



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

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## Committee on Enforced Disappearances

### Statement on non-State actors in the context of the International Convention for the Protection of All Persons from Enforced Disappearances

#### I. Introduction

The Committee on Enforced Disappearances,

Bearing in mind the object and purpose of the Convention,

Recalling the preamble of the Convention, under which States parties are aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity; is determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance; reaffirms the right of victims to justice and to reparation; and affirms the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to that end,

Recalling also article 2 of the Convention, under which, for the purposes of the Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law; and article 3, under which each State party must 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,

Recalling further article 5 of the Convention, under which the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and should attract the consequences provided for under such applicable international law,

Noting article 7 of the Rome Statute of the International Criminal Court, under which enforced disappearance of persons constitutes a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (art. 7 (1) (i)); and is defined as the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time (art. 7 (2) (i)),



Noting also that the International Committee of the Red Cross (ICRC) has recognized that enforced disappearance is prohibited under customary international law applicable in both international and non-international armed conflicts,<sup>1</sup>

Recalling article 28 of the Convention,

Having reviewed the case law of the Human Rights Committee and other treaty bodies, the practice of the special procedures of the Human Rights Council, and the case law of regional tribunals and human rights mechanisms and other relevant bodies, and having consulted the relevant human rights bodies with a view to ensuring the consistency of their respective observations and recommendations,

With a view to clarifying the scope of applicability of the Convention with regard to acts committed by non-State actors, the obligations of States parties in that regard, and the implications thereof for the functions entrusted to the Committee,

Decides to issue the present statement.

## **II. Notion of non-State actors**

1. There is no existing definition in international law of the notion of “non-State actors”. During the drafting of the Convention, various proposals were made by States on the way in which to refer to non-State actors. In the absence of consensus, States decided to use the neutral phrase “persons or groups of persons”, making clear through the use of the conjunction “or” in article 2 that the phrase was not referring to “agents of the State” (“agents of the State or persons or groups of persons”). In the light of the *travaux préparatoires*, and without prejudice to any reference to related items, the Committee does not consider it necessary to define the notion of “non-State actors” beyond the content of the Convention. However, the Committee deems it necessary to elaborate more specifically on the conditions and criteria that must be fulfilled for disappearance perpetrated by “persons or groups of persons” that are not State agents to be considered “enforced disappearance” within the meaning of the Convention.

## **III. Enforced disappearance committed by non-State actors falling within the scope of article 2**

2. Article 2 of the Convention deals with enforced disappearance perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State. It covers circumstances under which the acts or omissions of persons or groups of persons that are not agents of the State may nevertheless be attributed to the State and thus trigger the State’s responsibility in international law. Such attribution may occur in any context, including situations of international or non-international armed conflict.

3. “Authorization” means that the State, through its agents, has either orally or in writing given permission to persons or groups of persons to commit disappearance.

4. “Support” means that the State has provided some assistance to persons or groups of persons who have committed enforced disappearance, inter alia, through the sharing of information and/or the provision of means such as infrastructure, funding, weapons, training or logistics. For the purpose of attribution in this context, support does not have to be provided with the specific aim of committing enforced disappearance.

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<sup>1</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules* (Geneva, ICRC; Cambridge, United Kingdom, Cambridge University Press, 2005), rule 98.

5. “Acquiescence” means that the State knew, had reasons to know or ought to have known of the commission or of the real and imminent risk of commission of enforced disappearance by persons or groups of persons, but that one of the following applies:

(a) The State has either accepted, tolerated or given consent to this situation, even implicitly;

(b) The State has deliberately and in full knowledge, by action or omission, failed to take measures to prevent the crime and to investigate and punish the perpetrators;

(c) The State has acted in connivance with the perpetrators or with total disregard for the situation of the potential victims, facilitating the actions of the non-State actors who commit the act;

(d) The State has created the conditions that allowed their commission.

6. In particular, there is acquiescence within the meaning of article 2 when there is a known pattern of disappearance of persons and the State has failed to take the measures necessary to prevent further cases of disappearance and to investigate the perpetrators and bring them to justice.

7. In such cases, the State has the burden of proving that there was no acquiescence on its part, and it must demonstrate that it has taken concrete measures and action to prevent, investigate and punish the crime, and that such measures have been effective in practice.

