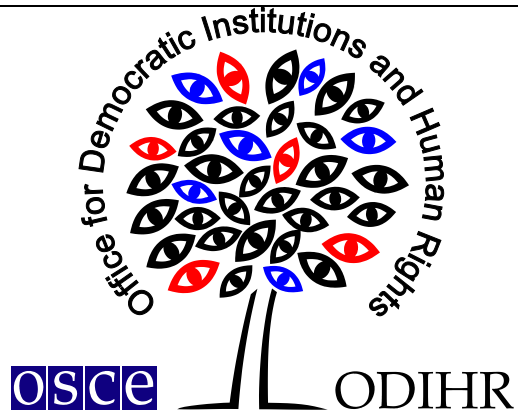


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OPINION

ON THE DRAFT ACT ON THE

CRIME OF ENFORCED DISAPPEARANCE

OF TUNISIA

**based on an unofficial English translation of the Draft Act commissioned by the
OSCE Office for Democratic Institutions and Human Rights**

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I. INTRODUCTION

1. *On 15 February 2016, the Minister in Charge of Relations with Constitutional Institutions, Civil Society and Human Rights of the Republic of Tunisia (hereinafter “the Minister”) sent a letter to the OSCE Office for Democratic Institutions and Human Rights (hereinafter “OSCE/ODIHR”) asking the OSCE/ODIHR to review the Draft Act on the Crime of Enforced Disappearance of Tunisia (hereinafter “the Draft Act”). Particularly, the Minister asked that the legal analysis focus on the Draft Act’s compliance with the International Convention for the Protection of All Persons from Enforced Disappearance, given Tunisia’s intention to make its legal framework compliant with the norms and principles contained therein.*
2. *On 17 February 2016, the OSCE/ODIHR Director responded to this request, confirming the Office’s readiness to prepare a legal opinion on the compliance of the Draft Act with international human rights standards and OSCE commitments.*
3. *The current Opinion was prepared in response to the above-mentioned Minister’s request. The OSCE/ODIHR conducted this assessment as part of the OSCE’s framework for enhanced co-operation with OSCE Mediterranean Partners for Co-operation, as provided by the Charter for European Security (1999)¹ and by OSCE Ministerial Council Decision 5/11.²*

II. SCOPE OF REVIEW

4. The scope of this Opinion covers only the Draft Act, which is also reviewed in light of other criminal law and procedure provisions, as appropriate and relevant. Thus limited, the Opinion does not constitute a full and comprehensive review of the entire legal and institutional framework pertaining to the prevention of and protection from enforced disappearances, and the prosecution of the respective perpetrators in the Republic of Tunisia.
5. The Opinion raises key issues and provides indications of areas of concern. In the interest of conciseness, the Opinion focuses more on areas that require amendments or improvements rather than on the positive aspects of the Draft Act. The ensuing recommendations are based on international and regional standards relating to human rights and fundamental freedoms, as well as relevant OSCE commitments. The Opinion also highlights, as appropriate, good practices from other States in this field. Moreover, in accordance with the 2004 OSCE Action Plan for the Promotion of Gender Equality and commitments to mainstream a gender perspective into OSCE activities, the Opinion analyses the potentially different impact of the Draft Amendments on women and men.³
6. This Opinion is based on an unofficial English translation of the Draft Act, commissioned by the OSCE/ODIHR, which is attached to this document as an Annex. Errors from translation may result.
7. In view of the above, the OSCE/ODIHR would like to make mention that the Opinion is without prejudice to any written or oral recommendations and comments related to this

¹ See the Charter for European Security, Istanbul, November 1999, par 48, available at: <http://www.osce.org/mc/17502>.

² See MC.DEC/5/11 of 7 December 2011 on Partners for Co-operation, available at <http://www.osce.org/mc/88839?download=true>.

³ See par 32 of the OSCE Action Plan for the Promotion of Gender Equality adopted by Decision No. 14/04, MC.DEC/14/04 (2004), available at <http://www.osce.org/mc/23295?download=true>.

and other related legislation of the Republic of Tunisia that the OSCE/ODIHR may make in the future.

III. EXECUTIVE SUMMARY

8. At the outset, the OSCE/ODIHR commends the legal drafters for this attempt to render the Tunisian legal framework compliant with the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter ‘the UN Convention’). The Draft Act contains numerous positive features, which are overall in line with the provisions of the UN Convention, including an absolute prohibition of enforced disappearances and the introduction of an autonomous offence of “enforced disappearance” into Tunisian criminal legislation, subject to the jurisdiction of ordinary courts.
9. At the same time, the Draft Act contains certain provisions which would benefit from some revision in order to fully implement Tunisia’s obligations under the UN Convention. Among others, the Draft Act does not contain stand-alone offences for certain serious acts, such as enforced disappearance constituting a crime against humanity or the falsification, concealment or destruction of documents attesting to the true identity of children victims of enforced disappearances. The Draft Act also does not expressly criminalize all forms of participation, as required in Article 6 of the UN Convention. Additionally, it would be advisable for Tunisian legislation to specify that for cases of enforced disappearances, general provisions of the Criminal Procedure Code pertaining to immunities, amnesty and pardons, as well as statutes of limitation should not apply, or at a minimum not exempt from or unduly limit the extent of criminal proceedings or sanctions. Also, the respective provisions should provide for penalties that are commensurate with the gravity of the offence. Finally, the drafters are urged to exclude the death penalty as a possible penalty.
10. Overall, the Draft Act likewise could be enhanced so as to provide a comprehensive legal framework, including gender and child-sensitive measures, to ensure adequate assistance and protection of all victims, including the relatives of the disappeared persons, and provide them with access to effective remedies.
11. In order to further improve the compliance of the Draft Act with international human rights standards and good practices, the OSCE/ODIHR makes the following key recommendations:
 - A. to revise Article 2 of the Draft Act to ensure that enforced disappearance is qualified as a *continuous* offence which lasts until the victim’s fate and whereabouts are established, while ensuring that this provision covers a broad array of cases, including legal or *illegal* arrest or any other forms of deprivation of liberty; [pars 28 and 30-32]
 - B. to criminalize as autonomous offences the following acts:
 - the widespread or systematic practice of enforced disappearance as a crime against humanity; [par 35]
 - the wrongful removal of children subjected to enforced disappearance, of children whose father, mother or legal guardian is subjected to enforced disappearance or of children born while their mothers are subjected to enforced disappearance; [par 41]

- the falsification, concealment or destruction of documents attesting to the true identity of such children. [par 41]
- C. to ensure that various forms of participation in the commission of enforced disappearances, including superior/command responsibility, are criminalized and met with adequate penalties in line with Article 6 of the UN Convention; [pars 37-40]
- D. to ensure that punishment is commensurate with the gravity of the crime and in accordance with international human rights standards by:
 - removing the possibility to impose the death penalty; [par 45]
 - increasing the range of sanctions provided by the Draft Act so that they are harsher than those provided for crimes of lesser gravity such as “abduction”; [pars 46-47 52]
 - providing for additional aggravating circumstances when the crime is accompanied by sexual violence or leads to an unwanted pregnancy; [par 48]
 - including the possibility to disqualify the convicted person from public service. [par 60]
- E. to consider excluding convicted or alleged perpetrators of enforced disappearance from special amnesty laws, pardons or similar measures that may exempt them from or unduly limit or reduce the extent of criminal proceedings or sanctions, while also excluding the possibility to invoke immunities; [pars 52 and 57]
- F. to strengthen the provisions relating to the protection and support of witnesses and victims by:
 - providing that the alleged perpetrator shall be suspended from official duties while the investigation is pending; [par 62]
 - including in the Draft Act and/or the Criminal Procedure Code protective measures against the ill-treatment or intimidation of the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation; [pars 73-74]
 - establishing mechanisms by which victims’ relatives can participate in the investigation, and be informed about its progress and results; [pars 72 and 90]
 - clarifying and supplementing the provisions relating to the reparation and assistance of victims, also by incorporating gender and child-sensitive measures. [pars 94-100]
- G. to strengthen the provisions relating to the prosecution and investigation of enforced disappearance cases by:
 - providing that a preliminary investigation should be initiated as soon as a first complaint is received; [par 65]
 - allowing the prosecutor to forward the case to the investigating judge even in the absence of a complaint; [par 65]
 - introducing a mechanism whereby the legal merits of the decision of the prosecutor to not investigate or prosecute a case of enforced disappearance can be challenged; [par 66]

- specifying that investigations into enforced disappearances should continue for as long as the fate and the whereabouts of the disappeared person remain unclear. [pars 67 and 90]
- H. to introduce a legal procedure to review adoptions and placement of children, which could then, where appropriate, lead to the annulment of any adoption or placement that originated in an enforced disappearance; [par 101]
- I. to provide for the possibility for the relatives of an enforced person to obtain a “declaration of absence due to enforced disappearance” to facilitate the access of relatives of the disappeared person to his/her assets, as well as to financial support and other social benefits; [par 102] and
- J. to enhance the protection of persons deprived of their liberty and prevent enforced disappearances, by ensuring immediate access to a lawyer in all cases and his or her presence during interrogations, obliging authorities to inform an arrested person about all his/her rights, including the right to remain silent and to have access to an attorney, and ensuring that the official register/recording of persons deprived of their liberty include all the information listed in Article 17 of the UN Convention. [pars 105-109]

Additional Recommendations, highlighted in bold, are also included in the text of the opinion.

IV. ANALYSIS AND RECOMMENDATIONS

1. International Standards Related to the Protection of All Persons from Enforced Disappearances

12. State-induced forced disappearances of political opponents or of other persons or groups, often due to their ethnic origin, religious beliefs, human rights work, among others, continue to constitute a global phenomenon. Considered as complex and extremely grave human rights violations, enforced disappearances have a long-lasting and devastating impact on victims, including relatives. Over the past forty years, the notion of States’ obligations to adopt legal and other measures to prevent and combat enforced disappearances has become increasingly prevalent, both at the regional and international levels.
13. The major international instrument addressing enforced disappearances that is binding upon the Republic of Tunisia is the International Convention for the Protection of All Persons from Enforced Disappearance⁴ (hereinafter “the UN Convention”), which was adopted by the UN General Assembly in 2006. The Draft Act must also be read against the background of recent Concluding Observations by the UN Committee on Enforced

⁴ UN International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly by Resolution A/RES/61/177 of 20 December 2006 (which entered into force on 23 December 2010). The Republic of Tunisia ratified the Convention on 29 June 2011 and it entered into force for Tunisia on 29 July 2011 pursuant to Article 39 par 1 of the Convention.

- Disappearances⁵ (hereinafter “the UN Committee”), which contain a number of recommendations on necessary legal reform.
14. In 1992, prior to the development of the UN Convention, the UN General Assembly adopted a Declaration on the Protection of All Persons from Enforced Disappearance⁶ (hereinafter “1992 UN Declaration”). Although non-binding, this was the first comprehensive framework that tackled the phenomenon of enforced disappearances, and clearly condemned any such act as an offence to human dignity. The already existing UN Working Group on Enforced or Involuntary Disappearances (hereinafter “the UN Working Group”)⁷ was then entrusted with monitoring the progress of States in fulfilling their obligations deriving from the UN Declaration and assisting in its implementation. The UN Working Group has since adopted a number of General Comments to clarify the various State obligations deriving from the UN Declaration, which serve as useful reference documents for the purposes of this Opinion.⁸
15. Article 2 of the UN Convention defines “enforced disappearance” as “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”. Additionally, Article 3 requires State Parties to investigate acts of 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”. The UN Convention prohibits enforced disappearances altogether, without any exception.⁹ Its Article 4 also requires States to “take the necessary measures to ensure that enforced disappearance constitutes an offence under [...] criminal law”. Moreover, pursuant to Article 5 of the UN Convention, 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”.
16. At the same time, the Republic of Tunisia is also a State Party to the Rome Statute of the International Criminal Court¹⁰ (hereinafter “the Rome Statute”), which likewise defines enforced disappearance as a crime against humanity where it is part of a widespread or systematic attack directed against any civilian population. Under the Rome Statute, the definition of “enforced disappearance” differs slightly from that of the UN Convention, as the Statute also requires the “intention of removing [the person] from the protection of the law for a prolonged period of time” and mentions “political organizations” as potential perpetrators of the offense.

⁵ See the Concluding Observations of the UN Committee on Enforced Disappearances on the Report submitted by the Republic of Tunisia, CED/C/TUN/CO/1 of 18 March 2016, advanced unedited version (hereinafter “2016 UN Committee’s Concluding Observations on Tunisia”), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED%2fC%2fTUN%2fCO%2f1&Lang=en.

⁶ UN Declaration on the Protection of All Persons from Enforced Disappearance, UN General Assembly Resolution 47/133, 18 December 1992 (hereinafter “the 1992 UN Declaration”), available at <http://www.un.org/documents/ga/res/47/a47r133.htm>.

⁷ See Resolution 20 (XXXVI) of 29 February 1980 of the Commission on Human Rights establishing the Working Group on Enforced or Involuntary Disappearances (hereinafter “the UN Working Group”), available at http://www.ohchr.org/Documents/Issues/Disappearances/E-CN.4-RES-1980-20_XXXVI.pdf. The last resolution renewing the mandate of the Working Group for a further period of three years, A/HRC/RES/27/1, was adopted by the Human Rights Council in September 2014.

⁸ All General Comments of the UN Working Group are available at <http://www.ohchr.org/EN/Issues/Disappearances/Pages/GeneralComments.aspx>.

⁹ In Article 1 of the UN Convention, it is stated that “no exceptional circumstances”, such as war, threat of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances. See also Article 7 of the 1992 UN Declaration.

¹⁰ Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998, which entered into force on 1 July 2002. The Republic of Tunisia deposited its instrument of accession of the Rome Statute on 24 June 2011 and it entered into force for Tunisia on 24 July 2011, pursuant to Article 126 par 2 of the Rome Statute.

