



# **International Convention for the Protection of all Persons from Enforced Disappearance**

**A Primer for Governments**



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# Preface

Enforced disappearance is not – not only – an omen of history, a crime from the past, linked with totalitarian regimes and military dictatorships of the XX<sup>o</sup> century. It is a burden for modern societies which have the duty to respect, to protect and fulfill human rights, especially for the victims of enforced disappearance, through the right to truth and to justice, the fight against impunity, and a guarantee of non-repetition.

Enforced disappearance is the cruel negation of the rule of law and the right to *habeas corpus*, it is the deprivation of such basic rights as human dignity and legal personality. It is a “black hole” in the domestic network of rights and duties, of safeguards and remedies. It is a timeless tragedy for relatives and communities abandoned to their plight, without an answer to their queries about beloved ones. It is a longing ordeal, with hope against all hope ...

International cooperation, legal accountability and independent scrutiny are crucial to upkeep the best standards of human rights, especially for such a “complex phenomenon” as enforced disappearance. The International Convention for the Protection of all Persons from Enforced Disappearance is a powerful tool to enact preventive measures and early warning mechanisms, to adopt a legal framework in order to criminalize enforced disappearance as an autonomous crime and as a crime against humanity.

Each year, the UN General Assembly adopts by consensus a resolution on the Convention, sponsored by Argentina, France and Morocco, urging Member States to ratify this universal treaty and to support the activities of the Committee on Enforced Disappearances. Moreover, the Secretary General of the UN makes a strong call for ratification during the International Day of the Disappeared, on August 30.

On behalf of the Committee on Enforced Disappearances, the treaty-body composed of independent experts instituted five years ago and that acts as a caretaker of the new Convention, I hope that these dynamics of ratification will reach every State and all continents. This must be a priority for the international community with the support of all stakeholders, especially civil society. I take this opportunity to commend the dedication and courage of grassroots NGOs across the network of the International Coalition Against Enforced Disappearances (ICAED).

**Prof. Emmanuel Decaux**

President of the Committee on Enforced Disappearances (CED)

# 1. Introduction

The practice of enforced disappearance was “formally recognised” by Adolf Hitler in his Nacht und Nebel Erlass (Night and Fog Decree) issued on 7 December 1941. The aim of such measure was spreading terror and creating a feeling of insecurity within the whole society. In order to reach this aim, persons were arrested, detained or abducted against their will by State agents or by groups or private individuals that acted on behalf of or with the tolerance of the State. This act was followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared persons. Victims were hence placed outside the protection of the law and disappeared “in the night and fog”.

The notion of “missing person” is broader than that of “person subjected to enforced disappearance”. Missing persons or persons unaccounted for, are those whose families are without news of them or are reported missing, on the basis of reliable information, owing to an international or non-international armed conflict, a situation of internal violence or disturbances. The term “missing” is used also for victims of natural calamities or catastrophes.

In certain circumstances missing persons are indeed victims of an enforced disappearance and the terms “missing” and “disappeared” have often been assimilated. Enforced disappearance is always a crime, while this is not necessarily the case for persons reported

missing. This publication will focus on enforced disappearance.

Since 1941 the practice of enforced disappearance has spread all over the world and nowadays it constitutes a global phenomenon that calls for a global response. The establishment of a Working Group on Enforced or Involuntary Disappearances (WGEID) in 1980 constituted a first attempt by the United Nations (UN) General Assembly to address the issue. The WGEID has mainly a humanitarian mandate, as it acts as a channel of communication between the families of the victims and their respective governments. Consequently, the WGEID has no binding powers and no competence in adjudicating on individual complaints. The WGEID is composed of five independent experts that meet three times a year to review the cases of enforced disappearance that have been submitted to it.

In 1992 the UN General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance. Although not legally binding, some provisions of the Declaration have come to be recognized as customary rules or general principles of international law. These provisions deal mainly with the prevention and suppression of enforced disappearance.

Given the declaratory nature of the Declaration and the mere humanitarian scope of the WGEID’s mandate, the international community found itself in need of a binding

legal instrument to effectively tackle enforced disappearance. The movement asking for a specific Convention started in Latin America, particularly in Argentina, and thanks to organizations such as the Latin American Federation of Associations of Relatives of Disappeared-Detainees (FEDEFAM), the issue reached the UN General Assembly.

The International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the UN General Assembly on 20 December 2006 and entered into force on 23 December 2010, after the 20th instrument of ratification had been deposited to the UN Secretary General by Iraq.

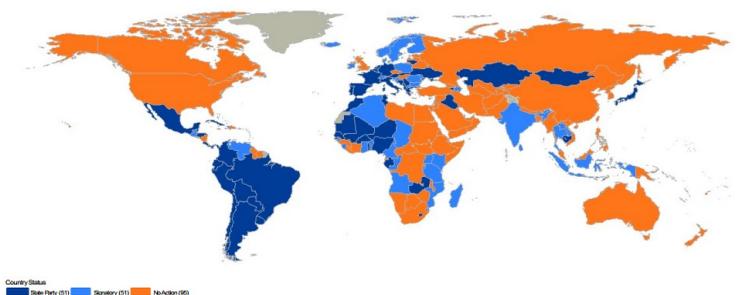
The number of States parties to the Convention keeps growing: as of February 2016, 51 States have already ratified it, the latest being Italy on 8 October 2015. This confirms that although at present Asia is the continent with the highest number of reported cases, enforced disappearances can occur everywhere. In this respect, according to the 2015 Annual Report of the WGEID, it received 150 urgent

cases from 16 countries, the majority of which came from Egypt (66 cases), and Pakistan (57 cases). The WGEID denounces a high rate of underreporting. Hence, these numbers are likely to be significantly higher.

In this context, AFAD has decided to realize two different Primers on the International Convention on the Protection of All Persons from Enforced Disappearance (the Convention). One is directed at States and the other to NGOs and civil society.

This Primer aims at addressing some of the most frequently asked questions by Governments concerning the Convention, thus focusing on the importance of the ratification and implementation of the Convention for States. The Primer directed to NGOs and civil society aims at giving them suggestions and additional tools for their lobbying activities.