8. The circumstances covered under article 2 apply, inter alia, to so-called “paramilitary groups”,<sup>2</sup> “civil patrols”<sup>3</sup> and private security companies.<sup>4</sup> They may also apply to persons involved in organized crime,<sup>5</sup> in particular groups of smugglers or traffickers, and extend to any individuals or groups of individuals, including informal groups or networks, from the moment when they received the authorization, support or acquiescence of a State authority.

#### **IV. Disappearance committed by non-State actors falling within the scope of articles 3 and 5**

9. The Committee is concerned about the growing number of allegations of disappearance imputable to non-State actors acting without the authorization, support or acquiescence of the State, some of which have been reported in the context of the Committee’s consideration of States parties’ reports under article 29 of the Convention.<sup>6</sup>

<sup>2</sup> See Inter-American Court of Human Rights, *Case of the 19 Merchants v. Colombia*, Judgment, 5 July 2004; Inter-American Court of Human Rights, *Case of the “Mapiripán Massacre” v. Colombia*, Judgment, 15 September 2005; and Human Rights Committee, *Serna et al. v. Colombia* (CCPR/C/114/D/2134/2012).

<sup>3</sup> Inter-American Court of Human Rights, *Case of Blake v. Guatemala*, Judgment, 24 January 1998, paras. 76 and 78.

<sup>4</sup> Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict (Montreux, ICRC, 2008), part one, para. 7.

<sup>5</sup> CED/C/MEX/VR/1 (Findings), para. 13: “Acts of enforced disappearance continue to be committed directly by public officials at the federal, state and municipal levels. In addition, persons involved in organized crime, with various forms of collusion and varying degrees of participation, acquiescence or omission by public officials, have become some of the main perpetrators of disappearances.”

<sup>6</sup> CED/C/IRQ/CO/1, paras. 22 and 23, and CED/C/IRQ/OAI/1, paras. 8 and 9; CED/C/COL/CO/1, paras. 23 and 24, and CED/C/COL/OAI/1, paras. 22 and 23; CED/C/MEX/CO/1, paras. 23 and 24, and CED/C/MEX/OAI/1, paras. 10 and 11; CED/C/GAB/CO/1, paras. 19 and 20; CED/C/HND/CO/1, paras. 28 and 29; CED/C/PAN/CO/1, paras. 12 and 13; CED/C/NER/CO/1, paras. 18 and 19; and CED/C/GRC/CO/1, paras. 26 and 27.

10. Bearing in mind articles 37 and 43 of the Convention,<sup>7</sup> the Committee considers that the Convention is a living instrument and should be interpreted in the light of present-day conditions and of the evolution of international law.

11. Under article 5 of the Convention, the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and should attract the consequences provided for under such applicable international law. The Rome Statute had already been adopted when the Convention was adopted in 2006, and has now been incorporated into the legislation of at least 46 States.<sup>8</sup> Article 7 of the Statute has also been transposed into the statutes of hybrid tribunals.<sup>9</sup> The International Criminal Court and other tribunals have developed case law related to enforced disappearance as a crime against humanity.<sup>10</sup> In 2009, the Working Group on Enforced or Involuntary Disappearances stated it was convinced that the definition given in article 7 (1) of the Rome Statute now reflected customary international law and could thus be used to interpret and

<sup>7</sup> Article 37 reads as follows: “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 43 reads as follows: “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.”

<sup>8</sup> See <https://justicebeyondborders.com>. See also A/HRC/16/48/Add.3 and A/HRC/16/48/Add.3/Corr.1, paras. 13–15, in which the Working Group on Enforced or Involuntary Disappearances noted that, at that time, 45 States had criminalized enforced disappearance as a crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, following the definitions of crimes against humanity and of enforced disappearance provided for in article 7 of the Rome Statute. The Working Group encouraged more States to ratify the Rome Statute and to transpose the crimes of the Rome Statute into domestic law, while reiterating its reservations on the specific definition of enforced disappearance provided for by the Rome Statute, and recommending that that definition be interpreted by the national authorities in line with the more adequate definition provided for in article 2 of the Convention.

