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

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

**Addendum**

**Best practices on enforced disappearances in domestic criminal  
legislation**

#### *Summary*

In its resolution 14/10 of 18 June 2010 entitled “Enforced or involuntary disappearance”, the Human Rights Council requested the Working Group to prepare a report for submission to the Human Rights Council at its sixteenth session. Drawing on existing legislation and jurisprudence, best practices are highlighted to assist States in enhancing existing, and developing new legislation on enforced disappearance. The conclusions contain a list of such best practices to be followed by all States.

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## I. Introduction

1. In the past, the Working Group on Enforced or Involuntary Disappearances carried out analysis that led to the conclusion that few States had codified enforced disappearance as a separate criminal offence under domestic law. As the Working Group always considered this issue of the utmost importance and, given that article 4 of the United Nations Declaration for the Protection of All Persons from Enforced Disappearance (“the Declaration”)<sup>1</sup> requires that States treat all acts of enforced disappearance as offences under criminal law, the Working Group decided to draft a study on the criminal law treatment of enforced disappearances in States around the world.

2. Based on this decision, a first questionnaire was submitted to States through a note verbale by the Office of the High Commissioner for Human Rights (OHCHR) on 22 March 2005. A few States responded, which only allowed the Working Group to come up with limited conclusions.

3. In 2008, the Working Group decided to renew its request. Based on this decision, on 18 December 2009, OHCHR sent a note verbale to all States requesting their views on the subject and submitting a list of questions.

4. In resolution 14/10 of 18 June 2010 entitled “Enforced or involuntary disappearances”, the Human Rights Council requested the Working Group to prepare a report for submission to the Human Rights Council at its sixteenth session on best practices on enforced disappearances in domestic criminal legislation, based on inputs solicited from Member States.

5. The present report is submitted pursuant to the above-mentioned resolution and aims at highlighting best practices in the matter of the criminal treatment of enforced disappearance and at formulating recommendations to assist States in enhancing existing legislation, and developing new legislation on enforced disappearance. The Working Group would like to express its deepest gratitude to those States that responded to the questionnaire and for the detailed information provided therein.<sup>2</sup>

6. From the answers received, the Working Group found that States have made significant progress between 2005 and 2010 in the enactment of legislation to address enforced disappearance. Numerous examples of best practices can be drawn from these national experiences and be used by those States which intend to enact new legislation or to revise their current legislation in the near future.

7. Before concentrating on those practices in the field of criminal law, the Working Group would like to congratulate those States where the non-derogable right of all persons

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<sup>1</sup> General Assembly resolution 47/133 of 18 December 1992.

<sup>2</sup> The following States have provided responses to the first questionnaire (2005): Belgium, Bolivia, Bulgaria, Canada, China, Colombia, Finland, Greece, Lebanon, Oman, the Philippines, Republic of Korea, Ukraine and Yemen. The following States have provided responses to the second questionnaire (2009): Argentina, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Cameroon, Chad, Colombia, Costa Rica, Czech Republic, Egypt, El Salvador, Eritrea, Estonia, France, Germany, Ghana, Guatemala, Iraq, Japan, Jordan, Kazakhstan, Kyrgyzstan, Latvia, Lebanon, Madagascar, Malaysia, Mauritius, Nicaragua, Paraguay, Peru, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Russian Federation, Serbia, Slovenia, Switzerland, Thailand, Togo, Uruguay and Venezuela (Bolivarian Republic of). The full texts of the submissions are available from the Secretariat.

not to be subjected to enforced disappearance is embodied in the Constitution.<sup>3</sup> Although not directly touching upon the issue of the criminal sanction of enforced disappearance, the Working Group deems it important that this right be fully recognized as a human right at the level of the Constitution, as it makes it clear that this right should be respected by all institutions of the State in all their activities.

8. The questionnaire sent by the Working Group covered six areas: the codification of the crime of enforced disappearances in domestic law (part I); the definition of the constitutive elements of the crime (part II); the continuous nature of the offence and its consequences in criminal law (part III); the modes of participation to the crime of enforced disappearance (part IV); applicable sanctions (part V); and the guarantees against impunity of perpetrators (part VI).

## II. The codification of the crime of enforced disappearance

9. Article 4 of the Declaration provides that “all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness”. In 1995, the Working Group adopted a general comment on this provision, noting that the obligation to codify enforced disappearance as a separate offence in domestic criminal codes “applies to all States regardless of whether acts of enforced disappearance actually take place or not. It is not sufficient for Governments to refer to previously existing criminal offences relating to enforced deprivation of liberty, torture, intimidation, excessive violence, etc. In order to comply with article 4 of the Declaration, the very act of enforced disappearance as stipulated in the Declaration must be made a separate criminal offence”.<sup>4</sup> The same concept was reiterated by the Working Group on a number of occasions.

10. Even if the absence of an autonomous crime does not excuse States from investigating and punishing acts of enforced disappearances, the obligation to criminalize enforced disappearance under national legislation as a separate offence is a powerful mechanism for overcoming impunity. The Supreme Court of Nepal found that “in the absence of pertinent laws, no real, effective or practical investigation can be carried out. ... For the purpose of addressing this problem effectively, it is necessary to urgently enact a law which includes provisions that the act of disappearance is a criminal offence, defining the act of disappearance pursuant to the definition stated in the International Convention”.<sup>5</sup>

11. A number of States admit that they have not yet incorporated the crime of enforced disappearance into their domestic legislation, but argue that their legislation provides for safeguards from various offences that are linked with enforced disappearance or are closely related to it, such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. However, a plurality of fragmented offences does not mirror the complexity and the particularly serious nature of enforced disappearance. While the mentioned offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection.

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<sup>3</sup> Bolivia (art. 15.IV), Colombia (art. 12), Ecuador (arts. 66, 80 and 120.13), Paraguay (art. 5) and Venezuela (art. 45).

<sup>4</sup> E/CN.4/1996/38, para. 54. See also A/HRC/7/2, para. 26 (para. 3 of the general comment on the definition of enforced disappearance).

<sup>5</sup> Supreme Court of Nepal, judgment of 1 July 2007, conclusion b.i).

12. The analysis of the responses given by States shows great progress made in a few years. In most of the cases, the impulse for codifying the crime of enforced disappearance seems to have been the ratification and thus the implementation of the Rome Statute of the International Criminal Court (ICC) in domestic law. At the same time, a number of States have also simultaneously or alternatively codified enforced disappearance as an autonomous crime in their domestic legislation.

### **A. The codification of enforced disappearance in conformity with the Statute of the International Criminal Court**

13. A significant number (45) of States analysed<sup>6</sup> have indeed criminalized enforced disappearance as a crime against humanity, when it is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, following the definition given of crimes against humanity and of enforced disappearance provided for in article 7 of the Rome Statute. The Working Group welcomes those positive developments that make the crime of enforced disappearance specifically punishable under certain domestic laws.

