek justice or reparation, and</li> <li>■ commence only from the moment when the offence of enforced disappearances ceases.</li> </ul>	
<p><b>Article 9 (1).</b>-</p> <p>States parties must provide for jurisdiction:</p> <ul style="list-style-type: none"> <li>■ when the offence is committed in any territory under its jurisdiction</li> <li>■ when the alleged offender is one of its nationals.</li> </ul> <p>States parties should provide for jurisdiction:</p> <ul style="list-style-type: none"> <li>■ when the disappeared person is one of its nationals.</li> </ul>	
<p><b>Article 9 (2).</b>- States parties must:</p> <ul style="list-style-type: none"> <li>■ Provide that their courts can exercise universal jurisdiction over any case of enforced disappearance and eliminate any barriers to exercising it, including any requirements that the suspect be present in their territory before</li> </ul>	

<p>an investigation can be opened or an extradition request made.</p>	
<p><b>Article 11.-</b> States parties should:</p> <ul style="list-style-type: none"> <li>■ Provide that only civilian courts have jurisdiction over the crime of enforced disappearance and that no military court or other special court have jurisdiction over this crime.</li> <li>■ Provide that their courts will not recognize any claim to immunity from arrest and prosecution for the crime of enforced disappearance.</li> <li>■ Provide that amnesties, pardons and similar measures of impunity do not bar investigations and prosecutions of enforced disappearance and other crimes under international law or of steps to ascertain the truth about these crimes or to obtain full reparation for them.</li> </ul>	
<p><b>Article 12 (1).-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Recognize in their law the right to report facts concerning enforced disappearances to the competent state authorities and to require those authorities promptly, thoroughly, independently and impartially to investigate such reports.</li> </ul>	
<p><b>Article 12 (2).-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Issue instructions to all authorities, including judicial authorities, to be alert to any indications that an enforced disappearance has taken place and, whenever that is the case, to require by law that they immediately open a thorough, independent and impartial investigation.</li> </ul>	
<p><b>Article 12 (3).-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Ensure in law and practice that the authorities investigating an enforced disappearance have the necessary powers and resources, as spelled out in international law and standards, to conduct the investigation, including unimpeded access to any place where a disappeared person might be found.</li> </ul>	
<p><b>Article 12 (4).-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Ensure in law and practice effective protection to the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation.</li> </ul>	
<p><b>Article 22.-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Provide for disciplinary sanctions and define as crimes the conduct covered in Article 22 of the Convention.</li> </ul>	
<p><b>Article 10 (1).-</b> Each state party should:</p> <ul style="list-style-type: none"> <li>■ Ensure in law and practice that whenever a person suspected of</li> </ul>	

<p>responsibility for an enforced disappearance is present in its territory, other territory under its jurisdiction or on one of its ships or planes or is expected to be present in one of those locations, it promptly examines the information available to it and determines whether criminal, surrender or extradition proceedings are warranted. If so, states parties must take him or her into custody or takes such other legal measures as are necessary to ensure his or her presence for those proceedings.</p> <ul style="list-style-type: none"> <li>■ The custody and other legal measures must be consistent with international law and standards and should be maintained only for such time as is necessary to ensure the person's presence at those proceedings.</li> </ul>	
<p><b>Article 10 (2).</b>- States parties where a suspect is present or expected to enter should:</p> <ul style="list-style-type: none"> <li>■ Immediately carry out a preliminary inquiry or investigations to establish the facts and should notify all states of the measures taken, the findings of the inquiry or investigations and whether they intend to exercise jurisdiction.</li> </ul>	
<p><b>Article 10 (3).</b>- States parties must:</p> <ul style="list-style-type: none"> <li>■ Ensure that the right of any person in custody to communicate immediately with nearest appropriate representative of the state of which he or she is national is recognize, including the right to converse and correspond with him and to arrange for his legal representation.</li> </ul>	
<p><b>Article 11 (3).</b>- States parties must:</p> <ul style="list-style-type: none"> <li>■ Ensure that all the rights recognized in international instruments recognizing the right to fair trial, such as Article 14 of the International Covenant on Civil and Political Rights, are guaranteed at all stages of proceedings involving persons suspected of responsibility for an enforced disappearance.</li> </ul>	
<p><b>Article 15.</b>- States parties should:</p> <ul style="list-style-type: none"> <li>■ Ensure, in law and practice, as well as in treaties, that their authorities provide full cooperation to victims of enforced disappearance and in searching for, locating and releasing disappeared persons and, in the event of death, exhuming and identifying them and returning their remains.</li> </ul>	
<p><b>Article 13.</b>- States parties should:</p> <ul style="list-style-type: none"> <li>■ Ensure that enforced disappearance is not considered a political offence or as an offence connected with a political offence or as an offence inspired by political motives, and that a request for extradition cannot be refused on these grounds.</li> <li>■ Ensure that enforced disappearance is an extraditable offence in all treaties with all states.</li> <li>■ Ensure that the Convention is considered the necessary legal basis for</li> </ul>	