Both Primers analyse in-depth the Convention's provisions and the mandate of the Committee on Enforced Disappearances.



[http://www.ohchr.org/Documents/HRBodies/CED/OHCHR\\_Map\\_CPED.pdf](http://www.ohchr.org/Documents/HRBodies/CED/OHCHR_Map_CPED.pdf)

<sup>1</sup> Report of the WGEID, UN Doc. A/HRC/30/38, 10 August 2015, p. 9-13, at: <http://www.ohchr.org/EN/Issues/Disappearances/Pages/Annual.aspx>

## 2. Why Do We Need the Convention?

There are various reasons that explain the need for the Convention.

Firstly, the existing gaps in international human rights law and in international humanitarian law hamper the effective protection of all persons from enforced disappearance.

Already existing legal instruments, such as the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance, have unfortunately proved insufficient to effectively put an end to the practice of enforced disappearance.

Similarly, international mechanisms that have dealt with enforced disappearance to different extents (including the WGEID, the UN Human Rights Committee, the European Court of Human Rights or the Inter-American Commission and Court on Human Rights, and the International Criminal Court) have not yet provided a comprehensive response to eradicate this practice.

Each of these bodies actually faces certain inherent limitations in the respective capacity to deal with enforced disappearance.

### The WGEID

It works mostly as a channel of communication between families of disappeared persons and States, and cannot but rely on the latter's good will to investigate and respond to its communications.

### The Human Rights Committee (HRC)

It monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR). It can receive and examine complaints only with regard to those States that have ratified the ICCPR and its First Optional Protocol. In these cases, it issues views and formulates recommendations. Unfortunately, such decisions often remain unimplemented.

### The European Court of Human Rights (ECHR) and the Inter-American Court of Human Rights (IACHR)

They can issue binding judgments on individual complaints. However, the geographical scope of their competence is limited and the proceedings before both may be extremely lengthy and complicated.

### The International Criminal Court (ICC)

The ICC could indeed try those responsible for the crime against humanity of enforced disappearance and establish individual criminal responsibility. The Rome Statute however is not a human rights instrument and thus it does not provide any set of measures for the victims. Moreover, when bringing the charges the prosecutor is bound by the definition given in the Statute, which is different from the one contained in the Convention; and investigations can be launched only in certain circumstances depending on where the crime was committed, and on the nationality of the perpetrator

**THE NEED FOR A  
CONVENTION IS THUS  
PRESSING.**

## a. Importance of the Convention for the Families of Disappeared Persons



Families of the disappeared in Argentina  
Source: (<http://savonagraffiti.it/images/articoli2014/appuntamenti/>)

The Convention comes as a result of a 30-year struggle of families of disappeared persons across the world. It thus represents a significant achievement in that it recognises the suffering of thousands of persons and lays the foundations for a different world. The Convention recognises for the first time the autonomous human right of every person not to be subjected to enforced disappearance.

This is an absolute right, that cannot be suspended or derogated at any time, including under exceptional circumstances, times of war, or threats to national security. Moreover, the Convention affirms that, in cases of enforced disappearance, “victim” is not only the disappeared person, but also any other individual who suffered a direct harm due to such enforced disappearance. Hence, the long-lasting struggle and suffering of relatives of disappeared persons is duly acknowledged, and

the Convention represents an effective tool to put an end to such suffering and avoid similar crimes to happen again.

The Convention puts on States the obligation to guarantee various rights, such as the fundamental right not to be subjected to enforced disappearance, the right to know the truth, and the right to reparations.

Moreover, it requires States to take appropriate preventive measures to protect witnesses and all those participating in investigations, to avoid secret detention and ensure fundamental guarantees to all persons deprived of liberty and, in general, to put an end to enforced disappearances. The Convention requires States to search for the disappeared person, and, in the event of death, to identify, respect and return mortal remains. The Convention also establishes that States must identify those responsible for the enforced disappearances concerned, prosecute and sanction them, ensuring that, where applicable, States cooperate among them to achieve these aims.

These elements make the Convention of fundamental importance for the disappeared, their families, and society as a whole.

## b. Importance of the Convention for Governments

The ratification of the Convention would be of great importance from an international point of view, as the State would be recognized as one committed to human rights protection and enforcement. Moreover, the ratification of

the Convention and the subsequent amendment of the domestic legal framework will allow the strengthening of national policies on crime prevention and security.

## C. Frequently Asked Questions on the Importance and Use of the Convention

### i. Are Existing Domestic Provisions, both in the Constitution and in Criminal Legislation, Enough?

Existing domestic provisions both in the Constitution and in criminal legislation are not sufficient to effectively prevent and suppress enforced disappearance. Enforced disappearance is a complex phenomenon that needs specific codification in a State's domestic criminal legislation.

Constitutions normally contain basic human rights principles, but they hardly go in details so as to include all rights involved in an enforced disappearance. As for domestic criminal legislation, it could include the crimes of homicide, arbitrary detention, abduction, perhaps torture, and there might also be provisions concerning the prevention of these crimes.

However, although these offences may form part of a type of enforced disappearance, none of them is sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection. Also those States that codify enforced disappearance as a crime against humanity when committed as part of a widespread or systematic attack against civilian population remain at odds with their international obligations and do not offer adequate guarantees, as isolated acts of

enforced disappearance would not be encompassed, thus fostering impunity.

For these reasons, the Convention obliges States to introduce in their criminal legislation the autonomous offence of enforced disappearance and to sanction it in accordance with its extreme gravity. For this crime, there is an *aut dedere aut judicare* obligation and precise duties are attached to the obligation to investigate and search for the disappeared. In addition, the Convention provides for specific conditions under which a person may be deprived of his or her liberty and a wide range of guarantees for all persons deprived of liberty and their families.

The Convention also requires States to adopt many other measures to ensure that their criminal, civil and administrative legislation offer adequate guarantees to disappeared persons and their families. Until all these measures are not enacted, domestic legislative frameworks remain plagued by loopholes that jeopardise the prevention and suppression of enforced disappearance.