17. Enforced disappearances lead to the violation of a number of human rights and fundamental freedoms, such as the rights to life, liberty and security of persons, to recognition as a person before the law, to a fair trial, to privacy and protection of family life, to health and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.¹¹ Such rights and freedoms are set out in the International Covenant on Civil and Political Rights¹² (hereinafter “ICCPR”), the International Covenant on Economic, Social and Cultural Rights¹³ (hereinafter “ICESCR”), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁴ (hereinafter “UNCAT”). At the regional level, the African Charter on Human and Peoples’ Rights¹⁵ (hereinafter “ACHPR”) also sets out similar rights and standards, including the right to have one’s legal status recognized, the prohibition of arbitrary arrest and detention, and of torture, cruel, inhuman or degrading punishment and treatment.
18. In light of this, within the OSCE region, enforced disappearances are contrary to numerous OSCE commitments, including those stipulating that no person shall be subject to arbitrary arrest or detention;¹⁶ prohibiting torture and other cruel, inhuman or degrading treatment or punishment and ensuring that States take effective legislative, administrative, judicial and other measures to prevent and punish such practices;¹⁷ as well as commitments pertaining to the rights to a fair trial and to an effective remedy.¹⁸

2. General Comments

19. At the outset, it is noted that the Draft Act aims to address a variety of matters, primarily regarding the criminalization of acts of enforced disappearances and related procedural measures to investigate, prosecute and judge such crimes. However, it also includes a few articles (particularly Articles 35 to 38) regarding the assistance and protection of victims of enforced disappearances.
20. The Draft Act contains numerous positive features which are overall in line with the UN Convention. In particular, Article 1 par 2 is welcome, as it incorporates an absolute

¹¹ See UN Working Group, *General Comment on Enforced Disappearance as a Continuous Crime* (UN Working Group’s Report 2010), Document A/HRC/16/48, par 2, available at <http://www.ohchr.org/EN/Issues/Disappearances/Pages/GeneralComments.aspx>. See also UN Human Rights Committee, *General Comment No. 6* (1982), par 4, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6630&Lang=en, where the Committee expressly states that enforced disappearances constitute a breach of Articles 6 and 7 of the ICCPR, and emphasizes that “States Parties should also take specific and effective measures to prevent the disappearance of individuals, something which [...] leads too often to arbitrary deprivation of life”.

¹² UN International Covenant on Civil and Political Rights, adopted by the UN General Assembly by Resolution 2200A (XXI) of December 1966. The Republic of Tunisia ratified this Covenant on 18 March 1969 and it entered into force in Tunisia on 23 March 1976, pursuant to Article 49 par 2 of the ICCPR.

¹³ UN International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly by Resolution 2200A (XXI) of December 1966. The Republic of Tunisia ratified this Covenant on 18 March 1969.

¹⁴ UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by UN General Assembly resolution A/RES/39/46 of 10 December 1984. The Republic of Tunisia ratified this Convention on 23 September 1988.

¹⁵ African (Banjul) Charter on Human and Peoples’ Rights, adopted by the African States members to the Organization of African Unity (the African Union since 2001) by decision OAU Doc. CAB/LEG/67/3 of 27 June 1981. The Republic of Tunisia ratified this Charter on 16 March 1983.

¹⁶ See par 23 of the OSCE Vienna Document (1989). See also the Moscow Document (1991) where OSCE Participating States guarantee that no one will be deprived of one’s liberty except on such grounds and in accordance with procedures established by law and that persons deprived of their liberty shall be promptly informed about their rights.

¹⁷ See in particular par 23 of the OSCE Vienna Document (1989); and the Istanbul Charter for European Security of 1999 where OSCE participating States committed to eradicate torture and other cruel, inhumane or degrading treatment or punishment in the OSCE area and to “promote legislation to provide procedural and substantive safeguards and remedies to combat these practices” (par 21).

¹⁸ See in particular par 13.9 of the OSCE Vienna Document (1989); and pars 5.10, 5.11, 5.21, 11 and 40.5 of the OSCE Copenhagen Document (1990).

prohibition of enforced disappearances, as also recommended by the UN Committee.¹⁹ It is noted, however, that, when specifying that no exceptions to this rule exist, this provision refers to war, threat, instability or “any other exceptional circumstance” instead of “any other public emergency” (as mentioned by the UN Convention); unless an error of translation, it is recommended to align the wording of Article 1 par 2 of the Draft Act with that of Article 1 par 2 of the Convention. Moreover, it is laudable that the Draft Act seeks to introduce an autonomous offence of “enforced disappearance” into Tunisian legislation, which directly addresses one of recommendations made by the UN Committee.²⁰ At the same time, the Draft Act does not contain stand-alone offences for certain acts, such as enforced disappearance constituting a crime against humanity or the falsification, concealment or destruction of documents attesting to the true identity of children victims of enforced disappearances, contrary to the provisions of the UN Convention (see particularly Section 4 *infra*).

21. While the Criminal Code of Tunisia expressly recognizes that certain matters may be covered by provisions outside the Code, it also specifies that laws or decrees that are contrary to the Criminal Code should be abrogated.²¹ Article 4 of the Draft Act appears to contradict this, as it states that the Criminal and Criminal Procedure Codes and other special legislation regarding other crimes shall apply to the crimes of enforced disappearances only insofar as their provisions are not inconsistent with the provisions of the Draft Act. This seems to define the Draft Act as a “*lex specialis*”, which means that it should take precedence over other pieces of legislation. Moreover, many provisions of the Draft Act overlap or seem to mirror those found in the Criminal and Criminal Procedure Codes, which may lead to ambiguities or doubts concerning their applicability and scope.
22. The Draft Act is a stand-alone law, and does not aim to amend and supplement the Criminal and Criminal Procedure Codes, as done in 2011 during the reform of the legal framework pertaining to the criminal offense of torture.²² It is essential to ensure the overall coherence of criminal legislation, while seeing to it that penalties are proportionate to the seriousness of the respective crime. To avoid duplication and possibly conflicting provisions, **it may thus be preferable to reformulate certain provisions of the Draft Act into amendments to the existing criminal legislation, rather than regulate the issue of enforced disappearances in a separate law.** At the same time, many aspects pertaining to the criminalization of certain offences linked to enforced disappearances and related procedural matters that are addressed in the UN Convention are not covered by the Draft Act (see e.g., Sections 4.1 to 4.3 and 5.3 and 5.4 *infra*). Moreover, certain general provisions of the Criminal and Criminal Procedure Codes also do not appear to be fully compliant with the UN Convention (see e.g., Sections 5.3, 6.4 and 9 *infra*). Also for this reason, it may be more practical to review and supplement the Criminal and Criminal Procedure Codes.

¹⁹ *Op. cit.*, footnote 5, par 13 (2016 UN Committee’s Concluding Observations on Tunisia) which states that Tunisia must “take the legislative measures necessary to specifically incorporate into domestic law an absolute prohibition of enforced disappearance, in line with article 1(2) of the Convention”.

²⁰ *ibid.* pars 14-15 (2016 UN Committee’s Concluding Observations on Tunisia), where the UN Committee recommended that Tunisia adopt “the legislative measures necessary to ensure that, as soon as possible, a) enforced disappearance is incorporated into domestic law as an autonomous offence, in accordance with the definition contained in article 2 of the Convention, and that the offence carries appropriate penalties which take into account its extreme seriousness, avoiding the imposition of the death penalty. It also invites the State party to establish the specific mitigating and aggravating circumstances provided for in article 7(2) of the Convention; b) enforced disappearance as a crime against humanity is criminalised in accordance with the standards provided for under article 5 of the Convention”.

²¹ See Decree of 9 July 1913 promulgating the Criminal Code, as last amended by Decree-Law no. 2011-106 of 22 October 2011, available at <http://www.legislation-securite.tn/fr/node/30894> (in French).

²² See Decree-Law n° 2011-106 of 22 October 2011, on the criminalization of torture and amending the Criminal Code and Criminal Procedure Code of Tunisia, available at <http://www.legislation-securite.tn/fr/node/30461> (in French).

3. Definition of “Enforced Disappearance” and Other Terms

3.1. Definition of “Enforced Disappearance”

23. According to Article 2 of the UN Convention, three constitutive elements are required to qualify an act as one of “enforced disappearance”.²³ These involve (i) any form of deprivation of liberty, whether initially legal or not;²⁴ that is (ii) carried out by agents of the state or by persons or groups of persons acting with the authorization, support or acquiescence of the state; and where (iii) the conduct is followed by either a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person.
24. The definition of the crime of enforced disappearance contained in Article 2 par 1 of the Draft Act is a step in the right direction, but would benefit from some amendments to ensure that it is fully in line with international standards.
25. While the first constitutive element of the offence meets international standards, the list of potential perpetrators (“public officials or alike, or [...] persons or groups of persons acting with the authorization or support of the state or by its direct or indirect consent”) is not quite clear, in particular the phrase “public officials *or alike*”. The latter could raise issues with regard to the *nullum crimen, nulla poena sine lege* principle, which requires criminal liability and punishment to be based on clear and precise legal provisions that can guide the behaviour of individuals.²⁵ **If “public officials *or alike*” is meant to refer to the definition of such persons provided under Article 82 (new) of the Criminal Code,²⁶ then this should be expressly mentioned. If not, then, unless the vagueness is due to a translation error, it is recommended to replace the word “alike” with wording closer to that of Article 2 of the UN Convention (“by agents of the State, or by persons or groups of persons acting with the authorization, support or acquiescence of the State”).**
26. It must also be noted that the term “consent” mentioned in the Draft Act is not quite the same as the word “acquiescence” used in the UN Convention, which corresponds to the lowest form of participation; the latter may for instance also result from the failure to exercise due diligence to prevent or investigate reprehensible acts. Unless “indirect consent” is interpreted in such a way, **Article 2 par 1 of the Draft Act should be amended to reflect the wording of the UN Convention. Additionally, Article 5 par 1 of the Draft Act seems to restate *in extenso* the definition of “enforced disappearance” contained in Article 2 par 1, although in slightly different terms; to avoid potentially conflicting provisions, it is recommended to delete this repetition from Article 5 par 1.**

²³ See UN Working Group, *General Comment on Article 4 of the Declaration*, Document E/CN.4/1996/38, par 55, available at <http://www.ohchr.org/EN/Issues/Disappearances/Pages/GeneralComments.aspx>.

²⁴ The UN Working Group has noted that an enforced disappearance may be initiated by an illegal detention, as well as by an “initially legal arrest or detention”; see UN Working Group, *General Comment on the definition of enforced disappearance* (2007 UN Working Group’s Report), Document A/HRC/7/2, par 7, available at <http://www.ohchr.org/EN/Issues/Disappearances/Pages/GeneralComments.aspx>.
http://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf.

²⁵ See e.g., UN Human Rights Committee, General Comment No. 29 on Article 4 of the ICCPR, CCPR/C/21/Rev.1/Add.11, 31 August 2001, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.11&Lang=en.

²⁶ See <http://www.legislation-securite.tn/fr/node/30894> (in French). Article 82 (new) of the Criminal Code defines a “public official” as “any person vested with public authority or performing functions with one of the State services or a local authority or an agency or a public institution or a public enterprise, or exercising functions with any other entity involved in the management of a public service. Persons “alike a public official” is defined as “any person having the status of a public official, or holding an elective office for public service, or designated by the judiciary to perform judicial duties”.

27. Further, Article 2 par 1 of the Draft Act ends by stating that the three constitutive elements “thus depriv[e] [the victim] of the protection of the law”. Both the UN Working Group and the UN Committee have pointed out that the “placement of the victim outside the protection of the law”, as mentioned in Article 2 of the UN Convention, is a consequence and not an additional constitutive element of the offence.²⁷ While assuming that this is what is meant by the current formulation of Article 2 par 1, it would be helpful **to somewhat clarify this aspect, to avoid misinterpretations.**²⁸
28. Finally, the Draft Act does not explicitly specify the “continuous nature” of the offence of enforced disappearance, meaning that the crime continues until the victim’s fate and whereabouts are established.²⁹ This is extremely important, in particular where the offence was initiated before enforced disappearance was criminalized under domestic law.³⁰ **The Draft Act should reflect the continuous nature of the crime of enforced disappearance.**

3.2. Other Definitions

29. Article 2 paragraphs 2 to 5 contain the definitions of the terms “arrest”, “detention”, “abduction” and “deprivation of liberty”. Given the very general nature of these terms, it is doubtful whether such definitions are necessary, or useful for the purposes of the Draft Act.
30. The terms “arrest”, “detention” or “deprivation of liberty” are not problematic by themselves – they only become so in the context of enforced disappearances, where such deprivations of liberty are either denied to have taken place, or where the disappeared person and his/her whereabouts are concealed. Moreover, enforced disappearances may be initiated by illegal arrests, detentions or deprivations of liberty, but also by perfectly legal ones.³¹ Again, it is the ensuing circumstances (i.e., the fact of denying that the deprivation of liberty occurred or not providing information about the whereabouts of a person) which determine whether what has happened is indeed an enforced disappearance. As such, the definition of the term “arrest” in Article 2 par 2 of the Draft Act is especially problematic as it refers to the violation of international or domestic law or to “arbitrary” deprivation of liberty, and thus seems to only encompass “unlawful or arbitrary” arrests. Similarly, “detention” is defined by reference to the “undisclosed location” and “illegal confinement” of the victim, which is unduly

²⁷ See UN Working Group, *Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation*, A/HRC/16/48/Add.3, 28 December 2010, pars 29-32, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/179/54/PDF/G1017954.pdf?OpenElement>; see also *opus cit.* footnote 24, par 26 (UN Working Group’s General Comment on the Definition of Enforced Disappearances); and e.g., UN Committee, *Concluding Observations on Paraguay*, doc. CED/C/PRY/CO/1 of 26 September 2014, pars 13-14, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED/C/PRY/CO/1&Lang=En.

²⁸ See e.g., national criminal provisions considered as good practice by the UN Working Group, such as in Bolivia (Art. 292-bis Criminal Code which states: “The person who, with authorization, support or acquiescence from some state agency, deprives the liberty of one or more persons and deliberately, hides and denies information on the recognition of the deprivation of liberty or whereabouts of the person, preventing in this way the exercise of recourses and procedural guarantees, shall be punished to five to ten years of imprisonment”); Colombia (Art. 165 Criminal Code); Venezuela (Art. 180-A Criminal Code).

²⁹ *Op. cit.* footnote 11, pars 1-2 (UN Working Group’s 2010 General Comment on Enforced Disappearance as a Continuous Crime).

³⁰ See Article 17 par 1 of the 1992 UN Declaration; and Article 8 par 1 (b) of the UN Convention. See also *op. cit.* footnote 27, pars 33-34 (2010 UN Working Group’s Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation). See also *op. cit.* footnote 11, pars 1-2 (UN Working Group’s 2010 General Comment on Enforced Disappearance as a Continuous Crime); and also, among others, IACtHR, case of *Heliodoro Portugal v. Panama*, judgment of 12 August 2008, Ser. C No. 186, par 34, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_186_ing.pdf; and ECtHR, case of *Varnava and others v. Turkey*, Grand Chamber judgment of 18 September 2009, par 148, available at <http://hudoc.echr.coe.int/eng/?i=001-94162>.

³¹ *Op. cit.*, footnote 24, par 7 (UN Working Group’s General Comment on the Definition of Enforced Disappearance); see also *op. cit.* footnote 27, pars 22-24 (2010 UN Working Group’s Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation); and UN Committee, case of *Yrasta v. Argentina*, decision of 21 March 2016, CED/C/10/D/1/2013, par 10.3, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED/C/10/D/1/2013&Lang=en (in Spanish only).

restrictive. As a consequence, the definition of “deprivation of liberty” which refers to these terms, is unduly restricted to cases where the law is violated.

