

CHALLENGES AND CONCERNS FROM THE NGO PERSPECTIVE

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These remarks will focus on a number of challenges that fall into three broad areas; first, achieving universal ratification of the Convention. Second, ensuring effective domestic implementation of the Convention, and third; ensuring the effective use of the Convention in urgent cases of enforced disappearance. However, I will concentrate principally on elaborating the ways in which Amnesty International believes that States should give interpretation and give effect to the Convention in their law and practice to ensure maximum human rights protection and compliance with international law.

The first challenge: achieving universal ratification of the Convention

The coming into force of the *Convention on Enforced Disappearance* in December 2010 was a major step forward in ensuring that victims of enforced disappearance and their families obtain justice, truth, and full reparation. That date was not so long ago, but in total more than five years have passed since this fundamental human rights treaty was adopted by the General Assembly. Yet to date only 32 States have become party to it. This is a disappointingly low number.

Amnesty International is also concerned by the extremely low number of States - just 12 - which have recognized the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation of provisions of this Convention. This risks undermining the fundamental purpose of the Committee and the Convention as a tool for combating the scourge of enforced disappearance. Therefore; the first, and most urgent, step that States should take is to accede to the Convention and make declarations under Article 31 allowing individual communications.

The second challenge: ensuring effective domestic implementation of the Convention

Adoption and implementation of this Convention by States should provide a first layer of procedural protections and guarantees against enforced disappearance and remedies for victims and their families. National legislation is one of the critical steps to ending enforced disappearance, along with governments and societies acknowledging the legacy of past enforced disappearances and taking steps to provide justice, truth, and full reparation to victims.

This is why Amnesty International has called on all governments to take effective steps to implement the Convention in their domestic law and practice¹. The lack of implementation of the provisions contained in the Convention by almost all States parties is a matter of great concern for my organization. To that end, as you know, Amnesty International has issued a Checklist for effective implementation of the Convention² which indicates both what States parties are required to do under the treaty and what Amnesty International recommends that they should do to comply with the highest standards of international law. The Checklist, which is available in hard copy in French for the first time today, is designed as a tool to assist States in bringing domestic law concerning enforced disappearances into line with the Convention and international law and standards.

There are a number of specific challenges within the overarching one of how to ensure effective domestic implementation, in the view of Amnesty International. First, we must recognise that this is an enormously complex treaty from which over 90 specific international legal obligations arise. As my organisation's Checklist highlights, this will require – in most instances – adjustments to criminal, civil, and family law at the domestic level. It is therefore a large undertaking and many States will require technical assistance. Second, in the view of my organisation it is incumbent on States, when taking steps to implement the Convention, to be mindful of where international law and standards go beyond the explicit terms of the Convention to provide even stronger human rights protection, which should therefore be implemented as a matter of good practice and in accordance with Article 37 of the Convention which makes clear that the treaty cannot infringe stronger protection in national or international law.

For instance, States should not adopt any narrower definition of enforced disappearance than that contained in Article 2 of the Convention. In particular, they should not include the restrictive language in Article 7 of the Rome Statute of the International Criminal Court that defines an enforced disappearance as one requiring the perpetrator have had the double intent to remove a person from the protection of the law and to do so for a prolonged period of time. The removal of the person from the protection of the law is a *consequence* of the crime in all cases; there is no requirement that the perpetrator have specifically intended to deprive the victim of the protection of the law. Similarly, there is no requirement that the removal be for a prolonged period of time.

¹ <http://www.amnesty.org/en/news/un-states-urged-act-over-enforced-disappearances-2011-11-08>.

² <http://www.amnesty.org/en/library/info/IOR51/006/2011/en>.

Another example is the provision in Article 5 concerning “widespread or systematic practice” of enforced disappearance. Article 5 does not fully reflect applicable international law to the extent that it might appear to suggest that enforced disappearance is a crime against humanity only if it is a widespread or a systematic practice. However, there is no such high threshold in the definition under international law. Article 7 of the Rome Statute of the ICC provides that an enforced disappearance is committed as part of a widespread or systematic attack on a civilian population. Thus, a *single* enforced disappearance can be a crime against humanity under Article 7 as long as it is part of a widespread or systematic attack, which could involve a wide range of other acts listed in that provision. This is an important distinction and States parties, in fulfilling all of their obligations under Article 5, must define enforced disappearance as a crime against humanity in accordance with applicable international law.