### ii. Are Other International Human Rights Treaties Enough?

Normally, they are not.

#### **The Inter-American Convention on Human Rights (IACvHR)**

The IACvHR is only binding upon those Latin

American States that have ratified it. It does not mention the autonomous right not to be subjected to enforced disappearance, nor the right to truth or the prohibition of secret detention. The IACHR is a court of last resort.

### **The European Convention on Human Rights (ECvHR)**

The ECvHR is binding only upon the member States of the Council of Europe. It does not enshrine the autonomous right not to be subject to enforced disappearance, the right to recognition as a person before the law or the right to know the truth. The ECHR gives a more restrictive interpretation to the notions of ‘victims’ and ‘reparations’.

### **The Convention Against Torture (CAT)**

Although enforced disappearance is a form of torture, the focus of the CAT is too narrow to encompass all the elements of an enforced disappearance. The CAT does not recognise other human rights that are violated in an enforced disappearance (right to know the truth, right to liberty, right to *habeas corpus*, right to a legal personality, right to family life).

### **The ICCPR**

The ICCPR does not contain provisions on the prohibition of enforced disappearance, and the right to know the truth. It does not provide for an urgent investigation procedure and does not contain criminal law provisions (obligation to criminalise enforced disappearance, superior responsibility, statute of limitations). The HRC issues views and formulates recommendations that often remain unimplemented.

In addition to the mentioned limitations, as each body has its own rules of procedure and its own jurisprudence, similar cases may be adjudicated in different ways.

Although an enforced disappearance infringes upon many rights, it is more complex and it entails something more than fragmented violations. As a consequence, other international human rights treaties are not suitable to capture its specificities and the Convention remains the only effective international instrument to comprehensively address this practice.



**STATES SHALL  
THUS RATIFY THE  
CONVENTION AND  
IMPLEMENT ITS  
PROVISIONS INTO  
THEIR DOMESTIC  
LAW.**

### **iii. What Can the Convention Do for Cases of Enforced Disappearance That Commenced Before its Entry into Force?**

According to Art. 35 of the Convention, the Committee on Enforced Disappearances is competent to deal only with enforced disappearances that commenced after the entry into force of the Convention for the State concerned.

However, the Committee on Enforced Disappearances clarified that it can nonetheless learn about enforced disappearances that commenced before the entry into force of the Convention when it examines the reports presented by States on the measures adopted to give effect to the Convention. In fact, States remain under an obligation to establish the truth on an enforced disappearance, to investigate and sanction those responsible and to provide reparations also with regard to enforced disappearances that commenced prior to the ratification of the Convention by the State concerned.

### **iv. Does the Convention Require to Amend Existing Domestic Legislation?**

Yes, the Convention obliges States to adapt their legislation in order to meet the international standards. In particular, Art. 4 of the Convention requires the codification of the crime of enforced disappearance as a separate offence in domestic legislation, to which ‘appropriate penalties’ must be attached.

Arts. 6 and 7 require States to amend domestic criminal legislation to sanction also superiors responsible for enforced disappearance, as well as all other persons involved in the

perpetration of enforced disappearance, such as accomplices. Mitigating and aggravating circumstances may be envisaged.

Art. 22 requires States to codify and sanction the delaying or obstruction of access to remedies related to persons deprived of liberty; the failure to record the deprivation of liberty of a person, or the recording of any information which the official responsible for the detention register knew or should have known to be inaccurate; and the 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.

Art. 23, para. 2, establishes that States must explicitly prohibit orders or instructions prescribing, authorizing or encouraging enforced disappearances.

Art. 24, para. 6, requires States to adopt adequate measures to regulate the legal status of disappeared persons and that of their relatives, in fields such as social welfare, financial matters, family law and property rights. The Committee on Enforced Disappearances has interpreted this in the sense of requesting States to introduce in their legal systems the “certificate of absence due to enforced disappearance”.

Art. 25 obliges States to codify 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. States must also codify as crimes the falsification, concealment or destruction of documents attesting to the true identity of disappeared children. Eventually, States that recognise systems of adoption must have legal procedures in place to review the adoption or, where appropriate, to annul any adoption of children that originated in an enforced disappearance.

Finally, States may need to envisage also other amendments to make sure to fully reflect in their legislation the rights enshrined in the Convention. For instance, States may consider recognising the right not to be subjected to enforced disappearance or the right to know the truth in their Constitution, or to adopt legislative measures that allow them to enforce other provisions of the Convention (e.g. the right to reparation, inter-state cooperation, etc.).

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

The Convention was adopted by the UN Human Rights Council in June 2006 and by the General Assembly in December of the same year. It was opened for signature on 6 February 2007 and it entered into force on 23 December 2010. It is the only universal human rights instrument addressing enforced disappearance that is legally binding upon State parties.

### a. Definition of ‘Enforced Disappearance’ and of ‘Victims’

#### Article 1: A New Human Right in the Form of an Absolute Prohibition of Enforced Disappearance

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.

#### Q: What Is an Absolute Prohibition?

A: Art. 1 establishes for the first time in international law the specific human right not to be subjected to enforced disappearance. As this right is attributed to everyone, everywhere and no suspension or limitations to it can be justified under any circumstances, the prohibition of enforced disappearance is absolute and cannot be suspended or derogated.

The existence of this right creates obligations on States parties to ensure the right is respected, to make sure that their national legislation expressly prohibits enforced disappearance and that this prohibition applies in all circumstances.

## Article 2: Definition of Enforced Disappearance

For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other forms 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.

### Q: What Is an Enforced Disappearance?

A: An enforced disappearance is composed of three constitutive elements:

- (1) The arrest, detention, abduction or any forms of deprivation of liberty of the victim: this deprivation of liberty can start either legally or illegally.
- (2) Perpetrated by agents of the State (e.g. police or soldiers) or by persons or groups of persons that act with the tolerance, acquiescence or support of the State (e.g. paramilitary groups).
- (3) The deprivation of liberty of the victim is followed by the refusal to acknowledge it or by the concealment of the fate or whereabouts of the disappeared person.

