



# General Assembly

Distr.: General  
31 August 2022

English only

---

## Human Rights Council

### Fifty-first session

12 September–7 October 2022

Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Thirtieth anniversary of the Declaration on the Protection of All Persons from Enforced Disappearance**

**Report of the Working Group on Enforced or Involuntary  
Disappearances\***

---

\* The present document is being issued without formal editing.



## I. Introduction

1. The year 2022 marks the thirtieth anniversary of the adoption – through General Assembly resolution 47/133 – of the Declaration on the Protection of All Persons from Enforced Disappearance. The Declaration is a body of principles for all States that is designed to prohibit enforced disappearances, to prevent their commission and to help victims of such acts and their families to unveil the truth, obtain justice and seek fair, prompt and adequate reparation.
2. Since its adoption, the Declaration significantly contributed to the progress of international law on enforced disappearance, culminated in the adoption and opening for signature in 2007 of the International Convention on the Protection of All Persons from Enforced Disappearance, as well as to the development of international practice and domestic legislation and jurisprudence.
3. The Working Group on Enforced or Involuntary Disappearances launched a special initiative to mark the adoption of the Declaration, aiming at taking stock of the progress of international law on the subject, as well as identifying the obstacles encountered in the implementation of the Declaration and the ways in which the Working Group could support States in overcoming them, including through technical assistance and cooperation.
4. On 3 November 2021, the Working Group circulated a call<sup>1</sup> to collect inputs from different stakeholders on the contribution of the Declaration to the progress of international and domestic law and jurisprudence, the obstacles encountered in its implementation, the relevant lessons learned and good practices.
5. As at August 2022, 47 written submissions had been received, respectively from States (18) intergovernmental organizations (1); United Nations and specialized agencies (1); civil society organizations, including associations of relatives of disappeared persons (21); and experts, scholars or academic institutions (6).<sup>2</sup> The Working Group wishes to express its gratitude for all the responses, which provided a wealth of information and insights.

## II. The Declaration at 30

6. The present document, drawing from the inputs received to the call disseminated in November 2021, as well as from the direct experience gathered by the Working Group over the past 30 years in the dissemination and implementation of the Declaration, aims at summarizing the process that led to its adoption, illustrating its contribution to the progress of international law, identifying the main obstacles to its implementation, good practices and lessons learned and offering a set of recommendations directed at States, the United Nations, regional human rights mechanisms, national human rights institutions, civil society organizations and academic institutions.

### A. Origins of the Declaration and progress in international law

7. The practice of enforced disappearance has been a source of concern for the United Nations since the 1970s.<sup>3</sup> This led, among other measures directed at putting an end to the suffering of relatives of disappeared persons and eradicating this crime under international law, to the establishment of the Working Group.<sup>4</sup>

---

<sup>1</sup> The text of the call for inputs is available at: <https://www.ohchr.org/en/calls-for-input/calls-input/call-inputs-view-special-initiative-marking-30th-anniversary>.

<sup>2</sup> The integral version of the contributions received is available at <https://owncloud.unog.ch/s/fHfDtANLPiYgexR>. As per the request of the submitting State or institution, three contributions have been kept confidential.

<sup>3</sup> See, among others, General Assembly resolution 33/173.

<sup>4</sup> Commission on Human Rights resolution 20 (XXXVI).

8. Albeit enforced disappearance was dealt with by international criminal tribunals<sup>5</sup> and human rights mechanisms,<sup>6</sup> until 1992 no internationally agreed definition of this crime existed. In 1984, the Sub-Commission on Prevention of Discrimination and Protection of Minorities prepared a preliminary draft of an International Declaration against the Unrecognized Detention of Persons. However, that draft text was not further discussed.

9. In 1988, the Sub-Commission, through its Working Group on Detention, decided to consider a draft declaration presented by the expert Louis Joinet. The draft was considered in the context of a seminar convened in 1988 by the non-governmental organization International Commission of Jurists in which participated members of the Working Group on Detention, experts of the Sub-Commission, and representatives of relatives of disappeared persons and of civil society organizations from across the world.<sup>7</sup>

10. The text emerged from the seminar was adopted by the Sub-Commission and then submitted to the Commission on Human Rights for consideration. The Commission established an Intersessional Open-ended Working Group to continue elaborating the document prior to its submission to the General Assembly for adoption, which eventually took place on 18 December 1992, through resolution 47/133, enshrining the 21 articles of the Declaration.

11. Since then, the Declaration, which contains the first internationally agreed definition of enforced disappearance, became a landmark reference in domestic and international law. As remarked in most of the replies received by the Working Group to its call, the Declaration has been instrumental to the development of international law on enforced disappearance. Indeed, all the legal instruments – both of international human rights and criminal law – that have been adopted afterwards at the regional and universal levels looked at the Declaration as an indispensable reference,<sup>8</sup> which, in this sense, led to the subsequent development of international law.

12. Ten years after the adoption of the Declaration, the existence of some gaps in the international legal framework dealing with enforced disappearance was acknowledged, along with the need for an internationally legally binding instrument to prevent and eradicate such a crime under international law.<sup>9</sup>

13. The Inter-sessional working group mandated to draft such legally binding normative instrument for the protection of all persons from enforced disappearance (which would become the International Convention) was in fact requested to elaborate the new instrument on the basis of the Declaration.<sup>10</sup> Its text was taken into account during the negotiations of the International Convention and the preamble of the latter explicitly recalls the Declaration.

14. The International Convention as approved by the General Assembly through resolution 61/177 of 20 December 2006, opened for signature in Paris on 6 February 2007 and entered into force on 23 December 2010, builds on the contents of the Declaration and represents today the highest standard in international human rights law on enforced

<sup>5</sup> Even though the practice as such had not been defined at the time, enforced disappearance was dealt with by the International Military Tribunal at Nuremberg and the United States of America Military Tribunal at Nuremberg. See, Finucane, *Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War*, in 35 *Yale Journal of International Law*, 2010, pp. 171-197.

<sup>6</sup> See, among others, Human Rights Committee, Case *Bleier v. Uruguay*, Views of 29 March 1982; and Inter-American Court of Human Rights, Case *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, Ser. C No. 4.

<sup>7</sup> See, among others, Tayler, *Background to the Elaboration of the Draft International Convention on the Protection of All Persons from Enforced Disappearance*, in *Review of the International Commission of Jurists*, special issue on ‘Impunity, Crimes against Humanity and Forced Disappearance’, 2001, pp. 63-73.

<sup>8</sup> In particular, the Inter-American Convention on Forced Disappearance of Persons (Belem do Pará, 9 June 1994) and the Statute of the International Criminal Court (Rome, 17 July 1998).

<sup>9</sup> Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to para. 11 of Commission Resolution 2001/46, E/CN.4/2002/71 of 8 January 2002.

<sup>10</sup> Commission on Human Rights, resolution 2002/41, para. 13.

disappearance. As such, the Working Group continues calling on States to ratify or accede to, without delay, the International Convention, and to acknowledge the competence of the Committee on Enforced Disappearances pursuant to articles 31 and 32 concerning individual and inter-state communications.

15. Bearing in mind that the provisions of the International Convention are based, to a great extent, on those of the Declaration, the Working Group is persuaded that its experience over the past 30 years and the identification of the main obstacles encountered in the implementation of the Declaration, as well as the good practices and the lessons learned, are also instrumental to the achievement of the objective of the universal ratification and implementation of the International Convention and acceptance of the competence of the Committee with regard to individual and inter-state communications.