14. During its recent mission to Bosnia and Herzegovina – one of those States that codified enforced disappearances pursuant to the Rome Statute – the Working Group was pleased to learn that a number of convictions had occurred on the basis of this crime. Those convictions positively succeed in grasping the specificity of those acts, which cannot be described satisfactorily with other qualifications such as “murder” or “torture”. Thus, the Working Group encourages more States to ratify the Rome Statute and to transpose the

<sup>6</sup> Argentina (art. 9 Law 26.200 of 5 January 2007); Australia (sect. 268.21 Criminal Code Act 1995 and Schedule 1 International Criminal Court Act 2002); Azerbaijan (art. 110 Criminal Code); Belgium (art. 136-ter Criminal Code); Bosnia and Herzegovina (art. 172 Criminal Code); Burkina Faso (art. 314 Criminal Code); Burundi (arts. 196-197 of the Criminal Code); Canada (sect. 4 and Schedule Crimes against Humanity and War Crimes Act 2000); Chile (Law 20.357 of 18 July 2009); Republic of the Congo (arts. 6.k and 8 Law No. 8 of 31 October 1998); Costa Rica (art. 379 Criminal Code); Croatia (art. 157-A Criminal Code); Cyprus (Sect. 4 Law No. 23(III)/2006 of 28 July 2006); Czech Republic (sect. 401 Criminal Code); Finland (Chapter 11 Criminal Code); France (art. 212.1 Criminal Code); Germany (sect. 7.1.7 German Code of Crimes against International Law); Indonesia (art. 9 Law No. 26 of 2000 establishing the ad hoc Human Rights Court); Iraq (art. 12 Law of the Supreme Iraqi Criminal Tribunal of 18 October 2005 – only for crimes committed from 17 July 1968 to 1 May 2003); Ireland (sects. 6 and 10 of the International Criminal Court Act 2006); Kenya (sect. 6 International Crimes Act 2008); Republic of Korea (art. 9 Act on the Punishment of the Crimes within the Jurisdiction of the International Criminal Court 2007); Lithuania (art. 100 Criminal Code); Macedonia (art. 403 Criminal Code); Mali (art. 29 Criminal Code); Malta (art. 54-C Criminal Code); Montenegro (art. 427 Criminal Code); the Netherlands (sect. 4 International Crimes Act 2003); New Zealand (sec. 10 International Crimes and International Criminal Court Act 2000); Norway (sect. 102 Criminal Code); Panama (art. 432 Criminal Code); Philippines (Republic Act n° 9851, An Act defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes against Humanity, organizing Jurisdiction, Designating Special Courts and For Related Purposes, 11 December 2009, Section 6); Portugal (art. 9 Law No. 31 of 22 July 2004); Romania (art. 175 Criminal Code); Rwanda (art. 6 Law on Genocide, Crimes against Humanity and Crimes of War 2003); Samoa (sect. 6 International Criminal Court Act 2007); Senegal (art. 431-2 Criminal Code); Serbia (art. 371 Criminal Code); Slovenia (art. 101 Criminal Code); South Africa (part 2 Implementation of the Rome Statute of the International Criminal Court Act 2002); Spain (art. 607-bis Criminal Code); Switzerland (arts. 264a Criminal Code and 109e Military Criminal Code); Timor-Leste (art. 124 Criminal Code); Trinidad and Tobago (sect. 6 International Criminal Court Act 2006); United Kingdom of Great Britain and Northern Ireland (sect. 50 International Criminal Court Act of 2001); and Uruguay (art. 18 Law 18.026 of 4 October 2006).

crimes of the ICC Statute into domestic law, including the crime of enforced disappearance as a crime against humanity.

15. However, the Working Group would like to reiterate the reservations it has already expressed (see its general comment on the definition of enforced disappearances)<sup>7</sup> on the specific definition of enforced disappearances resulting from the Rome Statute. In this regard, the Working Group recommends that the definition of enforced disappearance provided for by the Rome Statute be interpreted by the national authorities in line with the more adequate definition provided for in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

## **B. Codification of enforced disappearance as an autonomous crime**

16. Experience shows that enforced disappearances often do not occur as part of a widespread or systematic attack against civilians. In this perspective, criminalizing enforced disappearance in domestic law only when committed in this specific context implies that many acts of enforced disappearances remain outside the scope of domestic criminal law and the jurisdiction of national courts.

17. The Working Group has pointed out that “since most cases of enforced disappearance occur in isolation and not necessarily as part of a systematic attack with the intention to remove the victims from the protection of the law for a prolonged period of time ... efforts have to be increased to include enforced disappearance in all domestic criminal codes with appropriate punishment, and to bring the perpetrators to justice before domestic courts under national as well as universal jurisdiction”.<sup>8</sup>

18. Even if it cannot lead to invoking the jurisdiction of the International Criminal Court, an isolated act of enforced disappearance nonetheless remains an international crime and a gross human rights violation, which determines the criminal responsibility of the perpetrators, as required by several international human rights treaties. It follows that States cannot limit the criminalization of enforced disappearances only to those instances which would amount to crimes against humanity in the sense of the ICC Statute, but should encompass in the definition of the offence any kind of such act.

19. A number of good practices can be seen in this regard. Two States have thus established in their domestic legislation two separate offences: one in the context of article 7 of the ICC Statute and, another, punishing enforced disappearances that do not take place in a widespread or systematic attack against a civilian population.<sup>9</sup> Other States, however, have a single offence in their domestic law, which is sufficiently broad to include any instance of this crime, be it committed as an isolated act or as part of a widespread or systematic attack against a civilian population.<sup>10</sup> Some of those States have chosen to

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<sup>7</sup> A/HRC/7/2, para. 26.

<sup>8</sup> E/CN.4/2002/79, para. 365.

<sup>9</sup> Panama (arts. 150 and 432 Criminal Code); Uruguay (arts. 18 and 21 Law No. 18.026 of 4 October 2006). In the case of Uruguay, enforced disappearance as an autonomous offence (not in the context of article 7 of the ICC Statute), is nevertheless qualified as a crime against humanity.

<sup>10</sup> Armenia (art. 392 Criminal Code); Bolivia (art. 292-bis Criminal Code), Colombia (art. 165 Criminal Code), El Salvador (art. 364 Criminal Code), Guatemala (art. 201-ter Criminal Code), Mexico (art. 215-A Criminal Code), Nicaragua (art. 488 Criminal Code), Paraguay (art. 236 Criminal Code), Peru (art. 320 Criminal Code), Uruguay (art. 21 Law 18.026 of 4 October 2006), and Venezuela (art. 180-A Criminal Code).

qualify enforced disappearance as a crime against humanity, even if it is not committed in the context of a widespread or systematic attack.<sup>11</sup>

20. All those form distinct practices which are in conformity with article 4 of the Declaration and thus should be followed by States that are contemplating the adoption of legislation concerning enforced disappearances.

### III. The constitutive elements of the offence

21. Since 1995, the Working Group has clarified that States are not bound to strictly follow the definition of the offence as contained in the Declaration, ensuring however “that the act of enforced disappearance is defined in a way which clearly distinguishes it from related offences such as enforced deprivation of liberty, abduction, kidnapping, incommunicado detention, etc. The following three cumulative minimum elements should be contained in any definition: (a) Deprivation of liberty against the will of the person concerned; (b) Involvement of government officials, at least indirectly by acquiescence; (c) Refusal to disclose the fate and whereabouts of the person concerned”.<sup>12</sup>

#### A. The deprivation of liberty

22. Every enforced disappearance starts with the deprivation of liberty of the victim. The Working Group pointed out that “under the definition of enforced disappearance contained in the Declaration, the criminal offence in question starts with an arrest, detention or abduction against the will of the victim, which means that the enforced disappearance may be initiated by an illegal detention or an initially legal arrest or detention. That is to say, the protection of a victim from enforced disappearance must be effective upon the act of deprivation of liberty, whatever form such deprivation of liberty takes, and not be limited to cases of illegitimate deprivations of liberty”.<sup>13</sup>

23. Thus the definition of the crime in domestic law should cover all the varieties of situations covered by the generic term of “deprivation of liberty”. For instance, using the term “kidnapping” alone is inappropriate, as it refers only to a certain type of illegal abduction.