As a consequence of an enforced disappearance, the victim is placed outside the protection of the law.

States must ensure that the definition of enforced disappearance is accurately transposed into domestic legislation and that no justification can ever be accepted for violation of the right not to be subjected to enforced disappearance.

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## Article 3: Enforced Disappearances and Non-State Actors

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.

### Q: What Are the State’s Obligations in respect to Acts of Similar Nature Committed by Non-State Actors?

A; The Convention establishes that when acts of the same nature of an enforced disappearance are committed by so-called non-state actors (e.g. terrorist groups, guerrilla and insurgents) **States remain under an obligation to investigate, prosecute and sanction those responsible.**

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## Article 24: Definition of Victims of Enforced Disappearance and Their Fundamental Rights

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.
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.

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.

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.

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

## Q: Who is a Victim and What are His or Her Rights?

A: The Convention adopts a very broad notion of “victim” including all persons who were subjected to an enforced disappearance, as well as “any individual who has suffered harm as the direct result” of the crime. Consequently, the family, the community and perhaps the organisation the person belonged to (e.g. trade union, political party, religious community), can all be considered as victims under the Convention.

Art. 24 is the corner-stone of the Convention and enshrines the fundamental rights recognised to victims of enforced disappearance and the corresponding States’ obligations.

Art. 24, para. 2, recognises the fundamental **right to know the truth** about the circumstances of the enforced disappearance, the fate and whereabouts of the disappeared and the progress, and results of the investigations.

Art. 24, para. 3, obliges States to **search for the disappeared person** until they establish the truth about the victim’s fate and whereabouts. In case of death, the mortal remains must be located, exhumed, identified, respected and returned to the family.

Art. 24, paras. 4 and 5, require that States provide **prompt, fair and adequate compensation to victims** of enforced disappearance, **as well as other measures of reparation**, including restitution (for example, restitution of property, reinstatement of job), rehabilitation (for instance, medical and

psychological care), satisfaction (for example, disclosure of the truth and public apologies) and guarantees of non-repetition (for instance, institutional and legislative reforms).

Art. 24, para. 6, obliges States parties to adopt adequate measures (e.g. issuing “certificates of absence due to enforced disappearance”) to **regulate the legal status of the disappeared person** and his or her relatives in fields such as social welfare, financial matters, family law and property rights. This avoids the additional emotional burden to obtain certificates of death, when the fate and whereabouts of the disappeared remain unknown.

Art. 24, para. 7, requires States to guarantee the right to form and participate freely in associations dealing with enforced disappearance (e.g. associations of relatives of disappeared person, NGOs). This is a tribute to the efforts undertaken by organisations and associations of families of the victims in the struggle against enforced disappearance.

States must enact appropriate legislation to regulate the legal status of disappeared persons particularly in fields of social welfare, financial matters, family law and property rights. The Committee on Enforced Disappearances considers that “certificates of absence due to enforced disappearance” are adequate to fulfil this obligation.

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## Article 25: Enforced Disappearance of Children

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 forms 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.

### Q: What Are States' Obligations in respect to Enforced Disappearances of Children?

A: Art. 25 of the Convention deals with the special phenomenon of the enforced disappearance of children and spells out States' obligations in this regard, considering the special vulnerability of children and the obligation to duly take into account the best interest of children.

**States must adopt legislative measures** to codify as crimes the enforced disappearance of children and their subsequent wrongful removal, as well as the falsification of the documents attesting to their true identity.

**States must cooperate among themselves to search and locate disappeared children** and, when an adoption is found to originate in an enforced disappearance, **States must have legal procedures** to review and, when appropriate, to **annul such adoptions**.



A child offers flowers to *desaparecidos* in the Philippines during the observance of All Souls' Day.

(Source: <http://www.gmanetwork.com/news/photo/47760>)

## b. Criminal Provisions

### Article 4: Criminalization of Enforced Disappearance

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

### Article 5: Enforced Disappearance as a Crime Against Humanity

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.

### Article 6: Individual Criminal Responsibility

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;

(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.

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

### Article 7: Punishment

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

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.

### Article 8: Statute of Limitations

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.

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

### Q: What Does the Criminalisation of Enforced Disappearance Entail?

A: Arts. 4 and 5 require States to **codify** in domestic legislation enforced disappearances both as an **autonomous crime and as a crime against humanity**. Because it is specifically indicated that enforced

disappearance shall be ‘an offence’, States cannot rely on already existing criminal provisions leading to a separate prosecution of the elements of an enforced disappearance (such as arbitrary arrest, abduction, etc.).

When an enforced disappearance takes place in the context of a widespread or systematic attack against civilian population, the offence constitutes a crime against humanity. International criminal law regulates the consequences of the act.

### Q: Who is to be Held responsible for the Crime of Enforced Disappearance?

A: Art. 6 requires States to hold criminally responsible any person directly involved in the commission of the crime, as well as a superior in three cases:

- (i) he knew that a subordinate under his authority was committing or about to commit the crime;
- (ii) he exercised responsibility and control over activities concerned with the crime; and
- (iii) he failed to take all necessary measures to prevent or punish the commission of the crime.

Moreover, Art. 6, para. 2, prescribes that superior orders can never be invoked as a justification for the commission of an enforced disappearance. On the contrary, under international law there is a duty to disobey an order that is manifestly unlawful.

States parties must introduce the autonomous offence of enforced

disappearance into their domestic legislation. Furthermore, States are required to exclude superior orders as a possible defence and to refrain from creating new defences that could mitigate or exclude criminal responsibility.

### Q: What is the Penalty Foreseen for the Commission of an Enforced Disappearance?

A: Art. 7 does not provide for a specific penalty for the commission of an enforced disappearance, but it requires such penalty to be ‘appropriate’, taking into account the ‘extreme seriousness’ of the offence. A death penalty, however, should always be excluded as not appropriate, rather imposing a maximum sentence of life-imprisonment.

