

THE WORK OF THE COMMITTEE ON ENFORCED DISAPPEARANCES

ACHIEVEMENTS AND JURISPRUDENCE TEN YEARS AFTER THE ENTRY
INTO FORCE OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION
OF ALL PERSONS FROM ENFORCED DISAPPEARANCES

MARIA CLARA GALVIS PATIÑO
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Our sincerest gratitude, however, is due to all those victims, activists, and civil society organizations who fought relentlessly to have the Convention for the Protection of all Persons against Enforced Disappearance come into force, and who remind us each day that no disappeared person's fate shall remain unresolved, no national law shall stay insufficient, and no perpetrator shall go unpunished.

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Permanent Mission
of the Federal Republic of Germany
to the Office of the United Nations and
the other International Organizations
Geneva

FOREWORD

On 23 December 2020, we celebrated the 10th anniversary of the entry into force of the International Convention for the Protection of all Persons from Enforced Disappearances, adopted during the sixty-first session of the General Assembly. In these ten years, the Committee on Enforced Disappearances has been working on a daily basis to support States Parties, victims, civil society organizations and national human rights institutions in the eradication and prevention of enforced disappearance. Throughout these years, the Committee has progressively constructed its jurisprudence in the context of the examination of states' initial and follow-up reports, as well as reports containing additional information. It has also established its jurisprudence addressing urgent action requests and individual complaints. Lots remains to be done. However, it is time to take stock of what has been achieved and to raise awareness about the work of the Committee.

The present publication takes a picture of the Committee's jurisprudence as it stands today. It highlights the main issues addressed by the Convention and shows the evolution of recommendations that have been adopted. It draws up the balance of the positions adopted by the Committee, always with the aim of supporting States Parties, victims, civil society actors, national human rights institutions and all actors for what must be a priority for us all: Eradicate and prevent enforced disappearances in all parts of the world.

As the UN High Commissioner for Human Rights said recently at a joint public event of the Committee and the UN Working Group on Enforced and Involuntary Disappearances, "Promises and good intentions are indeed not enough to this end. It is urgent that all States ratify the Convention; as well as consider the relevant declarations to enable the Committee to examine individual complaints and interstate communications. We know that the Convention stems in great part from the terrible practices of the dictatorships in Latin America in the seventies and eighties. It is however a mistake to consider it as a tool relevant only in relation to past crimes and to limited regions of the world; indeed, enforced disappearance is a worldwide scourge."

I want to thank the author of this publication, Ms Maria Clara Galvis, ex-member of the Committee and professor of International Human Rights Law from Colombia. I also want to thank our colleague Barbara Lochbihler, who promoted the realization of this project, the members of CED Secretariat who contributed to the review of the publication, the Geneva Academy for project management, as well as the Permanent Mission of the Federal Republic of Germany and „Brot für die Welt“ (Bread for the World) for generously funding the initiative. This is a key tool that I hope will be useful to all actors involved in our daily struggle to prevent and eradicate enforced disappearances in every corner of the earth.

Mohammed Ayat

Chair of the Committee on Enforced Disappearances

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1. ABSOLUTE PROHIBITION OF ENFORCED DISAPPEARANCE

A heinous crime such as enforced disappearance must be absolutely prohibited. The drafters of the Convention were conscious of the fact that the abhorrent nature of this crime required a legal prohibition in absolute terms. In the working paper containing a draft Convention,¹ the text of an absolute prohibition was included after the definition of enforced disappearance. Some modifications were made adding more precision and qualifying the prohibition.² After discussions, this text became the first article of the Convention, stating that “no one shall be subjected to enforced disappearance” and that “no exceptional circumstances whatsoever, whether a state of war, threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.” During the *travaux préparatoires*, there was a proposal to enshrine in this article a right: “Everyone shall have the right not to be subjected to enforced disappearance.”³ Finally, an autonomous right was included both in the preamble of the Convention, as “the right of any person not to be subjected to enforced disappearance”, and in the body of the Convention, in Article 1, as an absolute prohibition of enforced disappearance, which entails the right of every person not to be subjected to that abhorrent practice.

In its first ten years, the Committee has consistently affirmed the absolute prohibition of enforced disappearance and its non derogability. Thus, when noting that domestic laws lacked a provision stating expressly that exceptional circumstances such as the ones mentioned in Article 1 of the Convention may not be invoked as a justification for restricting or derogating that absolute prohibition, the Committee has recommended that States Parties incorporate⁴ in their domestic legislation an absolute prohibition of that crime⁵ by “explicitly affirming that no exceptional circumstances of the kind described in Article 1 of the Convention may be invoked to justify the offence of enforced disappearance.”⁶

¹ The working paper was prepared by Mr. Bernard Kessedjian (France), Chairperson-Rapporteur of the Intersessional Open-ended Working Group, to which the Commission on Human Rights requested the elaboration of a legally binding normative instrument for the protection of all persons from enforced disappearance. E/CN.4/2004/59, para. 1; E/CN.4/2005/66, para. 1.

² Among other modifications, “no one may be” was modified to “no one shall be” and “no circumstance” was changed to “no exceptional circumstances.”

³ E/CN.4/2005/66, para. 26.

⁴ Tunisia, 2016 (CED/C/TUN/CO/1, para. 13); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 12); Austria, 2018 (CED/C/AUT/CO/1, para. 11); Japan, 2018, (CED/C/JPN/CO/1, para. 12). In a similar sense: France, 2013 (CED/C/FRA/CO/1, para. 11); Italy, 2019 (CED/C/ITA/CO/1, para. 13); Gabon, 2017 (CED/C/GAB/CO/1, para. 11); Peru, 2019 (CED/C/PER/CO/1, para. 13).

⁵ Tunisia, 2016 (CED/C/TUN/CO/1, para. 13); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 12); Austria, 2018 (CED/C/AUT/CO/1, para. 11); Gabon, 2017 (CED/C/GAB/CO/1, para. 11); Japan, 2018 (CED/C/JPN/CO/1, para. 12); Peru, 2019 (CED/C/PER/CO/1, para. 13). See also Gabon, 2017 (CED/C/GAB/CO/1, para. 11).

⁶ France, 2013 (CED/C/FRA/CO/1, para. 11). In a similar sense: Italy, 2019 (CED/C/ITA/CO/1, para. 13); Senegal, 2017 (CED/C/SEN/CO/1, para. 12).

Enforced Disappearance: Article 2

“is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”

International Convention for the Protection of All Persons
from Enforced Disappearance

2. DEFINITION OF ENFORCED DISAPPEARANCE

Substantial convergence of views among delegations was noted from the beginning of the *travaux préparatoires* regarding the cumulative elements contained in the draft definition of the working paper: Deprivation of liberty in whatever form; refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person; and the placing of the person outside the protection of the law. Rich discussions preceded the approval of the definition enshrined in Article 2 of the Convention. While some delegations proposed that the definition should be the one set out in the Rome Statute of the International Criminal Court, others considered that the latter instrument applies to cases involving enforced disappearance as a crime against humanity, whereas the then future convention was intended to include enforced disappearance that does not amount to a crime against humanity. The proposal to include in the definition the removal from the protection of the law “for a prolonged period of time” was rejected. Those who opposed this proposal pointed out that an enforced disappearance could be constituted from the moment of the arrest if there was a refusal to acknowledge the deprivation of liberty. Others mentioned that national and international bodies should be able to intervene as soon as the deprivation of liberty begins without waiting for a certain period to elapse. After extensive discussions regarding whether the removal from the protection of the law should be an element of the definition or a consequence of the offence, delegates opted for the latter. Accordingly, the conduct as defined places the disappeared person “outside the protection of the law.” The proposed formulation, “deprivation of liberty in whatever form,” was changed to “arrest, detention or abduction or any other form of deprivation of liberty.” In relation to the perpetrators, the inclusion of any other but state agents was rejected.⁷

In accordance with the definition enshrined in the Convention, in a number of occasions the Committee has recommended that States Parties take all necessary measures – among them reforming, reviewing, or expediting the revision of criminal codes⁸ – to ensure that the definition of enforced disappearance in national legislation is fully in line with⁹ that set forth in Article 2 of the Convention.¹⁰ Whenever the Committee has observed that existing definitions in domestic law differed from the one provided for in the Convention, either because they included elements not contained in the Convention —such as public officials or public servants,¹¹ political

7 E/CN.4/2004/59, para. 16 – 40; E/CN.4/2006/57, paras 91 – 97.

8 Argentina, 2013 (CED/C/ARG/CO/1, para. 13); Netherlands, 2014 (CED/C/NLD/CO/1, para. 15); Senegal, 2017 (CED/C/SEN/CO/1, para. 14).

9 Lithuania, 2017 (CED/C/LTU/CO/1, para. 12); Argentina, 2013 (CED/C/ARG/CO/1, para. 13); Netherlands, 2014 (CED/C/NLD/CO/1, para. 15).

10 Lithuania, 2017 (CED/C/LTU/CO/1, para. 12).

11 Peru, 2019 (CED/C/PER/CO/1, para. 14).

organizations¹² and non-state actors¹³— or lacked one or more of the elements listed therein,¹⁴ it has made precise recommendations so that the definition excludes elements that go beyond the Convention’s definition or incorporates elements missing from it. In this sense, it has recommended that the definition include the “arrest, detention, abduction, or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State¹⁵, as well as the refusal to provide information on the fate and not only on the whereabouts of the disappeared person.”¹⁶ It has also recommended that phrases such as “placing them outside the protection of the law” or “thereby impeding access to remedies and procedural safeguards” be considered or understood as a consequence of the commission of the crime of enforced disappearance, rather than as a necessary element of intent (*animus*) that would have to be present for the act to be considered a criminal conduct.¹⁷ In this sense, it has also recommended that States Parties avoid altering the text contained in Article 2 of the Convention by changing the position of phrases in sentences or by introducing new or vague expressions to preclude the definition from being understood as requiring intent to incriminate the conduct.¹⁸

In its views in *Yrusta v. Argentina*, the Committee recalled that the offence of enforced disappearance “may be initiated by an illegal detention or by an initially legal arrest or detention,” and that “in order to constitute an enforced disappearance, the deprivation of liberty must be followed by a refusal to acknowledge such deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law, regardless of the duration of the said deprivation of liberty or concealment.”¹⁹

12 Netherlands, 2014 (CED/C/NLD/CO/1, para. 14).

13 Colombia, 2016 (CED/C/COL/CO/1, para. 15).

14 Netherlands, 2014 (CED/C/NLD/CO/1, para. 14): the definition of enforced disappearance does not include the “concealment of the fate or whereabouts of the disappeared person”; Lithuania, 2017 (CED/C/LTU/CO/1, para. 11): arrest is not mentioned in the definition of enforced disappearance.

15 Honduras, 2018 (CED/C/HND/CO/1, para. 15); Peru, 2019 (CED/C/PER/CO/1, para. 15 (a)).

16 Honduras, 2018 (CED/C/HND/CO/1, para. 15).

17 Paraguay, 2014, (CED/C/PRY/CO/1 para. 14); Bolivia, 2019 (CED/C/BOL/CO/1, para. 13 (a)).

18 France, 2013 (CED/C/FRA/CO/1, para. 12, 13).

19 *Yrusta v. Argentina*, 2013 (CED/C/10/D/1/2013, para. 10.3).

3. DISAPPEARANCES COMMITTED BY NON-STATE ACTORS

During the *travaux préparatoires*, the issue of disappearances committed by non-state actors was discussed at length. Some delegations pointed out that, since in the future instrument obligations were addressed solely to states, the insertion of non-state actors would alter the traditional framework of responsibility related to human rights. Others considered that recognizing that enforced disappearances could be committed by non-state actors does not diminish the responsibility of states, to which the obligations were exclusively addressed.²⁰ Proposals on how to refer to non-state actors included the use of expressions such “organized groups,” “political organizations,” “members of political organizations,” “persons acting outside the direct or indirect authority of the State,” and even one taken from international humanitarian law: “Organizations or groups in effective control of part of the territory of a state.”²¹ It was not until the 2005 session of the Working Group charged with the elaboration of the draft convention that an agreement was reached on how to handle this issue in the future treaty.²² At this session, the following wording was presented: “Each State Party shall take the necessary measures to investigate 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.”²³ After introducing some amendments: —“enforced disappearances” was replaced by “acts or conduct described or defined” in the article containing the definition of enforced disappearance and “necessary” by “appropriate”—, the proposal was accepted as a new article —Article 3 of the Convention— and not as a paragraph of the definition of enforced disappearance contained in Article 2, as it was initially suggested.²⁴

In its concluding observations, the Committee, after noting the uncertainty in domestic criminal law concerning the application of the Convention to the actions of persons or groups of persons acting without the authorization, support or acquiescence of the state,²⁵ has encouraged States Parties to incorporate in their national legislation all appropriate measures²⁶ aimed at investigating the conduct defined in Article 2 of the Convention —which contains the definition of enforced disappearance— when committed by groups of persons acting without the authorization, support or acquiescence of state officials. After noting that legislation includes, as an element of

²⁰ E/CN.4/2004/59, para. 31, 32; E/CN.4/2005/66, para. 31.

²¹ E/CN.4/2004/59, para. 30, 39.

²² E/CN.4/2006/57, para. 12.

²³ E/CN.4/2006/57, para. 12.

²⁴ E/CN.4/2006/57, para. 13, 14.

²⁵ Senegal, 2017 (CED/C/SEN/CO/1, para. 15); Albania, 2018 (CED/C/ALB/CO/1, para. 14).

²⁶ Senegal, 2017 (CED/C/SEN/CO/1, para. 16). In similar sense: Albania, 2017 (CED/C/ALB/CO/1, para. 15).

the crime of enforced disappearance perpetrated by individuals, the stipulation that the deprivation of liberty must have been committed for the purpose of concealing the victim or his or her fate or whereabouts, the Committee recommended defining in domestic law the disappearance perpetrated by individuals in accordance with Article 3 of the Convention.²⁷ In a specific case, the Committee considered that the inclusion of non-state actors in the definition of the crime of enforced disappearance dilutes the accountability of the state and that a broad definition could have other consequences, such as a lack of accurate statistics or inadequacies in the searches for disappeared persons and in criminal investigations, as these require differentiated approaches and strategies. The Committee thus concluded that the relevant criminal provision must be applied in a way that guarantees the search as well as the criminal investigation and does not dilute state accountability.²⁸

In specific cases, the Committee recommended investigating offences of enforced disappearance committed by individuals;²⁹ documenting and investigating promptly, thoroughly, and impartially all reports of acts defined in Article 2 of the Convention committed by groups of persons without the authorization, support or acquiescence of state officials; bringing them to justice or prosecuting them, and punishing those responsible, in accordance with the gravity of their acts;³⁰ preventing the occurrence of such acts;³¹ and ensuring that all persons deprived of liberty by these groups, and whose fate remains unknown, are searched for and located.³²

²⁷ Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 11).

²⁸ Colombia, 2016 (CED/C/COL/CO/1, para. 15, 16).

²⁹ Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 25 (e)).

³⁰ Iraq, 2015 (CED/C/IRQ/CO/1, para. 22, 23); Colombia, 2016 (CED/C/COL/CO/1, para. 23, 24).

³¹ Colombia, 2016 (CED/C/COL/CO/1, para. 24).

³² Iraq, 2015 (CED/C/IRQ/CO/1, para. 23).

4. “PAST DISAPPEARANCES”

In the *travaux préparatoires* there is no reference to “past disappearances.” Nonetheless, delegates discussed whether the Committee should have competence regarding cases of deprivation of liberty that occurred after the entry into force of the treaty, or with regard to those that took place after the entry into force of the Convention.³³ There was agreement on the latter proposal, now contained in Article 35 of the Convention. In line with its statement on the *ratione temporis* element in the review of the reports submitted by States Parties,³⁴ the Committee, when it has received information on past enforced disappearances that is useful to fully understand the challenges of the present, has directed its attention in its concluding observations to the current obligations of the State Party concerned.

Regardless of whether the past is a civil war,³⁵ a dictatorship,³⁶ an armed conflict,³⁷ a communist regime,³⁸ a “dirty war,”³⁹ a “post- election crisis,”⁴⁰ or a specific period,⁴¹ the Committee, in its concluding observations, has consistently affirmed “the rights of victims to justice, to reparation and to know the truth about the circumstances of an enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”⁴²

In relation to justice, the Committee has recommended that States Parties ensure that all cases of enforced disappearance that may have been committed in the past by state officials, or by persons or groups of persons acting with their authorization, support or acquiescence,⁴³ are investigated thoroughly and impartially without

33 E/CN.4/2004/59, para. 165: “The question of retroactivity”; E/CN.4/2005/66, para. 142: “Competence *ratione temporis* of the monitoring body”

34 A/69/56, Annex V, para. 3.

35 Spain, 2013 (CED/C/ESP/CO/1, para. 31).

36 Spain, 2013 (CED/C/ESP/CO/1, para. 31); Chile, 2019 (CED/C/CHL/CO/1, para. 16).

37 Serbia, 2015 (CED/C/SRB/CO/1, para. 14); Montenegro, 2015 (CED/C/MNE/CO/1, para. 16,17); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 17); Colombia, 2016 (CED/C/COL/CO/1, para. 35, 36).

38 Albania, 2018 (CED/C/ALB/CO/1, para. 36, 37).

39 Mexico, 2015 (CED/C/MEX/CO/1, para. 32, 33).

40 Gabon, 2017 (CED/C/GAB/CO/1, para. 25).

41 Paraguay, 2014 (CED/C/PRY/CO/1, para. 17); Tunisia, 2016 (CED/C/TUN/CO/1, para. 22); Burkina Faso, 2016 (CED/C/BFA, para. 37); Albania, 2018 (CED/C/ALB/CO/1, para. 9, 10); Honduras, 2018 (CED/C/HND/CO/1, para. 24); Japan, 2018 (CED/C/JPN/CO/1, para. 25); Peru, 2019 (CED/C/PER/CO/1, para. 30); Bolivia, 2019 (CED/C/BOL/CO/1, para. 10).

42 Japan, 2018 (CED/C/JPN/CO/1, para. 25).

43 Serbia, 2015 (CED/C/SRB/CO/1, para. 14); Montenegro, 2015 (CED/C/MNE/CO/1, para. 17).

delay,⁴⁴ regardless of the time that has elapsed since the cases took place⁴⁵ and even if no formal complaint has been made;⁴⁶ that those found responsible, including military and civilian superiors,⁴⁷ are punished in accordance with the extreme seriousness⁴⁸ of their acts; and that the findings are made public.⁴⁹

With respect to the right to reparation, the Committee has held that states should take measures to guarantee that all persons who have suffered harm as a direct result of an enforced disappearance perpetrated during past periods, regardless of when the enforced disappearance took place, and even if there are no criminal procedures against possible perpetrators or these have not been identified,⁵⁰ can effectively enjoy their right to obtain full and adequate reparation.⁵¹ The right to reparation must include restitution, means and measures for rehabilitation,⁵² satisfaction, guarantees of non-repetition,⁵³ and a prompt, fair, and adequate compensation.

To guarantee the right to the truth, the Committee has recommended measures such as the following: Considering setting up a body of independent experts charged with establishing the truth about the past and ensuring that all victims are able to effectively enjoy the right to know both the circumstances of the enforced disappearance and the progress and results of the investigation.⁵⁴ The Committee has also recalled that, even if no formal complaint has been laid,⁵⁵ States Parties should search for all persons who were forcibly disappeared in past periods and whose fate is not yet clear, locate them, and in the event that they are found dead, identify their remains and return them⁵⁶ in a dignified and respectful manner.⁵⁷

44 Serbia, 2015 (CED/C/SRB/CO/1, para. 14); Montenegro, 2015 (CED/C/MNE/CO/1, para. 16, 17); Tunisia, 2016 (CED/C/TUN/CO/1, para. 23); Japan, 2018 (CED/C/JPN/CO/1, para. 26); Honduras, 2018 (CED/C/HND/CO/1, para. 25); “similarly”; Mexico, 2015 (CED/C/MEX/CO/1, para. 33 (a)); “promptly”; Gabon, 2017 (CED/C/GAB/CO/1, para. 26); “immediately”.

45 Japan, 2018 (CED/C/JPN/CO/1, para. 26 (b)).

46 Paraguay, 2014 (CED/C/PRY/CO/1, para. 18); Gabon, 2017 (CED/C/GAB/CO/1, para. 26); Honduras, 2018 (CED/C/HND/CO/1, para. 25); Japan, 2018 (CED/C/JPN/CO/1, para. 26).

47 Serbia, 2015 (CED/C/SRB/CO/1, para. 14); Montenegro, 2015 (CED/C/MNE/CO/1, para. 17); Iraq, 2015 (CED/C/IRQ/CO/1, para. 23).

48 Mexico, 2015 (CED/C/MEX/CO/1, para. 33 (a)); Honduras, 2018 (CED/C/HND/CO/1, para. 25 (b)); Chile, 2019 (CED/C/CHL/CO/1, para. 16).

49 Gabon, 2017 (CED/C/GAB/CO/1, para. 26).

50 Serbia, 2015 (CED/C/SRB/CO/1, para. 26); Tunisia, 2016 (CED/C/TUN/CO/1, para. 23 (b)); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 38).

51 Germany, 2014 (CED/C/DEU/CO/1, para. 25); Paraguay, 2014 (CED/C/PRY/CO/1, para. 26 (b)); Serbia, 2015 (CED/C/SRB/CO/1, para. 26 (b)); Tunisia, 2016 (CED/C/TUN/CO/1, para. 23 (d)); Colombia, 2016 (CED/C/COL/CO/1, para. 36 (b)); Chile, 2019 (CED/C/CHL/CO/1, para. 25 (a)); Albania, 2018 (CED/C/ALB/CO/1, para. 10 (c)).