## **B. Dissemination and Promotion of the Declaration**

16. After the adoption of the Declaration, the Secretary-General was entrusted with its widespread dissemination and promotion<sup>11</sup> and States have been regularly requested by the General Assembly to consider the possibility of translating the text of the Declaration in their respective national and local languages to facilitate its dissemination.<sup>12</sup> On the 20<sup>th</sup> anniversary of the Declaration, the Human Rights Council encouraged States to “translate the Declaration into their languages in order to assist its global dissemination and the ultimate goal of prevention of enforced disappearances”.<sup>13</sup> The General Assembly also acknowledged the action taken by NGOs in the implementation of the Declaration and invited them to continue facilitating its dissemination.<sup>14</sup>

17. With regard to the actions undertaken to disseminate and promote the Declaration, the Secretary-General informed that the Department of Public Information had drafted and distributed Fact Sheet No. 6 concerning enforced or involuntary disappearances and which contains the full text of the Declaration.<sup>15</sup> Moreover, a booklet on the Declaration has been distributed to, among others, United Nations peacekeeping offices and specialised agencies. The Secretary-General also referred to the production of special media information and a special backgrounder on enforced disappearances.<sup>16</sup>

18. As reported by the Secretary-General,<sup>17</sup> the Department’s Visitors’ Services Section contributed in making the Declaration available to the general public and educational institutes upon request; the text of the Declaration was made available on the Internet under the section on General Assembly resolutions; and the Department’s Development and Human Rights Section also distributed copies of the Declaration upon request.

19. Additional actions undertaken in the field by the Secretary-General include the following: United Nations information centres and services and United Nations offices are

<sup>11</sup> Commission on Human Rights resolutions 1993/35, para. 21; 1995/38, para. 30; 1996/30, para. 29; 1997/26, para. 10 (b); 1998/40, para. 10(b); 1999/38, para. 11 (b); 2000/37, para. 11 (c); 2002/41, para. 9 (c); 2003/38, para. 9 (c); and 2004/40, para. 11 (c). Subsequently, Human Rights Council resolutions 7/12, para. 10 (c); and 10/10, para. 10 (c). In the following resolutions of the Human Rights Council on enforced or involuntary disappearances, no more reference is made to the role of the Secretary-General in the dissemination of the Declaration. The General Assembly has also regularly requested the Secretary-General to keep it informed on the steps taken to disseminate and promote the Declaration: resolutions 49/193, para. 22; 51/94, para. 20; 53/150, para. 20; 55/103, para. 19; 57/215, para. 24; and 9/2000, para. 23.

<sup>12</sup> General Assembly resolutions 49/193, para. 9; 51/94, para. 7; 53/150, para. 7; 55/103, para. 7; 57/215, para. 9; and 9/2000, para. 9.

<sup>13</sup> Human Rights Council resolutions 16/16, para. 2; and 21/4, para. 8.

<sup>14</sup> General Assembly resolutions 49/193, para. 10; 51/94, para. 8; 53/150, para. 8; 55/103, para. 8; 57/215, para. 10; and 9/2000, para. 10.

<sup>15</sup> Fact Sheet No. 6 has subsequently been updated several times and is currently under revision. The latest available version can be found at: <https://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf>.

<sup>16</sup> A/51/561, paras. 2 and 4; A/53/304, paras. 2 and 4; A/55/289, paras. 3 and 7; A/57/140, para. 72.

<sup>17</sup> A/51/561, paras. 3-4; A/53/304, paras. 3-4; A/55/289, paras. 5-6; A/57/140, paras. 73-76; and A/59/341, paras. 76-80.

provided with copies of publications containing the Declaration, which they keep in their reference libraries for consultation and distribute copies to media and NGOs and at special events such as the annual celebration of Human Rights Day. Field offices of the United Nations High Commissioner for Human Rights have also actively distributed the Declaration to local NGOs and other interested parties and the Declaration has been included in the training projects on the administration of justice in the framework of the human rights' advisory services, technical assistance and information programme.

20. States informed about various measures undertaken to disseminate and promote the Declaration, including events directed at civil society organizations, publishing information on the Declaration in newspapers and through radio programmes,<sup>18</sup> or through the establishment of dedicated modules in academic curricula.<sup>19</sup>

21. Through the responses received, the Working Group learned about the existence of seven translations of the Declaration into national or local languages, in some cases facilitated by States and more often by civil society organizations.<sup>20</sup>

22. Moreover, the Working Group learned that the contents of the Declaration have been – and in some cases continue being – included in trainings directed at law enforcement personnel, medical personnel, public officials, lawyers and judges, human rights defenders, journalists, members of NGOs or associations of relatives of disappeared persons and imparted by different actors, including governmental ones, as well as civil society organizations, the academia, and international agencies. Iraq – which is a party to the International Convention – informed that it would include dedicated modules on the Declaration in trainings to be delivered to personnel of the Ministry of the Interior in 2022.

### C. The Working Group and the Declaration

23. In 1993, following the adoption of the Declaration, the Working Group was entrusted with assisting States in overcoming obstacles to its implementation. In this regard, the Commission on Human Rights requested the Working Group to take into account the provisions of the Declaration, and to modify its working methods if necessary and to cite in its future reports any obstacles to the proper application of the Declaration and to recommend means of overcoming them.<sup>21</sup> Since then, the original mandate of the Working Group has been extended as to including the monitoring of States' progress in implementing the Declaration,<sup>22</sup> drawing the attention of Governments and NGOs to different aspects of the Declaration, and recommending concrete ways of overcoming obstacles to the implementation of its provisions.<sup>23</sup> The Working Group discharges this part of its mandate

<sup>18</sup> The report of the Secretary-General refers to actions undertaken by Guatemala (A/57/140, para. 65).

<sup>19</sup> See the replies submitted respectively by Albania, Argentina, Colombia, El Salvador, Mexico, Uruguay, Uzbekistan and OHCHR-Mexico.

<sup>20</sup> The Working Group received translated versions of the Declaration in German, Italian, Nepalese, Persian, Polish, Portuguese and Turkish. They have been uploaded and are available at: <https://owncloud.unog.ch/s/fHfDtaNLPiYgexR>.

<sup>21</sup> Commission on Human Rights resolution 1993/35, paras. 15-16. General Assembly resolutions 49/193 of 23 December 1994, paras. 12-13; 51/94 of 12 December 1996, paras. 10 and 12; 53/150, para. 12; 55/103, para. 9; 57/215, para. 13; and 9/2000, para. 13.

<sup>22</sup> The General Assembly has regularly called on States to “provide concrete information on measures taken to give effect to the Declaration”; see resolutions 49/193, para. 8; 51/94, para. 6; 53/150, para. 6; 55/103, para. 6; and 57/215, para. 8; and 59/2000, para. 8.

<sup>23</sup> Commission on Human Rights resolutions 1995/38, preamble and paras. 16-17 and 19-21; 1996/30, preamble and paras. 17-18, 21 and 24; 1997/26, preamble and paras. 7 and 8(a); 1998/40, preamble and paras. 2(h), 7(a) and 8; 1999/38, preamble and paras. 2(c), 7 and 8; 2000/37, preamble and paras. 2(h), 7 and 8; 2002/41, preamble and paras. 2(h), 7 and 8; 2003/38, preamble and paras. 2 (h), 7 and 8; and 2004/40, preamble and paras. 2(h), 5(a), 9 and 10. Subsequently, Human Rights Council resolutions 7/12, preamble and paras. 2(h), 4(a), 8 and 9; and 10/10, preamble and paras. 4(a), 8 and 9. In the following resolutions of the Human Rights Council on enforced or involuntary disappearances, the Declaration is recalled solely in the preamble.

through multiple procedures, namely while carrying out country visits,<sup>24</sup> through general allegations,<sup>25</sup> in its annual reports, issuing general comments and thematic studies, and providing advisory services, including through technical assistance and cooperation.