Art. 7, para. 2, allows States to introduce in their legislation mitigating circumstances, that aim at reducing the penalty particularly for persons who helped clarify the fate and whereabouts of the disappeared; and aggravating circumstances, which on the contrary make the penalty heavier in case vulnerable persons are subjected to enforced disappearance.

States parties must introduce the autonomous offence of enforced disappearance into their domestic legislation. Furthermore, States are required to exclude superior orders as a possible defence and to refrain from creating new defences that could mitigate or exclude criminal responsibility.

## Q: Under Which Circumstances Are Statutory Limitations Applicable to Enforced Disappearances?

A: According to Art. 8, para. 1, enforced disappearances committed as crimes against humanity are not subjected to statutes of limitation. In other cases, States that apply statutory limitations, must ensure that in cases of enforced disappearances the term is of long duration and that it starts running from the moment the offence ceases, taking into account the continuous nature of the crime at stake.

## Q: What Does the ‘Continuous Nature’ of the Crime Entail?

A: An enforced disappearance starts with the deprivation of liberty of the victim and continues until **his or her fate or whereabouts has been established with certainty**. In this sense, the offence has a continuous nature. As a result, States parties must ensure that the term of limitation for criminal proceedings does not begin until the fate or whereabouts of the disappeared has been clarified.

States remain under an obligation to investigate and search for the disappeared until his or her fate and whereabouts are established with certainty. The obligation to prosecute perpetrators lasts until the term provided by the statutes of limitation has expired.

## Q: When Is a Remedy ‘Effective’?

A: Art. 8, para. 2, requires States to provide victims with an effective remedy during the term of limitation. A remedy is ‘effective’ when

it is real and not merely theoretical, it is available to the persons concerned and capable of restoring the enjoyment of the rights violated. In the event such remedy should become temporarily unavailable, the term of limitation should be suspended until the remedy has been re-established.

Enforced disappearances that amount to crimes against humanity are not subjected to any statute of limitation. In other cases, if States apply statutory limitations, they must be of long duration and take into account the continuous nature of the offence. Victims must be granted an effective remedy during the term of limitation.

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### Article 9: Criminal Jurisdiction

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.

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.

### 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.

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.

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 11: Rights of the Accused

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, 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.

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.

### Q: On Which Grounds Can a State Establish Its Criminal Jurisdiction?

A: Under Art. 9, para. 1, a State can assert its criminal jurisdiction over the accused of enforced disappearance on the basis of **three principles: territoriality**; when the perpetrator is one of its nationals (**active nationality**); and when the victim is one of its nationals (**passive nationality**).

Moreover, States must adopt legislative measures that enable them to exercise universal jurisdiction. When the accused is present on the State's territory, the State has a choice between the exercise of its criminal jurisdiction and the extradition of the accused to another State or international criminal tribunal (*aut dedere aut judicare*).

### Q: What Are State's Obligations if It Decides Not to Extradite or Surrender a Person Accused of Enforced Disappearance?

A: Art. 10 prescribes that when the suspect is present on the territory of a State, the latter must take him or her in custody or otherwise ensure his or her presence, and immediately start an investigation with the purpose of prosecution. The State must then notify the State where the offence was committed, or the State of which the offender is a national, or the State of which the victim is a national about the measures taken, the results of the investigation, and its intentions regarding prosecution.

### Q: What Are the Rights of the Accused?

A: According to Art. 11, para. 3, any person accused of enforced disappearance has the **right to a fair trial**. This right entails that he or she must be tried before a competent, independent and impartial court or tribunal established by law. The Committee on Enforced Disappearances has clarified that

military or special courts must not exercise jurisdiction in cases of enforced disappearance.<sup>2</sup>

States parties shall adopt the necessary measures to establish their criminal jurisdiction over the offence.

States must guarantee the right of every accused to a fair trial before a competent, independent and impartial civil court established by law. Military or special courts shall not have jurisdiction over enforced disappearance.

States must ensure that cases of enforced disappearance are effectively prosecuted by adopting measures allowing courts to disregard all types of immunities.

Moreover, those accused of enforced disappearance must not benefit from any amnesty law or similar measure that might have the effect of exempting them from any criminal proceedings or sanction.



(Source: <http://www.archive.org/details/TheMissing>)

<sup>2</sup>Committee on Enforced Disappearances, Statement on Enforced Disappearance and Military Jurisdiction, February 2015, at: [http://tbinetnet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCED%2fSUS%2f7639&Lang=en](http://tbinetnet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCED%2fSUS%2f7639&Lang=en).

## Article 12: The Obligation to Investigate

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.

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.

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.

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.

### Q: What Does the Right to Report Entail?

A: According to Art. 12, any person has the right to report an enforced disappearance to the competent national authorities. To guarantee the effectiveness of this right, States must adopt measures to ensure that every person involved, including legal persons such as associations or NGOs, is protected against possible ill-treatment or intimidation as a consequence of the complaint. In this respect, States must take preventive measures to make sure that persons suspected of being involved in the commission of the offence are not in a position to influence the progress of an investigation.

### Q: When Does the Obligation to Launch an Investigation Commence?

A: States must launch an investigation on cases of enforced disappearance where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, even if there has been no formal complaint.

## Q: What Powers Do National Authorities Have?

A: The national competent authorities must have all necessary powers and resources to conduct an effective investigation, including access to documentation and information relevant to the investigation and access to places of detention or any other place where there are reasonable grounds to believe that the disappeared may be present.

States parties shall guarantee the right to report cases of enforced disappearance to any individual and ensure protection against ill-treatment or intimidation. States must ensure that investigations are launched even if no formal complaint has been submitted (ex officio).

Furthermore, States must adopt preventive measures to avoid having persons suspected of being involved in an enforced disappearance in the position to influence the progress of an investigation, by means of pressure or intimidations of those involved in the investigation.

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### Article 13: Extradition

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 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 16: Non-Refoulement Principle

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.