52 Mexico, 2015 (CED/C/MEX/CO/1, para. 33 (d)); Albania, 2018 (CED/C/ALB/CO/1, para. 10 (c)).

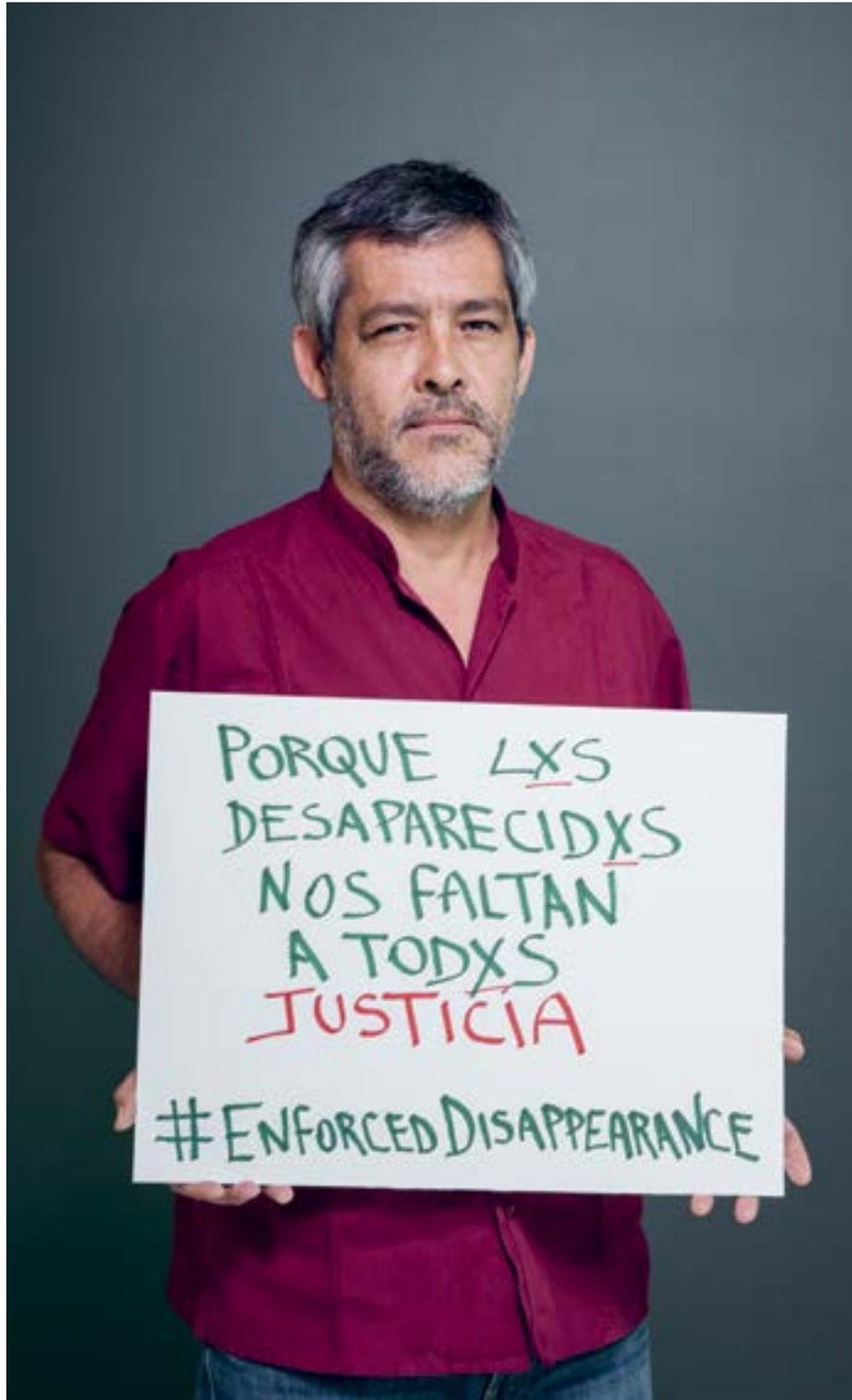
53 Serbia, 2015 (CED/C/SRB/CO/1, para. 26 (b)); Paraguay, 2014 (CED/C/PRY/CO/1, para. 26).

54 Spain, 2013 (CED/C/ESP/CO/1, para. 32, 33); Chile, 2019 (CED/C/CHL/CO/1, para. 17 (b)).

55 Spain, 2013 (CED/C/ESP/CO/1, para. 32).

56 Mexico, 2015 (CED/C/MEX/CO/1, para. 33 (b)); Tunisia, 2016 (CED/C/TUN/CO/1, para. 23 (c)); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 18); Peru, 2019 (CED/C/PER/CO/1, para. 33).

57 Albania, 2018 (CED/C/ALB/CO/1, para. 10); Chile, 2019 (CED/C/CHL/CO/1, para. 27); Peru, 2019 (CED/C/PER/CO/1 para. 33).



5. TRANSNATIONAL DISAPPEARANCES

During the *travaux préparatoires*, when discussing the definition of enforced disappearance, the question was raised whether to mention transnational disappearances in the body of the definition and, when discussing international and judicial cooperation, some delegations pointed out that the need for judicial cooperation “in the area of enforced transnational disappearances was essential.”⁵⁸ Nevertheless, no agreement was reached on this issue, so the Convention does not include a provision on transnational disappearances.

However, the Committee has addressed the situation of transnational disappearances when it has received information referring to cases of: i) disappearances and enforced disappearances of migrants, including migrant children;⁵⁹ ii) citizens from one country who have gone missing abroad, and of clandestine graves that were discovered in the country of destination, where victims from the country of origin were found, including those who may have been subjected to enforced disappearance;⁶⁰ or iii) trafficking in persons, especially of women and children foreign to the State Party as well as of citizens of the State Party.⁶¹

In the above-mentioned situations, the Committee has issued a common recommendation to States Parties: To take measures, in conjunction or in cooperation with countries of origin and destination of migrants and of persons subjected to trafficking in persons, to ensure the participation of victims and civil society.⁶² According to the Committee, those measures should be taken, among other aspects: i) to fully observe the State Party’s duties to prevent and investigate disappearances of migrants, to prosecute those responsible and to protect complainants, experts, witnesses and defence counsels;⁶³ ii) to guarantee the effective functioning of the Transnational Search and Access to Justice Mechanism set in place by a specific State Party, by permanently assigning specialized personnel to its diplomatic missions in relevant countries;⁶⁴ iii) to strengthen cooperation with the authorities of other states in the region in order to ensure that searches of disappeared migrants are carried out and that those allegedly responsible are investigated;⁶⁵ and iv) to redouble efforts to prevent trafficking in persons and disappearances.⁶⁶

⁵⁸ E/CN.4/2003/71, para. 36 and 64.

⁵⁹ Mexico, 2015 (CED/C/MEX/CO/1, para. 23).

⁶⁰ Honduras, 2018 (CED/C/HND/CO/1, para. 28).

⁶¹ Gabon, 2017 (CED/C/GAB/CO/1, para. 19).

⁶² Mexico, 2015 (CED/C/MEX/CO/1, para. 24); Honduras, 2018 (CED/C/HND/CO/1, para. 29); Gabon, 2017 (CED/C/GAB/CO/1, para. 20).

⁶³ Mexico, 2015 (CED/C/MEX/CO/1, para. 24).

⁶⁴ Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 23 (d)).

⁶⁵ Honduras, 2018 (CED/C/HND/CO/1, para. 29 (f)).

⁶⁶ Gabon, 2017 (CED/C/GAB/CO/1, para. 20).

6. ENFORCED DISAPPEARANCE AS AN AUTONOMOUS CRIME

In the framework of the *travaux préparatoires* of the Convention, when delegates were discussing offences and penalties, the issue arose of enforced disappearance as an independent offence. While some maintained that having all acts leading to an enforced disappearance constitute offences under criminal law was sufficient, others emphasized that defining the crime of enforced disappearance as an independent offence was one of the key elements of the future instrument, would better reflect the complexity of enforced disappearance, and would make sanctions more effective.⁶⁷ Therefore, the addition of a paragraph to the article that defined enforced disappearance was approved, stating that each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.⁶⁸ Subsequently, there was agreement to include this wording in a separate article, which corresponds to current Article 4 of the Convention.⁶⁹

In the context of state reporting and dialogues with states, the Committee has observed that in several cases the definition of enforced disappearance contained in domestic law is not fully consistent with the Convention⁷⁰ and, specifically, that some legislations contain no provision defining or criminalizing enforced disappearance;⁷¹ that enforced disappearance has not yet been incorporated, defined or criminalized as an autonomous or separate offence;⁷² that in federated states, differing definitions are established at state level;⁷³ that the formulation of the definition is unclear;⁷⁴ that criminal legislation contains a range of related offences⁷⁵—among them torture, cruel or inhumane treatment, false imprisonment, abduction, unlawful arrest, undue limitation of personal liberty, and abuse of authority against a person put under arrest or detained—⁷⁶ that do not reflect the gravity and specific nature of enforced disappearance⁷⁷ and are therefore not sufficient to adequately encompass

67 E/CN.4/2003/71, para. 37; E/CN.4/2004/59, para. 50, 52; E/CN.4/2005/66, para. 28.

68 E/CN.4/2004/59, para. 49.

69 E/CN.4/2006/57, page. 31.

70 Peru, 2019 (CED/C/PER/CO/1, para. 14); Honduras, 2018 (CED/C/HND/CO/1, para. 14).

71 Belgium, 2014 (CED/C/BEL/CO/1, para. 11); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 13); Cuba, 2017 (CED/C/CUB/CO/1, para. 11); Gabon, 2017 (CED/C/GAB/CO/1, para. 12).

72 Tunisia, 2016 (CED/C/TUN/CO/1, para. 14); Chile, 2019 (CED/C/CHL/CO/1, para. 8); Japan, 2018 (CED/C/JPN/CO/1, para. 13).

73 Mexico, 2015 (CED/C/MEX/CO/1, para. 19); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 13).

74 Albania, 2018 (CED/C/ALB/CO/1, para. 12).

75 Belgium, 2014 (CED/C/BEL/CO/1, para. 11).

76 Gabon, 2017 (CED/C/GAB/CO/1, para. 12); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 13); Italy, 2019 (CED/C/ITA/CO/1, para. 14).

77 Italy, 2019 (CED/C/ITA/CO/1, para. 14).

all the constituent elements and modalities of an enforced disappearance,⁷⁸ which is not a series of distinct offences but rather a separate and single complex offence.⁷⁹

In this connection, the Committee has recommended relevant States Parties to review the definition of enforced disappearance;⁸⁰ amend, reformulate or expedite the review of the criminal code⁸¹ to provide a clear and distinct definition of enforced disappearance;⁸² or adopt legislative measures to ensure that enforced disappearance is incorporated in domestic law as an autonomous offence⁸³ at both federal and state levels,⁸⁴ in line with the definition contained in Article 2 of the Convention. In addition, the Committee has recommended that the offence of enforced disappearance be defined in both its forms: As a separate offence, in line with Article 2 of the Convention, and as a crime against humanity, in line with Article 5 of the Convention.⁸⁵

78 Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 11); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 13); Japan, 2018 (CED/C/JPN/CO/1, para. 13); Portugal, 2018 (CED/C/PRT/CO/1, para. 14).

79 Germany, 2014 (CED/C/DEU/CO/1, para. 7); Spain, 2013 (CED/C/ESP/CO/1, para. 9); Belgium, 2014 (CED/C/BEL/CO/1, para. 11); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 13); Gabon, 2017 (CED/C/GAB/CO/1, para. 12).

80 Netherlands, 2014 (CED/C/NLD/CO/1, para. 15).

81 Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 14); Albania, 2018 (CED/C/ALB/CO/1, para. 13); Gabon, 2017 (CED/C/GAB/CO/1, para. 12).

82 Albania, 2018 (CED/C/ALB/CO/1, para. 13).

83 Germany, 2014 (CED/C/DEU/CO/1, para. 8); Mexico, 2015 (CED/C/MEX/CO/1, para. 20); Tunisia, 2016 (CED/C/TUN/CO/1, para. 15); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 12 (a)); Cuba, 2017 (CED/C/CUB/CO/1, para. 12 (a)); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 14); Japan, 2018 (CED/C/JPN/CO/1, para. 14); Portugal, 2018 (CED/C/PRT/CO/1, para. 15); Italy, 2019 (CED/C/ITA/CO/1, para. 19). In a similar sense: Belgium, 2014 (CED/C/BEL/CO/1, para. 12); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 14); Chile, 2019 (CED/C/CHL/CO/1, para. 9); Gabon, 2017 (CED/C/GAB/CO/1, para. 13); France, 2013 (CED/C/FRA/CO/1, para. 13); Spain, 2013 (CED/C/ESP/CO/1, para. 10).

84 Mexico, 2015 (CED/C/MEX/CO/1, para. 20).

85 Honduras, 2018 (CED/C/HND/CO/1, para. 15 (b)); Italy, 2019 (CED/C/ITA/CO/1, para. 19); Peru, 2019 (CED/C/PER/CO/1, para. 15 (c)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 13 (b)).

7. ENFORCED DISAPPEARANCE AS A CRIME AGAINST HUMANITY

Enforced disappearance as a crime against humanity was addressed from the beginning of the *travaux préparatoires* when dealing with the issues of offences and penalties.⁸⁶ The delegations instructed the Working Group charged with the elaboration of the draft Convention to specify under what circumstances enforced disappearance could be considered a crime against humanity and stressed its imprescriptibility.⁸⁷ In subsequent debates, some aspects of enforced disappearance as a crime against humanity were raised and, while some delegations considered that it should not be included in the treaty, since it was already in the Rome Statute, others proposed that it should be mentioned in the preamble and in the body of the treaty, otherwise it would imply a step backward in relation to existing international instruments. Others pointed out that the Rome Statute, because of its repressive nature, does not include norms for protection and prevention that do belong in a human rights treaty.⁸⁸ Discussions led to the inclusion of a separate article that was discussed at the 2005 session and, after some modifications,⁸⁹ the text found in the current Article 5 of the Convention was approved,⁹⁰ stating that the “widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law”.

During its first 10 years, the Committee has emphasized the imprescriptible character of enforced disappearance as a crime against humanity.⁹¹ At the same time, it has recommended that States Parties define in their domestic law or criminal codes enforced disappearance as a crime against humanity, in accordance with Article 5 of the Convention.⁹² In addition, the Committee has made specific recommendations, for example: i) reviewing the existing definition of enforced disappearance as a crime against humanity and ensuring its full conformity with Article 5 of the Convention;⁹³ ii) criminalizing enforced disappearance as a crime against humanity,

86 E/CN.4/2003/71, para. 39, 56; E/CN.4/2004/59, para. 42.

87 E/CN.4/2003/71, para. 41, 43 y 56.

88 E/CN.4/2004/59, para. 43 – 48.

89 E/CN.4/2005/66, para. 37, 38.

90 E/CN.4/2006/57, page 33.

91 Uruguay, 2013 (CED/C/URY/CO/1, para. 14); Armenia, 2015 (CED/C/ARM/CO/1, para. 13).

92 Belgium, 2014 (CED/C/BEL/CO/1, para. 16); Albania, 2018 (CED/C/ALB/CO/1, para. 17); Iraq, 2015 (CED/C/IRQ/CO/1, para. 14); Tunisia, 2016 (CED/C/TUN/CO/1, para. 15); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 12); Cuba, 2017 (CED/C/CUB/CO/1, para. 12); Gabon, 2017 (CED/C/GAB/CO/1, para. 13); Honduras, 2018 (CED/C/HND/CO/1, para. 15); Peru, 2019 (CED/C/PER/CO/1, para. 15); Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 11); Bolivia, 2019 (CED/C/BOL/CO/1, para. 13 (b)). In similar sense: Japan, 2018 (CED/C/JPN/CO/1, para. 14); Italy, 2019 (CED/C/IRA/CO/1, para. 15); Senegal, 2017 (CED/C/SEN/CO/1, para. 18).

93 Portugal, 2018 (CED/C/PRT/CO/1, para. 13).

regardless of the date on which the crime was committed;⁹⁴ iii) avoiding the death penalty as a sanction for enforced disappearance when characterized as a crime against humanity;⁹⁵ iv) eliminating the possibility of granting amnesty for international crimes, including enforced disappearance;⁹⁶ v) differentiating it from other international crimes, such as enslavement, and establishing that enforced disappearance need not be preceded by abduction to constitute a crime against humanity.⁹⁷

“States where enforced disappearances occur may fear to be criticized by the Committee. It is important that these States accept to take action to stop and prevent this crime, and understand that the Committee is also here to help and guide them.”

The Committee on Enforced Disappearances

94 Iraq, 2015 (CED/C/IRQ/CO/1, para. 14).

95 Tunisia, 2016 (CED/C/TUN/CO/1, para. 15 (a)); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 14); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 12 (a)); Cuba, 2017 (CED/C/CUB/CO/1, para. 12).

96 Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 26 (a)).

97 Senegal, 2017 (CED/C/SEN/CO/1, para. 18).

8. SUPERIOR RESPONSIBILITY

During the *travaux préparatoires*, when addressing the issue of incrimination and sanctions, there was considerable discussion on the responsibility of hierarchical superiors.⁹⁸ While some delegations proposed a separate article on superior responsibility distinct from that on complicity, attempted commission and conspiracy, others considered this unnecessary, since such responsibility was covered by the concept of complicity.⁹⁹ Others drew attention to the difficulty of establishing the criminal responsibility of a superior who “ought to have known” that a subordinate under his/her command was committing, or about to commit, an act of enforced disappearance.¹⁰⁰ Several proposals were inspired by Article 28¹⁰¹ of the Rome Statute, e.g.:¹⁰² i) to take up the expression of that rule concerning a situation in which the superior “knew, or consciously disregarded information which clearly indicated” that the subordinate was committing or was about to commit the offence; ii) to define more clearly the responsibility of the superior who “knew” that an enforced disappearance had been committed; iii) to specify that the superior’s liability could only be invoked with respect to acts committed by persons “under his or her effective authority and control”, since the contrary would be to create “liability for the actions of others”, which is inadmissible in criminal law. Others expressed concern that it might diminish the responsibility of military commanders under existing international law. To address these concerns, the majority agreed to explicitly state that what was said about superior responsibility should be without prejudice to higher norms of international law on the responsibility of a military leader or the person effectively acting in that capacity.¹⁰³ This proposal was accepted and is currently part of Article 6 (1) (c) of the Convention.

With respect to this issue, the Committee has recommended on several occasions that the States Parties concerned adopt the legislative measures necessary to provide¹⁰⁴ in their criminal legislation¹⁰⁵ the criminal responsibility of hierarchical superiors of

98 E/CN.4/2003/71, para. 41 and 53.

99 E/CN.4/2004/59, para. 55.

100 E/CN.4/2004/59, para. 56.

101 This article refers to the “responsibility of commanders and other superiors.”

102 E/CN.4/2004/59, para. 56; E/CN.4/2005/66, para. 39, 42 and 43.

103 E/CN.4/2005/66, para. 43.

104 Mexico, 2015 (CED/C/MEX/CO/1, para. 22); Iraq, 2015 (CED/C/IRQ/CO/1, para. 16); Montenegro, 2015 (CED/C/MNE/CO/1, para. 9); Tunisia, 2016 (CED/C/TUN/CO/1, para. 17); Serbia, 2015 (CED/C/SRB/CO/1, para. 11); Peru, 2019 (CED/C/PER/CO/1, para. 17); Bolivia, 2019 (CED/C/BOL/CO/1, para. 15). In a similar sense: Colombia, 2016 (CED/C/COL/CO/1, para. 18); Cuba, 2017 (CED/C/CUB/CO/1, para. 14); Lithuania, 2017 (CED/C/LTU/CO/1, para. 14); Gabon, 2017 (CED/C/GAB/CO/1, para. 16); Japan, 2018 (CED/C/JPN/CO/1, para. 18); Italy, 2019 (CED/C/ITA/CO/1, para. 17).

105 Colombia, 2016 (CED/C/COL/CO/1, para. 18); Cuba, 2017 (CED/C/CUB/CO/1, para. 14); Honduras, 2018 (CED/C/HND/CO/1, para. 17); Japan, 2018 (CED/C/JPN/CO/1, para. 18); Peru, 2019 (CED/C/PER/CO/1, para. 17); Bolivia, 2019 (CED/C/BOL/CO/1, para. 15); Burkina Faso, 2016 (CED/C/BFA/1, para. 16); Gabon, 2017 (CED/C/GAB/CO/1, para. 16). In a similar sense: Iraq, 2015 (CED/C/IRQ/CO/1, para. 16); Tunisia, 2016 (CED/C/TUN/CO/1, para. 17); Lithuania, 2017 (CED/C/LTU/CO/1, para. 14); Italy, 2019 (CED/C/ITA/CO/1, para. 17). Mexico, 2015 (CED/C/MEX/CO/1, para. 22).

civilian and military institutions,¹⁰⁶ in accordance with Article 6 (1) (b) of the Convention. In the same sense, it has recommended that the responsibility of the hierarchical superior be subject to full liability and not to a criminal regime as accomplices.¹⁰⁷

In accordance with Article 6 (1) (b) of the Convention, this implies that the superior should be held accountable when he or she:¹⁰⁸ (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;” (iii) failed to take all necessary and reasonable measures within his or her power to prevent or repress an enforced disappearance from being committed or to bring the facts to the competent authorities for investigation and prosecution.

106 Italy, 2019 (CED/C/ITA/CO/1, para. 20); Peru, 2019 (CED/C/PER/CO/1, para. 16).

107 France, 2013 (CED/C/FRA/CO/1, para. 17).

108 Lithuania, 2017 (CED/C/LTU/CO/1, para. 14); Honduras, 2018 (CED/C/HND/CO/1, para. 17); Peru, 2019 (CED/C/PER/CO/1, para. 17).

9. NON-EXCUSE BASED ON DUE OBEDIENCE: AGGRAVATING AND MITIGATING CIRCUMSTANCES

From the first sessions of the *travaux préparatoires*, when addressing exoneration of criminal responsibility and mitigating and aggravating circumstances, one of the issues discussed was that of a superior's order to commit an enforced disappearance. In the opinion of most of the participants, orders from a superior should not be considered grounds for exemption from responsibility or a mitigating circumstance, either in peacetime or in wartime.¹⁰⁹ Accordingly, broad approval was expressed for the inclusion in the treaty of a provision stating that no order or instruction from any public authority, civil or military, may be invoked to justify an offence of enforced disappearance.¹¹⁰ It was also agreed that each State Party may establish mitigating and aggravating circumstances of criminal responsibility. The circumstances included in the Convention have a stricter definition than the one in the 1998 draft,¹¹¹ mentioning expressly a number of circumstances of both types.¹¹²

On many occasions, the Committee has issued recommendations addressing both the responsibility of the hierarchical superior and the prohibition of invoking due obedience to a civil or military authority to justify an offence of enforced disappearance. With regard to the latter, the Committee has recommended that States Parties adopt the legislative measures necessary for domestic legislation to expressly prohibit invoking the orders or instructions of a superior to justify an offence of enforced disappearance.¹¹³ Another recommendation was to ensure that the Criminal Code is fully consistent with the prohibition established in Article 6 (2) of the Convention.¹¹⁴ In addition, the Committee recommends strengthening the protection and legal guarantees of subordinates wishing to disobey an order from a superior to commit an enforced disappearance.¹¹⁵

Furthermore, the Committee has invited States Parties to include in their national

¹⁰⁹ E/CN.4/2003/71, para. 53.

¹¹⁰ E/CN.4/2004/59, para. 72; E/CN.4/2005/66, para. 39.

¹¹¹ The "1998 draft" is the draft international convention on the protection of all persons from enforced disappearance transmitted by the Sub-Commission on the Promotion and Protection of Human Rights in its resolution 1998/25 of 26 August 1998. E/CN.4/2003/71, para. 1.

¹¹² E/CN.4/2003/71, para. 54; E/CN.4/2004/59, para. 61.

¹¹³ Honduras, 2018 (CED/C/HND/CO/1, para. 17); Bolivia, 2019 (CED/C/BOL/CO/1, para. 15); Albania, 2018 (CED/C/ALB/CO/1, para. 19). In a similar sense: Iraq, 2015 (CED/C/IRQ/CO/1, para. 16); Portugal, 2018 (CED/C/PRT/CO/1, para. 17); Italy, 2019 (CED/C/ITA/CO/1, para. 17).