24. Pursuant to its methods of work, the Declaration is the main legal standard which instructs the Working Group's decisions and actions.<sup>26</sup> With regard to the Declaration, the Working Group is mandated (a) to monitor States' compliance with their obligations deriving from the Declaration, and (b) to assist States in implementation of the Declaration. As monitoring body, it draws the attention of States, intergovernmental and national and international non-governmental organizations, families of forcibly disappeared persons, their associations, and other stakeholders to general and specific aspects of the Declaration; recommends ways of overcoming obstacles to the implementation of the Declaration; and discusses how to solve specific problems in light of the Declaration. It further assists States by carrying out country visits and providing advisory services upon their request. It conducts thematic studies and adopts General Comments whenever it determines that certain mandate-related issues or provisions of the Declaration require clarification or interpretation in the context of evolving international law.<sup>27</sup> Moreover, the Working Group maintains a dialogue with States on issues relating to enforced disappearances and the implementation of the Declaration.<sup>28</sup>

25. With regard to technical cooperation and assistance, it can take different forms. For instance, in countries such as Tunisia, Turkmenistan and Venezuela, the Working Group carried out short trainings on enforced disappearance for public officials and law enforcement personnel, including judges. In other instances, the Working Group – often upon requests received from OHCHR and other stakeholders – assists in relation to substantive matters, such as draft legislation, the creation of mechanisms devoted to the search for disappeared persons or truth commissions (e.g. The Gambia, Nepal or Sri Lanka). On other occasions, States directly request the Working Group to provide assistance. For instance, in 2017, the Government of Chile required assistance in the context of the follow-up report presented to the Human Rights Council and the then Chair of the Working Group travelled to the country to assist.<sup>29</sup>

26. In the course of the years, the Working Group has carried out a comprehensive interpretative work on the Declaration, providing clarification on a number of its provisions and other related issues in an effort to contribute to the progressive development of international law on these matters. This has been mainly done through general comments - until 2013 - and thematic reports or studies afterwards, but also in the context of country visits and other activities, including general allegations and communications to the Governments.

27. General comments have been issued on specific provisions of the Declaration, namely articles 3, 4, 10, 17, 18 and 19, as well as on the definition of enforced disappearance (enshrined in the preamble), on enforced disappearance as a crime against humanity (also referred to in the preamble), on enforced disappearance as a continuous crime, on the right

<sup>24</sup> In this regard, pursuant to its methods of work, the Working Group also undertakes visits to examine the practices carried out by States to prevent, investigate, punish, and eradicate enforced disappearances, including programmes and measures adopted to implement the Declaration and to guarantee the rights of victims and others. The Working Group reports to the Human Rights Council on its country visits. (A/HRC/WGEID/102/2, paras. 35-36).

<sup>25</sup> Pursuant to the Working Group's methods of work, the Working Group transmits to the States summaries of allegations received or gathered from States, non-governmental organizations, relatives of disappeared persons and other reliable sources regarding obstacles encountered in the implementation of the Declaration and requests the State to comment thereon. General allegations and comments are reflected in the post-session documents, in the annual report and on the website of the Working Group (A/HRC/WGEID/102/2, para. 24).

<sup>26</sup> A/HRC/WGEID/102/2, para. 1. The other legal instruments are the Charter of the United Nations, the Universal Declaration of Human Rights and the International Convention.

<sup>27</sup> *Ibid.*, para. 6.

<sup>28</sup> *Ibid.*, para. 27.

<sup>29</sup> See A/HRC/36/39, para. 13.

to truth in relation to enforced disappearance,<sup>30</sup> on the right to recognition as a person before the law in the context of enforced disappearances, and on children and women affected by enforced disappearances.<sup>31</sup>

28. Thematic reports or studies or specific thematic sections of annual reports have been devoted to a number of issues related to the Declaration and its implementation, such as compensation, presumption of death and exhumations,<sup>32</sup> reparations and enforced disappearances (article 19), enforced disappearances and economic, social and cultural rights (relevant to several articles of the Declaration), enforced disappearances in the context of migration (related to a number of provisions of the Declaration), standards and public policies for an effective investigation of enforced disappearances (relevant in particular to articles 9, 12 and 13) and enforced disappearance in the context of transnational transfers (especially related to articles 7 and 8 of the Declaration). In 2010, the Working Group issued a study on best practices on enforced disappearances in domestic criminal legislation, which reflects how States have implemented article 4 of the Declaration.<sup>33</sup>

29. The contribution of the Working Group on the development of international law on a number of matters related to the Declaration and the issue of enforced disappearance appears palpable through an examination of these documents. Below a non-exhaustive list of illustrative examples.

## 1. Technical and legal issues regarding the definition of enforced disappearance

### *Effects of the continuous nature of enforced disappearance*

30. Article 17 of the Declaration sets forth that acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of the disappeared person and these facts remain unclarified. As it will be illustrated below in section II.E, this provision of the Declaration has been regularly quoted both by domestic courts and international tribunals and is regarded as enshrining a rule of customary international law.

31. In its general comment on article 17 (2001), the Working Group clarified that one of the consequences of the continuous nature of the crime is that it is possible to convict someone for enforced disappearance on the basis of a legal instrument that was enacted after the enforced disappearance began, notwithstanding the fundamental principle of non-retroactivity.<sup>34</sup> This interpretation has been upheld by regional human rights courts and followed by a number of domestic courts, allowing to hold perpetrators accountable.

32. Article 17 of the Declaration also establishes that statutes of limitations relating to acts of enforced disappearance, where they exist, shall be substantial and commensurate with the extreme seriousness of the offence. However, the Working Group has in different occasions gone beyond the letter of this article observing, inter alia, that where statute of limitations exists, they shall be counted as starting from the moment at which light is shed on the fate or the whereabouts of the person,<sup>35</sup> and that cannot be applied in cases of enforced disappearance amounting to crimes against humanity.<sup>36</sup> This has been reflected in articles 5 and 8 of the International Convention.

<sup>30</sup> As aptly noted in one of the contributions received, albeit no provision of the Declaration acknowledges the right to know the truth as such, the interpretation given to this instrument by the Working Group over the years has been crucial for the development on international human rights law on the matter, eventually culminated in the formula currently enshrined in article 24.2 of the International Convention.

<sup>31</sup> The integral text of the general comments is available at <https://www.ohchr.org/en/special-procedures/wg-disappearances/general-comments>.

<sup>32</sup> E/CN.4/1998/43, paras. 23-65.

<sup>33</sup> See OHCHR | Annual reports.

<sup>34</sup> A/HRC/16/48, para. 5.

<sup>35</sup> See, for instance, A/HRC/27/49/Add.1, paras. 39 and 41 and A/HRC/33/51/Add.1, para. 19.

<sup>36</sup> Ibid., para. 20.

*Prohibition of amnesties and other similar measures*

33. Article 18 of the Declaration provides that persons who have or are alleged to have committed enforced disappearances shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.

34. In its general comment on article 18 of the Declaration, the Working Group affirmed that this article, when construed together with other provisions of the Declaration, may exceptionally allow for limited measures that directly lead to the prevention and termination of disappearances, as provided for in article 3 of the Declaration. These exceptional measures, however, have to be designed within certain clear limits, which take in due account the obligation to investigate and the satisfaction of the right to truth, justice, reparation and non-repetition.<sup>37</sup>

35. In its report on standards and public policies for an effective investigation of enforced disappearances, the Working Group clarified that States should in any case prohibit amnesties, pardons and other measures that may be aimed at avoiding or indirectly hindering the obligation to investigate, prosecute and punish the perpetrators of said crimes.<sup>38</sup> This has been reiterated by the Working Group in a number of occasions, including country visit reports.<sup>39</sup> Additionally, enforced disappearance amounting to crimes against humanity can never be subjected to amnesties or similar measures.<sup>40</sup>

*Temporal element*

36. The Working Group has consistently recognized that there is no time limit, no matter how short, for an enforced disappearance to occur – as long as the constitutive elements are present – and that accurate information on the detention of any person deprived of liberty and his or her place of detention should be made available promptly to family members.<sup>41</sup> The Working Group has been observing patterns of “short-term” enforced disappearances in the different regions of the world and, in the context of its mandate, it undertook a pedagogical effort to clarify that the duration of an enforced disappearance does not have any repercussion on the gravity of the crime or the harm caused to victims.<sup>42</sup>

*Military courts*

37. Article 16 of the Declaration indicates that persons alleged to have committed enforced disappearances shall be tried only by the competent ordinary courts in each State, with the exclusion of any other special tribunal, in particular military courts.