#### Q: What Is the Extradition Regime for Cases of Enforced Disappearance?

A: Pursuant to Art. 13, when examining a request for extradition, enforced disappearance must not be regarded as a political offence and the request should not be refused on the basis of this ground alone.

States must include this offence in any already existing extradition treaty and in any subsequent one concluded between them. However, Art. 13, para. 4, authorizes States to consider the Convention as a sufficient legal basis to grant extradition when this is requested by a non-State party to the extradition treaty.

Art. 13, para. 6, allows for the extradition request to be subjected to the conditions provided for by the domestic law of the requested State, pertaining to the minimum penalty requirement and the grounds upon which such State may refuse extradition.

The last paragraph provides for a human right safeguard allowing States to refuse extradition when they believe the accused would be at risk of human rights violations.

#### Q: What Is the *Non-refoulement* Principle for Enforced Disappearance?

A: The *non-refoulement* principle guarantees that a person will not be sent to another State where there is a real risk that once there, he or she will be subject to human rights violations, such as enforced disappearance, persecution, torture or other ill-treatment and arbitrary deprivation of life. In order to determine whether there is such a risk, authorities should take into account the general situation existing in the State concerned, particularly looking at whether a consistent pattern of gross human rights violations or serious violations of IHL are taking place. If this is the case, Art. 16 forbids States parties to return, expel, surrender or extradite the person concerned.



## C. International Cooperation between States Parties

### Article 14: Legal Cooperation between States

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 15: Humanitarian Cooperation between States

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.

### Q: What Is the Obligation of Mutual Assistance?

A: States have a duty to cooperate among them in relation to criminal proceedings (by

providing all evidence related to them), and with the aim of assisting victims, searching for, locating and releasing disappeared persons and, in case of death, in exhuming, identifying and returning mortal remains.

States must adopt legislative measures to ensure that they can afford one another mutual legal assistance in relation to criminal proceedings on enforced disappearance, including the supply of evidence at their disposal.

States must also adopt all necessary measures to mutually assist each other in searching for, locating and releasing disappeared persons and, in the event of their death, in exhuming and identifying them and returning their remains.

## D. Prevention and Protection of Persons Deprived of Liberty

### Article 17: Prohibition of Secret Detention and Guarantees for Persons Deprived of Liberty

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

### **Article 18: Right to Access to Information**

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.

### **Article 19: Detainees' Right to Privacy**

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.

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 20: Limitations to the Right to Access to Information**

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 21: Verifiable Release**

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.

## Article 22: Other Offences

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.

### Q: What Are the Minimum Guarantees for Persons Deprived of Liberty?

A: Art. 17, para. 1, provides for an **absolute prohibition of secret detention**. Secret detention occurs when a person is arrested or in any manner deprived of his or her liberty, legally (with an arrest warrant) or illegally (without any authorization), by State officials and any information on his or her whereabouts is concealed.

Art. 17, para. 2, provides for **rigorous criteria** every deprivation of liberty must comply with, in order to avoid such detention could become an enforced disappearance. As such, para. 2(f)

provides for the right to challenge the lawfulness of the detention in front of a court (right to *habeas corpus* or *amparo*).

In addition, Art. 17, para. 3, requires States to keep official registers and records of all those deprived of their liberty and to make them available to the competent authorities. These records shall contain precise minimum information such as the person's identity, dates, times and places of arrest, transfer and release, and information on the state of health of the detained person.

States must prohibit secret detention and ensure that every deprivation of liberty complies with the criteria set forth in Art. 17 of the Convention. States shall also make sure all decisions and elements concerning deprivation of liberty comply with the principle of transparency.

### Q: Who Has the Right to Access to Information on Persons Deprived of Liberty?

A: According to Art. 18, any person with a legitimate interest must have access to the information relating to the detained person, detailed in para. 1, contained in official registers. These persons include the relatives of the disappeared and their legal representative.

Art. 18, para. 2, puts an obligation on States to ensure the protection of all persons requesting access to these information that as a result of their participation in the investigation could be at risk of ill-treatment, intimidation or sanction.

## Q: How to Protect Sensitive Data?

A: As per Art. 19, sensitive information concerning the detained person can be made available only for the purpose of searching the disappeared person or for criminal proceedings. This provision aims to guarantee the right to privacy of the detained-disappeared person. However, it may be abused in order to avoid disclosure of information on the disappeared person. As a result, the right to privacy spelled out in Art. 19 must be interpreted so as to cover only information that is not necessary in order to determine the whereabouts of the person.

## Q: When Can the Right to Access to Information Be Restricted?

A: The right to access to information on persons deprived of their liberty can be restricted only under strict conditions enumerated in Art. 20, para. 1. In particular, the restriction must be provided by law, be strictly necessary to protect the privacy or safety of the person, the progress of a criminal investigation, and it must be granted on exceptional basis. States must guarantee that persons with a legitimate interest to access the information on the deprivation of liberty of someone have the right to a prompt and effective remedy to obtain information. The right to a remedy cannot be suspended or restricted under any circumstances.

States must guarantee the right to access to information on persons deprived of their liberty to those with a legitimate interest in the widest possible way. Limitations shall be constructed restrictively, in accordance

with applicable international law and with the objectives of the Convention.

## Q: What Are the Conditions for Release of Detained Persons?

A: Art. 21 responds to the practice adopted in the past by certain States to claim that the person deprived of his or her liberty had already been released and thus was no longer in their custody. This provision thus aims at preventing enforced disappearance by requiring all releases to be performed in a manner permitting its verification in a reliable way. Moreover, upon release, States must take measures to assure the physical integrity of the person concerned.

States must perform all releases of persons deprived of their liberty in a manner permitting their verification and must adopt all necessary measures to ensure the physical integrity of the person to be released.

## Q: What Other Offences Must be Adopted to Sanction Enforced Disappearance?

A: Pursuant to Art. 20 States must prescribe and sanction certain conducts contrary to what is provided for in the previous provisions, in particular:

1. Delaying or obstructing victim's remedies;
2. Failure to record the deprivation or liberty or the recording of inaccurate information;
3. Refusal to provide information on the deprivation of liberty.

