



## **Working Group on Enforced or Involuntary Disappearances**

### **General Comment on the Right to the Truth in Relation to Enforced Disappearances**

#### Preamble

The right to the truth – sometimes called the right to know the truth – in relation to human rights violations is now widely recognized in international law. This is witnessed by the numerous acknowledgements of its existence as an autonomous right at the international level, and through State practice at the national level. The right to the truth is applicable not only to enforced disappearances. However, this general comment is concerned solely with enforced disappearances in the context of the Declaration on the Protection of All Persons from Enforced Disappearance.

At the international level, the right to the truth relating to enforced disappearances or missing persons is recognized in a number of instruments. Article 32 of the Protocol I to the Geneva Conventions establishes “the right of families to know the fate of their [disappeared] relative”. Article 24 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance states:

“Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.”

The existence of the right to the truth as an autonomous right was acknowledged by the Working Group on Enforced or Involuntary Disappearances (WGEID) in its very first report (E/CN.4/1435, 22 January 1981, § 187). It has also been recognized by various other international bodies at the universal and regional levels (for relevant case law, see in particular the “Study on the right to the truth”, report of the UN Office of the High Commissioner for Human Rights, E/CN.4/2006/91, 8 February 2006); by intergovernmental bodies, including the Human Rights Commission and now the Human Rights Council (see

resolutions 2005/66 of 20 April 2005 of the Commission; decision 2/105, 27 November 2006; resolution 9/11, 18 September 2008; and 12/12, 1 October 2009 of the Council).

The existence of the right to the truth in international law is accepted by State practice consisting in both jurisprudential precedent and by the establishment of various truth seeking mechanisms in the period following serious human rights crises, dictatorships or armed conflicts (see the “Study on the right to the truth”, op. cit.). Those mechanisms include the launching of criminal investigations and the creation of “truth commissions” designed to shed light on past violations and, generally, to facilitate reconciliation between different groups.

The right to the truth is both a collective and an individual right. Each victim has the right to know the truth about violations that affected him or her, but the truth also has to be told at the level of society as a “vital safeguard against the recurrence of violations”, as stated in Principle 2 of the *Set of Principles for The Protection And Promotion Of Human Rights Through Action To Combat Impunity* (E/CN.4/2005/102/Add.1)

Principle 3 of this document specifies that the State has a correlative “duty to preserve memory”:

“A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.”

Principle 4 establishes the “victim’s right to know” as an individual right:

“Irrespective of any legal proceedings, victims and their families have the imprescriptable right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.”

The Working Group has often recommended that States adopt measures to promote truth, reparations for victims and reconciliation in their societies, as a means of implementing the right to the truth and the right to integral reparation for victims of enforced disappearances. Based on its experience, the Working Group has acknowledged that such processes are often

crucial to ensure non-repetition of enforced disappearances as well as to clarify cases, by uncovering the truth of the fate or the whereabouts of disappeared persons. However, the Working Group has also underlined that reconciliation between the State and the victims of enforced disappearance cannot happen without the clarification of each individual case.

The 1992 Declaration on the Protection of All Persons from Enforced Disappearance enumerates a number of obligations that flow from the right to the truth.

Based on the foregoing, the Working Group has decided to adopt this general comment in the following terms:

### **General Comment**

1. The right to the truth in relation to enforced disappearances means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s).

2. The right to the truth in relation to enforced disappearances should be clearly distinguished from the right to information, and in particular the right of the relatives or other persons with a legitimate interest, their representatives or their legal counsel, to obtain information on a person who is deprived of his liberty. The right to information on the person detained, together with the non-derogable right of *habeas corpus*, should be considered central tools to prevent the occurrence of enforced disappearances.

3. Article 13 of the Declaration recognizes the obligation of the State to investigate cases of enforced disappearances. Paragraph 4 of Article 13 specifies that “the findings of such an investigation shall be made available upon request to all interested persons, unless doing so would jeopardize an ongoing criminal investigation.” In light of the developments that happened since 1992, the Working Group deems that the restriction in the last part of this paragraph should be interpreted narrowly. Indeed, the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth. Such a limitation must be strictly proportionate to the only legitimate aim: to avoid jeopardizing an ongoing criminal investigation. A refusal to provide any information, or to communicate with the relatives at all, in other words a blanket refusal, is a violation of the right to the truth. Providing general

information on procedural matters, such as the fact that the matter has been given to a judge for examination, is insufficient and should be considered a violation of the right to the truth. The State has the obligation to let any interested person know the concrete steps taken to clarify the fate and the whereabouts of the person. Such information must include the steps taken on the basis of the evidence provided by the relatives or other witnesses. While the necessities of a criminal investigation may justify restricting the transmission of certain information, there must be recourse in the national legislation to review such a refusal to provide the information to all interested persons. This review should be available at the moment of the initial refusal to provide information, and then on a regular basis to ensure that the reason for the necessity that was invoked by the public authority, to refuse to communicate, remains present.

4. Paragraph 6 of Article 13 provides that: “An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.” The obligation to continue the investigation for as long as the fate and the whereabouts of the disappeared remains unclarified is a consequence of the continuing nature of enforced disappearances (see the Working Group’s general comment on article 17 and its general comment on enforced disappearance as a continuous human rights violation and continuous crime).