38. The Working Group has elaborated on this provision in a number of country and thematic reports, observing that trials before military tribunals do not guarantee the necessary independence of the investigations or the impartiality of the courts<sup>43</sup> and that no role should be given to the armed forces in the investigation and prosecution of enforced disappearances.<sup>44</sup>

**2. Enforced disappearances in the context of migration and transnational transfers**

39. Particularly relevant insofar as the contribution of the Working Group to the development of international law in the area of enforced disappearance are two thematic

<sup>37</sup> E/CN.4/2006/56, para. 49.

<sup>38</sup> A/HRC/45/13/Add.3, para. 98 (iii).

<sup>39</sup> See, for instance, A/HRC/27/49/Add.1, para. 29; A/HRC/39/46/Add.1, paras. 43, 52 and 77.

<sup>40</sup> See, for instance: CommentsDraftArticlesCrimesAgainstHumanity.pdf (ohchr.org).

<sup>41</sup> See for instance A/HRC/39/46, para. 143. See also Committee on Enforced Disappearances, Case *Yrusta v. Argentina*, views of 11 March 2016, para. 10.3.

<sup>42</sup> See, inter alia, CommentsDraftArticlesCrimesAgainstHumanity.pdf (ohchr.org), page 4.

<sup>43</sup> A/HRC/7/2, para. 424. See also A/HRC/39/46/Add.1, para. 54.

<sup>44</sup> A/HRC/45/13/Add.3, para. 40. See also Committee on Enforced Disappearances, Statement on enforced disappearance and military jurisdiction (2014).

reports, respectively on the issue of enforced disappearances in the context of migration<sup>45</sup> and on enforced disappearances in the context of transnational transfers.<sup>46</sup>

*Enforced disappearances as a consequence of smuggling and/or trafficking*

40. In the thematic report devoted to migration, the Working Group highlighted that the disappearances of migrants as a consequence of the criminal conduct of mainly non-State actors, notably smugglers or traffickers, can constitute enforced disappearances due to the involvement — direct or indirect — of official authorities.<sup>47</sup> The experts reckoned that sometimes State officials can be smugglers or traffickers themselves, directly organize the smuggling or trafficking of migrants, while in other cases they may just play a role in acquiescing to, or colluding with, trafficking networks.<sup>48</sup>

41. In this context, the Working Group called upon States to carefully consider, when designing them, the impact that migration regulations, policies and practices might have, and in particular assess the possible consequence of de facto compelling migrants to resort to smuggling networks, thus contributing to heightened risks of falling prey to trafficking networks and becoming victims of a number of human rights violations, including enforced disappearances.<sup>49</sup>

*Non-refoulement and pushbacks*

42. The Working Group also noted that, in addition to clear-cut cases where disappearances of migrants are carried out primarily by non-State actors but with the direct or indirect involvement of State authorities, there are other instances where migrants disappear as an involuntary but direct consequence of the actions of the State, for example in the case of pushback, at land or at sea.<sup>50</sup> The Working Group noted that whether or not these disappearances can be qualified as full-fledged enforced disappearances has to be assessed on a case-by-case basis and depends on various elements, including State attribution and whether a deprivation of liberty actually occurred.

43. Nevertheless, even if at times these cases may not reach the threshold of full-fledged enforced disappearances, they may equally trigger State responsibility in the context of the Declaration, notably article 8,<sup>51</sup> which provides that States should prohibit, in both legislation and practice the expulsion, return (refoulement) or extradition of persons to another State where there are substantial grounds to believe that they would be in danger of enforced disappearance. Therefore, the pushback of migrants to any country where they would be in danger of enforced disappearance would constitute a clear violation of the Declaration and any return must thus be the subject of careful individual assessment and follow due process, including the right to challenge the decision to expel/return.<sup>52</sup>

*Enforced disappearances in the context of transnational transfers*

44. Also in relation to article 8 of the Declaration, the Working Group documented several cases of enforced disappearances occurring in the context of transnational transfers.<sup>53</sup> This has been defined by the Working Group as the conduct of States resorting to capture their own nationals (or third States' nationals) with the participation, support or acquiescence of other States, often in the context of purported counter-terrorism operations.<sup>54</sup>

45. The Working Group noted how some of these enforced disappearances occurred within the context or, at the margins of, regular expulsion procedures, while others were

<sup>45</sup> A/HRC/36/39/Add.2.

<sup>46</sup> A/HRC/48/57, paras. 38-60.

<sup>47</sup> A/HRC/36/39/Add.2, paras. 34 ff.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid., para. 88 (a).

<sup>50</sup> Ibid., paras. 25-33.

<sup>51</sup> A/HRC/36/39/Add.2, para. 82.

<sup>52</sup> See, for instance, A/71/285, para. 14. See also A/HRC/31/35, paras. 24 ff and A/HRC/33/51/Add.1, para. 55.

<sup>53</sup> A/HRC/48/57 para. 40.

<sup>54</sup> A/HRC/48/57, page 14, footnote 12.

carried out as part of covert extraterritorial operations, including so-called extraordinary renditions.<sup>55</sup> Irrespective of the nature of the procedure, in most cases the documented circumstances resulted in the violation of the *non-refoulement* obligations of the host State, including as enshrined in article 8 of the Declaration.<sup>56</sup>

### 3. Enforced disappearances and economic, social and cultural rights

46. In the general comment on the right to recognition as a person before the law in the context of enforced disappearances,<sup>57</sup> the Working Group observed that the right to be recognized as a person before the law entails the obligation of the State to fully recognize the legal personality of disappeared persons and thus respect the rights of their next-of-kin and as well as others, notably when confronted with the impossibility of ascertaining a person's death. The Working Group found that the basis for such an acknowledgement should take the form of a declaration of absence by reason of enforced disappearance, to be issued, with the consent of the family, by a State authority after a certain time has elapsed since the disappearance, in any case no less than one year. Such a declaration should allow the appointment of a representative of the disappeared person, with the mandate to exercise his/her rights and obligations for the duration of his/her absence, in his/her interests and those of his/her next-of kin.<sup>58</sup> The Working Group held social allowances and measures of reparation should not be made conditional on the requirement that the relatives of the disappeared person produce a death certificate.<sup>59</sup>

47. The Working Group has further clarified – notably in the thematic report on enforced disappearances and economic, social and cultural rights as well as in country visit reports – the importance to establish mechanisms providing for social allowances or appropriate social and medical measures for relatives of disappeared persons in relation to the physical, mental and economic consequences of the absence of the disappeared.<sup>60</sup> At the same time, it has underscored that, in accordance with article 19 of the Declaration, in no case should the acceptance of financial support for members of the families be regarded as a waiver of the right to adequate, prompt and effective reparation for the damage caused by the crime of enforced disappearance.<sup>61</sup>

## D. Obstacles encountered in the implementation of the Declaration

48. Since the adoption of the Declaration, the Working Group noted with concern that the practice of a number of States could run counter to the provisions contained therein and devoted itself to identifying the main existing obstacles and assisting States in overcoming them. Based on the experience gathered by the Working Group, as well as on the inputs received from the different stakeholders that responded to its call, the prevailing obstacles identified concern the areas of prevention, domestication of international obligations, the search for disappeared persons and accountability.

49. Although in the past decade significant progress has been made in terms of codification of enforced disappearance as a separate criminal offence under domestic law, obstacles remain in the implementation of article 4 of the Declaration, mostly revolving around the following three issues: (a) several States maintain that other offences – linked or closely related to, but not reflecting the complexity of, an enforced disappearance – such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint or abuse of power, would be enough to abide by their international undertakings; (b) States that codify enforced disappearance as a separate offence in their domestic criminal legislation, adopt definitions that depart from the one enshrined in the Declaration or the International Convention, often with the effect of diluting the responsibility of the State,

<sup>55</sup> A/HRC/48/57 para. 41.

<sup>56</sup> Ibid.

<sup>57</sup> A/HRC/19/58/Rev.1, para. 42.

<sup>58</sup> Ibid., see in particular paras. 6 to 9.

<sup>59</sup> A/HRC/22/45, para. 50; and A/HRC/16/48/Add.1, para. 46.

<sup>60</sup> See, for instance, A/HRC/30/38/Add.5, para. 70 and A/HRC/22/45 Add.2, para. 83.

