



# International Convention for the Protection of All Persons from Enforced Disappearance

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## Committee on Enforced Disappearances

### Concluding observations on the report submitted by Burkina Faso under article 29, paragraph 1, of the Convention\*

1. The Committee on Enforced Disappearances considered the report submitted by Burkina Faso under article 29 (1) of the Convention (CED/C/BFA/1) at its 160th and 161st meetings (CED/C/SR.160 and 161), held on 8 and 9 March 2016. At its 171st meeting, held on 16 March 2016, it adopted the following concluding observations.

#### A. Introduction

2. The Committee welcomes the report submitted by Burkina Faso under article 29 (1) of the Convention, drafted in accordance with the reporting guidelines, and the information contained in the report. The Committee appreciates the frank and constructive dialogue with the delegation from the State party on the measures taken to implement the provisions of the Convention, which dispelled many of its concerns, and particularly welcomes the competence, rigour and openness with which the delegation responded to the questions raised. The Committee also thanks the State party for its written replies (CED/C/BFA/Q/1/Add.1) to the list of issues (CED/C/BFA/Q/1), as supplemented by statements by the delegation, and the additional information submitted in written form.

#### B. Positive aspects

3. The Committee commends the State party on having ratified almost all the core United Nations human rights instruments and their optional protocols, as well as the Rome Statute of the International Criminal Court.

4. The Committee notes with satisfaction the adoption by the State party of its National Policy on Human Rights and the Promotion of Civic Responsibility for 2013-2022.

5. The Committee commends the State party on having consulted civil society organizations on the drafting of its report under article 29 (1) of the Convention.

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\* Adopted by the Committee at its tenth session (7-18 March 2016).



## C. Principal subjects of concern and recommendations

6. The Committee is of the view that the legislation in force in the State party at the time of drafting these concluding observations does not fully comply with the obligations undertaken by States that have ratified the Convention. While noting that the State party has instigated a legislative process designed to fully implement the Convention, the Committee recommends that the State party take account of these recommendations, which it has formulated in a constructive and cooperative spirit, to ensure as soon as possible that the State party's legislation and the manner of its application by the authorities are fully consistent with the rights and obligations set out in the Convention.

### General information

#### Competence of the Committee under articles 31 and 32 of the Convention

7. The Committee regrets the fact that the State party has not yet made the declarations under articles 31 and 32 in order to enable the Convention to be fully implemented. It notes that the State party expects to hold consultations with stakeholders from the public and private sectors on the possibility of recognizing the competence of the Committee under articles 31 and 32 (arts. 31 and 32).

**8. The Committee invites the State party to recognize, at the earliest opportunity, the competence of the Committee under articles 31 and 32 of the Convention.**

#### National human rights institution

9. The Committee takes note of the decision taken in 2009 to establish a new National Human Rights Commission, but regrets the fact that the Commission has, since then, faced obstacles to its effective functioning. It welcomes the steps taken by the State party to amend the law establishing the Commission, with a preliminary draft produced in 2015 with a view to making the Commission more effective and independent, particularly in respect of funding, in full conformity with the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles) [art. 2].

**10. The Committee encourages the State party to expedite the process of amending the law establishing the National Human Rights Commission so as to make the Commission fully independent and to allocate to it sufficient human and financial resources to enable it to function properly, in full conformity with the Paris Principles. It invites the State party to include the issue of enforced disappearances explicitly in its mandate.**

#### National Observatory for the Prevention of Torture and Related Practices

11. The Committee takes note of the establishment of the National Observatory for the Prevention of Torture and Related Practices, as provided for in Act No. 022-2015/AN of 27 May 2014. It observes, however, that the Observatory is not yet operational (art. 2).

**12. The Committee encourages the State party to take the necessary steps to make the Observatory operational, including by allocating the necessary human and financial resources to it.**

## **Definition and criminalization of enforced disappearance (arts. 1-7)**

### **Incorporation of the definition and criminalization of enforced disappearance in the Criminal Code**

13. The Committee notes that the State party's Criminal Code contains no provisions defining or criminalizing enforced disappearance as required under articles 2 and 4 of the Convention. It notes, however, that the State party has initiated a legislative process intended, among other things, to include a definition of enforced disappearance in its Criminal Code and to criminalize it as a separate offence. It notes that, in the absence of the definition and criminalization of enforced disappearance, the State party in some cases refers to the general criminal legislation governing other offences that are considered to be covered by the definition of enforced disappearance, such as unlawful arrest or detention, false imprisonment or abduction, but that do not constitute the crime of enforced disappearance. The Committee is of the view that it is not enough to refer to other offences or the legislation governing them to meet this obligation, as the offence of enforced disappearance does not consist of a series of discrete offences but is a single complex offence committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, and constitutes a violation of several rights. In this context, the Committee considers that, by defining enforced disappearance as a separate offence, the State party would fulfil its obligation under article 4, which is closely linked to other Convention obligations related to legislation, such as those set out in articles 6 (1) (a) and 7. The Committee notes that the State party has introduced a moratorium on the death penalty and is contemplating its abolition (arts. 2, 4, 6 and 7).