24. Good practices can be identified in laws that simply use the term “deprivation of liberty of the victim”<sup>14</sup> or “deprivation of liberty in whatever form”<sup>15</sup> – which is even better. The terms “legally or illegally detain a person” can fit, provided they are interpreted broadly so as to cover all forms of deprivation of liberty in any place, and not only in official detention centres by competent authorities (although acting illegally).<sup>16</sup> Definitions inspired from the Rome Statute use the same wording as article 7, paragraph 2-i, that is to say, “the arrest, detention or abduction of persons”, which should be interpreted as sufficiently broad to cover all types of deprivation of liberty.

<sup>11</sup> Armenia (art. 392 Criminal Code); El Salvador (arts. 364-366 Criminal Code); Guatemala (art. 201-ter Criminal Code); Nicaragua (art. 488 Criminal Code) and Peru (art. 320 Criminal Code).

<sup>12</sup> E/CN.4/1996/38, para. 55.

<sup>13</sup> A/HRC/7/2, para. 26 (para. 7 of the general comment on the definition of enforced disappearance).

<sup>14</sup> Bolivia (art. 292-bis Criminal Code).

<sup>15</sup> Colombia (art. 165 Criminal Code); Guatemala (art. 201-ter Criminal Code); Panama (art. 150 Criminal Code); Uruguay (art. 21 Law 18.026, 4 October 2006).

<sup>16</sup> El Salvador (art. 364 Criminal Code); Nicaragua (art. 488 Criminal Code); Venezuela (art. 180-A Criminal Code).

## **B. The perpetrators of the offence**

25. In its general comment on the definition of enforced disappearance, the Working Group recalled that “with respect to the perpetrators of the crime, (...) for purposes of its work, enforced disappearances are only considered as such when the act in question is perpetrated by State actors or by private individuals or organized groups (e.g. paramilitary groups) acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government”.<sup>17</sup> Where domestic criminal legislation did not include acts committed by individuals acting on behalf of the Government or with its direct or indirect support, without necessarily having received orders or instructions from Government agents to commit the offence, the Working Group found that the definition was partial and, as such, needed to be amended.<sup>18</sup> The Working Group also noted that it “concur[s] with the provisions of article 3 of the International Convention, in connection with the fact that States shall take appropriate measures to investigate acts comparable to enforced disappearances committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice”.<sup>19</sup>

26. Good practices therefore flow from the implementation of the Rome Statute, which contemplates the repression of enforced disappearance as a crime against humanity when committed “by, or with the authorization, support or acquiescence of, a State or a political organization”, a wording which covers the broadest spectrum of instances of enforced disappearances. The same can be said of the definition of enforced disappearance as an autonomous offence which foresees the perpetration of the crime by “any individual”.<sup>20</sup> The Working Group however recalls that such broad definitions shall not be construed to dilute the responsibility of the State and should take into account the specificity of the offence of enforced disappearance that result from the other constitutive elements, and in particular the fact that such a crime results in placing the victim outside the protection of the law.

27. Equally positive and more in line with the language of the Declaration are the domestic laws restricting the category of potential perpetrators to those persons who have a link – whatever nature – with the State, following for instance the wording used in article 2 of the International Convention.<sup>21</sup>

## **C. The refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person**

28. According to definitions of enforced disappearance in international law, one of the constitutive elements of the offence is the refusal to acknowledge the deprivation of liberty of the victim, or the concealment of his or her fate or whereabouts. This element in fact distinguishes enforced disappearance from other offences, such as arbitrary detention.<sup>22</sup> Good practices of States include the codification of enforced disappearance following the definition given by the Rome Statute (“the arrest, detention or abduction of persons... followed by a refusal to acknowledge that deprivation of freedom or to give information on

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<sup>17</sup> A/HRC/7/2, para. 26 (para. 1 of the general comment on the definition of enforced disappearance).

<sup>18</sup> A/HRC/7/2/Add.2, para. 30.

<sup>19</sup> A/HRC/7/2, para. 26 (para. 2 of the general comment on the definition of enforced disappearance).

<sup>20</sup> Colombia (art. 165 Criminal Code). See also Paraguay (art. 236 Criminal Code), “Whoever with a political aim...”. However, the special intent element appears to be an undue limitation of the scope of the definition. See below on special intent.

<sup>21</sup> Bolivia (art. 292-bis Criminal Code); El Salvador (art. 364 Criminal Code).

<sup>22</sup> See Supreme Court of Justice of Peru, Acuerdo Plenario No. 9-2009/CJ-116 of 13 November 2009, paras. 9.B-10.

the fate or whereabouts of those persons”), as well as the codification of an autonomous offence including such an element in its definition.<sup>23</sup> Other wordings are equally acceptable, provided they are interpreted as covering all the cases contemplated in the Declaration, the International Convention and the Rome Statute, that is to say: refusal to acknowledge the deprivation of liberty; refusal to give information on/concealment of the fate or the whereabouts of the person.<sup>24</sup>

#### **D. The placement of the disappeared person outside the protection of the law and the intent of the perpetrators**

29. All definitions of enforced disappearance in international law indicate that the victim is placed outside the protection of the law. This peculiarity of enforced disappearance entails the suspension of the enjoyment of all other human rights and freedoms of the victim and places him or her in a situation of complete defencelessness. This is strictly related to the right of everyone to be recognized as a person before the law, which is a prerequisite to enjoy all other human rights.

30. Article 1, paragraph 2, of the Declaration provides that any act of enforced disappearance *has the consequence* of placing the persons subjected thereto outside the protection of the law.

31. With the aim of construing the definition of the offence in a way that is most conducive to the protection from enforced disappearance, the Working Group “admits cases of enforced disappearance without requiring that the information whereby a case is reported by a source should demonstrate, or even presume, the intention of the perpetrator to place the victim outside the protection of the law”.<sup>25</sup>

32. Good practices come from those States that include this element of “placement of the victim outside the protection of the law” as a *consequence* of the other constitutive elements, in conformity with the Declaration and the position of the Working Group.<sup>26</sup>

### **IV. The continuous nature of the offence and its consequences in criminal law**

33. Article 17.1 of the Declaration establishes that “acts constituting enforced disappearance shall be considered a continuous offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified”. In its general comment on enforced disappearance as a continuous crime, the Working Group pointed out that “enforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole time that the crime is not complete, that is to say until the State acknowledges the detention or releases information pertaining to the fate or whereabouts of the individual”.