¹¹⁴ Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 16); In a similar sense: Senegal, 2017 (CED/C/SEN/CO/1, para. 20); Gabon, 2017 (CED/C/GAB/CO/1, para. 18).

¹¹⁵ Albania, 2018 (CED/C/ALB/CO/1, para. 19).

legislations the aggravating and mitigating circumstances described in Article 7 (2) of the Convention,¹¹⁶ ensuring that the latter will in no case lead to a lack of appropriate punishment.¹¹⁷ According to Article 7 (2) of the Convention, States Parties may establish aggravating circumstances, in particular in the event of the death of the disappeared person or of the commission of an enforced disappearance affecting pregnant women, children, persons with disabilities, or other particularly vulnerable persons; and mitigating circumstances in particular for persons who, having been implicated in an enforced disappearance, effectively contribute to locating the disappeared person alive or who make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance. With regard to the latter, the Committee has pointed out that the inclusion of mitigating circumstances in the law might help recover the disappeared person alive, make it possible to clarify cases of enforced disappearance or contribute to identify the perpetrators of an enforced disappearance.¹¹⁸

“Disappearance creates permanent doubt and anguish, while inaction and impunity contribute to a pervasive sense of threat.”

Michelle Bachelet, UN High Commissioner for Human Rights

¹¹⁶ Belgium, 2014 (CED/C/BEL/CO/1, para. 18); Tunisia, 2016 (CED/C/TUN/CO/1, para. 15); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 16); Lithuania, 2017 (CED/C/LTU/CO/1, para. 16 (b)); Honduras, 2018 (CED/C/HND/CO/1, para. 17 (c)); Portugal, 2018 (CED/C/PRT/CO/1, para. 17); Italy, 2019 (CED/C/ITA/CO/1, para. 17); Bolivia, 2019 (CED/C/BOL/CO/1, para. 13 (d)).

¹¹⁷ Germany, 2014 (CED/C/DEU/CO/1, para. 9); Armenia, 2015 (CED/C/ARM/CO/1, para. 12); Japan, 2018 (CED/C/JPN/CO/1, para. 16 (b)). In a similar sense: Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 18); Senegal, 2017 (CED/C/SEN/CO/1, para. 22); Albania, 2018 (CED/C/ALB/CO/1, para. 21); Gabon, 2017 (CED/C/GAB/1, para. 14).

¹¹⁸ France, 2013 (CED/C/FRA/CO/1, para. 19).

10. APPROPRIATE PENALTIES

The question of the appropriate penalties for enforced disappearance was discussed from the beginning of the *travaux préparatoires* when addressing the issue of incrimination and sanctions. The initial proposal had as its source existing instruments and the 1998 draft,¹¹⁹ and mentioned that “penalties should be adequate and proportional to the seriousness of the offence”¹²⁰. The subsequent proposal, to punish enforced disappearance with “appropriate penalties which take into account its grave nature,” gave rise to several comments on the importance of taking into account, among other aspects, the “extreme grave nature” of enforced disappearance and the “grave nature of the acts” in the case of the enforced disappearance of particularly vulnerable persons and when the victim dies.¹²¹ It was agreed that the latter would be regarded as a reason for increasing the penalty. The agreed proposal, according to which “each State Party shall make enforced disappearance punishable by appropriate penalties that take into account its extreme seriousness,”¹²² corresponds to Article 7 (1), currently in the Convention.

On many occasions, the Committee has recommended that, when enshrining the crime of enforced disappearance in their criminal legislation, States Parties provide for adequate¹²³ punishment or penalties that take into account its extreme seriousness. On several occasions, the Committee has pointed out that the imposition of the death penalty should be avoided.¹²⁴ In cases of ongoing investigations of enforced disappearances committed in the past,¹²⁵ the Committee has indicated that those found responsible—civilian¹²⁶ and military¹²⁷ commanders and superiors or public officials giving their support, authorization, or acquiescence to militias or to persons

119 The “1998 draft” is the draft international convention on the protection of all persons from enforced disappearance transmitted by the Sub-Commission on the Promotion and Protection of Human Rights in its resolution 1998/25 of 26 August 1998. E/CN.4/2003/71, para. 1.

120 E/CN.4/2003/71, para. 41.

121 E/CN.4/2004/59, para. 58, 60.

122 E/CN.4/2005/66, para. 44.

123 Germany, 2014 (CED/C/DEU/CO/1, para. 8); Mexico, 2015 (CED/C/MEX/CO/1, para. 20); Armenia, 2015 (CED/C/ARM/CO/1, para. 12); Serbia, 2015 (CED/C/SRB/CO/1, para. 11); Iraq, 2015 (CED/C/IRQ/CO/1, para. 14); Montenegro, 2015 (CED/C/MNE/CO/1, para. 9); Tunisia, 2016 (CED/CED/TUN/CO/1, para. 15); Senegal, 2017 (CED/C/SEN/CO/1, para. 14); Portugal, 2018 (CED/C/PRT/CO/1, para. 15); Peru, 2019 (CED/C/PER/CO/1, para. 15 (d)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 13). In a similar sense: Spain, 2013 (CED/C/ESP/CO/1, para. 10); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 14); Lithuania, 2017 (CED/C/LTU/CO/1, para. 16); Chile, 2019 (CED/C/CHL/CO/1, para. 11); Belgium, 2014 (CED/C/BEL/CO/1, para. 12).

124 Tunisia, 2016 (CED/C/TUN/CO/1, para. 15); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 14); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 12); Cuba, 2017 (CED/C/CUB/CO/1, para. 12); Japan, 2018 (CED/C/JPN/CO/1, para. 16).

125 Bolivia, 2019 (CED/C/BOL/CO/1, para. 21); Peru, 2019 (CED/C/PER/CO/1, para. 19). A past of armed conflict: Montenegro, 2015 (CED/C/MNE/CO/1, para. 17); A past of dictatorship: Chile, 2019 (CED/C/CHL/CO/1, para. 17).

126 Montenegro, 2015 (CED/C/MNE/CO/1, para. 17).

127 Iraq, 2015 (CED/C/IRQ/CO/1, para. 20).



or groups of persons — ¹²⁸ shall be punished in accordance with the seriousness or extreme seriousness of their acts.¹²⁹ In specific cases, the Committee has also recommended eliminating the imposition of fines as the sole penalty for the crime of enforced disappearance; reducing the difference between the lowest and highest penalties provided for the crime of enforced disappearance; and ensuring that the minimum penalty takes into account the extreme seriousness of the crime.¹³⁰ Finally, the Committee has recommended that States Parties adopt legislative measures to incorporate as specific crimes, punishable by appropriate or proportional penalties that take into account their extreme seriousness, the following conducts: i) the appropriation of children who have been forcibly disappeared or whose father, mother or representative were subjected to enforced disappearance, or of children who were born in captivity of a mother subjected to enforced disappearance; and ii) the falsification or destruction of documents proving the true identity of children who have disappeared under the above circumstances.¹³¹

128 Iraq, 2015 (CED/C/IRQ/CO/1, para. 20); Montenegro, 2015 (CED/C/MNE/CO/1, para. 17).

129 Bolivia, 2019 (CED/C/BOL/CO/1, para. 21); Peru, 2019 (CED/C/PER/CO/1, para. 19); Chile, 2019 (CED/C/CHL/CO/1, para. 17).

130 Netherlands, 2014 (CED/C/NLD/CO/1, para. 17); Austria, 2018 (CED/C/AUT/CO/1, para. 13); Uruguay, 2013 (CED/C/URY/CO/1, para. 12).

131 Uruguay, 2013 (CED/C/URY/CO/1, para. 34); Spain, 2013 (CED/C/ESP/CO/1, para. 35); Germany, 2014 (CED/C/DEU/CO/1, para. 29); Paraguay, 2014 (CED/C/PRY/CO/1, para. 32); Mexico, 2015 (CED/C/MEX/CO/1, para. 45); Armenia, 2015 (CED/C/ARM/CO/1, para. 29); Iraq, 2015 (CED/C/IRQ/CO/1, para. 38); Montenegro, 2015 (CED/C/MNE/CO/1, para. 35); Tunisia, 2016 (CED/C/TUN/CO/1, para. 34); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 32); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 40); Colombia, 2016 (CED/C/COL/CO/1, para. 40); Cuba, 2017 (CED/C/CUB/CO/1, para. 36); Senegal, 2017 (CED/C/SEN/CO/1, para. 42); Chile, 2019 (CED/C/CHL/CO/1, para. 31).

11. STATUTES OF LIMITATIONS

From the beginning of *the travaux préparatoires*, it was clear that when enforced disappearance constitutes a crime against humanity, it is imprescriptible, and it was agreed that this should be established in the Convention.¹³² When the enforced disappearance does not constitute a crime against humanity, it was agreed that if the State Party applies a statute of limitation, the term should be long and proportionate to the seriousness of the crime.¹³³ However, it was discussed whether the limitation term should be regulated by domestic law¹³⁴ or by the treaty.¹³⁵ A proposal was accepted, now in Article 8 (1) (b) of the Convention, according to which when a State Party applies a statute of limitation in respect of enforced disappearance, the term of limitation for criminal proceedings “commences from the moment when the enforced disappearance ceases, taking into account its continuous nature”.¹³⁶ Some proposed establishing the suspension of the term when domestic law does not provide an effective remedy.¹³⁷ It was agreed instead that victims should be guaranteed the right to an effective remedy during the term of limitation, as stated in Article 8 (2) of the Convention.

The Committee has encouraged States Parties, when criminalizing enforced disappearance as an autonomous crime, to provide that the offence is not subject to any statute of limitations¹³⁸. And if it is¹³⁹, it has recommended that they expressly ensure in criminal legislation that the statute of limitations complies with the strict conditions set forth in the Convention,¹⁴⁰ according to which the term of limitation must be prolonged¹⁴¹ and proportionate with the extreme seriousness of the

132 E/CN.4/2003/71, para. 43, 56; E/CN.4/2005/66, para. 49.

133 E/CN.4/2003/71, para. 56.

134 E/CN.4/2004/59, para. 63; E/CN.4/2005/66, para. 46.

135 E/CN.4/2004/59, para. 63 – 68:

136 E/CN.4/2003/71, para. 44; E/CN.4/2005/66, para. 47; E/CN.4/2006/57, para. 113; E/CN.4/2006/57, page. 32.

137 E/CN.4/2005/66, para. 46; E/CN.4/2004/59, para. 66, 68, 69; E/CN.4/2005/66, para. 45, 46.

138 Germany, 2014 (CED/C/DEU/CO/1, para. 9); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 14); Gabon, 2017 (CED/C/GAB/CO/1, para. 14); Japan, 2018 (CED/C/JPN/CO/1, para. 20); Italy, 2019 (CED/C/ITA/CO/1, para. 19). In a similar sense, the Committee has invited States parties to provide for the imprescriptibility of the crime or of the criminal proceedings. See: Tunisia, 2016 (CED/C/TUN/CO/1, para. 19); Chile, 2019 (CED/C/CHL/CO/1, para. 13).

139 Germany, 2014 (CED/C/DEU/CO/1, para. 9); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 14); Gabon, 2017 (CED/C/GAB/CO/1, para. 14); Japan, 2018 (CED/C/JPN/CO/1, para. 20); Italy, 2019 (CED/C/ITA/CO/1, para. 19); Serbia, 2015 (CED/C/SRB/CO/1, para. 12); Chile, 2019 (CED/C/CHL/CO/1, para. 13).

140 Armenia, 2015 (CED/C/ARM/CO/1, para. 13).

141 Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 14); Montenegro, 2015 (CED/C/MNE/CO/1, para. 11); Tunisia, 2016 (CED/C/TUN/CO/1, para. 19); Gabon, 2017 (CED/C/GAB/CO/1, para. 14); Honduras, 2018 (CED/C/HND/CO/1, para. 19); Japan, 2018 (CED/C/JPN/CO/1, para. 20); Portugal, 2018 (CED/C/PRT/CO/1, para. 19); Chile, 2019 (CED/C/CHL/CO/1, para. 13). In a similar sense: Germany, 2014 (CED/C/DEU/CO/1, para. 9); Serbia, 2015 (CED/C/SRB/CO/1, para. 12); Austria, 2018 (CED/C/AUT/CO/1, para. 15).

offence.¹⁴² Taking into account the continuous nature of the crime,¹⁴³ the limitation term should begin to run from the moment the enforced disappearance ceases¹⁴⁴ in all its elements,¹⁴⁵ that is, from the moment the disappeared person is found alive or his or her remains are located and identified -in case he or she is found lifeless- or from the moment the identity of a child who has been the victim of appropriation is reestablished.¹⁴⁶ In accordance with the Committee's recommendations, when the enforced disappearance constitutes a crime against humanity, it is imprescriptible.¹⁴⁷

Regarding the statute of limitations for civil reparations in cases of enforced disappearance, the Committee has recommended that the limitation term should, at a minimum, be in line with that applied to other crimes of similar gravity, such as torture.¹⁴⁸ It also encouraged one State Party to incorporate in its legislation the opinion of its Supreme Court regarding "the non-applicability of statutory limitations to civil actions for damages arising from enforced disappearances" and, if that State Party applies a statute of limitations for bringing such actions, to ensure in its legislation that the term of limitation is of long duration and is counted from the moment when the enforced disappearance ceases.¹⁴⁹ It also recommended guaranteeing the right of the victims to an effective remedy during the term of limitation.¹⁵⁰

142 All mentioned in two previous footnotes and Senegal, 2017 (CED/C/SEN/CO/1, para. 24); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 20); Albania, 2018 (CED/C/ALB/CO/1, para. 23).

143 Montenegro, 2015 (CED/C/MNE/CO/1, para. 11); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para.14); Senegal, 2017 (CED/C/SEN/CO/1, para. 24); Belgium, 2014 (CED/C/BEL/CO/1, para. 20); Tunisia, 2016 (CED/C/TUN/CO/1, para. 19); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 14); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 20); Cuba, 2017 (CED/C/CUB/CO/1, para. 16); Uruguay, 2013 (CED/C/URY/CO/1, para. 14); Gabon, 2017 (CED/C/GAB/CO/1, para. 14); Honduras, 2018 (CED/C/HND/CO/1, para. 19); Chile, 2019 (CED/C/CHL/CO/1, para. 13).

144 Belgium, 2014 (CED/C/BEL/CO/1, para. 20); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 20); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 14); Germany, 2014 (CED/C/DEU/CO/1, para. 9); Montenegro, 2015 (CED/C/MNE/CO/1, para. 11); Senegal, 2017 (CED/C/SEN/CO/1, para. 24); Albania, 2018 (CED/C/ALB/CO/1, para. 23). In a similar sense: Spain, 2013 (CED/C/ESP/CO/1, para. 12); Cuba, 2017 (CED/C/CUB/CO/1, para. 12); Honduras, 2018 (CED/C/HND/CO/1, para. 19).

145 France, 2013 (CED/C/FRA/CO/1, para. 20).

146 Spain, 2013 (CED/C/ESP/CO/1, para. 12); Tunisia, 2016 (CED/C/TUN/CO/1, para. 19); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 14).

147 Armenia, 2015 (CED/C/ARM/CO/1, para. 13); Uruguay, 2013 (CED/C/URY/CO/1, para. 14).

148 France, 2013 (CED/C/FRA/CO/1, para. 21).

149 Chile, 2019 (CED/C/CHL/CO/1, para. 25).

150 Japan, 2018 (CED/C/JPN/CO/1, para. 20).

12. AMNESTIES, PARDONS, AND IMMUNITIES

The Convention does not include any provisions related to amnesties, pardons, immunities or other similar measures to exempt perpetrators of enforced disappearance from criminal proceedings and sanctions. During the *travaux préparatoires*, several positions were presented. Instead of prohibiting amnesties, as it is reflected in Article 18 of the 1992 Declaration on the Protection of all Persons from Enforced Disappearance, and as it was in the 1998 draft,¹⁵¹ some preferred to ask States Parties to take into account the seriousness of the conduct of enforced disappearance when imposing sanctions.¹⁵² Other considerations were that amnesties could be granted when the conduct of enforced disappearance does not amount to an international crime or after having established the truth, compensated the victims, and imposed penalties on perpetrators.¹⁵³ While some considered, in line with the draft under discussion, that amnesties were admissible as long as granting them does not prevent the use of an effective resource for obtaining reparations or hamper the right to obtain information on the fate of the disappeared person, others considered this to be too lax.¹⁵⁴ Still others supported the idea that sometimes amnesties are necessary for national reconciliation.¹⁵⁵ Another proposal consisted in prohibiting amnesties before judgment or conviction of the authors of enforced disappearances.¹⁵⁶ Some others expressed that, in the absence of an agreement to enshrine a prohibition of amnesties and pardons in the treaty, which would represent an advancement with regard to the 1992 Declaration, the proposal would be better suppressed.¹⁵⁷ In this way, the Convention was approved with no reference to amnesties, pardons or immunities.

With the purpose that all enforced disappearances be thoroughly investigated and sanctioned, in its concluding observations the Committee has argued that domestic legislations should not include provisions allowing perpetrators of enforced disappearances to be exempted from criminal proceedings or sanctions. In this regard, the Committee has maintained that any legal possibility of granting amnesties for international crimes, including enforced disappearance, should be removed¹⁵⁸ and

151 The "1998 draft" is the draft international convention on the protection of all persons from enforced disappearance transmitted by the Sub-Commission on the Promotion and Protection of Human Rights in its resolution 1998/25 of 26 August 1998. E/CN.4/2003/71, para. 1.

152 E/CN.4/2003/71, para. 52.

153 E/CN.4/2003/71, para. 52.

154 E/CN.4/2004/59, para. 73.

155 E/CN.4/2004/59, para. 75.

156 E/CN.4/2004/59, para. 79.

157 E/CN.4/2004/59, para. 80.

158 Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 26).

amnesty laws should be declared null and void.¹⁵⁹ Amnesty laws, while in force, should not be interpreted in a way that hinders criminal investigations.¹⁶⁰ Domestic legislations should also make it impossible to grant pardons for international crimes, including enforced disappearances.¹⁶¹

The Committee has recognized as positive the inclusion by state parties of a provision at constitutional level stating that enforced disappearances, among other serious crimes, “cannot under any circumstances be subject to amnesty” as well as the adoption of criminal legislation prohibiting the granting of pardons or amnesties for the crime of enforced disappearance.¹⁶² The Committee has also considered positive that amnesty legislation has not been applied by courts in the last two decades,¹⁶³ at the same time that it expressed concern that this legislation is still in force and therefore recommended that it should be annulled.

“Enforced disappearances is a heinous crime that goes beyond borders and casts shadows on the international community as a whole. Universal ratification of the Convention should be a top priority.”

The Committee on Enforced Disappearances

¹⁵⁹ Chile, 2019 (CED/C/CHL/CO/1, para. 17).

¹⁶⁰ Spain, 2013 (CED/C/ESP/CO/1, para. 12).

¹⁶¹ Peru, 2019 (CED/C/PER/CO/1, para. 15).

¹⁶² Albania, 2018 (CED/C/ALB/CO/1, para. 5 (a), (b)).

¹⁶³ Chile, 2019 (CED/C/CHL/CO/1, para. 16). The Committee refers to Amnesty Decree-Law No. 2191/1978.

13. JURISDICTION

During the *travaux préparatoires*, the issue of the obligation to try was raised with the aim of establishing the broadest possible jurisdiction for domestic criminal courts with respect to enforced disappearance, eliminating sanctuaries for the perpetrators, and improving national jurisdictions and international cooperation, including extradition, as basic mechanisms to that end.¹⁶⁴ Accordingly, Article 9 of the Convention establishes that States Parties shall exercise jurisdiction over enforced disappearances when committed in their territories, when the alleged offender is one of their nationals, or when the victim is a national and the State Party considers it appropriate. Consequently, Article 11 of the Convention states that all persons alleged to have committed an offence of enforced disappearance should be prosecuted by a competent, independent, and impartial court or tribunal if the State Party does not extradite that person or surrender him or her to another state in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized.

Based on this obligation, the Committee has recommended that States Parties adopt all necessary measures in order to ensure that the exercise of jurisdiction by the courts over offences of enforced disappearance is fully guaranteed in accordance with the obligations stemming from the Convention, also in accordance with the principle to extradite or prosecute.¹⁶⁵ When a State Party has considered it appropriate to adopt legislation as a basis for universal jurisdiction, the Committee has recommended incorporating enforced disappearances into such legislation.¹⁶⁶ Along these lines, the Committee has recommended that the State Party should submit any cases of enforced disappearance to the competent authorities for the purpose of prosecution, regardless of whether an extradition request against the suspect has been submitted beforehand.¹⁶⁷

The Committee has also recommended that cases be investigated thoroughly and impartially,¹⁶⁸ and tried only by the competent civil authorities¹⁶⁹ from the outset¹⁷⁰. In this sense, it has considered that, as a matter of principle, military courts do not provide the independence and impartiality required by the Convention to deal with

¹⁶⁴ E/CN.4/2003/71, para. 57 – 59, 65; E/CN.4/2004/59, para. 9; E/CN.4/2005/66, para. 56, 59.

¹⁶⁵ Germany, 2014 (CED/C/DEU/CO/1, para. 11); Iraq, 2015 (CED/C/IRQ/CO/1, para. 18); Senegal, 2017 (CED/C/SEN/CO/1, para. 26); Japan, 2018 (CED/C/JPN/CO/1, para. 22); Bolivia, 2019 (CED/C/BOL/CO/1, para. 17).

¹⁶⁶ Slovakia, 2019 (CED/C/SVK/CO/1, para. 13).

¹⁶⁷ France, 2013 (CED/C/FRA/CO/1, para. 23).

¹⁶⁸ See chapter on Duty to investigate.

¹⁶⁹ Netherlands, 2014 (CED/C/NLD/CO/1, para. 19); Mexico, 2015 (CED/C/MEX/CO/1, para. 26); Iraq, 2015 (CED/C/IRQ/CO/1, para. 21); Tunisia, 2016 (CED/C/TUN/CO/1, para. 21); Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 15).

¹⁷⁰ Colombia, 2016 (CED/C/COL/CO/1, para. 22).

human rights violations such as enforced disappearances,¹⁷¹ and that there is no guarantee of the proper legal characterization of cases.¹⁷² Therefore, the Committee has welcomed the exclusion of enforced disappearances from military jurisdiction¹⁷³ and has expressed concern when military courts investigate, hear, and try offences of enforced disappearance,¹⁷⁴ as well as when public officials influence the progress of investigations¹⁷⁵ by politicizing procedures;¹⁷⁶ when there are institutional ties to the entity to which the individual under investigation belongs;¹⁷⁷ or when other forms of interference and obstacles take place, such as legal restrictions to access documentation and information relevant to an investigation on the basis of confidentiality or harm to national interests.¹⁷⁸

171 Spain, 2013 (CED/C/ESP/CO/1, para. 15); Belgium, 2014 (CED/C/BEL/CO/1, para. 21); Mexico, 2015 (CED/C/MEX/CO/1, para. 25); Tunisia, 2016 (CED/C/TUN/CO/1, para. 20); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 21); Cuba, 2017 (CED/C/CUB/CO/1, para. 19); Gabon, 2017 (CED/C/GAB/CO/1, para. 23); Albania, 2018 (CED/C/ALB/CO/1, para. 26). See also chapter on Military Jurisdiction and the Independence of Judges.

