

General comment

Enforced disappearances as a crime against humanity

Preamble

The 1992 *Declaration for the Protection of All Persons from Enforced Disappearances* affirms the connection between enforced disappearances and crimes against humanity. It states, in the 4th Preambular paragraph that the “systematic practice [of enforced disappearances] is by its very nature a crime against humanity”.

The Working Group considers that this provision needs to be interpreted in the view of legal developments which have occurred since 1992.

Based on the foregoing the Working Group has decided to issue the following general comment:

General Comment

1. The notion of crimes against humanity has been recognized for a long time in international law. The connection between enforced disappearances and crimes against humanity was explicitly acknowledged in the 1983 Resolution 666 (XIII-0/83) of the General Assembly of the Organisation of American States, which described the practice of enforced disappearances *per se*, as crime against humanity: in other words, any act of enforced disappearance is considered, according to this text, to be a crime against humanity.
2. The 1994 Inter-American *Convention on Forced Disappearance of Persons* reaffirms, in its 6th Preambular paragraph “that the systematic practice of enforced disappearances of persons constitutes a crime against humanity”.
3. Article 18 of the 1996 International Law Commission draft *Code of Crimes Against Peace and Security for Mankind* defines crimes against humanity as the following: “A Crime against Humanity means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organisation or group”; this definition is applicable to all crimes enumerated in the article, among which enforced disappearances.
4. Article 7 paragraph 1, of the 1998 Rome Statute establishing the International Criminal Court, also gives a general definition of the concept of crime against humanity, applicable to all crimes listed in the above mentioned paragraph, including enforced disappearance. This definition includes several criteria: « For the purposes of this present Statute “crimes against humanity” means any of the following acts where committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack ».
5. Article 5 of the 2006 International Convention on the Protection of All Persons Against Enforced Disappearances states 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.”
6. This provision, while recalling the criteria which are similar to those enunciated in the draft Code of the International Law Commission, is in fact essentially referring to other instruments or sources of international law, by mentioning “crime against humanity *as defined in applicable international law*”. *Travaux préparatoires* confirm that States did not intend to give a *definition* of

enforced disappearances as a crime against humanity, but mainly to recall that, in accordance with other instruments and sources of international law, this qualification was accepted.

7. Drawing from the case law of international tribunals as well as from the Statute of the International Criminal Court, it can be seen that crimes against humanity are crimes which are committed in a context. In other words, crimes against humanity are characterized by *contextual elements*. Those specific elements make it possible to differentiate, for instance, murder as a common crime from murder when occurring as a crime against humanity.
8. The same applies to enforced disappearances, which can only be qualified as crimes against humanity when committed in a certain context.
9. Thus, the 4th Preambular paragraph of the 1992 Declaration is no longer in line with existing international law. Persuasive evidence of existing international law on this matter can be found in the case law of the international criminal tribunals, as well as hybrid tribunals and in the Rome Statute of the International Criminal Court.
10. The case law of the two *ad hoc* international criminal tribunals has been settled, among others, by the judgement of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia Appeals Chamber in the *Kunarac and others case* (12th June 2002, IT-96-23 & 23/1-A, see par. 71-105), in which the Appeals Chamber considered that the contextual elements of the crime against humanity are the following :
 - a. there has been an “attack”
 - b. the attack was targeting any civilian population;
 - c. this attack must have been widespread *or* systematic;
 - d. the perpetrator had knowledge of the attack.
11. These same elements are repeated in Article 7(1) of the Statute of the International Criminal Court which states: “For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.
12. The Statute of the International Criminal Court has been ratified by more than 100 countries. In a landmark decision, Preliminary Chamber I of the International Criminal Court extensively cited the *Kunarac* judgement to interpret Article 7(1) (*The Prosecutor v. Ahmad Muhammad Harun (« Ahmad Harun ») and Ali Muhammad Ali Abd-Al-Rahman (« Ali Kushayb »)*, n° ICC-02/05-01/07, Decision on the Prosecutor application under Article 58(7) of the Statute, 27 April 2007, par. 60-62).
13. It is also to be noted that Article 7(1) has been incorporated in the statutes of other international and hybrid tribunals, including the Sierra Leone Special Court, the Special Panels for Serious Crimes in Timor-Leste and the Extraordinary Chambers in the Courts of Cambodia.
14. The Working Group is thus convinced that the definition given by Article 7(1) of the Statute of the International Criminal Court now reflects customary international law and can thus be used to interpret and apply the provisions of the Declaration.
15. When there are claims of practices of enforced disappearances which may amount to crimes against humanity, the Working Group will evaluate these claims in the light of the criteria listed in Article 7(1) of the Rome Statute, as interpreted by international and hybrid tribunals and, if appropriate, will refer them to the competent authorities, be they international, regional or domestic.