<sup>23</sup> Bolivia (art. 292-bis Criminal Code); Colombia (art. 165 Criminal Code); El Salvador (art. 364 Criminal Code); Guatemala (art. 201ter Criminal Code); Uruguay (art. 21 Law 18.026, 4 October 2006); Venezuela (art. 180-A Criminal Code).

<sup>24</sup> See Nicaragua (art. 488 Criminal Code): “... and does not provide information on the whereabouts of the persons”.

<sup>25</sup> A/HRC/7/2, para. 26 (para. 5 of the general comment on the definition of enforced disappearance).

<sup>26</sup> Bolivia (art. 292-bis Criminal Code); Colombia (art. 165 Criminal Code); Venezuela (art. 180-A Criminal Code) – with a wording that is narrower but that could be construed in conformity with the Declaration, “thereby impeding to the victims the exercise of his or her rights”.

34. Responses to the questionnaire sent by the Working Group reveal best practices in this matter. In particular, some States expressly define enforced disappearance as a continuous offence under their criminal law.<sup>27</sup> This explicit characterization of the offence as continuous has facilitated domestic tribunals in convicting the accused for enforced disappearance in cases where the commission of the act had begun before the offence was codified under domestic law.<sup>28</sup> In other cases, although the offence is not expressly qualified as continuous, domestic tribunals have equally upheld this notion with regard to enforced disappearance and the application of the principle of non-retroactivity.<sup>29</sup> Other States where enforced disappearance is not codified as a separate offence nonetheless recognize the notion of continuous crime,<sup>30</sup> which might facilitate its application to acts of enforced disappearances. In one State, the offence of enforced disappearance is codified, but the case law has not yet applied to it the notion of “permanent” crime, even though other offences related to the violation of personal liberty, such as abduction, have been qualified as permanent.<sup>31</sup>

## V. Participation in the commission of enforced disappearance and inchoate offences

35. The different forms of participation in the commission of enforced disappearance, such as complicity, command responsibility or instructions, instigation, consent, acquiescence and active concealment, shall also be punishable under domestic criminal law. This is important notably as regards the criminal responsibility of persons involved in the

<sup>27</sup> Guatemala; Uruguay; and Venezuela. Nicaragua answered that the notion of continuous crime is known under Nicaraguan legislation (art. 83 Criminal Code) and enforced disappearance is considered as such.

<sup>28</sup> See, inter alia, Tribunal Primero de Sentencia of Chiquimula (Guatemala), judgment of 3 December 2009 (Case Marco Antonio Sánchez Samayoa et al.); Tribunal for Criminal Act, Narco-activity and Crimes against the Environment of the region of Chimaltenango (Guatemala), judgment No. C-26-2-2006 of 7 September 2009; Constitutional Court of Guatemala, judgment of 7 July 2009; Constitutional Section of the Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela, judgment of 10 August 2007.

<sup>29</sup> See, inter alia, Juzgado Tercero Penal del Circuito Especializado Bogotá, judgment of 9 June 2010 (Case Alfonso Plazas Vega); Supreme Court of Justice of Peru, Acuerdo Plenario No. 9-2009/CJ-116, of 13 November 2009, paras. 14-15; Supreme Court of Justice of Peru, judgment of 20 March 2006 (Exp. 111-04, D.D. Cayo Rivera Schreiber); Constitutional Court of Peru, judgment of 18 March 2004 (Exp. 2488-2002-HC/TC), para. 26; Supreme Court of Justice of Mexico, judgment of 20 July 2004 (P./J.49/2004); Constitutional Court of Peru, judgment of 9 December 2004 (Exp. 2798-04-HC/TC), para. 22; and Constitutional Court of Colombia, judgment of 31 July 2002 (No. C-580/02).

<sup>30</sup> Egypt, where unjust imprisonment is deemed to be a continuous crime during the whole period in which the victim remains deprived of his or her freedom; Eritrea, applied to offences such as abduction; Estonia; France; Germany, applied to unlawful imprisonment; Japan, applied to “unlawful capture and confinement” and “kidnapping”; Jordan, applied to “illegal deprivation of liberty”; Kazakhstan, applied to “abduction”; Republic of Korea, applied to false arrest, illegal confinement...; Latvia; Lebanon; Madagascar; Mauritius; Moldova, applied to unlawful deprivation of liberty and hostage-taking but not to abduction; Poland, applied to the crime of deprivation of liberty; Portugal explains that the notion of continuous crime is known to the Portugal legislation (art. 30, par. 2 Criminal Code) but that enforced disappearance would rather be qualified as “permanent extension crimes”, meaning those crimes committed through several acts or through one single act that could be extended in terms of duration (e.g. illegal restraint); Qatar, applied to abduction; Serbia (art. 61 Criminal Code); Thailand; Togo.

<sup>31</sup> El Salvador: Tribunal Primero de Sentencia de San Miguel, Case n° 0301-82-2004, judgement of 3 August 2004.

chain of command. Usually many perpetrators are implicated in the commission of an enforced disappearance and not necessarily all of them are aware of the whereabouts or the fate of the victim.<sup>32</sup>

36. Although the Declaration does not contain a detailed provision on this matter, article 6, paragraph 1, of the International Convention provides that States 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 or prosecution”.<sup>33</sup>

37. Good practices from a great number of States result from the implementation of the Rome Statute in their domestic legislation and in particular of articles 25 and 28 of this Statute, which provide for a detailed account of forms of responsibility, comparable to the one that can be found in article 6 of the International Convention.<sup>34</sup> However, this only concerns responsibility of persons having committed the crime of enforced disappearance as a crime against humanity, under the condition and the specific definition given in article 7 of the Statute.<sup>35</sup>

<sup>32</sup> Supreme Court of Justice of Peru, Acuerdo Plenario No. 9-2009/CJ-116, of 13 November 2009, para. 11: “The Supreme Court of Justice of Peru declared that “the duty to provide information is crucial for the codification of the offence. [...] As long as the situation of disappearance lasts, all those officials and agents that are in the position to know what has happened are under the mentioned duty to provide information. To be held criminally responsible, it is not necessary that perpetrators or participants intervene since the very beginning of the commission of the offence”.

<sup>33</sup> Art. 6, 1(c) of the International Convention establishes that: “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”.

<sup>34</sup> Australia (sect. 268.115 Criminal Code Act of 1995); Bosnia and Herzegovina (art. 180.2 Criminal Code); Canada (sect. 5 Crimes against Humanity and War Crimes Act 2000); Chile (arts. 35-35 Law 20.357 of 18 July 2009); Republic of Congo (art. 10 Law No. 8 of 31 October 1998); Croatia (art. 167-A Criminal Code); Finland (sects. 12-13 Chapter 11 Criminal Code); Germany (sects. 4, 13 and 14 German Code of Crimes against International Law); Indonesia (arts. 41-42 Law No. 26/2000); Iraq (art. 15 Law of the Supreme Iraqi Criminal Tribunal of 18 October 2005); Republic of Korea (art. 5 Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court Act 2007); former Yugoslav Republic of Macedonia (art. 416.B Criminal Code); Malta (art. 54-E Criminal Code); Montenegro (art. 440 Criminal Code); the Netherlands (sect. 9 International Crimes Act 2003); Norway (sect. 109 Criminal Code); Panama (art. 445 Criminal Code); Philippines (Republic Act n° 9851, An Act defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes against Humanity, organizing Jurisdiction, Designating Special Courts and For Related Purposes, 11 December 2009, Section 8 and 10); Portugal (art. 6 Law 22 July 2004); Rwanda (art. 18 Law No. 33-bis 2003); Samoa (art. 10 International Criminal Code Act 2007); Serbia (art. 384 Criminal Code); Slovenia (art. 104 Criminal Code); Spain (art. 615-bis Criminal Code); Switzerland (arts. 264k and 264l Criminal Code and arts. 20 and 114 Military Criminal Code); Timor-Leste (art. 136 Criminal Code); United Kingdom of Great Britain and Northern Ireland (sect. 65 International Criminal Court Act 2001); Uruguay (art. 10 Law 18.026 4 October 2006).