Regarding punishment of the crime of enforced disappearance, Article 7 provides that “Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness”. The maximum sentence should not exceed the maximum sentence of life imprisonment for this crime under the Rome Statute and the statutes of other international criminal courts and should therefore also exclude application of the death penalty.

The Convention contains a weak provision on statutes of limitation in Article 8, in contrast with Article VII (1) of the Inter-American Convention on Forced Disappearance of Persons which provides that “[c]riminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.” In order to comply with international law, this prohibition must always apply in the case of the crime of enforced disappearances as a crime against humanity. Moreover, States parties should provide that the crime of enforced disappearance is not subject to any statute of limitation, whether with respect to either criminal or civil proceedings, and apply measures under Article 8 strictly as temporary measures, never allowing time to run on a limitation period during a time when victims are unable effectively to seek justice or reparation due to obstacles.

On a similar note, States parties must ensure the following: that they prohibit amnesties for enforced disappearance, eliminate any barriers to exercising jurisdiction over the offence of enforced disappearance, ensure that the crime of enforced disappearance may be tried only by competent ordinary courts, and not in military courts, and recognize the right of victims to

full reparation for this crime. The checklist itself provides specific guidance to legislative drafters on all of these points, for example setting out some changes that should be made to law and administrative procedures in order to provide victims with access to specific remedies, such as obtaining declarations of absence for unresolved cases.

Finally, on this point, Amnesty International emphasizes that States parties must implement the Convention not only in law, but in practice, including the adoption of a long-term, comprehensive plan that involves establishment of effective training programs for law enforcement and other personnel. Moreover civil society organisations, including associations of victims and their families, should be consulted and included during the process of drafting implementing legislation and national action plans.

The third challenge: effective use of the Convention in situations of enforced disappearance

To be sure, it is important to achieve global recognition that enforced disappearance is a human rights violation that individuals have the right to be protected from *and* a crime under international law that can be punished through the full weight of the law as I have outlined briefly here. Recourse to the rapid response mechanism that is the Working Group on Enforced and Involuntary Disappearance or indeed the new Committee or other international mechanisms, such as the International Criminal Court or Inter-American Court of Human Rights, should be the latter lines of defence – although today they are still of critical importance when States violate their obligations to protect, respect, and fulfil the rights of victims of enforced disappearance.

For the time being, it is sadly true that they are likely to be often needed. It will be a challenge to encourage States to shrug off the all too common lack of will to address widespread or systematic situations of human rights violations and ensure that when the Committee refers such a situation concerning enforced disappearances to the UN General Assembly or Secretary General pursuant to Article 34 of the Convention, they respond with a sense of urgency. The International Criminal Court may also have a role to play in respect of instances of widespread or systematic practice of enforced disappearances, and in this regard it is important to note that the Committee can also bring urgent situations to the attention of the UN Secretary General, who may in turn address the Security Council.

AI's recommendations – the role of the Committee on Enforced Disappearances

While you may rest assured that Amnesty International will continue to urge States to sign and ratify the Convention, to implement it fully in domestic law, and to fulfil their reporting

requirements to the Committee through a number of targeted campaigns on each continent over the next two years, we also believe that the role of the Committee is key. Regarding the low number of ratifications and declarations under Articles 31 and 32 of the Convention, the Committee should, as it did through the letter dated 25 January of this year call on all States to ratify or accede to the treaty. While doing so the Committee should recall to States becoming party to the Convention that interpretative declarations which may amount to prohibited reservations – such as the one made by Germany regarding state immunity- should not be made or, if already made, should be promptly withdrawn.

Concluding remarks

Hundreds of thousands of persons have been the victim of this crime. Enforced disappearance saw a resurgence in Latin America in the 1950s and to this day Amnesty International continues to document cases of enforced disappearance on every continent and to identify persistent impunity and obstacles to justice, truth, and reparation for victims of enforced disappearance and their relatives. The international community must keep this fact in the forefront as they face the challenges of building a strong global response to combating impunity for this crime.