<p>extradition in respect of enforced disappearance to any state with which there is no extradition treaty.</p> <ul style="list-style-type: none"> <li>■ Eliminate any of the above obstacles to extradition where they exist in national law or treaties.</li> <li>■ Implement Article 13 without any other inappropriate obstacles to extradition (such as political control over granting of extradition requests, prohibition of extradition of nationals, double criminality, <i>ne bis in idem</i> when it would preclude a retrial after a sham or unfair proceeding, non-retroactivity of national law even when enforced disappearance was considered a crime under international law, statutes of limitation and amnesties or similar measures of impunity), eliminate any such obstacles in current law and treaties and include effective human rights safeguards.</li> </ul>	
<p><b>Article 14.-</b> States parties should:</p> <ul style="list-style-type: none"> <li>■ Implement Article 14 without any inappropriate obstacles to mutual legal assistance, eliminate any such obstacles in current national law and treaties and include effective human rights safeguards.</li> </ul>	
<p><b>Article 16.-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Not expel, return, surrender or extradite a person to another state where there is a risk that upon removal he or she would be subjected to an enforced disappearance or to other forms of serious harm such as persecution, torture or other cruel, inhuman or degrading treatment or punishment, arbitrary deprivation of life or an unfair trial.</li> <li>■ National law should prohibit any transfer of effective control over a person to a state where he or she would face such risks.</li> <li>■ National law should provide a procedure whereby individuals who allege they would face such risks can have their claims examined by an independent and impartial body.</li> </ul>	
<p><b>Article 17 (1).-</b> States parties should:</p> <ul style="list-style-type: none"> <li>■ Expressly prohibit secret detention in national laws and define it according to the essential elements identified in this document, along with all other forms of unofficial detention.</li> </ul>	
<p><b>Article 17 (2).-</b> States parties must:</p> <p>Effectively guarantee each of the safeguards for persons deprived of liberty and provide in their legislation all the measures required in Article 17 (2), in addition to other requirements in international law and standards. Particularly, states must:</p> <ul style="list-style-type: none"> <li>■ Establish the conditions under which orders of deprivation of liberty may be given.</li> </ul>	

<ul style="list-style-type: none"> <li>■ Indicate the authorities authorized to order the deprivation of liberty.</li> <li>■ Guarantee that any person deprived of liberty be held solely in officially recognized and supervised places of deprivation of liberty.</li> <li>■ Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited in accordance with international law.</li> <li>■ Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty.</li> <li>■ Guarantee that any person deprived of liberty and, in the case of a suspected enforced disappearance, any persons with a legitimate interest is 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.</li> </ul>	
<p><b>Article 17 (2).</b>- States parties should:</p> <p>Implement each of these steps, in law and practice, in addition to those expressly mentioned in Article 17 (2) of the Convention. Particularly, states should:</p> <ul style="list-style-type: none"> <li>■ Guarantee that any action by intelligence services should be governed by law, which in turn should be in conformity with international norms.</li> <li>■ Provide for institutions that are strictly independent of those that have allegedly been involved in secret detention to investigate promptly any allegations of secret detention.</li> <li>■ Provide in their domestic legislation that the status of all pending investigations into allegations of ill-treatment and torture of detainees and detainee deaths in custody should be made public.</li> <li>■ Guarantee that victims of secret detention be provided with judicial remedies and reparation in accordance with the Convention and relevant international norms.</li> </ul>	
<p><b>Article 17 (3).</b>- State parties must:</p> <ul style="list-style-type: none"> <li>■ Create official up-to-date registers of persons deprived of liberty in times of peace and armed conflict, which include all the information required by the Convention and other international law and standards.</li> </ul>	
<p><b>Article 18 .-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Ensure that national law guarantees that all persons with legitimate interests have the right to receive in a timely manner all the information required in the Convention and in other international law and standards.</li> </ul>	