<sup>9</sup> See regulation No. 2000/15 of 6 June 2000 of the United Nations Transitional Administration in East Timor, on the establishment of panels with exclusive jurisdiction over serious criminal offences, sects. 5 (1) (i) and 5 (2) (h); Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990 (annexed to the Agreement between the Government of Senegal and the African Union on the Establishment of Extraordinary African Chambers within the Senegalese Judicial System, which was signed in Dakar on 22 August 2012), art. 6 (f); Act No. 10.001 of 6 January 2010 on the Criminal Code of the Central African Republic, art. 153, and Organic Act No. 15.003 of 3 June 2015 on the creation, organization and functioning of the Special Criminal Court; and Act No. 05/L-053 of 3 August 2015 on Specialist Chambers and Specialist Prosecutor’s Office of the Assembly of Republic of Kosovo, art. 13 (1) (i) (references to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999)).

<sup>10</sup> International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Trial Chamber I, *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Judgment, 15 April 2011, paras. 1831–1839 and 1891; Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, *Prosecutors v. Nuon Chea and Khieu Samphan*, Case No. 002/01, Judgment, 7 August 2014, paras. 441–444 (see also paras. 640–643, 653–657, 942, 1029, 1032, 1036 and 1054); Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, *Prosecutors v. Nuon Chea and Khieu Samphan*, Case No. 002/02, Judgment, 16 November 2018, paras. 753–755 (see also paras. 1200–1204, 1422–1429, 1708–1712, 1838–1846, 2852–2858, 3160–3166, 3341, 3342, 3927, 4147, 4152 and 4198); Extraordinary African Chambers within the Senegalese judicial system, Trial Chamber (*Chambre africaine extraordinaire d’assises*), *Ministère public c. Hissène Habré*, Judgment, 30 May 2016, para. 1471; and International Criminal Court, Pretrial Chamber III, *Situation in the Republic of Burundi*, Case No. ICC-01/17-X, public redacted version of “Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Burundi” (ICC-01/17-X-9-US-Exp, 25 October 2017), 9 November 2017, para. 120.

apply the provisions of the Declaration on the Protection of All Persons from Enforced Disappearances.<sup>11</sup>

12. Article 3 of the Convention deals with acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State. It covers situations in which the acts or omissions of persons or groups of persons are not attributable to the State, because the persons have no link to the State authorities and the State did not authorize, support or give its acquiescence to the acts or omissions. The *travaux préparatoires* revealed diverging views among States as to whether disappearance perpetrated in such circumstances should be called or equated to “enforced disappearance”.<sup>12</sup> As a result, it was decided to refer to such acts in a separate article and to use the wording “acts defined in article 2” instead of “enforced disappearance”. One major concern was to avoid the confusion between enforced disappearance and other crimes such as abduction or kidnapping.<sup>13</sup> This concern still exists today, including for the Committee.

13. As noted above, in the context of armed conflict, ICRC has recognized that the prohibition of enforced disappearance is a norm of customary international humanitarian law.<sup>14</sup> This norm is applicable in both international and non-international armed conflicts. In the latter case, it applies to all parties, including armed groups with some level of organization.

14. The Committee is also aware of the practice of some commissions of inquiry set up after 2006 that have classified disappearance perpetrated by non-State actors as enforced disappearance.<sup>15</sup>

15. The Committee notes that in 2019, the Working Group on Enforced or Involuntary Disappearances decided, in the light of its humanitarian mandate, to document cases concerning acts tantamount to enforced disappearance allegedly perpetrated by non-State actors that exercised effective control and/or government-like functions over a territory.<sup>16</sup>

16. Based on the foregoing, the Committee considers it necessary to clarify the legal status of disappearance perpetrated by non-State actors acting without the authorization, support or acquiescence of the State, distinguishing cases that constitute “enforced disappearance” as a crime against humanity under article 5 of the Convention from those defined in article 2 that fall within the scope of article 3 of the Convention.

17. Under article 5 of the Convention, disappearance perpetrated by a non-State actor acting without the authorization, support or acquiescence of the State constitutes “enforced disappearance” if committed as part of a widespread or systematic attack against a civilian population, in compliance with the definition of crimes against humanity in international criminal law.

18. An act defined in article 2 committed by a non-State actor acting without the authorization, support or acquiescence of the State falls under article 3 of the Convention in either of the following circumstances:

<sup>11</sup> Working Group on Enforced or Involuntary Disappearances, general comment on enforced disappearance as a crime against humanity, para. 14 ([A/HRC/13/31](#) and [A/HRC/13/31/Corr.1](#), para. 39).

<sup>12</sup> [E/CN.4/2003/71](#), paras. 35 and 39; and [E/CN.4./2004/59](#), para. 17.