**14. The Committee recommends that the State party expedite the amendment of the Criminal Code designed to implement the Convention with a view to defining and criminalizing enforced disappearance as a separate offence, in accordance with the definition in article 2 of the Convention, punishable by appropriate penalties which take into account its extreme seriousness, while excluding the death penalty.**

### **Order from a superior**

15. The Committee notes that, under article 70 of the Criminal Code, "no criminal responsibility shall attach to a person who commits an act ordered by a legitimate authority unless that act is manifestly unlawful", and that under article 141 of the Criminal Code, any public official who orders or causes others to order an arbitrary act or one that is prejudicial to the individual freedom or the civic rights of one or more persons cannot be punished if he or she can demonstrate that he or she was acting on the legal orders of his or her superiors. The Committee takes note of the explanations provided by the delegation of the State party, but points out that these provisions are not very specific and do not appear to offer the guarantees required under article 6 (1) (b) and (c) and (2) of the Convention (art. 6).

**16. The Committee recommends that the State party, in establishing enforced disappearance as an offence in its Criminal Code, should clarify the provisions of articles 70 and 141 (2) of the Code, so as to make them fully consistent with article 6 (1) (b) and (c) and (2) of the Convention.**

### **Mitigating and aggravating circumstances**

17. The Committee notes that the State party's Criminal Code establishes a general regime of mitigating and aggravating circumstances for crimes and offences and that aggravating circumstances for offences related to enforced disappearance would, according to the State party, be applicable in cases of enforced disappearance. The Committee

nonetheless believes that these provisions of the Criminal Code are not fully in conformity with article 7 (2) of the Convention.

18. **The Committee recommends that the State party, in establishing enforced disappearance as a separate offence, should also amend its Criminal Code to include mitigating and aggravating circumstances for the act of enforced disappearance, covering all the elements set out in article 7 (2) of the Convention. It also recommends that the State party ensure that the mitigating circumstances in no way obviate the imposition of the appropriate punishment.**

## **Judicial procedure and cooperation in criminal matters (arts. 8-15)**

### **Continuous nature of the offence of enforced disappearance, and statute of limitations**

19. The Committee notes that the State party recognizes the continuous nature of the offence of enforced disappearance and is considering writing this into its Criminal Code. However, the Committee notes that, according to the State party, the term of limitation for the crime of enforced disappearance should be governed by the ordinary statute of limitations for the crimes and offences provided for in the Criminal Code, that is, 10 years for crimes and 3 years for offences. The Committee also takes note of the information provided by the delegation, that the statute of limitations for the crime of enforced disappearance would start to run as of the moment the violation ceased (art. 8).

20. **The Committee recommends that the State party should ensure that the new Criminal Code includes the necessary provisions to specifically recognize the continuous nature of the crime of enforced disappearance, and also that the term of limitation for criminal proceedings reflects the extreme seriousness of the crime of enforced disappearance and starts to run only when the violation ceases. The Committee nevertheless encourages the State party, in establishing enforced disappearance as a separate offence, to ensure that it is not subject to any statute of limitations.**

### **Military courts**

21. The Committee takes note of the clarification provided by the delegation of the State party, but observes that military courts appear to be competent to try crimes of enforced disappearance committed by members of the military in the course of their duties or inside military facilities. The Committee recalls its position that, as a matter of principle, military courts cannot offer the independence and impartiality required by the Convention to hear cases of human rights violations such as enforced disappearance (art. 11).

22. **The Committee, recalling its statement on enforced disappearances and military jurisdiction (A/70/56, annex III), recommends that the State party take the necessary legislative or other measures to ensure that all cases of enforced disappearance remain expressly outside military jurisdiction and can be investigated and tried only by the ordinary courts.**

### **Protection of complainants, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation**

23. The Committee takes note of the information from the State party that the protection of complainants and witnesses can be requested by the public prosecutor or investigating judge, who, under articles 41 and 50 of the Criminal Code, have the right to call directly on the services of the law enforcement agencies. The Committee points out that these provisions are very general and, furthermore, are neither sufficient nor sufficiently explicit

to afford protection to all the categories of persons referred to in article 12 (1) of the Convention and therefore fail to meet the requirements of this article (art. 12).