172 Colombia, 2016 (CED/C/COL/CO/1, para. 21).

173 France, 2013 (CED/C/FRA/CO/1, para. 25).

174 Spain, 2013 (CED/C/ESP/CO/1, para. 15); Cuba, 2017 (CED/C/CUB/CO/1, para. 19); Chile, 2019 (CED/C/CHL/CO/1, para. 15).

175 Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 25).

176 Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 17).

177 Honduras, 2018 (CED/C/HND/CO/1, para. 23).

178 Japan, 2018 (CED/C/JPN/CO/1, para. 23).

14. MILITARY JURISDICTION AND THE INDEPENDENCE OF JUDGES

At an early stage of the *travaux préparatoires*, the question was raised whether the Convention should ban special courts, particularly military courts, from trying cases of enforced disappearance. As international law tended increasingly to rule out the use of such courts to try serious violations of human rights—e.g. Article IX of the Inter-American Convention on Forced Disappearance of Persons and Article 14 of the 1992 Declaration on the Protection of all Persons from Enforced Disappearance illustrate this tendency—it was emphasized that the use of military courts very often led to situations of impunity.¹⁷⁹ Nevertheless, there was no agreement on an explicit exclusion of military courts or a provision preventing trials before special courts, as some delegations proposed.¹⁸⁰ Rather, agreement was reached that the Convention should establish, as currently reflected in its article 11 (3), that trials for the offence of enforced disappearance should take place before “a competent, independent and impartial court or tribunal established by law.”

Since it started working, the Committee considered that “as a matter of principle, military courts do not provide the independence and impartiality required by the Convention to deal with human rights violations such as enforced disappearances.”¹⁸¹ A few years after beginning its work, taking into account the Convention and the gradual development of international law, and with a view to providing clearer guidance to States Parties to ensure consistency in the implementation of international standards, the Committee, in its *Statement on Enforced Disappearance and Military Jurisdiction*, expressed “that military jurisdiction could limit the effectiveness of investigations and prosecutions of enforced disappearances” and reaffirmed that “military jurisdiction ought to be excluded in cases of gross human rights violations, including enforced disappearances.”¹⁸² Along this line, the Committee has recommended that States Parties take legislative or other measures to ensure that all cases of enforced disappearance, including those committed by a military officer against another military officer,¹⁸³ “remain expressly outside military jurisdiction and be investigated [and prosecuted by, or under control of, civil authorities¹⁸⁴] and tried

179 E/CN.4/2003/71, para. 47; E/CN.4/2005/66, para. 58.

180 E/CN.4/2005/66, para. 58; E/CN.4/2006/57, page. 50.

181 Spain, 2013 (CED/C/ESP/CO/1, para. 15); Belgium, 2014 (CED/C/BEL/CO/1, para. 21). In similar sense: Mexico, 2015 (CED/C/MEX/CO/1, para. 25); Tunisia, 2016 (CED/C/TUN/CO/1, para. 20); Albania, 2018 (CED/C/ALB/CO/1, para. 26); Gabon, 2017 (CED/C/GAB/CO/1, para. 23); Spain, 2013 (CED/C/ESP/CO/1, para. 15); Belgium, 2014 (CED/C/BEL/CO/1, para. 21); Mexico, 2015 (CED/C/MEX/CO/1, para. 25); Tunisia, 2016 (CED/C/TUN/CO/1, para. 20); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 21); Cuba, 2017 (CED/C/CUB/CO/1, para. 19); Gabon, 2017 (CED/C/GAB/CO/1, para. 23); Albania, 2018 (CED/C/ALB/CO/1, para. 26).

182 A/70/56, Annex III, para. 2 and 10.

183 Mexico, 2015 (CED/C/MEX/CO/1, para. 26); Chile, 2019 (CED/C/CHL/CO/1, para. 15).

184 A/70/56, Annex III, para. 5.



only by ordinary courts.”¹⁸⁵ In specific cases, the Committee has made the following recommendations: i) to subject any offence of enforced disappearance to the jurisdiction of a specialized judicial center established in a court of major jurisdiction in order to ensure the independence of investigations;¹⁸⁶ ii) to take the necessary measures to guarantee in practice that all cases of presumed enforced disappearance, including those in which the victim is found deceased, are tried, from the outset, by ordinary courts;¹⁸⁷ iii) to ensure that enforced disappearances allegedly committed by members of the security forces are investigated and prosecuted by competent, independent, and impartial prosecutors and judges who have no institutional ties to the entity to which the individual under investigation belongs.¹⁸⁸ The Committee has also expressed concern at the fact that the competence of military authorities under national law to investigate persons accused of enforced disappearance could hinder the prompt, effective, and impartial investigation of alleged cases of enforced disappearance.¹⁸⁹

In relation to the independence of ordinary courts, the Committee has expressed concern that the hierarchical subordination of courts to other organs of the state may affect the guarantee of independence of the courts required under the Convention in hearing cases of enforced disappearance, and has therefore recommended that the State Party concerned adopt the measures necessary to guarantee the full independence of the judiciary and other branches of government.¹⁹⁰ The Committee, after noting that the legislation of a specific state on the transfer and dismissal of judges could compromise the internal independence of the judiciary, and emphasizing the importance of the independence of the authorities responsible for prosecuting enforced disappearances, has recommended that the State Party takes the necessary legislative and administrative measures regarding the competence of its Supreme Court of Justice to consolidate the internal independence of the judiciary.¹⁹¹

185 Spain, 2013 (CED/C/ESP/CO/1, para. 16); Netherlands, 2014 (CED/C/NLD/CO/1, para. 19); Belgium, 2014 (CED/C/BEL/CO/1, para. 22); Tunisia, 2016 (CED/C/TUN/CO/1, para. 21); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 22); Cuba, 2017 (CED/C/CUB/CO/1, para. 20); Gabon, 2017 (CED/C/GAB/CO/1, para. 24); Albania, 2018 (CED/C/ALB/CO/1, para. 27); Japan, 2018 (CED/C/JPN/CO/1, para. 24 (c)); Chile, 2019 (CED/C/CHL/CO/1, para. 15); Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 15).

186 France, 2013 (CED/C/FRA/CO/1, para. 25).

187 Colombia, 2016 (CED/C/COL/CO/1, para. 22).

188 Honduras, 2018 (CED/C/HND/CO/1, para. 23).

189 Japan, 2018 (CED/C/JPN/CO/1, para. 23).

190 Cuba, 2017 (CED/C/CUB/CO/1, para. 17 -18).

191 Uruguay, 2013 (CED/C/URY/CO/1, para. 15-16).

15. DUTY TO INVESTIGATE

During the *travaux préparatoires*, attention was drawn to the special importance of investigations as a mechanism to prevent impunity in cases of disappearance, conducted by a responsible body, independent from the institution to which the person being accused of the offence belongs, and provided with adequate resources and sufficient authority to conduct the investigation speedily and efficiently.¹⁹² Consistent with this, Article 12 of the Convention established a number of rules regarding the duty to investigate.

The Committee has upheld the rules enshrined in Article 12 as elements of the duty to investigate: The right of any individual to report the facts to the competent authorities;¹⁹³ the duty to conduct without delay a thorough, impartial, complete, diligent and effective investigation, even if there has been no formal complaint,¹⁹⁴ where there are reasonable grounds for believing that a person has been the victim of an enforced disappearance;¹⁹⁵ the appropriate and effective protection of the complainant, witnesses, relatives of the disappeared person, and their defence counsel, as well as of those who participate in the investigation, against all ill-treatment or intimidation as a consequence of the complaint or of any evidence given;¹⁹⁶ and the effective and timely access by the authorities involved in the investigation to documentation and other relevant information,¹⁹⁷ as well as to any place where there are reasonable grounds for the authorities to believe that the disappeared person may be, with prior judicial authorization if necessary.¹⁹⁸

The Committee has also developed more specific guidance on how to strengthen investigations on the offence of enforced disappearance. In this respect, it has requested that States Parties ensure that enforced disappearances are investigated as such¹⁹⁹ and not as any other offence; that investigations are not only initiated immediately after receiving information with reasonable grounds to believe that a

192 E/CN.4/2003/71, para. 75 – 77.

193 Colombia, 2016 (CED/C/COL/CO/1, para. 20 (c)); Japan, 2018 (CED/C/JPN/CO/1, para. 24).

194 Mexico, 2015 (CED/C/MEX/CO/1, para. 28); Iraq, 2015 (CED/C/IRQ/CO/1, para. 23 (a)); Colombia, 2016 (CED/C/COL/CO/1, para. 20 (a)); Senegal, 2017 (CED/C/SEN/CO/1, para. 28); Gabon, 2017 (CED/C/GAB/CO/1, para. 25); Honduras, 2018 (CED/C/HND/CO/1, para. 25 (a)); Japan, 2018 (CED/C/JPN/CO/1, para. 24 (b)); Argentina, 2013 (CED/C/ARG/CO/1, para. 17); Gabon, 2017 (CED/C/GAB/CO/1, para. 26); Spain, 2013 (CED/C/ESP/CO/1, para. 12); Armenia, 2015 (CED/C/ARM/CO/1, para. 15); Iraq, 2015 (CED/C/IRQ/CO/1, para. 20 (a)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 21 (a)).

195 Mexico, 2015 (CED/C/MEX/CO/1, para. 28); Iraq, 2015 (CED/C/IRQ/CO/1, para. 23 (a)); Colombia, 2016 (CED/C/COL/CO/1, para. 20 (a)); Senegal, 2017 (CED/C/SEN/CO/1, para. 28); Gabon, 2017 (CED/C/GAB/CO/1, para. 25); Honduras, 2018 (CED/C/HND/CO/1, para. 25 (a)); Japan, 2018 (CED/C/JPN/CO/1, para. 24 (b)).

196 Uruguay, 2013 (CED/C/URY/CO/1, para. 18); Mexico, 2015 (CED/C/MEX/CO/1, para. 24, 31 (a)); Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 14.

197 Colombia, 2016 (CED/C/COL/CO/1, para. 20 (f)); Chile, 2019 (CED/C/CHL/CO/1, para. 17); Japan, 2018 (CED/C/JPN/CO/1, para. 24 (d)).

198 Honduras, 2018 (CED/C/HND/CO/1, para. 25 (d)); Japan, 2018 (CED/C/JPN/CO/1, para. 24 (e)).

199 Uruguay, 2013 (CED/C/URY/CO/1, para. 14).

person has been subjected to an enforced disappearance, but also that they be continued until the fate or whereabouts of the disappeared person have been clarified (for example, when the person is found alive, his or her remains are found in the event of death, or the identity of children subjected to wrongful removal is restored);²⁰⁰ that the perpetrators are punished for the offence, irrespective of their status²⁰¹ and of the time that has elapsed since the commencement of the criminal conduct;²⁰² and calling to account all authorities and officials involved in the crimes to any degree, regardless of their nationality.²⁰³ In a context of widespread disappearances, the Committee has encouraged States Parties to exhaust all lines of inquiry²⁰⁴ and to adopt a common approach to investigations, following specific strategies based on similar crime commission patterns and regional contexts, and avoiding fragmented investigations that undermine their own effectiveness.²⁰⁵ According to the *Guiding Principles for the Search for Disappeared Persons*, contextual analyses should not be used as a pretext for dismissing investigative or search hypotheses that are not consistent with them at first glance.²⁰⁶

The Committee has recommended States Parties to allow all persons with a legitimate interest, such as the family, close friends and legal representatives of disappeared persons,²⁰⁷ to participate fully or actively in judicial proceedings relating to the investigation of the offence²⁰⁸ and to be informed regularly about the progress and the results of the investigation,²⁰⁹ without this conferring upon them any responsibility for providing evidence.²¹⁰ With respect to transnational searches²¹¹ and access to justice mechanisms in cases affecting migrants²¹² as well as in the context of international armed conflicts,²¹³ the Committee has recommended that full participation in proceedings should be allowed and information about progress of the investigation should be provided, irrespective of where relatives of the victim reside. It has also recommended that the findings of investigations are made pub-

200 Argentina, 2013 (CED/C/ARG/CO/1, para. 17); Spain, 2013 (CED/C/ESP/CO/1, para. 12); Iraq, 2015 (CED/C/IRQ/CO/1, para. 20); Tunisia, 2016 (CED/C/TUN/CO/1, para. 23).

201 Serbia, 2015 (CED/C/SRB/CO/1, para. 14); Iraq, 2015 (CED/C/IRQ/CO/1, para. 20 (b)); Montenegro, 2015 (CED/C/MNE/CO/1, para. 17); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 22).

202 Uruguay, 2013 (CED/C/URY/CO/1, para. 14); Tunisia, 2016 (CED/C/TUN/CO/1, para. 22); Spain, 2013 (CED/C/ESP/CO/1, para. 12).

203 Germany, 2014 (CED/C/DEU/CO/1, para. 13).

204 Mexico, 2015 (CED/C/MEX/CO/1, para. 28 (a)).

205 Colombia, 2016 (CED/C/COL/CO/1, para. 20).

206 Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 8.

207 Honduras, 2018 (CED/C/HND/CO/1, para. 25).

208 Uruguay, 2013 (CED/C/URY/CO/1, para. 22); Senegal, 2017 (CED/C/SEN/CO/1, para. 28 (b)).

209 Honduras, 2018 (CED/C/HND/CO/1, para. 24); Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 5.

210 Mexico, 2015 (CED/C/MEX/CO/1, para. 28).

211 Austria, 2018 (CED/C/AUT/CO/1, para. 17).

212 Mexico, 2015 (CED/C/MEX/CO/1, para. 23 and 24); Italy, 2019 (CED/C/ITA/CO/1, para. 23).

213 Montenegro, 2015 (CED/C/MNE/CO/1, para. 13).

lic²¹⁴ and, accordingly, has expressed concern regarding pretrial investigations and results of investigations that are kept secret in the context of rendition and secret detention programs in which, in addition, victims are not duly recognized.²¹⁵ The Committee has also recommended that States Parties ensure that adequate technical, financial, and human resources are provided to the authorities in charge of investigating cases.²¹⁶ In this regard, the Committee has encouraged States Parties to consider establishing a specialized unit under the competent body of prosecution, with staff specifically trained to investigate effectively all cases of alleged enforced disappearance,²¹⁷ and to pursue investigations and coordinate criminal prosecution policy in this field.²¹⁸ Along this line, the *Guiding Principles* indicate that the distribution of trained professionals between search and investigation should reflect that both require equal attention.²¹⁹

214 Gabon, 2017 (CED/C/GAB/CO/1, para. 26).

215 Lithuania, 2017 (CED/C/LTU/CO/1, para. 21).

216 Paraguay, 2014 (CED/C/PRY/CO/1, para. 18); Mexico, 2015 (CED/C/MEX/CO/1, para. 28 (c)); Serbia, 2015 (CED/C/SRB/CO/1, para. 14); Montenegro, 2015 (CED/C/MNE/CO/1, para. 17); Tunisia, 2016 (CED/C/TUN/CO/1, para. 24); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 18); Colombia, 2016 (CED/C/COL/CO/1, para. 20 (d)); Senegal, 2017 (CED/C/SEN/CO/1, para. 28 (g)); Gabon, 2017 (CED/C/GAB/CO/1, para. 27); Japan, 2018 (CED/C/JPN/CO/1, para. 24 (f)); Chile, 2019 (CED/C/CHL/CO/1, para. 17 (e)); Peru, 2019 (CED/C/PER/CO/1, para. 19 (b)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 21 (b)).

217 Uruguay, 2013 (CED/C/URY/CO/1, para. 22); Argentina, 2013 (CED/C/ARG/CO/1, para. 19); Mexico, 2015 (CED/C/MEX/CO/1, para. 29); Iraq, 2015 (CED/C/IRQ/CO/1, para. 20).

218 Uruguay, 2013 (CED/C/URY/CO/1, para. 22); Iraq, 2015 (CED/C/IRQ/CO/1, para. 21).

219 Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 13.

16. DUTY TO SEARCH

During the *travaux préparatoires*, the right of victims to know the truth regarding the circumstances of the enforced disappearance as well as the fate and whereabouts of the disappeared person was widely accepted.²²⁰ To satisfy that right, Article 24 of the Convention establishes that each State Party shall take all appropriate measures to search for, locate, and release disappeared persons and, in the event of death, to locate, respect, and return their remains.

Accordingly, the Committee has stated that determining the whereabouts of victims includes searching for and locating disappeared persons without delay²²¹ or immediately and expeditiously,²²² and, in the event of death, guaranteeing that their remains are identified, respected, and returned in a dignified manner,²²³ including through the adoption of measures such as the preservation and protection of mass graves²²⁴ and of all other sites where there is a suspicion that human remains of disappeared persons might be found.²²⁵ However, in the *Guiding Principles for the Search for Disappeared Persons*, the Committee has ascertained that the search should be conducted under the presumption that the disappeared person is alive, regardless of the circumstances of the disappearance, the date on which the disappearance began, and when the search is launched.²²⁶ Along these lines, it has emphasized the importance of swiftly adopting search measures in order to increase the chances of finding persons alive²²⁷ and of continuing the search until the fate of the disappeared person has been clarified or established.²²⁸ In the same sense, the Committee, in accordance with Article 12 of the Convention, has held that the authorities responsible should launch and conduct the search for the disappeared person on their own initiative, even without a formal complaint.²²⁹ According to the *Guiding Principles*, during the

220 E/CN.4/2005/66, para. 60, 70.

221 Iraq, 2015 (CED/C/IRQ/CO/1, para. 34); Tunisia, 2016 (CED/C/TUN/CO/1, para. 23 (c)); Colombia, 2016 (CED/C/COL/CO/1, para. 26); Honduras, 2018 (CED/C/HND/CO/1, para. 41 (a)); Peru, 2019 (CED/C/PER/CO/1, para. 33 (a)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 39 (a)).

222 Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 6.1.

223 Serbia, 2015 (CED/C/SRB/CO/1, para. 28); Iraq, 2015 (CED/C/IRQ/CO/1, para. 34); Tunisia, 2016 (CED/C/TUN/CO/1, para. 23 (c)); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 18); Colombia, 2016 (CED/C/COL/CO/1, para. 26); Honduras, 2018 (CED/C/HND/CO/1, para. 41); Chile, 2019 (CED/C/CHL/CO/1, para. 27 (a)); Peru, 2019 (CED/C/PER/CO/1, para. 33 (c)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 39 (d)).

224 Iraq, 2015 (CED/C/IRQ/CO/1, para. 34).

225 Chile, 2019 (CED/C/CHL/CO/1, para. 27 (d)).

226 Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 1.

227 Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 19 (f)); Colombia, 2016 (CED/C/COL/CO/1, para. 26 (a)); Honduras, 2018 (CED/C/HND/CO/1, para. 41 (a)).

228 Iraq, 2015 (CED/C/IRQ/CO/1, para. 34); Tunisia, 2016 (CED/C/TUN/CO/1, para. 23 (a)); Colombia, 2016 (CED/C/COL/CO/1, para. 26 (a)); Honduras, 2018 (CED/C/HND/CO/1, para. 41 (e)); Peru, 2019 (CED/C/PER/CO/1, para. 33 (e)); Chile, 2019 (CED/C/CHL/CO/1, para. 27 (d)).

229 Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 6.2; Spain, 2013, para. 32.

search processes, victims should be recognized as possessing important knowledge that may contribute to the effectiveness of the search²³⁰ and thus authorities should consider all information provided by victims and make use of their experience and that of their organizations.²³¹ Although States Parties have the obligation to adopt all measures necessary to determine the whereabouts of the victims independently from the initiatives undertaken by relatives,²³² victims should nevertheless be allowed to be actively involved in the investigations where necessary and if they so request.²³³ The Committee has also recognized the particular relevance of relatives in collecting genetic samples during search processes.²³⁴

Furthermore, in the *Guiding Principles* the Committee has indicated that the search should be conducted as part of a comprehensive public policy on disappearances that is comprehensive, clear, transparent, visible, and consistent, particularly in contexts where disappearances are frequent or perpetrated on a mass scale.²³⁵ Furthermore, the search should be conducted on the basis of a comprehensive strategy that allows exploring all reasonable hypotheses concerning the person's disappearance, using contextual analyses to determine patterns, clarify the motives and modus operandi of perpetrators, profile disappeared persons, and establish regional particularities that explain disappearances.²³⁶ In this respect, the Committee has made the following recommendations to States Parties: Conducting extensive campaigns to collect *ante-mortem* and *post-mortem* information;²³⁷ expediting the identification and handover of the exhumed remains, and cross-checking the information between the agencies responsible for the search for disappeared persons;²³⁸ establishing public search protocols²³⁹ and registers, including genetic databanks²⁴⁰ and databases on disappeared persons that cover the entire national territory; preserving data on the number and identity of all disappeared persons, their sex, gender identity, age, nationality, and, if applicable, their ethnic group or religious affiliation, the status of the search procedure and investigation, and the place, date, and circumstances of the disappearance;²⁴¹ and making available the information obtained from the criminal investigations on those responsible for the disappearance in the search for the disappeared person and *vice versa*.²⁴²

230 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 2.2.

231 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 8.5.

232 Spain, 2013 (CED/C/ESP/CO/1, para. 31).

233 Colombia, 2016 (CED/C/COL/CO/1, para. 26 (e)); Chile, 2019 (CED/C/CHL/CO/1, para. 27).

234 Colombia, 2016 (CED/C/COL/CO/1, para. 26 (b)).

235 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 3.1, 3.4.

236 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 8.6.

237 Colombia, 2016 (CED/C/COL/CO/1, para. 26 (b)); Honduras, 2018 (CED/C/HND/CO/1, para. 41 (c)).

238 Colombia, 2016 (CED/C/COL/CO/1, para. 26 (c)); Honduras, 2018 (CED/C/HND/CO/1, para. 41 (d)); Chile, 2019 (CED/C/CHL/CO/1, para. 27 (a)); Peru, 2019 (CED/C/PER/CO/1, para. 33 (c)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 39 (d)).

239 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 16.

240 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 11.

241 Iraq, 2020 (CED/C/IRQ/OAI/1, para. 5).

242 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 13.