31. In comparison, it is worth noting that Article 2 of the Organic Law adopted in 2013 for the establishment of the National Preventive Mechanism against Torture³² of Tunisia contains a very broad definition of “deprivation of liberty”.³³ The definition provided in the Draft Act should be equally broad to ensure the widest possible protection of persons subjected to enforced disappearance. Here, the focus should rather be on whether or not a person is permitted to leave at will any specific location, be it private or public.³⁴
32. In light of the above, the legal drafters should **reconsider the definitions of “arrest” and “detention” in Article 2 pars 2 and 3 of the Draft Act, and revise the definition of “deprivation of liberty” to ensure the broadest possible coverage, including initially legal or illegal arrests and any other forms of deprivation of liberty.**
33. Regarding the definition of the term “abduction”, **it is worth noting that such offence is already defined in Article 237 (new) of the Criminal Code³⁵** which differs from the definition in the Draft Act; rather than providing a new definition, it may be advisable **to include a cross-reference to Article 237 (new), to avoid confusion.**
34. Finally, Article 2 par 6 of the Draft Act is positive in that it provides a broad definition of the term “victim” which includes any person subjected to enforced disappearance as well as any person who has suffered harm as a direct result of such disappearance. This mirrors Article 24 par 1 of the UN Convention and is in line with international jurisprudence on this subject. At the same time, to ensure that the definition is not given a restrictive interpretation, it may be helpful to specify in this provision that this includes, at a minimum, the following persons: (a) children born in and out of wedlock, adopted children or step-children; (b) lawfully wedded partner or unwedded partners; (c) parents (including step-mother, step-father, adopter); and (d) full or half or adopted sisters and brothers.³⁶

4. The Criminalization of “Enforced Disappearance” and Related Offences in compliance with the UN Convention

4.1. “Enforced Disappearance” as a Crime Against Humanity

35. Article 11 par e of the Draft Act foresees life imprisonment and a fine of fifty thousand dinars (equivalent to € 22,000) where “the crime of enforced disappearance constitutes a crime against humanity”. This is the case where this crime is committed in the context of a widespread or systematic attack against a civilian population, “with knowledge of the attack”. It is noted in this context that while this provision sees such cases as

³² Organic Law n° 2013-43 of 21 October 2013, available at <http://www.legislation-securite.tn/fr/node/32692> (in French).

³³ i.e., “any form of detention or arrest or imprisonment or placement of a person on the order of a judicial or administrative authority or any other authority or at its instigation or with its consent or acquiescence”.

³⁴ See UN Human Rights Committee, *General Comment No. 35 on Article 9 of the ICCPR* (28 October 2014), par 6, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en.

³⁵ Article 2 par 4 of the Draft Act states that “abduction is achieved when the perpetrator compels the victim to leave one’s location unwillingly using mental or physical means of constraints or fraud or deceit or any act of coercion or felony which enables the perpetrator to mislead the victim regardless of purpose or motive meant by the perpetrator of this abduction”. Article 237 (new) of the Criminal Code, available at <http://www.legislation-securite.tn/fr/node/30894> (in French), states: “**Any person who by fraud, violence or threats, abduct or attempt to abduct a person or will have dragged, diverted or moved from the place where the person was, or attempted such acts, shall be punished by ten years imprisonment**”.

³⁶ See e.g., International Committee of the Red Cross, *Guiding Principles / Model Law on the Missing* (2009), Article 2 (2), available at <https://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law>.

constituting aggravating circumstances leading to harsher punishment, the UN Committee specifically recommended that cases involving crimes against humanity should be criminalized separately in compliance with Article 5 of the UN Convention (and the Rome Statute).³⁷ In Article 11, this particular aggravating circumstance seems to be on par with other aggravating circumstances of lesser gravity,³⁸ which would not appear to adequately reflect the extreme gravity and seriousness of crimes against humanity, and thus the special rules applicable in these cases. At the same time, it is understood that there may be ongoing domestic legislative initiatives to codify crimes against humanity. If this is the case, then the Draft Act should be harmonized with such initiatives to avoid potential conflicts or overlaps. In any case, **enforced disappearance as a crime against humanity should be criminalized as an autonomous offence.**

36. In addition, when codifying enforced disappearance as a crime against humanity, it is important to ensure that, as stipulated in the Rome Statute, state officials are not immune or exempt from criminal liability (Article 27), and that statutes of limitation do not apply (Article 29) (see also Section 5.4 *infra*). Moreover, in such cases, instances of command responsibility shall not relieve the primary perpetrator of criminal responsibility (Article 33). Finally, the rules pertaining to the responsibility of commanders and other superiors for such crimes should also be in line with Article 28 of the Rome Statute (see par 40 *infra*).

4.2. Orders and Instructions, Attempt, Complicity, Participation, and Criminal Responsibility of Superiors

37. Article 5 par 2 of the Draft Act expressly states that the attempt to commit the crime of enforced disappearance shall be punished in the same way as a committed crime. However, it does not mention other related modalities of criminal responsibility, such as complicity, incitement or other forms of participation. In this context, it is noted that under Article 6 par 1 (a) of the UN Convention, “any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance” is criminally responsible.³⁹ A number of these conducts are addressed in the Criminal Code (for instance, complicity under Articles 32 to 35, as is the attempt under Article 59), although they do not cover the broad range of acts contemplated by Article 6 par 1 (a) of the UN Convention. **It would be preferable if Article 5 par 2 would reflect all the forms of participation mentioned in Article 6 of the UN Convention, with appropriate cross-references to the relevant provisions in the Criminal Code.**
38. Article 3 of the Draft Act exempts persons who refuse to obey orders or instructions to commit enforced disappearances from criminal liability; further, Article 5 par 3 specifies that an order or instruction from a public authority can never justify such crimes. While these principles are welcome and in line with the UN Convention, it is noted that they somewhat derogate from Article 42 of the Criminal Code, which considers orders from a competent authority to constitute exculpatory circumstances for criminal liability. **It is thus recommended to reflect, in Article 42 of the Criminal Code, the possibility of such exceptions as specified in the Draft Act.**

³⁷ *Op. cit.* footnote 5, par 15 (b) (2016 UN Committee’s Concluding Observations on Tunisia).

³⁸ E.g., the fact that the enforced disappearance exceeded a month or when the intent is to execute an order or to undermine the safety of the victim physically.

³⁹ See also *op. cit.* footnote 27, pars 35-36 (2010 UN Working Group’s Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation).

39. Article 6 of the Draft Act lists a number of circumstances where certain persons in the chain of command are equally liable for enforced disappearance as the direct perpetrator, which is welcome. The reference to “any person” seems to imply that this applies to both **military commanders and civilian superiors, which is welcome**. In addition, while generally mirroring the provisions of Article 6 par 1 (b) of the UN Convention, it is unclear whether the circumstances that are described (awareness of the crime, responsibility/control, and active prevention) are cumulative or alternative. Unless this unclarity is due to a translation error, the cumulative nature of these conditions should be specified. Moreover, Article 6 of the Draft Act could be further complemented along the lines of Article 23 par 2 of the UN Convention (and Article 6 par 2 of the 1992 UN Declaration) which states that “orders or instructions prescribing, authorizing or encouraging enforced disappearance [shall be] prohibited”, while setting forth specific appropriate sanctions for those responsible for imparting such orders or instructions.⁴⁰
40. Finally, in the context of enforced disappearance as a crime against humanity, military commanders or persons effectively acting as such are under a higher standard of responsibility. They will be liable even where they were not aware or informed in whatever manner of the (potential) crimes, if in light of the circumstances, they **should have known that enforced disappearances were being or could be practiced by personnel under their command (Article 28 (a) of the Rome Statute)**. Unless addressed in other legislation, **the Draft Act should be supplemented accordingly**.

4.3. Other Related Criminal Offences

41. Article 10 of the Draft Act deals with certain more serious aggravating circumstances, leading to 20 years’ imprisonment and a fine of twenty thousand dinars (equivalent to € 8,800). These include, in paragraphs f and g, the kidnapping of children and falsification, concealment or destruction of documents proving a child’s true identity. According to Article 25 par 1 (a) and (b) of the UN Convention⁴¹ and as recommended by the UN Committee,⁴² these types of crimes shall be codified as autonomous and specific offences, not as mere aggravating circumstances. This would be more appropriate, both due to the serious nature of the crimes,⁴³ and because such acts may potentially be committed by perpetrators who are different from the ones having committed the initial act of enforced disappearance. **Part II of the Draft Act should thus be supplemented to specifically criminalize the two following conducts: (i) the wrongful removal of children who are subjected to enforced disappearance, of children whose father, mother or legal guardian is subjected to enforced disappearance or of children born during the captivity of a mother subjected to enforced disappearance; and (ii) the falsification, concealment or destruction of documents attesting to the true identity of such children**. These conducts should be sanctioned in accordance with the gravity of the crimes committed.

⁴⁰ See also *op. cit.* footnote 27, pars 52-54 (2010 UN Working Group’s Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation). See also Principle 27 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (hereinafter, “the 2005 UN Principles against Impunity”), recommended by the United Nations Commission on Human Rights Resolution No. 81/2005 of 21 April 2005, E/CN.4/2005/102/Add.1, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.

⁴¹ Pursuant to Article 25 par 1 of the UN Convention, “[e]ach State Party shall take the necessary measures to prevent and punish under its criminal law: (a) The wrongful removal of children who are 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; (b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a) above”.

⁴² *Op. cit.* footnote 5, par 34 (2016 UN Committee’s Concluding Observations on Tunisia).

⁴³ *ibid.* par 34 (2016 UN Committee’s Concluding Observations on Tunisia).

42. Additionally, at the international level, it is generally recommended to also criminalize a number of acts relating to enforced disappearance (e.g. intentional mutilation, despoliation and desecration of the dead).⁴⁴ The legal drafters should ensure that such offences are covered by the Draft Act, unless they are governed by other domestic laws.
43. Articles 7 and 8 of the Draft Act criminalize the failure of a public official to notify his or her superiors or other competent authorities if he or she has sufficient reasons to believe that an enforced disappearance occurred or is planned; similarly, the failure of a public official to record accurately all cases of enforced disappearances is also sanctioned. In line with Article 22 of the UN Convention, **these provisions should be expanded to also cover the delay or obstruction of access to court for persons deprived of liberty or their relatives or counsels, of the review of lawfulness of the deprivation of liberty, or of the receipt of all relevant and correct information regarding the deprivation of liberty.**

5. Punishment Commensurate with the Gravity of the Crime

5.1. Penalties for the Crime of Enforced Disappearance and Aggravating Circumstances

44. For the crime of enforced disappearance, Article 5 of the Draft Act sets out a punishment of ten years of imprisonment and a fine of ten thousand dinars (equivalent to € 4,400), which may be increased to higher penalties when certain aggravating factors exist (Articles 10-12 of the Draft Act). Under Article 11, the punishment may be increased to life imprisonment and a fine of fifty thousand dinars. Article 12 of the Draft Act provides for the death penalty if the crime provoked the death of the victim.
45. First and foremost, the imposition of the death penalty set out in Article 12 of the Draft Act would appear to be at odds with international standards. The UN Committee specifically recommended to Tunisia to avoid the imposition of the death penalty in its future legislation on enforced disappearance.⁴⁵ The UN Working Group has also expressly stated that even in cases of extremely serious crimes of enforced disappearance, imposing the death penalty is excessive.⁴⁶ It must be noted that even with the most serious crimes such as genocide or crimes against humanity, the statutes of international courts established since 1993 and the Rome Statute provide that the maximum sentence should not exceed life imprisonment.⁴⁷ Furthermore, the UN General Assembly Resolution “Moratorium on the use of the death penalty” with a view to abolishing capital punishment is enjoying increasing support among UN Member States.⁴⁸ In light of the above, **it is recommended to delete from the Draft Act the possibility to impose the death penalty, and more generally to reconsider the possibility provided in the Criminal Code to impose the death penalty for other crimes.**
46. Second, the maximum punishment (i.e., ten years’ imprisonment) set forth pursuant to Article 5 of the Draft Act does not seem commensurate to the gravity of the crime, as

⁴⁴ *Op. cit.* footnote 36, Article 24 (2009 ICRC Model Law on the Missing).

⁴⁵ *Op. cit.* footnote 5, par 15(a) (2016 UN Committee’s Concluding Observations on Tunisia).

⁴⁶ UN Working Group, *Report on the Mission to Guatemala*, doc. A/HRC/4/41/Add.1 of 20 February 2007, par 34.

⁴⁷ See e.g., Article 77 of the Rome Statute which states that “[a] term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person”, as the maximum applicable penalty.

⁴⁸ UN General Assembly Resolution A/RES/69/186, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/186, was passed with 117 votes in favour, 38 against, 34 abstentions and four absent. See also par 24 of the OSCE Vienna Document (1989); and par 17 of the OSCE Copenhagen Document (1990).

required by Article 7 par 1 of the UN Convention. In this context, the UN Working Group has stressed the need to ensure that offences that are less serious than enforced disappearance do not incur more severe punishments than those set out for enforced disappearance.⁴⁹ In general, both the UN Working Group and the UN Committee have found higher sanctions, ranging from 10 to 25,⁵⁰ or even 25 to 40 years⁵¹ imprisonment, to be compliant with international standards. On the other hand, the UN Committee has recently considered a minimum sentence of two years to be contrary to Article 7 of the UN Convention.⁵²

47. Finally, it must be underlined that the penalties provided by Article 5 of the Draft Act for enforced disappearance (without aggravating circumstances) are equivalent to those set out for the general crimes of “abduction”⁵³ or of “arrest, detention or sequestration without legal orders”.⁵⁴ In the case of “abduction”, aggravated circumstances may also lead to enhanced penalties amounting to twenty years of imprisonment, life imprisonment or death penalty (in cases where this leads to the death of the victim). If enforced disappearance is punishable in a similar manner as abduction, or illegal deprivations of liberty, then this does not take into account the special nature of the crime of enforced disappearance.⁵⁵ This essentially lies in the state-induced removal of a person from the protection of the law in a way that provides no information as to the fate and whereabouts of the disappeared person, which inflicts severe suffering on both the victims, and their relatives for prolonged periods of time. Hence, to demonstrate the serious and inhuman nature of enforced disappearances, **the range of sanctions provided by the Draft Act should be harsher than the ones provided for “abduction” and other crimes involving illegal deprivation of liberty. The Draft Act should be amended accordingly.**
48. Articles 10 to 12 of the Draft Act provide for a number of aggravating circumstances leading to the imposition of enhanced penalties. Under Article 10 d), enforced disappearance is punishable by twenty years’ imprisonment and a high monetary fine if the “victim is a child under eighteen years old or a pregnant woman or a person with a disability or any other vulnerable person”. As noted in the UN Working Group’s General Comment on Women Affected by Enforced Disappearances, however, the suffering of any woman affected by enforced disappearances may be increased by sexual violence, unwanted pregnancy, the potentially destructive impact of enforced disappearances on families, including social stigma and the disruption of family structures.⁵⁶ Such extremely serious circumstances would appear to also speak in favour of aggravated penalties.⁵⁷ Consequently, **if the crime of enforced disappearance is accompanied by sexual violence, or leads to an unwanted pregnancy, then this should also be considered an aggravating circumstance under Article 11 of the**

⁴⁹ UN Working Group, *Report on the Mission to Honduras*, doc. A/HRC/4/41/Add.2 of 6 March 2007, par 33, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/114/19/PDF/G0711419.pdf?OpenElement>.

