

Statement of Mr. Solomon Sacco – Amnesty International

Commemoration of the 10th Anniversary of the International Convention for the Protection of All Persons from Enforced Disappearances.

Punishment of the crime of enforced disappearance

People literally disappear, from their loved ones and their community, when state officials (or someone acting with state consent) grab them from the street or from their homes and then deny it, or refuse to say where they are.

Enforced disappearance is perhaps one of the most deliberately and chillingly cruel forms of intimidation and punishment aimed not just at political and social activists but at their families and communities. This applies not only to those subjected to the horror of secret detention and the physical and mental torture that goes along with it but also for families and friends who have to live, often for the rest of their lives, with the almost, but only almost, certainty that their wife or daughter or friend is dead. Enforced disappearances are therefore crimes under international law and must be punished, wherever they occur, regardless of whether they occur within a nexus to an armed conflict or as part of a widespread or systematic attack on a civilian population.

Enforced disappearances have occurred in various situations over history – from the Night and Fog operation during the Second World War, to suppression of dissent during the military dictatorships in South American states to systematic disappearances during the Balkan conflicts. Enforced disappearances are criminalised under national law, customary international law (both as war crimes and crimes against humanity¹); the Rome Statute and the Convention obliges all states to criminalise the practice.

¹ See for example Prosecutor v. Šimšić (Bosnia Herzegovina) but also going back to the conviction of Keitel at the Nuremberg trials.

Numerous states have incorporated the Rome Statute's prohibition of enforced disappearance into their criminal codes. Over ninety states have signed the Convention on the Protection of All Persons from Enforced Disappearance, which obliges parties to criminalize the offense under their domestic laws. However, nearly ten years have passed since this fundamental human rights treaty was adopted by the General Assembly and only 51 states have become party to the Convention; in addition, only 19 states so far have made the declaration under article 31 and 18 the one contained in article 32.

There is of course a complicated web of international humanitarian, international criminal and international human rights standards to be applied to the criminalisation and punishment of enforced disappearances – therefore non ratification of the Convention does not provide cover to governments that perpetrate or allow the perpetration of enforced disappearances. However, an important weakness of the Rome Statute, for example, is that prosecution of enforced disappearance is limited to situations where it can be charged as war crimes or crimes against humanity. It is therefore important for further ratification and domestication of the Convention to ensure that enforced disappearances are fully criminalised across the entire world. This is because the parties to the convention undertake to:

- ensure that enforced disappearance constitutes an offence under their criminal law;
- investigate acts of enforced disappearance and bring those responsible to justice;
- establish jurisdiction over the offence of enforced disappearance when the alleged offender is within its territory, even if they are not a citizen or resident (the obligation to prosecute or extradite);
- co-operate with other states in ensuring that offenders are prosecuted or extradited, and to assist the victims of enforced disappearance or locate and return their remains.

Amnesty International works for the ratification and implementation of the Convention by as many states as possible. In doing so our members call on states to make the declarations under articles 31 and 32 of the Convention – the articles which recognize the competence of the Committee to receive and consider communications from or on behalf of individuals and other states, respectively.

Amnesty International also recalls that, while depositing the instrument of ratification/adherence to the Convention, states should not make any reservation - nor any 'interpretative declaration' which may amount to a reservation - able to defeat the object and purpose of the treaty or, if already made, should be promptly withdrawn.

Likewise, Amnesty International focuses its attention on the effective implementation of the Convention into national law, which is as important as the ratification itself. National criminalisation of enforced disappearances and effective systems to ensure investigations and prosecutions is invaluable to ending this insidious practice. Of course, one of the concerns with the use of domestic law is that enforced disappearances may be prosecuted as kidnapping and murder rather than as enforced disappearance (as in Argentina's 1985 trial of the Juntas). Depending on the domestic law concerned this may lead to a lack of accountability – thus we call for states to domesticate the convention and ensure that enforced disappearances are prosecuted as such.

As some of you may know Amnesty International launched in 2011 a Checklist for the effective implementation of the Convention into national law, modelled on the checklists of the implementation of the Rome Statute published in 2001 and 2008. The Checklist is available today in English, French, Arabic, Spanish, Indonesian and Chinese and it is aimed at providing guidance to states in implementing the Convention into national law. It is also a helpful tool to civil society in participating in the drafting of implementing legislation or in commenting on draft implementing legislation.

Regarding implementation Amnesty International is urging all states party to:

- ensure that enforced disappearance constitutes an offence under its criminal law, with the consequences provided in conventional and customary international law, either committed by states agents or non state agents;
- ensure 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;
- ensure that they exclude statutes of limitation for the crime of enforced disappearance with respect to either criminal or civil proceedings;
- prohibit amnesties for enforced disappearance, recognize the right of victims to full reparation for this crime and exclude the death penalty for this crime;
- ensure that they incorporate a single rule of superior responsibility for commanders and superiors in accordance with the strictest requirements of international law (unlike CPED);
- states parties must exclude superior orders as a ground for excluding criminal responsibility, although it can be a ground for mitigation of punishment, and expressly provide that the order to commit or to participate in any way in the crime of enforced disappearance is “manifestly unlawful” or criminal;
- Establish appropriate penalties for the crime of enforced disappearance with a maximum sentence of life imprisonment, excluding in any case the death penalty in accordance with international law and standards;
- States parties must provide that their courts can exercise universal jurisdiction over any case of enforced disappearance. They should eliminate any barriers to exercising it, including the requirement that the suspect be present in their territory before an investigation can be opened or an extradition request made.

- States parties should provide that only ordinary courts have jurisdiction over the crime of enforced disappearance and that no military court or other special court have jurisdiction over this crime.
- State parties should provide that their courts will not recognize any claim to immunity from arrest and prosecution for the crime of enforced disappearance.
- Take the necessary measures to hold criminally responsible at least any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance, as well as a superior who knew, 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;
- Enact legislation providing for reparations to victims and their relatives including the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition;
- Eliminate all obstacles over extradition and mutual legal assistance between states;
- Prohibit secret detentions.