<sup>61</sup> A/HRC/22/45 Add.2, para. 84.

creating insurmountable procedural obstacles, and leaving significant loopholes; and (c) the sanctions envisaged are not commensurate to the extreme seriousness of the crime.

50. The Working Group noted with concern that, especially over the last years, the full implementation of the principle of non-refoulement enshrined in article 8 of the Declaration is encountering a growing number of obstacles, that span from policies and practices aiming at circumventing it, to the existence of agreements – often of a secret nature – between two or more States, that openly violate it.

51. Obstacles are encountered also in the full implementation of articles 9-12 of the Declaration, establishing fundamental guarantees in favour of persons deprived of their liberty and of crucial importance in the prevention of enforced disappearance. In particular, reference has been made to the anti-terrorism legislation of several countries, which would significantly curtail – if not suspend altogether – the guarantees contained therein. Two practical obstacles that have been reported with regard to the said provisions are related respectively to the frequent absence of concrete procedures to exercise the right to a prompt and effective judicial remedy as a means of determining the whereabouts and state of health of persons deprived of their liberty (article 9), and to the lack of official up-to-date registers of all persons deprived of their liberty in every place of detention (article 10 (3)), as well as the failure to adequately preserve the corresponding archives or records.

52. Despite the existence of good practices with regard to standards and public policies for an effective investigation of enforced disappearance, thoroughly documented by the Working Group in its corresponding report,<sup>62</sup> the full implementation of article 13 of the Declaration seems to remain problematic. In particular, among the hurdles reported to the Working Group are the concrete difficulties determined in terms of search and investigation by the passing of time in cases where the enforced disappearance commenced several years before; the failure to understand the search for the disappeared person and the criminal investigation of the persons responsible for the disappearance as intrinsically linked and mutually reinforcing; the absence of an effective strategy to search for disappeared persons; the failure to put in place adequate measures to preserve mass graves and burial sites and to conduct exhumations and thorough investigations; the numerous – usually unpunished – acts of harassment, reprisal and intimidation against relatives of the disappeared, their representatives, witnesses, and other persons involved in the investigation and search and the ensuing climate of fear and lack of trust towards the institutions; and the absence of up-to-date and comprehensive lists of victims of enforced disappearance, as well as of databases of criminal proceedings concerning this crime.

53. Albeit article 16 (2) of the Declaration is adamant in establishing that persons alleged to have committed an enforced disappearance shall be tried only by the competent ordinary courts and not by any other special tribunal, in particular military courts, the Working Group continues receiving allegations from different parts of the world that show serious obstacles in the implementation of this provision.

54. As emphasised in the previous paragraphs, article 17 of the Declaration is one of the most quoted by domestic and international tribunals, unanimously regarded as a customary rule with regard to the continuing nature of enforced disappearance. Nevertheless, the Working Group continues receiving information on instances whereby such rule is disregarded, circumvented or blatantly violated, either in the legislation or in the jurisprudence.

55. Similarly, despite the prohibition of amnesty laws or similar measures that might have the effect of exempting persons alleged to have committed enforced disappearances from any criminal proceedings or sanctions (article 18 (2) of the Declaration), the Working Group is aware of, and deeply concerned about, several cases whereby this rule is disregarded.

56. The implementation of article 19 of the Declaration continues encountering obstacles, especially related to the failure to understand measures of reparation in a holistic manner, encompassing compensation, restitution, rehabilitation, satisfaction and guarantees of non-recurrence; to the obligation imposed in certain countries to declare the disappeared person

---

<sup>62</sup> A/HRC/45/13/Add.3.

dead, in order for his or her relatives to have access to compensation or measures of psycho-social support; and to the existence of practical and bureaucratic obstacles in the access to redress.

57. The obstacles in the implementation of the Declaration summarised in the previous paragraphs – which, as reported to the Working Group become even more complex where one of more States are involved, for instance in cases of disappearances in the context of migration – show that more needs to be done to effectively prevent enforced disappearances and to ensure that victims realize their rights to truth, justice and reparation.

58. The Working Group remains fully committed in assisting States in identifying the said obstacles and overcoming them, including through technical cooperation and advisory services. In this regard, good practices and lessons learned over the past 30 years in the implementation of the Declaration can certainly be of inspiration and, hopefully, of use.

## E. Good practices and lessons learned

59. From the information received, as well as the experience gathered by the Working Group over the past 30 years, emerge good practices and lessons learned in terms of implementation of the Declaration, which has become a landmark both at the domestic and international levels.

60. References to the Declaration, the rules contained therein, and the corresponding obligations can be found in resolutions on enforced disappearance issued by international institutions, including the Parliamentary Assembly of the Council of Europe.<sup>63</sup>

61. Pursuant to article 4 of the Declaration, a number of States codified enforced disappearance as an autonomous offence under their criminal legislation.<sup>64</sup> In doing so, the definition of enforced disappearance embodied in the preamble of the Declaration,<sup>65</sup> as well as other key provisions (including articles 13, 16, 17, 18, 19 and 20) were taken into account. The Declaration was also quoted as relevant reference in other domestic legislative measures relevant to enforced disappearance.<sup>66</sup> The Working Group played a pivotal role in supporting States in the adoption of legislation that duly reflects and implements States' obligations under the Declaration, in particular through general allegations and communications, during country visits or by providing technical assistance.

62. The Declaration has been regularly quoted in the case law of the main international human rights mechanisms. The Human Rights Committee made reference to the Declaration

<sup>63</sup> Parliamentary Assembly of the Council of Europe, resolution 1463 (2005), para. 7.

<sup>64</sup> A/HRC/16/48/Add.3.

<sup>65</sup> The definition of enforced disappearance contained in the preamble – as well as other key provisions – of the Declaration were taken into account when codifying the crime at the domestic level and adopting broader legislative measures on the matter. See, for instance, Arts. 74 and 109-c of the Albanian Criminal Code; Art. 142-ter National Criminal Code, Law No. 24.556 of 13 September 1995, Law No. 26.298 of 14 November 2007, and Law No. 26.679 of 13 April 2011 (Argentina); Arts. 135, 137 and 451 of the Criminal Code of Armenia; Art. 110 of the Criminal Code of Azerbaijan; Arts. 172 and 190a of the Criminal Code of Bosnia and Herzegovina and the 2004 Law on Missing Persons; Law No. 589 of 6 July 2000 and Law No. 971 of 14 July 2005 (Colombia); Arts. 148-A, 364, 365 of the Criminal Code of El Salvador; Art. 201-ter of the Criminal Code of Guatemala; Art. 442-1bis of the Criminal Code of Luxembourg; Art. 333-A of the Criminal Code of Honduras; Law No. 105/2018 of 12 November 2018 on the Missing and Forcibly Disappeared (Lebanon); 2017 General Law on Enforced Disappearance in Mexico; 2012 Anti-Enforced Disappearance Act of the Philippines; Art. 146 of the Criminal Code of Ukraine; and Law No. 18026 of 25 September 2006 (Uruguay). States that are currently adopting legislative measures to criminalise enforced disappearance, such as Iraq or Pakistan, indicated that they are taking into account the Declaration for such purposes. In the case of Pakistan, the Working Group is closely following the process and providing advice to the government (see PAK 7/2021, PAK 11/2021 and PAK 12/2021).