To comply promptly and effectively with the above-mentioned purposes, States Parties should allocate sufficient human, technical, and financial resources²⁴³ and ensure that the search is conducted by independent and autonomous entities free from influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason,²⁴⁴ in accordance with the highest international standards.²⁴⁵ In connection with this idea, the Committee has recommended the creation of a genetic databank to be used in locating disappeared persons²⁴⁶ and the possibility of setting up an *ad hoc* body, endowed with sufficient powers and the necessary resources, responsible for the search for victims of enforced disappearance.²⁴⁷ In this regard, in the *Guiding Principles* the Committee has affirmed that the search should be coordinated, that is, centralized under or led by a competent body that ensures effective coordination with all the other entities²⁴⁸ whose cooperation is required for the search to be effective, exhaustive, and prompt. Finally, the search should be carried out safely and respecting human dignity. This involves recognizing victims as particularly vulnerable rights holders and protecting them from stigmatization, moral ill-treatment, and security risks.²⁴⁹ Respect for human dignity also implies that the remains of a disappeared person should be handed over to the family under decent conditions, in accordance with the cultural norms and customs of the peoples or communities to which the victims belonged, keeping in mind that they are human remains and not objects.²⁵⁰

243 Spain, 2013 (CED/C/ESP/CO/1, para. 32); Iraq, 2015 (CED/C/IRQ/CO/1, para. 34); Tunisia, 2016 (CED/C/TUN/CO/1, para. 24); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 18); Colombia, 2016 (CED/C/COL/CO/1, para. 26 (c)); Honduras, 2018 (CED/C/HND/CO/1, para. 41 (d)); Chile, 2019 (CED/C/CHL/CO/1, para. 27 (b)); Peru, 2019 (CED/C/PER/CO/1, para. 33 (d)).

244 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 15.4.

245 Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 19 (c)).

246 Peru, 2019 (CED/C/PER/CO/1, para. 32).

247 Spain, 2013 (CED/C/ESP/CO/1, para. 31, 32).

248 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 12.1.

249 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 2.2, 2.3.

250 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 2.4; Colombia, 2016 (CED/C/COL/CO/1, para. 26 (f)).



WE COUNT ON YOU.

**STOP ENFORCED
DISAPPEARANCES**

17. SANCTION OF ACTS THAT MAY HINDER THE INVESTIGATION INTO AN ENFORCED DISAPPEARANCE

During the *travaux préparatoires*, when discussing preventive measures, attention was drawn to the need to punish state agents who are guilty of obstructing investigations. In the view of most participants, the penalties laid down could include non-criminal sanctions.²⁵¹ Accordingly, the Convention recognized in Article 12 (4) that acts that could hinder the progress of investigations shall be prevented and punished, without mentioning the specificities of sanctions.

In its first ten years of work, the Committee has upheld this guarantee aimed at protecting investigations by recommending that States Parties adopt the measures necessary to ensure that persons suspected of having committed an enforced disappearance are not in a position to obstruct investigations. In this regard, the Committee has recommended that explicit measures in the legal system be adopted: i) to prevent alleged perpetrators of enforced disappearance, whether civilian or military, from hindering or influencing, directly or indirectly, the progress or the course of an investigation;²⁵² ii) to guarantee that officials suspected of having perpetrated an enforced disappearance are suspended from duty for the duration of the investigation,²⁵³ without prejudice to the presumption of innocence,²⁵⁴ and do not participate in the investigations,²⁵⁵ which includes the involvement of suspected law enforcement or security officials in the initial stages of an investigation,²⁵⁶ as well as the participation of officials belonging to the same institution as the person suspected or accused of the offence²⁵⁷ and the involvement of the law enforcement

²⁵¹ E/CN.4/2003/71, para. 78.

²⁵² Argentina, 2013 (CED/C/ARG/CO/1, para. 23); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 16); Netherlands, 2014 (CED/C/NLD/CO/1, para. 19); Paraguay, 2014 (CED/C/PRY/CO/1, para. 16); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 28); Ecuador, 2017 (CED/C/ECU/CO/1, para. 14); Bolivia, 2019 (CED/C/BOL/CO/1, para. 20 (c)); Peru, 2019 (CED/C/PER/CO/1, para. 19 (d)).

²⁵³ Netherlands, 2014 (CED/C/NLD/CO/1, para. 19); Serbia, 2015 (CED/C/SRB/CO/1, para. 16); Paraguay, 2014 (CED/C/PRY/CO/1, para. 16); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 28); Cuba, 2017 (CED/C/CUB/CO/1, para. 21); Ecuador, 2017 (CED/C/ECU/CO/1, para. 14); Armenia, 2015 (CED/C/ARM/CO/1, para. 15); Austria, 2018 (CED/C/AUT/CO/1, para. 19).

²⁵⁴ Ecuador, 2017 (CED/C/ECU/CO/1, para. 14).

²⁵⁵ France, 2013 (CED/C/FRA/CO/1, para. 25); Paraguay, 2014 (CED/C/PRY/CO/1, para. 16); Mexico, 2015 (CED/C/MEX/CO/1, para. 28 (d)); Armenia, 2015 (CED/C/ARM/CO/1, para. 15); Serbia, 2015 (CED/C/SRB/CO/1, para. 16); Senegal, 2017 (CED/C/SEN/CO/1, para. 28 (e)); Iraq, 2015 (CED/C/IRQ/CO/1, para. 20); Cuba, 2017 (CED/C/CUB/CO/1, para. 22).

²⁵⁶ Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 15).

²⁵⁷ Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 16); Armenia, 2015 (CED/C/ARM/CO/1, para. 15); Serbia, 2015 (CED/C/SRB/CO/1, para. 16).

or security force to which the officials suspected of having committed an enforced disappearance belong.²⁵⁸

To that end, the Committee has recommended that mechanisms be established and all the necessary measures taken to ensure that the guarantee that persons suspected of having committed an enforced disappearance are not in a position to influence the investigation is respected in all investigations,²⁵⁹ including by preventing and punishing acts of intimidation and/or ill-treatment of any of the persons referred to in Article 12 (1) of the Convention.²⁶⁰ Finally, the Committee has also recalled the importance of documenting cases of assault against participants in the investigations into enforced disappearances so as to devise prevention and protection policies and facilitate the effective investigation of such cases.²⁶¹ It has also recommended that all efforts are stepped up to prevent and punish any possible acts of intimidation against human rights defenders working to combat enforced disappearances and to assist victims, as well as to take appropriate measures, including awareness-raising campaigns, to prevent and punish actions that criminalize, intimidate or stigmatize disappeared persons, their families or the human rights defenders who support them.²⁶²

Along the same lines, in order to protect the independence and impartiality of the search, in its *Guiding Principles for the Search for Disappeared Persons* the Committee set forth that no person suspected of having been involved in an enforced disappearance should participate in, or be in a position to influence, the course of the search; and that if such suspicions fall on a person working for an institution responsible for, or cooperating with, the search, he or she should be relieved of his or her search duties immediately.²⁶³

²⁵⁸ Paraguay, 2014 (CED/C/PRY/CO/1, para. 16); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 28); Cuba, 2017 (CED/C/CUB/CO/1, para. 22).

²⁵⁹ Argentina, 2013 (CED/C/ARG/CO/1, para. 23).

²⁶⁰ Peru, 2019 (CED/C/PER/CO/1, para. 21).

²⁶¹ Mexico, 2015 (CED/C/MEX/CO/1, para. 29).

²⁶² Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 27).

²⁶³ *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 15.3.

18. NON-REFOULEMENT

During the *travaux préparatoires*, the issue of non-refoulement was addressed in the discussion on asylum and refuge as aspects of protection against impunity. The link was discussed between the obligations to abstain from granting asylum or refuge to a person suspected of having participated in an enforced disappearance and to refrain from returning that person to a state where he or she may be at risk of enforced disappearance. Also, whether the obligation of non-refoulement applies only to the risk of enforced disappearance or to serious human rights violations as well.²⁶⁴ Subsequently, non-refoulement was dealt with as a form of prevention of enforced disappearance in a specific article²⁶⁵ which corresponds to the current Article 16 of the Convention.

The Committee has recommended States Parties to ensure, in law and in practice, the strict respect, under all circumstances without exception,²⁶⁶ of the prohibition of refoulement,²⁶⁷ which entails not proceeding with an expulsion, return, surrender or extradition whenever there are reasonable grounds to believe that a person would be in danger of being subjected to enforced disappearance.²⁶⁸ In addition, the Committee has made specific recommendations to States Parties to ensure: i) that respect for the principle of non-refoulement is not subject to any conditions;²⁶⁹ ii) that there are clear and specific criteria and/or procedures in place for assessing and verifying the risk that a person may be subjected to enforced disappearance in the country of destination²⁷⁰ prior to expulsion, return or extradition, and that, if such risk exists, the person is not expelled, extradited or returned;²⁷¹ iii) strict compliance by the relevant authorities to extradition, expulsion, surrender and return procedures²⁷² and that a thorough, comprehensive and individual assessment or examination of each case is carried out impartially and independently to determine whether there are substantial grounds to believe that the person would be at risk of enforced disappearance before extraditing, expelling, surrendering or returning

²⁶⁴ E/CN.4/2003/71, para. 49.

²⁶⁵ E/CN.4/2004/59, para. 131, 133.

²⁶⁶ Italy, 2019 (CED/C/ITA/CO/1, para. 27); Tunisia, 2016 (CED/C/TUN/CO/1, para. 28); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 18); Senegal, 2017 (CED/C/SEN/CO/1, para. 32); Slovakia, 2019 (CED/C/SVK/CO/1, para. 15); Portugal, 2018 (CED/C/PRT/CO/1, para. 21).

²⁶⁷ France, 2013 (CED/C/FRA/CO/1, para. 27); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 30).

²⁶⁸ Spain, 2013 (CED/C/ESP/CO/1, para. 22); Germany, 2014 (CED/C/DEU/CO/1, para. 15); Iraq, 2015 (CED/C/IRQ/CO/1, para. 27); Montenegro, 2015 (CED/C/MNE/CO/1, para. 23); Tunisia, 2016 (CED/C/TUN/CO/1, para. 28); Peru, 2019 (CED/C/PER/CO/1, para. 23); Bolivia, 2019 (CED/C/BOL/CO/1, para. 25); Slovakia, 2019 (CED/C/SVK/CO/1, para. 15 (a)).

²⁶⁹ Slovakia, 2019 (CED/C/SVK/CO/1, para. 15 (c)).

²⁷⁰ Lithuania, 2017 (CED/C/LTU/CO/1, para. 20); Austria, 2018 (CED/C/AUT/CO/1, para. 21 (b)); Albania, 2018 (CED/C/ALB/CO/1, para. 29); Japan, 2018 (CED/C/JPN/CO/1, para. 30).

²⁷¹ Peru, 2019 (CED/C/PER/CO/1, para. 23); Bolivia, 2019 (CED/C/BOL/CO/1, para. 25).

²⁷² Spain, 2013 (CED/C/ESP/CO/1, para. 22); Armenia, 2015 (CED/C/ARM/CO/1, para. 17).



him or her;²⁷³ iv) that there is the possibility to appeal any order to expel, extradite, surrender or return a person²⁷⁴, with the power to suspend such an order,²⁷⁵ leading to a re-examination of the risk²⁷⁶ and, if the risk exists, ensuring that the person is not expelled, extradited or returned;²⁷⁷ and v) that diplomatic assurances are assessed with the utmost care and are not requested or accepted in any case where there are substantial grounds to believe that the person would be at risk of becoming a victim of enforced disappearance.²⁷⁸ In its opinion on the case of *E.L.A. v. France*, the Committee stated that “the risk of enforced disappearance must be examined by the domestic courts in a comprehensive manner,” which implies that they “must meticulously examine the essential issues before them, rather than merely giving formal answers to the arguments raised by the author or simply endorsing the conclusions of a lower court,” as occurred in the case of Mr. E.L.A., in which the judicial authority confirmed the decision to deny him asylum and ordered his expulsion to Sri Lanka without examining the merits of the case.²⁷⁹

With regard to the issue of asylum seekers and refugee status, the Committee has recommended ensuring that the rules on the application for refugee status are applied in a manner that is fully compatible with the prohibition of refoulement²⁸⁰ and expediting the introduction of a statutory regime on asylum.²⁸¹ Asylum seekers, including those without valid travel documents or visas, should have unimpeded access to effective refugee status determination procedures, in full compliance with Article 16 of the Convention.²⁸² On the principle of non-refoulement and migrants, the Committee has recommended, among other measures, that States Parties: i) refrain from carrying out collective expulsions of migrants, especially those arriving by sea, on ships; ii) ensure individual assessment of each migratory situation; and iii) take into account the special protection needs of each individual.²⁸³

273 Spain, 2013 (CED/C/ESP/CO/1, para. 22); Armenia, 2015 (CED/C/ARM/CO/1, para. 17); Iraq, 2015 (CED/C/IRQ/CO/1, para. 27); Gabon, 2017 (CED/C/GAB/CO/1, para. 31); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 18).

274 Netherlands, 2014 (CED/C/NLD/CO/1, para. 23).

275 Austria, 2018 (CED/C/AUT/CO/1, para. 21 (c)); Peru, 2019 (CED/C/PER/CO/1, para. 23); Slovakia, 2019 (CED/C/SVK/CO/1, para. 15).

276 Netherlands, 2014 (CED/C/NLD/CO/1, para. 23).

277 Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 18).

278 Germany, 2014 (CED/C/DEU/CO/1, para. 17); Armenia, 2015 (CED/C/ARM/CO/1, para. 17); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 18).

279 *E.L.A. v. France*, (CED/C/19/D/3/2019, para. 7.6).

280 Ecuador, 2017 (CED/C/ECU/CO/1, para. 16).

281 Tunisia, 2016 (CED/C/TUN/CO/1, para. 28).

282 Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 18).

283 Italy, 2019 (CED/C/ITA/CO/1, para. 27 (b), (c), (e)).

19. PROHIBITION OF SECRET DETENTION

From the beginning of the *travaux préparatoires*, states considered that the Convention they were drafting should include, as a way to prevent enforced disappearances, a prohibition of secret detention and that such a prohibition should be absolute.²⁸⁴ Accordingly, the Convention included a provision of this nature.

The Committee recalled in *Yrusta v. Argentina* that, pursuant to Article 17 of the Convention, “no one shall be held in secret detention.” In its views on this case, the Committee considered as secret detention the concealment of the whereabouts of Roberto Agustín Yrusta, - who was serving a custodial sentence in an official prison - for more than seven days, during which his sisters didn’t receive any information about him and were not even told that he had been transferred from one prison to another. With a view to avoiding secret detention, the Committee emphasized “the special obligation to safeguard rights, established in the Convention, of persons deprived of their liberty and to take effective measures to ensure, *inter alia*, that the deprivation of liberty will not at any time become secret detention or an enforced disappearance.”²⁸⁵ With the same purpose of preventing secret detention, the Committee, in its concluding observations, has also set forth that any person under administrative detention should be “immediately placed under judicial supervision”²⁸⁶ and “should have the right to communicate with the outside world.”²⁸⁷

In the context of dialogues with States Parties, when it has received reliable information that secret detention has been used, or when it is aware that domestic law does not include an explicit ban and effective safeguards against secret detention, the Committee has issued recommendations aimed at preventing enforced disappearances by ensuring²⁸⁸ “that no person is held in secret detention” and “that all persons deprived of their liberty are afforded,” in law and in practice, “from the outset of the deprivation of liberty, all the fundamental legal safeguards set out in Article 17 of the Convention.”²⁸⁹ For example, the Committee has requested that States Parties guarantee that all deprivations of liberty are carried out only by officials authorized by law to arrest and detain persons;²⁹⁰ that all persons deprived of liberty have access to a lawyer²⁹¹ and can communicate without delay with their relatives or any person

284 E/CN.4/2003/71, para. 67.

285 *Yrusta v. Argentina* (CED/C/10/D/1/2013, para. 10.5).

286 Argentina, 2013 (CED/C/ARG/CO/1, para. 25).

287 France, 2013 (CED/C/FRA/CO/1, para. 31).

288 Iraq, 2015 (CED/C/IRQ/CO/1, para. 29); Gabon, 2017 (CED/C/GAB/CO/1, para. 35).

289 Iraq, 2015 (CED/C/IRQ/CO/1, para. 29); Gabon, 2017 (CED/C/GAB/CO/1, para. 35).

290 Iraq, 2015 (CED/C/IRQ/CO/1, para. 29).

291 Gabon, 2017 (CED/C/GAB/CO/1, para. 35).

of their choosing, or with their consular authorities when the person is a foreigner.²⁹² To uphold the prohibition of secret detention, the Committee has requested that allegations of States Parties' involvement in secret detention programs be fully investigated, that those responsible be held accountable, and that the victims be recognized and provided with appropriate reparations.²⁹³



²⁹² Iraq, 2015 (CED/C/IRQ/CO/1, para. 29); Gabon, 2017 (CED/C/GAB/CO/1, para. 35).

²⁹³ Lithuania, 2017 (CED/C/LTU/CO/1, para. 22).

20. REGISTER OF PERSONS DEPRIVED OF LIBERTY

During the *travaux préparatoires* of the Convention, the need to register detainees was considered at early stages as a measure to prevent enforced disappearances. As part of this preventive approach, delegations discussed whether such registers should be made available to persons with a legitimate interest in obtaining such information; whether detainees should be released in a manner that ensured a genuine release; and whether the registration of detainees should serve to cross-check information at both federal and state levels.²⁹⁴ Proposals and debates led to the approval of a provision, now contained in Article 17 (3) of the Convention, according to which each State Party shall ensure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty that shall include, as a minimum, the information listed in the article mentioned above. This information shall be made promptly available upon request to any judicial or other competent authority or institution authorized for that purpose by domestic law or any relevant international legal instrument to which the state concerned is a party.²⁹⁵ As part of the same preventive approach, Article 21 of the Convention provides for ensuring that persons deprived of liberty are released in a manner that guarantees that they have actually been set free and that their physical integrity and the full exercise of their rights are also assured.

In the context of the reporting process, the Committee has consistently issued recommendations aimed at the State Party concerned to ensure that registers and individual records of persons deprived of their liberty are duly and properly completed, according to standard protocols, and accurately and promptly updated,²⁹⁶ at both federal and state levels;²⁹⁷ and that an effective system of checks is put into place for that purpose in accordance with the Convention, with the appropriate sanctions for the failure to do so.²⁹⁸ In certain cases, the Committee has also recommended that a computerized register of all detainees be set up as rapidly as possible, as a matter

²⁹⁴ E/CN.4/2003/71, para. 68, 71.

²⁹⁵ E/CN.4/2004/59, para. 126; E/CN.4/2006/57, page. 36.

²⁹⁶ Paraguay, 2014 (CED/C/PRY/CO/1, para. 22 (a)); Armenia, 2015 (CED/C/ARM/CO/1, para. 19 (a)); Montenegro, 2015 (CED/C/MNE/CO/1, para. 25).

²⁹⁷ Germany, 2014 (CED/C/DEU/CO/1, para. 19).

²⁹⁸ Argentina, 2013 (CED/C/ARG/CO/1, para. 27 (b), (c), (d)); Netherlands, 2014 (CED/C/NLD/CO/1, para. 27); Germany, 2014 (CED/C/DEU/CO/1, para. 19); Belgium, 2014 (CED/C/BEL/CO/1, para. 30); Paraguay, 2014 (CED/C/PRY/CO/1, para. 22 (a), (b), (c)); Mexico, 2015 (CED/C/MEX/CO/1, para. 35 (a), (b), (c)); Armenia, 2015 (CED/C/ARM/CO/1, para. 19 (a), (b), (c)); Iraq, 2015 (CED/C/IRQ/CO/1, para. 29 (d), (e)); Montenegro, 2015 (CED/C/MNE/CO/1, para. 25); Tunisia, 2016 (CED/C/TUN/CO/1, para. 30 (c), (d)); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 34); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 22 (a), (b)); Colombia, 2016 (CED/C/COL/CO/1, para. 32); Senegal, 2017 (CED/C/SEN/CO/1, para. 34 (a), (b)); Gabon, 2017 (CED/C/GAB/CO/1, para. 35 (c), (d)); Honduras, 2018 (CED/C/HND/CO/1, para. 33 (b), (c)); Japan, 2018 (CED/C/JPN/CO/1, para. 36 (a), (b), (d)); Peru, 2019 (CED/C/PER/CO/1, para. 25 (b)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 29 (a), (b)).

of urgency, and that it be fully in line with Article 17 (3) of the Convention;²⁹⁹ also, the prompt and immediate registration of the identity of all persons entering all migrant centers,³⁰⁰ establishing an up-to-date database of disappeared migrants, and ensuring that ante-mortem data are collected and entered into the forensic database of missing migrants.³⁰¹

With regard to transfers of detainees, in its concluding observations the Committee emphasized the need to ensure that all transfers are subject to judicial control and are carried out only with the knowledge of the detainee's counsel and relatives. Moreover, States Parties have to put in place the inspection and oversight mechanisms necessary to prevent unlawful transfers and to ensure that such practices are appropriately punished.³⁰² In its views in *Yrusta v. Argentina*, after noting that no agent of the State Party provided any information whatsoever to Roberto Augustín Yrusta or to his representatives or family members regarding his transfer from one prison to another, the Committee recalled the States Parties' obligation to ensure that the relevant information concerning a person's deprivation of liberty is available in detailed and accessible registers.³⁰³

299 Argentina, 2013 (CED/C/ARG/CO/1, para. 29 (b)).

300 Italy, 2019 (CED/C/ITA/CO/1, para. 29).

301 Honduras, 2018 (CED/C/HND/CO/1, para. 29 (c), (d)).

302 Argentina, 2013 (CED/C/ARG/CO/1, para. 27).

303 *Yrusta v. Argentina* (CED/C/10/D/1/2013, para. 10.5).