⁵⁰ UN Committee, Concluding Observations on the Report submitted by Argentina, CED/C/ARG/CO/1, 12 December 2013, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED%2fC%2fARG%2fCO%2f1&Lang=en, read together with par 3 of the Report, available at <http://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx>.

⁵¹ *Op. cit.* footnote 27, par 40 (2010 UN Working Group’s Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation).

⁵² UN Committee, Concluding Observations on the Report submitted by Uruguay, CED/C/URY/CO/1, 8 May 2013, pars 11-12, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED%2fC%2fURY%2fCO%2f1&Lang=en.

⁵³ See Article 237 of the Criminal Code which provides for ten years of imprisonment, although without specifying the payment of any fine.

⁵⁴ See Article 250 of the Criminal Code which provides for ten years of imprisonment and a fine of twenty thousand dinars.

⁵⁵ See e.g., UN Working Group, *Report on the Mission to El Salvador*, doc. A/HRC/7/2/Add.2 of 26 October 2007, pars 33 and 89.

⁵⁶ UN Working Group, *General Comment on Women Affected by Enforced Disappearances*, A/HRC/WGEID/98/2 of 14 February 2013, pars 5, 8-9 and 19, available at <http://www.ohchr.org/EN/Issues/Disappearances/Pages/GeneralComments.aspx>.

⁵⁷ *ibid.* par 19 (2013 UN Working Group’s General Comment on Women Affected by Enforced Disappearances).

Draft Act. Social stigma and the disruption of family life should also be taken into consideration when assessing the right to reparation of the victims (see par 97 *infra*).

5.2. Mitigating Circumstances

49. Article 13 of the Draft Act provides that “a person who is involved in the commission of an enforced disappearance and who takes the initiative to inform the relevant authorities [thus] enabling them to discover the crime and avoid its execution, is exempt of punishment”. It is assumed that this provision (if translated accurately) refers to the situation where the respective person is still able to prevent the enforced disappearance from happening. Such a provision is generally in line with international standards.
50. At the same time, if the crime of enforced disappearance has already occurred, then “contributing to bringing the disappeared forward alive or provide information to make it possible to clarify cases of enforced disappearance” can be a mitigating circumstance, but should not eliminate criminal responsibility⁵⁸ (see also Article 7 par 2 (1) of the UN Convention). Within the framework of mitigating measures, reasonable alternative criminal sanctions (i.e. payment of compensation, community work, etc.) should always be applied in order to not completely exempt a perpetrator from punishment.⁵⁹ **This should be reflected, as applicable, in Articles 13 and 14 where individuals involved in enforced disappearances helped release the victims and cooperate with law enforcement authorities.**
51. Similarly, Article 15 of the Draft Act allows for a mitigated sentence (2-5 years’ imprisonment) if a person releases a forcibly disappeared person within the first five days of the enforced disappearance. Article 15 also appears to provide for the possibility of abandoning prosecution of the respective person “if it fulfills all conditions set forth which have already been given”. This wording is quite vague and it would be helpful to clarify when a person would be subject to reduced sentence or when he/she would not face prosecution at all. At the same time, even if the release mentioned in this provision would take place after a relatively short time, the UN Committee has recently confirmed that enforced disappearances, even if brief (seven days in the given case) still constitute crimes.⁶⁰ A complete exemption from criminal responsibility would appear to be disproportionate in this light. Bearing this in mind, **the legal drafters should revise Article 15 of the Draft Act to ensure that in such cases, other alternative criminal sanctions such as community work, public apology or others (plus in all cases the payment of compensation) are always possible.**

⁵⁸ *Op. cit.* footnote 27, pars 42-43 (2010 UN Working Group’s Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation). See also *op. cit.* footnote 40, Principle 28 par 1 (2005 UN Principles against Impunity) which states that “[t]he fact that a perpetrator discloses the violations that he, she or others have committed in order to benefit from the favorable provisions of legislation on disclosure or repentance cannot exempt him or her from criminal or other responsibility”.

⁵⁹ UN Working Group, *General Comment on Article 18 of the UN Declaration on the Protection of all Persons from Enforced Disappearance*, par 8 (a), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/168/77/PDF/G0516877.pdf?OpenElement>.

⁶⁰ *Op. cit.* footnote 31, par 10.3 (2016 UN Committee case of *Yrusta v. Argentina*).

5.3. The Exclusion of Amnesty, Pardons, and Immunities in Cases of Enforced Disappearances

52. Article 18 of the 1992 UN Declaration states that convicted or alleged perpetrators of enforced disappearance shall not benefit from amnesty laws, and that in the exercise of the right to pardon,⁶¹ the “extreme seriousness” of the act should be taken into account. While not formally prohibited, pardons (which only concern the execution of the sentence and will have no impact on the criminal liability *per se*) should in any case never completely exempt a person from punishment, nor lead to a sentence that would not be proportionate to the gravity of the crime. As a matter of comparison, in the case of torture, the UN Committee against Torture concluded that a State violated the Convention when imposing a light penalty following a pardon granted to the perpetrator, which it believed would allow torture to go unpunished and encourage its repetition.⁶² As it stands, the Draft Act does not **formally exclude convicted or alleged perpetrators of enforced disappearance from special amnesty laws, pardons or similar measures that may exempt them from or unduly limit the extent of criminal proceedings or sanctions**. Including such a provision would help fight impunity, along the lines of Article 18 par 1 of the 1992 UN Declaration.⁶³ While going beyond the scope of this Opinion, the same should apply to other cases of gross human rights violations, such as torture.
53. Article 29 of the Draft Act refers to a number of circumstances that prevent “public action”, including when such “public action” was carried out abroad, or when the person was convicted and the sentence executed, when punishment is prescribed or is covered by an amnesty pronounced abroad. The wording of Article 29 thereby seems to duplicate Article 307 (bis) of the Criminal Procedure Code, which codifies the general ban on double jeopardy (multiple punishment for the same crime).⁶⁴
54. Given the special and serious nature of the crime of enforced disappearance, it is important to take note of a number of issues in this respect. First, as already mentioned, alleged perpetrators of such serious crimes shall not benefit from amnesty or similar measures that would exempt them from criminal proceedings and sanctions. Recognizing an amnesty pronounced by a foreign State would run counter to this principle, and could lead to impunity. **The reference to amnesty in Article 29 of the Draft Act should thus be deleted.**
55. Second, Principle 29 (b) of the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (hereinafter, “the 2005 UN Principles against Impunity”)⁶⁵ states that a criminal procedure and/or conviction of a perpetrator in another state should not prevent his/her prosecution with respect to the same conduct **if said procedures aimed to shield this person from criminal responsibility, or where the procedures were not conducted independently or**

⁶¹ i.e., an official act that exempts a convicted person from serving a sentence, in whole or in part, without expunging the underlying conviction from the criminal record.

⁶² See *Urra Guridi v. Spain*, UNCAT Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002, 17 May 2005, par 6.7, available at <http://www1.umn.edu/humanrts/cat/decisions/212-2002.html>.

⁶³ *Op. cit.* footnote 27, pars 48-51 (2010 UN Working Group’s Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation). See also UN Committee, *Concluding Observations on the Report submitted by Spain*, doc. CED/C/SPA/1 of 14 November 2013, par 12, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED%2fC%2fESP%2fCO%2f1&Lang=en. See also examples of good practices at the domestic level, e.g., Colombia (Art. 14 Law No. 589 of 2000), Ecuador (Arts. 80 and 120 Constitution), Nicaragua (Art. 130 Criminal Code); Panama (Art. 115 Criminal Code), Uruguay (Art. 8 Law No. 18.026 of 4 October 2006), and Venezuela (Arts. 180-A Criminal Code and 29 Constitution). In Guatemala, the amnesty law itself does exclude enforced disappearance from its scope (Art. 8 Decree 145-1996 Law of National Reconciliation, 1996).

⁶⁴ Available at <http://www.legislation-securite.tn/fr/node/27937> (in French).

⁶⁵ *Op. cit.* footnote 40 (2005 UN Principles against Impunity).

impartially. To avoid impunity, it is therefore **recommended to supplement Article 29 using similar wording.**

56. Third, regarding specifically crimes against humanity, Article 29 of the Rome Statute provides that statutes of limitation do not apply to the crimes covered by the Statute. This should be **specified in Article 19 of the Draft Act, so that statutes of limitation of other countries cannot be invoked to prevent the prosecution of such crimes in Tunisia.**
57. Furthermore, given the duty of State Parties to the UN Convention to investigate all alleged cases of enforced disappearance (Article 12 of the UN Convention), there should be no immunity from prosecution in these cases. As mentioned in the UN Human Rights Committee's General Comment No. 31, "no official status justifies persons who may be accused of responsibility for [violations recognized as criminal, including enforced disappearances] from being held immune from legal responsibility".⁶⁶ It is recommended **to supplement the Draft Act accordingly by specifying that the official capacity of an alleged perpetrator, e.g., as a Head of State or Government, a member of a Government or parliament, an elected representative or other government official shall in no case exempt this person from criminal responsibility, or lead to a reduction of sentence.** This would also be in line with Article 27 of the Rome Statute on the irrelevance of the official capacity of the perpetrator.

5.4. Statutes of Limitation and Prescription

58. **Article 19 of the Draft Act** states that "there is no prescription for public cases of enforced disappearance". This is welcome and in line with the UN Committee's recommendations to Tunisia⁶⁷ and international standards.⁶⁸ In this respect, it should also be highlighted that **Article 5 of the Criminal Procedure Code** contains general rules regarding the prescription of public prosecution, and exceptions thereto for the crimes of torture (although this latter provision was recently repealed to be included in the Organic Law n° 2013-43 regarding the National Preventive Mechanism against Torture). It is recommended **to supplement this provision by adding that also public prosecution of cases of enforced disappearance should be exempt from prescription; the same should apply for crimes against humanity and war crimes in accordance with Article 29 of the Rome Statute.**⁶⁹
59. At the same time, this principle should not only apply to public prosecution, but also to penalties, and to criminal proceedings in general.⁷⁰ Article 34 of the Draft Act provides that penalties imposed in cases of enforced disappearances are prescribed after thirty years (and penalties for misdemeanors after ten years) from the date when the punishment decided by the court becomes effective. This would not appear to be congruent with international standards, which stipulate that sanctions for enforced disappearance shall similarly not be prescribed.⁷¹ In addition, investigations should not

⁶⁶ UN Human Rights Committee, *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), par 18, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en.

⁶⁷ *Op. cit.* footnote 5, par 19 (2016 UN Committee's Concluding Observations on Tunisia).

⁶⁸ *Op. cit.* footnote 27, pars 55-56 (2010 UN Working Group's Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation).

⁶⁹ Article 29 of the Rome Statute states that "the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations".

⁷⁰ See Article 29 of the Rome Statute. See also *op. cit.* footnote 27, pars 55-56 (2010 UN Working Group's Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation).

⁷¹ *Op. cit.* footnote 40, Principle 23 (2005 UN Principles against Impunity).

be subject to any statute of limitation until the fate and whereabouts of the disappeared person have been established (see also Section 6.2 *infra* on criminal investigations).⁷² **Article 34 should thus be amended to specify that penalties for enforced disappearance are not subject to prescription. More generally, the Draft Act should reflect the above principle with regard to the exemption of investigations from statutes of limitation.**

5.5. Other Types of Sanctions

60. A number of states have enacted legislation ensuring that those found guilty of enforced disappearance are disqualified from public service.⁷³ In this respect, Article 5 (new) of the Criminal Code provides for a range of principal and accessory sanctions, including the prohibition to perform certain public functions or other professions; however, such accessory sanctions can apparently only be imposed in corruption-related cases. The law drafters should consider including in **the Draft Act supplementary sanctions, in addition to imprisonment and fines, such as the disqualification from public service.**
61. Article 16 of the Draft Act provides for the possibility to expel and deport a foreigner who has been convicted of the crime of enforced disappearance, except where there are substantial grounds to believe that he/she may be subject to enforced disappearance in the country of destination. In this context, a person **should generally not be expelled or returned to a country where he/she would be in danger of being subjected to torture or other ill-treatment or punishment,⁷⁴ or otherwise risk serious human rights abuses, or where this would result in disproportionate interference with the right to family life.⁷⁵ This should be reflected in Article 16** (see also comments on *non-refoulement* and extradition in general in Section 6.4 *infra*).
62. Article 25 of the Draft Act criminalizes acts where alleged perpetrators attempt to impede criminal procedures, including cases where persons use their authority or pressure to influence the course of the investigation or commit other acts of intimidation or retaliation against persons participating in the investigation. While this is a welcome provision that is also in line with Article 12 par 4 of the UN Convention, it may also be useful to **include in the Draft Act, or other relevant legislation, a provision stating that the alleged perpetrator shall be suspended from any official duties during the investigation** (Article 16 (1) of the 1992 UN Declaration). This would help ensure that alleged perpetrators are not in a position to impede or curtail investigations against them (see also pars 73-74 *infra*).
63. Finally, in addition to state responsibility and criminal penalties, Article 5 of the 1992 UN Declaration also mentions general civil liability for perpetrators of enforced

⁷² See Article 13 par 6 of the 1992 UN Declaration. See also e.g., *op. cit.* footnote 30, par 206 (IACtHR Case *Heliodoro Portugal*), where the Inter-American Court of Human Rights has specified that, for domestic legislation on enforced disappearance to meet international standards, not only the punishment of the offence shall be subjected to a statute of limitations; the criminal proceedings should also not fall under a statute of limitations until the fate and whereabouts of the disappeared person have been established.

⁷³ *Op. cit.* footnote 27, par 45 (2010 UN Working Group's Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation). See also *op. cit.* footnote 49, pars 39 and 66 c) (2007 UN Working Group's Report on the Mission to Honduras). See also examples of good practices: Colombia (Art. 165 Criminal Code), El Salvador (Art. 366 Criminal Code), Mexico (Arts. 215-C and 215-D Criminal Code), Nicaragua (Art. 488 Criminal Code), Peru (Art. 320 Criminal Code), and Uruguay (Art. 12 Law No. 18.026 of 4 October 2006).

⁷⁴ See UN Committee Against Torture, Committee Against Torture, *General Comment 1, Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture* (1998), Annex IX on page 52, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A%2f53%2f44&Lang=en.