<sup>35</sup> In Uruguay, enforced disappearances are always crimes against humanity even when not perpetrated under the conditions set by the Rome Statute.

38. When it comes to enforced disappearance as an autonomous crime, one State establishes a comprehensive regime specifically dealing with those who solicit or induce the commission of, attempt to commit, are accomplice to, or participate in an enforced disappearance.<sup>36</sup> Another State more generally provides for the responsibility of “those who participate or conceal the offence”.<sup>37</sup>

## VI. Sanctions

39. Article 4, paragraph 1, of the Declaration states that: “All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness”.<sup>38</sup>

40. The Working Group found that a penalty of 25 to 40 years of imprisonment for the offence of enforced disappearance is consistent with the Declaration.<sup>39</sup> Good practices in this regard can be found in a limited number of States.<sup>40</sup>

41. In some States, the penalty provided for by domestic legislation does not seem appropriate at first sight when applied to enforced disappearance as an autonomous offence, even though in certain cases, a very broad choice is let to the appreciation of the judge or the jury pronouncing the sentence, including through the consideration of possible aggravating circumstances.<sup>41</sup> Penalties contemplated to punish enforced disappearance as a crime against humanity as defined by the Rome Statute are generally more appropriate, although it is not always the case. However, the Working Group deems that if enforced disappearance as a crime against humanity is abhorrent, enforced disappearance as a single act is still a very serious crime that deserves a correspondingly severe sentence.

42. Article 4, paragraph 2, of the Declaration states: “Mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance”.<sup>42</sup>

43. The Working Group found that the criminal legislation that “provides for mitigating measures only in the case that the perpetrators cooperate in the liberation of the victim or in the finding of the remains of the victim, as the case may be” meets the requirements of article 4, paragraph 2, of the Declaration.<sup>43</sup>

44. A number of States establish specific aggravating or mitigating circumstances for enforced disappearance,<sup>44</sup> while others refer to the generic circumstances, if any,

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<sup>36</sup> Colombia (art. 340, 348, 441, 446, 449 and 450 Criminal Code).

<sup>37</sup> Venezuela (art. 180-A Criminal Code).

<sup>38</sup> Similarly, see article 7 of the International Convention.

<sup>39</sup> A/HRC/4/41/Add.1, para. 33. See also E/CN.4/2006/56/Add.1, para. 27.

<sup>40</sup> Colombia (320/540 months of prison and up to 480/600 months in case of aggravating circumstances, plus pecuniary sanction, plus disqualification from public offices for 160/360 months); Guatemala (25/40 years of prison, but also the death penalty: see below).

<sup>41</sup> Bolivia (5 to 15 years of prison and up to 30 years in case of aggravating circumstances); Peru (“no less than 15 years of prison” and disqualification from office of public servants); Uruguay (2 to 25 years).

<sup>42</sup> See also article 7, paragraph 2, of the International Convention.

<sup>43</sup> E/CN.4/2006/56/Add.1, para. 27.

<sup>44</sup> Bolivia (art. 292-bis Criminal Code), Colombia (arts. 166 and 167 Criminal Code), Guatemala (art. 201-ter Criminal Code), Mexico (art. 215-B Criminal Code), Panama (arts. 150-151 Criminal Code),

established in the Criminal Code. When specific aggravating circumstances are provided for, they relate, among others, to the event of the death or of serious physical or psychological harm to the disappeared person, the fact that the victim is a member of a particularly vulnerable group, the fact that the perpetrator is a public official, or the fact that the act considered is a continuous crime.<sup>45</sup> In some other States, the commission of a crime over a longer period of time is considered as an aggravating circumstance.<sup>46</sup> As regards mitigating circumstances, they include, among others, the fact that the victim is freed within a given lapse of time or the fact that the person implicated provides information which makes it possible to clarify the case or to identify the perpetrators.

45. As regards accessory sanctions, the Working Group held that domestic legislation dealing with enforced disappearance shall provide that perpetrators must suffer administrative disqualification.<sup>47</sup> Accordingly, some States expressly provide for disqualification from office for public servants convicted of enforced disappearance.<sup>48</sup>

46. The obligation to provide for appropriate criminal sanctions shall not detract from the duty to ensure that full civil reparation is granted to the victims. The Working Group recalled that “in addition to the applicable criminal penalties, the alleged perpetrators of enforced disappearance bear general civil liability”.<sup>49</sup>

## VII. Guarantees against impunity

47. In its 1994 report (E/CN.4/1994/26), the Working Group specifically referred to the question of impunity, reminding States of their obligations not to make or enact laws that would in effect give immunity to perpetrators of disappearances. Subsequent reports have repeated this concern. There exists a vicious circle between the commission of enforced disappearance and impunity. As noted by the Working Group and the Commission on Human Rights, impunity is simultaneously one of the underlying causes of enforced disappearance and one of the major obstacles to the elucidation of the cases thereof.<sup>50</sup> In this regard, the Working Group notes a number of good practices from States that progressively contributed to put an end to a situation of impunity on their territory.

### A. Amnesty

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

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Uruguay (arts. 15 and 21.3 Law No. 18.026 of 4 October 2006), and Venezuela (art. 180-A Criminal Code).

<sup>45</sup> E.g. Nicaragua (art. 83 Criminal Code).

<sup>46</sup> E.g. Czech Republic (Sect. 42.m of the Criminal Code).

<sup>47</sup> A/HRC/7/2/Add.1, paras. 39 and 66.c). Article 5 of the Declaration establishes that, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law, in addition to such criminal penalties as are applicable, enforced disappearance render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law.

<sup>48</sup> Colombia (art. 165 Criminal Code), El Salvador (art. 366 Criminal Code), Mexico (arts. 215-C and 215-D Criminal Code), Nicaragua (art. 488 Criminal Code), Peru (art. 320 Criminal Code), and Uruguay (art. 12 Law No. 18.026 of 4 October 2006).

<sup>49</sup> A/HRC/7/2/Add.1, paras. 39 and 66 (c).

<sup>50</sup> See, *inter alia*, Commission on Human Rights Resolution No. 2001/46 of 23 April 2001.

proceedings or sanction”.<sup>51</sup> The Working Group issued a thorough interpretation of this provision in its general comment on article 18 of the Declaration.<sup>52</sup> It detailed those cases where an amnesty would be deemed contrary to article 18 and gave examples of “similar measures” which should also be prohibited. It also stated that “article 18 of the Declaration, when construed together with other provisions of the Declaration, allows limited and exceptional measures that directly lead to the prevention and termination of disappearances, as provided for in article 3 of the Declaration, even if, *prima facie*, these measures could appear to have the effect of an amnesty law or similar measure that might result in impunity” – and gave a detailed account of the types of measures that could be taken (see in particular paragraph 8 of the general comment).