21. HABEAS CORPUS

During the *travaux préparatoires*, the importance was emphasized of judicial supervision of detention, *habeas corpus* and other guarantees against arbitrary detention.³⁰⁴ In response to the draft submitted for discussion, which stated that only the person deprived of liberty could take proceedings before a court, several proposals were discussed - for example, that the proceedings could be initiated by any person with a legitimate interest,³⁰⁵ that the identity of these persons should be specified, and that they could intervene only when the person deprived of liberty was unable to do so.³⁰⁶ It was also proposed that the right to take proceedings before a court be limited to cases in which there are grounds to presume that a person was subjected to enforced disappearance and that the term "presumption" be replaced by "suspicion" of enforced disappearance.³⁰⁷ After the discussion, agreement was reached on the inclusion of a provision, now Article 17 (2) (f), stating that *habeas corpus* shall be guaranteed to any person deprived of liberty and that, when there is suspicion of enforced disappearance, it be extended to persons with a legitimate interest, such as relatives of the person deprived of liberty or their representative or lawyer.³⁰⁸

In its concluding observations, the Committee has expressed its satisfaction when *habeas corpus* is recognized in States Parties' constitutions³⁰⁹ and has made specific recommendations aimed at supporting States Parties with the full implementation of the obligations stemming from Article 17 (2) of the Convention. In this respect, it encouraged a State Party to regulate the exercise of *habeas corpus* through legislative measures in conformity with the Convention, in order to prevent enforced disappearance through guarantees against secret detention.³¹⁰ Regarding the possibility under domestic law of suspending the right of *habeas corpus* when a state of emergency or siege is declared, the Committee stated that the right to apply for *habeas corpus* may not be suspended or restricted under any circumstances, and that the State Party must guarantee that any person with a legitimate interest may initiate the procedure.³¹¹ In response to information concerning obstacles and delays in the processing of *habeas corpus* applications when a case of enforced disappearance is alleged, the Committee recommended that the State Party adopt the necessary measures to ensure that all persons deprived of their liberty enjoy all the guarantees enshrined in the Convention, in particular those in Article 17 (2).³¹²

304 E/CN.4/2003/71, para. 73, 74.

305 E/CN.4/2005/66, para. 75, 78.

306 E/CN.4/2006/57, para. 132, 133.

307 E/CN.4/2005/66, para. 78; E/CN.4/2006/57, para. 133.

308 E/CN.4/2006/57, page 38, Article 17.2 (f).

309 Uruguay, 2013 (CED/C/URY/CO/1, para. 25); Spain, 2013 (CED/C/ESP/CO/1, para. 25).

310 Uruguay, 2013 (CED/C/URY/CO/1, para. 26).

311 Spain, 2013 (CED/C/ESP/CO/1, para. 26).

312 Honduras, 2018 (CED/C/HND/CO/1, para. 30, 31).

The Committee has also made recommendations on specific aspects of the right to *habeas corpus*, including: (i) establishing the right of detained persons to appeal to a judge to confirm “that coercive measures are lawful” and to be brought to justice;³¹³ (ii) ensuring that any person detained is subject to immediate judicial control in order to avoid enforced disappearances related to administrative detentions carried out arbitrarily, without a prior judicial order or subsequent judicial control;³¹⁴ (iii) incorporating into criminal legislation a specific remedy so that all persons with a legitimate interest, such as relatives of the person deprived of liberty, their representative or their attorney, may take proceedings before a court to determine without delay the legality of the detention and order the release of the person concerned if he or she is unlawfully deprived of liberty;³¹⁵ (iv) incorporating the right to challenge the legality of a detention among the rights that may not be restricted even in a state of war or emergency.³¹⁶

“The urgent action procedure enables relatives and any person with a legitimate interest to address the Committee so that it can request the State concerned to take immediate action to search for and locate their beloved who has been disappeared.”

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³¹³ France, 2013 (CED/C/FRA/CO/1, para. 31).

³¹⁴ Argentina, 2013 (CED/C/ARG/CO/1, para. 24, 25).

³¹⁵ Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 32).

³¹⁶ Montenegro, 2015 (CED/C/MNE/CO/1, para. 25).

22. ACCESS TO INFORMATION

During the *travaux préparatoires*, it was considered that certain information contained in registers of detainees should be made available to persons with a legitimate interest in obtaining it.³¹⁷ It was also considered that any person with a legitimate interest has the right of access to information concerning the disappeared person, and that relatives, representatives or counsel of persons deprived of liberty and of those suspected of having been subjected to an enforced disappearance have the right of access to information. Accordingly, Article 18 of the Convention enshrines that right.

Taking the aforementioned into account, in its concluding observations the Committee recommends that States Parties establish mechanisms to guarantee that any person with a legitimate interest has a prompt, easy and real possibility of access, anywhere in the territory³¹⁸ and including during the police custody period,³¹⁹ to at least the information listed in Article 18 (1) of the Convention concerning the person deprived of liberty or presumed disappeared.³²⁰ States Parties should guarantee that those persons have access to prompt and effective judicial remedies to obtain that information without delay, as established in Article 20 (2) of the Convention, and the possibility of appealing against a refusal to disclose such information.³²¹ In line with Article 22 of the Convention, States Parties should also make explicit provisions in their criminal legislation, for instance, for sanctions to be imposed for the deliberate failure to record a deprivation of liberty or the relevant information about it, as well as for the deliberate refusal to provide such information.³²² With regard to the right to access the information included in registers of persons deprived of liberty, in its views in *Yrusta v. Argentina*, the Committee, after concluding that the prison authorities failed to respond to Mr. Yrusta’s family members’ requests for information about what happened during a period of over seven days in which Mr. Yrusta’s whereabouts remained unknown in the context of a transfer from one prison to another, the Committee, pursuant to Article 18 of the Convention, held that States Parties shall guarantee to any person with a legitimate interest, such as relatives of the person deprived of liberty, their representative or their counsel, access to at least the information listed in Article 18 (1) of the Convention.³²³ This

³¹⁷ E/CN.4/2003/71, para. 68.

³¹⁸ Iraq, 2015 (CED/C/IRQ/CO/1, para. 29 (f)).

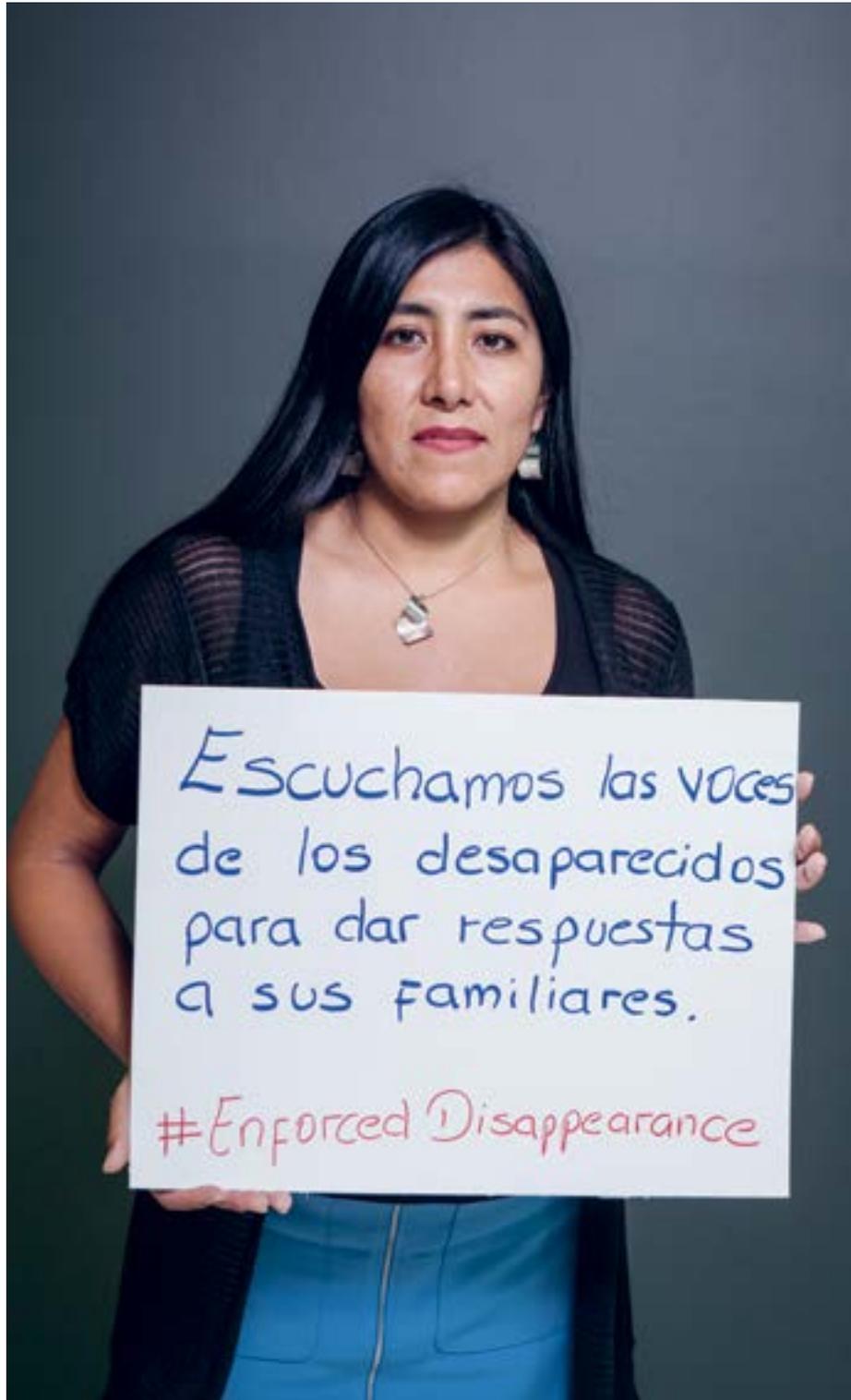
³¹⁹ Tunisia, 2016 (CED/C/TUN/CO/1, para. 30 (b)); Senegal, 2017 (CED/C/SEN/CO/1, para. 34 (d)); Gabon, 2017 (CED/C/GAB/CO/1, para. 35 (b)).

³²⁰ Netherlands, 2014 (CED/C/NLD/CO/1, para. 29); France, 2013 (CED/C/FRA/CO/1, para. 33); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 34); Senegal, 2017 (CED/C/SEN/CO/1, para. 34 (d)); Gabon, 2017 (CED/C/GAB/CO/1, para. 35 (b)); Honduras, 2018 (CED/C/HND/CO/1, para. 33 (a)); Japan, 2018 (CED/C/JPN/CO/1, para. 36 (c)); Slovakia, 2019 (CED/C/SVK/CO/1, para. 21).

³²¹ Netherlands, 2014 (CED/C/NLD/CO/1, para. 29); France, 2013 (CED/C/FRA/CO/1, para. 33); Senegal, 2017 (CED/C/SEN/CO/1, para. 34 (d)).

³²² Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 34).

³²³ *Yrusta v. Argentina* (CED/C/10/D/1/2013, para. 10.5).



information refers, *inter alia*, to the “whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer.”³²⁴ Furthermore, the Committee held that “[a]lthough the right of family members to obtain information about a person’s arrest and place of detention may be restricted, such restriction is subject to very strict conditions as set out in Article 20 (1) of the Convention”³²⁵ and can only take place when the detained person is under the protection of the law and the deprivation of liberty is subject to judicial control.

Regarding the search, according to the *Guiding Principles for the Search for Disappeared Persons*, victims, their legal representatives, counsel or any person authorized by them, and any person, association or organization with a legitimate interest, should have access to information on the actions taken and on the progress and results of the search and the investigation.³²⁶ Ensuring access to information includes the obligation to provide adequate guidance to victims concerning their rights and the mechanisms for the protection of those rights. It also includes the duty to provide regular and occasional information on the measures adopted to find the disappeared persons and investigate their disappearance, and on any obstacles that may impede the progress of the search. Victims should be informed and consulted before the authorities pass their information on to the media.³²⁷

324 Article 18 (1) (d) of the Convention.

325 *Yrusta v. Argentina* (CED/C/10/D/1/2013, para. 10.6).

326 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 5.1; Mexico, 2015 (CED/C/MEX/CO/1, para. 24).

327 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 5.2.

23. MUTUAL COOPERATION

From the beginning of the *travaux préparatoires*, the drafters of the Convention considered it essential to include mechanisms of international cooperation, such as extradition and judicial cooperation.³²⁸ Some delegates said that the 1998 draft,³²⁹ which limited judicial cooperation to criminal matters, should be complemented, especially with civil matters important in cases of disappeared children.³³⁰ Therefore, “international cooperation mechanisms to locate and return such children”³³¹ should be included. Among other proposals, one recommended that in the absence of a bilateral judicial cooperation treaty, the future Convention serve as the legal basis for cooperation.³³² The last text submitted for discussion on this topic³³³ corresponds to the current Article 15 of the Convention, which stipulates that States Parties shall cooperate and provide each other with all possible support, both to assist victims of enforced disappearance and to search for, locate, and release the disappeared person, and to exhume, identify and return the remains in the event of death. A provision related to mutual cooperation among States Parties to search for, identify, and locate children subjected to wrongful removal was included in Article 25 (3) of the Convention.

The Committee has welcomed that in the legislation there were no particular restrictions related to international judicial cooperation in cases of enforced disappearance in the domestic law of a State Party.³³⁴ With a view to expediting the identification process, the Committee, while welcoming a State Party for having taken measures to promote regional cooperation in the search for disappeared and missing persons, has recommended promoting cooperation with other specific states.³³⁵ In addition, it has recommended providing³³⁶ judicial assistance requested by the authorities of other States Parties for the purpose of identifying disappeared and missing persons³³⁷ and investigating enforced disappearances,³³⁸ including furnishing the ev-

328 E/CN.4/2003/71, para. 61 – 65.

329 The “1998 draft” is the draft international convention on the protection of all persons from enforced disappearance transmitted by the Sub-Commission on the Promotion and Protection of Human Rights in its resolution 1998/25 of 26 August 1998. E/CN.4/2003/71, para. 1.

330 E/CN.4/2003/71, para. 64.

331 E/CN.4/2003/71, para. 89.

332 E/CN.4/2003/71, para. 64.

333 E/CN.4/2005/66, para 70.

334 Spain, 2013 (CED/C/ESP/CO/1, para. 19).

335 Montenegro, 2015 (CED/C/MNE/CO/1, para. 12, 13).

336 Japan, 2018 (CED/C/JPN/CO/1, para. 28). In a similar sense: Spain, 2013 (CED/C/ESP/CO/1, para. 20).

337 Montenegro, 2015 (CED/C/MNE/CO/1, para. 15); Italy, 2019 (CED/C/ITA/CO/1, para. 25).

338 Spain, 2013 (CED/C/ESP/CO/1, para. 20); Montenegro, 2015 (CED/C/MNE/CO/1, para. 15); Japan, 2018 (CED/C/JPN/CO/1, para. 28); Italy, 2019 (CED/C/ITA/CO/1, para. 25).

idence in their possession.³³⁹ While pointing out that enforced disappearance is not enshrined as a crime, or that international assistance is subject to reciprocity, or that there is a “dual criminality” requirement,³⁴⁰ the Committee recommended that these situations should not be an obstacle to providing maximum assistance to foreign authorities, upon request, in assisting victims of enforced disappearance in their search, location, and release, and, if the person is deceased, in the exhumation, identification, and restitution of their remains.³⁴¹ Taking into account the vulnerability of victims of human trafficking and the risk of their being placed outside the protection of the law and subjected to enforced disappearance, the Committee has recommended amending the legal framework to ensure that all forms of human trafficking are criminalized, and strengthening efforts to prevent both trafficking and disappearance, in cooperation with the countries of origin and destination and with the participation of the victims.³⁴²

With respect to disappeared migrants, the Committee has expressed the need for mutual cooperation between countries of origin and destination, with the participation of victims and civil society, in order to: i) prevent and investigate the disappearance of migrants, criminally prosecute those responsible, and adequately protect complainants, experts, witnesses and defenders;³⁴³ ii) guarantee the immediate search for disappeared migrants and, if their remains are found, their identification and restitution with dignity; iii) establish an updated database of disappeared migrants; iv) collect *ante mortem* information and include it in the forensic databank of disappeared migrants;³⁴⁴ v) ensure that the families and loved ones of disappeared migrants, regardless of their place of residence, can effectively obtain information and participate in the investigation and search, which includes the prompt granting of humanitarian visas with the optimum validity period to guarantee their purpose.³⁴⁵

339 Spain, 2013 (CED/C/ESP/CO/1, para. 20); Italy, 2019 (CED/C/ITA/CO/1, para. 25).

340 Japan, 2018 (CED/C/JPN/CO/1, para. 27); Montenegro, 2015 (CED/C/MNE/CO/1, para. 14); Italy, 2019 (CED/C/ITA/CO/1, para. 24).

341 Japan, 2018 (CED/C/JPN/CO/1, para. 28); Montenegro, 2015 (CED/C/MNE/CO/1, para. 15); Italy, 2019 (CED/C/ITA/CO/1, para. 25); Spain, 2013 (CED/C/ESP/CO/1, para. 20).

342 Gabon, 2017 (CED/C/GAB/CO/1, para. 19, 20).

343 Mexico, 2015 (CED/C/MEX/CO/1, para. 24); Honduras, 2018 (CED/C/HND/CO/1, para. 29).

344 Honduras, 2018 (CED/C/HND/CO/1, para. 29).

345 Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 23 (f)).

24. TRAINING ON THE CONVENTION

During the *travaux préparatoires*, training on the provisions of the Convention was conceived as a way to prevent enforced disappearances. In the discussions, several participants pointed out the need to include police, prison staff, judges, prosecutors and lawyers in the list of persons to be trained, as well as the objectives of the training and the need to inform agents about the unlawfulness of orders demanding an enforced disappearance and the duty to disobey such orders.³⁴⁶ This list was expanded taking into account the Convention Against Torture, which mentions “law enforcement personnel”, and is reflected in Article 23 of the Convention.³⁴⁷ This article also included the objectives of the training, the need to ensure instruction on the relevant provisions of the Convention, and the duty to report to superiors the commission of an enforced disappearance.³⁴⁸

In order to contribute to strengthen the capacity of States Parties to prevent enforced disappearances through training their agents, the Committee made numerous recommendations to ensure that all military or civilian law enforcement personnel, medical personnel, officials and others who may be involved in the custody or treatment of persons deprived of liberty, including judges, prosecutors and other officials responsible for the administration of justice, receive adequate and regular training on the provisions of the Convention, according to its Article 23.³⁴⁹

It has also made specific recommendations on targeted training and capacity building for the following personnel: i) judges and prosecutors in order to ensure that phrases regarding the offence of enforced disappearance, such as “placing them outside the protection of the law,”³⁵⁰ “thereby impeding access to remedies and procedural safeguards,”³⁵¹ or “thereby makes for them impossible to exercise legal pro-

346 E/CN.4/2003/71, para. 80.

347 E/CN.4/2003/71, para. 81; E/CN.4/2004/59, para. 130; E/CN.4/2006/57, para. 139 and page. 41.

348 E/CN.4/2005/66, para. 102.

349 Uruguay, 2013 (CED/C/URY/CO/1, para. 30); Argentina, 2013 (CED/C/ARG/CO/1, para. 33); Netherlands, 2014 (CED/C/NLD/CO/1, para. 32); Germany, 2014 (CED/C/DEU/CO/1, para. 23); Belgium, 2014 (CED/C/BEL/CO/1, para. 26); Paraguay, 2014 (CED/C/PRY/CO/1, para. 24); Armenia, 2015 (CED/C/ARM/CO/1, para. 23); Serbia, 2015 (CED/C/SRB/CO/1, para. 22); Montenegro, 2015 (CED/C/MNE/CO/1, para. 27); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 36); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 26); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 34); Senegal, 2017 (CED/C/SEN/CO/1, para. 36); Ecuador, 2017 (CED/C/ECU/CO/1, para. 20); Lithuania, 2017 (CED/C/LTU/CO/1, para. 26); Honduras, 2018 (CED/C/HND/CO/1, para. 35); Honduras, 2018 (CED/C/HND/CO/1, para. 23); Albania, 2018 (CED/C/ALB/CO/1, para. 31); Japan, 2018 (CED/C/JPN/CO/1, para. 38); Portugal, 2018 (CED/C/PRT/CO/1, para. 23); Italy, 2019 (CED/C/ITA/CO/1, para. 31); Chile, 2019 (CED/C/CHL/CO/1, para. 21); Peru, 2019 (CED/C/PER/CO/1, para. 27); Bolivia, 2019 (CED/C/BOL/CO/1, para. 31); Slovakia, 2019 (CED/C/SVK/CO/1, para. 23).

350 Paraguay, 2014 (CED/C/PRY/CO/1, para. 14).

351 Bolivia, 2019 (CED/C/BOL/CO/1, para. 13 (a)).

tection,”³⁵² are considered a consequence of the perpetration of the crime of enforced disappearance and not an element of intentionality, necessary for incrimination; ii) judges, so that the concept of injured party conforms in its application to the definition of victim in Article 24 (1) of the Convention;³⁵³ iii) the staff of the unit specialized in investigating enforced disappearances that the Committee recommended setting up in the Office of the Attorney General;³⁵⁴ iv) all relevant authorities on the mechanisms contained in the regulations in force regarding the search for disappeared persons, respect for and return of their remains and, in particular, on the proper implementation of the National Plan for the Search for Disappeared Persons and the Urgent Search Mechanism;³⁵⁵ v) the relevant authorities on the procedure for the declaration of absence by reason of enforced disappearance;³⁵⁶ vi) the authorities charged with investigating cases of enforced disappearance on how to initiate and conduct this type of investigations;³⁵⁷ vii) the personnel requiring specific training in order to work for the National Search Commission, the Special Prosecutor’s Office for the Investigation of Crimes of Enforced Disappearance, the local specialized prosecutors’ offices and the Mechanism for the Protection of Human Rights Defenders and Journalists³⁵⁸ in all territorial, federal, national and local contexts.³⁵⁹

352 Slovakia, 2019 (CED/C/SVK/CO/1, para. 23).

353 Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 28).

354 Mexico, 2015 (CED/C/MEX/CO/1, para. 29).

355 Colombia, 2016 (CED/C/COL/CO/1, para. 26 (d)).

356 Colombia, 2016 (CED/C/COL/CO/1, para. 38).

357 Japan, 2018 (CED/C/JPN/CO/1, para. 24).

358 Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 19 (b), 25 (j) and 27 (b)).

359 Germany, 2014 (CED/C/DEU/CO/1, para. 23); Mexico, 2015 (CED/C/MEX/CO/1, para. 37, 38).

25. THE RIGHT TO THE TRUTH

Article 24 of the Convention establishes the right of each victim to know the truth regarding: i) the circumstances of the enforced disappearance, ii) the progress and results of the investigation, and iii) the fate of the disappeared person. Although at the time of the *travaux préparatoires* the right to the truth was already recognized in international humanitarian law as well as in international judicial practice related to human rights,³⁶⁰ the inclusion of this right in an international human rights treaty is highly innovative and represents one of the main features of the Convention.

During its first ten years of work, the Committee has regularly recommended that States Parties incorporate the right to the truth in their legal systems by including an “explicit provision for the right of victims to know the truth regarding the circumstances of an enforced disappearance and the fate of the disappeared person”.³⁶¹ The Committee has also recommended that States include in their legal systems a definition of victim of enforced disappearance in line with Article 24 (2) of the Convention, so as to ensure that all persons who have suffered harm as a direct result of an enforced disappearance can fully and effectively exercise the right to the truth, among other rights enshrined in the Convention.³⁶² States Parties, therefore, should ensure that all victims of enforced disappearance are able to enjoy this right fully and effectively,³⁶³ without needing to be represented by a lawyer³⁶⁴ and without time limits related to when the enforced disappearance was committed.³⁶⁵

To guarantee the right to the truth, among other rights, the Committee has recommended such measures as: ensuring prompt, thorough, and impartial investigations; making certain that law enforcement or security forces, whether civilian or military, whose members are suspected of having committed an enforced disappearance, do not take part in investigations and are not in a position to influence their progress; developing strategies for the full investigation of cases of disappearance in order to avoid the fragmentation of investigations, and ascertaining that the context is analyzed, patterns are identified, and all possible hypotheses and lines of investigation are generated and followed, including the possible involvement of state agents; and investigating possible chains of command, indirect perpetrators, and other forms of perpetration and participation, including all those referred to in Arti-

360 E/CN.4/2004/59, para. 170 (b); E/CN.4/2005/66, para. 14.

361 Armenia, 2015 (CED/C/ARM/CO/1, para. 27 (b)); France, 2013 (CED/C/FRA/CO/1, para. 35).

362 Serbia, 2015 (CED/C/SRB/CO/1, para. 24); Montenegro, 2015 (CED/C/MNE/CO/1, para. 29); Albania, 2018 (CED/C/ALB/CO/1, para. 33); Japan, 2018 (CED/C/JPN/CO/1, para. 40 (a)); Italia, 2019 (CED/C/ITA/CO/1, para. 33); Chile, 2019 (CED/C/CHL/CO/1, para. 23); Bolivia, 2019 (CED/C/BOL/CO/1, para. 33).