⁷⁵ See Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30 on Discrimination against Non-citizens*, 1 October 2004, pars 25-28, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCERD%2fGEC%2f7502&Lang=en.

disappearance.⁷⁶ In this context, it is noted that Article 8 of the Criminal Procedure Code subjects civil action to the same statutes of limitation as public action. Since Article 19 of the Draft Act excludes public prosecution from statutes of limitation, this would mean that the rights of victims to effective remedies are also guaranteed without time limitations, which is in line with Article 8 par 2 of the UN Convention. It would, however, be **advisable to state more clearly in the Draft Act, e.g. in Article 36 on the right to reparation and compensation, the perpetrator's liability under civil law and the relevant procedures, with relevant cross-references to provisions of the Civil Procedure Code.**

6. Criminal Proceedings

6.1. Public Prosecution

64. Section 2 of the Draft Act deals with the public prosecution of cases of enforced disappearances. This Section should be read together with the provisions of the Criminal Procedure Code, particularly Articles 22 and 23 on the powers of General Prosecutors. Given that the General Prosecutors of the Court of Appeals are under the direct authority of the Minister of Justice (who can *inter alia* direct the General Prosecutor to prosecute certain persons or cases),⁷⁷ it is, however, doubtful whether the prosecution enjoys a certain level of independence from the executive, as required by international standards.⁷⁸ While this question extends beyond the purposes of this Opinion, the **responsible decision-makers and stakeholders are encouraged to review the legislation on the prosecution service of Tunisia to ensure some form of independence from the executive branch.**
65. Article 18 of the Draft Act provides that where a prosecutor has reasonable grounds to believe that a person has been a victim of enforced disappearance, he/she asks the local investigating judge to conduct a search. Given the important human rights at stake in cases of enforced disappearance, **it is recommended to expand this provision, so that the competent authorities shall initiate a preliminary investigation (and hence refer the case to the investigating judge) as soon as a first complaint is received.**⁷⁹ At the same time, investigations into such cases shall be initiated where there are reasonable grounds to believe that enforced disappearance has taken place, *even in the*

⁷⁶ See e.g., *op. cit.* footnote 49, pars 39 and 66 c) (UN Working Group's Report on the Mission to Honduras).

⁷⁷ UN Special Rapporteur on the independence of judges and lawyers, *Report on Mission to Tunisia*, A/HRC/29/26/Add.3, 26 May 2015, pars 71-72 and 108-112, available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Pages/ListReports.aspx>.

⁷⁸ See e.g., the *UN Guidelines on the Role of Prosecutors*, adopted by the 8th UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>; and the U.N. Commission on Crime Prevention and Criminal Justice, *Resolution on "Strengthening the rule of law through improved integrity and capacity of prosecution services"*, Annex - 1999 International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors (Vienna, 14-18 April 2008), Principle 2 "Independence", available at http://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards/UN-Resolution/UN_Resolution_IAP_Standards_draft_as_approved-1.pdf.aspx; and Venice Commission, *Report on European Standards as regards the Independence of the Judicial System: Part II The Prosecution Service*, CDL-AD(2010)040, Venice, 17-18 December 2010), available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)040.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2010)040.aspx). See also the recommendations to Tunisia formulated by, among others, the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, to "guarantee, in law and in practice, the impartiality of the Office of the Public Prosecutor, thereby ending the authority and control exercised by the Minister for Justice" (UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, *Report on the Mission to Tunisia* (11–16 November 2012), doc. A/HRC/24/42/Add.1 of 30 July 2013, par 87 (b) (vi), available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/24/42/Add.1). See also *op. cit.* footnote 77, pars 108 (UNSR on the independence of judges and lawyers, 2016 Report on Mission to Tunisia).

⁷⁹ See, regarding cases of torture, International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite, Belgium v. Senegal*, judgment of 20 July 2012, par 88, available at <http://www.icj-cij.org/docket/files/144/17064.pdf>. These could apply *mutatis mutandis* to cases of enforced disappearances.

absence of a formal complaint (Article 12 par 2 of the UN Convention). **Article 18 of the Draft Act should thus specify that the prosecutor shall forward the case to the investigating judge even in the absence of a complaint.**

66. Moreover, it is not clear whether under the Tunisian legal framework, it is possible for persons reporting the commission of serious crimes, such as enforced disappearances, **to challenge the legal merits of the prosecutor's decision not to investigate or prosecute such cases.**⁸⁰ If not already provided by the Criminal Procedure Code or other legislation, the **legal drafters should consider introducing such a mechanism into the Draft Act or the Criminal Procedure Code.**

6.2. Criminal Investigations

67. Generally, **investigations by criminal justice actors or other entities** (see par 71 *infra*) **into enforced disappearances should continue for as long as the fate and the whereabouts of the disappeared person remain unclear.**⁸¹ **This should be reflected in the Draft Act** (see also Section 7 *infra* on the right to the truth).
68. Article 20 of the Draft Act on mandatory investigation and rules of jurisdiction for investigating judges appears to largely repeat the wording of Article 47 of the Criminal Procedure Code which provides that “[p]reliminary investigation [by investigating judges] is mandatory for crimes”. It is thus recommended to delete this **provision and cross-reference Article 47**. In any case, as mentioned in par 65 *supra*, the prosecutor should be able to request an investigation by the investigating judge *ex officio*, even in the absence of a complaint.
69. Articles 21 and 22 of the Draft Act provide general information on the duties and powers of the persons in charge of investigations, including access to documents and other information to support a court's verdict, as well as access to places of arrest, and any other premises where there are reasonable grounds to believe that the disappeared person may be held. These provisions somewhat mirror Article 12 par 3 of the UN Convention. At the same time, it would be helpful to also reflect therein the need for necessary financial, technical and human resources to carry out proper investigations (Article 12 par 3 (a) of the UN Convention).
70. In general, the unrestricted access to places of detention or arrest in support of criminal investigations is welcome. However, unrestricted access to any other place or premise, either at the police's own initiative or upon the request of the public prosecutor, without specific safeguards in place, may be excessive and could potentially lead to abuse. In that respect, it would be preferable if the Draft Act would contain some reference to the rules and safeguards of the Criminal Procedure Code governing access and search of premises (Articles 93 to 96).
71. While Articles 20 to 23 of the Draft Act detail the role and responsibilities of “investigative authorities”, it is unclear whether these authorities would also be competent to trace the disappeared persons and deal with their families, while serving as an interface with other State authorities for all issues related to the search, the identification of human remains, and the protection of the rights of disappeared persons and their relatives. Good practices suggest to separate the authorities in charge of the criminal investigations from those responsible for tracing disappeared persons and to

⁸⁰ See e.g., UN Committee, *Concluding Observations on the Report submitted by France*, CED/C/FRA/CO/1, 8 May 2013, par 25, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CED%2fC%2fFRA%2fCO%2f1&Lang=en.

⁸¹ See Article 13 par 6 of the 1992 UN Declaration.

detail their respective competences.⁸² This will allow the search to continue even in cases where the alleged perpetrator dies or is convicted without revealing the fate or whereabouts of the disappeared person, which shall in principle lead to the termination of public prosecution and investigations (Article 4 of the Criminal Procedure Code). In any case, since Articles 21 and 22 speak only of “the person in charge of the investigation”, **it would be beneficial to specify more explicitly which authorities would be competent to conduct the search, and to outline their mandates, obligations, and how relatives of victims should interact with and support them in their search operations (or include a cross-reference to other applicable legislation).**⁸³ In particular, such authorities should have full access to State archives, including those of military, security and intelligence services.⁸⁴ Necessary measures should also be taken to ensure that all public entities co-operate with the search and investigative organs⁸⁵ (see also Section 7 *infra* regarding the right to information of relatives of disappeared persons).

72. Given the sensitivity of the subject, it is important that provisions concerning those authorities competent and officially qualified in exhumations and forensic work are in line with **international standards on the subject.**⁸⁶ **Namely, the body and human remains need to be treated with respect and dignity, and shall be returned to the families together with any personal effects** (Article 24 par 3 of the UN Convention).⁸⁷ **Also, to prevent any secondary victimization⁸⁸ of the relatives, the State, or any other authority, should provide mechanisms for families, or their representatives, to observe and participate in the process of identification of the remains;**⁸⁹ **also, authorities should not dispose of those remains, without the full participation of the family and without fully informing the general public of such measures.**⁹⁰ **The Draft Act should be supplemented accordingly** (see also par 90 *infra*).
73. Article 23 of the Draft Act regulates the testimony of witnesses outside of the presence of the alleged perpetrator, to avoid a possible confrontation with the latter. This provision somewhat duplicates Article 65 par 1 of the Criminal Procedure Code, without mentioning details on the hearing of witnesses by the investigating judge as set out in Part I, Chapter II, Section II of the Code. At the same time, Article 23 introduces a new feature, i.e., the possibility to order a confrontation between the alleged perpetrator and the witness, *only upon the latter’s consent*, which is positive, as this aims to protect the witness. However, neither the Draft Act, nor the Criminal Procedure Code contain **protective measures against ill-treatment or intimidation of the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation.** As the adoption of such

⁸² See e.g., *op. cit.* footnote 36, Articles 12, 14, 15 and 16 par 2 (2009 ICRC Model Law on the Missing).

⁸³ See e.g., *ibid.* Articles 19, 21, 22 and 23 (2009 ICRC Model Law on the Missing).

⁸⁴ UN Working Group, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*, A/HRC/16/48, par 9, available at http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf.

⁸⁵ *Op. cit.* footnote 5, par 24 (2016 UN Committee’s Concluding Observations on Tunisia).

⁸⁶ See e.g., the 1991 UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, available at http://www.ohchr.org/Documents/Issues/Executions/UNManual2015/Annex1_The_UN_Manual.pdf. See also the UN Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights, Human Rights Council, 24 August 2010, UN Doc.A/HRC/15/26, pars 48-64, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/155/94/PDF/G1015594.pdf?OpenElement>. See also *op. cit.* footnote 36, Articles 19, 21, 22 and 23 (2009 ICRC Model Law on the Missing).

⁸⁷ *Op. cit.* footnote 84, par 6 (UN Working Group’s General Comment on the Right to the Truth in Relation to Enforced Disappearances).

⁸⁸ i.e., when the victims suffer further harm not as a direct result of the criminal act but due to the manner in which the institutions and other individuals deal with the victim.

⁸⁹ See UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter “2005 UN Basic Principles on Right to Remedy for Gross Human Rights Violations”), adopted and proclaimed by UN General Assembly Resolution 60/147 of 16 December 2005, par 10, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

⁹⁰ *ibid.* par 6 (UN Working Group’s General Comment on the Right to the Truth in Relation to Enforced Disappearances).

measures was specifically recommended by the UN Committee in its Concluding Observations, **the Draft Act and/or the Criminal Procedure Code should be supplemented accordingly.**⁹¹ Pursuant to Article 12 of the UN Convention, adequate resources should be allocated for this purpose.

74. **A number of additional measures may be considered to protect victims and/or witnesses,**⁹² ranging from assistance before and during trial to cope with the psychological and practical aspects of testifying, to special protective measures for witnesses “at risk”, and from court procedures to ensure the witness’ safety while testifying, to covert witness protection programmes. Special measures for child victims and witnesses should also be adopted, in accordance with international standards;⁹³ such issues are apparently not specifically addressed in the Child Protection Code.
75. Article 24 of the Draft Act provides for special safeguards when a foreign suspect is detained in Tunisia, including the right to immediately contact his/her diplomatic representation. To be fully in line with the UN Vienna Convention on Consular Relations,⁹⁴ **this provision should also provide that the foreign national shall be informed of the above right without delay** (see also par 107 *infra*).
76. Moreover, to ensure adequate protection of foreigners, he/she should also be able, if there is no such consular/diplomatic representation of his/her home country, to contact the mission of any other State entrusted with the protection of his/her interests by his/her State.⁹⁵ Refugees, asylum-seekers and stateless persons should also be able to contact representatives of the Office of the United Nations High Commissioner for Refugees or other bodies, including available national refugee bodies or other agencies, including ombudsperson or human rights commissions or NGOs.⁹⁶ It is recommended **to amend Article 24 to reflect these additional safeguards.**
77. Finally, to enhance and regulate co-operation with the International Criminal Court in cases of enforced disappearance committed as crimes against humanity, it is recommended to ensure that **Tunisian legislation is compliant with all obligations of co-operation provided in the Rome Statute (Articles 86 to 111) and the Agreement on Privileges and Immunities of the Court (APIC).** This may however already be part of the parallel domestic legislative initiative to codify crimes against humanity mentioned above (see par 35 *supra*).

⁹¹ *Op. cit.*, footnote 5, par 26 (2016 UN Committee’s Concluding Observations on Tunisia).

⁹² See e.g., Article 24 of the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I), its Protocols, specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, Annex II, Articles 6 and 7) and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, Annex III, Articles 5 and 16).

⁹³ See e.g., Annex to the UN Economic and Social Council (ECOSOC) Resolution 2005/20, 22 July 2005, *UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, available at <http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf>.

⁹⁴ The UN Vienna Convention on Consular Relations, adopted on 22 April 1963 by the United Nations Conference on Consular Relations held at the Neue Hofburg in Vienna, Austria, available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf. The Republic of Tunisia acceded to this Convention on 8 July 1964.

⁹⁵ See Article 10 of the UN Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live, adopted by the UN General Assembly, in resolution 40/144 on 13 December 1985, available at <http://www.un.org/documents/ga/res/40/a40r144.htm>.

⁹⁶ See e.g., United States Institute of Peace in cooperation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UNOHCHR), and the UN Office on Drugs and Crime (UNODC), *Model Code of Criminal Procedure (2008)*, Article 172 par 3 sub-par (g), available at <http://www.usip.org/model-codes-post-conflict-justice-publication-the-model-codes/english-version-volume-2> See also *op. cit.* footnote 34, par 58 (2014 UN HRC General Comment No. 35 on Article 9 of the ICCPR); and the Guideline 7 (vii) of the UNHCR Detention Guidelines (2012), available at <http://www.refworld.org/pdfid/503489533b8.pdf>.

6.3. Competent Courts and Jurisdiction over Crimes of Enforced Disappearance

78. According to Articles 26 and 27 of the Draft Act, crimes of enforced disappearances shall be tried before ordinary courts *only*, which would then be competent for all crimes committed in the territory of Tunisia, including Tunisian aircrafts and ships. It is understood that this would also rule out the competence of military tribunals, in line with the UN Committee's recommendations⁹⁷ and international standards.⁹⁸ At the same time, Articles 5-6 (new) of the Code of Military Justice, as amended in 2011,⁹⁹ provide that military tribunals are competent over general criminal offences committed by military personnel, and may also try civilians under certain circumstances. **To ensure that the jurisdiction of military courts is excluded in all enforced disappearance cases, it may be helpful to expressly provide this in the Draft Act, and to also reflect such exclusion in the Code of Military Justice.**¹⁰⁰
79. Articles 26 and 27 of the Draft Act specify the rules of competence of "the judicial courts" in relation to cases of enforced disappearances, but do not mention the competence to investigate and prosecute. **The Draft Act should be supplemented accordingly, since Article 9 par 1 of the UN Convention refers to the competence to exercise jurisdiction in general, implying both the competence to investigate and prosecute, as well as to judge cases of enforced disappearance.**
80. Subject to such expansion, these provisions appear to be overall in line with the scope of Article 9 par 1 of the UN Convention. However, Article 27 third indent appears to exclude potential crimes committed abroad against stateless persons, and should be revised to include this.
81. It is also unclear whether Article 27 third indent seeks to impose limitations to the principle of universal jurisdiction. Indeed, this provision seems to infer that the competence of the court will cease from the moment when competent authorities legally request the extradition of the alleged perpetrator. This should, however, only be the case if the extradition is actually granted by the Tunisian authorities. To avoid misunderstandings, it is recommended to align the wording of this provision with Article 9 par 2 of the UN Convention, so that courts may **exercise jurisdiction over all cases of enforced disappearance when the alleged perpetrator is present on the territory under Tunisia's jurisdiction. Such jurisdiction shall only be superseded if Tunisia extradites or surrenders the perpetrator to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.**¹⁰¹ In that respect, it is welcome that Article 28 of the Draft Act provides that public proceedings regarding acts committed abroad take place irrespective of the criminalization of the offence in the foreign country. This is in line with international standards regarding universal jurisdiction over crimes of enforced disappearances.