49. The best practices emanate from States that expressly exclude the crime of enforced disappearance from the application of amnesty laws or similar measures, wherever the act is qualified as a crime against humanity or not.<sup>53</sup> Some other States limit the exclusion to disappearances which fall under the definition of crimes against humanity.<sup>54</sup> Again, the Working Group would like to underline that whereas enforced disappearance as a crime against humanity is abhorrent, enforced disappearance as a single act is still a very serious crime and should be as such excluded from any measure of amnesty that would not respect the conditions set by the Working Group in its general comment on article 18.

50. In some States, there exists no restriction at all that would prevent the granting of an amnesty for acts of enforced disappearances.<sup>55</sup> The Working Group would like to recommend those States to follow the best practices by the States mentioned above, by excluding disappearances from the application of amnesty laws or similar measures.<sup>56</sup> In any event, those States should refrain from adopting any amnesty law or similar measure that would not respect the conditions detailed by the Working Group in its general comment on article 18.

51. In a number of other States, previous amnesty laws or similar measures have been reviewed, limited in their scope of application or even declared illegal *ex post facto*, thus allowing the opening or reopening of judgements over crimes committed in the past, including still unsolved cases of enforced disappearances.<sup>57</sup>

<sup>51</sup> E/CN.4/1996/38, paragraphs 57-58.

<sup>52</sup> E/CN.4/2006/56, paragraph 49. See also paragraph 8 of the general comment on the right to the truth in relation to enforced disappearance (A/HRC/16/48, paragraph 39).

<sup>53</sup> Colombia (art. 14 Law No. 589 of 2000), Ecuador (arts. 80 and 120 Constitution), Nicaragua (art. 130 Criminal Code); Panama (art. 115 Criminal Code), Uruguay (art. 8 Law No. 18.026 of 4 October 2006), and Venezuela (arts. 180-A Criminal Code and 29 Constitution). In Guatemala, the amnesty law itself does exclude enforced disappearance from its scope (art. 8 Decree 145-1996 Law of National Reconciliation, 1996).

<sup>54</sup> Burundi (arts. 170-171 Criminal Code); and Iraq (art. 15.6 Law of Supreme Iraqi Criminal Tribunal of 18 October 2005).

<sup>55</sup> Bosnia and Herzegovina; Czech Republic; Eritrea; Slovenia.

<sup>56</sup> Estonia clarified its position that no amnesty would be applied to enforced disappearances, despite the fact that no explicit provision provides for such an exclusion.

<sup>57</sup> In Argentina, in 2003, the Parliament declared null and void the two mentioned amnesty laws and on 14 June 2005 the Supreme Court of Justice declared them unconstitutional, thus concretely allowing the opening or re-opening of judgments over the crimes committed by the military in the Seventies, including thousands of cases of enforced disappearances (Reference is made to Supreme Court of Justice, Case S.1767.XXXVIII, Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc., judgment of 14 June 2005.) On 13 July 2007, the Supreme Court adopted a decision whereby it declared ineffective the pardon of 1990 in one specific case, establishing a significant precedent. Reference is made to Supreme Court of Justice, Case Santiago Omar Riveros, judgment of 13 July 2007. In Chile, the Supreme Court adopted a series of decisions excluding the application of the

## B. Due obedience to superior orders

52. All international human rights instruments dealing with enforced disappearance make it clear that no order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.<sup>58</sup> The Working Group stressed that this principle shall be duly mirrored by domestic legislation.<sup>59</sup> None of the mentioned international instruments refers to the fact that superior orders could be considered a ground for mitigation of punishment if justice so requires. Indeed, even if national legislation were to introduce mitigation of sentence based on superior orders, mitigation could not be without limits: if too great a reduction of penalty were permitted by national law, it would contravene the obligation to provide for “appropriate penalties” contained, among others, in article 4 of the Declaration.

53. According to the responses received by the Working Group, it appears that a number of States already include in their domestic legislation provisions that expressly state that no order or instruction may be invoked to justify an enforced disappearance, in most of the cases when this act receives the qualification of crime against humanity.<sup>60</sup> In other States, acting pursuant to an order normally excludes responsibility, unless the order was “manifestly unlawful”<sup>61</sup> or out of the limits of the superior’s powers,<sup>62</sup> or the subordinate

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Amnesty Decree-Law of 1978 to crimes against humanity. The Supreme Court also decided that the doctrine of “continuing offence of kidnapping” should prevent any application of amnesty or prescription to cases of enforced disappearances. In El Salvador, in a judgement of 26 September 2000, the Supreme Court of Justice affirmed that the Decree of 20 March 1993 granting amnesty to all those who participated in crimes prior to 1 January 1992 could not be declared unconstitutional, but that judges had the faculty of avoiding its application in specific cases, which happened once, in a case of extrajudicial executions (See the Working Group’s report on El Salvador, para. 64.) In this case, however, the Working Group has urged the Legislative Assembly to amend the Decree in order to bring it into line with the points made in paragraph 8 of the Working Group’s General Comment on Article 18 of the Declaration (see A/HRC/7/2/Add.2, par. 90.) In Iraq, article 15, par. 6 of the Law of the Supreme Iraqi Criminal Code establishes that amnesty decrees prior to the coming into force of the Law does not apply to persons accused of committing any of the crimes stipulated therein.

<sup>58</sup> See art. 6 of the Declaration; art. VIII of the Inter-American Convention on Forced Disappearance of Persons; and arts. 6.2 and 23.2 of the International Convention. All mentioned provisions also establish that States shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited; and that a person who refuses to obey such an order will not be punished. On this subject see also art. 33 of the Rome Statute.

<sup>59</sup> A/HRC/7/2/Add.1, para. 35.

<sup>60</sup> Colombia (art. 32 Criminal Code); Uruguay (art. 9 Law No. 18.026 of 4 October 2006); Venezuela (arts. 180-A Criminal Code and 25 and 45 Constitution). The same principle is established with regard to crimes against humanity by: Belgium (arts. 70 and 136-octies Criminal Code); Bosnia and Herzegovina (art. 180.3 Criminal Code); Burundi (art. 31 Criminal Code); Canada (sect. 14 Crimes against Humanity and War Crimes Act 2000); France (art. 213-4 Criminal Code); Germany (sect. 3 of the German Code of Crimes against International Law); Iraq (art. 15.5 Law of the Supreme Iraqi Criminal Tribunal of 18 October 2005); the Philippines (Republic Act n° 9851, An Act defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes against Humanity, organizing Jurisdiction, Designating Special Courts and For Related Purposes, 11 December 2009, Section 12); Portugal; Switzerland (art. 264l Criminal Code); Uruguay (art. 9 Law 18.026 4 October 2006); Venezuela (art. 180-A Criminal Code).