<sup>13</sup> [E/CN.4/2006/57](#), para. 13: “Many delegations suggested replacing the words ‘enforced disappearances’ by a reference to acts or conduct described or defined in article 1, in order to highlight the fact that disappearances committed by non-State actors are not of the same nature as those committed by agents of the State and fall outside the sphere of application of article 1.”

<sup>14</sup> Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, vol. I, *Rules*, rule 98.

<sup>15</sup> Independent International Commission of Inquiry on the Syrian Arab Republic (“Without a trace: enforced disappearances in Syria”, conference room paper, 19 December 2013; available at <https://www.ohchr.org/en/hr-bodies/hrc/iici-syria/documentation>), Group of Eminent International and Regional Experts (“Situation of human rights in Yemen, including violations and abuses since September 2014: detailed findings of the Group of Eminent International and Regional Experts on Yemen”, conference room paper, 29 September 2020, para. 166; available at <https://www.ohchr.org/en/hr-bodies/hrc/yemen-gee/index>); and Independent Fact-Finding Mission on Libya ([A/HRC/48/83](#), annex II, para. 14).

<sup>16</sup> [A/HRC/42/40](#), para. 94.

(a) It was perpetrated in the context of a non-international armed conflict, as defined in international humanitarian law;

(b) It was perpetrated by a non-State actor exercising effective control and/or government-like functions over a territory.

19. Other acts defined in article 2 falling within the scope of article 3 but not perpetrated in either of the above circumstances are generally characterized as “kidnapping” or “abduction”, or as appropriate under domestic law.

## **V. Obligations of States parties in relation to disappearance committed by non-State actors falling within the scope of articles 3 and 5**

20. Under article 3 of the Convention, States parties have the obligation to 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. As a corollary, States have an obligation to search for disappeared persons in accordance with the Guiding Principles for the Search for Disappeared Persons adopted by the Committee.<sup>17</sup> In order to comply fully with such obligations, States must ensure full respect for the rights of victims, including children.

21. In the case of enforced disappearance falling under article 5 of the Convention, States parties must apply all the provisions of the Convention, specifically fulfilling their obligations set forth in articles 4 to 16, 24 and 25.

22. In addition, the Committee recalls that under international law, States have strict obligations with regard to due diligence when they have knowledge of a case of disappearance, or of a real and imminent risk of disappearance, perpetrated by a non-State actor. These due diligence obligations are particularly strict where women or girls are involved, owing to the link that the disappearance may have with, *inter alia*, acts of sexual violence, femicide and trafficking in women.

## **VI. Procedural consequences**

23. In the context of their reporting obligations under article 29, States parties must report on all cases of disappearance attributable to non-State actors falling within the scope of articles 3 and 5 of the Convention, as explained in section IV above, and on the fulfilment of their obligations under those articles, as specified in section V above.

24. In the context of requests for urgent action under article 30 of the Convention, the Committee may decide to register cases of disappearance allegedly committed by non-State actors falling within the scope of article 3 and 5, as explained in section IV above, and request the State to search for and locate the person as a matter of urgency. Even though the State may not immediately have the capacity to search for and locate the person – for instance, if the non-State actors alleged to be responsible for the disappearance have control over the territory in which the person was disappeared – the Committee may request the State party to take all reasonable measures, within the scope of their powers, that are necessary to do so, including interim measures, such as the following: registering the case in a specific database; securing mass graves and preserving evidence; collecting relatives’ DNA; providing assistance to relatives, including legal and psychological assistance; and taking steps, to the extent possible, to obtain information from the non-State actor as to the fate or whereabouts of the disappeared person.

25. Under articles 31 and 32 of the Convention, the Committee may receive communications alleging that a State party has violated its obligations under articles 3 and 5 with respect to disappearance allegedly committed by non-State actors.

26. Under article 33 of the Convention, if the Committee receives reliable information indicating that a State party is seriously violating its obligations with respect to disappearance

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<sup>17</sup> CED/C/7, annex.

attributable to non-State actors falling within the scope of articles 3 and 5, the Committee 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.

27. Under article 34 of the Convention, the Committee may, after seeking all the relevant information on the situation in the State party, urgently bring to the attention of the General Assembly, through the Secretary-General, widespread or systematic practice of enforced disappearance falling within the scope of article 5 in the territory under the jurisdiction of the State party.

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