⁹⁷ See also *op. cit.* footnote 5, pars 20-21 (2016 UN Committee's Concluding Observations on Tunisia).

⁹⁸ See *op. cit.* footnote 40, Principle 29 (2005 UN Principles against Impunity).

⁹⁹ Available at <http://www.legislation-securite.tn/fr/node/27829> (in French).

¹⁰⁰ In a similar sense see also UN Committee, *Statement on Enforced Disappearance and Military Jurisdiction* of 13 February 2015, available at http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/1_Global/INT_CED_SUS_7639_E.pdf; *op. cit.* footnote 27, pars 57-58 (2010 UN Working Group's Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation); *op. cit.* footnote 78, par 85 (c) and (d) (UNSR on the promotion of truth, justice, reparation and guarantees of non-recurrence, 2013 Report on Mission to Tunisia); and *op. cit.* footnote 77, pars 74-78 (UNSR on the independence of judges and lawyers, 2016 Report on Mission to Tunisia). See some examples from States which have expressly established in their domestic legislation that enforced disappearance can never be considered as an in-service offence and that military courts have no jurisdiction on enforced disappearance (e.g., Colombia (Arts. 1-3 Military Criminal Code), Uruguay (Art. 11 Law No. 18.026 of 4 October 2006); Venezuela (Arts. 29 and 261 Constitution).

¹⁰¹ *Op. cit.* footnote 27, pars 59-61 (2010 UN Working Group's Study on Best Practices on Enforced Disappearance in Domestic Criminal Legislation).

82. Further, Part III of the Draft Act would appear to not be fully compliant with Article 11 par 1 of the UN Convention and the principle of *aut dedere aut judicare* (either extradite or prosecute). The International Court of Justice has specified that this means that a State shall submit a case to its prosecuting authorities, *irrespective of the existence of a prior request for extradition of an alleged perpetrator*.¹⁰² Although Article 27 third indent exclusively concerns the competence of the courts, it may be interpreted as an exception to this rule when a request to extradite from foreign authorities is received. To be fully in line with the obligations of the UN Convention and international standards, **it is recommended to clarify under the Section 2 on Public Prosecution of Part III of the Draft Act that prosecution shall proceed regardless of whether the extradition of an alleged perpetrator has been requested or not by a foreign authority, unless he or she is extradited or surrendered under the circumstances mentioned above.**

6.4. Non-refoulement and Extradition

83. As it stands, the Draft Act does not clearly provide for the principle of *non-refoulement* of asylum-seekers and refugees (i.e., that they should not be returned to places where their lives or human rights and fundamental freedoms could be threatened). It is understood that Tunisia is currently developing separate legislation on the right of asylum, which should address the issue in a manner consistent with Article 16 of the UN Convention.¹⁰³
84. Moreover, Article 16 of the Draft Act prohibits the expulsion or deportation of foreigners who have been convicted of enforced disappearance and have served their sentence when they may be subject to enforced disappearance in the country of destination. Such a prohibition should similarly apply in cases where a foreigner would be under a real risk of being subjected to torture or other inhuman or degrading treatment or punishment,¹⁰⁴ or to death, or other forms of persecution in the target state.¹⁰⁵
85. The Draft Act also does not cover all other cases where a foreigner may face expulsion, deportation, or rejection, for instance in cases of illegal immigration. Unless expressly provided by other legislation, it is also recommended to include in the Draft Act **a general prohibition to expel, return, or surrender any person to a country where there are substantial grounds for believing that the person would be in danger of being subject to enforced disappearance in the country of destination.** As mentioned in Article 16 par 2 of the UN Convention, “[f]or the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law”. Such amendments would also be in line with the recommendations made by the UN Committee.¹⁰⁶ Again, as mentioned in par 84 *supra*, such a prohibition should similarly apply when there are real risks of torture or other inhuman or degrading treatment or punishment, or death, or other forms of persecution in the country of destination.

¹⁰² See, regarding cases of torture, International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite, Belgium v. Senegal*, judgment of 20 July 2012, par 95, available at <http://www.icj-cij.org/docket/files/144/17064.pdf>. This could apply *mutatis mutandis* to cases of enforced disappearance.

¹⁰³ *Op. cit.* footnote 5, par 27 (2016 UN Committee’s Concluding Observations on Tunisia).

¹⁰⁴ See Article 3 of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁰⁵ See Article 3 of the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁰⁶ *Op. cit.* footnote 5, par 28 (2016 UN Committee’s Concluding Observations on Tunisia).

86. Regarding extradition in particular (Section 5 of the Draft Act), Article 31 of the Draft Act specifically refers to Article 308 of the Criminal Procedure Code and subsequent provisions, which deal with the extradition of non-nationals. However, the provisions of the Draft Act somewhat duplicate, overlap and/or potentially contradict certain aspects of the Criminal Procedure Code. As mentioned before, it may thus be preferable to amend and supplement the relevant provisions of the Criminal Procedure Code to ensure an overall coherence of the rules on extradition. Article 30 of the Draft Act, e.g., specifies that “enforced disappearance” is not a political or related crime (that could prevent extradition) and thereby mirrors the wording of Article 13 par 1 of the UN Convention; such a provision could easily be included under Article 313 (new) par 1 of the Criminal Procedure Code,¹⁰⁷ which clarifies which cases are excluded from the meaning of “political offence” for the purposes of refusing a person’s extradition. It is also worth noting that Articles 309 to 313 of the Criminal Procedure Code provide a number of additional conditions or criteria to be considered when accepting or refusing extradition (e.g., no extradition should be granted in violation of the principle *ne bis in idem* (double jeopardy) or if the statute of limitations has expired in the requesting State). Despite the fact that Article 4 of the Draft Act depicts the Draft Act as a *lex specialis*, it is not clear how to harmonize the two sets of provisions. Moreover, **Article 31** would not appear to be necessary given the existing legal framework on extradition already provided in the Criminal Procedure Code. **The legal drafters should thus consider removing this provision.**
87. Notwithstanding, Article 31 of the Draft Act seems to require extradition in all cases where the crime of enforced disappearance was committed outside the territory of Tunisia, against foreigners, and by a foreigner or stateless person. This is subject to a number of exceptions listed in Article 32, which are overall in line with international standards.¹⁰⁸ This is welcome, as the Criminal Procedure Code does not provide for such exclusions. At the same time, it may be helpful to include additional exceptions recommended at the international level, namely cases **where there is a risk that the extradited person would not receive the minimum fair trial guarantees in the requesting State (including trials before a military tribunal), or where he/she would be subject to extra-legal, arbitrary or summary execution¹⁰⁹ or to the death penalty.¹¹⁰** It is recommended to supplement Article 32 of the Draft Act accordingly.
88. In any case, even if extradition is refused, Article 33 of the Draft Act provides that the alleged perpetrator shall be “sued without delay”. This fails to address cases where extradition is refused before court proceedings have been initiated, or where the suspect is only subject to a preliminary inquiry or to an investigation. Under these circumstances, there may not always be sufficient grounds to initiate court proceedings and cases may be dismissed. As mentioned in par 82 *supra*, **the Draft Act should outline that, when extradition is refused, the case shall be submitted to the prosecuting authorities, except in cases where court proceedings have already been initiated (dealt with by Article 33). In light of the available evidence, the competent authorities will then decide whether to initiate proceedings, as for any other offence** (see Article 11 par 2 of the UN Convention).

¹⁰⁷ Article 313 (new) par 1 of the Criminal Procedure Code states that “extradition is not granted 1) when the crime or offense has a political nature or it is inferred from the circumstances that extradition is requested for a political purpose. An attempt on the life of a Head of state or his/her family member, or a member of the government is not considered to be a political offence”.

¹⁰⁸ See Article 3 par 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁰⁹ *Op. cit.* footnote 40, Principle 26 (a) (2005 UN Principles against Impunity).

¹¹⁰ See UNODC, Model Law on Extradition (2004), available at https://www.unodc.org/pdf/model_law_extradition.pdf.

7. The Search for Disappeared Persons and the Right to the Truth

89. Articles 14 and 15 of the UN Convention provide that States must co-operate at the international level both in terms of legal assistance during criminal proceedings concerning cases of enforced disappearance, and in the search of disappeared persons and assistance to victims. Similarly, Article 25 pars 2 and 3 of the UN Convention requires **co-operation to search for, identify and locate children victims of enforced disappearance**. Unless regulated by separate legislation, it would be positive if the Draft Act would **further detail these matters, in particular with regard to legal assistance, including in the area of evidence-gathering**.
90. Moreover, the Draft Act does not explicitly **recognise the right of relatives and their legal representatives to know the truth** pursuant to Article 24 par 2 of the UN Convention. This right relates to the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate and whereabouts of the disappeared person. The right to know this latter information is an **absolute right, not subject to any limitation or derogation**.¹¹¹ It includes in particular **an obligation for the authorities to keep relatives informed about the progress and results of investigations, and means that all interested persons have the right to request information from the investigative authorities, with recourse to review in case of refusal** (see also pars 71-72 *supra*).¹¹² This also encompasses the State's **duty to ensure the preservation of, and access to, archives and other evidence concerning violations of human rights and to facilitate knowledge of those violations**.¹¹³ The Draft Act should be supplemented accordingly.

8. Assistance and Protection of Victims

91. Regarding the assistance and protection of victims, Articles 35 to 37 of the Draft Act provide some welcome information, but could be enhanced. Since measures of reparation are very important for relatives of the disappeared persons, it is essential to substantively strengthen this section of the Draft Act; also, as these relatives are often women and children, a gender- and child- sensitive approach should be adopted. The issue of reparation and monetary compensation must be clearly distinguished from social and other protection measures (e.g. welfare) provided to the families to cope with the consequences of the disappearance.¹¹⁴
92. More specifically, Articles 35 and 36 of the Draft Act provide for free health treatment, legal aid and a general right to reparation, including monetary compensation from a state fund if the perpetrator is unable to pay such compensation to the victims. Additionally, Article 37 of the Draft Act on reparation mirrors Article 24 par 5 of the UN Convention, but does not go into detail.
93. First, in terms of treatment of victims, including relatives, they should, as appropriate, benefit from measures similar to the ones mentioned above in pars 73-74 *supra* regarding the protection of witnesses.

¹¹¹ *Op. cit.* footnote 84, par 4 (UN Working Group's General Comment on the Right to the Truth in Relation to Enforced Disappearances).

¹¹² *ibid.* pars 3-5 (UN Working Group's General Comment on the Right to the Truth in Relation to Enforced Disappearances).

¹¹³ *Op. cit.* footnote 40, Principles 3 and 5 (2005 UN Principles against Impunity).

¹¹⁴ See e.g., UN Working Group, *Thematic Section on Measures of Reparation for Enforced Disappearance in Annual Report for 2012*, A/HRC/22/45, 28 January 2013, par 53, available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.45_English.pdf.

94. Moreover, when dealing with victims of enforced disappearances, it is particularly important to ensure that certain measures are in place to avoid their “secondary victimization”.¹¹⁵ **In that respect, it is essential to carry out a comprehensive review of the Code of Criminal Procedure Code, and other relevant legislation, to ensure that appropriate gender and child-sensitive measures are incorporated.**¹¹⁶
95. Regarding victims’ access to justice, in addition to legal aid and if not already foreseen in other legislation, the **State should also disseminate, through public and private mechanisms, information about all available remedies** for gross violations of international human rights law, including enforced disappearances.¹¹⁷ **Procedures should allow not only individuals, but also groups of victims to present claims for reparation and to receive reparation.**¹¹⁸ Special support measures and services could be considered to enhance access to justice for women, including safe transportation, psychosocial assistance, and State support to women’s and other organizations to enhance their collaboration with courts.¹¹⁹
96. Regarding reparation for victims *per se*, it is positive that Article 37 of the Draft Act contemplates not only material and moral damages, but also restitution, rehabilitation, satisfaction and guarantees of non-repetition. At the same time, to ensure that this provision is applied in practice, and unless already set out in other legislation, the legal drafters may consider the additions set out in the following paragraphs, also in other cases involving serious human rights violations.
97. First, it may be advisable to **specify more clearly what is meant by material and moral damages**. In that respect, Principle 20 of the 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹²⁰ (hereinafter “the 2005 UN Basic Principles”) are useful. They provide that this should cover **economically assessable damage, such as (a) physical or mental harm; (b) lost opportunities, including employment, education and social benefits; (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage; or (e) costs required for legal or expert assistance, medicine and medical services, and psychological and social services**. Regarding monetary

¹¹⁵ i.e., when the victims suffer further harm not as a direct result of the criminal act but due to the manner in which the institutions and other individuals deal with the victim. Secondary victimization may be caused, for instance, by repeated exposure of the victim to the perpetrator, repeated interrogation about the same facts, the use of inappropriate language, unintentionally insensitive comments made by all those who come into contact with victims, insensitive media reporting of cases. See *op. cit.* footnote 89, par 10 (2005 UN Basic Principles on Right to Remedy for Gross Human Rights Violations). See also e.g., pars 3.3 and 12.2 of the Appendix to CoE Recommendation Rec(2006)8 and Chapter 5 of the 2009 Report on Non-Criminal Remedies for Crime Victims prepared by the Group of Specialists on Remedies for Crime Victims (CJ-S-VICT) nominated by the Committee of Ministers of the Council of Europe, under the aegis of the European Committee on Legal Co-operation (CDCJ), available at http://www.coe.int/t/dghl/standardsetting/victims/victims%20final_en%20with%20cover.pdf (hereinafter “2009 Report on Non-Criminal Remedies for Crime Victims”).