<sup>61</sup> Cameroon (art. 83 of the Criminal Code); Costa Rica (art. 36 Criminal Code); Eritrea (art. 70 Transitional Penal Code of Eritrea); France (art. 122, par 4); Jordan; Latvia (art. 34 Criminal Code) but due obedience can never be invoked in cases of crimes against humanity; Madagascar; Moldova (art. 364, par. 6 Criminal Code); Russian Federation (art. 42, par. 2 Criminal Code).

<sup>62</sup> Kyrgyzstan (Art. 7, para. 6, of the Public Service Act).

would commit a criminal act by carrying out the order.<sup>63</sup> With regard to these States, the Working Group suggests that it should be specified, either by way of judicial interpretation or legislative amendment, that the order to commit or to participate in any way in the crime of enforced disappearance is “manifestly unlawful” or criminal.

54. Finally, some other States still retain the principle according to which obeying an order is an exempting circumstance for the subordinate. The Working Group recommends those States to amend their legislation on this issue and to put in line with international law, following the good practices of other States.

### C. Statute of limitations

55. The qualification of any instance of enforced disappearance as not being subjected to statute of limitations is a concrete guarantee against impunity. This must always be recognized when the offence is committed in a context in which it becomes a crime against humanity. In other cases, if States decide to enact statutes of limitations, it must be made clear by domestic legislation that these terms shall not start for as long as the fate or whereabouts of the victims remain unclarified.

56. Best practices emanate from States that have established that enforced disappearances are not subjected to statute of limitations.<sup>64</sup> In other States, it is established that crimes against humanity in general are not subjected to statute of limitations,<sup>65</sup> which in most of the cases – in particular when the crime against humanity is the result of the implementation of the Rome Statute - includes enforced disappearances. Some other States informed that they subject crimes, including in some cases enforced disappearances, to statute of limitations.<sup>66</sup> A good practice though, is set by those States which, among them,

<sup>63</sup> Czech Republic (Section 48, art. 2 of the Law on Professional Soldiers, No. 221/1999); Egypt (art. 63 Criminal Code); Serbia (art. 13, par. 3 Law on the Serbian Army 2007).

<sup>64</sup> Ecuador (art. 80 Constitution); El Salvador (arts. 34 Code of Criminal Procedure for proceedings, although it applies only to enforced disappearances whose commission began after 20 April 1998; and 99 Criminal Code for sanctions); Nicaragua (art. 131 Criminal Code); Panama (art. 120 Criminal Code); Paraguay (art. 5 Constitution and art. 102 Criminal Code), Uruguay (art. 7 Law No. 18.026 of 4 October 2006); Venezuela (arts. 180-A Criminal Code and 29 Constitution).

<sup>65</sup> Argentina (art. 11 Law No. 26.200 of 5 January 2007); Azerbaijan (arts. 75.5 and 80.4 Criminal Code); Bosnia and Herzegovina (art. 19 Criminal Code); Burkina Faso (art. 317 Criminal Code); Burundi (arts. 150 and 155 Criminal Code); Chile (art. 40 Law 20.357 of 18 July 2009); Republic of Congo (art. 14 Law No. 8 of 31 October 1998); Croatia (arts. 18 and 24 Criminal Code); Czech Republic (sect. 35 Criminal Code); Estonia (Art. 81 Criminal Code); Finland (sects. 1 and 6 Chapter 8 Criminal Code); France (art. 213-5 Criminal Code); Germany (sect. 5 of the German Code of Crimes against International Law); Indonesia (art. 46 Law No. 26/2000); Kazakhstan (Chapter 4 of the Criminal Code); Republic of Korea (art. 6 Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court 2007); Mali (art. 32 Criminal Code); Malta (art. 54-I Criminal Code); Moldova; Montenegro (art. 129 Criminal Code); the Netherlands (sect. 13 International Crimes Act); Philippines (Republic Act n° 9851, An Act defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes against Humanity, organizing Jurisdiction, Designating Special Courts and For Related Purposes, 11 December 2009, Section 11); Poland (art. 101 Criminal Code); Portugal (art. 7 Law No. 31 of 22 July 2004); Romania (arts. 138 and 146 Criminal Code); Rwanda (art. 20 Law No. 33-bis 2003); Serbia (art. 108 Criminal Code); Slovenia (art. 95 Criminal Code); Spain (arts. 131.4 and 133.2 Criminal Code); Switzerland (art. 101 Criminal Code and 59 Military Criminal Code); Timor-Leste (art. 117 Criminal Code).

<sup>66</sup> Belgium (10 years for crimes); Chad (10 years); Costa Rica (3 to 10 years depending on the sanction contemplated for the crime concerned, art. 30-35 Code of Criminal Procedure); Egypt (1 to 10 years depending on the offence concerned, art. 15 Criminal Code, although “certain offences, including unjustified detention, are excluded from the application of a statute of limitation (arts. 117, 126, 127,

interpreted the statute of limitations in combination with the principle according to which enforced disappearance is to be considered as a continuous crime, thus admitting that the statute of limitations runs from the moment when the offence ceases.<sup>67</sup>

#### D. Competent tribunal to judge enforced disappearances

57. The Working Group has pointed out that the codification of enforced disappearances as offences under criminal law, “refers to the relevant domestic criminal codes that are to be enforced by competent ordinary courts, i.e. neither by any special tribunal, in particular military courts (article 16, par. 2 of the Declaration), nor by administrative agencies or tribunals”.<sup>68</sup> It reiterated that domestic legislation shall “stipulate that those responsible for the offence of enforced disappearance shall be tried only by the competent ordinary courts, in each State, and not by any other special tribunal, in particular military courts”.<sup>69</sup>

58. Some States expressly establish in domestic legislation that enforced disappearance can never be considered as an in-service offence and that military courts have no jurisdiction on enforced disappearance.<sup>70</sup> Other States affirmed that enforced disappearance could only be tried by competent ordinary courts.<sup>71</sup>

#### E. Universal jurisdiction and *aut dedere, aut judicare*

59. As a crucial guarantee against impunity, domestic legislation shall provide for the application in cases of enforced disappearance of the principle of universal jurisdiction, in addition to or in combination with that of *aut dedere aut judicare*. This allows States to bring to justice all persons presumed responsible for enforced disappearance who are found on their territory.

60. A number of States reported to have domestic provisions that allow for the application of the principles of universal jurisdiction and/or *aut dedere aut judicare*.<sup>72</sup> In

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282 and 309 Criminal Code); Eritrea (3 to 25 years depending on the sanction envisaged for the offence concerned, art. 225-238 Transitional Penal Code); Estonia (5 to 10 years, but crimes against humanity are not subjected to statute of limitations, see above); Kazakhstan (2 to 20 years, but crimes against the security of mankind are excepted, see above); Madagascar (for punishment, 20 years in case of criminal offences; for criminal proceedings, 1 to 10 years depending on the sanction contemplated for the offence concerned); Moldova (2 to 25 years, art. 60 Criminal Code, but crimes against peace and security of mankind are not covered, see above); Poland (30 years for homicide and 20 years for other crimes); Qatar (3 to 10 years, depending on the offence); Togo (10 years).

<sup>67</sup> Belgium; Lebanon has no specific crime of enforced disappearance but states that enforced disappearance would be regarded as a continuous offence if codified, and accordingly the statute of limitation would begin on the date on which the deprivation of liberty comes to an end, i.e. when the abducted person recovers his personal liberty; Thailand has no specific crime of enforced disappearance either but it stated that offences relating to detaining, confining or depriving of liberty of a person are regarded as continuous crimes and the prescription shall be activated as from the date of the end of such offences; Poland.