24. **The Committee recommends that the State party take the necessary measures, as part of the reform of its Code of Criminal Procedure, to protect all the categories of persons listed in article 12 (1) of the Convention from any ill-treatment or intimidation as a consequence of the complaint or any evidence given. It invites the State party to consider establishing specific protection programmes for this purpose.**

#### **Persons suspected of having committed an offence of enforced disappearance**

25. The Committee takes note of the information from the State party that “in practice, when a member of a law enforcement unit is accused of an offence, the other members of the unit are not involved in the investigation”. The Committee notes, however, that this practice is not written down anywhere in the State party’s legislation (art. 12).

26. **The Committee recommends that the State party take measures in its criminal legislation, in accordance with article 12 (4) of the Convention, to ensure that persons suspected of having committed an offence of enforced disappearance and their units are not in a position to influence, either directly or indirectly, on their own or through an intermediary, the progress of an investigation.**

#### **Participation of victims in the investigation**

27. The Committee notes that, according to the State party, under the Code of Criminal Procedure, the victim takes part in the investigation into enforced disappearance either as a claimant for criminal damages or as a witness. The Committee nevertheless observes that the relevant provisions of the Criminal Code (art. 84 et seq.) are not very explicit on the extent of the victim’s participation in the criminal proceedings. The Committee also notes that there are no specialized bodies in the State party to conduct inquiries or investigate cases of enforced disappearance. It notes too that, according to the delegation of the State party, the authority to conduct investigations and prosecutions lies with the judicial police, the ordinary courts and, to some extent, the National Human Rights Commission (art. 12).

28. **The Committee encourages the State party to ensure, in its reform of the Code of Criminal Procedure, that the Code allows victims of enforced disappearance to participate actively and without restrictions in the relevant judicial proceedings. It also invites the State party to consider training some judicial police officers and court officials specifically to investigate, where necessary, alleged cases of enforced disappearance and to conduct criminal prosecutions in cases of this kind.**

### **Measures to prevent enforced disappearances (arts. 16-23)**

#### **Non-refoulement**

29. The Committee takes note of the information provided by the State party concerning the various procedures for expulsion and extradition and the remedies available. It notes, however, that, according to the delegation of the State party, the principle of non-refoulement is not expressly provided for in legislation; this means that there is no guarantee of legal protection for persons who are at risk of enforced disappearance in the event of their return to another State (art. 16).

30. **The Committee recommends that the State party take the necessary steps to incorporate the principle of non-refoulement explicitly into its legislation, in order to ensure that individuals are not at risk of enforced disappearance in the event of their return to another State.**

**Specific remedies concerning the lawfulness of a detention**

31. The Committee notes that the legislation of the State party does not include provision for a specific remedy that would allow all categories of persons covered by the Convention to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention. The Committee notes that the absence of such a provision deprives persons detained or, if they are not able to exercise the right themselves, any persons with a legitimate interest, as provided for in article 17 (2) (f) of the Convention, of a remedy by which to establish the lawfulness of their detention (art. 17).

**32. The Committee encourages the State party to take the necessary measures to provide in its criminal legislation for a specific remedy that would allow all categories of persons covered by the Convention to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful, in accordance with the provisions of article 17 (2) (f) of the Convention and other relevant international standards.**

**Keeping of registers and access to information**

33. The Committee notes with concern that the deliberate failure to record a deprivation of liberty or the information provided for in article 17 (3) of the Convention is not automatically subject to sanctions. The Committee notes that such failure may give rise to an investigation only if there is deliberate intention on the part of the official responsible for the official register to participate as an accomplice in an offence. The Committee further notes the absence of any information concerning the possibility of imposing sanctions for refusal to provide information on a deprivation of liberty or the provision of inaccurate information (arts. 17, 18 and 22).

**34. The Committee recommends that the State party ensure that registers are properly maintained and guarantee that any person with a legitimate interest has the right and a real possibility of access to information concerning the disappeared persons referred to in article 17 (3), in accordance with article 18 (1). It also recommends that explicit provision be made in the State party's criminal legislation, in accordance with article 22 of the Convention, for sanctions to be imposed for deliberate failure to record a deprivation of liberty or the relevant information, as well as for deliberate refusal to provide such information.**

**Human rights training, particularly on the provisions of the Convention**

35. The Committee takes note of the information concerning training in human rights and standards governing the deprivation of liberty provided to members of the police and the prison service. The Committee notes, however, that such training does not specifically cover the Convention (art. 23).