<p><b>Article 19.-</b> States must:</p> <ul style="list-style-type: none"> <li>■ Ensure that all proceedings undertaken to search for disappeared persons do not violate human rights with regard to the collection, processing, use and storage of personal information, as well as its protection.</li> </ul>	
<p><b>Article 20.-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Expressly provide in their domestic law for the strictest conditions under which the right to access to information of the person deprived of liberty can be restricted.</li> <li>■ Limit it in nature and duration, subject (in cases where the restrictions are not requested by the detainee) to a specified absolute maximum of, for instance, 18 hours, and in strict conformity with applicable international law and standards and with the objectives of the Convention.</li> <li>■ Ensure that concern for privacy or safety of the detainee cannot be invoked to restrict information against the will of the detainee him- or herself.</li> <li>■ Ensure that neither “national security” nor “public security” is a ground for refusing information under Article 20.</li> <li>■ Guarantee that any person with a legitimate interest in the information mentioned in Article 18 (1) has the right to a prompt and effective judicial remedy to obtain that information without delay.</li> <li>■ Guarantee that this right is not suspended or restricted under any circumstances.</li> </ul>	
<p><b>Article 21.-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Provide in their domestic legislation and practice effective measures to ensure reliable verification of the release of persons deprived of liberty, as well as to ensure physical integrity of such person and their ability to exercise fully their rights at the time of release.</li> </ul>	
<p><b>Article 23.-</b> States parties should:</p> <ul style="list-style-type: none"> <li>■ Implement each of the four steps required under Article 23 in their law and practice.</li> </ul>	
<p><b>Article 24.-</b> States parties must:</p> <ul style="list-style-type: none"> <li>■ Ensure equal and effective access to justice as provided for under international law.</li> <li>■ Pay special attention to cases of enforced disappearances of women and men who may have been targeted for sexual and other forms of violence, and vulnerable persons such as children.</li> </ul>	

<p><b>Article 18 (2).</b>- States parties must:</p> <ul style="list-style-type: none"> <li>■ Ensure that their domestic law provides at least the same level of protection for victims as that required under their international obligations.</li> <li>■ Provide for effective measures of protection to victims, witnesses of enforced or involuntary disappearances, human rights defenders acting against enforced disappearances, and the lawyers and families of disappeared persons against any intimidation, persecution, reprisals or ill-treatment to which they might be subjected.</li> <li>■ Pay special attention to children as well as women relatives seeking to resolve the disappearance of their family members.</li> </ul>	
<p><b>Article 24 (2).</b>-</p> <p>States parties must:</p> <ul style="list-style-type: none"> <li>■ Provide for effective mechanisms to guarantee the individual and collective dimension of the right to truth, ensuring that both victims and society are informed of what happened.</li> </ul> <p>States should:</p> <ul style="list-style-type: none"> <li>■ Ensure that no statute of limitations apply to these rights.</li> </ul>	
<p><b>Article 24 (3).</b>- States must:</p> <ul style="list-style-type: none"> <li>■ Provide for effective mechanisms in order to conduct an investigation to locate and release disappeared person and, in the event of death, to locate, respect and return their remains.</li> </ul>	
<p><b>Article 24 (4) and (5).</b>- States must:</p> <ul style="list-style-type: none"> <li>■ Guarantee the right of victims of enforced disappearances to obtain reparation consistently with international law, with special attention to cases of enforced or involuntary disappearances of persons belonging to vulnerable groups, especially children, and enforced disappearances of women, as they may be targeted for sexual and other forms of violence, and persons belonging to vulnerable groups, such as children.</li> </ul>	
<p><b>Article 24 (6).</b>- States parties must:</p> <ul style="list-style-type: none"> <li>■ Establish the procedures for recognising a legal status to a disappeared person by issuing a declaration of absence.</li> <li>■ A representative should be appointed to protect the interests and see to the immediate needs of the disappeared person and the dependents.</li> <li>■ The representative should be entitled to preserve the rights of the disappeared person and manage of their property and assets as well as the</li> </ul>	