It also makes it clear that the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation. No legitimate aim, or exceptional circumstances, may be invoked by the State to restrict this right. This absolute character also results from the fact that the enforced disappearance causes “anguish and sorrow” (5<sup>th</sup> preambular paragraph of the Declaration) to the family, a suffering that reaches the threshold of torture, as it also results from article 1§2 of the same Declaration that provides: “Any act of enforced disappearance (...) constitutes a violation of the rules of international law guaranteeing, (...) the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.” In this regard, the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives.

5. The State’s main obligations under the right to the truth are mainly procedural and include:

the obligation to investigate until the fate and the whereabouts of the person have been clarified; the obligation to have the results of these investigations communicated to the interested parties under the conditions specified in paragraph 3 of this general comment; the obligation to provide full access to archives; and the obligation to provide full protection to witnesses, relatives, judges and other participants in any investigation. There is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result. Indeed, in certain cases, clarification is difficult or impossible to attain, for instance when the body, for various reasons, cannot be found. A person may have been summarily executed, but the remains cannot be found because the person who buried the body is no longer alive, and nobody else has information on the person's fate. The State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person.

In its general comment on article 19 (the right to compensation), the Working Group made it clear that: "As a general principle, no victim of enforced disappearance shall be presumed dead over the objections of the family."

6. The right to know the truth about the fate and the whereabouts includes, when the disappeared person is found to be dead, the right of the family to have the remains of their loved one returned to them, and to dispose of those remains according to their own tradition, religion or culture. The remains of the person should be clearly and indisputably identified, including through DNA analysis. The State, or any other authority, should not undertake the process of identification of the remains, and should not dispose of those remains, without the full participation of the family and without fully informing the general public of such measures. States ought to take the necessary steps to use forensic expertise and scientific methods of identification to the maximum of its available resources, including through international assistance and cooperation.

7. The right to know the truth about the fate and the whereabouts also applies to the cases of children who were born during their mothers' enforced disappearances, and who were thereafter illegally adopted. Article 20 of the Declaration provides that such acts of abduction, as well as the act of altering or suppressing documents attesting to their true identity, shall constitute an extremely serious offence, which shall be punished as such". The same provision also provides that States "shall devote their efforts to the search for and

identification of such children and to the restitution of the children to their families of origin”. That is to say that the falsity of the adoption should be uncovered. Both the families of the disappeared and the child have an absolute right to know the truth about the child’s whereabouts. However, paragraph 2 of the same article tries to ensure a balance when it comes to the issue of whether the adoption should be revisited. This balance, taking into consideration the best interest of the child, does not prejudice the right to know the truth of the family of origin or the child’s whereabouts.

8. The right to know the truth about the circumstances of the disappearance, in contrast, is not absolute. State practice indicates that, in some cases, hiding parts of the truth has been chosen to facilitate reconciliation. In particular, the issue whether the names of the perpetrators should be released as a consequence of the right to know the truth is still controversial. It has been argued that it is inappropriate to release the names of the perpetrators in processes such as “truth commissions”, when perpetrators do not benefit from the legal guarantees normally granted to persons in criminal processes, in particular the right to be presumed innocent. Regardless, under article 14 of the Declaration, the State has an obligation to bring any person alleged to have perpetrated an enforced disappearance “before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force.”

However, in its general comment on article 18 of the Declaration, the Working Group noted that the prohibition of amnesty provided for by article 18 allowed “limited and exceptional measures that directly lead to the prevention and termination of disappearances, as provided for in article 3 of the Declaration, even if, prima facie, these measures could appear to have the effect of an amnesty law or similar measure that might result in impunity.”

The Working Group continued:

“Indeed, in States where systematic or massive violations of human rights have occurred as a result of internal armed conflict or political repression, legislative measures that could lead to finding the truth and reconciliation through pardon might be the only option to terminate or prevent disappearances.”

In other words, restrictions on the right to the truth do not affect the right to justice of the

victims, i.e. the decision not to release the names of the perpetrators in a truth process does not prevent a prosecution from occurring. In the meantime, the realization of the right to the truth may in exceptional circumstances result in limiting the right to justice, within the strict limits contained in paragraphs 6 and 8 of the Working Group's general comment on article 18 and taking account paragraph 3-b of the same general comment. The Working Group in particular recalls that: "Pardon should only be granted after a genuine peace process or bona fide negotiations with the victims have been carried out, resulting in apologies and expressions of regret from the State or the perpetrators, and guarantees to prevent disappearances in the future" (general comment on article 18, § 8-b). In addition, the Working Group is of the opinion that no such limitation may occur when the enforced disappearance amounts to a crime against humanity (on the definition of enforced disappearances as a crime against humanity, see the WGEID's general comment on this issue).

9. The right to the truth implies that the State has an obligation to give full access to information available, allowing the tracing of disappeared persons. Paragraph 2 of Article 13 of the Declaration states that the "competent authority [to investigate] shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits". This authority should also have the power to have full access to the archives of the State. After the investigations have been completed, the archives of the said authority should be preserved and made fully accessible to the public.

10. Finally, the right to the truth also ensures that the State has an obligation to provide the necessary protection and assistance to victims, witnesses and other interested persons. The search for truth often provokes perpetrators and others, who may attempt to prevent the truth from being discovered by threatening or even attacking persons participating in an investigation. Thus, the State has an obligation to provide for effective protection of interested parties. Paragraph 3 of Article 13 is very clear when it states that "[s]teps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal." In particular, the State may set up a witness protection programme through an independent institution.