## Article 23: Other Measures of Prevention

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.

### Q: What Other Measures Must Be Adopted to Prevent Enforced Disappearances?

A: To prevent enforced disappearance, Art 23 requires States to adopt various measures:

1. Trainings of all personnel that is involved in the custody or treatment of persons deprived of liberty;
2. Prohibition of orders or instructions encouraging the commission of enforced disappearance; and protection of those who refuse to obey such orders;
3. Imposing a duty on all personnel that is involved in the custody or treatment of persons deprived of liberty to report to the competent authorities all information concerning a potential enforced disappearance.

States must ensure that effective measures aiming at preventing enforced disappearances are taken and that sanctions are provided for in case of violations.

## E. The Committee on Enforced Disappearances and its Mandate

### Article 26: Composition and Functioning of the Committee

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 not 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.

6. The Committee shall establish its own rules of procedure.

7. The Secretary-General of the United Nations shall provide the Committee with the necessary means, staff and facilities for the effective performance of its functions. The Secretary-General of the United Nations shall convene the initial meeting of the Committee.

8. The members of the Committee shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations, as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

9. Each State Party shall 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.

## The Committee in a nutshell:

<b>Composition</b>	The Committee is composed of ten independent experts, elected by States parties for a period of four years.
<b>Functions</b>	<ul style="list-style-type: none"> <li>• Review of States' reports</li> <li>• General comments</li> <li>• Urgent actions procedure</li> <li>• Individual complaints</li> <li>• Inter-State complaints</li> <li>• Country visits</li> <li>• Report to the UN Secretary General</li> </ul>
<b>States parties' actions</b>	<ul style="list-style-type: none"> <li>• States shall submit a first report on the measures adopted to implement the Convention within two years after the entry into force of the Convention for their State.</li> <li>• States may, at any time, declare the acceptance of the Committee's competence to receive and consider individual and inter-State communications (Arts. 31 and 32).</li> </ul>

## What Are the Main Differences between the Committee and the WGEID?

	Committee on Enforced Disappearances	Working Group on Enforced or Involuntary
<b>Nature</b>	It is a treaty body: its mandate and its functioning are regulated by the Convention.	It is a special procedure: it was established on the basis of a Human Rights Council's resolution.
<b>Mandate</b>	The Committee has multiple functions, that include monitoring and issuing decisions on individual and inter-State communications.	It mainly has a humanitarian nature, aiming at being a channel of communication between States and relatives of the disappeared person and at facilitating the location of the disappeared person.
<b>Territorial Competence</b>	The Committee is competent only with regard to States that have ratified the Convention.	It is competent with regard to all States members of the UN.
<b>Temporal Competence</b>	The Committee is competent only in respect of enforced disappearances that commenced after the entry into force of the Convention for the State concerned.	It accepts cases of enforced disappearances perpetrated after 1945.
<b>Individual complaint procedure</b>	In order to receive and examine an individual complaint, the State concerned must have previously accepted the competence of the Committee pursuant to Art. 31 of the Convention.	

## Article 27: “Revision” Clause

A Conference of the States Parties will take place at the earliest four years and at the latest six years following the entry into force of this Convention to evaluate the functioning of the Committee and to decide, in accordance with the procedure described in article 44, paragraph 2, whether it is appropriate to transfer to another body — without excluding any possibility — the monitoring of this Convention, in accordance with the functions defined in articles 28 to 36.

### Q: What Does the “Revision” Clause Provide?

A: According to Art. 27, States shall convene a conference by December 2016 at the latest, to decide whether to renew the mandate of the Committee or rather transfer its functions to another existing body (such as the HRC).

## Article 28: Cooperation with Other UN Organs

1. In the framework of the competencies granted by this Convention, the Committee shall cooperate with all relevant organs, offices and specialized agencies and funds of the United Nations, with the treaty bodies instituted by international instruments, with the special procedures of the United Nations and with the relevant regional intergovernmental organizations or bodies, as well as with all relevant State institutions, agencies or offices working towards the protection of all persons against enforced disappearances.

2. As it discharges its mandate, the Committee shall consult other treaty bodies instituted by relevant international human rights

instruments, in particular the Human Rights Committee instituted by the International Covenant on Civil and Political Rights, with a view to ensuring the consistency of their respective observations and recommendations.

## Article 36: Annual Report

1. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

2. Before an observation on a State Party is published in the annual report, the State Party concerned shall be informed in advance and shall be given reasonable time to answer. This State Party may request the publication of its comments or observations in the report.

### Q: What Are the Committee’s Obligations?

A: Art. 28 imposes on the Committee the legal duty both to cooperate with other UN institutions and to consult “other treaty bodies”, particularly the HRC. As the HRC has already developed a vast case law on enforced disappearance, the Committee shall ensure consistency between its and the HRC’s findings.

Moreover, under Art. 36, the Committee has an obligation to report on its activities every year to the States parties and to the UN General Assembly.

## Article 29: States’ Reports

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.

### Q: What Are the States Parties' Obligations vis-à-vis the Committee?

A; States parties shall submit, within two years after the entry into force of the Convention in their State, a report indicating the measures that have been taken in order to implement the Convention. The Committee examines these reports and issues concluding observations and recommendations. It requests the State concerned to provide follow-up information on the status of implementation of some “priority recommendations” within a year. Further, the Committee fixes a different deadline for the submission of subsequent periodic reports, depending on the situation in the country concerned.

NGOs and civil society organisations can submit alternative reports to the Committee.



Mexico Appeared before UN Committee on Enforced Disappearances. © CUARTOSCURO/ ALAN ORTEGA  
(Source: <http://thenews.mx/2015/02/moreira-valdez-attends-mexico-un-meeting/>)

### Article 30: Urgent Action Procedure

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.

### Q: What is the Purpose of the Urgent Action Procedure?

A: The urgent action procedure aims at seeking and finding a disappeared person. This procedure can be activated with regard to all States parties to the Convention.