<sup>68</sup> E/CN.4/1996/38, para. 56.

<sup>69</sup> A/HRC/7/2/Add.1, paras. 38 and 66.(iv). See also, inter alia, art. 14 of the Declaration; art. 11.3 of the International Convention; E/CN.4/2006/56 of 27 December 2005, para. 599; and E/CN.4/1993/25, para. 46.

<sup>70</sup> Colombia (arts. 1-3 Military Criminal Code), Uruguay (art. 11 Law No. 18.026 of 4 October 2006); Venezuela (arts. 29 and 261 Constitution).

<sup>71</sup> Paraguay; Peru.

<sup>72</sup> See, however, States that does not recognize expressly those notions: Eritrea; Kyrgyzstan; Madagascar; Moldova legislation does not provide for universal jurisdiction, but nothing is said on

some States, *aut dedere aut judicare* is recognized for at least some international crimes, but not the principle of universal jurisdiction.<sup>73</sup> In at least two States, universal jurisdiction is provided for by procedural law, while *aut dedere aut judicare* is not.<sup>74</sup> In a limited number of States one principle or the other, or the combination of the two principles apply to any act of enforced disappearance.<sup>75</sup> In many cases those principles are codified with express reference only to crimes against humanity or more generally to crimes coming under the jurisdiction of the International Criminal Court.<sup>76</sup> One State informed that its law does not make specific reference to the principle of universal jurisdiction, although two instances closely reflect the concept, namely the exercise of jurisdiction over genocide and the offences that this State is bound to suppress under its treaty obligations.<sup>77</sup> Also, in the same State, while the Criminal Procedure Code does not make specific reference to the principle *aut dedere aut judicare*, the principle is largely observed by virtue of the legislation in force and jurisprudence tends to apply it.

61. However, several States observed that, as enforced disappearance is not codified as a separate offence under their criminal legislation, the principles of universal jurisdiction and *aut dedere aut judicare* would not apply to such offence considered as such, which does not prevent to apply it to other acts linked to enforced disappearance<sup>78</sup>. This confirms the crucial importance to combat impunity of the codification of enforced disappearance as a separate offence.

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*aut dedere aut judicare*.

<sup>73</sup> Bosnia and Herzegovina; Colombia; Egypt; Mauritius.

<sup>74</sup> Republic of Korea; Nicaragua.

<sup>75</sup> El Salvador (art. 10 Criminal Code), Guatemala (art. 5 Criminal Code), Nicaragua (art. 16 Criminal Code); Japan, Panama (arts. 19 and 20.4 Criminal Code), and Uruguay (arts. 3-5 Law No. 18.026 of 4 October 2006).

<sup>76</sup> Argentina (arts. 3-4 Law No. 26.200 of 5 January 2007); Australia (sect. 268.117 Criminal Code Act 1995); Azerbaijan (arts. 12.3 and 13.3 Criminal Code); Belgium (art. 12-bis preliminary section of the Code of Criminal Proceedings); Bosnia and Herzegovina (art. 12 Criminal Code); Burundi (art. 10 Criminal Code); Canada (sects. 6 and 8 Crimes against Humanity and War Crimes Act 2000); Croatia (art. 14 Criminal Code); Cyprus (sect. 6 Law No. 23 (III)/2006); Finland (sects. 7-8 Chapter 1 Criminal Code); Germany (sect. 1 Code of Crimes under International Law); Ireland (sect. 12 International Criminal Court Act 2006); Kenya (sect. 6 International Crimes Act 2008); Republic of Korea (art. 3 Act on the Punishment of Crimes within the Jurisdiction of the International Criminal Court 2007); Lithuania (art. 7 Criminal Code); Malta (art. 5 Criminal Code); Montenegro (arts. 135-137 Criminal Code); the Netherlands (sect. 2 International Crimes Act 2003); New Zealand (sect. 8 International Crimes and International Criminal Court Act 2000); Philippines (Republic Act n° 9851, *An Act defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes against Humanity, organizing Jurisdiction, Designating Special Courts and For Related Purposes*, 11 December 2009, Section 17); Portugal (art. 5 Law No. 31 of 22 July 2004); Romania (art. 13 Criminal Code); Samoa (sect. 13 International Criminal Code Act 2007); Senegal (art. 431.6 Criminal Code); Serbia (art. 9 and 10 Criminal Code); Slovenia (arts. 11 and 13.2 Criminal Code); South Africa (Section 4 Implementation of the Rome Statute of the ICC Act 2002) Spain (Organic Law No. 1/2009 of 4 November 2009); Switzerland (art. 264m Criminal Code); Timor-Leste (art. 8 Criminal Code); Trinidad and Tobago (sect. 8 International Criminal Court Act 2006); and United Kingdom of Great Britain and Northern Ireland (sects. 54 and 60 International Criminal Court Act 2001).

<sup>77</sup> Brazil.

<sup>78</sup> Bulgaria; Cameroon; Costa Rica; Czech Republic; France; Kazakhstan (application of the two principles are subject to international treaties to which the State is a party).

## VIII. Conclusions

62. The Working Group would like to thank all the States that have responded to its questionnaires, thus providing a reliable legal basis for its study on best practices. While the details of those best practices are developed in the report itself, the Working Group would like to highlight certain of those best practices that should be followed by all States:

(a) Ratification of the relevant international instruments and incorporation of those instruments in domestic legislation, in particular, the Rome Statute of the International Criminal Court and the International Convention for the Protection of All Persons from Enforced Disappearance;

(b) Codification of an autonomous offence of enforced disappearance sufficiently broad to cover enforced disappearances committed as part of a widespread or systematic attack against a civilian population, but also isolated acts;

(c) Inclusion in the definition of the crime of the three following cumulative minimum elements: (i) deprivation of liberty of the victim; (ii) involvement of Government officials, at least indirectly by acquiescence; and (iii) refusal to disclose the fate and whereabouts of the person concerned;

(d) Inclusion of the element of “placement of the victim outside the protection of the law” as a *consequence* of the other constitutive elements;

(e) Characterization of the offence of enforced disappearance as a continuous crime;

(f) Establishment of a comprehensive regime of individual responsibility in relation to enforced disappearances, including superior responsibility;

(g) Providing for appropriate penalties which take into account the extreme seriousness of the crime, whether qualified as a crime against humanity or not;

(h) Providing for appropriate mitigating or aggravating circumstances, as well as appropriate accessory sanctions;

(i) Exclusion of the crime of enforced disappearance from the application of amnesty laws or similar measures, whether qualified as a crime against humanity or not;

(j) Providing that no order or instruction may be invoked to justify an enforced disappearance, whether qualified as a crime against humanity or not;

(k) Providing that enforced disappearances are not subject to statute of limitations, whether qualified as a crime against humanity or not;

(l) Providing that enforced disappearances can never be considered as an in-service offence and that military or other special courts have no jurisdiction on enforced disappearances;

(m) Providing for universal jurisdiction and for the principle *aut dedere, aut judicare* in relation to crimes of enforced disappearances, whether qualified as a crime against humanity or not.