¹¹⁶ This could include, among others, modalities to avoid contact between the perpetrator and the victim at all stages of the criminal proceedings; support from third parties such as psychologists or other professionals; having the intake interview/interrogation carried out by same sex officers (unless the victim requires otherwise); the use of video equipment for all interviews of child victims and witnesses; ensuring that safety risks, including the vulnerability of victims, are taken into account in decisions concerning non-custodial or quasi-custodial sentences, the granting of bail, conditional release, parole or probation, especially when dealing with dangerous offenders; the obligation to notify victims when the accused/convicted person is released from custody or escape; ensuring that risks affecting victim safety are taken into account in decisions regarding the release of perpetrators; the possibility for victims and witnesses to testify without being seen by other participants in the trial, for instance via video transmission facilities or through in camera hearings or protective screens where needed (e.g., *op. cit.* footnote 56, par 31 (UN Working Group’s General Comment on Women Affected by Enforced Disappearances); various confidentiality and privacy measures; and more generally, a victim-centred approach and a duty to inform victims about their rights at all stages of the criminal justice process - see Section 4 of the *OSCE/ODIHR Opinion on the Draft Criminal Procedure Code of the Kyrgyz Republic* (19 June 2015), available at <http://www.legislationline.org/countries/country/20>.

¹¹⁷ *Op. cit.* footnote 89, par 12 (2005 UN Basic Principles on Right to Remedy for Gross Human Rights Violations).

¹¹⁸ *ibid.* par 13 (2005 UN Basic Principles on Right to Remedy for Gross Human Rights Violations). See also *op. cit.* footnote 114, par 66 (UN Working Group’s 2012 Report - Thematic Section on Measures of Reparation).

¹¹⁹ *Op. cit.* footnote 56, par 31 (UN Working Group’s General Comment on Women Affected by Enforced Disappearances).

¹²⁰ Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

- compensation for child victims, legislation should ensure that children will have full access to compensation when they reach an appropriate level of maturity, or compensation should be available to them through a parent or guardian.¹²¹
98. Second, it would be advisable to outline the types of measures that can be adopted regarding other aspects of reparation. In that respect, the definitions found in the 2005 UN Basic Principles for the terms “restitution”, “rehabilitation”, “satisfaction” and “guarantees of non-repetition” may be useful.¹²² **The establishment of a comprehensive national programme on reparations could also be helpful.** Regarding rehabilitation in particular, in addition to medical and psychological care, authorities should **ensure that members of families of disappeared persons are entitled to social benefits and other measures of social support, including special education programmes or financial support** (for instance, part of the wages of the disappeared person could be provided to the relatives until a permanent and adequate reparation scheme is developed);¹²³ **additionally, child victims of enforced disappearances should have access to education, and should be able to return to school.**
99. In that respect, the UN Working Group has emphasized that both a gender- and child-sensitive as well as culturally-sensitive approach should be taken in the determination of the forms and modalities of reparations.¹²⁴ Consultations with the victims and communities are thus important;¹²⁵ special support measures should also be provided to women and marginalized groups, as needed, to overcome any obstacles to reparations, such as potential linguistic or literacy barriers, lack of documentation or financial constraints.¹²⁶
100. More generally, regular **human rights and international humanitarian law education, including on enforced disappearance, should be provided to law enforcement and other relevant officials.**¹²⁷ **In particular, gender-sensitive training** is essential to ensure effective protection and reparation of women victims.¹²⁸
101. Regarding specifically child victims of enforced disappearance, and cases where their identity has been altered, States should adopt measures to facilitate proper documentation and pertinent corrections in all relevant registries.¹²⁹ Further, pursuant to Article 25 par 4 of the UN Convention, Tunisia should also **introduce a legal procedure to review adoptions and placements of children and, where appropriate, to annul any adoption or placement that originated in an enforced disappearance; when doing so, the best interests of the child should be given due consideration.**¹³⁰

¹²¹ UN Working Group, *General Comment on Children Affected by Enforced Disappearances*, par 32, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/112/64/PDF/G1311264.pdf?OpenElement>.

¹²² *Op. cit.* footnote 89, pars 19-23 (2005 UN Basic Principles on Right to Remedy for Gross Human Rights Violations).

¹²³ UN Working Group, *Study on Enforced or Involuntary Disappearances and Economic, Social and Cultural Rights* (doc. A/HRC/30/38/Add.5 of 5 July 2015), pars 60 and 64, available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Pages/ListReports.aspx>.

¹²⁴ *Op. cit.* footnote 114, pars 67-68 (UN Working Group’s 2012 Report - Thematic Section on Measures of Reparation). See also *op. cit.* footnote 121, pars 30-36 (UN Working Group’s General Comment on Children Affected by Enforced Disappearances).

¹²⁵ *ibid.* pars 67-68 (UN Working Group’s 2012 Thematic Section on Measures of Reparation for Enforced Disappearance).

¹²⁶ *Op. cit.* footnote 56, par 43 (UN Working Group’s General Comment on Women Affected by Enforced Disappearances).

¹²⁷ Article 23 par 1 of the UN Convention specifically requires States to ensure that “the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized”. See also *op. cit.* footnote 89, par 23 (e) (2005 UN Basic Principles on Right to Remedy for Gross Human Rights Violations).

¹²⁸ *Op. cit.* footnote 56, par 45-46 (UN Working Group’s General Comment on Women Affected by Enforced Disappearances).

¹²⁹ *Op. cit.* footnote 121, par 31 (UN Working Group’s General Comment on Children Affected by Enforced Disappearances).

¹³⁰ *ibid.* par 22 (UN Working Group’s General Comment on Children Affected by Enforced Disappearances).

Children should be able to express their views during this process, according to their age and maturity, as stated in Article 12 of the UN CRC.¹³¹

102. Further, it is noted that the Draft Act does not specify the rights of relatives in relation to the legal status of a disappeared person, as required by Article 24 par 6 of the UN Convention in fields such as social welfare, financial matters, family law and property rights. To avoid a situation where relatives are forced to declare their disappeared loved ones dead in order to access social welfare or obtain reparations,¹³² the Draft Act should enable them **to obtain a “declaration of absence due to enforced disappearance” and should specify the requisite procedure.** This should, for instance, entitle the dependants to gain access to bank accounts, to a financial allowance from the assets of the disappeared person or to claim other social benefits.¹³³
103. On a related but separate note, Article 38 deals with the issue of data collection, and data processing, use and retention in the context of victims of enforced disappearance, related criminal proceedings and civil compensation. While the provision refers to the general obligation to comply with international human rights standards, it does not provide details. It is understood that a special Law on Data Protection from 2004¹³⁴ regulates these issues in Tunisia. It may be advisable **to include in Article 38 a cross-reference to this law, so that the safeguards to ensure the protection of personal data contained therein are explicitly applicable to the cases covered by the Draft Act.** In any case, relevant legislation should specify how data should be kept, who should be allowed access and the conditions for transferring data to other services; moreover, the law should outline how data subjects may exercise their data protection rights and how access is controlled by an independent authority. Finally, Article 38 of the Draft Act specifically refers to medical and genetic data. These are closely linked to certain personal characteristics of an individual and intimate sphere, and thus highly sensitive.¹³⁵ The legislation should specify the modalities of retention and destruction of this sensitive information, in particular once the fate and whereabouts of the disappeared person are known.
104. Finally, pursuant to Article 24 par 7 of the UN Convention, **the right of any person, including the relatives of the victims of enforced disappearance, to form and participate freely in organisations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons and to assist victims, should be guaranteed under Tunisian legislation.**

¹³¹ This should apply even where a child is very young or in a particularly vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, is homeless etc.), see par 54 of the General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf.

¹³² See among others, Human Rights Committee, case of *Rizvanović v. Bosnia and Herzegovina*, Communication no. 1997/2010, UN Doc. CCPR/C/110/D/1997/2010, 21 March 2014, par 9.6, available at <https://www1.umn.edu/humanrts/undocs/1997-2010.html>.

¹³³ See UN Working Group, *General Comment on the Right to Recognition as a Person before the Law*, pars 8 and 10, available at <http://www.ohchr.org/Documents/Issues/Disappearances/GCRecognition.pdf>. See also, among others, UN Committee, *Concluding Observations on Germany*, doc. CED/C/DEU/CO/1, 27 March 2014, pars 26-27; and *Concluding Observations on the Netherlands*, doc. CED/C/NLD/CO/1, 27 March 2014, pars 34-35. This is especially important for women and children (see International Centre for Transitional Justice, *The Disappeared and the Invisible – Revealing the Enduring Impact of Enforced Disappearance on Women* (2015), available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Gender-Disappearances-2015.pdf>; *op. cit.* footnote 56, par 18 (UN Working Group’s General Comment on Women Affected by Enforced Disappearances); and *op. cit.* footnote 121, par 30 (UN Working Group’s General Comment on Children Affected by Enforced Disappearances)). See also instances of good practices at the domestic level e.g., Argentina (Law 24321 of 11 May 1994); Chile (Law 20377 of 25 August 2009); Colombia (Law No. 1531 of 23 May 2012); Peru (Law No. 28413 of 24 November 2004); Uruguay (Law No. 17894 of 6 September 2005).

¹³⁴ Available at http://www.tunisie.gov.tn/SYNC_1615697015.pdf (in French).

¹³⁵ See e.g., Opinion 3/2012 on Developments in Biometric Technologies by the European Advisory Body on Data Protection and Privacy (set up under Article 29 of Directive 95/46/EC), available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2012/wp193_en.pdf.

9. Prevention of Enforced Disappearances

105. Articles 17 to 21 of the UN Convention aim to prevent enforced disappearances by obliging States to provide certain measures to protect persons deprived of their liberty. It is laudable that Article 13 (new) of the Criminal Procedure Code contains a number of such safeguards, including the notification of charges in a language that the arrested person understands, the right of a person to have the fact of his/her detention notified to a third party of choice, and the maintenance of a register at the place of detention, among others. It is understood that recent amendments to the Criminal Procedure Code will also **guarantee access to a lawyer from the start of the deprivation of liberty**;¹³⁶ this is a welcome additional safeguard to prevent enforced disappearances. At the same time, it is important to ensure that such a guarantee will apply in all cases; the UN Committee has thus recommended that **access to a lawyer be offered to all persons from the time of arrest, irrespective of what they are accused of, and that communication with relatives or other third persons be permitted without delay**.¹³⁷ Additionally, access to **legal assistance should be provided free of charge if the person does not have sufficient means to pay for such assistance**.¹³⁸ Moreover, **an attorney should be present already during police interrogations**.¹³⁹ It is recommended to **supplement the Criminal Procedure Code accordingly**.
106. Article 13 (new) par 3 of the Criminal Procedure Code also states that the arrested person shall be informed of his or her rights “provided by law”, including the possibility to undergo a medical examination. **It may be helpful to specify in more detail the content of information to be notified upon arrest¹⁴⁰ in the Criminal Procedure Code (unless they are set out elsewhere)**. These should also include the right to be informed at the time of arrest about **the rights to remain silent,¹⁴¹ not to testify against oneself¹⁴² and against close relatives, and the right to an attorney**.
107. At the same time, it is noted that Article 13 (new) of the Criminal Procedure Code does not **mention the notification of diplomatic or consular office in cases where foreigners are arrested or detained**. While Article 24 of the Draft Act provides for such a safeguard for foreigners suspected of having committed a crime of enforced disappearance, this guarantee should be provided in all cases (see the UN Vienna Convention on Consular Relations).¹⁴³ Article 13 (new) of the Code should be amended, and should also provide that **foreign nationals shall be informed of this right without delay** (see also par 75 *supra*).¹⁴⁴ The legal drafters should also consider including additional safeguards, as mentioned in par 76 *supra*.
108. Regarding the official register/recording of persons deprived of their liberty, **the information listed in Article 13 (new) of the Criminal Procedure Code should be**

¹³⁶ *Op. cit.* footnote 5, par 29 (2016 UN Committee’s Concluding Observations on Tunisia).

¹³⁷ *ibid.* par 30 (2016 UN Committee’s Concluding Observations on Tunisia).

¹³⁸ See Principle 17 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, A/RES/43/173, 9 December 1988, available at <http://www.un.org/documents/ga/res/43/a43r173.htm>.

¹³⁹ See e.g., UN Special Rapporteur on the Independence of Judges and Lawyers, Report on the Mission to the United Kingdom (5 March 1998), E/CN.4/1998/39/Add.4, par 47, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/107/16/PDF/G9810716.pdf?OpenElement>; UN Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, 2015 Report, A/HRC/31/69, 10 March 2016, par 24, available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session31/Pages/ListReports.aspx>.

¹⁴⁰ See e.g., Article 172 of the Model Code of Criminal Procedure (2008) developed by the United States Institute of Peace in cooperation with the Irish Centre for Human Rights (ICHR), the Office of the UN High Commissioner for Human Rights (UNOHCHR), and the UN Office on Drugs and Crime (UNODC), available at <http://www.usip.org/sites/default/files/MC2/MC2-15-Ch9.pdf>.

¹⁴¹ Although not expressly provided in international human rights treaties, such a right derives from Article 14 par 3 (g) of the ICCPR and is expressly mentioned in Article 55 par 2 (b) of the Rome Statute.

¹⁴² Article 14 par 3 (g) of the ICCPR.

¹⁴³ *Op. cit.* footnote 94, Article 36 par 1 (b) (UN Vienna Convention on Consular Relations).

¹⁴⁴ *ibid.*

supplemented in order to render this provision fully compliant with Article 17 par 3 of the UN Convention, which lists the minimum information to be mentioned in such documents.¹⁴⁵

109. The Draft Act or other relevant legislation shall also **guarantee to any person with a legitimate interest, such as relatives of persons deprived of their liberty, representatives or counsel, access to the information listed under Article 18 of the UN Convention.**¹⁴⁶ This does not seem to be provided under the current legal framework nor in the Draft Act.
110. More generally, a systematic review of the applicable legal framework should be carried out to ensure that all the guarantees mentioned under Articles 17, 20 and 21 on deprivation of liberty, 19 on protection of personal data and 22 regarding the provision of sanctions in cases of violations of such rules, are all available in Tunisia.

10. Final Comments

111. Overall, while many provisions of the Draft Act are welcome, they are more likely to achieve results in practice if adequate funding is allocated to their implementation, including assistance and protection schemes. It is not clear whether a full financial impact assessment has been carried out to analyze the funding needed to ensure the implementation of the Draft Act, including the financial and human costs. **More generally, policy-makers and other stakeholders should carry out a full impact assessment of planned legislation**, including a gender and social impact assessment, to address specifically the possible future impact of the law.
112. Finally, it is worth reiterating that OSCE commitments require legislation to be adopted “as the result of an open process reflecting the will of the people, either directly or through their elected representatives” (Moscow Document of 1991, par 18.1). The UN Committee has specifically noted the importance of requesting contributions from NGOs and other members of civil society, in particular those with activities related to the UN Convention or related fields, as early as possible in the law-making process to allow their views to be taken into consideration.¹⁴⁷ Public discussion and an open and inclusive debate will increase all stakeholders’ understanding of the various issues involved. It will also enhance confidence and trust in the adopted legislation, and ultimately ensure its implementation.