<p>needs of their dependents.</p> <ul style="list-style-type: none"> <li>■ The dependants should be entitled to financial assistance by way of an allowance drawn from the assets of the disappeared person when no public assistance is available.</li> <li>■ This declaration should entitle relatives and dependants of the disappeared persons to financial assistance and social benefits.</li> <li>■ Establish effective procedures and conditions for a declaration of death of disappeared persons, including the date of death and effects of the declaration.</li> </ul>	
<p><b>Article 24 (7).</b>- States parties must:</p> <ul style="list-style-type: none"> <li>■ Guarantee the right of association concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearances as well as protect those who participate in.</li> </ul>	
<p><b>Article 25.</b>- States parties should:</p> <ul style="list-style-type: none"> <li>■ Take each of the necessary steps with regard to the wrongful removal of children of disappeared parents: <ul style="list-style-type: none"> <li>■ respect the best interests of the child,</li> <li>■ prevent and punish in criminal law such wrongful removal, search for and identify children of disappeared parents, and</li> <li>■ assist other states taking such steps and establish effective adoption procedures.</li> </ul> </li> </ul>	
<b>PART II</b>	
<p><b>Article 26.</b>- States parties should:</p> <ul style="list-style-type: none"> <li>■ Nominate candidates, including women, in transparent consultation with civil society, who are highly qualified experts of high moral character and recognized competence in the field of human rights to serve in their personal capacity as independent and impartial members of the Committee (Article 26 (1) (2)).</li> <li>■ Elect in a secret ballot members of the Committee from among these candidates according to equitable geographical distribution, taking into account the importance of having members with relevant legal experience and ensuring a balanced gender representation (Article 26 (1) and (2)).</li> <li>■ Appoint, in transparent consultation with civil society, a candidate from among its nationals to serve out the term of a member of the Committee who dies, resigns or for any other reason can no longer perform his or her</li> </ul>	

Committee duties (Article 26 (5)).

**Article 29.-** States parties should:

- Submit a report within two years of entry into force of the Convention for that state party on the measures taken to give effect to its obligations under the Convention (Article 29 (1)).
- Respond without delay to the comments, observations and recommendations of the Committee with regard to this report and implement fully and without delay those recommendations (Article 29 (3)).
- Provide, without delay, any additional information requested by the Committee at any time on the implementation of the Convention (Article 29 (4)).

**Article 30.-** States parties should:

- Submit a report within two years of entry into force of the Convention for that state party on the measures taken to give effect to its obligations under the Convention (Article 29 (1)).
- Respond without delay to the comments, observations and recommendations of the Committee with regard to this report and implement fully and without delay those recommendations (Article 29 (3)).
- Provide, without delay, any additional information requested by the Committee at any time on the implementation of the Convention (Article 29 (4))

**Article 31.-** States parties should:

- Provide, within the time limit set by the Committee, any information requested by the Committee on the situation of the persons sought, as a matter of urgency, in a submission to the Committee 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 a legitimate interest (Article 30 (1) and (2)).
- Implement fully, within the period of time specified by the Committee, its recommendations, including any request that the state party should take all the necessary measures, including interim measures, to locate and protect the person concerned in accordance with this Convention and to inform the Committee, within a specified period of time, of measures taken, taking into account the urgency of the situation (Article 30 (3)).