363 France, 2013 (CED/C/FRA/CO/1, para. 35); Serbia, 2015 (CED/C/SRB/CO/1, para. 24); Albania, 2018 (CED/C/ALB/CO/1, para. 33); Japan, 2018 (CED/C/JPN/CO/1, para. 40 (c)); Italy, 2019 (CED/C/ITA/CO/1, para. 33); Chile, 2019 (CED/C/CHL/CO/1, para. 23).

364 France, 2013 (CED/C/FRA/CO/1, para. 35).

365 Argentina, 2013 (CED/C/ARG/CO/1, para. 35); Mexico, 2015 (CED/C/MEX/CO/1, para. 32 (c)); Honduras, 2018 (CED/C/HND/CO/1, para. 37 (c)).

cle 6 of the Convention.³⁶⁶ In certain cases, the Committee has recommended setting up commissions of independent experts charged with establishing the truth about past human rights violations, in particular regarding enforced disappearances;³⁶⁷ ensuring that truth commissions have sufficient personnel as well as financial and technical resources to carry out their work promptly and effectively;³⁶⁸ and taking the necessary measures to guarantee that all public entities cooperate with these organs and provide them all the assistance within their power.³⁶⁹ In other cases, the Committee has recommended that, as a means to establish the truth, State Parties determine the fate and whereabouts of all persons who have been reported missing and, in the event of death, identify their remains and appoint forensic experts to ensure that exhumations and identifications take place as swiftly as possible upon locating mortal remains.³⁷⁰

366 Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 25 (b), (d), (g), (h)).

367 Spain, 2013 (CED/C/ESP/CO/1, para. 33).

368 Tunisia, 2016 (CED/C/TUN/CO/1, para. 24 (a)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 35 (a)).

369 Tunisia, 2016 (CED/C/TUN/CO/1, para. 24 (b)).

370 Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 18); Montenegro, 2015 (CED/C/MNE/CO/1, para. 13).

26. DEFINITION OF VICTIM

During the *travaux préparatoires*, some delegations referred to direct and indirect victims, while some others considered that the Convention should distinguish between two types of victims: Those against whom the crime of enforced disappearance had been committed and those whose interests had suffered owing to the commission of the crime, including members of the victim's family.³⁷¹ There were debates about whether the latter should enjoy independent rights.³⁷² The scope of the definition of "victim" and its consequences with regard to reparations had evolved, so the delegations agreed to recognize in the Convention that the notion of victim should not be restricted to the disappeared persons alone and should also recognize others who might be adversely affected by the disappearance,³⁷³ such as their relatives. That is how a broad definition of victim was approved and established in Article 24 (1) of the Convention, which includes the disappeared person and any others who have suffered harm as the direct result of an enforced disappearance.

During its first ten years of work, the Committee has consistently upheld the definition of victim contained in the Convention. Therefore, when it has observed that i) domestic legislation did not provide for a definition of victim;³⁷⁴ ii) the definition was not fully in line with that in the Convention;³⁷⁵ iii) the definition was restrictive³⁷⁶ or iv) narrower than that in the Convention;³⁷⁷ v) it excluded persons such as the spouses or partners of lesbian, gay, bisexual, transgender and intersex persons or members of subversive organizations and their families;³⁷⁸ or vi) it included as victims only the disappeared persons and their widows or widowers,³⁷⁹ the Committee has recommended that States Parties take adequate legislative measures —whether in criminal codes³⁸⁰ or in other applicable legislation³⁸¹— to adopt a definition that effectively incorporates the full scope of the definition of victim³⁸² and is consistent with the one contained in Article 24 (1) of the Convention, recognizing as victim

371 E/CN.4/2003/71, para. 28; E/CN.4/2004/59, para. 134.

372 E/CN.4/2003/71, para. 28.

373 E/CN.4/2003/71, para. 83.

374 Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 27); Albania, 2018 (CED/C/ALB/CO/1, para. 32).

375 Armenia, 2015 (CED/C/ARM/CO/1, para. 24).

376 France, 2013 (CED/C/FRA/CO/1, para. 34).

377 Serbia, 2015 (CED/C/SRB/CO/1, para. 24); Montenegro, 2015 (CED/C/MNE/CO/1, para. 29); Lithuania, 2017 (CED/C/LTU/CO/1, para. 27); Honduras, 2018 (CED/C/HND/CO/1, para. 36); Japan, 2018 (CED/C/JPN/CO/1, para. 39).

378 Peru, 2019 (CED/C/PER/CO/1, para. 28).

379 Bolivia, 2019 (CED/C/BOL/CO/1, para. 32).

380 Uruguay, 2013 (CED/C/URY/CO/1, para. 22); Armenia, 2015 (CED/C/ARM/CO/1, para. 24, 25); Lithuania, 2017 (CED/C/LTU/CO/1, para. 28).

381 Serbia, 2015 (CED/C/SRB/CO/1, para. 24); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 36); Montenegro, 2015 (CED/C/MNE/CO/1, para. 29).

382 Italy, 2019 (CED/C/ITA/CO/1, para. 33).

any person who has suffered harm as the direct result of enforced disappearance,³⁸³ with no requirement that such harm should also be personal.³⁸⁴ In this sense, the Committee has stated that any natural person, without exception,³⁸⁵ who has suffered harm as the direct result of an enforced disappearance can exercise the rights set forth in the Convention, in particular the rights to truth and reparation,³⁸⁶ and is entitled to all the reparatory and compensatory measures provided for under the law, even if no criminal proceedings have been initiated.³⁸⁷

383 France, 2013 (CED/C/FRA/CO/1, para. 35); Armenia, 2015 (CED/C/ARM/CO/1, para. 25); Serbia, 2015 (CED/C/SRB/CO/1, para. 24); Montenegro, 2015 (CED/C/MNE/CO/1, para. 29); Tunisia, 2016 (CED/C/TUN/CO/1, para. 32 (a)); Spain, 2013 (CED/C/ESP/CO/1, para. 30); Senegal, 2017 (CED/C/SEN/CO/1, 38 (a)); Albania, 2018 (CED/C/ALB/CO/1, para. 33); Japan, 2018 (CED/C/JPN/CO/1, para. 40 (a)); Chile, 2019 (CED/C/CHL/CO/1, para. 33); Peru, 2019 (CED/C/PER/CO/1, para. 29 (a)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 33).

384 France, 2013 (CED/C/FRA/CO/1, para. 35).

385 Peru, 2019 (CED/C/PER/CO/1, para. 29 (a)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 33).

386 Serbia, 2015 (CED/C/SRB/CO/1, para. 24); Montenegro, 2015 (CED/C/MNE/CO/1, para. 29); Tunisia, 2016 (CED/C/TUN/CO/1, para. 32 (a)).

387 Spain, 2013 (CED/C/ESP/CO/1, para. 30); Japan, 2018 (CED/C/JPN/CO/1, para. 40).

27. PARTICIPATION OF VICTIMS IN PROCEDURES

During the *travaux préparatoires*, a proposal was discussed according to which the “right of victims to participate in all stages of proceedings should be guaranteed.”³⁸⁸ Finally, Article 12 (1) of the Convention established that relatives of the disappeared person have the right to participate in the investigation. Concerning the exercise of other rights, the Convention refers to any person with a legitimate interest.³⁸⁹

Regarding the participation of victims in investigations, the Committee has recommended in its concluding observations that States Parties encourage and facilitate i) the participation of all persons with a legitimate interest, such as family members, close friends, and legal representatives of disappeared persons in the investigations and at all stages of proceedings,³⁹⁰ within the framework of due process, as well as ensure that they are regularly informed about the progress and results of investigations,³⁹¹ and ii) the involvement of the relatives of the disappeared person in the investigations, without this conferring upon them any responsibility to provide evidence³⁹² and without imposing such participation a procedural burden of any kind.³⁹³ The Committee has also encouraged States Parties to: i) expand their efforts to allow the relatives of disappeared persons to submit complaints,³⁹⁴ and ii) ensure that criminal codes allow victims of enforced disappearance to participate actively and without restrictions in the relevant judicial proceedings³⁹⁵ as well as during the administrative reparation plans, which should result from consultation with and the participation of victims.³⁹⁶

With respect to participation in the search, according to the *Guiding Principles for the Search for Disappeared Persons*, the victims, their legal representatives, counsel or any person authorized by them, as well as any person, association or organization with a legitimate interest, have the right to take part in the search. That right should be protected and guaranteed at all stages of the search process, without prejudice to the measures taken to preserve the integrity and effectiveness of the criminal

388 E/CN.4/2003/71, para. 88; E/CN.4/2006/57, page 34. Article 12 (1) of the Convention.

389 Articles 17.2 (f), 18 (1) and 30 (1) of the Convention.

390 Honduras, 2018 (CED/C/HND/CO/1, para. 25 (c)).

391 Colombia, 2016 (CED/C/COL/CO/1, para. 20 (c)); Honduras, 2018 (CED/C/HND/CO/1, para. 25 (c)).

392 Mexico, 2015 (CED/C/MEX/CO/1, para. 28 (a)).

393 Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 25 (c)).

394 Colombia, 2016 (CED/C/COL/CO/1, para. 20 (c)).

395 Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 28); Senegal, 2017 (CED/C/SEN/CO/1, para. 28 (b)); Gabon, 2017 (CED/C/GAB/CO/1, para. 27 (a)).

396 Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 28 (b)).



investigation or the search itself.³⁹⁷ In addition, all information provided by the victims or complainants must be considered in the search process, and the experience of victims and their organizations that have carried out search activities taken into account.³⁹⁸ In its concluding observations, the Committee has requested States Parties to ensure that victims are actively involved in this process if they so request or wish.³⁹⁹ Regarding the registers of persons subjected to disappearance, the Committee has recommended that States Parties register the cases of disappeared and missing persons with the involvement of family members and civil society organizations.⁴⁰⁰ In addition, the Committee has pointed out the importance of incorporating the input from victims and civil society in the prevention of, and investigation into, the disappearance of migrants.⁴⁰¹ The Committee has also recommended that States Parties ensure the effective participation, from their countries of residence, in search processes by family members and persons close to those subjected to disappearance on migration routes, considering that their knowledge and that of organizations with experience in supporting migrants should be included in the design of strategies and measures for the search for disappeared migrants.⁴⁰² In addition, the *Guiding Principles* establish that any public search policy adopted by a State Party should be designed and implemented with the participation of victims and of all persons and civil society organizations with experience and willingness to cooperate in the design and/or implementation of the policy.⁴⁰³

397 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 5.1.

398 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 8.5.

399 Colombia, 2016 (CED/C/COL/CO/1, para. 26 (e)); Chile, 2019 (CED/C/CHL/CO/1, para. 27 (c)); Peru, 2019 (CED/C/PER/CO/1, para. 33 (b)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 39 (b)); Iraq (follow up) (CED/C/IRQ/OAI/1, para. 23 (b)).

400 Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 17).

401 Mexico, 2015 (CED/C/MEX/CO/1, para. 24); Honduras, 2018 (CED/C/HND/CO/1, para. 29); Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 23 (f)).

402 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 9.4; Honduras, 2018 (CED/C/HND/CO/1, para. 29).

403 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 3.5.

28. REPARATIONS

During the *travaux préparatoires*, the drafters of the Convention agreed that a broad definition of victim was required in the understanding that the right to reparation is directly related to the definition of victim.⁴⁰⁴ Thus, they held that the Convention needed to establish a basic minimum concerning the right to reparation in order to make it easier for that right to be recognized by all legal systems and, at the same time, to serve as a guide for national authorities.⁴⁰⁵ As a consequence of those debates, the right to obtain reparation, enshrined in Article 24 of the Convention, incorporated the concepts of compensation, restitution, rehabilitation, satisfaction (including the restoration of dignity and reputation), and the guarantee of non-repetition, already contained in previously adopted documents of the United Nations.⁴⁰⁶ This provision also stipulated that compensation should be prompt, fair and adequate.⁴⁰⁷

The Committee has consistently called on States Parties to revise or adopt the legislative or other measures necessary to explicitly recognize the right of persons who have suffered harm as a direct result of an enforced disappearance, regardless of their nationality⁴⁰⁸ and without discrimination—for example, persons who were not recognized as victims by truth commissions—, to obtain prompt, fair and adequate compensation, which covers both material and moral damage,⁴¹⁰ and to obtain other forms of reparation mentioned in the Convention, including social benefits and other measures of social support,⁴¹¹ medical and psychological rehabilitation,⁴¹² restitution, satisfaction, including restoration of dignity and reputation,⁴¹³ as well as guarantees of non-repetition,⁴¹⁴ in accordance with Article 24 (5) of the Convention⁴¹⁵ and other relevant international standards.⁴¹⁶ Reparations should be

404 E/CN.4/2003/71, para. 84, 88.

405 E/CN.4/2004/59, para. 135, 136. E/CN.4/2005/66, para. 103.

406 The report of the Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms and General Assembly resolution 56/83 of 12 December 2001 on responsibility of States for internationally wrongful acts.

407 E/CN.4/2003/71, para. 86; E/CN.4/2004/59, para. 138.

408 Slovakia, 2019 (CED/C/SVK/CO/1, para. 25); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 38).

409 Chile, 2018 (CED/C/CHL/CO/1, para. 25).

410 Lithuania, 2017 (CED/C/LTU/CO/1, para. 30).

411 Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 38).

412 Paraguay, 2014 (CED/C/PRY/CO/1, para. 26 (b)); Montenegro, 2015 (CED/C/MNE/CO/1, para. 31).

413 Montenegro, 2015 (CED/C/MNE/CO/1, para. 31).

414 Chile, 2019 (CED/C/CHL/CO/1, para. 25).

415 France, 2013 (CED/C/FRA/CO/1, para. 35); Spain, 2013 (CED/C/ESP/CO/1, para. 30); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 28); Netherlands, 2014 (CED/C/NLD/CO/1, para. 33); Iraq, 2015 (CED/C/IRQ/CO/1, para. 32); Lithuania, 2017 (CED/C/LTU/CO/1, para. 30); Honduras, 2018 (CED/C/HND/CO/1, para. 37 (b)); Albania, 2018 (CED/C/ALB/CO/1, para. 35); Portugal, 2018 (CED/C/PRT/CO/1, para. 25).

416 Tunisia, 2016 (CED/C/TUN/CO/1, para. 32 (b)); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 28); Cuba, 2017 (CED/C/CUB/CO/1, para. 32); Senegal, 2017 (CED/C/SEN/CO/1, para. 38 (b)); Slovakia, 2019 (CED/C/SVK/CO/1, para. 25).

provided to all persons, without exception,⁴¹⁷ who have suffered harm as a result of an enforced disappearance, including relatives of disappeared persons,⁴¹⁸ occurring anywhere in the territory,⁴¹⁹ regardless of the circumstances or when it was perpetrated.⁴²⁰ Furthermore, the Committee has recommended that States Parties adopt comprehensive systems of reparation and compensation⁴²¹ sensitive to the victims' individual characteristics, taking into account, for example, their sex, sexual orientation, gender identity, age, ethnic origin, social status and disability.⁴²² The system should be provided with adequate financial and technical resources and qualified staff.⁴²³

States Parties should ensure that comprehensive administrative reparation plans are the product of consultation with and participation by the victims, their representatives and human rights organizations, and are designed and implemented expeditiously in the light of the time that has passed and the advanced age of the relatives.⁴²⁴ In addition, all victims of enforced disappearance should have access to full reparation and social allowances or other forms of compensation⁴²⁵ without having to prove the death of the disappeared person,⁴²⁶ and even if no criminal proceedings have been brought against the possible perpetrators or if these have not been identified.⁴²⁷ All obstacles and restrictions hindering victims' registration in the reparation programs should be eliminated.⁴²⁸ In addition, the Committee has recommended that States Parties gather statistics on reparations granted to victims of enforced disappearance as a tool for improving reparation measures.⁴²⁹

417 Peru, 2019 (CED/C/PER/CO/1, para. 29 (a)).

418 Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 38).

419 Honduras, 2018 (CED/C/HND/CO/1, para. 33).

420 Argentina, 2013 (CED/C/ARG/CO/1, para. 35); Paraguay, 2014 (CED/C/PRY/CO/1, para. 26).

421 Tunisia, 2016 (CED/C/TUN/CO/1, para. 32 (b)); Iraq, 2015 (CED/C/IRQ/CO/1, para. 32); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 28); Lithuania, 2017 (CED/C/LTU/CO/1, para. 30).

422 Colombia, 2016 (CED/C/COL/CO/1, para. 36 (a)); Cuba, 2017 (CED/C/CUB/CO/1, para. 32); Honduras, 2018 (CED/C/HND/CO/1, para. 37 (b)); Japan, 2018 (CED/C/JPN/CO/1, para. 40 (b)); Peru, 2019 (CED/C/PER/CO/1, para. 29 (c)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 35 (d)); Slovakia, 2019 (CED/C/SVK/CO/1, para. 25).

423 Chile, 2019 (CED/C/CHL/CO/1, para. 25).

424 Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 29 (b)).

425 Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 38).

426 Honduras, 2018 (CED/C/HND/CO/1, para. 33); Serbia, 2015 (CED/C/SRB/CO/1, para. 26 (b)).

427 Spain, 2013 (CED/C/ESP/CO/1, para. 30); Serbia, 2015 (CED/C/SRB/CO/1, para. 26); Japan, 2018 (CED/C/JPN/CO/1, para. 40 (b)); Lithuania, 2017 (CED/C/LTU/CO/1, para. 30); Honduras, 2018 (CED/C/HND/CO/1, para. 37 (b)).

428 Peru, 2019 (CED/C/PER/CO/1, para. 29 (b)).

429 Argentina, 2013 (CED/C/ARG/CO/1, para. 37).

29. LEGAL SITUATION OF DISAPPEARED PERSONS AND THAT OF THEIR RELATIVES

During the *travaux préparatoires*, the legal situation of disappeared persons and that of their relatives was not discussed in depth. Nevertheless, it was considered that victims “should be entitled to the broadest protection possible against violations of their rights during proceedings.”⁴³⁰ Thus, the delegations agreed to include in Article 24 (6) of the Convention a provision to address the legal situation of disappeared persons and that of their relatives.⁴³¹

The Committee has consistently recommended that States Parties ensure that the legal situation of the disappeared person whose fate has not been established and that of their relatives in areas such as social welfare, financial matters, family law and property rights is appropriately addressed in domestic law without having to presume the death of the disappeared person or to declare it, in the understanding that such a requirement does not acknowledge the complexity⁴³² of the crime of enforced disappearance and its continuous nature.⁴³³ In this respect, the Committee has affirmed that there is no reason to presume the death of the disappeared person until his/her fate has been clarified.⁴³⁴ Along these lines, in the *Guiding Principles for the Search for Disappeared Persons*, the Committee maintained that the search for the disappeared person “should continue until his or her fate and/or whereabouts have been determined with certainty”, based on the presumption that the disappeared person is alive.⁴³⁵ The Committee, therefore, has recommended that States Parties review⁴³⁶ or adopt legislation⁴³⁷ repealing the presumption of death,⁴³⁸ to recognize

430 E/CN.4/2003/71, para. 88.

431 E/CN.4/2005/66, para. 103; E/CN.4/2006/57, page. 40.

432 Germany, 2014 (CED/C/DEU/CO/1, para. 26); Paraguay, 2014 (CED/C/PRY/CO/1, para. 29); Ecuador, 2017 (CED/C/ECU/CO/1, para. 21); Bolivia, 2019 (CED/C/BOL/CO/1, para. 36); Slovakia, 2019 (CED/C/SVK/CO/1, para. 26).

433 Netherlands, 2014 (CED/C/NLD/CO/1, para. 34); Germany, 2014 (CED/C/DEU/CO/1, para. 26); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 39); Ecuador, 2017 (CED/C/ECU/CO/1, para. 22).

434 Montenegro, 2015 (CED/C/MNE/CO/1, para. 32); Netherlands, 2014 (CED/C/NLD/CO/1, para. 34); Germany, 2014 (CED/C/DEU/CO/1, para. 26); Iraq, 2015 (CED/C/IRQ/CO/1, para. 35); Ecuador, 2017 (CED/C/ECU/CO/1, para. 21); Honduras, 2018 (CED/C/HND/CO/1, para. 38); Japan, 2018 (CED/C/JPN/CO/1, para. 41); Slovakia, 2019 (CED/C/SVK/CO/1, para. 26); Bolivia, 2019 (CED/C/BOL/CO/1, para. 36).

435 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 7.1 and Principle 1.

436 Netherlands, 2014 (CED/C/NLD/CO/1, para. 35); Germany, 2014 (CED/C/DEU/CO/1, para. 27); Slovakia, 2019 (CED/C/SVK/CO/1, para. 27).

437 Mexico, 2015 (CED/C/MEX/CO/1, para. 16); Serbia, 2015 (CED/C/SRB/CO/1, para. 30); Cuba, 2017 (CED/C/CUB/CO/1, para. 34); Lithuania, 2017 (CED/C/LTU/CO/1, para. 32); Honduras, 2018 (CED/C/HND/CO/1, para. 39).

438 Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 37).

the right of the families of disappeared persons to request a declaration of absence by reason of enforced disappearance⁴³⁹ or to adopt specific legal provisions establishing a legal procedure to obtain such a declaration,⁴⁴⁰ irrespective of the date when the disappearance began.⁴⁴¹ Once reviewed or adopted, the legislation should subsequently be implemented in a timely and effective manner.⁴⁴² In addition, the Committee has called on States Parties to ensure that legal provisions on the declaration of absence as a result of enforced disappearance are applied throughout the territory and are binding on all authorities, “ensuring full and effective protection of the legal situation and assets”⁴⁴³ of the disappeared persons and their families. The Committee has considered it important to strengthen outreach campaigns and to provide specific training on a regular basis to relevant authorities concerning the procedure for the declaration of absence by reason of enforced disappearance.⁴⁴⁴

Moreover, the Committee has held that “a declaration of death of a missing or disappeared person does not remove the obligation on the State Party to continue its investigation.”⁴⁴⁵ The *Guiding Principles* state that the completion of the criminal investigation, along with any conviction or acquittal of those accused of having committed an offence of enforced disappearance or a declaration of absence by reason of enforced disappearance, should not constitute an obstacle to the continuation of search activities or be invoked to justify their suspension.⁴⁴⁶

439 Argentina, 2013 (CED/C/ARG/CO/1, para. 39).

440 Argentina, 2013 (CED/C/ARG/CO/1, para. 39); Paraguay, 2014 (CED/C/PRY/CO/1, para. 30); Mexico, 2015 (CED/C/MEX/CO/1, para. 43); Serbia, 2015 (CED/C/SRB/CO/1, para. 30); Iraq, 2015 (CED/C/IRQ/CO/1, para. 36); Montenegro, 2015 (CED/C/MNE/CO/1, para. 33); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 30); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 40); Cuba, 2017 (CED/C/CUB/CO/1, para. 34); Senegal, 2017 (CED/C/SEN/CO/1, para. 40); Ecuador, 2017 (CED/C/ECU/CO/1, para. 22); Lithuania, 2017 (CED/C/LTU/CO/1, para. 32); Gabon, 2017 (CED/C/GAB/CO/1, para. 39); Honduras, 2018 (CED/C/HND/CO/1, para. 39); Japan, 2018 (CED/C/JPN/CO/1, para. 42); Peru, 2019 (CED/C/PER/CO/1, para. 31); Bolivia, 2019 (CED/C/BOL/CO/1, para. 37); Slovakia, 2019 (CED/C/SVK/CO/1, para. 27).