<sup>66</sup> For instance, Supreme Decree No. 27089 of 18 June 2003 (Bolivia) on the establishment of an inter-institutional council for the clarification of enforced disappearances. Mexico expressed that the Declaration was taken as a reference to draft the 2020 Homologated Protocol for the Search for Forcibly Disappeared and Missing Persons.

in views delivered on individual communications.<sup>67</sup> Both organs of the Inter-American system of human rights have referred to provisions of the Declaration on multiple occasions.<sup>68</sup> The European Court of Human Rights explicitly referred to the Declaration since its first judgment on a case of enforced disappearance and in its subsequent jurisprudence.<sup>69</sup> The African Commission on Human and Peoples' Rights extensively referred to the Declaration in the 2022 Guidelines on the Protection of All Persons from Enforced Disappearance in Africa. Also the Human Rights Chamber for Bosnia and Herzegovina frequently referred to the Declaration, especially to establish whether the events it was assessing fell within the definition of enforced disappearance contained therein.<sup>70</sup>

63. The most quoted provisions of the Declaration in the context of international human rights jurisprudence are those concerning the definition of the crime; enforced disappearance as a crime against humanity; the obligation to codify enforced disappearance as an autonomous crime and to conduct a prompt, thorough and impartial investigation on the corresponding complaints; the right to an effective remedy; the absolute nature of the prohibition of enforced disappearance; the continuous nature of the offence; the prohibition of amnesty laws and similar measures; the prohibition of military courts to try persons alleged to have committed enforced disappearance; the right to compensation and other measures of reparation; and enforced disappearance of children (i.e. preamble and articles 1, 4, 7, 9, 13, 16, 17, 18, 19 and 20).

64. Also international criminal tribunals and hybrid courts consistently quoted the Declaration as a legal instrument that enshrines fundamental principles on the prohibition of enforced disappearance and the corresponding obligations.

65. The International Criminal Tribunal for the former Yugoslavia referred to the Declaration as one of the texts that allow to identify the "set of basic rights appertaining to human beings, the infringement of which, depending on the circumstances, may amount to crimes against humanity".<sup>71</sup>

<sup>67</sup> See, among others, Human Rights Committee, Case *Jegatheeswara Sarma v. Sri Lanka*, Views of 31 July 2003, para. 8.13 and footnote 21.

<sup>68</sup> See, among others, Inter-American Court of Human Rights, Case *Blake v. Guatemala*, judgment of 24 January 1998, Ser. C No. 36, paras. 63, 97, 103; Case *Goiburú and others v. Paraguay*, judgment of 22 September 2006, Ser. C No. 153, paras. 82-83 and footnote 87; Case *Anzualdo Castro v. Peru*, judgment of 22 September 2009, Ser. C No. 202, para. 93; Case *Radilla Pacheco v. Mexico*, judgment of 23 November 2009, Ser. C No. 209, paras. 140, 143 and 238; Case *Chitay Nech and others v. Guatemala*, Ser. C No. 212, judgment of 25 May 2010, para. 83; and Case *Gelman v. Uruguay*, judgment of 24 February 2011, Ser. C No. 221, paras. 67, 69, 201 and 203. Among the latest judgments see Case *Masacre de la Aldea Los Josefinos v. Guatemala*, judgment of 3 November 2021, Ser. C No. 442; and Case *Julien Grisonas Family v. Argentina*, judgment of 23 September 2021, Ser. C No. 437: footnotes 104 and 154 respectively make reference to articles 1, 4 and 17 of the Declaration. With regard to the Inter-American Commission on Human Rights, see, among others, Report No. 37/93 of 7 October 1993 on Case No. 10563 *Guadalupe Ccallocunto v. Peru*.

<sup>69</sup> See, among others, European Court of Human Rights, Case *Kurt v. Turkey*, judgment of 5 May 1998, para. 64; Case *Varnava and others v. Turkey*, judgment of 18 September 2009, paras. 89-90; and Case *Marguš v. Croatia*, judgment of 27 May 2014, para. 201.

<sup>70</sup> See, among others, Human Rights Chamber for Bosnia and Herzegovina, Case *Avdo and Esmā Palić v. Republika Srpska*, decision on admissibility and merits of 11 January 2001, CH/99/3196, paras. 21-22, 66 and 72. See also *Dorđo Unković v. the Federation of Bosnia and Herzegovina*, CH/99/2150, 9 November 2001; *Selima Pašović and 5 others v. Republika Srpska*, CH/01/8569 and 5 others, 7 November 2003; *Angelina, Dragan and Nikola Savić v. Federation of Bosnia and Herzegovina*, CH/99/2688, 22 December 2003; *Boško and Mara Jovanović v. Federation of Bosnia and Herzegovina*, CH/02/9180, 5 December 2003; *M.Č. and 6 others v. Republika Srpska*, CH/02/9851 and 9 others, 22 December 2003; *Nedžiba Mujić and 8 Others v. Republika Srpska*, CH/02/10235 and 8 others, 22 December 2003; *Anica Vištica v. Bosnia and Herzegovina and Federation of Bosnia and Herzegovina*, CH/02/8744, 9 March 2004.

<sup>71</sup> International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Kupreškić et al.* (IT-95-16), Trial Chamber judgment of 14 January 2000, para. 566.

66. The Extraordinary Chambers in the Courts of Cambodia quoted the Declaration and, in particular, its preamble and article 1 (2), explicitly considering it one of the main sources of international law on the matter.<sup>72</sup>

67. In the decision issued by the Pre-Trial Chamber III of the International Criminal Court pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in Burundi, the Declaration – and, in particular, articles 7, 13 (1), and 17(1) – were referred to.<sup>73</sup>

68. In a decision issued in October 2020 on the confirmation of an indictment before the Specialist Chambers for Kosovo repeated references were made to the Declaration, and, in particular, to the definition of enforced disappearance contained in the preamble; to article 1 (2) on the multiple rights infringed by an enforced disappearance; to article 13 (1) on the obligation to conduct an effective investigation into allegations that an enforced disappearance might have been committed, to article 17 (1) on the continuous nature of enforced disappearance.<sup>74</sup> With specific reference to the definition of enforced disappearance and the elements of the crime, the Declaration was regarded as one of the legal instruments enshrining customary international law on the matter.<sup>75</sup>

69. The Declaration has been referred to multiple times by domestic courts, especially – but not solely – in the context of criminal proceedings and before constitutional courts.<sup>76</sup> Also

<sup>72</sup> Extraordinary Chambers in the Courts of Cambodia, *Prosecutor v. Nuon Chea and Khieu Samphan* (Case No. 002/01), Trial Chamber judgment of 7 August 2014, para. 446, and footnotes 1321 and 1323; and Appeals judgment of 23 November 2016, para. 589.

<sup>73</sup> International Criminal Court, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi*, ICC-01/17-X-9-US-Exp, 25 October 2017, footnotes 302, 304 and 311.

<sup>74</sup> Specialist Chambers for Kosovo, *Public Redacted Version of Decision on the Confirmation of the Indictment against Hashim Thaçi et al.*, KSC-BC-2020-06 of 26 October 2020, paras. 72-77 and footnotes 114-117, 121, 122, 124 and 126.

<sup>75</sup> *Ibid.*, paras. 75 and 77 and footnote 116.