[END OF TEXT]

¹⁴⁵ Pursuant to Article 17 par 3 of the UN Convention, the information contained therein shall include, as a minimum: (a) The identity of the person deprived of liberty; (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty; (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty; (d) The authority responsible for supervising the deprivation of liberty; (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty; (f) Elements relating to the state of health of the person deprived of liberty; (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains; (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

¹⁴⁶ These include at least the following information: (a) The authority that ordered the deprivation of liberty; (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty; (c) The authority responsible for supervising the deprivation of liberty; (d) 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; (e) The date, time and place of release; (f) Elements relating to the state of health of the person deprived of liberty; (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.

¹⁴⁷ See e.g., pars 13-14 of the UN Committee, *Concluding Observations on the Report submitted by Belgium*, CED/C/BEL/CO/1, 15 October 2014, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CED%2fC%2fBEL%2fCO%2f1&Lang=en.

ANNEX:

**DRAFT ACT ON THE CRIME OF ENFORCED
DISAPPEARANCE**

INTRODUCTORY PROVISIONS

Article 1:

The law aims to prevent enforced disappearances cases and to combat impunity for perpetrators of the crime of enforced disappearances within the framework of international conventions ratified by the Republic of Tunisia.

No exceptional circumstances can be invoked whether it concerns a state of war or a threat of war or internal political instability or any other exceptional circumstance to justify enforced disappearances.

Article 2:

For the purpose of this law, the following terms mean:

1. **Enforced disappearances:** every arrest or detention or abduction or any other form of deprivation of liberty being done by public officials or alike, or by persons or groups of persons acting with the authorization or support of the state or by its direct or indirect consent and followed by refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person thus depriving such a person of the protection of the law.

2. **Arrest:** any act whereby a person is being deprived of liberty without any respect for human rights provisions enshrined in international, regional and bilateral treaties and relevant laws and detention is considered arbitrary when there is no legal basis for the deprivation of liberty, or when this deprivation of liberty is a result of the person's exercise of individual rights or the result of a trial contrary to international fair trial rights standards.

3. **Detention:** any act whereby a person gets caught or deprived of liberty and the denial of the person's freedom of movement or the person's illegal confinement for a long or short period of time at an undisclosed location .

4. **Abduction:** it is achieved when the perpetrator compels the victim to leave one's location unwillingly using mental or physical means of constraints or fraud or deceit or any act of coercion or felony which enables the perpetrator to mislead the victim regardless of purpose or motive meant by the perpetrator of this abduction.

5. **Deprivation of liberty:** every form of detention of a person or arrest or imprisonment by order of a judicial, administrative or other authority or authorities or with its consent or acquiescence.

6. **Victim:** every person facing enforced disappearance and every individual who has suffered harm as a direct result of an enforced disappearance.

7. **Moral entity:** any entity which is financially independent from its managers or shareholders even if it is not assigned a legal personality under a special provision of the law.

Article 3:

A person who refused to obey orders or instructions prescribing enforced disappearance, authorizing or encouraging it shall not be held criminally liable.

Article 4:

The provisions of the Criminal Code and the Code of Criminal Procedure and the special provisions related to certain crimes and their pertaining procedures are applied to the crimes subject of this law as far as their provisions are not inconsistent with the provisions of this law. Children are subject to the provisions of the Child Protection Code.

PART II

SANCTIONING ENFORCED DISAPPEARANCES

Section 1: Perpetrators of the Crime

Article 5:

Shall be punished by imprisonment of ten years and a fine of ten thousand dinars every public official or alike or a person or an individual acting with the authorization or support from the state or with its direct or indirect consent, who deliberately arrests, detains or abducts or infringes on the freedom of another person in any form of deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person thus depriving such a person of the protection of the law.

Every attempt to commit the crime of enforced disappearance shall be sanctioned by due punishment for the same crime.

No order or instruction from any public, civilian, military or other authority may be invoked to justify the crime of enforced disappearance.

Article 6:

Is considered as the perpetrator of enforced disappearances crime and punished by the same penalties prescribed for the primary perpetrator:

First: the person who was aware that one of the subordinates who worked under his or her command and supervision is committing or about to commit a crime of enforced disappearance or the person who consciously disregarded information which clearly indicated it.

Second: the person who was exercising responsibility for and supervision on activities that are associated with the crime of enforced disappearance.

Third: the person who failed to take necessary and reasonable measures that could prevent the commission of a crime of enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution.

Article 7:

Is punished with imprisonment from one year to five years and a fine ranging from two thousand dinars to five thousand dinars, every public official or alike or any person who might have to intervene in the custody or treatment of any individual deprived of liberty and who did not inform his or her superiors or relevant authorities immediately of what he or she noticed as acts or gathered as information and has serious and sufficient reasons to believe that an enforced disappearance occurred or is planned for or provided incorrect information at a time when the legal requirements for providing such information existed.

Article 8:

Shall be punished in the same way prescribed in Article 7 of this law, every public official or alike assigned to the maintenance of records of persons deprived of their liberty and who is in

breach of the obligation to record all cases of deprivation of liberty or who recorded information that he or she was aware were not correct.

Article 9 :

A moral entity can be sued if its responsibility in the commission of crimes of enforced disappearance is proved and it is punished with a fine equal to five times the value of the fine imposed on natural persons.

Furthermore, the competent court can suspend the activity of the moral entity for a maximum period of five years or order its dissolution.

The punishment of the moral entity does not prevent from applying sanctions stipulated in this law to its representatives or directors or partners, if their personal responsibility for these acts is proved.

Section II - Increasing the severity of punishments

Article 10:

The punishment will be an imprisonment for twenty years and a fine of twenty thousand dinars:

- a) If enforced disappearances were accompanied by threat or violence.
- b) If this operation was carried out using a weapon or by several people.
- c) If the victim is an employee or a member of a diplomatic or consular mission or a member of their family .
- d) If the victim is a child under the age of eighteen years old or a pregnant woman or a person with a disability or any other particularly vulnerable person.
- e) If the enforced disappearance is committed for a ransom or to execute a command or condition, whatever the status of the person.
- f) in the form of kidnapping of children undergoing enforced disappearance, or of children whose parent or legal guardian is a victim of enforced disappearance, or of children born while their mothers were held in captivity as a result of enforced disappearance.
- g) In the form of falsification, concealment or destruction of documents attesting the true identity of the children referred to in subparagraph (f) of this Article.

Article 11:

The punishment will be life imprisonment with a fine of fifty thousand dinars:

- a) If enforced disappearance has exceeded a month.
- b) if it resulted in physical disability or illness.
- c) If the intent of this crime is to prepare or facilitate the commission of a felony or a misdemeanor, as well as if there was an attempt to ensure the impunity of the perpetrators or their participation in the crime or misdemeanor.
- d) if the intention is to execute an order or to undermine the safety of the victim (s) physically.
- e) if the crime of enforced disappearance constitutes a crime against humanity, that is when committed in the same conditions and circumstances mentioned in Article 6 of this law in the context of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Article 12:

If the crimes mentioned under the above Articles result in death, the punishment will be death penalty with a fine of one hundred thousand dinars.

Section III - Exemption from punishments and mitigation

Article 13:

The person who is involved in the commission of a crime of enforced disappearance and who takes the initiative to inform the relevant authorities and provide them with information enabling them to discover the crime and avoid its execution, is exempt of punishment.

Article 14:

The persons mentioned in Article 13 of this law, are punishable by half of the initial punishment if the information they provided to the relevant authorities enabled the return of the disappeared person alive and clarify cases of enforced disappearance, or to identify all those who are responsible, or some of them, for enforced disappearance or their arrest.

The punishment shall be 20 years of imprisonment if the initial sanction for the crime is lifelong imprisonment or a more severe sanction.

Article 15:

Shall be punished by imprisonment for a period ranging from two to five years every person who released a person forcibly disappeared before the lapse of the fifth day from the day of the enforced disappearance and prosecution is abandoned if it fulfils all conditions set forth which have already been given.

Article 16:

The foreigner who has been convicted for the crime of enforced disappearance should be expelled from Tunisian territory and deported once the prison sentence has been served. Expulsion and deportation should be forbidden if there are substantial grounds for believing that the person may be subject to enforced disappearance.

PART III ABOUT PROCEEDINGS

Section 1 - Judicial Police Commissioners

Article 17:

The commissioners of the Judicial Police have to inform the relevant public prosecutors and to ask them to promptly consider the cases of enforced disappearance and to inform the relevant authorities immediately about such crimes if there is any suspicion concerning agents of the internal security forces or the military forces or agents of the Customs.

Section 2 - Public prosecution

Article 18:

The prosecutor has to inform immediately the General Prosecutor of the Court of Appeal from the prosecutor's jurisdiction of all cases of enforced disappearance coming to the prosecutor's knowledge and when there are reasonable grounds for believing that a person has been a victim of enforced disappearance and to ask the local investigating judge to conduct a search.

Article 19:

There is no prescription for public cases of enforced disappearance.

Section 3 - About Investigation

Article 20:

Investigation of the crimes of enforced disappearance is mandatory. Investigating judges proceed with their actions while complying with the rules of jurisdiction.

Article 21:

The person in charge of the investigation shall investigate the crime of enforced disappearance without delay and supervise all matters and have access to documents and other information that can be used by the court to support the verdict.

Article 22 :

The person in charge of the investigation on his or her own initiative or at the request of the public prosecutor goes to the place of detention or arrest and anywhere else where there are reasonable grounds to believe that the disappeared person is held.

Article 23:

Witnesses testify individually and without the presence of the suspected persons and perform their testimony without the aid of any written statement after the verification of their identity and civil status.

The investigating judge can order a confrontation between the witnesses and the suspected person only with their consent.

Article 24:

Every foreigner detained in Tunisia suspected of having committed the crime of enforced disappearance has the right to contact immediately the nearest appropriate representative of the State of his or her nationality or the representative of the state of his or her residence in the case of a stateless person.

Article 25:

Shall be punished by imprisonment for a term of five years every person who acts or uses means that would impede the course of the investigation of the crime of enforced disappearance or uses his or her authority or pressure to influence the course of the investigation or to accomplish acts of intimidation or retaliation against the complainant or witnesses or relatives of the disappeared person and their lawyers as well as the participants in the investigation.

Section 4 – At the judicial courts

Article 26 :

Judicial courts are the only instances entitled to examine enforced disappearances cases and related crimes if committed:

- in the territory of the Republic.
- On board of an aircraft registered in the Tunisian State if the perpetrator or the victims are Tunisians or the plane landed in Tunisia after the commission of the crime.
- On board of an aircraft leased without a crew for the benefit of an operator residing in Tunisia.

- On board of any ship flying the flag of the Tunisian state when the crime was committed.

Article 27:

Furthermore, judicial courts are the only instances entitled to examine enforced disappearances crimes committed outside the territory of the Republic in the following cases:

- If committed by a citizen of Tunisia.
- If the disappeared person is Tunisian.
- If the crime is committed against foreigners by a foreigner or a stateless person who has his or her habitual residence in the Tunisian territory or by a foreigner or a stateless person who is found in the Tunisian territory and the competent foreign authorities did not ask legally for his or her extradition before the issuance of a final judgment on his or her case by the Tunisian relevant courts.

Article 28:

In cases provided for in article 27 of this law, public proceedings shall not be subject to the condition that the relevant acts are criminalized under the law of the country where they were committed.

Article 29 :

No public action against the perpetrators of crimes of enforced disappearances can take place if it is proved that such a public action has been previously done abroad and completed, and in case of the issuance of a verdict and where the perpetrator performed the entire punishment sentence or that this punishment is prescribed or is covered by an amnesty.

Section 5 - Extradition

Article 30:

Enforced disappearances cannot be considered in any way as a political crime or a crime linked to a political crime or a crime whose motives are political and not allowing for extradition.

Article 31:

Enforced disappearance crimes require extradition according to the provisions of Article 308 and onwards of the Code of Criminal Procedure, if it is committed outside the territory of the Republic against foreigners or foreign interests by a foreigner or a stateless person found in Tunisian territory.

Extradition is done only in cases where the relevant Tunisian authorities receive a legal request from a competent state given in accordance with its domestic law, provided that the case has not been determined by the Tunisian courts as above in accordance with the rules of jurisdiction.

Article 32:

Extradition is not allowed if there are substantial grounds for believing that the person concerned by the extradition request will be facing torture or that the extradition request aims to pursue or punish the person because of sex, race, religion, nationality, ethnic origin or political opinion, or membership of a particular social group, or if there are substantial grounds for believing that the person may be subject to enforced disappearance or if accepting this request would cause harm to that person for any of these reasons.

To verify the existence of such grounds, the competent authorities take into account all the relevant considerations including, where appropriate, the existence in the state concerned of constant cases of systematic violation or flagrant or mass violations of human rights or of international humanitarian law .

Article 33:

If a decision of not extraditing a person sued or under trial for any of the offenses set forth in this law is taken, this person is sued without delay before the Tunisian Courts of Justice if this person is present on Tunisian ground, whether the crime was committed or not in this territory and regardless of the nationality or statelessness of the perpetrator.

Section VI - Prescription

Article 34:

Penalties imposed in cases of crimes of enforced disappearances and if the acts constitute a crime, are prescribed after thirty years; however, the convicted person cannot live in the jurisdiction where the crime was committed without an authorization of the relevant administrative authority; otherwise penalties for violating the rules on residence will be imposed.

The penalties for misdemeanours are prescribed after ten full years.

The prescription duration starts from the date when the punishment decided by the court becomes effective.

The prescription duration starts from the day of the announcement of the verdict in a trial in absentia in case where the perpetrator was not personally informed of this verdict or it appears from the acts of execution of the judgment that the perpetrator was informed of this judgment.

Section 7 -Assistance and protection of victims

Article 35:

Victims enjoy free treatment in all public health structures.

Legal aid can be provided to the victims of enforced disappearance in civil or criminal judicial proceedings concerning them.

Article 36:

The victims of enforced disappearance have the right to obtain reparation and get compensation in a prompt, fair and adequate manner.

The victims who are entitled on the basis of a court verdict to get compensation from the perpetrator but this cannot be implemented, may request to get these amounts from the state fund.

The state acts on behalf of the victims to get the amounts reimbursed as they are considered as a public debt.

Article 37:

The right to obtain reparation referred to in Article 36 of this law includes material and moral damages and, if necessary, other means of reparation such as:

- a) Restitution.
- b) Rehabilitation.
- c) Satisfaction, including restoration of the person's dignity and reputation
- d) Guarantees of non-repetition.

Article 38:

Personal information, including medical and genetic data collected and transmitted during the search for a person subject to enforced disappearance, cannot be used or made available for purposes other than the search. This is without prejudice to the use of such information in criminal proceedings related to the offense of enforced disappearance or the exercise of the right to compensation.

The collection of personal information, including medical and genetic data, their processing, use and retention should not violate or lead to the violation of human rights and fundamental freedoms as well as human dignity.