**Article 32.-** States parties should:

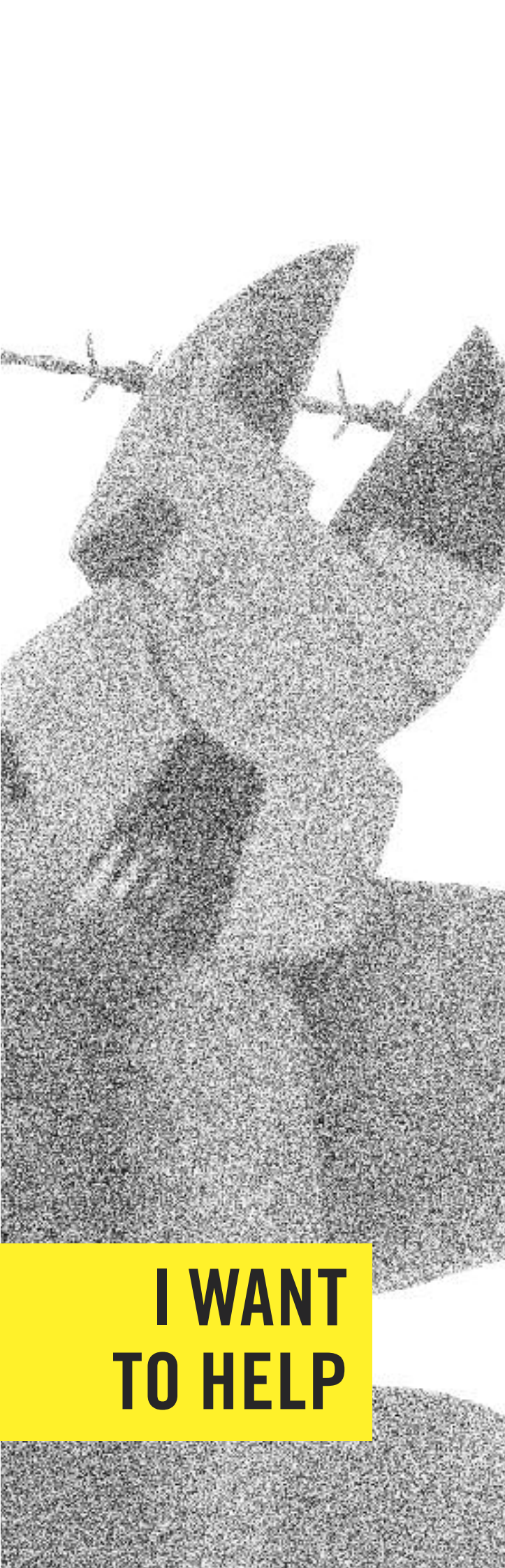
- Recognize the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be a victim of a violation of the Convention by the state party (Article 31 (1)).
- Provide, within the time limit set by the Committee, observations and comments on such individual communications (Article 31 (3)).
- Take, immediately, any interim measures requested by the Committee as may be necessary to avoid possible irreparable damage to the victims (Article 31 4)).

**Article 33.-** States parties should:

- Recognize 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 the Convention (Article 32).
- Agree, without delay, to any request by the Committee to visit, work with the Committee to define the modalities of the visit and provide the Committee with all the facilities needed for the successful completion of the visit (Article 33).
- Implement fully and without delay the Committee's recommendations based on the visit (Article 33 (5)).

**Article 34.-** States parties should:

- Provide all information requested, without delay, by the Committee when it is considering information it has received that appears to contain well-founded indications that enforced disappearances are being practiced on a widespread or systematic basis (Article 35).



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## **NO IMPUNITY FOR ENFORCED DISAPPEARANCES**

### **Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance**

The adoption of the International Convention on the Protection of All Persons from Enforced Disappearance was a major step forward in ensuring that victims of enforced disappearance and their families obtain justice, truth and full reparation. Amnesty International has been calling on all states not only to sign and ratify the Convention, but also to take effective steps to implement it in law and practice.

This checklist provides useful guidance to states on how to implement, in law and practice, their obligations under the Convention and related international law and standards. It is also a useful tool for civil society participating in the drafting of legislation implementing the Convention. Indeed, civil society should be involved in the drafting at the earliest possible stage.

The checklist emphasizes that effective implementation is not limited to legislation. States parties should also adopt, in consultation with civil society, a long-term, comprehensive plan to implement the Convention in practice; this should include establishing effective training programmes for law enforcement and other personnel. As part of that plan, the highest authorities in every state that ratifies the Convention should make clear that enforced disappearances will not be tolerated under any circumstances.

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