**36. The Committee encourages the State party to ensure that the training provided to military and civilian law-enforcement personnel, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty, including judges, prosecutors and other judicial officials at all levels, incorporates training on the Convention, in accordance with article 23.**

## **Measures to provide reparation and to protect children against enforced disappearance (arts. 24 and 25)**

### **Reparation**

37. The Committee welcomes the information on the various mechanisms for obtaining reparation that exist in the State party and are available to victims of enforced disappearance. The Committee also notes that the State party has set up a High Council for Reconciliation and National Unity, which is specifically mandated to receive and address complaints concerning human rights violations committed in the past, with a view to providing reparation, and that the High Council has identified approximately 5,000 such cases (art. 24).

**38. The Committee invites the State party to provide information on possible cases of enforced disappearance that have been identified and addressed by the High Council for Reconciliation and National Unity and on any proposed measures for reparation. It also invites the State party to provide information on the number of cases in which the complainants have preferred to apply to the ordinary courts for the purposes of prosecution.**

### **Protection of the disappeared person**

39. The Committee notes that the State party's Personal and Family Code sets time limits for the issuance of a declaration of death of a missing or disappeared person, which opens the path for settlement of the legal situation of that person in the areas of social welfare, financial matters, family law and property rights. The Committee notes that the issuance of a declaration of death can lead to termination of the search for the disappeared person, unless the prosecutor makes an explicit request for its continuation. While understanding the importance of clarifying the legal situation and social entitlements of the relatives of a disappeared person, the Committee considers that, given the continuous nature of enforced disappearance, this legal procedure should, as a matter of principle, not be based on a presumption that the disappeared person has died until his or her fate has been clarified (art. 24).

**40. The Committee invites the State party to consider revising its legislation to ensure that, in a case of enforced disappearance, a declaration of death of a missing or disappeared person does not remove the obligation on the State party to continue its investigation pursuant to article 24 (3) and (6) of the Convention. The Committee invites the State party to establish a balance in its legislation between the need to clarify the legal situation and rights of the relatives of a missing or disappeared person and the interest and rights of that person, and specifically the obligation on the State party to continue its investigation.**

### **Legislation on the protection of children**

41. The Committee takes note of the measures taken by the State party to categorize the production and use of forged documents as a criminal offence. It notes, however, that, according to the delegation of the State party, its legislation does not contain any specific provision making it possible to prevent or punish under its criminal law the falsification, concealment or destruction of documents attesting to the true identity of the children referred to in article 25 (1) (a) of the Convention.

**42. The Committee recommends that the State party strengthen its criminal legislation specifically to prevent and punish cases of falsification, concealment or destruction of documents attesting to the true identity of the children referred to in article 25 (1) (a).**

## **D. Dissemination and follow-up**

43. The Committee wishes to recall the obligations undertaken by States when ratifying the Convention and, in this connection, urges the State party to ensure that all the measures it adopts, irrespective of their nature or the authority from which they emanate, are in full accordance with the obligations it assumed when ratifying the Convention and other relevant international instruments. In this regard, the Committee particularly urges the State party to ensure the effective investigation of all enforced disappearances and the full satisfaction of the rights of victims as set forth in the Convention.

44. The Committee wishes to emphasize the particularly cruel effect of enforced disappearances on the rights of women and children. In the case of women, it makes them particularly vulnerable to sexual and other forms of gender violence. Women who are relatives of a disappeared person are particularly likely to suffer serious social and economic consequences and to be subjected to violence, persecution and reprisals as a result of their efforts to locate their loved ones. Children who are victims of enforced disappearance, either because they themselves have been subjected to disappearance or because they suffer the consequences of the disappearance of their relatives, are especially vulnerable to numerous human rights violations, including identity substitution. In this context, the Committee places special emphasis on the need for the State party to ensure that gender perspectives and child-sensitive approaches are used in implementing the rights and obligations set out in the Convention.

45. The State party is encouraged to disseminate widely the Convention, its report submitted under article 29 (1) of the Convention, the written replies to the list of issues drawn up by the Committee and the present concluding observations, in order to raise awareness among the judicial, legislative and administrative authorities, civil society and non-governmental organizations operating in the State party and the general public. The Committee also encourages the State party to promote the participation of civil society in the actions taken in line with the present concluding observations.

46. In accordance with the Committee's rules of procedure, by 18 March 2017 at the latest, the State party should provide relevant information on its implementation of the Committee's recommendations, as contained in paragraphs 10, 14 and 32.

47. Under article 29 (4) of the Convention, the Committee requests the State party to submit, no later than 18 March 2022, specific and updated information on the implementation of all its recommendations and any other new information on the fulfilment of the obligations contained in the Convention, in a document prepared in accordance with paragraph 39 of the guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention (CED/C/2). The Committee encourages the State party to promote and facilitate the participation of civil society in the preparation of this information.

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