441 Chile, 2019 (CED/C/CHL/CO/1, para. 29).

442 Colombia, 2016 (CED/C/COL/CO/1, para. 38).

443 Mexico (follow up), 2018 (CED/C/MEX/OAI/1, para. 39).

444 Colombia, 2016 (CED/C/COL/CO/1, para. 38).

445 Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 40).

446 Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 13.4.

30. WRONGFUL REMOVAL OF CHILDREN

At early stages of the *travaux préparatoires*, there was agreement that the Convention should contain special provisions for the protection of children. Situations were discussed in which perpetrators of enforced disappearances have appropriated the children of disappeared persons, or in which children are born while their mothers are victims of enforced disappearances and are then given up for adoption, thus losing their identity. There were also discussions on the importance of establishing genetic data banks aimed at helping children to recover their identity and protecting the best interest of the child.⁴⁴⁷ As a result of the discussions, the Convention establishes, among other aspects, the wrongful removal of children as a crime in itself (Art. 25 (1) (a)) and the enforced disappearance of minors as an aggravating circumstance (Art. 7 (2) (b)), as well as the duty to prevent such crimes and to search for, identify, and locate children who were victims of wrongful removal (Art. 25).

During its first ten years of work, the Committee has consistently emphasized the particularly cruel effect of enforced disappearances on children. They are especially vulnerable to numerous human rights violations, including identity loss or substitution, either because they themselves were subjected to enforced disappearance or because they suffer the consequences of the enforced disappearance of their relatives. In this context, the Committee has recommended that States Parties ensure that child-sensitive approaches are used in implementing the rights and obligations set out in the Convention,⁴⁴⁸ incorporate in their criminal legislation as specific offences, at both the federal and state levels,⁴⁴⁹ the wrongful removal of children subjected to enforced disappearance, children whose father, mother, or legal guardian is subjected to enforced disappearance, or children born during the captivity of a mother subjected to enforced disappearance, with appropriate penalties that

447 E/CN.4/2003/71, para. 29, 89, 90, 91.

448 Uruguay, 2013 (CED/C/URY/CO/1, para. 38); Argentina, 2013 (CED/C/ARG/CO/1, para. 41); Spain, 2013 (CED/C/ESP/CO/1, para. 37); Netherlands, 2014 (CED/C/NLD/CO/1, para. 41); Germany, 2014 (CED/C/DEU/CO/1, para. 31); Belgium, 2014 (CED/C/BEL/CO/1, para. 32); Paraguay, 2014 (CED/C/PRY/CO/1, para. 34); Mexico, 2015 (CED/C/MEX/CO/1, para. 47); Armenia, 2015 (CED/C/ARM/CO/1, para. 31); Serbia, 2015 (CED/C/SRB/CO/1, para. 34); Iraq, 2015 (CED/C/IRQ/CO/1, para. 40); Montenegro, 2015 (CED/C/MNE/CO/1, para. 37); Tunisia, 2016 (CED/C/TUN/CO/1, para. 36); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 44); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 34); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 42); Colombia, 2016 (CED/C/COL/CO/1, para. 42); Cuba, 2017 (CED/C/CUB/CO/1, para. 38); Senegal, 2017 (CED/C/SEN/CO/1, para. 44); Ecuador, 2017 (CED/C/ECU/CO/1, para. 24); Lithuania, 2017 (CED/C/LTU/CO/1, para. 34); Gabon, 2017 (CED/C/GAB/CO/1, para. 43); Austria, 2018 (CED/C/AUT/CO/1, para. 27); Albania, 2018 (CED/C/ALB/CO/1, para. 41); Japan, 2018 (CED/C/JPN/CO/1, para. 46); Portugal, 2018 (CED/C/PRT/CO/1, para. 29); Italy, 2019 (CED/C/ITA/CO/1, para. 37); Chile, 2019 (CED/C/CHL/CO/1, para. 33); Peru, 2019 (CED/C/PER/CO/1, para. 37); Bolivia, 2019 (CED/C/BOL/CO/1, para. 43); Slovakia, 2019 (CED/C/SVK/CO/1, para. 29); Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 4.2.

449 Mexico, 2015 (CED/C/MEX/CO/1, para. 45).

take into account the extreme seriousness of the offences;⁴⁵⁰ investigate cases of removal and/or irregular adoption;⁴⁵¹ search for, locate and identify disappeared children,⁴⁵² if required, by mutual assistance agreements with other states;⁴⁵³ ensure that disappeared children are returned to their families of origin if they have been victims of identity substitution;⁴⁵⁴ ensure that victims of identity substitution are able to exercise their right to recover their identity;⁴⁵⁵ prevent and punish cases of falsification, concealment or destruction of documents attesting to the true identity of the children referred to in Article 25 (1) of the Convention;⁴⁵⁶ and create a DNA database that includes genetic samples for all cases of wrongful removal, enforced disappearance or falsification of identity that have been reported.⁴⁵⁷ Furthermore, the Committee has recommended that States Parties establish specific procedures for such a review and, where appropriate, for the annulment of adoptions, placements or guardianships that originated in an enforced disappearance, and for re-establishing the true identity of the children concerned with retroactive effect.⁴⁵⁸ The procedures should take into consideration the situation and best interests of the child and recognize the child's right to be heard if he/she is capable of forming his or her own views, and hence ensure that the views of the child are given due weight, in accordance with his or her age and maturity.⁴⁵⁹

In addition, the Committee has urged States Parties to prevent the disappearance of migrant children, to investigate thoroughly the disappearance of unaccompanied children from asylum reception centers, and to search for and identify those chil-

450 Uruguay, 2013 (CED/C/URY/CO/1, para. 34); Netherlands, 2014 (CED/C/NLD/CO/1, para. 37); Germany, 2014 (CED/C/DEU/CO/1, para. 29); Paraguay, 2014 (CED/C/PRY/CO/1, para. 32); Mexico, 2015 (CED/C/MEX/CO/1, para. 45); Armenia, 2015 (CED/C/ARM/CO/1, para. 29); Serbia, 2015 (CED/C/SRB/CO/1, para. 32); Iraq, 2015 (CED/C/IRQ/CO/1, para. 38); Montenegro, 2015 (CED/C/MNE/CO/1, para. 35); Tunisia, 2016 (CED/C/TUN/CO/1, para. 34); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 32); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 40); Colombia, 2016 (CED/C/COL/CO/1, para. 40); Cuba, 2017 (CED/C/CUB/CO/1, para. 36); Senegal, 2017 (CED/C/SEN/CO/1, para. 42); Gabon, 2017 (CED/C/GAB/CO/1, para. 41); Austria, 2018 (CED/C/AUT/CO/1, para. 25); Japan, 2018 (CED/C/JPN/CO/1, para. 44 (a)); Portugal, 2018 (CED/C/PRT/CO/1, para. 27); Chile, 2019 (CED/C/CHL/CO/1, para. 31); Peru, 2019 (CED/C/PER/CO/1, para. 35 (a)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 40 (a)).

451 Chile, 2019, para. 31.

452 Netherlands, 2014, (CED/C/NLD/CO/1, para. 37); Bosnia and Herzegovina, 2016, (CED/C/BIH/CO/1, para. 40); Colombia, 2016, (CED/C/COL/CO/1, para. 40).

453 Albania, 2018 (CED/C/ALB/CO/1, para. 39 (c)).

454 Colombia, 2016 (CED/C/COL/CO/1, para. 40); Peru, 2019 (CED/C/PER/CO/1, para. 35 (b)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 40 (b)).

455 Chile, 2019 (CED/C/CHL/CO/1, para. 31); Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 8.8.

456 Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 42).

457 Honduras, 2018 (CED/C/HND/CO/1, para. 43).

458 Albania, 2018 (CED/C/ALB/CO/1, para. 39); Honduras, 2018 (CED/C/HND/CO/1, para. 43); Japan, 2018 (CED/C/JPN/CO/1, para. 44 (b)); Peru, 2019 (CED/C/PER/CO/1, para. 35 (c)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 41 (c)).

459 France, 2013 (CED/C/FRA/CO/1, para. 37); Spain, 2013 (CED/C/ESP/CO/1, para. 30); Iraq, 2015 (CED/C/IRQ/CO/1, para. 32).

dren who may have been victims of enforced disappearance.⁴⁶⁰ To protect migrant children from enforced disappearance, the Committee has recommended that States Parties ensure that unaccompanied minors are promptly referred to child protection authorities as soon as possible after their arrival at an immigration detention center; to pursue the effective application of harmonized multidisciplinary age-assessment procedures across all immigration detention centers, and to ensure that anyone claiming to be a child is treated as such until a comprehensive and child-friendly age-assessment is undertaken; to improve the data system for unaccompanied or separated minors; to ensure that statistics are collected on unaccompanied minors and children going missing from reception centers,⁴⁶¹ as well as to register, gather, preserve and allow access to information on the origins of adopted children.⁴⁶²

460 Netherlands, 2014 (CED/C/NLD/CO/1, para. 37); Italy, 2019 (CED/C/ITA/CO/1, para. 23); Guiding Principles for the Search for Disappeared Persons, CED/C/7*, Principle 9.1.

461 Italy, 2019 (CED/C/ITA/CO/1, para. 35).

462 Belgium, 2014 (CED/C/BEL/CO/1, para. 30).

31. GENDER DIMENSION OF THE CONVENTION

Neither the Convention nor the discussions during the *travaux préparatoires* incorporated a gender dimension in addressing enforced disappearances. Aside from Article 7 (2) (b), relating to the appropriate penalties and the aggravating circumstances when enforced disappearance is perpetrated against pregnant women, and which resulted from discussions on penalties during the *travaux préparatoires*,⁴⁶³ the Convention lacks a gender approach.

However, during its first ten years of work, the Committee has extensively emphasized in its concluding observations the particularly cruel effect of enforced disappearances on women and children.⁴⁶⁴ Women who are subjected to enforced disappearance are particularly vulnerable to sexual and other forms of gender-based violence, and women relatives of disappeared persons are subjected to violence, persecution, and reprisals as a result of their efforts to locate their loved ones and are particularly likely to suffer serious social and economic disadvantages.⁴⁶⁵ In this context, the Committee has placed special emphasis on the need for States Parties to ensure that women victims of enforced disappearance receive specific protection and assistance⁴⁶⁶ and that the gender perspective is used in implementing the rights and obligations set forth in the Convention.⁴⁶⁷ Regarding the right to receive

463 E/CN.4/2004/59, para. 60, 61.

464 On children, see preceding chapter.

465 Uruguay, 2013 (CED/C/URY/CO/1, para. 38); Argentina, 2013 (CED/C/ARG/CO/1, para. 41); Spain, 2013 (CED/C/ESP/CO/1, para. 37); Netherlands, 2014 (CED/C/NLD/CO/1, para. 41); Germany, 2014 (CED/C/DEU/CO/1, para. 31); Belgium, 2014 (CED/C/BEL/CO/1, para. 32); Paraguay, 2014 (CED/C/PRY/CO/1, para. 34); Mexico, 2015 (CED/C/MEX/CO/1, para. 47); Armenia, 2015 (CED/C/ARM/CO/1, para. 31); Serbia, 2015 (CED/C/SRB/CO/1, para. 34); Iraq, 2015 (CED/C/IRQ/CO/1, para. 40); Montenegro, 2015 (CED/C/MNE/CO/1, para. 37); Tunisia, 2016 (CED/C/TUN/CO/1, para. 36); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 44); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 34); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 42); Colombia, 2016 (CED/C/COL/CO/1, para. 42); Ecuador, 2017 (CED/C/ECU/CO/1, para. 24); Lithuania, 2017 (CED/C/LTU/CO/1, para. 34); Albania, 2018 (CED/C/ALB/CO/1, para. 41); Japan, 2018 (CED/C/JPN/CO/1, para. 46); Portugal, 2018 (CED/C/PRT/CO/1, para. 29); Italy, 2019 (CED/C/ITA/CO/1, para. 37); Honduras, 2018 (CED/C/HND/CO/1, para. 45); Chile, 2019 (CED/C/CHL/CO/1, para. 33); Peru, 2019 (CED/C/PER/CO/1, para. 37); Bolivia, 2019 (CED/C/BOL/CO/1, para. 43); Slovakia, 2019 (CED/C/SVK/CO/1, para. 29).

466 France, 2013 (CED/C/FRA/CO/1, para. 39).

467 Argentina, 2013 (CED/C/ARG/CO/1, para. 41); Spain, 2013 (CED/C/ESP/CO/1, para. 37); Netherlands, 2014 (CED/C/NLD/CO, para. 41); Germany, 2014 (CED/C/DEU/CO/1, para. 31); Belgium, 2014 (CED/C/BEL/CO/1, para. 32); Paraguay, 2014 (CED/C/PRY/CO/1, para. 34); Armenia, 2015 (CED/C/ARM/CO/1, para. 31); Serbia, 2015 (CED/C/SRB/CO/1, para. 34); Iraq, 2015 (CED/C/IRQ/CO/1, para. 40); Montenegro, 2015 (CED/C/MNE/CO/1, para. 37); Tunisia, 2016 (CED/C/TUN/CO/1, para. 36); Burkina Faso, 2016 (CED/C/BFA/CO/1, para. 44); Kazakhstan, 2016 (CED/C/KAZ/CO/1, para. 34); Bosnia and Herzegovina, 2016 (CED/C/BIH/CO/1, para. 42); Colombia, 2016 (CED/C/COL/CO/1, para. 42); Ecuador, 2017 (CED/C/ECU/CO/1, para. 24); Lithuania, 2017 (CED/C/LTU/CO/1, para. 34); Albania, 2018 (CED/C/ALB/CO/1, para. 41); Japan, 2018 (CED/C/JPN/CO/1, para. 46); Portugal, 2018 (CED/C/PRT/CO/1, para. 29); Italy, 2019 (CED/C/ITA/CO/1, para. 37); Honduras, 2018 (CED/C/HND/CO/1, para. 45); Chile, 2019 (CED/C/CHL/CO/1, para. 33); Peru, 2019 (CED/C/PER/CO/1, para. 37); Bolivia, 2019 (CED/C/BOL/CO/1, para. 43); Slovakia, 2019 (CED/C/SVK/CO/1, para. 29).

reparation and prompt, fair, and adequate compensation, the Committee has recommended that States Parties adopt a comprehensive, gender-sensitive system of reparation that is fully in line with the Convention.⁴⁶⁸ This means, according to the Committee, that any measure taken with respect to the rights of victims should be sensitive to gender⁴⁶⁹ and to the victims' personal circumstances.⁴⁷⁰ Along these lines, in order to be adequate, reparation should include the means for the rehabilitation of the victims and take into account gender issues⁴⁷¹ as well as the victims' personal circumstances and individual characteristics, such as their sex, sexual orientation, gender identity, age, ethnic origin, social status and disability.⁴⁷²

Regarding the register and statistics on persons subjected to enforced disappearance, the Committee has recommended that the necessary steps be taken to generate accurate statistics that can be used to devise comprehensive and coordinated public policies for the prevention, investigation, punishment, and elimination of this abhorrent crime, including information regarding the sex of disappeared persons.⁴⁷³

468 Paraguay, 2014 (CED/C/PRY/CO/1, para. 26); Serbia, 2015 (CED/C/SRB/CO/1, para. 26); Tunisia, 2016 (CED/C/TUN/CO/1, para. 32 (b)); Bosnia and Herzegovina (CED/C/BIH/CO/1, 2016, para. 38); Lithuania, 2017 (CED/C/LTU/CO/1, para. 30).

469 Spain, 2013 (CED/C/ESP/CO/1, para. 30).

470 Colombia, 2016 (CED/C/COL/CO/1, para. 36).

471 Spain, 2013 (CED/C/ESP/CO/1, para. 12); Tunisia, 2016 (CED/C/TUN/CO/1, para. 23 (d)).

472 Colombia, 2016 (CED/C/COL/CO/1, para. 36); Cuba, 2017 (CED/C/CUB/CO/1, para. 32); Peru, 2019 (CED/C/PER/CO/1, para. 29 (c)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 35 (d)).

473 Mexico, 2015 (CED/C/MEX/CO/1, para. 18); Iraq, 2015 (CED/C/IRQ/CO/1, para. 12).

32. DATA AND STATISTICS, DATABASES, INCLUDING FORENSIC DATABANKS AND REGISTERS

Despite the fact that during the *travaux préparatoires* of the Convention there was only a brief mention of the possibility that States Parties set up genetic data banks as a tool for the search for disappeared persons and to help children recover their identity,⁴⁷⁴ the need for States Parties to establish registers and databases on disappeared persons has been highlighted by the Committee throughout its first ten years of work.

The *Guiding Principles for the Search for Disappeared Persons* hold that States Parties should create registers and databases on disappeared persons covering the entire national territory and allowing for disaggregation of such aspects as the authority entering the data, the date a person was reported missing or found alive, and when his or her body was exhumed or his or her remains identified and handed over; also, carry out investigations to establish whether or not it was an enforced disappearance and the reason for the disappearance. These registers and databases should be continuously updated.⁴⁷⁵ Moreover, States Parties should establish databases containing elements that are relevant to the search, including genetic databanks and consultation systems that make it possible to obtain results quickly. These databases should be designed using an interdisciplinary approach and aim to be mutually compatible.

Furthermore, in its concluding observations the Committee, has recommended that States Parties take the necessary steps to clean and consolidate data on disappeared persons⁴⁷⁶ or to establish a single nationwide register of disappeared persons⁴⁷⁷ within or outside their territory,⁴⁷⁸ including cases perpetrated in the past,⁴⁷⁹ in order to generate accurate statistics and information that can be used to devise comprehensive and coordinated public policies for the prevention, investigation, punishment, and elimination of this abhorrent crime.⁴⁸⁰ According to the Commit-

474 E/CN.4/2003/71, para. 90.

475 *Guiding Principles for the Search for Disappeared Persons*, CED/C/7*, Principle 11.2 and 11.7.

476 Colombia, 2016 (CED/C/COL/CO/1, para. 14).

477 Mexico, 2015 (CED/C/MEX/CO/1, para. 18); Iraq, 2015 (CED/C/IRQ/CO/1, para. 12); Honduras, 2018 (CED/C/HND/CO/1, para. 13); Bolivia, 2019 (CED/C/BOL/CO/1, para. 11).

478 Honduras, 2018 (CED/C/HND/CO/1, para. 13).

479 Iraq, 2015 (CED/C/IRQ/CO/1, para. 12); Peru, 2019 (CED/C/PER/CO/1, para. 11).

480 Mexico, 2015 (CED/C/MEX/CO/1, para. 18); Iraq, 2015 (CED/C/IRQ/CO/1, para. 12).

tee, and as stated in the *Guiding Principles*, the register should, as a minimum:⁴⁸¹ (a) provide exhaustive and detailed information about all cases of disappeared persons, including information about their sex, age, nationality, ethnic group, and religious affiliation and the place and date of their disappearance; (b) include information that can be used to determine whether the case in question is one of enforced disappearance or a disappearance without any involvement of State agents, in order to “generate statistical information that indicates the extent of the problem of enforced disappearances in the strict sense of the term, that is, disappearances where State agents were allegedly involved, directly or indirectly, in committing the offence;”⁴⁸² (c) facilitate the generation of statistical data that reflect the total number of disappeared persons, the number who have subsequently been found, whether alive or dead, and the number who are still missing;⁴⁸³ and (d) contain information based on clear and consistent criteria and be updated on a regular basis. The Committee has also requested that States Parties guarantee that all cases of disappeared persons are consistently and exhaustively recorded immediately after a disappearance is reported;⁴⁸⁴ develop and establish a DNA database with the purpose of intensifying efforts to locate and identify persons who suffered enforced disappearance;⁴⁸⁵ and ensure that DNA banks hold genetic samples and information for all cases reported, whether through administrative or judicial channels, so that the information can be checked against the data of disappeared persons’ relatives in order to facilitate their identification.⁴⁸⁶ In certain cases, the Committee has recommended that States Parties gather and preserve information on the origin of adopted children and allow access to it;⁴⁸⁷ improve data systems on unaccompanied or separated minors; and collect statistics on unaccompanied minors and children going missing from reception centers.⁴⁸⁸ The Committee has likewise recommended that States Parties compile statistics on reparations granted to victims of enforced disappearance as a tool for improving reparation measures.⁴⁸⁹ States Parties should also ensure efficient coordination, cooperation and cross-referencing of data among the agencies responsible for investigating enforced disappearances, searching for disappeared persons and identifying their remains in case of death.⁴⁹⁰

481 Mexico, 2015 (CED/C/MEX/CO/1, para. 18); Iraq, 2015 (CED/C/IRQ/CO/1, para. 12).

482 Colombia, 2016 (CED/C/COL/CO/1, para. 14 (c)).

483 Peru, 2019 (CED/C/PER/CO/1, para. 11); Bolivia, 2019 (CED/C/BOL/CO/1, para. 11).

484 Colombia, 2016 (CED/C/COL/CO/1, para. 14 (a)); Iraq, 2015 (CED/C/IRQ/CO/1, para. 12 (c)).

485 Paraguay, 2014 (CED/C/PRY/CO/1, para. 28 (b)).

486 Spain, 2013 (CED/C/ESP/CO/1, para. 35); Bolivia, 2019 (CED/C/BOL/CO/1, para. 39 (c)).

487 Belgium, 2014 (CED/C/BEL/CO/1, para. 30).

488 Italy, 2019 (CED/C/ITA/CO/1, para. 35 (c)).

489 Argentina, 2013 (CED/C/ARG/CO/1, para. 37).

490 Chile, 2019 (CED/C/CHL/CO/1, para. 27 (a)); Peru, 2019 (CED/C/PER/CO/1, para. 33 (c)); Bolivia, 2019 (CED/C/BOL/CO/1, para. 39 (d)).

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The Geneva Academy
of International Humanitarian Law
and Human Rights

Villa Moynier
Rue de Lausanne 120B
CP 1063 - 1211 Geneva 1 - Switzerland
Phone: +41 (22) 908 44 83
Email: info@geneva-academy.ch
www.geneva-academy.ch

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