<sup>76</sup> See, among others, Supreme Court of Justice of Peru, Acuerdo plenario No. 9/2009/CJ-116 of 13 November 2009, paras. 8(b) and 14; Sala Penal Nacional de Peru, Exp. 16-06 (*Brito Gomero et al.*) of 13 October 2009, pp. 123 and 148; Supreme Court of Justice of Peru, IV Juzgado Penal Superprovincial, Exp. 2007-00935-62 of 19 August 2009, p. 9 (footnote 5); Supreme Court of Justice of Mexico, *Amparos en revisión* No. 934/2016 of 29 March 2017, No. 835/2018 of 9 October 2019 and No. 1077/2019 of 16 June 2021, para. 68 and footnote 23, *Contradicciones de tesis* No. 367/2016 of 10 January 2018, No. 261/2018 of 13 March 2019, and Primer tribunal colegiado en material penal del primer circuito, Amparo en revisión No. 53/2019 of 9 May 2019 (Mexico); Supreme Court of Justice of El Salvador, case No. HC 379-2000 of 20 March 2002, HC 215-2007 of 17 February 2003; HC 26-2003 of 27 May 2003; HC 197-2007 of 26 June 2007; HC 198-2007 of 25 November 2007, HC 104-2005 of 21 April 2008, HC 132-2007 of 15 June 2009, HC 199-2007 of 1 December 2010, HC 203-2007 of 27 July 2011, HC 323-2012 of 10 July 2015, HC 40-2015 of 17 January 2017, HC 406-2015 of 7 March 2018; Lebanon State Council, verdict of 4 March 2014; Constitutional Court of Colombia, judgment of 29 March 2000 (No. C-368), judgment of 10 May 2005 (No. C-473), judgment of 7 March 2011 (No. C-620), judgment of 20 June 2018 (No. C-067); Bosnian War Crimes Chamber, *Prosecutor v. Mitar Rašević and Savo Todović*, Case No. X-KR/06/275, first instance verdict of 28 February 2008, p. 88; United States of America District Court, Columbia, *René Schneider et al. v. Henry Kissinger et al.*, verdict of 30 March 2004; Juzgado Central de Instrucción No. 5 of Spain, Audiencia Nacional, Auto 18 November 2008, pp. 45-46; Supreme Court of Nepal, *Rabindra Dhakal on behalf of Rajendra Prasad Dhakal v. Nepal Government*, Writ No. 3575, verdict of 1 June 2007, pp. 216, 225 and 235, and *Madhav Kumar Basnet and others for JuRI-Nepal v. Government of Nepal*, Writ No. 0058, decision of 2 January 2015, paras. 7 and 8; Supreme Court of Pakistan, Case *Muhabbat Shah v. the Government of Pakistan*, Case No. 29388-K, 10 December 2013. With regard to Argentina: Causa No. 12.313 - Sala II de la Cámara Nacional de Casación Penal - “*Ulibarrie, Diego Manuel s/recurso de casación*”, p. 51; Causa No. 10.431 – C.F.C.P. SALA II- “*Losito, Horacio y otros s/recurso de casación*”, p. 93; Causa No. 17.052 - Sala III C.F.C.P. “*Acosta, Jorge E. y otros s/recurso de casación e inconstitucionalidad*”, p. 78; Causa No. FRE 2699/2015/TO2/CFC17 Sala III “*Patetta, Luis Alberto y otros s/recurso de casación*”, p. 69; Causa No. 13.085/13049 “*Albornoz, Roberto; De Cándido, Luis; De Cándido, Carlos y Menéndez, Luciano s/ Recurso de Casación*”, p. 138; Causa No. 91133453/2013 - Principal en Tribunal Oral La Plata, “*Etchecolatz, Miguel Osvlado y otros*”, p. 19; Causa No. 82000149/10 – Tribunal Oral Federal de Rosario, “*Saint Amant et al.*”, p. 872; and Causa No. 85000124/2010, Tribunal Oral Federal de Rosario “*Nast et al.*”, p. 101.

in this case, the most quoted provisions of the Declaration are those enshrining the definition of enforced disappearance, the obligation to codify it as a separate offence under domestic criminal legislation and the corresponding obligation to investigate, the continuous nature of the crime, and the provisions concerning the incompetence of military courts and the prohibition of amnesty laws and similar measures (i.e. preamble and articles 1 to 4, 9 to 13, 16, 17 and 18).

### III. The way ahead

70. The International Court of Justice found that two criteria need to be fulfilled for a rule to be considered part of customary international law: (1) an established, widespread and consistent State practice; and (2) an *opinio juris*, that it is that States comply with the rule because they consider themselves legally bound by it.<sup>77</sup> The Court has been taking into account international instruments of universal application and General Assembly resolutions as evidence of *opinio juris* as it shows States' commitment to the rule.<sup>78</sup> Rules of customary international law bind all States, regardless of whether they participated in the formulation of the practice.<sup>79</sup>

71. The application of certain rules by national and international courts and tribunals is an illustration of the binding nature of customary international law. As illustrated in the previous section, the Declaration has been consistently referred to by national and international courts – including by explicitly acknowledging its customary status – and its provisions and the corresponding obligations – have been enshrined in domestic legislations.

72. The Working Group affirmed that the Declaration reflects, codifies and consolidates the customary international law that is legally binding on all States.<sup>80</sup> As outlined, State practice and *opinio juris* converge to show that various provisions of the Declaration, such as those enshrining the definition of enforced disappearance and the continuing nature of the offence – today are part of customary international law. In their replies to the call for inputs of November 2021, some States expressly referred to the binding nature of the Declaration at the domestic level.<sup>81</sup>

73. The fact that the Declaration largely reflects customary international law bears a number of relevant legal consequences, in the sense that, among others, it amounts to an important source of law, binding on all States. As of today, the Declaration should be regarded as the “minimum common denominator” of the rules concerning the prevention and eradication of enforced disappearance. In this light, a wide dissemination and promotion of the Declaration remains of crucial importance, as well as the activities conducted by the Working Group in identifying the existing hurdles in its implementation and in providing technical assistance and cooperation to States to overcome such obstacles.

<sup>77</sup> International Court of Justice, *North Sea Continental Shelf (Germany v. Denmark and The Netherlands)*, 20 February 1969, para. 77.

<sup>78</sup> International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, 20 July 2012, para. 99; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996, § 73; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 27 June 1986, para. 188.

<sup>79</sup> International Court of Justice, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 13 July 2009, para. 47 referring to the fact that the Vienna Convention on the Law of Treaties is applicable to all States as it is customary international law.

<sup>80</sup> A/HRC/33/51/Add.3, para. 3.

<sup>81</sup> For instance, Colombia mentioned that the Declaration is part of what is referred to as “constitutional block” (*bloque de constitucionalidad*), meaning that it is regarded as a parameter against which domestic legislation must be assessed to be considered aligned with the Constitution. The contribution submitted by OHCHR-Mexico elaborates on the criteria applied by domestic authorities vis-à-vis international soft law instruments, illustrating how some court affirmed that a soft law instrument such as the Declaration can be regarded as binding when this serves the purpose of effectively protecting a constitutionally guaranteed right (references available here: <https://sjf2.scjn.gob.mx/detalle/tesis/2018817>). In this sense, the Declaration “orients/guides” Mexican courts in the interpretation of domestic legislation.

74. In addition, the Declaration enshrines a rule of *jus cogens*, namely the prohibition of enforced disappearance and the corresponding obligation to investigate and punish perpetrators.<sup>82</sup> This recognition entails that the rule concerned enjoys a higher rank in the international hierarchy than treaty law and even ordinary customary rules. Indeed, the consequences are manifold and include the de-legitimation, at the inter-state level, of any legislative, administrative or judicial act authorising enforced disappearance, either explicitly or implicitly. Moreover, national measures authorising or condoning enforced disappearance or absolving its perpetrators through an amnesty law are internationally unlawful and victims are entitled to lodge claims before competent international or national judicial bodies to have the mentioned measures declared null and void and to bring civil suits for damage in foreign courts. Furthermore, perpetrators of enforced disappearance acting upon or benefiting from the mentioned national measures may be held criminally responsible for enforced disappearance, whether in a foreign State or in their own State. The corresponding criminal proceedings may not be covered by a statute of limitations and the alleged perpetrator must not be excluded from extradition under any political exemption.<sup>83</sup>

75. Bestowing *jus cogens* nature to the prohibition of enforced disappearance and the duty to investigate and punish, gives rise to obligations for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so.

76. As illustrated above, the Declaration played a pivotal role in the development of international law – and, in particular, international human rights law – on enforced disappearance, culminated in the adoption of the International Convention, whose provisions are based, to a great extent, on those of the Declaration. In this regard, the recognition that the Declaration largely reflects customary international law binding on all States, enshrines a rule of *jus cogens*, and the activities directed at favouring its wide dissemination and promotion, as well as supporting – including through technical assistance and cooperation – its full implementation, should serve as incentives to States that have not yet done so, to ratify or accede to, the International Convention.