### Q: What Are the Characteristics of an Urgent Action Procedure?

A: Art. 30, para. 2, lists five cumulative conditions that must be present in order for the Committee to find the request admissible. These are:

1. The request is not manifestly unfounded;
2. It does not constitute an abuse of the right of submission of the request;
3. It has already been presented to the competent bodies of the State concerned;
4. It is not incompatible with the provisions of the Convention; and
5. The same case has not been submitted to another international procedure of the same nature (such as the Human Rights Committee or the WGEID).<sup>3</sup>

However, the prior exhaustion of domestic remedies is not required.

Art. 30, para. 3, allows the Committee to send recommendations to States parties, including requests to take urgent temporary measures (interim measures) to locate and protect the disappeared person.

The Committee remains seized of the matter under the urgent procedure until the fate of the person sought remains unresolved.

## Article 31: Individual Communications

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

<sup>3</sup>Report of the Committee on Enforced Disappearances on its Third Session, para. 17(b), at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCED%2fSED%2f3%2f20942&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCED%2fSED%2f3%2f20942&Lang=en). The Committee stressed that an urgent action that had already been submitted to the WGEID cannot normally be admitted by it.

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.

## Q: What Are the Conditions for the Submission of an Individual Communication?

A: Pursuant to Art. 31, para. 1, the Committee can only receive and examine individual communications concerning States that made a declaration recognizing its competence to this extent.

Art. 31, para. 2, provides for four admissibility conditions:

- The communication is anonymous;
- It constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;
- The same matter is being examined under another international procedure of the same nature; or where
- All effective available domestic remedies have not been exhausted.

When the requirements of para. 2 are met, the communication is transmitted to the State party concerned, which is requested to provide a response within a time limit. The Committee may request the State to take interim measures to avoid irreparable damages to the victims.

The Committee issues its views on the communications found admissible and

formulates recommendations to the State held responsible for violating the Convention.

### **Article 32: Inter-States Communications**

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 neither made such a declaration, nor communications from a State Party which has not made such a declaration.

#### **Q: What Is an Inter-State Communication?**

A: Art. 32 provides for the possibility for the Committee to receive and consider communications in which a State party claims that another State party is in breach of the Convention. In order for the Committee to be competent, both States involved must have made a specific declaration accepting the inter-State procedure.

### **Article 33: Country Visits**

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.

#### **Q: When Can the Committee Undertake a Country Visit?**

A: According to Art. 33, the Committee can request a State party to undertake a visit when it receives reliable information that the provisions of the Convention are being seriously violated.

However, without a formal invitation from the State concerned, the Committee cannot undertake such country visit. At the end of a country visit, the Committee issues a report containing its recommendations to the State concerned.

### **Article 34: Referral to the UN General Assembly**

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.

### Q: When Can the Committee Seek the Intervention of the UN General Assembly?

A: If the Committee is informed about the fact that enforced disappearances reaching the threshold of crimes against humanity are being practiced in the territory of a State party, it can urgently bring the matter, through the UN Secretary General, to the General Assembly. These situations could in turn be referred to other international mechanisms, including the ICC.

### Article 35: Temporal Competence “*Ratione Temporis*”

1. The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.

2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.

### Q: Which Enforced Disappearances Fall under the Temporal Competence of the Committee?

A: Pursuant to Art. 35 the Committee is competent to deal only with enforced disappearances that commenced **after the entry into force of the Convention for the State concerned.**

Nonetheless, the Committee clarified that it can learn about enforced disappearances that commenced before such date when reviewing the reports presented by States on the measures adopted to give effect to the Convention. In fact, States remain under an obligation to establish the truth, investigate and to provide reparations also with regard to enforced disappearances that commenced prior to the ratification of the Convention by the State concerned.

States have an obligation to submit all reports and all necessary information to the Committee. Moreover, States shall make a declaration accepting the competence of the Committee to receive and consider both individual communications and the inter-State complaints procedure.

## 4. Final Recommendations to Governments

ICAED calls on all States that have not yet done so, to ratify or accede to the International Convention for the Protection of All Persons from Enforced Disappearance. Moreover, all States must accept the competence of the Committee on Enforced Disappearances to receive and examine individual complaints as well as inter-State communications, pursuant to Arts. 31 and 32 of the Convention.

In addition, States are advised to implement the following recommendations:

<p>Concerning Domestic Legislation, States shall:</p>	<ul style="list-style-type: none"> <li>- Adopt a definition of enforced disappearance that takes into account the absolute nature of the prohibition and that is in line with the elements of crime provided for in Art. 2 of the Convention;</li> <li>- Introduce the autonomous offence of enforced disappearance as a crime against humanity in the criminal legislation;</li> <li>- Exclude superiors' orders as a possible defence;</li> <li>- Pay special attention when criminalising acts of enforced disappearances of children;</li> <li>- Recognize and guarantee the rights of the victims and provide effective remedies;</li> <li>- Adopt measures aiming at preventing the occurrence of enforced disappearance;</li> <li>- Prohibit secret detention and adopt effective measures to avoid its occurrence;</li> <li>- Adopt adequate measures to regulate the legal status of disappeared persons and that of their relatives, by creating the certificate of "absence due to enforced disappearance";</li> <li>- Introduce the non-derogable right not to be subjected to enforced disappearance and the right to know the truth in the Constitution.</li> </ul>
<p>Working with Civil Society</p>	<ul style="list-style-type: none"> <li>- States are recommended to cooperate with NGOs and civil society in the drafting process of domestic legislation concerning enforced disappearance.</li> </ul>
<p>In order to raise awareness on enforced disappearance, States should organise:</p>	<ul style="list-style-type: none"> <li>- Panel discussions;</li> <li>- Trainings;</li> <li>- Cineforums (Film screenings and debates);</li> <li>- Conferences;</li> <li>- Cultural events and Exhibitions.</li> </ul>

States where outstanding cases of enforced disappearance are ongoing must take measures aiming at:

- Preventing recurrence;
- Unveiling the truth;
- Providing relatives of disappeared persons with justice, prosecuting and sanctioning those responsible;
- Providing victims with integral redress and reparations.

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