#### IV. Conclusions and recommendations

**77. The adoption of the Declaration 30 years ago spurred the progress of international law on enforced disappearance, culminated, with regard to international human rights law, in the adoption of the International Convention. The Declaration enshrines a rule of *jus cogens*, namely the prohibition of enforced disappearance and the corresponding obligation to investigate and punish perpetrators, and it largely reflects, codifies and consolidates the customary international law that is legally binding on all States. As such, it remains a crucial reference and it should be globally disseminated and promoted.**

**78. The Working Group reiterates its commitment to assist all States – including through technical assistance, cooperation and advisory services and visits – in the implementation of the Declaration, with a view at overcoming any obstacles that they may encounter in this regard. The full implementation of the Declaration is instrumental to the eradication of enforced disappearance and can be achieved and**

<sup>82</sup> A/HRC/45/13/Add.3, para. 9. In the same sense, see Inter-American Court of Human Rights, Case *Goiburú and others*, op. cit., para. 84 (conclusion reiterated in all the subsequent judgments of the Court on cases of enforced disappearance). The nature of *jus cogens* of the rule concerned has been flagged out also in some of the replies received to the call for inputs of November 2021.

<sup>83</sup> See, *mutatis mutandis*, ICTY, (Decision) 10 December 1998, Case No. IT-95-17/1, *Furundžija Case*, Trial Chamber, paras. 153-157. See also Cançado Trindade, ‘Enforced Disappearances of Persons as a Violation of *Jus Cogens*: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights’; and Sarkin, ‘Why the Prohibition of Enforced Disappearance Has Attained the Status of *Jus Cogens* in International Law?’: both articles in 81 *Nordic Journal of International Law*, 2012, respectively pp. 507-536 and 537-584.

facilitated through a concerted effort among different stakeholders. To this end, the Working Group recommends the following:

## A. States

79. States that have not yet done so, are encouraged to ratify, or accede to, the International Convention and to recognise the competence of the Committee to receive and examine individual and inter-state complaints.

80. With regard to the Declaration, States should:

(a) Take all necessary measures to implement the Declaration and continue providing concrete information on such measures, as well as the obstacles encountered, to the Working Group;

(b) Engage and cooperate with the Working Group, including through the acceptance of country visits, and by regularly replying to the general allegations received and implementing the recommendations received with regard to existing obstacles in the implementation of the Declaration and the means of overcoming them;

(c) Consider availing themselves of the advisory services, technical assistance and cooperation provided by the Working Group, with a view at overcoming any obstacles encountered in the implementation of the Declaration;

(d) Bearing in mind the main obstacles in the implementation of the Declaration, as well as the best practices and lessons learned identified in this study, ensure that:

(i) Enforced disappearance is codified as an autonomous offence under domestic criminal legislation and the definition contains these three cumulative elements: deprivation of liberty of the victim, involvement of Government officials, at least indirectly by acquiescence, and refusal to disclose the fate and whereabouts of the person concerned;

(ii) The sanctions envisaged are commensurate to the extreme gravity of the crime;

(iii) Enforced disappearances are not justified on the grounds of any reasons and, in particular, protecting national security, combating terrorism and tackling extremism;

(iv) Laws and agreements that contravene the international human rights obligations of States regarding involuntary transfers of individuals and the prohibition of refoulement are reviewed and repelled; in particular, oversight and procedural safeguards prior to extradition, deportation, expulsion and return processes are strengthened and fully complied with;

(v) Procedural safeguards and guarantees upon arrest and during the first hours of deprivation of liberty are fully implemented, with the aim of preventing enforced disappearance and other human rights violations.; these safeguards should include immediate registration and judicial oversight of the detention, the determination of the state of health of the person deprived of his or her liberty, notification of family members as soon as an individual is deprived of liberty, the availability of a defence lawyer of one's choice, and lawyer-client privilege;

(vi) The compilation and maintenance of one or more up-to-date official registers of persons deprived of liberty, to be made promptly available to their family members, their counsel or to any other person having a legitimate interest in the information, as well as to any judicial or other competent authority or institution authorised for such purpose by the law is ensured. In general, enact legislation requiring both governmental and non-governmental bodies to preserve archives and records that may contain relevant information on enforced disappearances;

- (vii) Also taking into consideration the 2019 Guiding Principles for the Search for Disappeared Persons, a comprehensive strategy for the search for disappeared persons is in place, bearing in mind that the search for the disappeared person should be linked to the criminal investigation and they should be mutually reinforcing;
  - (viii) All necessary measures are taken to ensure that, in the event of death of disappeared persons, their remains are located, respected, exhumed and returned to their relatives; in particular, burial sites and mass graves should be identified, mapped and preserved, to prevent instances of manipulation and tampering; in addition, the use of scientific evidence is promoted, on the basis of the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), including through the creation of local, autonomous forensic teams with access to sufficient human, financial and technical resources;
  - (ix) All necessary and effective measures are adopted to protect from harassment, reprisals and intimidation victims, their family members, their counsels, witnesses and other persons involved in the investigation, including defendants who may provide relevant information on cases;
  - (x) To facilitate all search operations and investigations, a list of disappeared persons is compiled and maintained up-to-date, including data disaggregated, inter alia, by sex, age, ethnic origin and geographical location;
  - (xi) All the necessary measures are undertaken to ensure that persons accused of enforced disappearance are tried solely by the competent ordinary courts, to the exclusion of all other special jurisdictions and, in particular, military courts;
  - (xii) The permanent nature of the crime of enforced disappearance is recognised under domestic criminal legislation and, accordingly, where statutes of limitations to criminal proceedings exist, ensure that in the case of enforced disappearance they commence running only after the offence ceases (i.e. the fate and whereabouts of the disappeared person are established with certainty) and are substantial and commensurate with the extreme seriousness of the offence;
  - (xiii) Bearing in mind the permanent nature of the crime and the continuing character of the multiple human rights violations concerned, ensure that persons found guilty of enforced disappearance can be convicted on the basis of provisions enacted after the enforced disappearance began;
  - (xiv) Amnesties, pardons and other measures that may be aimed at avoiding or indirectly hindering the obligation to investigate, prosecute and punish the perpetrators of said crimes are prohibited; where such measures are already in place, declare them null and void or, in any case, devoid of any legal effects;
  - (xv) Victims of enforced disappearance are entitled to receive prompt, fair and adequate reparation for the harm suffered, encompassing compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition; they should equally be entitled to have access to effective psycho-social support; these measures cannot be made conditional upon declaring the disappeared person dead and unnecessary bureaucratic requirements to realize the corresponding rights should be removed;
  - (xvi) More efforts are devoted to adopt concrete and effective measures aimed at preventing enforced disappearance and at tackling the phenomenon in contexts – such as migration – where two or more States are concerned;
- (e) Translate the text of the Declaration into national and indigenous languages and facilitate its dissemination, including by making it available in accessible formats and through technologies appropriate to different users, with special attention to persons with disabilities;
- (f) Ensure the delivery of regular training programmes that include the necessary education and information on the contents of the Declaration directed at 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.

## **B. United Nations**

81. The United Nations and, in particular, the Secretary-General, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and, in particular, field offices, should facilitate the dissemination of the Declaration in all formats, including through the design and diffusion of dedicated audio-visual material.

82. The contents of the Declaration, as interpreted and clarified by the Working Group over the years, should be included in training programmes on the administration of justice and security in the framework of human rights' advisory services, technical assistance and cooperation. More broadly, OHCHR should take steps to further improve awareness of, and familiarize its staff at all levels with, the contents of the Declaration.

83. Where appropriate, the United Nations Development Programme and specialised agencies and funds of the United Nations should also cooperate in the dissemination of the Declaration and in its inclusion in the relevant training programmes.

## **C. Regional human rights mechanisms**

84. Regional human rights mechanisms should contribute to the dissemination of the Declaration and to raise awareness on its contents, including, where appropriate, through reference to its provisions in their respective jurisprudence.

## **D. National human rights institutions, civil society organizations and academic institutions**

85. National human rights institutions, civil society organizations and academic institutions should continue their efforts in the dissemination of the Declaration and regularly engage with the Working Group, including through submitting information on the implementation of the Declaration and, where necessary, general allegations on the obstacles encountered in this regard.

86. In particular, academics are encouraged to further the research on issues relating to the contents and the implementation of the Declaration, thus contributing to enhance its visibility and application. Moreover, those responsible for human rights curricula and training programmes should consider including dedicated modules to the subject and, where appropriate, provide technical assistance to policy makers, practitioners, public officials and law enforcement personnel.